

Winter 2007-2008

Volume 34, Number 4

# The Reporter

The Judge Advocate General's Corps

## The First JASOC



Judge Advocate Staff Officer Course  
Class 69-A  
March 1969  
Maxwell Air Force Base, Alabama

First Row, L to R - Roger A. Jones, James E. Caldwell,  
Vernon L. Steerman, Fred M. Sims, James F. Nooney, James A.  
Mitchell.

Second Row, L to R - Dudley G. Rickenbacker, Robert F. Elbg,  
William L. Irons, Hershel L. Abbot, Jr., John K. (Kevin)  
Donovan, Lawrence R. Metsch.

Third Row, L to R - Harold F. Boardman, Jr., Bruce R.  
Houston, Ronald J. Riach, James E. Crowley, William A.  
Dorland, James R. Miles.

Fourth Row, L to R - Gilbert D. Stephenson, Michael E.  
Murphy, Robert G. Douglass.

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*USAFR (Ret.)*

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The students of the pilot class of Judge Advocate Staff Officer Course stand before the first JASOC "school house", which had served as the base child day care center and also as a liquor store in previous incarnations.

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# The Reporter

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Winter 2007-2008  
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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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JACK L. RIVES

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of the Air Force*

MAJOR GENERAL  
CHARLES J. DUNLAP, JR.  
*The Deputy Judge Advocate General  
of the Air Force*

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The Judge Advocate General's School*

LIEUTENANT COLONEL  
BRADLEY W. MITCHELL  
MAJOR KYLE W. GREEN  
*Editors*

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## Message from the Commandant

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Colonel David C. Wesley

In this edition, we present a broad range of articles. Each is designed to elevate the level of our practice and give you inspirational, practical advice on how to improve your performance as a member of the Corps.

One of the JAG Corps' great historians, Brigadier General (ret'd) Ed Rodriguez, explores the origins of the Judge Advocate Staff Officer Course. Gen Rodriguez relates insights from his own JASOC experience, and ties this heritage into our shared horizon as the course enters its 40th year. His remarks were first delivered as a Dining Out address to JASOC 07-C.

Brigadier General Dave Ehrhart investigates the cutting-edge legal issues surrounding civilians accompanying military forces, describing the rapid evolution of solutions to provide accountability for contractors on the battlefield. This is a complex and important area, worthy of further study by all judge advocates preparing to deploy.

Also, Military Judges Lieutenant Colonel John Hartsell and Major Bryan Watson share a key strategic point drawn from recent cases they have heard. Their article contains must-read insight, whether you are prosecuting or defending in our military justice system.

As you read the articles in this issue, I hope you'll be inspired to write something for a future edition of *The Reporter* or another publication. The JAG Corps demands much of its attorneys, paralegals, and staff. But is inspirational to see the time our authors have invested to bring their messages to you. These general officers and sitting judges -- among the busiest professionals in our Corps -- carved out time to capture their ideas in print for your benefit.

Take their lead and share your ideas with current colleagues and future generations!

**THE FIRST JUDGE ADVOCATE STAFF OFFICER COURSE:  
Remarks Delivered at the Dining-Out Celebrating the Graduation of JASOC 07-C\***  
by Brigadier General Edward F. Rodriguez, Jr.,\* USAFR (Ret.)

Thank you, Colonel Wesley, for inviting me to speak at this dining-out to celebrate the graduation of JASOC Class 07-C. To be asked to address a graduating JASOC class is a great honor and privilege. I truly appreciate the opportunity.

Thank you, graduates, for choosing to serve our country as Air Force officers and judge advocates. Thank you for serving our country as members of the bar. Each of you, with the support of your family, has chosen a path that is not easy - nor one that many take -- a path to become a serving member of the armed forces. You have joined the Air Force at a time when there is no draft pushing you along. You have joined at a critical time in our country's history. We just marked the sixth anniversary of 9/11. I know that you may go in harm's way. Thank you for your service. Thank you for your courage.

Coming to Maxwell brings back many memories -- not just JAG memories, but family memories. My father was a student in the Air War College Class of 1960. I spent my sophomore year of high school here. We lived on base. I had a motor scooter and a girl friend. That was a great year!

In reflecting on what I might say to you this evening, thoughts of my own JASOC class -- 71-A -- and my classmates came to mind. Old photos were located; certificates found; and, to my neat-freak wife's disgust, I went over my file copy of my JASOC travel voucher. I still have it.

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\* Brigadier General Edward F. Rodriguez, Jr., (B.S., Georgetown University; J.D., University of Texas at Austin, School of Law) retired in 1999 with 29 years of active duty and reserve service. In 2005, the Air Force JAG Corps awarded him with its Special Service Award, and he was honored with the Waldrop Award at KEYSTONE 2007.

\* *Editors note:* General Rodriguez kindly added annotations to these remarks after addressing the dining-out, providing context and research assistance.

I also looked at photographs of each of you and thought about how much JASOC has changed. It occurred to me that I should focus on JASOC this evening -- its origins and its importance.

JASOC came first. Without JASOC, there might not be a JAG School. Without JASOC, there would be a JAG Corps, but it might not have esprit de corps.

This is a good time to revisit JASOC's roots. Next year will be its 40th anniversary. As the Air Force prepared for its 60th Anniversary, it looked out to its horizon and back upon its heritage. JASOC is a big part of the JAG Corps' heritage and horizon. Your speaker is from the heritage side of the statement Heritage to Horizon.

Major General Reginald Harmon, the first TJAG, was opposed to formal in-house training. He firmly believed that lawyers could and should train themselves. However, he permitted a Judge Advocate General Staff Officer Course, JASOC's predecessor, to be conducted here, at Maxwell, from 1950 to 1955. JAGSOC was necessary because two things had happened. First, the Korean War had started and large numbers of lawyers were being recalled to active duty. Second, the UCMJ had been adopted and would go into effect in mid-1951. JAGs needed current military justice knowledge.<sup>1</sup>

The Korean War ended with a cease-fire in 1953 and two years later, JAGSOC stood down. Thereafter, new JAGs were trained by correspondence. There would be no formal JAG training for another 13 years.<sup>2</sup>

In preparing these remarks I exchanged email with Major General Andy Egeland, a former Deputy Judge Advocate General. General Egeland believes that he may be one of

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<sup>1</sup> PATRICIA A. KERNS, THE FIRST 50 YEARS: U.S. AIR FORCE JUDGE ADVOCATE GENERAL'S DEPARTMENT 27 (2004).

<sup>2</sup> *Id.* at 32.

the last JAGs to be trained by correspondence.<sup>3</sup> He observed that "... JASOC was a great thing in those days when you were really isolated at a base office. ... You really had no network opportunity unless you attended a conference and met other JAGs. JASOC started what we take for granted today -- a network and true sense of JAG Family."<sup>4</sup>

You came to JASOC by different routes -- some by way of the Air Force Academy; some by ROTC; others by direct appointment and COT. Each of you arrived designated a judge advocate. You showed up wearing your badge. By law and regulation, you were a JAG, but to me, it's JASOC that makes you a JAG in fact. It's here that you become a member of the Corps, a member of the JAG family. You've shared experiences. You've been through challenging exercises together. You've learned what it means to be a JAG. You've learned how to be a JAG. You've done and seen things together that early JASOC students never got to experience. You bonded together to become a great class.

During JASOC, you made friends for life. For some of you, tomorrow and graduation came too quickly. I'll bet that you know each other better, after these nine weeks, than you did your law school classmates or the friends in your study group. You may be experiencing some melancholy about leaving tomorrow. You have something early JASOC students did not have. You have the ability to stay in touch with one another with ease. You have email and cell

<sup>3</sup> Major General Andrew Egeland to the author, email, Aug. 22, 2007.

<sup>4</sup> *Id.*

phones and perhaps even Facebook and MySpace pages.

So why did formal JAG training start up again? What happened to get me here in 1971 and you here now. In 1967, there was a significant JAG retention problem. Too many were getting out. It was determined that the situation might improve with a return to



**The First JASOC Faculty (left to right):** Capt Kastl, Maj Riccio, Capt Foray, Colonel Tucker, Capt Foley, Lt Col Crawford, and Capt Ramirez.

professional training,<sup>5</sup> among other things.<sup>5</sup> What was probably missing was an experience to give new JAGs a sense of belonging to something bigger than themselves. Brigadier General Roger Jones, former Strategic Air Command SJA and the JAG School Foundation's immediate past-president, was a member of the first JASOC. He

observed that the return of formal training was a pivotal point in JAG history.<sup>6</sup>

The initial JASOC faculty convened here in the summer of 1968. Colonel Tommy Tucker left his assignment as Air University SJA to become "Course Director." The duty title wasn't yet "Commandant." The basement of the AU headquarters building served as the incubator for the new faculty. Joining Colonel Tucker were six others: Lieutenant Colonel Bill Crawford; Major Charles Riccio and Captains Jim Foley, John Foray, Wayne Kastl and Joe Ramirez.<sup>7</sup>

<sup>5</sup> KERNS, *supra* note 1 at 63.

<sup>6</sup> Brigadier General Roger Jones to author, email, Aug. 23, 2007.

<sup>7</sup> Colonel John Foray to author, telephone interview, Sept. 5, 2007; *see also*, Colonel Quincy W. Tucker, Jr., and Captain Joseph W. Kastl, *Judge Advocate Course Successfully Completes First Year*, 12 JAG L. REV. 162 (1970), which is reprinted in the *Heritage*

JASOC was part of Air University's Institute for Professional Development. The Institute Commandant was a Colonel Gill. According to Colonel Riccio, the initial faculty was referred to as "Colonel Gill and the Seven Dwarfs."<sup>8</sup> The Institute was a predecessor of the Ira C. Eaker College for Professional Development, from which the JAG School separated only last year.

While Colonel Tucker and the Dwarfs went off to work planning JASOC in the headquarters basement, JASOC's first home -- a small wood frame building near the Bell Street Gate -- was being renovated.<sup>9</sup> The little building had previously been a base child day care center and a liquor store -- not at the same time.

The first JASOC class -- 69-A -- was a pilot class. It met for three weeks in March 1969. Colonel Gill, in letter of appreciation, to Captain Jones' MAJCOM commander, summed up the purpose of that first class. "... [Captain Jones'] function was not only to be a student in the usual sense, but also to help us to refine our curriculum for this course." Colonel Gill went on to say that "Captain Jones was diligent and dedicated, giving us many useful suggestions for improvement of the curriculum. He also gave valuable assistance to the faculty in the development of course material to be used in future classes."<sup>10</sup>

To be selected for the pilot class, you had to have been on active duty for at least two years, but not more than six. Captain Egeland was too junior for the pilot class and then, because he had completed the correspondence work, he was too qualified to attend one of the regular classes - a JAG "Catch 22."<sup>11</sup>

In the pilot class photo, the class is formed up on the front steps of JASOC's first home.

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to *Horizon* feature of this edition of THE REPORTER, *infra* at page 37.

<sup>8</sup> Colonel Charles Riccio to author, telephone interview, Sept. 5, 2007; Colonel Charles Riccio to author, email, Sept. 6, 2007.

<sup>9</sup> Colonel John Foray interview, *supra* note 7.

<sup>10</sup> Colonel Richard Gill, Letter to Commander, HQ ADC, Apr. 14, 1969.

<sup>11</sup> Major General Andrew Egeland to the author, email, Aug. 23, 2007.

The building has since been torn down. Among my JASOC photos is one of me standing next to the sign that hung in front of the building. The sign reads "Judge Advocate Staff Officer Course," not yet "JAG School."

Captain Karl Kristoff was stationed with Captain Egeland at Tyndall. He attended the first regular class. General Egeland said that, when Captain Kristoff returned from JASOC, "... we old hands at the base office got tired of hearing him talk about 'JASOC' this and 'JASOC' that. ... I think we were jealous that he got to go and we didn't. ... After about a week of listening to him, I recall cutting a big [letter] 'J' out of cardboard and hanging a sweaty gym sock on it and tacking the whole thing to his door. That helped."<sup>12</sup> Captain Kristoff went on to retire as a major general in the New York Air National Guard.

Let me tell you about my JASOC class: 71-A. The course was then six weeks long. Our class, of 41 students, graduated on Friday, February 19th, 1971. The night before, our graduation dinner was held in a room down the hall. We wore coats and ties. Ours wasn't a dining in or out. There wasn't a grog bowl. I don't recall anyone coming from Washington to welcome us into the JAG family. But there was great joy because JASOC was over.

Now, here you are, perhaps a little sad about leaving tomorrow, and there we were, glad to be going home. Now, don't get me wrong. We too made friends for life. We learned a lot. We had a great time. When we were here, the Snake Pit, in the basement of the Maxwell Officers Club, was in its "Glory Days." There was great music -- live bands. Every night was Saturday night. JASOC was six weeks of lectures and note taking, with some small seminar groups. There were no athletic events. There were no ball games. There was a trip to Washington, but it was nothing like yours. We just visited office. After seven years of class work in college and law school, the last thing we wanted was six more weeks of much the same.

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<sup>12</sup> Major General Andrew Egeland to the author, email, Aug. 22, 2007.

For us, JASOC was six weeks of isolation. There were no cell phones. There was a pay phone booth in the hall. There were no private baths. You shared a bathroom with your neighbor. There were no iPods, computers, CDs, email, calculators, DVDs, satellite radios, X-Boxes. There was a lounge with a TV with rabbit ears. I can't remember, but I think each room came with an AM radio. I'm jealous of your JASOC, just as Captain Egeland was of mine.

At our graduation dinner, the joy of leaving was evidenced by some drinking and much toasting. That's when I got in trouble. I could -- right now -- repeat what I said, but you might not get it -- not without some background.

To give you the background, let me tell you about 1968, the year the initial faculty gathered in that basement. The events of that year must have had an impact on them. The events of 1968,<sup>13</sup> and the years on either side,<sup>14</sup> still affect our country -- its politics, culture, values, and ethics.<sup>15</sup> 1968 could easily be the subject of a college course. Perhaps, somewhere it is.

Let me summarize what happened that year. These events are in chronological order so you can sense the building momentum.

- North Korea seized the USS Pueblo, claiming it was a spy ship.
- The Tet Offensive - Eighty thousand North Vietnamese regulars and Viet Cong irregulars opened a general offensive across South Vietnam attacking over 100 cities and towns.
- Sen. Eugene McCarthy, the anti-war candidate, nearly defeated LBJ in the New Hampshire primary. Hundreds of college

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<sup>13</sup> See, e.g., CHARLES KAISER, 1968 IN AMERICA: MUSIC, POLITICS, CHAOS, COUNTERCULTURE, AND THE SHAPING OF A GENERATION (1988); MARK KURLANSKY, 1968: THE YEAR THAT ROCKED THE WORLD (2005).

<sup>14</sup> See, e.g., DAVID MARANISS, THEY MARCHED INTO SUNLIGHT: WAR AND PEACE, VIETNAM AND AMERICA, OCTOBER 1967 (2003).

<sup>15</sup> See, e.g., TOM BROKAW, BOOM!: VOICES OF THE SIXTIES PERSONAL REFLECTIONS ON THE '60S AND TODAY (2007); Jonathan Darman, 1968: The Year That Made Us Who We Are, NEWSWEEK, Nov. 19, 2007, 42.

students flooded into New Hampshire to help with his campaign.

- The My Lai Massacre. Soldiers of the Americal Division killed hundreds of South Vietnamese villagers. As a result, eventually, JAGs would become very involved with rules of engagement and the practical application of the Law of Armed Conflict.
- LBJ decided to not seek re-election.
- Martin Luther King was assassinated. Riots followed in several major cities.
- Columbia University students, to protest the war in Vietnam and the draft, took over several buildings and shut down the university.
- Bobby Kennedy was assassinated. Kennedy had entered the presidential race after Eugene McCarthy had done so well in New Hampshire.
- 200,000 Warsaw Pact troops, with 5,000 tanks, invaded Czechoslovakia to crush that country's freedom movement.
- Chicago police battled with antiwar protesters at the Democratic National Convention. The "Chicago Eight" were among those arrested. During 1969 and 1970, they were tried for conspiracy and inciting a riot. They were defended by the radical lawyer William Kunstler. Black Panther Bobby Seale was one of the eight. However, his case was severed because of his courtroom outbursts. During his separate trial, he was kept bound and gagged. This was not Bobby Seale's first run in with the law. Ten years before Chicago, A2C Seale was court-martialed for disrespect towards his superior officer and superior noncommissioned officer. His Air Force Board of Military Review case is reported at 27 CMR 951.
- Black athletes rendered the Black Power salute as the National Anthem was played during the Summer Olympics in Mexico City.<sup>16</sup>

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<sup>16</sup> Other notable events of 1968: *Hair: The American Tribal Love-Rock Musical* opens on Broadway; "May of 68" student and worker strikes in France; after a coup d'état, Saddam Hussein becomes Vice Chairman of Iraq's Revolutionary Council; Students

Such was the backdrop to the 1968 start of JASOC. Soon, new JAGs, who had lived through these events as college and law students, would begin arriving at JASOC. None were strictly volunteers. The draft was pushing them along. Not every JASOC student was happy to be here.

Those early JASOC classes did not look like America. While I was on active duty there were only three women JAGs. To my knowledge, there was only one African-American JAG. All were ROTC graduates. JASOC students were still diverse. Some came from red states, others from blue. They were graduates of all manner of colleges and law schools -- state, private, big, small, prestigious, and some not so. Their politics were across the board.

So, in a moment of youthful lawyerly exuberance, at my JASOC graduation dinner, among many toasts, I gave mine. "Here's to William Kuntzler, the defender of the Chicago Seven! May we be as zealous in the defense of our clients, as he is for his!"

Well, there followed much cheering and laughter from my fellow students. The faculty looked a little grim. I had already volunteered for Vietnam, so there wasn't much they could do to me.

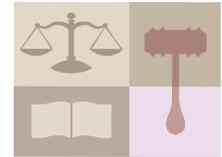
It's remarkable that I'm speaking to a JASOC class. While in Vietnam, I applied for and was accepted into the Trial Judiciary program, which was brand new. Once back in Washington, since the Trial Judiciary office wasn't ready to open at Bolling, I did odds and ends for Colonel Herb Turk, the Judiciary Director. He handed me a file and asked that I prepare thank you notes for those whose Trial Judiciary applications had not been accepted. The applications of the successful candidates were in the file too. I found mine. It had a hand written note clipped to it: "Check his background."

Thank you for allowing me to share this history. Good luck with your JAG careers whether it be one of four years or thirty. Tomorrow you start the best years of your professional lives!



**Current Faculty and Staff in front of The Judge Advocate General's School**

# Prospective Professional Responsibility: Privatized Housing



Legal assistance walk-ins have been coming in all afternoon. You've been greeting clients and entering them into WebLIONS for prompt service. The last person through the door has a normal legal question:

*"Three months ago, I told my landlords that a bunch of shingles blew off. Every time it rains, the roof leaks and water gets all over the living room. Can I keep the rent until they fix the roof?"*

But keying in her address, you notice that she lives on base. And housing on your base has been completely privatized with a government contractor. You remember something about conflicts of interest and not assisting in claims against the government. Can she be seen in legal assistance for this matter?

## Coping with Conflicts

This scenario can occur in many offices already, and will occur in more offices as additional base housing shifts to the privatized housing model. Potential conflict is a valid concern -- but offices can take simple steps to provide legal assistance.

The key conflict of interest is highlighted in AFI 51-504, *Legal Assistance, Notary and Preventive Law Programs*. Para. 1.2.1 prohibits legal assistance for "official matters in which the Air Force has an interest."

The Air Force interest in privatized housing is discussed at length in Special Subject Letter 2004-6: *Legal Assistance for Privatized Housing Tenants* (4 August 2004):

The Air Force clearly has an "official interest" in housing privatization projects as a whole. It leases the land to the developer and enters into real estate commitments requiring the developer to use and operate the housing units for specified purposes. [\* \* \*] Further, Air Force attorneys at the base, MAJCOM, and Air Force levels provide support and assistance to commanders, government contracting personnel and other staff on all aspects of such projects.

The Special Subject Letter, though, goes far beyond noting the potential conflict. It finds that an actual conflict is "extremely unlikely", finding the Air Force's primary interest is in quality housing:

The Air Force is not a party to the lease agreements between developers and privatized housing tenants and has no official interest in resolving lease disputes between those two parties. Moreover, if anything, the interests of the Air Force and the military members residing in housing coincide.

Still, the SSL notes a remote potential for conflict -- and sets out simple steps to protect against it:

- (1) Create a "fire wall".** Attorneys working on privatized housing projects for the Air Force will simply see legal assistance clients on other matters. Conversely, an attorney with a privatized housing legal assistance client will remain clear of working on privatized housing projects for the Air Force.
- (2) Disclose the potential conflict.** Before entering into an attorney-client relationship, attorneys must fully discuss the Air Force's interest in privatized housing. If the disclosure concerns the potential client, the alternate sources of legal assistance can be discussed. (These are detailed in AFI 51-504, para. 1.7.)
- (3) Obtain the client's consent.** If the client would like to proceed, memorialize the understanding and conflict waiver in writing. A sample waiver is available on the website of the Legal Assistance Mission of The Judge Advocate General's School. The letter is reprinted in this edition for immediate use. *Note:* The SSL mandates the consent letter be kept for one year.

### Privatized Housing Potential Conflict of Interest Disclosure/Waiver Form

The Air Force, along with the rest of the Department of Defense, is heavily engaged in an effort to privatize military family housing to rapidly improve the quality of housing for our military personnel. As implemented by the Air Force, these privatization transactions involve a long term outlease of government land to a private developer of military family housing units. In return, the developer commits to renovate, destroy/build, operate and maintain the units to make them available for military tenants on a priority basis. The developer enters into private leases with individual military members residing in privatized housing.

Although the Air Force does have an interest in the underlying arrangement between itself and the developer, it is not a party to the lease agreements between privatized-housing developers and privatized-housing tenants. It is therefore unlikely that the Air Force's interest will conflict with the interest of military tenants leasing from that developer. However, it is possible for such a potential conflict to arise. For that reason, legal assistance clients seeking advice on matters arising out of their relationship with privatized-housing developers are assigned to Air Force attorneys who are not involved, and purposely remain uninvolved, with the privatized housing projects at that location. Clients who do not want to see any Air Force counsel are not required to do so.

By signing below, I understand that there is a potential for a conflict between my interest and the interest of the Air Force. Notwithstanding this potential conflict of interest, I desire to obtain legal representation from this Air Force legal office.

Date: \_\_\_\_\_

Client Signature: \_\_\_\_\_

Print Client Name: \_\_\_\_\_

### Key Air Force Rules of Professional Conduct Involved in this Issue:

#### Rule 1.7 Conflict of Interest: General Rule

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless: (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and (2) each client consents after consultation.

#### Rule 1.13 The Air Force as Client

(a) Except when authorized to represent an individual client or the government of the United States, an Air Force judge advocate or other Air Force lawyer represents the Department of the Air Force acting through its authorized officials.

Questions 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 / (703) 696-9029. Questions on Legal Assistance may be directed to the Chief of the Legal Assistance Mission, Maj Lance Mathews at [lance.mathews@maxwell.af.mil](mailto:lance.mathews@maxwell.af.mil) or DSN 493-4452 / (334) 953-4452. Maj Mathews' December webcast on privatized housing is available in the Distance Learning section of the School's site on FLITE.

### Professional Responsibility Webcast Recording

On December 18th, 2007, Maj Kyle Green of the School's Professional Outreach Division presented a webcast on Professional Responsibility for Litigators. The session discussed the case of Michael Nifong, the former district attorney for Durham County, North Carolina removed due to his misconduct in the 2006 Duke University lacrosse case. Lt Col Mark Patterson, AF/JAU, provided additional guidance during the webcast.

A recording of the webcast is available in the Distance Learning section of the School's site on FLITE.



# Ask the Experts

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

## **Our Wing Commander has studied the impact of smoking on health. He believes that smoking is incompatible with military service and would like to ban all smoking in uniform. Is such an order lawful?**

Such an order was recently examined at length by AF/JAA and found to be outside of a commander's authority.

The analysis, *Orders Restricting Tobacco Use in Uniform*, dated 11 December 2007, arrives at that answer using rules of construction, an understanding of lawful orders, and considerations of enforceability.

AF/JAA focuses initially on pre-emption. The Secretary of the Air Force "issued definitive and specific guidance on tobacco use in uniform" in AFI 36-2003, *Dress and Personal Appearance of Air Force Personnel* (6 Aug 07).

Paragraph 1.3.2.3 of the instruction explicitly prohibits smoking while walking in uniform. AF/JAA applies the standard rule of construction that voicing a specific rule implies alternatives were rejected. The Secretary's specific policy is assumed to be chosen over more restrictive options (like the proposed total ban on smoking in uniform). Additional language in the AFI authorizes supplements to the uniform policy. But setting out specific aspects of uniform policy installation commanders may supplement limits their authority to supplement in other areas.

AF/JAA also analyzes the lawfulness of such a military order. Fundamental legality of a military order rests in its clearly articulable link to military duty. It should not "interfere with private rights or personal affairs" absent a valid military purpose. THE MANUAL FOR COURTS-MARTIAL UNITED STATES (2005 ed.), Part IV, paragraph 14c(2)(a)(iii). The analysis notes some existing restrictions on private rights, but finds them tightly linked to military duty. Prohibitions on drinking alcohol while "on duty" or before duty -- so-called "bottle to throttle" periods -- are based on a clear link with duty performance. A narrow ban on smoking may have a similar link; AF/JAA provides the example of AETC's restriction on non-prior service personnel in training, with its clear link to the military duty of integrating discipline as a new Air Force member.

The analysis closes by noting a ban "would be difficult to enforce and would likely result in willful and open violations" and encouraging creative solutions to health issues related to tobacco without creating a "patchwork approach" regulating its use.

**On a related note**, see the AF/JAA memo, *Orders Restricting Alcohol Consumption*, dated 16 April 2007.

## **How can I learn about labor law -- including working with the experts in the Labor Law Field Support Center (LLFSC)?**

The LLFSC hosts a very useful website: [https://aflsa.jag.af.mil/AF/JACL/LLFSC/llfsc\\_homepage.htm](https://aflsa.jag.af.mil/AF/JACL/LLFSC/llfsc_homepage.htm)

The website carries forward the excellent Online Law Library maintained for over a decade by Mr. Gary Tidmore. The library contains a wealth of labor law materials, from primers for those new to the practice area to deskbooks and updates for expert practitioners. The materials are expertly organized for immediate access.

The site also details the standup of the FSC and explains the plan for continuing its JAG Corps 21 evolution.

## CLOSING THE GAP:

### The Continuing Search for Accountability of Civilians Accompanying the Force

by Brigadier General David G. Ehrhart,\* 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<sup>1</sup>

Recently, Congress passed legislation that amended the Uniform Code of Military Justice (UCMJ) to extend military criminal jurisdiction over civilians accompanying the force.<sup>2</sup> This has raised a multitude of issues, which the armed forces and contractors who support contingency operations need to sort through. This paper will examine the historic context for contractors on the battlefield, the problems associated with the lack of criminal jurisdiction over civilians, and the issues driven by the new language in the Uniform Code of Military Justice (UCMJ).

Last year, the *Washington Post* revealed disturbing allegations that armed personal security detail (PSD) contractors working for Triple Canopy went on an unprovoked shooting rampage in Baghdad.<sup>3</sup> The *Washington Post* reported that Triple Canopy had assigned four (three American and one Fijian) PSDs to protect executives from Kellogg, Brown and Root. The article stated one of the contractors began that

day’s mission by saying, “I want to kill someone today.” Then, while traveling between the Green Zone and the Baghdad Airport, he opened fire on an old man in a taxi cab and another contractor in the same vehicle opened fire on a civilian truck. It is unknown whether anyone was injured in those incidents or whether any of the PSDs was or will be prosecuted.<sup>4</sup>

Similarly, in 2005, an allegation arose against 19 armed security guards from a North Carolina based security company named Zapata while they were working for an American engineering firm which had contracted for work in Iraq.<sup>5</sup> The accuser alleged that the contracted guards opened fire on unarmed Iraqi civilians and also on a Marine outpost tower in Fallujah. The Marines arrested and jailed the 19 men, but they were all eventually released. That case likewise has not resulted in any prosecutions.

Contractor discipline was again highlighted this past September when Blackwater security guards escorting a diplomatic motorcade allegedly fired at a car when it did not heed a policeman’s call to stop. At least 10 Iraqis were killed.<sup>6</sup> While this incident is still under

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<sup>2</sup> 2007 National Defense Authorization Act, Pub. L. No. 109-364, 120 Stat. 2217 (2006) [hereinafter cited as 2007 NDAA] amended Article 2(a)(10) of the Uniform Code of Military Justice.

<sup>3</sup> Tom Jackman, *U.S. Contractor Fired on Iraqi Vehicles for Sport, Suit Alleges*, WASH. POST, Nov. 17, 2006, at A20.

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<sup>4</sup> *Id.* The article noted the contractor employees were returned to the United States and were then suspended and later fired.

<sup>5</sup> T. Christian Miller, *The Conflict in Iraq: U.S. Marines Detained 19 Contractors in Iraq*, LOS ANGELES TIMES, June 8, 2005, at A10.

<sup>6</sup> Sabrina Tavernise and James Glanz, *Iraqi Report Says Blackwater Guards Fired First*, N.Y. TIMES, Sep. 19, 2007, at A12; John M. Broder and James Risen, *Shootings by Blackwater Exceed Other Firms in Iraq*, N.Y. TIMES, Sep. 27, 2007, at A1. *But see* Joshua Partlow and Walter Pincus, *Iraq Bans Security Contractor*, WASH. POST, Sep. 18, 2007, at A1 (Blackwater vice president said that the company’s guards had responded appropriately to an ambush.)

investigation at the time of this writing, it underscores the need to adopt appropriate processes to deal with potential contractor misconduct.<sup>7</sup>

## II. Contractors on the Battlefield

### A. Traditional Roles

Historically in this country, contractors have always been present in some capacity on the battlefield. From the American Revolution, where George Washington used contractors to haul supplies, up through the numerous wars of the 20<sup>th</sup> Century, contractors have continued to be part of the make up of our ability to fight wars.<sup>8</sup> It has been only recently, however, that the United States has transformed the role of contractors from merely supplementing military efforts to one of serving as an absolutely essential function indispensable to military operations.

Throughout the nineties, the role of contractors continued to increase. During Desert Storm, nearly 10,000 contractors were deployed.<sup>9</sup> They provided supplies, did the laundry, manned the mess halls, drove vehicles, maintained high-tech support equipment, and more. After the Dayton Peace Accords, contractors in Bosnia became increasingly essential in peacekeeping operations, freeing up the military to focus their resources on operational missions.<sup>10</sup> Their presence also helped to alleviate pressure to hold military troop strength down.<sup>11</sup> Contractors now were not only needed, they had become such an integral part of contingency operations that they were absolutely essential.<sup>12</sup> Stated more precisely, the mission could no longer be done without them. In the 21<sup>st</sup> Century, this trend continued in Operation ENDURING FREEDOM (OEF) in Afghanistan and Operation IRAQI FREEDOM (OIF).<sup>13</sup>

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<sup>7</sup> The New York Times quoting “government and industry officials” suggests that Blackwater “has been involved in cases in which its personnel fired weapons while guarding State Department officials in Iraq at least twice as often per convoy mission as security guards working for other American security firms...” *Id.* The trend of shooting by security contractors seems to be on the rise. From May 2006 to May 2007, the number of warning or deadly shots fired at Iraqis by security contractors was 207. This was up from 115 for the same period the previous year. Jim Michaels, *Number Of Incidents In Which Civilians Fired Shots Nearly Doubles*, USA TODAY, Sep. 4, 2007, at 7. The Deputy Secretary of Defense has weighed in as well sending a memorandum covering the importance of managing contractor personnel accompanying the force and highlighting that “DOD contractor personnel (regardless of nationality) accompanying U.S. armed forces in contingency operations are currently subject to UCMJ jurisdiction.” Memorandum, Deputy Secretary of Defense Gordon England, subject: Management of DOD Contractors and Contractor Personnel Accompanying U.S. Armed Forces in Contingency Operations Outside the United States (25 Sept. 2007).

<sup>8</sup> Karen L. Douglas, *Contractors Accompanying the Force Empowering Commanders with Emergency Change Authority*, 55 A.F.L. REV. 127, 130 (2004) [hereinafter cited as Douglas]; Rebecca R. Vernon, *Battlefield Contractors; Facing the Tough Issues*, 33 PUB. CONT. L. J. 369, 373-374 (2004).

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<sup>9</sup> Douglas, *supra* note 8, at 130.

<sup>10</sup> Wm. C. Peters, *On Law, Wars, and Mercenaries: The Case for Courts-Martial Jurisdiction over Civilian Contractor Misconduct in Iraq*, 2006 B.Y.U.L. REV. 367, 380-84 [hereinafter cited as Peters].

<sup>11</sup> Douglas, *supra* note 8, at 131.

<sup>12</sup> See Ricou J. Heaton, *Civilians at War: Reexamining the Status of Civilians Accompanying the Armed Forces*, 57 A.F.L. REV. 155 (2005) [hereinafter cited as Heaton] citing the GEN. ACCOUNTING OFFICE, GAO-03-695, *MILITARY OPERATIONS: CONTRACTORS PROVIDE VITAL SERVICES TO DEPLOYED FORCES BUT ARE NOT ADEQUATELY ADDRESSED IN DOD PLANS*, at 8-9, 16 (2003) [hereinafter 2003 GAO REPORT ON MILITARY OPERATIONS] (discussing reliance on contractors to provide maintenance for various systems is unavoidable because the armed forces simply lack any internal capacity to maintain the equipment).

<sup>13</sup> The numbers increased as well. *Overseas War Profiteering and Contractor Crimes, 2007; Hearings on H.R. 369 Before the Subcommittee on Crime, Terrorism, and Homeland Security of the House Judiciary Committee*, 110th Congress (2007) (statement of Scott Horton Adjunct Professor, Law Columbia University School of Law) [hereinafter cited as Horton Testimony]. Professor Horton testified: “Before the commencement of the surge, for instance, the total community of contractors in Iraq was around 100,000 and the number of

## B. New Roles

As their presence increased, so did their role. Contractors began to serve as interrogators and guards, providing intelligence services, and increasing their utility for traditionally military-only activities.<sup>14</sup> Their presence raised significant issues in a number of areas of the law to include the Law of Armed Conflict.<sup>15</sup> The presence of contractors on the battlefield also raised fundamental acquisition law questions regarding the intersection between traditional military operations and non-traditional contract actions.

As contractors assumed these new roles in OEF and OIF, they also began paying a heavy price. For example, in Fallujah, four Blackwater PSD contractors were ambushed while escorting kitchen equipment through the city. Their bodies were burned, dismembered, and hung on a bridge.<sup>16</sup> Many also encountered roadside bombs, surprise attacks, and snipers.<sup>17</sup>

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uniformed service personnel was around 125,000.”  
*Id.*

<sup>14</sup> See 2003 GAO REPORT ON MILITARY OPERATIONS, *supra* note 12, at 2-10, Table 1 at 7.

<sup>15</sup> Phillip Carter, *Hired Guns: What to do about Military Contractors Run Amok*, SLATE MAGAZINE, (Apr. 10, 2004) <http://www.slate.com/id/2098571> (last visited Jan. 26, 2008). For a summary of how contractors and civilians are treated under the Law of Armed Conflict, see generally Heaton, *supra* note 12.

<sup>16</sup> Colin Freeman, *Horror at Fallujah – 4 U.S. Contractors Die*, SAN FRANCISCO CHRONICLE (Apr. 1, 2004), available at [http://www.sandline.com/hotlinks/San\\_Fran\\_Chron-Blackwater.html](http://www.sandline.com/hotlinks/San_Fran_Chron-Blackwater.html) (last visited Jan. 27, 2007). See Alan Feuer, *For An Iraq Contractor, Duty, And Then Death*, N.Y. TIMES, Aug. 8, 2007, at A12 (private security expert killed by a roadside bomb). Many understand the risks but believe the compensation is worth it. See Tyler Bridges, *Hired Guns Shrug Off War Risks For Payday*, MIAMI HERALD, Aug. 1, 2007, at 1. See also Eviatar, *Contract With America, Hard Terms for the Soldier of Fortune*, HARPER'S MAGAZINE, 74-77 (October 2007).

<sup>17</sup> Certainly contractors did not start paying the price here. Whenever they were close to the action they were at risk. For example, in World War II, when the Navy started building airfields in the South Pacific, the invading Japanese army captured, killed or wounded contractors right along side their military hosts. Michael E. Guillory, *Civilianizing the Force:*

Contractors not only became indispensable, they also felt the negative consequences of being so close to kinetic military operations. As an integral part of U.S. Armed Forces presence then, many of the same factors that make military operations successful apply to contractors as well. First and foremost among these is discipline. George Washington said it best when he said “Discipline is the soul of an Army.”<sup>18</sup> More broadly stated, discipline is the soul of the Armed Forces, of civilians accompanying the force, and of contractors who support that mission.

## C. Discipline is the Soul of the Force

We do not have to look too far to see that a lack of discipline can have a disastrous effect on the outcome of a military operation. The prison abuses at Abu Ghraib still ring in our minds as an unfortunate example of how the lack of discipline by a few individuals (both military and civilian) can totally undercut a commander's ability to win.<sup>19</sup> We were able to win the war;

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*Is the United States Crossing the Rubicon?*, 51 A.F. L. REV. 111, 118-119 (2001). This was the motivating factor for the creation of the Fighting Seabees Construction Battalions. *Id.* citing Hugh B. Cave, *WE BUILD, WE FIGHT! THE STORY OF THE SEABEES* (New York 1944). The creation of this construction battalion also inspired the Hollywood movie *THE FIGHTING SEABEES* (Republic Pictures 1944).

<sup>18</sup> *THE AMERICAN REVOLUTION*, at <http://www.americanrevolution.com/AmRevFormArmy.htm> (last visited Jan. 27, 2008):

Basing his observations on his experience with British Regulars during the French and Indian War, Washington wrote: "Discipline is the soul of an army. It makes small numbers formidable; procures success to the weak and esteem to all." *Id.*

<sup>19</sup> Major General George R. Fay's investigation into the Abu Ghraib scandal is available at <http://www.defenselink.mil/news/Aug2004/d20040825fay.pdf>. He went on to write:

I would be remiss if I did not reemphasize that the 180,000 U.S. and coalition forces, under all echelons of command within the CJTF-7, were prosecuting this complex

the bigger question was (and still is) can we win the peace?<sup>20</sup> The primary battle being waged now is for the hearts and minds of the people of Iraq and Afghanistan. When we have a lack of discipline on the scale of Abu Ghraib or even during the business of going door-to-door searching houses, interrogating detainees, or simply driving a vehicle among the population, our ability to win the peace will be undercut.

This is not meant to argue that misconduct on the part of civilians is out of control. While we have no statistics on civilian misconduct during contingency operations, we can examine disciplinary rates in the Air Force and nation wide. In the past 10 years, only 0.263% of Air Force military personnel have been subject to a court-martial.<sup>21</sup> Fortunately, like the military, relatively few civilians commit crimes. About three percent of the U.S. population has engaged in criminal conduct resulting in imprisonment.<sup>22</sup> While it is encouraging that percentages are

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counter-insurgency operation in a tremendously horrid environment, and were performing above all expectations. Leaders and Soldiers confronted a faceless enemy whose hatred of the United States knew no limits. The actions of a few undisciplined Soldiers at Abu Ghraib have overshadowed the selfless service demonstrated every day, twenty-four hours a day, by the vast majority of our Soldiers and civilians on the battlefield. We, as a Nation, owe a debt of gratitude to our service members who have answered our Nation's call and are in harm's way, every day. This fact became perfectly clear to me as I conducted my investigation. *Id.*

<sup>20</sup> Josh White & Amy Goldstein, *Abu Ghraib Investigator Points to Pentagon*, WASH. POST, Jun. 17, 2007, at A7. See also Joshua Partlow and Walter Pincus, *Iraq Bans Security Contractor*, WASH. POST, Sep. 18, 2007, at A1 (Iraqi Government revoked the license of Blackwater USA for its involvement in a shootout in Baghdad that killed a number of people).

<sup>21</sup> Air Force Legal Operations Agency (AFLOA)/JAJM figures as of June 25, 2007. The Army and Navy do not keep similar statistics.

<sup>22</sup> *Criminal Offender Statistics*, U.S. Department of Justice, (last modified Sep. 6, 2006), available at <http://www.ojp.usdoj.gov/bjs/crimoff.htm> (last visited Jan. 27, 2008).

relatively low, with the number of contractors increasing over the past 15 years, the issue of how to deal with serious criminal misconduct has become increasingly worrisome.

### III. JURISDICTIONAL GAP

#### A. Uniform Code of Military Justice

Since 1947, commanders have exercised discipline over the uniformed military by applying the Uniform Code of Military Justice (UCMJ). The UCMJ is amazingly broad and flexible and applies globally. Commanders, however, have had no effective means to deal with civilian misconduct and/or lack of discipline when civilians accompanied the force overseas.

Article 2(10)(a) of the UCMJ<sup>23</sup> provides that “[i]n time of war, persons serving with or accompanying an armed force in the field” are subject to this law.<sup>24</sup> Courts have interpreted the critical words “in time of war” to mean during a declared war.<sup>25</sup> In our country's history, we have had only five declared wars<sup>26</sup> with the last one being World War II. Under this structure, it was very unlikely that the UCMJ would be used to cover the jurisdictional gap.

#### B. War Crimes Act

In 1996, Congress passed the War Crimes Act.<sup>27</sup> This Act punishes US Armed Forces members and U.S. nationals who commit grave breaches of the Geneva Convention's Article

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<sup>23</sup> 10 U.S.C. §§ 801-946 (2005) (prior to enactment of the 2007 NDAA, *supra* note 2).

<sup>24</sup> *Id.*

<sup>25</sup> *Reid v. Covert*, 354 U.S. 1 (1957), and progeny, as cited in *U.S. v. Averette*, 41 C.M.R. 363 (C.M.A. 1970), at 364. See also *McElroy v. United States*, 361 U.S. 281 (1960). But see *Peters*, *supra* note 10 at 394-406.

<sup>26</sup> *Congress' Role in War*, U.S.A TODAY, (last modified May 18, 2005) available at <http://www.usatoday.com/news/nation/2002-10-08-congress-war.htm> (last visited Jan. 27, 2008). The War of 1812, Mexican-American War, Spanish-American War, World War I, and World War II have been the only instances where the United States Congress has declared war against other countries. See *Peters*, *supra* note 10 at note 153 and accompanying text.

<sup>27</sup> 18 U.S.C. § 2441 (2005).

3.<sup>28</sup> These grave acts include torture, cruel or inhumane treatment, biological experiments, murder, mutilation or maiming, rape, sexual assault, and hostage taking. While the Act does grant jurisdiction for a number of serious crimes, it falls short in dealing with a whole host of other serious crimes for which the U.S. government would want to hold civilians accountable.

For example, during peacekeeping operations in Bosnia, it was alleged that contractor employees were running a sex slave operation. Once investigators learned the likely suspects were civilian contractors, they attempted to turn over the investigation to local authorities for prosecution. Those authorities were either unable or unwilling to prosecute the case. The War Crimes Act did not apply and neither did the UCMJ.<sup>29</sup>

In another instance, the United States Court of Appeals for the Second Circuit overturned the conviction of a civilian who was convicted of sexual acts with a minor, his step-daughter.<sup>30</sup> The court held that because the abuse occurred in base housing in Germany, the conviction lacked the requisite jurisdictional element for the federal crime.<sup>31</sup>

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<sup>28</sup> The relevant conventions which have a common Article 3 are: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

<sup>29</sup> See *The U.N. and the Sex Slave Trade in Bosnia: Isolated Case or Larger Problem in the U.N. System?: Hearing Before the Subcommittee on International Operations and Human Rights of the Committee on International Relations*, 107th Cong. 9-10 (Apr. 24, 2002).

<sup>30</sup> *United States v. Gatlin*, 216 F.3d 207 (2d Cir. 2000).

<sup>31</sup> *Id.* at 209. See Glenn R. Schmitt, *Closing the Gap in Criminal Jurisdiction Over Civilian Accompanying the Armed Forces Abroad – A First Person Account*

Once again the cry went out for Congress to close this jurisdictional gap as the judge in that case took the unusual step of directing his clerk to forward his opinion to Congress.<sup>32</sup> They responded with the Military Extraterritorial Jurisdiction Act (MEJA).<sup>33</sup>

### C. MEJA

MEJA applies to crimes defined as felonies under U.S. law which are committed outside the United States. Its reach extends “to persons employed by or accompanying the U.S. Armed Forces overseas and certain uniformed personnel, such as separated personnel whose crimes were not discovered prior to discharge.”<sup>34</sup>

Seemingly, at least for felonies, MEJA looks like it had done its job in closing the jurisdictional gap. In practice, however, it has proved much more difficult. The first problem with MEJA was that only a U.S. Attorney could prosecute the offense and must use his or her own resources to do so.<sup>35</sup> As it has turned out, MEJA has been used very infrequently.<sup>36</sup> One of the first uses of MEJA was in a case out of Japan. In 2002, Mr. Billy Bryan, a civilian employee, sexually assaulted an 11-year-old girl on Yokota Air Base, Japan.<sup>37</sup> Through extensive cooperation between the base legal office, the victim, Japanese prosecutors, and the U.S. Attorney’s Offices in Guam and Tacoma,

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*of the Creation of the Military Extraterritorial Jurisdiction Act of 2000*, 51 CATH. U.L. REV. 55, 76 (2001).

<sup>32</sup> *Id.*

<sup>33</sup> 18 U.S.C. § 3261 (2007).

<sup>34</sup> Ronald R. Ratton, *Case Study: Use of the Military Extraterritorial Jurisdiction Act to Prosecute Misconduct by a Civilian Employee in Japan*, 29 *The Reporter* (Vol. 4) 32, 32-34 (2003) [hereinafter cited as Ratton].

<sup>35</sup> As with most Government agencies, funding is tight. The DOJ is no exception. See Scot J. Paltrow, *JUSTICE DELAYED: Budget Crunch Hits U.S. Attorneys’ Offices*, *Wall Street Journal*, Aug 31, 2007; p. A1.

<sup>36</sup> See William Matthews, *Contractor Crackdown: Civilian contract employees can now be prosecuted under the UCMJ*, *Armed Forces Journal*, <http://www.armedforcesjournal.com/2007/02/247180> 8 (last visited Jan. 17, 2007).

<sup>37</sup> Ratton, *supra* note 34, at 32-34.

Washington, the United States was successful in prosecuting the defendant upon his arrival in Washington.<sup>38</sup> Even more illustrative of the issues facing the U.S. Attorney however was the case of LaTasha Arnt.

Staff Sergeant Matthias Anthony Arnt III and LaTasha Arnt were stationed at Incirlik Air Base in Turkey. In 2003 at the beginning of OIF, all civilian dependents were evacuated from Incirlik due to its proximity to Iraq and the possibility that it could be attacked. After Iraq fell, the dependents were allowed to return. On her second night back, Mrs. Arnt fatally stabbed her husband during a domestic dispute. As in the *Bryan* case, DOD had not yet issued implementing guidance for MEJA.<sup>39</sup> Despite this, the Staff Judge Advocate (SJA) at Incirlik and the SJA for United States Air Forces in Europe worked closely with AF/JA, SAF/GC and DOD/GC to find a MEJA solution to this case.<sup>40</sup> Using the draft MEJA regulations, the MEJA point of contact at DOJ called the U.S. Attorney's Office for the Central District of California, where Mrs. Arnt was from and an Assistant U.S. Attorney agreed to prosecute the case. This Assistant U.S. Attorney tried the case in the Los Angeles District Court and it ended with a hung jury. Mrs. Arnt was retried and was convicted of manslaughter and sentenced to eight years in prison. In April of 2007, the Ninth Circuit overturned the case finding the trial judge erred in not advising the jury that they could have found Mrs. Arnt guilty of the lesser

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<sup>38</sup> *Id.* On 9 January 2003, Mr. Bryan pled guilty pursuant to a plea agreement. On 4 April 2003, the court sentenced him to 18 months confinement followed by three years of supervised release. *Id.* at 34.

<sup>39</sup> However, DOD had drafted proposed implementing regulations that were followed in the Arnt case as an informal Beta Test of the proposed procedures. Interestingly, as in the *Bryan* case, Mrs. Arnt did not challenge jurisdiction under the MEJA.

<sup>40</sup> This involved a great deal of coordination between Incirlik Air Base (39<sup>th</sup> ABW/JA), United States Air Forces in Europe (USAFE/JA), the Air Force Directorate of the Judiciary, Military Justice Policy Division (AFLSA/JAJM), the DOD/GC (Associate Deputy General Counsel (Military Justice and Personnel Policy)), and the DOJ Criminal Division.

included offense of involuntary manslaughter.<sup>41</sup> Consequently, the U.S. Attorney's Office will have to try this case again.

An additional problem with MEJA was that it did not initially extend to non-Defense Department contractors. Congress attempted to remedy this in 2004 by applying MEJA to contractors of other federal agencies, to the extent their employment related to supporting the DOD mission overseas.<sup>42</sup> Recently, CIA contractor David Passaro was convicted and sentenced to 8 years in prison for charges in connection with the death of an Afghan farmer whom Passaro beat during in a series of interrogations.<sup>43</sup> However, because Passaro was a CIA contractor and the offense occurred prior to the effective date of the 2004 amendment to MEJA, prosecution under MEJA would have been problematic.<sup>44</sup> Thus, U.S. prosecutors chose to try Passaro under the USA PATRIOT Act,<sup>45</sup> which extends the reach of American law to military bases located overseas.<sup>46</sup>

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<sup>41</sup> *United States v. Arnt*, 474 F.3d 1159 (9<sup>th</sup> Cir. 2007).

<sup>42</sup> The extent to which this attempt has effectively extended jurisdiction to non-DOD civilians is questionable. The language is broad and vague and would raise problems for prosecutors. These problems may explain why Congress is considering amending MEJA again. In October of 2007, the House passed H.R. 2740. Paragraph 3 of Section 2 of this bill would amend MEJA to apply to contractors of any federal agency "in an area, or in close proximity to an area (as designated by the Department of Defense) where the Armed Forces is conducting a contingency operation."

<sup>43</sup> Andrea Weigl, *Passaro Will Serve 8 Years for Beating*, THE NEWS & OBSERVER, Feb. 14, 2007, available at

[http://www.newsobserver.com/nation\\_world/passaro/story/543038.html](http://www.newsobserver.com/nation_world/passaro/story/543038.html) (last visited Jan. 25, 2008).

<sup>44</sup> See *Q&A: Private Military Contractors and the Law*, Human Rights Watch, <http://hrw.org/english/docs/2004/05/05/iraq8547.htm> (last visited Jan. 25, 2008).

<sup>45</sup> Horton Testimony, *supra* note 13. Andrea Weigl, *Passaro Convicted of Assaulting Afghan: The Former CIA Contractor, Found Guilty of Beating a Prisoner in Afghanistan, Faces a term of two to 11.5 years*, NEWS & OBSERVER, Aug. 18, 2006, available at

On the whole, U.S. Attorneys are very cooperative and are willing to try MEJA cases. Making them less attractive, however, the crime scene can be thousands of miles away and prosecutors must transport the defendant and witnesses from significant distances. To achieve a successful prosecution, the U.S. Attorneys must devote precious fiscal and human resources. Hence, the jurisdictional gap remained open.

#### IV. Closing the Gap – Back to the UCMJ

##### A. The New Law

The most recent attempt to close the jurisdictional gap came in 2006 with the passage of the 2007 National Defense Authorization Act.<sup>47</sup> Senators Lindsey Graham and John Kerry introduced the legislation to change the UCMJ to include civilians under its jurisdiction. The law changed Article 2(a)(10) to read:

In time of declared war or a contingency operation, persons serving with or accompanying an armed force in the field shall be subject to this chapter.<sup>48</sup>

There is no legislative history accompanying this provision but the title of this section of the legislation is instructive: “SEC. 552. *Clarification of Application of Uniform Code of Military Justice During Time of War.*”<sup>49</sup> Clearly Congress was attempting to deal with the ruling of the Supreme Court in *Reid* and the military courts in *Averette*.<sup>50</sup> The press quoted Senator Graham as saying:

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[http://www.newsobserver.com/nation\\_world/passaro/story/476483.html](http://www.newsobserver.com/nation_world/passaro/story/476483.html) (last visited Jan. 26, 2008) [hereinafter Weigl].

<sup>46</sup> Horton Testimony, *supra* note 13. Weigl, *supra* note 45.

<sup>47</sup> H.R. 5122, 109th Cong. § 2 (2006) (*emphasis added to highlight the amended language*).

<sup>48</sup> 2007 NDAA, *supra* note 2.

<sup>49</sup> *Id.*

<sup>50</sup> The 1996 NDAA directed that an Advisory Committee comprised of DoJ and DOD representatives be established to examine the possibility of criminal prosecution of civilians accompanying the armed forces in the field outside the United States in time of armed conflict not involving a war declared by Congress. Congress

Right now you have two different standards for people doing the same job. This will bring uniformity to the commander’s ability to control the behavior of people representing our country.<sup>51</sup>

While my guess is that Senator Graham most likely defines “the same job” rather broadly, the significant impact of this new law has been to put civilians under the jurisdiction of the UCMJ. This of course raises a whole host of issues as to how this new law will apply to contractors.<sup>52</sup> Some authors have suggested dire consequences.<sup>53</sup> For corporate counsel who must advise their clients, one of the main concerns has been the nature of the guidance the Department of Defense (DOD) will provide regarding the application of this law.

##### B. Joint Service Committee Review

In January 2007, pursuant to DOD Directive 5500.17,<sup>54</sup> the Joint Service Committee on Military Justice (JSC) was tasked to address how DOD would review this new legislation and recommend amendments, if necessary, to the Manual for Courts-Martial (MCM).<sup>55</sup> The JSC

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directed the Advisory Committee to provide proposed legislation in its report back to Congress. This committee, which included Mr Reed, concluded that the judicially-construed “declared war” of Article 2, UCMJ, did not reflect how the military had been engaging in present-day armed conflicts and also recommended that Congress amend the UCMJ to include “contingency operations as designated by the Secretary of Defense (e.g., 10 U.S.C. § 101(a)(13)(a).” Discussion between Mr. Robert Reed, Associate Deputy General Counsel (Military Justice and Personnel Policy), Department of Defense, and the author.

<sup>51</sup> Griff Witte, *New Law Could Subject Civilians to Military Trial*, WASH. POST, Jan. 15, 2007, at A01.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* William Mathews, *New Law Subjects Contractors to Military Justice*, Jan. 5, 2007, <http://www.federaltimes.com>. *But see* Peters, *supra* note 10, at 406.

<sup>54</sup> U.S. DEP’T OF DEFENSE, DIR. 5500.17, ROLE AND RESPONSIBILITIES OF THE JOINT SERVICE COMMITTEE (JSC) ON MILITARY JUSTICE (3 May 2003).

<sup>55</sup> Briefing by Mr. Robert Reed to the ABA Public Contract Law Section’s Battle Space and

made interim recommendations in May of 2007 and presented its views to the DOD General Counsel.<sup>56</sup> One of the non-voting advisors to the JSC, Mr. Robert Reed of DOD/OGC, analyzed the criminal articles under the UCMJ and the MCM to determine which would apply to civilians. By their nature, some offenses do not apply to civilians because one of the elements of these offenses is that the charged person must be in the military.<sup>57</sup> Some offenses are only offenses under the UCMJ since they have no counterpart in other federal law.<sup>58</sup> Some are violations of both the UCMJ and other federal law—providing for jurisdiction by civilian and military courts.<sup>59</sup> Mr Reed worked through the various specifications of each offense to determine the appropriate category for each. Due to the subjective nature of that analysis however, the effort was to achieve “the 80% solution” for the purposes of making some preliminary determinations on how DOD would approach the application of the UCMJ to civilians, in light of MEJA jurisdiction.

The draft analysis revealed that of 163 offenses listed in the UCMJ and Part IV of the MCM, 14 are not applicable to civilians.<sup>60</sup> Of the remaining 149 UCMJ offenses, 67 have no comparable crime in other federal law and are, therefore, exclusive court-martial jurisdiction.<sup>61</sup> The remaining offenses have an analogous offense under other federal law: 60 are felony-

level offenses to which MEJA would apply and 22 are “minor offenses” to which MEJA would not apply (since MEJA jurisdiction only applies to felony-level offenses). This 80% solution then sets up the discussion for how the armed forces might begin to deal with the application of the UCMJ to DOD contractors and DOD civilian employees.

In those areas where MEJA applies, one possibility is that the Armed Forces could look to the Department of Justice (DOJ) to prosecute those offenses in accordance with MEJA. Some would argue that the DOD should at least give the DOJ the right of first refusal since many prefer prosecutions of civilians in civilian courts whenever a civilian court has jurisdiction. DOJ officials have stated that they could let DOD know within two business days whether they will take a particular case for MEJA prosecution. In the above analysis, DOJ would have the right of first refusal for offenses for which there is a comparable felony-level federal crime. For the remaining offenses, guidance is appropriate regarding both the level at which actions might be taken and the oversight to be provided by the Combatant Commander and ultimately DOD.

### C. Withhold Authority

Military command and orders are executed through the chain of command. It is anathema to the military justice system for a higher level commander to direct a subordinate commander to take a particular disciplinary action. In fact, this would be illegal.<sup>62</sup> If a superior commander either prefers to exercise jurisdiction on a case himself or disagrees with a subordinate commander, that commander would withhold the authority of the lower level commander to exercise his court-martial or non-judicial punishment authority.<sup>63</sup> This approach keeps the

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Contingency Procurements Committee on June 8, 2007 [hereinafter cited as Reed Briefing].

<sup>56</sup> *Id.*

<sup>57</sup> For example, desertion, AWOL, fraternization, etc. See Uniform Code of Military Justice (UCMJ) arts. 85, 86, 134 (2005).

<sup>58</sup> For example, disorderly conduct, drunk driving, provoking speech. See UCMJ arts. 134, 111, 117 (2005); See MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005) [hereinafter MCM], Rules for Courts-Martial (R.C.M.) 201(d)(1) on exclusive court-martial jurisdiction.

<sup>59</sup> See MCM, *supra* note 58, R.C.M. 201(d)(2).

<sup>60</sup> Reed Briefing, *supra* note 55. In these offenses, the offender must be a member of the armed forces. The nature of the offenses and the elements are only applicable to service members. *Id.*

<sup>61</sup> *Id.* See MCM, *supra* note 58 and R.C.M. 201(d)(1).

<sup>62</sup> See *U.S. v. Levite*, 25 M.J. 334 (1987); *U.S. v. Treacle*, 18 M.J. 646 (1984).

<sup>63</sup> MCM, *supra* note 58, R.C.M. 306(a) provides:

Each commander has discretion to dispose of offenses by members of that command. Ordinarily the immediate commander of a person accused or suspected of committing

lines of authority clear and allows an unfettered and independent authority to decide the disposition of a particular case. Therefore, in this new area of exercising jurisdiction over civilians accompanying the force during contingency operations, the proper level of making a decision to prosecute a civilian could be made through this type of withholding action. The JSC considered that the Secretary of Defense (SECDEF) would potentially withhold Article 2(a)(10), UCMJ, jurisdiction in the following instances:

- Offenses committed in the CONUS, and
- All court-martial convening authority from commanders who do not possess general court-martial convening authority;<sup>64</sup>
- All nonjudicial punishment actions from all commanders who do not possess general court-martial convening authority;<sup>65</sup>
- For concurrent jurisdiction offenses, withhold action until DOJ determines (within two days after appropriate information is forwarded by DOD/GC to DOJ/DSS) if federal jurisdiction will be exercised.

The JSC's general belief is that authority to exercise this power should remain at a high level. Overall, Combatant Commanders are

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an offense triable by court-martial initially determines how to dispose of that offense. A superior commander may withhold the authority to dispose of offenses in individual cases, or generally. A superior commander may not limit the discretion of a subordinate commander to act on cases over which authority has not been withheld.

<sup>64</sup> Commander, COCOM has authority to further limit by withholding action to specified general court-martial convening authorities; limit to specified geographic areas within COCOM theater of contingency operation; and to further limit by withholding action against host-nation or third country national employees/contractors serving with or accompanying the armed force in the field. Reed Briefing, *supra* note 55.

<sup>65</sup> Information required under DOD Instruction 5525.11 for potential MEJA jurisdiction.

ultimately responsible for operations in their area of responsibility. Among many things, this includes good order and discipline. There have been suggestions that the power to prosecute a civilian should be held at the level of the SECDEF and some authorities may very well be withheld at that level. However, actions taken in the military justice realm by SECDEF could only be appealed to the President. The better practice would be to keep most of these actions at lower levels where this authority would be exercised by senior-level decision makers at the combatant commander level or just below. The JSC would further propose that these withholding actions be combined with the proper level of oversight.

#### D. Oversight

Regarding oversight, the JSC has considered several elements. Importantly, civilian employees and/or contractors need to know under which convening authority they fall.<sup>66</sup> This need has collateral impacts on the military's efforts to track contractors deploying with the force (CDF) in the theater of operations.<sup>67</sup> Designation of the responsible convening authority would be done as part of that process. The JSC also proposes that the SECDEF's withholding action to general court-martial convening authorities be accompanied

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<sup>66</sup> Reed Briefing, *supra* note 55.

<sup>67</sup> U.S. DEP'T OF DEFENSE, Inst. 3020.41, CONTRACTOR PERSONNEL AUTHORIZED TO ACCOMPANY THE U.S. ARMED FORCES (3 Oct. 2005), requires the Under Secretary of Defense for Personnel and Readiness (USD (P&R)), in coordination with the Under Secretary of Defense for Acquisition, Technology and Logistics (USD (AT&L)), to designate or develop a joint web-based database and procedures for its use, as the central repository for information on all CDF personnel. Memorandum, Director, Defense Procurement and Acquisition Policy Shay Assad, subject: Implementation Guidance for the Synchronized Predeployment and Operational Tracker (SPOT) to Account for Contractor Personnel Performing in the United States Central Command Area of Responsibility (AOR) (28 Jan. 2008). The Synchronized Predeployment and Operational Tracker (SPOT) was designated as the database to serve as this repository. *Id.*

by a requirement that the GCM first notify and obtain Combatant Commander approval to dispose of a case under the UCMJ before initiating court-martial or nonjudicial punishment action.<sup>68</sup> By doing so, this enables potential federal concurrent jurisdiction to be examined and affords the Combatant Commander, as a superior competent authority with equivalent jurisdiction to determine whether the Combatant Commander's general court-martial convening authority will instead be exercised in the case. For potential MEJA cases, the JSC proposes that the GCM notify DOD/GC, pursuant to DOD Instruction 5525.11 MEJA reporting requirements, of its intended actions under the UCMJ.<sup>69</sup> Because of the unique nature of exercising court-martial jurisdiction over civilians, with the attendant litigation and legal challenges to be expected which may require DoJ support and representation if challenged in the federal court system, it is clear that DOD envisions a reporting requirement of the intended UCMJ disposition that will afford a review of possible federal prosecution alternatives and litigation risk analysis before the commander embarks on his intended UCMJ disposition and commits the case to a course of protracted litigation and constitutional challenges. Not all cases on their facts and circumstances may be worthy of weathering this storm.

## V. Conclusion

Through the history of warfare civilians and contractors have accompanied armed forces on the battlefield. In the past several years, the number of contractors working with the military in contingency operations has risen dramatically. This has resulted in new roles for contractors that have made them essential to the successful execution of military missions. Successful execution requires not only disciplined uniformed members but also disciplined civilians accompanying the force.

Unfortunately, for commanders in contingency operations, virtually no tools have existed with which to control or deter misconduct by civilians accompanying the force overseas. The War Crimes Act covered some of the more heinous crimes addressed by the Geneva Conventions but this statute has proved too limiting for the type of control commanders need. The Military Extraterritorial Jurisdiction Act (MEJA) has attempted to solve some of these problems but has still left a large jurisdictional gap where civilian prosecutions were concerned. The latest attempt to close the gap occurred in an amendment to the UCMJ in the 2007 National Defense Authorization Act. That amendment expanded UCMJ jurisdiction over civilians accompanying the force in declared wars or contingency operations.

This latest statutory change has raised a number of issues of concern to the Department of Defense and fears for contractors supporting contingency operations. The JSC, however, has analyzed the new legislation and their recommendations for managing how these cases are procedurally addressed are promising. The JSC review of the offenses involved was thorough and the JSC is working to ensure that only very senior military officials will have authority to invoke the new legislation's powers. As an additional protection, the JSC has urged that DOD create an oversight mechanism, which would ensure appropriate DOD-level review. At this point, the DOD General Counsel has not finished reviewing the JSC proposals so the final result may not be known for some time. The outlook, however, is promising for a reasonable application of the new rules to civilians with a focus on discipline and mission accomplishment. This approach will not guarantee that we will win the peace, but it may prevent us from losing it because of a lack of discipline by either uniformed members or civilians.

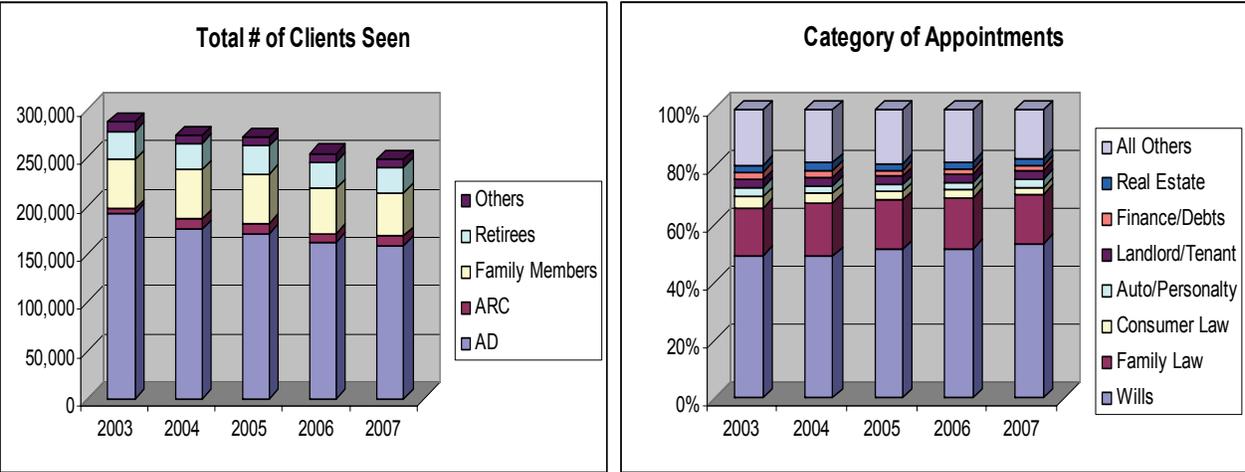
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<sup>68</sup> Reed Briefing, *supra* note 55. This would provide the COCOM the option to withhold authority or exercise his or her own authority in a particular case.

<sup>69</sup> *Id.*

# Legal Assistance Notes

Five-Year Trends: The numbers don't lie: JAGs have more legal assistance appointments *even in the face of a downsized force*. The WeBLIONS data for the last five years shows two particularly poignant trends. First, the number of clients is shrinking in relation to the reductions in manpower, but the total number of appointments has remained roughly the same. In 2003, we assisted 286,000 clients and have slowly declined to 248,000 in 2007 (a decrease of 15%). Over the same time period, the number of legal assistance appointments rose from 113,000 to 126,000 (an increase of 10%). The second noticeable trend is that our areas of practice are constant over the years: wills and family law account for over two-thirds of our business from year to year -- nearly 70,000 wills and over 20,000 divorce, support, child custody, and paternity clients annually. Judge advocates, civilian attorneys, paralegals and legal office staff are all to be congratulated for their efforts in helping fellow Airmen (Retired, Reserve, and AD) and their dependents settle their personal legal affairs professionally and enthusiastically!



New Course Offerings in Legal Assistance: In light of the data, AFJAGS has focused training to match our high-demand topics. Webcast distance education sessions were recently held for both Automobile Sales (15 Nov 07) and Landlord/Tenant law (20 Dec 07). Both sessions were recorded for use as in-house training options.

AFJAGS is offering four new centrally funded in-residence courses covering a variety of legal assistance topics. The courses focus on estate planning and family law. The courses are geared towards the base level JAG who provides legal assistance on a regular basis. Each goes far beyond what is taught at JASOC. Chiefs of Legal Assistance are encouraged to attend the courses, or send another representative from the office. Again, these courses are centrally funded!

<b>LEGAL ASSISTANCE PRACTICE ALERT</b>	<p>On 20 December 2007, President Bush signed The Mortgage Forgiveness Debt Relief Act of 2007, legislation that protects families from higher taxes when they refinance their homes. This Act creates a three-year window for homeowners to refinance their mortgage and pay no taxes on any debt forgiveness that they receive, helping to avoid foreclosures. Under the previous law, if the value of your house declines, and your bank or lender forgives a portion of your mortgage, the tax code treats the amount forgiven as income that can be taxed. It is the hope for the Bush Administration that this Act will increase the incentive for borrowers and lenders to work together to refinance loans and allow American families to secure lower mortgage payments without facing higher taxes. More information can be found at <a href="http://www.whitehouse.gov/news/releases/2007/12/20071220-6.html">http://www.whitehouse.gov/news/releases/2007/12/20071220-6.html</a>.</p> <p><i>(Special thanks to Mr. Bill Wells, AFMCLO/JAK for alerting The Reporter on this legislation!)</i></p>
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# Military Justice Pointers

## Major Revisions to AFI 51-201, *Administration of Military Justice*

AFI 51-201, *Administration of Military Justice*, was updated considerably and released on December 21, 2007. Some of the major changes are immediately apparent, including an entirely new chapter on AMJAMS. New topics have been added. For example, the AFI provides guidance on media subpoenas and warrants of attachment. Many other topics were given expanded coverage. Also, new sample documents provide practical models throughout the new instruction.

The Military Justice Division of the Air Force Legal Operations Agency (AFLOA/JAJM) is the instruction's OPR. Major Jennifer Hays, Chief of the Policy and Precedent Branch in the division, shared these chapter-by-chapter pointers on some of the significant changes.

*Note:* Practitioners must still read the entire revised AFI to understand all of the important updates.

### **Chapter 1, Purpose, Command Influence and Professional Conduct**

- Unlawful Command Influence (UCI): SJAs are already always on guard against this enemy of military justice. The revised instruction provides additional discussion directing SJAs to act decisively when apprised of facts or circumstances which might give rise to UCI.
- Ethics and Standards of Conduct: Foreign national attorneys as well as other practitioners in Air Force proceedings are now treated under separate headings to give more visibility to the requirements for each group.

### **Chapter 2, Court-Martial Convening Authority and Jurisdiction**

- General, Special, and Summary Court Martial Authority: While not changing how authority is granted, guidance has been updated to clarify the process.
- Host-Tenant Jurisdiction: Court-martial jurisdiction by a host commander over members of tenant organizations was added. (This had previously been in AFI 25-201, *Support Agreement Procedures*.)
- Court-martial jurisdiction over trial judiciary personnel: regardless of location, all trial judiciary personnel are assigned to AFLOA for court-martial jurisdiction. In turn, all AFLOA personnel fall under AFDW.
- Jurisdiction involving state or foreign prosecution: Expanded guidance clarifies when a state or foreign trial is considered “pending”. The fact this rule does not apply to vacation proceedings is highlighted and a separate paragraph provides procedures for SJAs to follow when a member is subject to both military and civilian jurisdiction. Also, the instruction directs SJAs to foster relationships with a view “toward maximizing Air Force jurisdiction.”
- Military Extraterritorial Jurisdiction Act (MEJA): The instruction now includes an explanation of the application of MEJA.
- Jurisdiction over Reservists: Reflecting a directive in the 2006 NDAA, jurisdiction over Reservists while performing continuous inactive duty training overseas was added.

### **Chapter 3, Military Magistrates, Pretrial Restraint, and Preferral**

- **Military Magistrates:** Authority to appoint more than two military magistrates is provided for in unique circumstances. Permission must be obtained from the GCMCA and approved by JAJM. Military magistrates no longer need to be designated primary and alternate -- a magistrate is a magistrate. Also, the commander may now appoint a military magistrate for matters involving Air Force personnel on a non-Air Force installation.
- **Pretrial Confinement:** This section was expanded to help clarify and update the various steps involved in authorizing pretrial confinement. Additional memoranda to include a sample probable cause determination memorandum and a sample pretrial review officer's review were added. The use of pretrial confinement to administer mental health evaluations was clarified. Additional guidance makes it very clear that suicide prevention by itself is not a proper use of pretrial confinement.
- **Authority to Proceed in Cases Involving An Accused with Special Access:** The instruction now outlines the process and recommends authority be sought prior to preferral, rather than merely referring readers to the 31-series instructions.
- **Extension Beyond Expiration of Term of Service (ETS):** The instruction provides guidance on holding a member beyond their ETS.

### **Chapter 4, Forwarding and Disposition of Charges**

- **Article 32 Investigations:** Guidance on Article 32 Investigations has expanded greatly -- from roughly a page to over six pages. Discussion is added regarding the qualifications of the investigating officer, government representative, and counsel for the accused. Guidance is also given on delays and speedy trial issues, preliminary actions by the IO, witness issues, conducting the investigation, accused's statements, argument, objections, basis for tape recording witness testimony, investigating uncharged misconduct, objections to the IO report, and distribution of the report.
- **Sample forms** were added including "Appointment of Investigating Officer", and "Authentication of Oral Deposition" (by a transcriber or by a deposition officer). The instruction also provides a sample "Pretrial Advice".
- The section on oral depositions was greatly enlarged from one sentence to three paragraphs, including guidance on authenticating videotaped depositions.
- **Rehearings:** The AFI contains special instructions for rehearings.
- **Arraignment and Pleas at 39(a) Sessions:** Article 39 of the UCMJ allows judges to arraign and receive pleas at 39(a) sessions when authorized by the Secretary. The revised AFI puts this authorization into effect.
- **Docketing:** The instruction reflects the shift of docketing from military judges in the field to procedures established by USAF/JAT.

### **Chapter 5, Court-Martial Composition and Personnel, Reporters, and Convening Courts-Martial**

- **JAG Corps 21:** Changes in organization and titles are reflected.
- **Summary Court-Martial Officer:** A discussion of summary court-martial officers -- including their detailing and selection -- was added. A provision that had been in Chapter 2 allowing a Reservist to act as Summary Court-Martial Officer now appears in this chapter.
- **Individual Military Defense Counsel Requests:** This section was redrafted to add clarity. A paragraph was added on IMDC requests for Reservists. (Only ARC attorneys on "Title 10" tours can be requested and they must be in Title 10 status when performing IMDC duties. Requests are processed exactly as with their active duty counterparts.)
- **Defense Investigative Support:** In addition to moving defense requests for investigative support from a separate memorandum into the revised instruction, detailed information on the process has also been added.

- Court Reporters: This section was rewritten to reflect the fact that the Air Force Court Reporting Program is now managed by the Superintendent, USAF Judiciary. Digital reporting is discussed as the primary means of recording. The term “Contingency Court Reporting” has been removed as that specific program no longer exists. The instruction also notes that the primary role of enlisted court reporters is expeditionary court reporting.
- Detailing and Excusing members: Guidance was added on detailing members, including enlisted members, as well as changing or excusing detailed members.

## **Chapter 6, Travel Funding, Witness Production, and Immunity**

- Centralized Witness Funding: Procedures are changed significantly to reflect the use of the new electronic Witness Funding Management System.
- Funding Limits: The instruction reflects the new funding limits of \$1000 per day and \$4000 per case (updated from \$500 and \$2000).
- Consultants. Payment for consultants remains a convening authority responsibility. But the instruction clarifies that if an expert witness does not testify, JAJM will not revoke its funding.
- Failure to Appear: Detailed instructions for obtaining a Warrant of Attachment for civilian witnesses who fail to appear has been included.
- Subpoenas to the Media: A new section that deals with subpoenas to the media has been added. Air Force policy requires the exercise of due care when issuing subpoenas to media organizations. The section sets out mandatory considerations and processing requirements.
- Pretrial Agreements (PTAs): Provisions on PTAs were moved to Chapter 8, Trial Matters.

## **Chapter 7, Victim and Witness Assistance**

- Airman and Family Readiness Center (A&FRC) Responsibilities: A paragraph was added to reflect A&FRC responsibilities to victims of crime.
- Sexual Assault Prevention and Response Program: The instruction now provides a one-page discussion of the program.

## **Chapter 8, Trial Matters**

- Changes: The instruction discusses “minor” versus “major” changes and the requirements that flow from the distinction.
- Withdrawal of Charges: The revised instruction contains a detailed discussion of both complete and partial withdrawal of charges.
- Pretrial Agreements: The provisions on PTAs were moved to this chapter from Chapter 6.
- Psychotherapist-Patient Confidentiality: A detailed discussion of the Military Rule of Evidence (M.R.E.) 513 privilege is included.
- Confidentiality of Sexual Assault Protected Program Records: The instruction provides a detailed discussion regarding the confidential nature of SARC and Victim Advocate records, including restricted reporting information.
- Hate Crimes: The instruction notes that trial counsel may present evidence in aggravation under Rule for Courts-Martial (R.C.M.) 1001(b)(4).
- Officer Resignations for the Good of the Service: The instruction now clearly states “A RILO may not be submitted post-arraignment.”
- Classified or Controlled Information: The discussion of classified and controlled material has been expanded as well as the discussion regarding the assertion of the M.R.E. 505 privilege.
- Use of Audiovisual and Teleconferencing Technology: The instruction includes SECAF authorization to use audiovisual and teleconferencing technology to the extent allowed by the Rules for Courts-Martial.

## **Chapter 9, Post-Trial Procedure**

- Publication of Results of Trial: The instruction greatly expanded its guidance in this area.
- Entry into Post-Trial Confinement: A section was added to describe how the DD Form 2707, *Confinement Order*, is used to process the accused into confinement.
- SJA Recommendation (SJAR): The instruction clarifies when SJARs are required and provides a sample action memorandum when an SJAR is not required.
- SJAR Format, Preparing and Signing the SJAR, Serving of SJAR on Defense, and Defense Counsel Response to SJAR: These topics have been divided into separate headings with greatly expanded coverage.
- Staff Summary Sheets: Discussion regarding the use of a staff summary sheet has been expanded, cautioning against its use to avoid raising new matters.
- Duration of Forfeitures: The consequences of an approved sentence of total forfeitures are explained, referencing the DOD Financial Management Regulations.
- Disqualification of Convening Authority: Because this determination is reasonably subjective, the revised instruction provides a list of case citations to aid in researching the issue.
- Article 57(a) and 58(b) Deferral and Waiver Provisions: The instruction contains a greatly expanded section on this topic, including a chart clarifying the effects of adjudged versus mandatory forfeitures.

## **Chapter 10, Court-Martial Orders**

- This chapter was edited and reorganized, and distribution lists and attachments were updated.

## **Chapter 11, Appeals and Reviews, Rehearings, Retrials, Dubai Hearings and Clemency**

- Requests for Appellate Review and Waiver or Withdrawal From Appellate Review: These topics were expanded to provide more details on the process as well as the consequences of waiver or withdrawal.
- Article 64(a) Review: This section was greatly expanded from two paragraphs to two pages, including extensive guidance on the form and content of the review.
- Review by the Air Force Court of Criminal Appeals (AFCCA) and Notification of AFCCA's Decision: Additional detailed instructions regarding the notification process are included and this section incorporates the accused's right to appeal to United States Court of Appeals for the Armed Forces (USCAAF).
- USCAAF and Supreme Court Review: The revised instruction discusses these levels of review.
- Petition for New Trial: Discussion has been enlarged from one paragraph to two pages, providing a detailed description of the entire process.
- Rehearings: This section has been greatly expanded with significant emphasis placed on *Dubai* hearings.

## **Chapter 12, Automated Military Justice Analysis and Management System (AMJAMS)**

- This chapter is entirely new. It provides detailed and extensive guidance on the use of AMJAMS including a field-by-field explanation of data used within the system.
- Defense Incident-Based Reporting System. The instruction now discusses DIBRS responsibilities.
- Time Management: The instruction discusses Air Force metrics and directs SJAs to regularly analyze available AMJAMS data relating to each segment of case processing over which they have control.

## **Chapter 13, Miscellaneous Military Justice Matters**

- Transmitting Special Interest Reports (SIRs) to JAJM: The instruction has been updated to require that SIRs be transmitted using AMJAMS rather than by fax machine; AMJAMS procedures are explained.
- Search Authorization involving ADCs: The instruction discusses the procedures to be followed when search authorization is to be issued against an ADC or SDC.
- Crimes Against Children and Sexually Violent Offender Registration under Federal Law: Guidance has been updated to reflect changes in this rapidly expanding area.

Additionally, the "Glossary of Abbreviations and Acronyms" and the "Subject Index" located at Attachments 1 and 2, respectively, of the instruction have been updated.

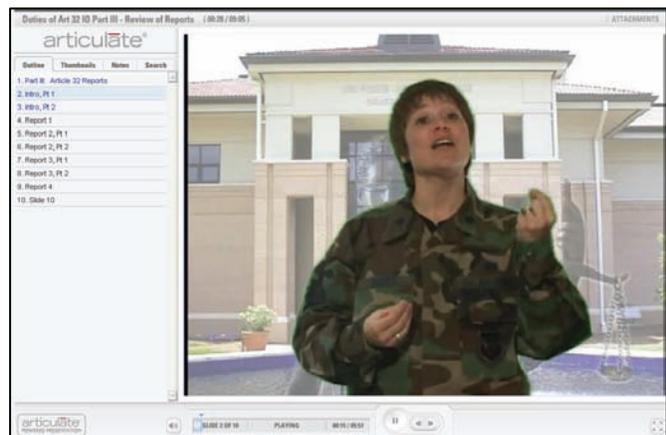
## New Distance Education Course for Article 32 Investigating Officers

The Military Justice Division of the Judge Advocate General's School worked with experts in the field to create a new distance education course for Article 32 Investigating Officers.

Maj Tara Olayvar, an instructor/litigator at AFJAGS, led the project: "We built this to be immediately useful. It will directly repay the IO for investing a couple of hours in it."

The course consists of three lessons:

- Part I focuses on prehearing matters. IO appointment and qualifications are discussed, as are issues related to delays. Attention is also given to working with the media and members of the public.
- Part II focuses on conducting the investigation. The lesson begins by defining the scope of the investigation. It then devotes considerable coverage to evidentiary issues, including alternatives to testimony, MRE 412 (past sexual behavior) issues, and objections. It closes with guidance on writing the report.
- Part III gives a unique view on Article 32 reports. It features Lt Col Marlesa Scott, the Chief of Military Justice for 8th Air Force. Lt Col Scott presents years of lessons learned by reviewing several real-world Article 32 reports. She highlights areas of excellence, as well as practical pitfalls to avoid. The reports are part of the lesson, allowing students to follow along point-by-point.



Maj Chris Leavey, Chief of the Military Justice Division at AFJAGS, encourages feedback: "We've invested time in creating a practical course that benefits from years of great advice from many people. We're committed to making it even better, so please share your thoughts with us."

The course is on FLITE's JADE system: <https://aflsa.jag.af.mil/kworks/> (note: the trailing slash is crucial)

# Advice from the Field...

## **A Suggested Reading List for Deployment in Iraq** *created by Lieutenant Colonel Douglas B. Cox, USAFR*

*The last edition of The Reporter contained great practical advice on preparing physically and mentally to deploy. This edition provides an excellent overview on preparing intellectually.*

*Lt Col Cox is a Reserve Military Judge. He recently returned from serving as a Strategist and Legal Advisor to the Deputy Chief of Staff, Strategic Plans and Assessment, Multi-National Force-Iraq, headquartered in Baghdad. -- The Editors*

Regardless of the position or role to be filled by a deploying JAG Corps member in Iraq, time invested in reading will pay large dividends. An increased familiarity with the history of Iraq, the Iraqi legal system, Iraqi society, a general understanding of Islam and of the Sh'ia and Sunni sects of that religion, the mission and objectives of the Multi-National Force-Iraq, and the nature of the conflict in which the United States and its Coalition allies are now fighting will increase effectiveness, efficiency, and situational awareness.

There are various reading lists on general topics for JAG Corps members, but we wanted to provide a pre-deployment reading list for those headed to Iraq. To put such a reading list together, inputs were solicited from fellow judge advocates currently in Iraq from the U.S. Air Force, Army, Navy, and Coalition Forces. This suggested list is based on the personal experiences and preferences of those that contributed to this effort (and to whom I am greatly appreciative), and may be tailored to an individual's deployment position, prior experience, duty location, and personal preference.

### **The Current State of Iraqi Law**

It is important to remember that we are not bringing the concept of law to Iraq, but merely assisting the Iraqis as they rebuild their legal and political institutions. As a fellow JAG reminded me, Iraq is the land of Hammurabi and produced the first legal code in human history. There are multiple possible sources of Iraqi law, and fitting these different sources together can prove.

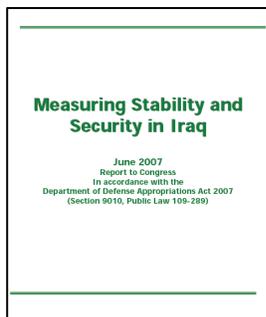
There is a large body of pre-2003 Iraqi law that is still valid. The post-Coalition invasion period provides several additional sources of law. In April of 2003, the Coalition Provisional Authority (CPA) was established as the temporary civil administration for Iraq, headed by L. Paul Bremer. The CPA issued regulations and orders. Some of those regulations and orders are still valid sources of law. On 28 June 2004, the interim constitution for Iraq went into effect. It was called the Law of Administration for the State of Iraq for the Transitional Period. It was also known as the Transitional Administrative Law (TAL). This followed the official transfer of power from the CPA to the recognized sovereign government of Iraq. The TAL was subsequently superseded by the permanent Iraqi Constitution that was approved by referendum on October 15, 2005. Under current Iraqi law, unless a previous law

conflicts with the Iraqi Constitution or has been revoked or superseded by a more recent law, that law is still valid. Thus, certain Iraqi law that existed prior to 2003 is still valid, as are certain CPA orders that were either not revoked by the CPA or replaced by newly enacted Iraqi laws. Finding a complete repository of all existing Iraqi law can be difficult, as can be finding English translations of the original Arabic versions. Even finding a quick source for determining which CPA orders were rescinded by the CPA while it existed, or later superseded by Iraqi law can be elusive, and would be an excellent project to for someone to undertake.

The Government of Iraq is also currently working towards passing critical legislation referenced in the White House's Benchmark Assessment Report. A quick on-line search for information on the following pending Iraqi legislation would be time well spent. The hydrocarbon framework, provincial powers, the Accountability and Justice Law (formerly called the De-Ba'athification Law), and Article 140 (a reference to Article 140 of the Iraqi Constitution). These laws are critical for reconciling rifts within Iraqi society, and their progression are being watched with great interest.

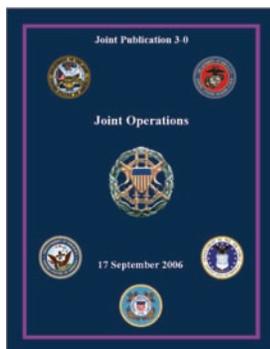
### The Suggested Reading List

**The White House's Benchmark Assessment Report on Iraq.** *White House Progress Report on Iraq (Initial Benchmark Assessment Report)*, (July 12, 2007), available on the internet at <http://www.whitehouse.gov/nsc/iraq/2007/FinalBenchmarkReport.pdf>. A 25-page document that covers critical political, legal and military issues in Iraq. This will provide invaluable situational awareness.



**June 2007 "Section 9010" Report to Congress on Iraq.** *Measuring Stability and Security in Iraq*, submitted pursuant to Section 9010 of the Department of Defense Appropriations Act 2007, Public Law 109-289. This 46-page is very comprehensive, and is easy to skim. It includes performance indicators and measures of progress toward political, economic, and security stability in Iraq. Found at: <http://www.defenselink.mil/pubs/pdfs/9010-Final-20070608.pdf>

**The Joint Campaign Plan for Operation Iraqi Freedom.** The *Joint Campaign Plan for Operation Iraqi Freedom* (JCP) is a classified document, so this will take a little more effort to locate and read. It is readily available in country. The JCP serves as the roadmap for the Coalition's general strategy in Iraq, and provides invaluable information regarding the political and security environment in country. There are subsections that a judge advocate or paralegal will recognize as being directly applicable to our piece of the fight, including a "Rule of Law" section, and another entitled "Situation" that summarizes critical information about circumstances in Iraq.



**Joint Publication 3-0, Joint Operations, (17 September, 2006).** This document was suggested for inclusion by several JAGs. MNF-I is a joint operation, and as its name states, also multinational. JP 3-0, *Joint Operations*, reflects the current guidance for conducting joint and multinational activities across the range of military operations. The "Executive Summary Commander's Overview" in JP 3-0 is 19 pages

long. If you are assigned as part of the large MNF-I staff, you will be working with many officers extremely familiar with this publication, and its concepts. It is used daily to plan and fight the war.

**FM 3-24, Counterinsurgency, (December 2006), Headquarters, Department of the Army.** The United States and its Coalition partners are fighting a counterinsurgency war in Iraq, and this is the recently updated field manual on this type of warfare, with a Forward co-authored by the MNF-I Commander, General David Petraeus. It is a lengthy; however the first 29 pages are recommended reading for everyone assigned to MNF-I. A link is also found on the MNF-I homepage: <http://www.mnf-iraq.com/> Additionally, read Appendix D, Legal Considerations.

<http://www.fas.org/irp/doddir/army/fm3-24.pdf> or  
<http://usacac.army.mil/cac/repository/materials/coin-fm3-24.pdf>

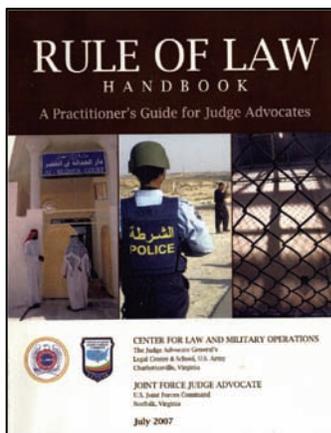
**The Iraqi Constitution.** The text of the Iraqi Constitution can be found at:

[http://portal.unesco.org/ci/en/ev.php-URL\\_ID=20704&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/ci/en/ev.php-URL_ID=20704&URL_DO=DO_TOPIC&URL_SECTION=201.html)

**Coalition Provisional Authority Website Containing Regulations and Orders.** The CPA published a series of regulations and orders, some of which, as discussed above, still serve as sources of current Iraqi law. Although the CPA no longer exists, a CPA webpage still exists and is maintained for historical purposes at <http://www.cpa-iraq.org/> Of particular interest is CPA Order Number 17 (Revised), “Status of the Coalition Provisional Authority, MNF-Iraq, Certain Missions and Personnel in Iraq.” CPA 17 sets forth what the Multi-National Forces-Iraq may do in Iraq while assisting the government of Iraq. It is still valid by agreement between the Government of Iraq and the Coalition as set forth in applicable United Nations Security Agreements.

**United Nations Security Council Resolutions 1790 & 1564.** MNF-I remains in Iraq at the request of Iraq. MNF-I remains legitimately in Iraqi by international law pursuant to a series of United Nations Security Council Resolutions (“UNSCRs”). UNSCR 1564 and letters that are attached to it provide the explanation why the MNF-I still operates according to certain CPA Orders (like CPA Order Number 17) while in Iraq at the request of the Iraqi government.

UNSCR 1790, currently in effect, extends the mandate of UNSCR 1564 through 31 December 2008.



**Chapter VII of the Charter of the United Nations.** The UNSCRs applicable to Iraq are issued by the United Nations Security Council under Chapter VII of the Charter of the United Nations. Chapter VII authorizes the use of military forces necessary to maintain or restore international peace and security. This is a quick, one-page read.

**Rule of Law Handbook, A Practitioner's Guide for Judge Advocates (July 2007).** Published by the Center for Law and

Military Operations, The Judge Advocate General's Legal Center and School, U.S. Army, and the Joint Force Judge Advocate, U.S. Joint Forces Command. This resource will be of particular interest to JAGs assigned to Rule of Law positions. The Handbook is available at:

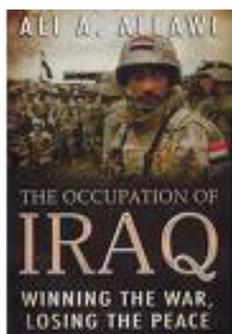
**Selected Army Regulations for JAGs Assigned to the Multi National Security Transition Command – Iraq (MNSTC-I).** For JAGs assigned to MNSTC-I, Office of the Staff Judge Advocate (which serves as the command legal advisor on all legal support issues including but not limited to fiscal and contract law, administrative law, legal assistance, and the UCMJ), a recommendation was made to be familiar with U.S. Army regulations, practices, and procedures, because although there are members from all of the U.S. Armed Forces, most of the personnel are U.S. Army. Suggested MNSTC-I reading includes the following Army Regulations (AR):

AR 27-10, *Military Justice*

AR 15 - 6, *Procedure for Investigating Officers and Boards of Officers*

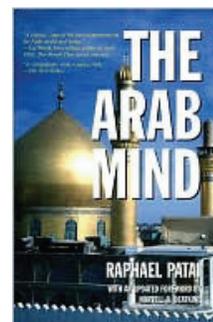
AR 600-37, *Unfavorable Information*

**Oppenheim's International Law, 9<sup>th</sup> Edition**, by Sir Robert Jennings and Sir Arthur Watts and **Textbook on International Law, 5<sup>th</sup> Edition**, by Martin Dixon. Recommended by a senior Australian judge advocate for JAGs that will be concentrating on international law issues.

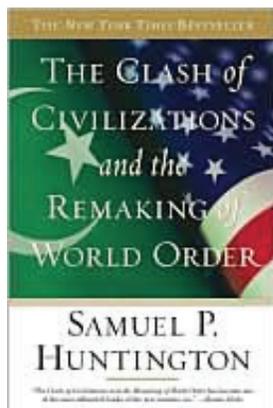


**The Occupation of Iraq, Winning the War, Losing the Peace**, by Ali A. Allawi. Written by a long-time opposition leader of the Ba'athist regime in Iraq who was also a former Minister of Defense and Finance. The book tracks the growth of the insurgency and discusses the complex relationships between the Shi'as, Sunnis, and Kurds.

**The Arab Mind**, by Raphael Patai. This book is used by the U.S. Army to provide insight into Arab culture useful to deploying troops.

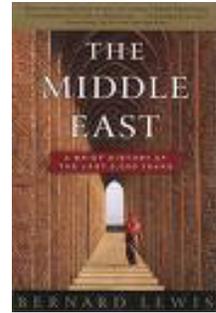


**Cobra II, The Inside Story of the Invasion and Occupation of Iraq**, by Michael R. Gordon and Lt Gen Bernard E. Trainor. This book was recommended by several JAGs, and is often seen on the bookshelves of officers at MNF-I headquarters.



**Clash of Civilizations and the Remaking of World Order**, by Samuel Huntington. Recommended by an Air Force JAG captain assigned to Task Force 134 as “probably one of the most prescient books of the 1990s, and explains a lot about how we got to where we are today.” This book has generated a certain amount of disagreement among political scientists, and some of the book's predictions have not fully played out. However, it is an excellent read, made perhaps more so by the debate it has generated.

**The Middle East, A Brief History of the Last 2000 Years**, by Bernard Lewis. Provides an excellent overview of the Middle East, including a particularly useful discussion of the long and tumultuous relationship between the Persians and the Arabs. It also contains a chapter on religion and the law. This book was recommended by a Strategist/B-1 pilot stationed in Iraq who read the book before reporting to a staff position at CENTAF in 2004. He cited it as an “impact” book that improved his ability to grasp issues related to the Middle East and Iraq.



**Three recommended on-line blogs:**

- Michael Yon, an independent journalist in Iraq:  
<http://www.michaelyon-online.com>
- Michael Totten, a reporter embedded with U.S. Army and Marine Corps units:  
<http://www.michaeltotten.com>
- W. Thomas Smith’s blog *The Tank* at National Review Online:  
<http://tank.nationalreview.com/>

**Tactical Iraqi Arabic.** A language and culture program available through the Air Force Portal. Don’t wait until you are in Iraq to attempt to download this program. The Air Force Portal links to a DOD contractor website, and because it is a non-DOD website, IT protocols block the ability to access the program, at least at the U.S. Embassy Annex in Baghdad.

**Additional Resources**

Lt Col Cox mentions other JAG Corps reading lists. An excellent general list ran as the lead article in the March 2006 edition of *The Reporter* (Volume 33, Number 1): *Dunlap's Very Subjective Reading List for Air Force Judge Advocates*. Then-Brigadier General Charles J. Dunlap, Jr., shares insights from over two-dozen titles.

Readers seeking a brief, fast-paced overview of the history and culture of the Arabic World have several options:

- The School's December 2006 webcast featured Dr. David Sorenson of the Air War College giving a talk based on his Corona presentation. A recording of the webcast is available on the Distance Learning area of the School's site on FLITE.
- KEYSTONE 2007 featured Lt Col Adam Oler, currently a Legal Advisor in the Senior Official Inquiries Directorate, Office of the Air Force Inspector General, presenting "The Middle East: One JAG's View" based upon his extensive study and experiences in the area. A recording of the video is available on the KEYSTONE site on FLITE.

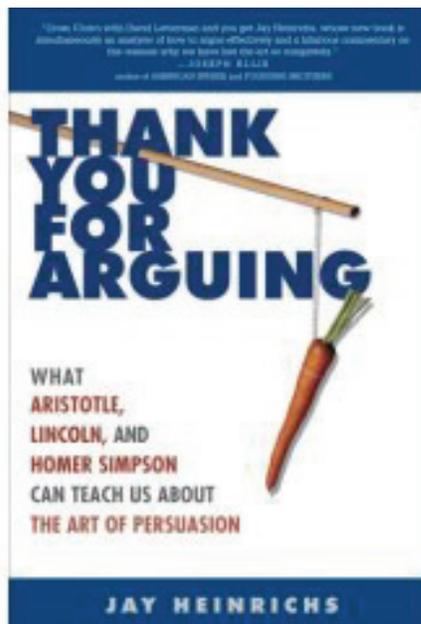


## BOOKS IN BRIEF



Legal professionals are constantly reading and learning. This is frequently focused on changes in the law, or learning another practice area. From time to time, though, some of the learning should be directed to the fundamental principals of the profession like research and writing. Our paralegal degree or juris doctor should not close the door on renewing and strengthening these basic skills.

Advocacy is one of these key skills. Regardless of the particular practice area within the law, legal professionals consistently advocate positions -- whether from their general sense of the right course of action, or in pursuing a client's goals. Major Elizabeth Schuchs-Gopaul introduces a uniquely enjoyable new work sure to build the advocacy skills of any reader.



**Thank You for Arguing**, Jay Heinrichs, \$13.95,  
Three Rivers Press, [www.crownpublishing.com](http://www.crownpublishing.com)

An attorney should be a master at the art of persuasion. Yet, how many of us have studied this art and its tools of the trade *ethos*, *pathos*, and *logos*? Instead, we stand in a court-martial and make our arguments using the skills learned in on-the-job training. Let's face it, who has the time to study the teachings of Aristotle? But, fear not, in a new book, *Thank you for Arguing*, Jay Heinrichs has taken the teachings of the masters and paired them with examples of modern rhetoric showing what Aristotle, Lincoln and even Homer Simpson and Eddie Haskell can teach us about the art of persuasion.

In this clever book, Heinrichs demonstrates through personal, popular, and historical examples how rhetoric can be used to persuade any audience. While entertaining and educating, he gives the reader the techniques to both

support and defend basis arguments all the while persuading the reader of the importance of the study of rhetoric. Whether it is your spouse or a jury, Heinrichs shows how classical techniques can move a modern audience.

Faced with an unhappy audience and an unpopular message to deliver? Follow George Washington. As the unpaid soldiers of the American Revolution grew restless and weary, General Washington asked to meet with his troops. Pulling his remarks from his pocket, he fumbled with his glasses, saying "Forgive me, gentleman, for my eyes have grown dim in the service of my country." By disclosing a defect or weakness about himself, General Washington demonstrated his dedication to his audience and their concerns before he even began his remarks.

Have you ever conceded that a severe (and unlikely) punishment like a dishonorable discharge was inappropriate in a case as a way to strengthen your argument for a bad conduct discharge? You were doing an Eddie Haskell. In the classic television show, *Leave It to Beaver*, Eddie was a master at reaping the credit for making a decision that was almost a foregone conclusion.

This and many other insightful and witty examples await the reader in what truly is a "master class in the art of persuasion."

This excerpt from *Thank You for Arguing* displays the interesting and effective layout used throughout the book. It also shows the author's ability to convey weighty concepts in an engaging style -- and gives the alert reader at least three tools to try, all within the first page of the book. (There are over 130 other "argument tools" in the book which you can use to persuade others, as well as detect when you may be the target of attempted manipulation.)

Teaching points are explained in interesting stories, rather than the dry academic form of traditional tomes on rhetoric

The book is nicely divided in sections of a page or two -- conveniently sized to fit education into the fast pace of modern life

# 1. Open Your Eyes

▲

## THE INVISIBLE ARGUMENT

A personal tale of unresisted persuasion

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*Truth springs from argument among friends.*

—DAVID HUME

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It is early in the morning and my seventeen-year-old son eats breakfast, giving me a narrow window to use our sole bathroom. I wrap a towel around my waist and approach the sink, avoiding the grim sight in the mirror; as a writer, I don't have to shave every day. (Marketers despairingly call a consumer like me a "low self-monitor.") I do have my standards, though, and hygiene is one. I grab toothbrush and toothpaste. The tube is empty. The nearest replacement sits on a shelf in our freezing basement, and I'm not dressed for the part.

"George!" I yell. "Who used all the toothpaste?"

A sarcastic voice answers from the other side of the door. "That's not the point, is it, Dad?" George says. "The point is how we're going to keep this from happening again."

He has me. I have told him countless times how the most productive arguments use the future tense, the language of choices and decisions.

"You're right," I say. "You win. Now will you please get me some toothpaste?"

"Sure." George retrieves a tube, happy that he beat his father at an argument.

Or *did* he? Who got what he wanted? In reality, by conceding his point, I persuaded *him*. If I simply said, "Don't be a jerk and get me some toothpaste," George might stand there arguing. Instead I made him feel triumphant, triumph made him benevolent, and that got me exactly what I wanted.

**TRY THIS IN A MEETING**  
 Answer someone who expresses doubt over your idea with "Okay, let's tweak it." Now focus the argument on revising your idea as if the group had already accepted it. This move is a form of *concession*—rhetorical jujitsu that uses your opponent's moves to your advantage.

Quotes from an amazing array of sources introduce each section

Frequent side bars amplify points from the text (often by using contrast)

This excerpt reprinted from THANK YOU FOR ARGUING by Jay Heinrichs. Copyright © February 2007. Published by Three Rivers Press, a division of Random House, Inc.

## WHEN LIES HAVE VALUE:

### The Admissibility of Uncharged False Exculpatory Statements in Pre-Sentencing

by Lieutenant Colonel John E. Hartsell,\* USAF and Major Bryan D. Watson,\*\* USAF

*“[A]ny statement made may be used as evidence against the accused or suspect in a trial by court-martial.”<sup>1</sup>*

#### I. Introduction

Lies have an extraordinary half-life; they survive both time and crime and their admissibility can yield significant value to a practitioner’s case. When an accused is the origin of lies pertaining to his or her court-martial, the consequences can be enormous. An accused’s lies can prove consciousness of guilt, crush an alibi, impeach remorse, and erode evidence of rehabilitative potential. A litigator - - trial or defense -- who recognizes these possibilities and understands how to ensure they’re considered during a case’s presentation, has a monumental advantage over a less insightful adversary. Such an advantage can be increased even further when counsel understand how to use uncharged false exculpatory statements during pre-sentencing proceedings.

A false exculpatory statement occurs when an accused attempts to explain or show innocence through statements or actions that are later shown to be false. In other words, it’s a deceitful action from an accused in an effort to demonstrate his or her innocence. Such deceptive actions are persuasive evidence in a courtroom because innocent people don’t ordinarily need to lie. Thus, a false exculpatory statement is powerful evidence of consciousness of guilt and accomplished trial and defense counsel should always anticipate its use during a case on the merits.<sup>2</sup> Additionally, a false

exculpatory statement can be powerful pre-sentencing evidence. Use of such false statements have different rules, depending on whether they are offered during findings or sentencing.<sup>3</sup> This article seeks to educate practitioners on the admissibility of uncharged false exculpatory statements during trial in an effort to familiarize them with this relatively simple, but misunderstood, area of the law. Trial counsel should read this article to understand how to use false exculpatory evidence and how it can impeach defense evidence. Defense counsel should read this article to understand how to ensure false statements are inadmissible and thereby insulate defense cases from getting undermined by powerful rebuttal evidence.

#### II. A Typical Example

Let’s say an accused is suspected of downloading child pornography over a year-long period of time. His actions come to the attention of Air Force Office of Special Investigations (AFOSI) investigators and they seek his participation in an interview. Following a proper rights advisement and conscious waiver by the accused, the interview begins. The AFOSI investigators quickly confront the accused with the allegations and he denies them. However, his denial is more than a simple, “I didn’t do it.” Specifically, the accused states, and later writes, “I couldn’t download child pornography because I don’t own any computers, I never use the internet, and I don’t have access to any computer technology.”

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\* Lieutenant Colonel John Hartsell (B.S., M.B.A., J.D., Nova Southeastern University; M.H., University of Richmond) is the Deputy Chief Trial Judge of the Air Force, stationed at Bolling Air Force Base, Washington, D.C.

\*\* Major Bryan Watson (B.A., J.D., University of Missouri-Columbia; M.A., Air Command and Staff College) is a trial judge, stationed at Randolph Air Force Base, Texas.

<sup>1</sup> MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 305(c)(3) (2005) [hereinafter MCM].

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<sup>2</sup> See, Maj John E. Hartsell, *Litigating with the Law: An Introduction to the False Exculpatory Statement Instruction*. THE REPORTER, Mar. 2002, at 3 [hereinafter *Litigating with the Law*].

<sup>3</sup> A false exculpatory statement during the merits portion of a case is usually more than a mere denial; however, there’s no such limitation in pre-sentencing. *Id.*

Shortly after the interview, AFOSI conducts a lawful search of the accused's dorm room and finds three computers, with internet access, and they each contain hundreds of child pornography images. During a subsequent interview, the accused reverses himself and admits he did, in fact, own three computers, he used the internet on a daily basis, and he had unlimited access to various computer technology. He also admits he downloaded hundreds of images of pornography.

This scenario presents a situation wherein the accused lied to investigators in an effort to demonstrate his innocence. In a litigated case, trial counsel could offer the false exculpatory statement evidence as consciousness of guilt and request the military judge to instruct the members accordingly.<sup>4</sup> The false statement, when combined with the subsequent confession, would likely prove devastating for the defense.

That said, the use and impact of the false exculpatory statement is much more limited if the accused chooses to plead guilty. It's well understood that certain evidence that may be relevant during fact-finding may be irrelevant during sentencing. False exculpatory statements fall within this category. The reason is simple: a false exculpatory statement may be used to prove guilt<sup>5</sup>, but if the determination of guilt isn't at issue, it may no longer be relevant. After all, pre-sentencing evidence for the prosecution is generally limited to service data of the accused, evidence of prior convictions, evidence in aggravation, and evidence of rehabilitation potential. An accused's false statements to investigators don't ordinarily fall within any of these categories.<sup>6</sup>

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<sup>4</sup> U.S. DEP'T OF ARMY, PAM, 27-9, LEGAL SERVICES: MILITARY JUDGES' BENCHMARK, para. 7-22 (15 Sep. 2002), [hereinafter *Benchmark*]. In order to trigger the "False Exculpatory Statement" instruction during the merits portion of the case, the determination of the false statement cannot turn on the ultimate question of guilt or innocence of the accused.

<sup>5</sup> See, *United States v. Mahone*, 14 M.J. 521 (A.F.C.M.R. 1982).

<sup>6</sup> MCM, Rule for Court-Martial [hereinafter R.C.M.] 1001(b).

Let's return to our fictional scenario – this time set within a guilty plea case. Too often, trial counsel seek to offer evidence of the accused's lies to AFOSI agents as evidence in aggravation. Trial counsel usually argue that the lies are directly relating or resulting from the offense of which the accused has been found guilty.<sup>7</sup> In such a case, defense counsel should immediately object and cite *United States v. Caro*.<sup>8</sup>

### III. A Close Look at *Caro*

In *Caro*, the accused stole two guitars and subsequently lied to investigators. In pre-sentencing, the trial counsel offered, and the military judge admitted, the accused's lie as aggravating evidence relating to or resulting from the offense of which the accused was found guilty.<sup>9</sup> The Air Force Court of Military Review (A.F.C.M.R.) disagreed with the trial judge's decision. The Air Force Court stated in part:

As to the facts before us, it would be difficult to argue that the appellant's false statement did not relate to the offense. The issue, however, is whether evidence of the false statement showed how the theft, or the actions of the accused in the course of the *theft*, impacted on the victim or significantly affected the command.<sup>10</sup>

The evidence that an accused lied to investigators proves nothing regarding the impact of the crime<sup>11</sup> ... but, it may have other uses during pre-sentencing.

Practitioners need to understand the entire *Caro* decision which includes an intriguing footnote towards the end of the decision. The note states:

We note that the appellant expressed remorse for the offense, stated that he had tried to make restitution, submitted evidence regarding

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

<sup>8</sup> 20 M.J. 770 (A.F.C.M.R. 1985).

<sup>9</sup> MCM, *supra* note 6, R.C.M. 1001(b)(4).

<sup>10</sup> *Caro* at 771.

<sup>11</sup> The case may develop differently if the trial counsel offers the lies, and additional evidence, to show a continued investigation had a significant adverse impact on investigators. *Id.* at 771.

his rehabilitation potential, and, through his counsel, asked for the opportunity to be rehabilitated. Although the evidence of the false statement was not a proper matter in aggravation, it could properly have been admitted in rebuttal of the matters raised by the appellant.”<sup>12</sup>

So, while *Caro* generally prevents the admission of false exculpatory statements as aggravating evidence, it permits their admission to rebut expressions of remorse and evidence of rehabilitation potential. Accordingly, in the hands of a clever trial counsel, the *Caro* footnote can have serious consequences for the defense case.

Let’s examine some implications of *Caro*, using our example. The accused is questioned, he lies, he later confesses, and he chooses to plead guilty. If the trial counsel seeks to offer the accused’s lies, they probably won’t come in as evidence during the government’s pre-sentencing case-in-chief. They’re not evidence of the accused’s service record, not evidence of a prior conviction, and they’re not evidence in aggravation, per *Caro*. The defense counsel can relax...but not abandon his or her wits. A savvy trial counsel will place the accused’s lies in one hand, place the *Caro* decision in the other, listen carefully to the defense presentation of pre-sentencing evidence ... and wait.

In our example, the defense counsel is facing a minefield. The trial counsel is waiting for the slightest opening to get the lies into evidence. If the accused says he’s sorry in his unsworn statement, the trial counsel will pounce. If the defense offers character letters or character witnesses indicating the accused’s remorse or rehabilitation potential, the trial counsel will pounce. Even if the defense calls witnesses and carefully questions them with excruciating precision, trial counsel will pounce. The cross examination might go something like this:

Q: When you said, “xyz” did you mean to suggest, in any way, that he has rehabilitation potential?

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<sup>12</sup> *Id.* at 772, citing MCM, *supra* note 6, R.C.M. 1001(d).

(If the answer is no) Q: So you, who know him better than any of us, want to make it crystal-clear that you WILL NOT offer any opinion on his so-called rehabilitation potential?

(If the answer is yes) Q: Did you know, when he was initially questioned by Air Force investigators, when he had a chance to accept responsibility from the start and come clean, when he had a chance to demonstrate his character, HE LIED and said...?

Q: When you said, “xyz” did you mean to suggest, in any way, that he’s sorry for what he’s done?

(If the answer is no) Q: So you, who know him better than us, want to make it crystal-clear that you WILL NOT offer any opinion on whether or not he has even an atomic particle of remorse?

(If the answer is yes) Q: Did you know, when he was initially questioned by Air Force investigators, when we had a chance to see if he was sincerely sorry or just conveniently sorry, when he had a chance to come clean and premiere the character of his soul, HE LIED and said...?

Presumably, the cross-examination would drag on much longer and prove far more withering than provided here, but you get the point. Once false exculpatory statements exist and pre-sentencing begins, every litigator in the courtroom should be on full “rebuttal alert.”

Until a few years ago, defense counsel would argue *Caro* was just a footnote. They would make valiant arguments to limit the authority of the case and such arguments might have succeeded from time to time. In 2000, those arguments fell completely silent. The Air Force Court issued *United States v. Cameron*,<sup>13</sup> and it expanded *Caro*’s footnote into a clear, affirmative holding.

#### **IV. Cameron: Building on Caro**

In *Cameron*, the accused provided AFOSI investigators with a written statement wherein he denied knowingly using illegal drugs. Subsequently, he pled guilty and, over defense

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<sup>13</sup> 54 M.J. 618 (A.F.C.M.R. 2000).

objections, his false statement was admitted into evidence during the government's presentencing case-in-chief. As with *Caro*, the *Cameron* decision held that uncharged false statements are not generally admissible as evidence in aggravation.<sup>14</sup> However, the Court found such evidence to be probative in other respects:

"An accused's decision to lie or tell the truth when confronted by an official inquiry may provide the sentencing authority with valuable insight into the character and rehabilitation potential of the accused."<sup>15</sup>

Thus, *Cameron* goes beyond simply solidifying *Caro*'s footnote; it establishes firm precedent alongside a practical analytical framework. It specifically holds that an accused's false denial is admissible in rebuttal once the defense places the accused's character or rehabilitation potential into evidence.<sup>16</sup> Moreover, it conscientiously reminds practitioners of an often overlooked balancing test: "[e]vidence of the appellant's false denial of his use of marijuana would have satisfied the Mil. R. Evid. 403 balancing test as rebuttal evidence."<sup>17</sup>

## V. Conclusion

Returning to our example, long before the accused pleads guilty, both parties need to identify the false exculpatory statement and carefully consider its potential impact. They need to understand its use during findings<sup>18</sup> and sentencing. With respect to sentencing, defense counsel must act warily before he or she stipulates to uncharged false denials, because such evidence is likely inadmissible. The defense counsel should also avoid inadvertently making the false denials relevant by carefully scrutinizing character letters, expected witness

<sup>14</sup> *Id.* at 619 citing, MCM, *supra* note 6, R.C.M. 1001(b)(4).

<sup>15</sup> *Id.* at 620.

<sup>16</sup> *Cameron* does not specifically address the admissibility of an accused's false denial to rebut expressions of remorse. Thus, *Caro*—and its footnote—continues to serve as an important resource during presentencing.

<sup>17</sup> *Id.* at 620.

<sup>18</sup> *See, Litigating with the Law, supra* note 2.

testimony, and the accused's unsworn statement. Trial counsel should ensure they represent their client zealously as well, and take the necessary time to examine the false denials in order to determine if, somehow, the evidence directly (and significantly) relates to or results from the offenses. He or she must also carefully scrutinize all of the defense evidence to determine whether the false denials become relevant to counter evidence of rehabilitation potential or remorse. Finally, both parties must remember to consider the Mil. R. Evid. 403 balancing test, and prepare to articulate their positions to the military judge.

Chess is much more fun when both opponents know the rule -- an observation that's presumably true in most competitive endeavors. Likewise, the art of advocacy and the skill involved in litigation are heightened when practitioners understand the rules. After all, practitioners' respective clients deserve no less. Understanding the admissibility of uncharged false exculpatory statements is critical. Trial counsel need to avoid potentially reversible error and need to understand when evidence becomes admissible. Defense counsel need to avoid having their case impeached, and each needs to appreciate how to skillfully represent their respective client. After all, the success of a case may rise or fall if an accused's untruths are presented as evidence at any stage.

See? Lies have value ... honest.

### Sentencing Argument VTC

One of the authors of this piece, Lt Col John Hartsell, presented an excellent video-teleconference seminar in January 2008.

The seminar described his modular approach to building a sentencing argument. This approach allows counsel to create better arguments in less time. Tailoring tested elements of an argument frees up effort to focus on the unique aspects of each case.

A recording of the seminar -- along with related documents -- may be found in the Distance Learning collection of the School's site on FLITE.

# Heritage to Horizon: JASOC

JASOC has evolved greatly over four decades -- but it has also stayed true to its core purpose. This article from The United States Air Force JAG Law Review -- now called the Air Force Law Review -- reveals some remarkable differences, but also some startling visionary similarities.



## JUDGE ADVOCATE COURSE SUCCESSFULLY COMPLETES FIRST YEAR

*Col Quincey W. Tucker, Jr., and Capt Joseph W. Kastl*

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On 2 March 1970, the Judge Advocate Staff Officer Course completed its first year of operation; thus far, over 250 judge advocates have graduated from the school.

Conducted five times per year by the Air University Institute for Professional Development, the course is six weeks long; it contains 240 curriculum hours composed of military justice; civil law; claims; and command and staff operations. The usual class consists of 32 students who are normally ROTC graduates who took a deferment of their active duty to complete law school. They usually attend the school within about three months after beginning military duty.

The school's physical plant houses an auditorium, a well-equipped practice courtroom, three large seminar rooms, a student lounge, and private offices for each instructor. There are seven faculty members, including the director.

### EDUCATIONAL METHODS

What can a young judge advocate expect to find when selected to attend the course? Basically, the educational methods employed will

be similar to those he found in law school. Because of time limitations, the lecture method is used to lay the necessary foundation in a subject. Then, the class is divided into three smaller seminar groups for discussion, practical applications, and case studies. In addition, practice courts and boards provide training in successful presentation and advocacy.

But the student can expect some newer approaches too, in addition to these traditional teaching methods. The school breaks fresh ground by importing into law instruction certain educational devices which have been successful elsewhere.

One such technique is the demonstration-performance, used to explain proper courtroom procedure; in one such presentation, faculty members demonstrate how to enter items properly into evidence. Also, a programmed learning text is employed to study line-of-duty determinations in depth. Television is used too, with each student presenting a short argument as if he were before a court panel; this is followed by a playback and critique. For students wishing greater depth and enrichment in a given area, an extensive

tape library is available with advanced materials.

In the future, television will be used to a far greater degree when a central cable can transfer programs from Air University television studios directly to the school. In addition, the possibility of using self-pacing computers to improve learning is being explored; such computers are already employed in analyzing test questions and results.

## CURRICULUM

The course itself is divided into four major instructional areas.

Military justice is the largest single unit. It includes 80 hours of classroom instruction, 25 hours of which are devoted to practice court. Five moot courts are scheduled during each course; every student performs as counsel in at least one case; faculty members serve as Military Judge and court president, and students act as court members, witnesses in another case. A field trip to The district office furnishes agents as witnesses in cases involving OSI testimony, and two attractive young WAF lieutenants help as witnesses in another case. A field trip to the Office of the Judge Advocate General offers students a chance to hear presentations by personnel at Headquarters USAF; in addition, students have an opportunity to be admitted to the Court of Military Appeals. This block of instruction is especially thorough since the course is now the main route to certification as trial and defense counsel. Upon completion of the course with satisfactory performance in the military justice unit, students are certified by The Judge Advocate General at graduation.

The civil law and military affairs instructional unit is also quite comprehensive. Students receive an introduction to such subjects as procurement, labor-management relations, international law, administrative boards, nonappropriated funds, and legal assistance. During a moot board proceeding, a video tape

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is made; the tape can then be played back for participants, with a running critique of their performance, while students, who are not involved, watch the performance on a monitor in a nearby conference room.

Claims constitutes the third major instructional area. In this unit are 17 hours, covering all the usual types of claims. The resident faculty calls upon claims experts from Headquarters USAF for straight-from-the-shoulder discussions of new developments.

The fourth instructional unit is devoted to command and staff problems. The object of this block is to broaden the student's perspective of the Air Force and its operation. Included in this unit are such subjects as oral and written communications, the functions of the JAG in remote areas, legal ethics, and career management. Another feature of this unit is a talk by one of the major command judge advocates as to JAG functions within that command.

## EVALUATION

The course is designed to foster the growth of the student as an officer and judge advocate. In the field, senior judge advocates with direct supervision of graduates are probably in the best position to evaluate the school's efforts. Accordingly, the course has developed a questionnaire which is sent to supervisors after students complete approximately eight months of duty.

## PHILOSOPHY

Graduates of the course will, at some time in their careers, be assigned to almost every level of command. The philosophy of the school is to instill in students the fundamentals that will be necessary for them to efficiently perform during this basic phase of their career. It is this goal—advancing the proficiency of the student as both an officer and attorney—at which the school constantly aims.

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JASOC has built on this heritage across four decades. JASOC has expanded by a month, adding operations law and significant new areas of civil law, military justice, and leadership. These pioneers' experiments with computers and video have grown in great ways few could have predicted in that early year. But the JASOC horizon has remained constant: preparing judge advocates for the interwoven challenges of serving as both officers and attorneys in our Corps.