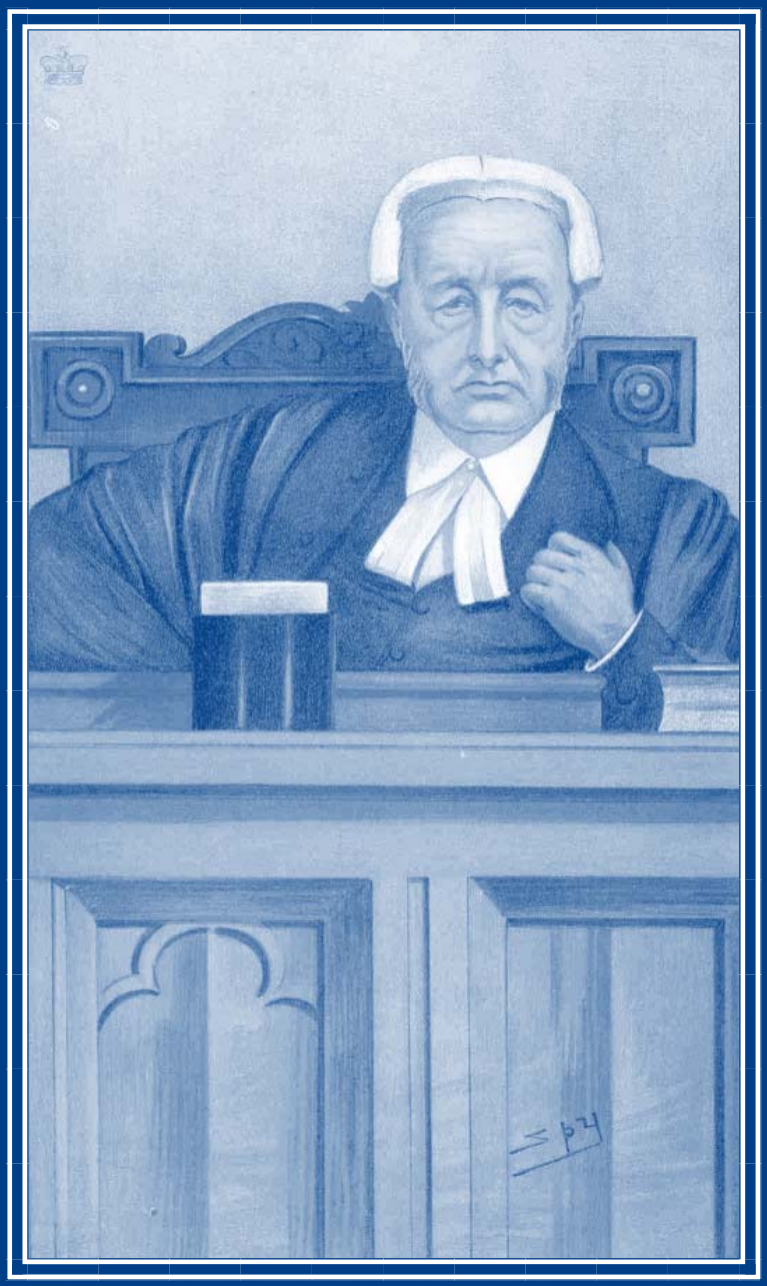
The Reporter

December 2001

OFFICE OF THE JUDGE ADVOCATE GENERAL



AIR FORCE RECURRING PERIODICAL 51-1, VOLUME 28 NUMBER 4

The Reporter

FROM THE EDITOR

Our lead articles include a candid discussion on a variety of issues from a variety of judges as well an informative article on recent FOIA developments, and a practical article on office safety. In our FYI section appears an article on the role of paralegals in the future. As always, you'll find useful articles on a variety of topics. We extend our sincere appreciation to the authors who submitted the pieces that appear in this edition.

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The Reporter is published quarterly by the Air Force Judge Advocate General School for the Office of the Judge Advocate General, United States Air Force. Views expressed herein, unless otherwise indicated, are those of the individual author. They do not purport to express the views of The Judge Advocate General, the Department of the Air Force, or any other department or agency of the United States Government.

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

Subscriptions: Paid subscriptions are available through the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402

Citation: Cite as [Author], [Title], The Reporter, [date], at [page number]

Distribution: Special, Air Force legal offices receive *The Reporter* from AFLSA/CCQ, Bolling AFB, D.C. 20332-6128 (Comm (202) 757-1515/DSN 297-1515).

THE VIEW FROM THE BENCH:
FOUR JUDGES TALK ABOUT ADVOCACY, DRAMA AND HUMOR IN THE COURTROOM

Air Force Judge Advocate School Faculty

Everyone who has tried a case in the military has experienced it. The military judge has asked you a question. Not just one, but several questions. The questions put you on the spot, may hurt your position, and you would just as soon not answer. However, in this article, the roles are reversed.

The Reporter solicited questions to ask military judges. Several trial attorneys proposed questions ranging from serious and incisive to humorous and topical. Four Air Force judges from diverse backgrounds agreed to answer the questions posed to them. Colonel John J. Powers is the Chief Trial Judge. He became a JAG in 1978, and has served as an Area Defense Counsel, contracts attorney, Medical Law Consultant and Staff Judge Advocate. Colonel James A. Young III is the Chief Judge for the United States Air Force Court of Criminal Appeals. He was commissioned in 1969, after which he accumulated over 1000 combat hours serving as an airborne combat information control officer. Graduating law school in 1975, Colonel Young has served as a Staff Judge Advocate, trial judge and appellate judge. Colonel Linda Strite Murnane is the Chief Circuit Trial Judge for the European Circuit. She enlisted in the Air Force in 1974, and was commissioned through Officer Training School in 1976. She has served as a Public Affairs Officer, and, following law school, has served as an Area Defense Counsel, Staff Judge Advocate and Circuit Military Judge. Colonel Patrick M. Rosenow, a graduate of the Air Force Academy, is the Chief Circuit Trial Judge for the Central Circuit. Before becoming a JAG in 1984, he served as a KC-135 navigator. As a JAG he has served as a Staff Judge Advocate and as an instructor for the Air Force Judge Advocate General School.

How important is findings and sentencing argument to you in a judge alone case? In each case, the judges felt that argument was important if done properly. Colonel Rosenow felt that judge alone arguments are probably too long. "Waving the flag or invoking Shakespeare's 'the quality of mercy is not strained' is not worth a lot of counsel's time. Tell me something I may not have thought of or noticed." Col Murnane agrees: "I know what the five principles of sentencing are and don't need counsel to take their time, or mine, to explain them to me judge alone." However, the judges are quick to point out that the content of the argument is the key. As Colonel Rosenow explained, "the very best arguments I've heard are ones that made me think 'that's right!' For instance, if a charged offense came right on the heels of an LOR, point that out. Conversely, if a great EPR came at the same point, use that to minimize the LOR." To Col Murnane, an effective sentencing argument for the prosecution is one that explains how the sentence "will make the victims whole, will help the Air Force, and will mend the accused and his or her error in judgment that got them into court."

As compared to the practice of law in the civilian sector, what unique aspect of the military justice system do you like least? Why? Three of the judges singled out member sentencing as the least liked aspect of the military justice system. "Court member sentencing makes no sense in today's environment" said Col Young. "We have fewer cases than ever. And, court members sentence in less than 50% of those we have. This results in court panels without sufficient experience to determine an appropriate sentence." Col Powers and Col Rosenow were also in favor of military judges doing all the sentencing. Col Powers believes that judge alone sentencing "would go a long way toward obtaining more consistency in the sentences adjudged."

> "Court member sentencing makes no sense in today's environment"

Which assignment sticks out in your mind as the one that caused you to decide to make the Air Force a career and why? Not surprising, economic incentive was not the basis for making a career in the military. Instead, the people and the mission were the most often cited reasons for remaining. Col Murnane

enlisted with the intent of making the Air Force a career, and remained committed following law school. "My counterparts from law school may make more money than I do, but their lives miss the passion and commitment I feel from serving my country and doing my job for a greater purpose." While attending law school, Col Young found he "missed the military and civilian personnel whose sense of duty and mission had been part of my every day life in the Air Force."

How frequently do you see overcharging by the Government? What do you believe causes this? Col Powers believed that an SJA's philosophy concerning the Article 32 process could explain some overcharging. "I believe we see less overcharging now than we did years ago, but it certainly does still occur. I think some of this stems from the philosophy of some SJAs that at the Article 32 stage they want to 'test drive' all potential charges…to see which have merit." Col Young agreed that there is less overcharging now and recommended that attorneys go beyond the report of investigation before charging. "Until a lawyer goes out and interviews the witnesses, examines the evidence, and researches the issues, there is no way of knowing what the appropriate charge is and whether it is provable in court" he said.

What is the most dramatic experience that you have witnessed in curt as an advocate or a military judge? A trial is, by its very nature, dramatic. The judges we questioned have had their share of dramatic experiences to relate. Colonel Rosenow recounted the time he witnessed an accused, just convicted of WAPS cheating, shout at the trial counsel that she didn't do it, and he knew she didn't do it. Or, more tragic still, when the mother of a shaken baby homicide testified about the decision to take her child off life support and then "look for a coffin small enough to fit in her car." Colonel Powers related a story passed on to him by the late Colonel Donald E. Weir about an accused trying to escape by diving through the third story window of a makeshift courtroom. "In his unsuccessful attempt, the accused was seriously lacerated and bled profusely," Colonel Powers related. As Col Murnane noted, "courts are a daily lesson in drama and tragedy."

What is the funniest moment you have witnessed in court as an advocate or a military judge? Col Murnane explained how one maternally deprived counsel responded to her question with "yes, mom" instead of "yes ma'am." Col Rosenow offers this exchange from a counsel trying to prove there was a lot of drinking at a party attended by the witness: Q: "So the alcohol was freely flowing?" A: "Oh no, it was a cash bar." But perhaps funniest of all is the story told by Col Powers of a swooning prosecutor. "The female prosecutor was standing at the podium asking voir dire questions of the members. Given the design of that courtroom, she stood a few feet in front of the defense counsel table, with her back to the defense table and the members directly in front of her. She was setting the stage for the theory of her case by asking questions as to whether they could impose a punitive discharge and other potential punishments. I noticed that as she stood at the podium, she began gripping it rather tightly. Her speech began to slow up, and she turned toward me to say something when I noticed her eyes roll up into her head, and she began to fall backward in a faint. In a flash, the accused sprang out of his seat and caught the prosecutor just before her head crashed onto the concrete floor. There was no question in the minds of everyone who witnessed the incident, including the members, that but for the heroic action of the accused, the prosecutor might well have been seriously injured. As it was, she was out cold from having fainted, and had to be taken to the hospital by emergency personnel. After an hour-long recess, the trial resumed, but the prosecution's ability to convince those court members the accused deserved serious punishment was rendered DOA. After all, he was the kind of guy who would even LEAP to the aid of the very person out to get him!"

"Her speech began to slow up, and she turned toward me to say something when I noticed her eyes roll up into her head, and she began to fall backward in a faint."

What are the toughest cases you've seen for trial counsel and what makes them that way? Every single judge included urinalysis cases as among the toughest to try. "Obviously the dry nature of the case and the fact that in many cases the accused has an extensive good character defense makes it tough for everyone," explained Colonel Rosenow. Col Powers agreed. "The testimony is technical and dry, and a prosecutor must overcome the natural inclination of many members to distrust the science." Surprisingly, Col Young also felt larceny cases were among the most difficult to try. "I can't tell you how many cases I presided over in which the prosecutor's opening statement claimed, 'This is a simple larceny case.' There are no simple larceny cases. Larceny is among the toughest offenses to prove and the prosecutor has to do her homework or the case will not go well."

What are the toughest cases to judge and why? For Col Powers, child sex offenses are some of the toughest to judge, especially when the child victim is called to testify. "They often have difficulty articulating their testimony; you often have to deal with the issue of having the child testify out of the presence of the accused. This all presents challenging legal considerations for the judge." Many of the judges explained that it wasn't the offense that made a case difficult to judge, it was the lack of preparation by counsel. Col Murnane noted that any case "where the counsel aren't well prepared" are the toughest to try. The same level of preparation is required for appellate work. Col Young noted "at the appellate level, the most difficult to judge are those in which counsel at trial are not organized in the presentation of evidence."

If you had to pick one thing that a young JAG should do to become an accomplished trial lawyer, what would it be? Although it would be nice if there were some trick or gimmick to being an accomplished trial, preparation seems to be the key. "There is simply no substitute for good preparation, and no excuse for lack of good preparation" says Col Powers. "A successful trial lawyer prepares a thorough trial brief, knows just what evidence proves each element and what foundation must be made for its admissibility." Col Murnane was quick to point out that knowing the rules of evidence is crucial. "The one thing I think a young JAG should do to become an accomplished trial lawyer is to take the military rules of evidence and 'own' them one rule at a time. For example, if you are in a case that has bad checks, you may want to research and learn all you can about laying a foundation, or business record exceptions to the hearsay rule. In the next case, you may have the chance to try a rape case – and that's your chance to learn everything there is to know about M.R.E. 412." Even if you can't become experienced as fast as you would like, perhaps the next best thing is to study advocacy. Col Young suggests that aspiring advocates "read books about criminal law, evidence, and advocacy, and then get into the courtroom at every opportunity. There is no substitute for experience, but reading can certainly provide important insight into the process and methods that have proven successful for master advocates."

Are there any final comments you would like to make?

Col Powers: "I would like to say a word or two in praise of those unsung professionals who are absolutely essential to the court-martial process, but who often go under-appreciated—the court reporters. It is their job to make sure that what goes on inside the courtroom is thoroughly and accurately reflected in the record of trial. They are mentors to young counsel; they are great resources of knowledge in courtroom procedure that all counsel would be wise to tap into; they save judges from embarrassing oversights; and their professionalism has helped make being a military judge the rewarding job it has been for me all these years."

Col Young: "Hear, hear! Much of what I know about processing courts-martial, I learned from Mrs. Edna Brown, a superb court reporter at Carswell AFB, Texas. In my six years as a military judge, I could not believe how many JAGs, both junior and senior, thought court reporters were merely transcribers. Any office that doesn't make the court reporter a key player in the court-martial process is wasting a valuable resource."

Col Murnane: "The Air Force has been a wonderful career for me – after 27 years of service I can say, I've had good jobs and better ones, good bosses and some I'd rather not have worked for. I'm glad I didn't quit even when I thought I might. Being a military judge has been the best job I've ever had – particularly because it gives me the opportunity to be in the courtroom and to continue to work with bright and eager young counsel."

Col Rosenow: "Even though our system of military justice constitutes a relatively small backwater of American Criminal Jurisprudence, I'm honored to be a part of it. No JAG can do more in the service of our nation than to be a part of the system that vindicates good order and discipline while ensuring those men and women who risk their lives to defend our constitution are protected by the same great document."

OFFICE SAFETY: ARE YOU PREPARED?

Technical Sergeant Christopher J. Stein

Given the devastating events of 11 September and the fight against terrorism, the importance of office security has dramatically increased. However, even before that fateful day, reports of office violence were often in the news. In most of these cases, a current or former employee violently retaliated for perceived wrongs by management or other employees. These tragedies physically and mentally wounded the victims and adversely affected those who witnessed the deadly events.

The Air Force is not immune from workplace violence. A perfect example is the shooting spree at Fairchild AFB, Washington, in June 1994. In this case, a former airman shot and killed 5 people and wounded 23 others at the Fairchild AFB hospital before he was shot and killed by an AF Security Policeman. Air Force legal offices are also not exempt from this problem. Violent attacks have been seen at the 21st AF Legal Office, Myrtle Beach AFB, and the Ramstein ADC Office.

As you can see, office security is a real concern in today's world. However, paranoia is not the point of this article. The intent is to help you know what to do to protect your office and minimize risks. The key to making your office more secure is to apply the principals of Operational Risk Management (ORM), perform Force Protection Surveys, and execute good, solid planning. Some solutions are quite simple and cost nothing. Others require considerable thought and effort and may require significant funding.

The first step is to become aware of a potential risk, to understand it, and know how to minimize that risk. Sound familiar? This is the first step in ORM. It is important to recognize that attacks do occur at legal offices and in the courtroom. To understand the potential risks and know how to minimize it, we need to consider two basic elements of the risks that exist: people and facilities. To minimize the risks, we must identify the procedures that are currently in place and, if necessary, adjust the procedures. Finally, we must assess our facilities.

We can classify people into two groups: employees and visitors. Typically, visitors pose the biggest threat to any office. In fact, the attacks at legal offices have not been by disgruntled workers, but by visitors. Visitors can be grouped into three main categories: trusted visitors, unknown visitors, and adverse visitors.

Trusted visitors are commanders, first sergeants, and civilian employees conducting official, non-personal business. They visit legal offices quite frequently and pose little or no actual threat because of their position and type of business they are handling. Legal Assistance clients and claimants are unknown visitors and pose a higher threat. As you know, situations handled by legal offices are sometimes emotionally charged. Some examples are the legal assistance client seeking advice regarding a divorce or a claimant upset about their payment. Adverse visitors pose the highest risk. They are service members facing disciplinary action, such as an Article 15, administrative discharge, or a court-martial, are the highest risk potential.

Now that the threat from visitors has been identified, the next step is to implement procedures to manage or reduce the threat. Identify your current procedures for moving visitors through your office. Is there a central reception area where all visitors sign in and wait for assistance? Is that area away from the rest of the work centers within the office? Are visitors escorted throughout the office? Are there multiple entrances to your office? You can conduct a simple survey to answer these basic questions. Security Forces are available to conduct a threat assessment of your office facility and will assist in determining steps to reduce the risks in your office.

Once visitors have been identified with the appropriate threat level they represent, we must take steps to manage that threat. One method of managing the risk is to control a visitor's movement within the office to the degree warranted by the threat they pose. The simplest way to control a visitor's movement within an office is to escort them. Commanders and First Sergeants conducting business within the legal office can typically be granted free, unescorted movement within the office. Unknown visitors such as claimants and legal assistance clients typically should be met at the reception area by the employee who will be assisting them, escorted to the appropriate office and escorted

TSgt Christopher J. Stein is currently the NCOIC of General Law at Mountain Home AFB, Idaho. He is a former Law Enforcement Specialist with extensive experience in Crime Prevention, Resource Protection and Criminal Investigation.

back to the reception area upon completion of their visit. There is a minor inconvenience to the receptionist and the section they are visiting, but the increased control and security this measure brings will offset the inconvenience, and the visitor will appreciate this professional and polite assistance. They will probably not realize that one reason for this "personal handling" is to control their movement within your office.

Service members facing disciplinary action should be the most highly restricted visitors to the office. When the mission requires their presence within the office, their access must be limited to areas absolutely necessary to complete their business. They should be under constant escort by office personnel that are aware of their unique situation and familiar with any procedures in place for dealing with a potentially threatening situation. Escorting unknown visitors and adverse visitors within the office is a simple procedure that restricts access to only areas necessary to conduct business.

Another simple method of managing risks associated with visitors in your office is to schedule the times they have access to your office. While it is not possible to schedule when Commanders and First Sergeants need access to your Military Justice section, the need to control their movement within your office is low enough that it should not be a concern. Claimants and legal assistance clients who pose a higher risk can easily be scheduled. Even walk-in claims or legal assistance service can be scheduled or offered on certain days or certain times of the day. You will know the times of increased traffic (and increased threat) within your office and be able to manage your resources effectively to accommodate your customers and manage the potential threat.

Regarding the facilities, there are a number of low or no cost things you can do to your office that will reduce the threat by controlling movement within your office. First, limit points of entry to the office. Ideally, there should only be one door for the unknown visitor to access your office. Ideally, this door should lead to an enclosed lobby where the receptionist can greet them and route them to the appropriate section. From the lobby, the visitor should not be able to walk around the rest of the office. There should be a door leading to the rest of the office. If there is not, see if you can install one. If that is not possible, place the reception area so that it is an obstacle to free access. This lobby should serve as the waiting are for visitors to be escorted to the section they will be visiting. There should also be a way to let your trusted visitors pass with minimal delay. Other entrances to the office should be locked and used only as convenience entrances for your staff.

While the physical layout of your office will ultimately determine where each section is physically located in relationship to the lobby, consider placing the sections that serve your unknown visitors closest to the lobby. This way, only your trusted visitors have access to the whole office area and your unknown visitors are escorted to areas closest to the lobby area, denying them access to areas they do not need to visit.

Of course, these solutions cannot solve everything. What do you do if there is a problem? How do you let others in your office know there is a situation that may be elevating and require intervention? One simple solution is to establish a duress word/phrase procedure. A duress word/phrase is simply a word that is used in normal conversation that alerts someone that there is a problem. For example, if the duress word/phrase is "Captain Morgan" and you are working with a claimant that is becoming hostile, you could call a co-worker and ask for "Captain Morgan" to assist you. The co-worker would then implement whatever procedure you have in place. You could also establish two duress words in your office: One that signals escalating situation in which assistance is needed, and the other to signal a hostile or dangerous situation informing someone should call "911."

All office personnel must know the duress words/phrases, and the procedures must be simple and well practiced. The words/phrases should be changed regularly, briefed to the staff often, and be something that doesn't tip off the visitor.

Finally, your office security procedures should be published in an office operating instruction. All personnel in the office must be familiar with all procedures and occasional tests should be conducted.

If you can afford it, an excellent addition to these alert procedures is a duress button. This is a button that can be activated inconspicuously that will sound an alarm in another area. While it is not reasonable to put a duress button on every desk, some key areas you should consider are the reception area, judge's bench, and the judge's chambers. The alarm must ring in areas of the office that are always occupied or, if possible, at the Security Forces Desk. If a button is installed in the judge's bench or chamber, the judge must be briefed on its location and procedures to follow.

Finally, the Security Forces Squadron should be able to conduct a force protection survey on your office. They can recommend procedures or modifications to your office that will enhance the overall security of your office. Your Wing may have Force Protection Funds available to assist with the cost of implementing the recommendations of the Force Protection Survey.

You can take some very simple and inexpensive

steps to increase your office security and the safety of your personnel. Several of the measures discussed in this article cost nothing. They are relatively easy to implement and may be invisible to your customers. Other measures can involve significant expense but that should not deter you. Alternate sources of funding should be explored. The results are worth whatever the expense. You may not ever know what tragic event you deterred or prevented, but you will never forget the one you did not.

FREEDOM OF INFORMATION ACT: NOT SO FREE ANYMORE

Anderson and Anderson

INTRODUCTION

Any attorney who has dealt with the Freedom of Information Act (FOIA)[1] knows policy plays as important a role as the law in deciding what government information will be released in response to a FOIA request. Two recent events have certainly brought this fact home: the change in presidential administration (and the resultant end of the Reno doctrine), and the terrorist attacks of September 11, 2001.

The essence of these changes is captured in Attorney General John Ashcroft's October 12 announcement of the new administration's FOIA policy[2] and in the November 19, DoD implementing Memorandum.[3] These new changes represent a marked shift in FOIA policy and will fundamentally change the way the federal government responds to FOIA requests. The changes are fundamental enough that they were implemented through a memorandum pending revision of implementing regulations.[4] A hailstorm of discussion has followed the Ashcroft memorandum among those who regularly work with FOIA policy. As base level attorneys are often the only legal reviewers of a records release, it is important that they be familiar with the new policy's basic provisions.

THE RENO DOCTRINE

The FOIA, originally passed in 1966, requires the government to release information when requested unless the information is protected by one of the Act's nine specific exemptions.[5] It was enacted to ensure we have "an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed."[6] During the Reagan years, former Attorney General William Smith set the government tone in his 1981 guidelines—stating DOJ's policy to "defend all suits challenging an agency's decision to deny a request submitted under the FOIA unless … the agency's denial lacke[d] a sound legal basis; or … present[ed] an unwarranted impact on other agencies' ability to protect important records."[7] Under Smith's policy, which lasted until the Clinton administration's Attorney General, Janet Reno, replaced it, discretionary releases were not encouraged.

In October 1993, Attorney General Reno changed DOJ's longstanding policy by issuing a FOIA policy memorandum encouraging FOIA officers "to make 'discretionary disclosures' whenever possible under the Act."[8] That memo explained that "[t]he Department [DoJ] will no longer defend an agency's withholding of information merely because there is a 'sound legal basis' for doing so. Rather . . . we will apply a presumption of disclosure. . . . In short, it shall be the policy of the Department of Justice to defend the assertion of a FOIA exemption *only* in those cases where the agency reasonably foresees that disclosure would be harmful to an interest protected by that exemption."[9] The Reno doctrine, as it was called, was implemented through the Defense Department's FOIA regulation, DoD 5400.7-R, DoD *Freedom of Information Act Program*: "As a matter of policy, DoD Components shall make discretionary disclosures of exempt records or information whenever disclosure would not foreseeably harm an interest protected by a FOIA exemption … ."[10]

Although implementing the new presumption of disclosure under the "foreseeable harm standard" caused some initial confusion,[11] agencies came to realize that applying it proved especially appropriate when requested records related solely to the internal personnel rules and practices of the agency under the low-2 exemption or to agency deliberations under exemption 5.[12] Discretionary releases were less appropriate under the remaining exemptions—especially those relating to individuals' privacy.

THE ASHCROFT DOCTRINE

On October 12, 2001, President Bush's Attorney General, John Ashcroft, reversed the Reno doctrine, in effect, reinstating the Smith doctrine: "When you

Maj Calvin Anderson (B.S., Virginia Military Institute; J.D., William and Mary School of Law) is currently an instructor at the Air Force Judge Advocate General School.
Maj Lawrence Anderson (J.D., William Mitchell School of Law) is the head of the Information/Privacy Branch of HQ USAF/JAG.

carefully consider FOIA requests and decide to withhold records, in whole or in part, *you can be assured that the Department of Justice will defend your decisions* unless they lack a sound legal basis or present an unwarranted risk of adverse impact on the ability of other agencies to protect other important records."[13] The Ashcroft doctrine was implemented within the DoD on November 19, 2001 by the DoD FOIA office via a policy memorandum which immediately superceded the current DoD FOIA regulation, DoD 5400.7-R.[14]

Reversing the Reno doctrine will primarily affect the application of the low-2 exemption and exemption 5. Before Reno's policy encouraging waiver of discretionary exemptions, "low-2" was used to deny FOIA requests for mundane administrative data such as facsimile cover sheets, file numbers, room numbers, mail routing stamps, data processing notations, and other trivial administrative matter of no genuine public interest. Legislative and judicial history make it clear that the "low-2" exemption is based upon the rationale that the task of processing and releasing some requested records would place an administrative burden on agencies that could not be justified by any genuine public benefit. After Reno's 1993 FOIA memorandum, nearly all administrative information covered solely under "low-2" was considered appropriate for discretionary disclosure. In fact, DoD 5400.7-R forbids DoD use of the low-2 exemption.[15] With Attorney General Ashcroft's return to a policy of not encouraging discretionary disclosures,[16] many federal agencies will once again use low-2 to deny burdensome FOIA requests for internal administrative records that shed little light on an agency's performance of its statutory duties. This new policy is effective immediately for DoD offices while we wait for a revised DoD 5700.7-R.[17]

The Ashcroft doctrine also, more importantly, allows agencies a greater ability to withhold information under exemption 5.[18] Exemption 5 protects agency information that is normally privileged under the rules of civil discovery. These privileges include the deliberative-process privilege, used to protect pre-decisional intra-agency deliberations, and the attorney-client privilege, which protects the majority of legal opinions. Of these two, the Ashcroft doctrine will primarily increase application of the deliberative process privilege.[19] The decreased likelihood that such predecisional documents will be released will promote "candid and complete agency deliberations without fear that they will be made public."[20]

ADDRESSING SECURITY CONCERNS

The new administration's decision to again defend agencies in federal court under a "sound legal basis" standard is not the only event driving a rethinking of FOIA policy--the September 11th terrorist attacks have also shaped how agencies are likely to respond to requests. Since these attacks, a greater concern for national security and the personal privacy interests of DoD employees has arisen. The Ashcroft memorandum addressed these concerns by not only promising to defend agencies, but also by tacitly encouraging even greater withholding under the high-2 exemption and exemption 6: "I encourage your agency to carefully consider the protection of all such values and interests when making disclosure determinations under the FOIA. Any discretionary decision by your agency to disclose information protected under the FOIA *should be made only after* full and deliberate consideration of the institutional, commercial, and personal privacy interests that could be implicated by disclosure of the information."[21] Accordingly, post-September 11th concerns will be primarily addressed using the high-2 exemption and exemption 6.

Following the attacks, President Bush declared a national emergency.[22] Shortly thereafter, Paul Wolfowitz, Deputy Secretary of Defense, issued a memorandum encouraging greater operations security "to deny our adversaries the information essential for them to plan, prepare or conduct further terrorist or related hostile operations against the United States and this Department."[23] One powerful means to address these security concerns when responding to FOIA requests is through the use of the high-2 exemption.

"High-2" applies to internal matters whose release would risk circumvention of a legal requirement. It has traditionally been used to deny information covering vulnerability assessments, stockpile information, security assessments, and the like.[24] Post September 11th, DOJ has encouraged even greater emphasis on the high-2 exemption: "Agencies should *be sure to avail themselves of the full measure* of Exemption 2's protection for their critical infrastructure information as they continue to gather more of it, and assess its heightened sensitivity, in the wake of the September 11 terrorists attacks."[25] As agencies pull previously posted material from their web pages, and, in some cases, refuse to release the same types of information once routinely released, significant waiver issues arise. Information once posted and now pulled presents the greatest challenge. If previously released information

is requested, DOJ will have a hard time defending suits as agencies have already made the information public. Relief legislation may be the only answer for these cases.

If, on the other hand, a requestor asks for recently compiled information, even if it is almost identical to previously released information, DOJ would likely have greater ease in defending access suits arising from such requests. In certain cases, even revealing the existence of, or changes to, a sensitive vulnerability study or emergency plan could threaten an interest protected by high-2. The bottom line is that after September 11th, changes--or lack of changes--to sensitive information is arguably a protectable interest.

Even easier to defend would be denials for certain *types* of vulnerability assessment information that routinely changes from month to month. For example, even if the government previously routinely released certain stockpile inventories, it could be argued that previous releases of this type of information has not waived the right to protect it today. After all, the information for this month has changed from last month, and heightened domestic threats require that the federal government reevaluate what information it should release. Having waived release of an inventory or a security assessment in a previous month thus does not mean disclosure of the current month's inventory or assessment is necessary. It is *new* information (withheld in light of a new threat environment), and the right to exempt it should not be held to have been waived. Courts have not yet had to deal with waiver issues following a catastrophic event as the September 11th terrorist attacks and the resulting, immediate increase in domestic security interests. Whether courts will support liberal application of high-2, or whether legislative relief will be needed, is an open question.

The changed security posture not only affects application of the high-2 exemption; it has also prompted the DoD Director of Administration and Management, David Cooke, to issue a policy memorandum addressing privacy concerns under exemption 6.[26] Mr. Cooke's memorandum sets a new release policy pertaining to lists of personally identifying information for DoD: "All DoD components shall ordinarily withhold lists of names and other personally identifying information of personnel currently or recently assigned within a particular component, unit, organization or office with the Department of Defense in response to requests under the FOIA. This is to include active duty military personnel, civilian employees, contractors, members of the National Guard and Reserves, military dependents, and Coast Guard personnel when the Coast Guard is operating as a service in the Navy. If a particular request does not raise security or privacy concerns, names may be released as, for example, a list of attendees at a meeting held more than 25 years ago. Particular care shall be taken prior to any decision to release a list of names in any electronic format." Until the dust settles, units should clear release of lists they do not believe are protected by exemption 6 through higher headquarters even if the lists were once routinely released.[27]

This new DoD policy appropriately gives greater weight to the privacy rights of military personnel during times of national crisis. Some may argue that withholding lists that were previously routinely released flies in the face of established FOIA waiver principles. However, as lists with personally identifying information shed little light on how the government conducts its business, it is crucial to recast the waiver issue as one of a pure balancing test between personal privacy interests and the public need to know. Because the interest protected here is the individual's privacy interest and not the government's, the government cannot *waive* it. Privacy interests of DoD personnel have increased since the September 11th attacks, making release of such information a "clearly unwarranted invasion of personal privacy."[28] Although "clearly unwarranted" is a high standard, what it comes down to is a "balancing of the public's right to disclosure against the individual's right to privacy."[29] In this light, withholding the lists from release should be defensible. In responding to FOIA requests for lists of names or other personal identifying information, offices should cite both exemption 2 and 6.

CONCLUSION

Between Attorney General Ashcroft's return to the "sound legal basis" for discretionary denials, and the heightened security and privacy concerns following the September 11th terrorist attacks, FOIA policy has undergone a drastic change. The change is most noticeable in application of exemptions 2, 5, and 6. Base level attorneys reviewing FOIA releases must understand the basis for the policy shift as well as its application. While FOIA *denials* go to the MAJCOM level, FOIA *releases* are generally made at the base level. A base level attorney may be the only legal oversight to catch improper releases. "Office-file research" is of little help after these recent changes. Fortunately, up-to-date assistance is available on the web.[30]

[1] 5 U.S.C. § 552.

[2] Memorandum from John Ashcroft, Attorney General, for Heads of all Federal Departments and Agencies, The Freedom of Information Act, Oct. 12, 2001 [hereinafter Ashcroft Memo] *available at* U.S. DOJ Office of Information and Privacy FOIA POST: New Attorney

General FOIA Memorandum issued, Oct. 15, 2001, *at* http://www.usdoj.gov/oip/foiapost/2001foiapost19.htm [hereinafter FOIA POST].

[3] Memorandum from M. I. McIntyre, DoD Directorate of Information and Security Review, DoD Guidance on Attorney General Freedom of Information Act (FOIA) Memorandum [hereinafter DoD Memo] (recapping an Oct. 18 FOIA officers conference held in Washington D.C.) *available at* https://aflsa.jag.af.mil/GROUPS/AIR_FORCE/GENERAL_LAW/SOURCE/agmemofoia.pdf

[4] *Id*. The current FOIA regulation is DoD 5400.7-R/AF Supp., *DoD Freedom of Information Act Program*, July 22, 1999 [hereinafter DoD 5400.7-R] *at* http://afpubs.hq.af.mil/pubs/majcom.asp?org=AF.

[5] 5 U.S.C. § 552(b). Of the nine exemptions in section (b), seven routinely apply to the military: (b)(1) classified information; (b)(2) internal matters of relatively trivial nature (low-2) or internal matters whose release would risk circumvention of a legal requirement (high 2); (b)(3) information protected by statute; (b)(4) certain trade secrets and financial information, (b)(5) information normally protected from civil discovery; (b)(6) protection of privacy interests; and (b)(7) protection of law enforcement information. For a complete discussion see DOJ FOIA Guide *infra* note 30.

[6] *NLRB v. Robbins Tire & Rubber Co*., 473 U.S. 214, 242 (1978).

[7] Memorandum form William French Smith, Memorandum Regarding FOIA, May 4, 1981, *text available at* http://www.usdoj.gov/oip/foia_updates/Vol_II_3/page3.htm.

[8] Memorandum from Janet Reno, for Heads of Departments and Agencies, The Freedom of Information Act, Oct. 4, 1993 [hereinafter Reno Memo]. As each administration sets its FOIA policy, it tends to follow party lines: AG Bell, democrat, "demonstrably harmful" standard, *see* Justice Sets New FOIA Policy, at http://www.usdoj.gov/oip/foia_updates/Vol_II_3/page1.htm; AG Smith, republican, "sound legal basis;" AG Reno, democrat, "foreseeable harm;" AG Ashcroft, republican, "sound legal basis."

[9] Reno Memo, *supra* note 8.

[10] ¶ C1.3.1.1.

[11] *See e.g*., *Public Interest Under the FOIA*, THE ACCORD, 9-10, Aug. 1996 (written to address confusion in applying the Reno Doctrine to privacy interests under exemptions 6 and 7(c)).

[12] *See supra* note 5 for a list of exemptions. Privacy interests are especially inappropriate for discretionary release because the interest being protected belongs to the individual and is not the government's to waive. This is in contrast to discretionary disclosures under exemptions 2 and 5.

[13] Ashcroft Memo, *supra* note 2 (emphasis added).

[14] DoD Memo, *supra* note 3 ("Effective immediately, DoD components will adopt the **Sound Legal Basis** standard as reflected in the Attorney General Memorandum.").

[15] DoD 5400.7-R, *supra* note 4 ¶ C.3.2.1.2. (superceded by DoD Memo, *supra* note 3).

[16] *See also* DoD Memo, *supra* note 3 ("Discretionary disclosures are no longer encouraged.").

[17] DoD Memo, *supra* note 3.

[18] Ashcroft memo, *supra* note 2.

[19] Even under the Reno doctrine, we have never had difficulty writing legal opinions protecting legal opinions.

[20] *Id*. ¶ 3.

[21] *Id*. ¶ 4 (emphasis added). *See supra* note 5 for a listing of FOIA exemptions.

[22] Proclamation 7463--Declaration of National Emergency by Reason of Certain Terrorist Attacks, Sep. 14, 2001 (66 FR 48199, Sep. 18, 2001) *at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2001_register&docid=01-23358-filed.

[23] Memorandum for Secretaries of the Military Departments …, Operations Security Throughout the Department of Defense, Oct. 18 2001, *available as an attachment at* https://aflsa.jag.af.mil/GROUPS/AIR_FORCE/GENERAL_LAW/Briefings/Lists.pdf.

[24] See DOJ FOIA Guide *infra* note 30, for detailed discussion of "high-2."

[25] FOIA POST *supra* note 2 (emphasis added).

[26] Memorandum for DoD FOIA Offices, Withholding of Personally Identifying Information Under the Freedom of Information Act (FOIA), Nov. 19, 2001[hereinafter Cooke Memo] *available at* https://aflsa.jag.af.mil/GROUPS/AIR_FORCE/GENERAL_LAW/Briefings/Lists.pdf.

[27] *See id*. ("When processing a FOIA request, a DoD component may determine that exemption (b)(6) does not fully protect the component's or an individual's interests. In this case, please contact … Directorate of Freedom of Information and Security Review … .).

[28] 5 U.S.C. 522(b)(6).

[29] DOJ FOIA Guide, *infra* note 30 at 282.

[30] The Air Force's General Law Division has an excellent webpage available through the FLITE homepage *at* https://aflsa.jag.af.mil. Other useful sites include: DOJ FOIA Office *at* http://www.usdoj.gov/04foia/index.html (with comprehensive DOJ FOIA Guide available); Air Force FOIA Page *at* http://www.foia.af.mil/ (with common DoD exemption 3 statutes *at* http://www.foia.af.mil/b3.pdf); ACC On-line FOIA Guide (providing flow-chart analysis for common requests); DoD FOIA Page *at* http://www.defenselink.mil/pubs/foi/. For Privacy Act information, *see* DOJ's site *at* http://www.usdoj.gov/04foia/04_7_1.html; DoD's site at *at* http://defenselink.dtic.mil/privacy/notices/ (listing agency specific routine disclosures).

PRACTICUM

• CHARGING POSSESSION OF CHILD PORNOGRAPHY

The possession of child pornography is not a specifically named offense under the UCMJ. However, the U.S. Code and Article 134, UCMJ, can be used as bases to charge military members for possession of child pornography.

Title 18, § 2251 et. seq., addresses sexual exploitation and other abuse of children. 18 U.S.C. § 2252 makes it unlawful, inter alia, to knowingly possess 1 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction of a minor engaging in sexually explicit conduct, when the possession is in a government owned or controlled building or the visual depiction has been produced or transported using interstate commerce. 18 U.S.C. § 2252A makes it unlawful, inter alia, to knowingly possess any book, magazine, periodical, film, videotape computer disk, or any other material that contains an image of child pornography, when the possession is in a government owned or controlled building or the visual depiction has been produced or transported using interstate commerce. The main difference between these two sections is 18 U.S.C. § 2252 focuses on the possession of matter containing a minor engaging in sexually explicit conduct, while 18 U.S.C. § 2252A focuses on the possession of an image of child pornography, when the image may only appear to be of a minor. These sections may be charged as violations under Clause 3 of Article 134, crimes and offenses not capital.

Article 134 is the general article of the UCMJ. Clause 2 makes punishable conduct which has a tendency to bring the service into disrepute or which tends to lower it in public esteem. Unlike the sections in Title 18, an element of Clause 2 of Article 134 is that the conduct is of a nature to bring discredit upon the armed forces.

CAAF issued several opinions addressing the providency of guilty pleas to charges based on 18 U.S.C. § 2252. In *U.S. v. Falk*, 50 M.J. 385 (CAAF 1999), A1C Falk had 126 files containing child pornography divided into 4 directories on the hard drive of his personal computer at his on-base residence. He was charged under Clause 3 of Article 134 with a violation of 18 U.S.C. § 2252. At the time of his offense, 18 U.S.C. § 2252 proscribed the possession of 3 or more matters and 18 U.S.C. § 2252A had not been enacted. Due to confusion on the part of most parties to the court-martial, the military judge instructed A1C Falk on the elements of the newly enacted 18 U.S.C. § 2252A. During his guilty plea inquiry, A1C Falk did not admit his conduct was prejudicial to good order and discipline, nor admit his conduct was of a nature to bring discredit upon the armed forces. The Court held that the computer hard drive is a single matter for purposes of 18 U.S.C. § 2252, A1C Falk did not admit the elements of 18 U.S.C. § 2252, and, as a result of the confusion, in fairness the guilty plea was improvident. Of note, in his dissenting opinion, Judge Sullivan declares that "[p]ossession of 126 computer images of child pornography, lasciviously organized into four directories on a personal computer, in government housing on a military post, is *per se* service discrediting conduct in my view." (emphasis added)

On 9 June 2000, CAAF decided two more cases dealing with the possession of child pornography. In *U.S. v. Sapp*, 53 M.J. 90 (CAAF 2000), SrA Sapp had 188 sexually explicit images of minor children in 3 files on the hard drive on his personal computer at his on-base residence. Like A1C Falk, he was charged under Clause 3 of Article 134 with a violation of 18 U.S.C. § 2252 (before it was amended to proscribe the possession of only 1 matter). During his guilty plea inquiry, SrA Sapp admitted that such possession was service-discrediting conduct. The AFCCA held his plea of guilty to a violation of 18 U.S.C. § 2252 was improvident because all the depictions were on a single disk and not 3 separate matters, but the plea was provident to the lesser included offense of service-discrediting conduct under Clause 2 of Article 134. After affirming this holding, CAAF distinguished this case from *Falk*. "[I]n *Falk*, the adequacy of the guilty-plea inquiry as to the offense charged was at issue; a lesser included offense was not at issue at the lower court or before our Court." In *U.S. v. Augustine*, 53 M.J. 95 (CAAF 2000), a factually similar case to *Sapp*, the Court again found the plea to 18 U.S.C. § 2252 improvident but the plea to service-discrediting conduct provident. In both these cases, CAAF reasoned that the accused was on notice of a violation of Article 134, the accused admitted all elements necessary for a conviction of Article 134, and service-discrediting conduct is an offense closely related to 18 U.S.C. § 2252.

In this line of cases, CAAF addressed 18 U.S.C. § 2252 before it was amended and did not address 18 U.S.C. § 2252A. The Court would likely have found the pleas provident if the offenses had taken place under the current laws proscribing possession of one, not three, images or matters. Also, in these cases the Court made it clear that possession of child pornography can be a violation of Clause 2 of Article 134. In such a case, the element of service-discrediting conduct must

be proven or admitted. However, unlike the federal statutes, Article 134 does not include the elements of possession in a government owned or controlled building, or production or transportation using interstate commerce.

Another important consideration is the constitutionality of 18 U.S.C. § 2252A. The Supreme Court recently heard oral argument in *Ashcroft v. The Free Speech Coalition*, 198 F. 3d 1083 (9th Cir. 1999), *cert. granted*, 121 S. Ct. 876 (2001). One of the questions presented is whether the prohibition in 18 U.S.C. § 2252A on the shipment, distribution, receipt, reproduction, sale or possession of any visual depiction that *appears to be* of a minor engaging in sexually explicit conduct violates the First Amendment of the Constitution. The Supreme Court granted the Attorney General's petition for writ of certiorari after the 9th Circuit found the provision unconstitutional. The 9th Circuit decision conflicts with decisions of the 1st, 4th and 11th Circuits. A decision is expected in Spring, 2002.

Based on the CAAF decisions and the Supreme Court's interest in 18 U.S.C. § 2252A, military justice practitioners must analyze the law and decide what works best for a particular case. For more information about child pornography crime, see the April 2001 edition of the ACE newsletter.

• "TIME OF WAR" ISSUES UNDER THE UCMJ AND MCM

One can find the words "time of war" in various places in the UCMJ and MCM. Neither however, contain guidance on when these provisions are triggered.

"Time of war" is defined at R.C.M. 103(19). However, this definition applies only to R.C.M. 1004(c)(6) and Parts IV and V of the MCM. Under R.C.M. 103 (19), a "time of war" exists if: 1) Congress declares that the United States is at war; or 2) the President makes a factual determination that the existence of hostilities warrants a finding that a "time of war" exists for these purposes. If this "time of war" definition is triggered, R.C.M. 1004(c)(6) would add an aggravating factor allowing the imposition of the death penalty for rape and murder offenses committed "in territory in which the United States or an ally of the United States was then an occupying power or in which the armed forces of the United States were then engaged in active hostilities."

Furthermore, "time of war" provisions in the punitive articles and the nonjudicial punishment section of the UCMJ (Parts IV and V of the MCM) would become effective. For example, the following are offenses that can only occur during time of war: improper use of a countersign (Art. 101); misconduct as a prisoner (Art. 105); and spying (Art. 106). Also, during a "time of war" the maximum punishment for the following offenses would increase: desertion (Art. 85); assaulting or willfully disobeying a superior commissioned officer (Art. 90); drug offenses (Art 112a); misbehavior of a sentinel or lookout (Arts.113 or 134); malingering (Art. 115); and self-injury without intent to avoid service (Art. 134).

Determining whether a "time of war" exists for purposes of provisions which are not in Parts IV or V of the MCM is more difficult. For example, Article 43, UCMJ, is in neither Part IV nor Part V of the MCM. However, it extends the statute of limitations for crimes committed in "time of war." Art. 43 provides that a person who committed an act of desertion, absence without leave or missing movement in time of war may be tried and punished at any time without limitation. To determine whether a "time of war" designation exists for statute of limitations purposes, one must look to case precedent. The Court of Military Appeals held that the conflict in Vietnam, though not formally declared a war by Congress, was a "time of war" for statute of limitations purposes. *U.S. v. Anderson*, 38 C.M.R. 386 (1968). Factors that military courts have used to determine whether a "time of war" exists include whether there are armed hostilities against an organized enemy (*U.S. v. Shell*, 23 C.M.R. 110 (1957)); and whether legislation, executive orders, or proclamations concerning the hostilities are indicative of a time of war (*U.S. v. Bancroft*, 11 C.M.R. 3 (CMA 1953)). Military courts have also rejected the notion that there is a geographical component to the "time of war;" absence from the combat zone at the time of an offense does not prevent the offense from occurring in "time of war." *U.S. v. Averette*, 41 C.M.R. 363 (1970).

At this time there has been no declaration of war by Congress or factual finding of war by the President. If it becomes appropriate to implement the "time of war" provisions, it is likely that DoD would make a formal request to the President and if approved, an Executive Order would be issued. For example, executive orders invoked and then revoked the provisions for the Korean War.

• UPDATE FROM THE JOINT SERVICE COMMITTEE

In July, the Joint Service Committee (JSC) forwarded to the DoD General Counsel a proposed Executive Order (EO) for the President's signature to amend several sections of the Manual for Courts-Martial. Of interest to most practitioners, the EO will implement section 577 of the National Defense Au-

thorization Act for Fiscal Year 2000 (Public Law 106-65; 113 Stat. 512) which authorizes special courts-martial to impose a maximum punishment of confinement up to one year and forfeitures not to exceed two-thirds of pay per month for one year, replacing the current previous six-month maximums. The EO consolidated changes proposed over the course of the last three years, but was not signed before the end of the Clinton Administration. After the change in administration, all pending Executive Orders were returned for staffing and review by Bush Administration personnel. In October 2001, DoD General Counsel forwarded the consolidated EO, including the change to the maximum punishments in special courts-martial, to the Office of Management and Budget for review and coordination. If OMB agrees with the proposals, the EO will be forwarded to the President for his consideration.

Apart from the special court-martial punishment provision, the EO will make a number of other substantive changes to our practice, including the following:

-- Recognize the military judge's authority to issue orders limiting extrajudicial statements by trial participants. The military judge must determine that such statements present a substantial likelihood of material prejudice to the accused's right to a fair trial

-- Expand guidance on adultery to give commanders a better understanding of what factors to consider when determining whether such conduct is prejudicial to good order and discipline or of a nature to bring discredit to the armed forces

-- Clarify provisions of the RCMs to better define prior civilian convictions that may be admitted in courts-martial for the purpose of determining an appropriate sentence

-- Change the MCM to conform to Article 56a to authorize a general courts-martial to adjudge a sentence of life without eligibility for parole

-- Amend MRE 615 to extend to victims the right to be present at all public court-martial proceedings related to the offense, unless the military judge determines that testimony by the victim would be materially affected

-- Raise the maximum punishment threshold in property crimes from $100 to $500

-- Provide additional explanation to trial practitioners to clarify that thefts or wrongful appropriations of credit, debit, and other electronic transactions are chargeable under Article 121

In addition to the changes listed in the EO, Congress has introduced into the FY 02 Omnibus Legislative Proposal, language to reduce the .10 BAT level stated in Article 111 to .08.

Prompted by proposals that originated in the House Armed Services Subcommittee, Congress is also considering implementing two other significant changes to the military justice process:

-- In a case in which the accused may be sentenced to death, the convening authority must appoint at least 12 panel members unless the convening authority makes a detailed finding that 12 members were not reasonably available.

-- Except in death penalty cases, the accused may choose to be tried before members and sentenced by the military judge.

These proposals are all in various stages of the decision making process. AFLSA/JAJM will continue to update legal offices with information as more information becomes available.

CAVEAT

- **NICE TRY**

In the case of *United States v. Lancaster,* ACM 34439 (A.F. Ct. Crim. App., September 17, 2001) pursuant to a pretrial agreement (PTA), the accused pleaded guilty to a variety of offenses. The military judge accepted the plea and at the conclusion of this trial by general court-martial sentenced the accused to a bad-conduct discharge, confinement for 15 months, forfeiture of all pay and allowances, reduction to E-1, and a fine of $500. As an added incentive, the judge sentenced the accused to serve an additional 30 days of confinement if the fine were not paid. In the PTA, the convening authority, in exchange for the accused's guilty plea to all offenses, agreed he would not approve confinement in excess of 10 months. In his action, the convening authority reduced the period of confinement to 10 months, but otherwise approved the sentence (including the contingent confinement).

On appeal, the accused argued that by approving the "contingent fine," the convening authority exceeded the maximum punishment authorized under the PTA. Not so, responded the government counsel. They

countered that the accused was not sentenced to a contingent fine, but to a fine with contingent confinement if he failed to pay the fine. The United States further claimed that since there was no evidence that the convening authority ever tried to enforce the contingent confinement, the issue was not "ripe for review." In other words, "no harm, no foul."

While it found the government's "ripeness" argument attractive (in the sense of "[w]hy take action to correct an error that may never occur?"), the Court concluded that the argument failed to account for the differences between the federal court system and the military justice system. In our system, Article 60, UCMJ, requires the convening authority to take action on the sentence adjudged. Although he has wide discretion in deciding what action to take, he must give an accused the benefit of any bargain negotiated in a PTA, lest the plea be rendered improvident. On that basis, the Court held that the convening authority's approval of the contingent confinement provision in the sentence was incorrect as a matter of law and set it aside. The moral of this story is, in cases such as this, if the convening authority wants to retain a pay the fine or risk serving more confinement incentive clause, he must ensure that the total confinement he approves, including the contingent portion, is within the limits specified in the PTA.

• WATCH YOUR Ps AND RTDPs

In a case recently reviewed for possible Secretarial clemency, the accused, in his clemency petition, requested that the convening authority direct his entry into the Return-to-Duty Program (RTDP) at the Naval Consolidated Brig, Charleston, South Carolina. Pursuant to AFI 31-205, court-martial convening authorities are authorized to direct accused into the four to six month program at the time they take action on the sentence. In his recommendation to the convening authority, the SJA recommended that the accused not be approved for entry in the program because *approval* of his request would result in his adjudged BCD being remitted.

The SJA's advice was off-target and misleading. Merely directing an airman's entry into the rigorous Charleston program has no affect whatever on an adjudged and approved punitive discharge. What the SJA should have informed the convening authority was that if an airman successfully completes the program and is thereafter returned to duty by direction of the Air Force Clemency and Parole Board, his punitive discharge (if any) would then be suspended for a specified period of time, normally a year, and thereafter automatically remitted (unless, of course, sooner vacated as a result of misconduct during the period of probation).

The RTDP is a highly successful Air Force rehabilitation program. During its more than 50 years of operation, in excess of 15,000 airman have been entered in the program, and over 8,000 of them returned to productive service. Although entry in the program carries with it the possibility of eventual remission of an adjudged punitive discharge, that result is by no means assured. It will only come to pass following successful transit of many difficult hurdles over the course of more than a year. Those interested may learn more about program requirements by accessing the JAJR Docushare site.

GENERAL LAW

• DEA CLARIFIES STATUS OF HEMP

The Drug Enforcement Agency (DEA) released an interim rule earlier this month clarifying the legal status of "hemp" products. Hemp refers to stalks and sterilized seeds of the cannabis plant. Various products, including paper, rope, clothing, animal feed mixtures, personal care products, and food and beverages are made from hemp. Food and beverages made from hemp include pasta, tortilla chips, candy bars, nutritional bars, and dietary supplements.

The DEA concluded that all parts of the marijuana plant, including hemp, contain tetrahydrocannabinols (THC), the hallucinogenic substance in marijuana. This is significant because a product that contains any amount of THC is a schedule I controlled substance as defined in the Controlled Substance Act (CSA). However, in its rule, the DEA is exempting from application of the CSA hemp products that contain THC but are <u>not intended</u> for human consumption. Human consumption is defined as "ingested orally or applied by any means such that THC enters the human body." Air Force members are already prohibited from ingesting hemp seed oil or products made with hemp seed oil pursuant to IC 99-1 to AFI 44-121, para. 3.5.5.

While exempting various hemp products from the CSA, the rule specifically provides that "any food or beverage or dietary supplement" containing THC is not exempted. The rule provides a grace period until 6 Feb 02 in which to dispose of hemp products that are intended for human consumption and contain THC. However, during this grace period such products may not be manufactured or distributed within the United States.

Importantly, the DEA states that hemp products that do not contain THC are not illegal under the CSA.

Therefore, there may continue to be hemp products that are legal to purchase or possess, yet are prohibited from ingestion by AFI 44-121, *Alcohol and Drug Abuse Prevention and Treatment (ADAPT) Program*, para. 3.5.5., which prohibits Air Force members from ingesting hemp seed oil or products made with hemp seed oil. However, In light of DEA's rule that hemp products that do not contain THC are legal, AF policy in this area will be reviewed if it is established in the future that hemp seed oil products do not contain THC.

• SPECIAL CONSIDERATIONS IN ANALYZING GIFTS TO THE AIR FORCE

In response to the attacks of September 11, 2001, the Armed Forces are experiencing an outpouring of gifts from private individuals and companies. In keeping with longstanding Air Force policy, such gifts, processed according to AFI 51-601*, Gifts to the Department of the Air Force*, are normally accepted unless acceptance "would not be in the best interest of the Air Force." Some of the reasons for rejecting a gift are set forth in AFI 51-601 (e.g., an item is dangerous, in bad taste, or the costs associated with it would outweigh the benefit). However, those reasons are not exclusive; there are other considerations that commanders should factor in before accepting gifts to the Air Force. so an amplification of other factors that indicate acceptance of a girt would not be in the best interest of the Air Force may be helpful in light of the current gift-giving environment.

The Air Force can accept gifts that enhance our capabilities and further our mission, provided that these gifts have not been solicited and they are accepted consistent with the guidance in AFI 51-601. Nevertheless, approval authorities should consider the following when determining if acceptance is appropriate:

- Is acceptance of the gift consistent with security? Some offers, especially those involving computers, communications, and electronics, may require technical evaluation.
- Will the gift create interoperability issues?
- Will acceptance commit the Air Force to a long-term proprietary relationship (e.g., require ongoing support) or compromise ongoing or future procurements?
- Will acceptance violate the terms of an existing contract?
- Are there any circumstances associated with acceptance that would involve the Air Force in controversy or subject the Air Force to criticism now or in the future?

It is essential to involve the functional experts in whose area the gift pertains in the gift acceptance staffing process. Functional experts should advise the approval authorities regarding the technical, logistical or contractual implications of the offered gifts. When the nature of the gift raises these issues, judge advocates should ensure that the such experts are consulted and these factors are addressed prior to the offer being staffed to before the approval authority makes a decision. The short term benefits of a gift may well be outweighed by long term problems or controversies that only functional experts or contracting officials are in a position to recognize. Therefore, a team approach to reviewing gift proposals is the best way to help approval authorities weigh all the pertinent considerations.

• REPRISAL 101

Scenario: SSgt Labor reports Fraud, Waste and Abuse to his MAJCOM/CC via e-mail. The matter in question fell within the control of a Group Commander who knew nothing about the problem and would have fixed it if SSgt Labor had reported it to him. SSgt Labor's chain of command was annoyed that they didn't get an opportunity to address the problem until it was brought to their attention from above. However, MSgt Xerox, SSgt Labor's supervisor was incensed. He provided SSgt Labor formal written counseling about failing to use his chain of command and marked down his next EPR in the conduct block, while including a comment that SSgt Labor's potential for increased responsibility was hampered by his failure to properly use the chain of command. This EPR became a matter of official record after endorsement by MSgt Xerox's supervisor and review by SSgt Labor's squadron commander.

The chain of command is such a thoroughly engrained and basic concept within the military--certainly failure to use it to rectify problems warrants a punitive response--right? In some cases, that view is so firmly held by military members like MSgt Xerox, supervisors, or commanders, that they would not think twice about the scenario described above. We hope, however, that it did raise the eyebrows of our judge advocate readership. The following provides a brief overview, "Reprisal 101" if you will, for judge advocates to use for heading off trouble when they see scenarios like that described above developing. It only provides the core knowledge required to address that scenario and then highlights resources available to gain an in-depth understanding of how to address reprisal complaints.

Members of the Armed Forces have a statutory right

to report fraud, waste and abuse and other incidents of misconduct. They are protected against adverse personnel actions (to include withholding favorable personnel actions) taken as a result of their making communications protected under 10 U.S.C. § 1034 (commonly referred to as the Military Whistleblower's statute).[1] The statute provides that military members may not be restricted from making lawful communications to a Member of Congress or an Inspector General. Furthermore, when reporting information the member reasonably believes constitutes a violation of law or regulation, mismanagement, a gross waste of funds, an abuse of authority or a substantial and specific danger to public health or safety, Air Force members are protected if they make those reports to a Member of Congress; an IG; a representative of any DoD audit, inspection, investigation, or law enforcement organization; or a person designated by an Air Force regulation or other established administrative procedure for addressing such communications. AFI 90-301, *Inspector General Complaints*, designates Military Equal Opportunity personnel, Family Advocacy, and commanders in the member's chain of command as persons or organizations authorized to receive communications protected under 10 U.S.C. § 1034.[2]

In the scenario above, SSgt Labor communicated with a commander in his chain of command about fraud, waste and abuse, which qualifies as a protected communication under the Whistleblower's statute. The formal counseling and unfavorable EPR constitute unfavorable personnel actions. As a result, not only MSgt Xerox, but also his supervisor and squadron commander would most likely be found guilty of reprisal if they knew the protected communication had been made. If a judge advocate or personnelist had been asked for advice in this matter and told MSgt Xerox or his supervisors that it was okay to take the adverse action to punish SSgt Labor for making his complaint, they could also be found to be responsible for reprisal. Bottomline: While members may be encouraged to use the chain of command to help resolve issues at the lowest level possible, they may not be punished for making protected communications that go outside the normal chain of command process.

Judge advocates have an important educational role in preventing or heading off reprisal. It is fundamental for all supervisors to know that reprisal against those who make protected communications is illegal. Judge advocates should actively look for opportunities to help the Inspector General get that word out. In addition, to effectively prepare for that role, judge advocates should be thoroughly familiar with the provisions of 10 U.S.C. § 1034; DoD Directive 7050.6, *Military Whistleblower Protection*; and the reprisal components of AFI 90-301. Furthermore, DoD IG's *Guide to Investigating Reprisal and Improper Referrals for Mental Health Evaluations*[3] is a must read for any judge advocate whose primary responsibilities include advising the Inspector General or an investigating officer assigned to look into reprisal allegations. This practical guide fleshes out many of the nuances of the statutory protection, as well as providing a helpful framework for analysis, commonly referred to as the "Acid Test".

DoD IG has a statutory oversight role of the process for investigating reprisal allegations. As a general rule, DoD IG's interpretations as to what qualify as protected communications and adverse actions are broad to maximize the statutory protections afforded military members, consistent with the intent of that statute. Because of their oversight role, these interpretations are necessarily entitled to great deference. Questions regarding the proper interpretation of each element of the statute or "Acid Test" that arise in the complaint analysis or investigative phases of the IG complaints process should be raised through the IG functional chain in coordination with the JA functional chain.

[1] Civilian employees are protected against reprisal under Title 5, United States Code.
[2] See OpJAGAFs 2000/39 and 2000/62 for expanded discussions of organizations or established administrative procedures for handling complaints to which one can make protected communications.
[3] This publication currently can be found on-line on the SAF/IGQ webpage at http://www.ig.hq.af.mil/igq/downloads/IGDG7050-6.PDF

LABOR LAW

• RECENT EEO DECISIONS APPEAR TO EXPAND REACH OF CONTINUING VIOLATION THEORY

A federal employee who believes he or she has been discriminated against on a prohibited basis (i.e., race, color, national origin, gender, religion, age, disability or protected EEO activity) must follow strict administrative procedures for pressing the allegation. *See* 29 C.F.R. Part 1614. Specifically, the aggrieved employee must make initial contact with an agency EEO counselor within 45 days of the complained-of adverse action. § 1614.105(a)(1). The agency may dismiss any complaint where the employee fails to comply with this requirement. § 1614.107(a)(2).

One of the exceptions to this rule is a concept known as the continuing violation theory. This theory allows the complainant to reach back from a timely incident to include otherwise untimely incidents, if the inci-

dents constitute a related pattern of discrimination. A continuing violation is more likely to be established when the same agency official (or officials) is involved in the alleged acts. *Woljan v. Environmental Protection Agency*, EEOC No. 05950361 (October 5, 1995).

Until recently, in order to obviate the 45-day contact rule under the continuing violation theory, the complainant had to satisfy three requirements. First, there had to be a series of acts, one of which must have occurred within 45 days of the complainant's contact with the EEO counselor. Second, the acts had to exhibit a high degree of relatedness, or nexus. Finally, the complainant had to lack prior knowledge or a reasonable suspicion of the discrimination.

The "prior knowledge" prong of the continuing violation test has proven to be a substantial challenge for complainants seeking to use the doctrine to resurrect untimely claims. In most cases where the continuing violation theory is advanced, the complainant knew or should have known that he or she was being discriminated against at the time of the alleged act. For instance, in *Coley v. Social Security Administration,* EEOC 01983879 (November 8, 1999), the EEOC determined that untimely claims regarding denial of training and an involuntary reassignment were discrete events that should have triggered the complainant's duty to assert her rights. *See also, Madlangbayan v. Department of the Air Force*, EEOC No. 01991462 (November 5, 1999) (issuance of a poor performance appraisal was an incident that has the degree of permanence that should trigger an employee's duty to assert his rights).

There had been isolated cases in which the EEOC did not strictly apply the reasonable suspicion test. *See e.g., Bogy v. United States Postal Service*, EEOC No. 01996250 (January 18, 2001). In this case, the EEOC found a continuing violation where a sexist remark was made three years before the filing of the EEO complaint even though such statements should have made the complainant aware of her basis to file an EEO complaint at the time the statements were made. However, the EEOC largely has held complainants to the 45-day requirement where the events in question should have triggered suspicion of discrimination.

Perhaps recognizing that the prior knowledge prong had become a stumbling block for complainants wishing to press untimely claims, the EEOC recently made it clear that its view of the continuing violation theory had changed. *See Anisman v. O'Neil*, EEOC No. 01994634 (April 12, 2001). In *Anisman*, the complainant alleged that he was nonselected for promotion to various attorney positions because of his sex. *Id.* at 1-2. One of the nonselections occurred within 45 days of the complainant's contact with an EEO counselor, but two earlier ones did not. *Id.* at 2. The agency accepted for investigation the complaint about the most recent nonselection, but dismissed claims regarding the two earlier nonselections for failure to contact an EEO counselor within 45 days of their occurrence. *Id.* In its original decision, the EEOC upheld the agency's dismissal of these claims. *Id.* at 3. On reconsideration, however, the EEOC reversed its earlier decision. *Id.* at 6-7.

This decision represents a significant departure from the previous application of the continuing violation theory. While acknowledging that its previous decision "stated that a continuing violation will not be found where the acts complained of are, by themselves, capable of triggering a reasonable suspicion of discrimination," the Commission asserts that since the revision of 29 C.F.R. Part 1614 and the EEO's MD-110 (Management Directive, or the Federal Sector Complaint Processing Manual) in November 1999 it has "held that evidence showing that a complainant had, or should have had, a reasonable suspicion of discrimination more than 45 days prior to initiating EEO counselor contact, will not preclude acceptance of an otherwise timely claim of on-going discrimination." *Id.* at 5 (citations omitted). This is a questionable assertion, inasmuch as the EEOC applied the "old" continuing violation theory requirements in its original consideration of *Anisman*.

The Commission also "observes" that recent decisions by the United States Courts of Appeals have allowed plaintiffs to utilize a continuing violation theory irrespective of whether the individual had prior notice or reasonable suspicion that his rights were being violated. In support of this proposition, the Commission cites two cases. First, it references *Morgan v. National Railroad Passenger Corp. d/b/a Amtrak*, 232 F.3d 1008 (9th Cir. 2000), *cert. granted* 533 U.S. __ (June 25, 2001). The EEOC neglects to point out that the Ninth Circuit appears to be alone in not applying the reasonable suspicion test to the continuing violation theory. Indeed, the Supreme Court has granted certiorari on this very issue. (To date, oral arguments have not been scheduled). Thus, the continued vitality of the Ninth Circuit's reasoning (and also likely that of the EEOC) may be determined in the Court's current term.

The other case cited by the EEOC, *Anderson v. Zubieta*, 180 F.3d 329 (D.C. Cir 1999), involves allegations of discriminatory pay practices and stands only for the proposition that such claims constitute a "new" violation with each pay period. Thus, this case is easily distinguishable from the facts of *Anisman*.

The EEOC has also applied its reasoning in *Anisman* to subsequent decisions. *See Seagren v. Dahlberg*, EEOC No. 01995042 (May 1, 2001); *Hadnot v. Marti-*

nez, EEOC No. 01995230 (May 8, 2001). In *Seagren*, the complainant alleged that she was subjected to a hostile work environment because of several protected bases. In support of her claim, complainant recited a litany of agency actions, several of which were outside the 45-day limit for initial contact with an EEO counselor. *Id*. at 1-2. Citing *Anisman*, the EEOC concluded that the complainant had properly alleged a continuing violation and that the agency inappropriately dismissed claims based on acts outside the 45-day limit, regardless of whether complainant should have suspected discrimination at that point. *Id.* at 2-3.

In *Hadnot*, the complainant alleged discrimination on the basis of race, sex, age and prior EEO activity. EEO No. 01995230 at 1. The facts, similar to *Anisman*, involved a series of nonselections for positions. *Id.* The agency dismissed the claims for nonselections outside the 45-day limit for EEO counselor contact. *Id.* For some reason, unapparent from the EEOC's decision, the agency did not address two of complainant's claims in its Final Agency Decision. *Id.* The EEOC "note[ed] … that complainant allege[d] *on appeal* that his complaint was about more than specific non-selections, noting that the agency was preventing him from participating in the merit staffing process by determining that his applications did not meet the required qualifications for the positions." *Id.* at 2 (emphasis added). Again citing *Anisman*, the EEOC had no difficulty in overturning the agency's dismissal of the untimely complaints. *Id.* One wrinkle in this case is that the record did not establish whether any of complainant's claims was timely. Thus, the EEOC remanded the case back to the agency to make this determination. *Id*.

As should be apparent from the above discussion, the EEOC's recent pronouncements on the continuing violation theory represent a substantial change. They also mean that dismissals of claims for discrete employment actions for which the employee should have been on notice of the alleged discrimination will be overturned when the complainant alleges a continuing violation, assuming she can establish the necessary relatedness of the events. Remember, however, that the requirements for relatedness of the events complained of and that at least one event must have occurred within 45 days of contact with an EEO counselor still obtain for continuing violation to apply. Thus, don't overlook these important prongs in your analysis.

- **MSPB APPLIES SUPREME COURT'S DECISION IN BUCKHANNON IN RULING THAT AN APPELLANT IS NOT ENTITLED TO ATTORNEY FEES WHEN AGENCY VOLUNTARILY CANCELS THE ACTION AND RESTORES APPELLANT TO STATUS QUO ANTE**

Since the end of May 2001, Agency representatives have been wondering what effect, if any, the U.S. Supreme Court's Decision in *Buckhannon v. West Virginia Department of Health and Human Services*, 121 S.Ct. 1835 (2001), would have with respect to the attorney fees analysis under 5 U.S.C. § 7701(g)(1). On September 4, 2001, the MSPB issued two decisions applying the Supreme Court's decision in *Buckhannon*, ruling that an appellant is not a "prevailing party" when the Agency voluntarily cancels the adverse action and restores the appellant to status quo ante. *Sacco v. Department of Justice*, 2001 MSPB LEXIS 918; *Nichols v. Department of Veterans Affairs*, 2001 MSPB LEXIS 924.

In *Buckhannon*, the Supreme Court rejected what is known as the "catalyst theory" as a permissible basis for the award of attorney fees. Under the "catalyst theory," a plaintiff is considered a "prevailing party" if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant's conduct. As a result, the Court ruled that only enforceable judgments on the merits and court-ordered consent decrees create the "material alteration of the legal relationship of the parties" necessary to permit an award of attorney's fees. In accord with *Buckhannon*, the MSPB could not discern any basis to employ a different meaning in the use of the term "prevailing party" with respect to 5 U.S.C. § 7701(g)(1). See *Sacco v. Department of Justice*.

As the MSPB explained in *Nichols v. Department of Veterans Affairs*: "*Buckhannon* held, specifically, that the catalyst theory is not a permissible basis for an award under the Fair Housing Amendments Act and the Americans with Disabilities Act (ADA), neither of which is at issue here. We award fees in an adverse action appeal under 5 U.S.C. § 7701(g)(1)-(2)." Nonetheless, the Court stated that the term "prevailing party" is "a legal term of art," which Congress used in numerous statutes that address a variety of subjects. It went on to analyze the issue by examining several of those areas and its discussion is clear that, at least in the absence of some unstated reason for differentiation, its holding is applicable to the broad range of statutes that award fees to a "prevailing party."

Further, the Court cited to not just the ADA, but the Civil Rights Act and the Civil Rights Attorney Fees Awards Act in its discussion of the meaning of prevailing party. "Each of those statutes is relevant to our fee awards under section 7701(g)(2) and, in *Hodnick*, we specifically discussed the latter two, as well as several of the cases interpreted in *Buckhannon* in reaching our determination of the meaning of 'prevailing

party.'" Thus, having considered much of the same authority that the Board did, the Court reached the opposite result.

Further, in *Hodnick*, the Board had noted that the legislative history of section 7701(g)(2) showed that it was the intent of Congress "to provide appellants with the same reimbursement of fees in administrative proceedings as would be available in civil proceedings." *Hodnick*, 4 M.S.P.R. at 374. Since now, under *Buckhannon*, the law is clear that an individual cannot be awarded fees in a civil proceeding under the catalyst theory, it would be contrary to the legislative history and congressional intent to allow fees on that theory under section 7701.

The MSPB recently considered for the first time the effect of *Buckhannon's* analysis of the requirements for "prevailing party" status as it affects the award of attorney fees under the authority of 5 U.S.C. § 7701. *Sacco v. Department of Justice*, M.S.P.B. Docket No. DC-0752-0219-A-1 (September 4, 2001)($34,716.27 in attorney fees). In *Sacco*, the MSPB found no ground for distinguishing *Buckhannon* or finding its holding inapplicable to fee awards under § 7701. Therefore, the Board's line of decisions applying the "catalyst theory" (e.g., *Joyce v. Department of the Air Force*, 83 M.S.P.R. 666 (1999)) were overruled to the extent they were in conflict with *Buckhannon. Id.* at P10.

The Board applied the principles set forth in *Buckhannon* to determine whether the appellant qualified as a "prevailing party." As stated above, before the completion of the hearing, the agency fully rescinded the 30-day suspension taken against the appellant, and the Administrative Judge issued a decision dismissing the appeal as moot, without a decision on the merits. The initial decision became final on November 10, 1999. Under *Buckhannon*, the agency's voluntary change in conduct, i.e., the rescission of the 30-day suspension action, although accomplishing what the appellant sought to receive by filing an appeal with the Board, lacked the necessary "judicial imprimatur," i.e., an "enforceable judgment on the merits" or "court-ordered consent decree," to create the requisite "material alteration of the legal relationship of the parties." *Buckhannon*, 121 S. Ct. at 1840. Thus, there is no basis upon which to find that the appellant is a prevailing party.

Under these rulings, canceling an action prior to going to a hearing significantly reduces the Agency's liability if the Appellant is represented by counsel. Therefore, if there are problems with a charged offense, Agency counsel should consider these decisions as a way to decrease the Agency's liability, to encourage the settlement of a case, or as an opportunity to regroup and start anew.

TORT CLAIMS AND HEALTH LAW

The Health Integrity and Protection Data Bank has now been implemented by the Air Force Surgeon General in accordance with statutory and DoD directive. This Data Bank is meant to cover those health care related personnel, military and civilian, who health care related acts or omissions result in criminal or administrative penalty. For any questions concerning the procedures involved with this Data Bank, the DoD and AF/SG implementation letters have been posted on the AFLSA/JACT Medical Law website.

- **RES GESTAE**

The annual Accident Investigation Board (AIB) Legal Advisor Course (Class 02-A) will be taught at the AFJAGS, Maxwell AFB, AL from 13-15 February 2002. This course is designed to train future AIB Legal Advisors in the statutory and regulatory procedures for conducting investigations of aircraft, missile and space mishaps in accordance with AFI 51-503. Legal Advisors work directly with the AIB President and other board members on a full time basis for a period of 30-45 days to determine the what and why of a mishap, and to publish a fully releasable report on all the facts and circumstances surrounding the accident, to include a statement of opinion on causation. Participation in an accident investigation is a unique opportunity for JAGs to utilize their legal and investigative skills while providing timely legal advice to the AIB President. Completion of this course will become a mandatory requirement for JAGs participating in accident investigations beginning in 2002. Field grade and senior Captain JAGs are encouraged to apply for this course. All nominations should be processed through MAJCOM/JA channels to AF/JAX . The course is locally (unit) funded.

Due to the aftermath of the 11 September tragedy, the 2001 Medical Law Mini-Course was cancelled. It will be held again in October 2002.

The 2001 Medical Law Consultants Course will be held at Malcolm Grow USAF Medical Center, Andrews AFB, Maryland from 17 April - 17 May 2002. The Course is designed to offer intensive training in law, ethics and health care delivery for newly selected Medical Law Consultants.

- **VERBA SAPIENTI**

Too few lawyers and judges appreciate the potential impact of digital photography on admission of photographs in everyday proceedings. If a photograph is merely to be used as an exhibit for demonstrative purposes, it is generally allowed for that purpose because a witness testifies that the photograph accurately depicts the scene as it existed at the time of an incident. This is acceptable because such evidence is merely concerned with real objects that illustrate some verbal testimony and has no probative value in itself.[1]

If, on the other hand, an attorney wished to enter a photograph into evidence as probative matter, proof of an alleged fact or proposition, our common law heritage refers us to the "Best Evidence Rule." Federal Rule of Evidence (FRE) 1002 requires an original photograph to prove its content. At the same time, FRE 1003 allows admissibility of a duplicate photograph unless "(1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original."

Based upon these evidentiary rules, the use of an image produced by digital photography raises new issues for the creation, discovery, authentication and presentation of evidence. "Unlike traditional cameras that use film to capture and store an image, digital cameras use a solid-state device called an image sensor. These fingernail-sized silicon chips contain millions of photosensitive diodes called photosites. In the brief flickering instant that the shutter is open, each photosite records the intensity or brightness of the light that falls on it by accumulating a charge; the more light, the higher the charge. The brightness recorded by each photosite is then stored as a set of numbers that can be used to set the color and brightness of dots on the screen or ink on the printed page to reconstruct the image."[2] Digital photography involves taking, storing, touching up and displaying digital image pictures. Once the sensor has captured an image, it must be read, converted to digital, and then stored. A digital picture is stored in a traditional computer file format with some built-in file management and controls. The file listing includes file size and file creation date. This self-generating audit trail is the beachhead for authentication or challenges. By connecting the camera to a computer with a cable, the operator can download the file to a directory on the computer or another computer data storage device. This preserves the file data as though it was the original. Accordingly, the best practice is to keep the source media intact, showing the original directory with dates, file size and file names automatically generated by the digital camera.

Keeping the source media intact, however, overcomes only one hurdle to introducing a digital photograph into evidence. Further difficulties arise in the ease of manipulating a digital photographic image. What enables manipulation in a digital photograph is nothing more than a series of dots called "pixels" for "picture elements." Many simple and readily available software programs exist to modify digital photographs: tools to "re-sample" the picture, to achieve the same resolution but in a larger frame; tools to change brightness, contrast, hue, and saturation; touch-up tools to mark and enhance the digital picture; as well as filters to sharpen the picture and create special effects. All of these tools and filters can work at the level of a single pixel or a whole object, area or segment to change, copy or delete, thereby altering a digital photographic image to appear differently than it existed at the time the digital photograph was imaged.

Accordingly, the proponent of computer-generated evidence may have to prove the trustworthiness of the item to the trial judge, since the admission of photographs is within the judge's discretion, and will not be overturned absent a clear showing of an abuse of discretion.[3] "The use of discovery to inquire into the creation, storage, manipulation and final representation of images should become more frequent. Indeed, parties that want to facilitate the authentication of real evidence will now be compelled to devise systems allowing them to prove there has been no subtle alteration. Courts increasingly will be called on to examine the technological facts. This will take place in Rule 104 hearings in advance of trial just as in *Daubert*-type [*Daubert v. Merrell Dow Pharm. Inc.*, 509 U.S. 579 (1993)] cases."[4] In *Daubert*, the Supreme Court held that an expert's testimony must rest both on a reliable foundation and be relevant to the case.

Moreover, since the image relies upon the underlying computer program which interprets it, it is not inconceivable that the party desiring to enter a digital photograph would have to show: (1) who took the image; (2) who operated the computer which transformed the data into a readable image; (3) what software was loaded on the computer at the time the data was converted to an image; (4) whether the person operating the computer was trained in the specific software being used, and (5) whether the image was printed at the time, and if so, how the printed image was stored.[5]

JACT has been advising the field to assess the situation, and call the base alert photographer if they believe a potential tort claim warrants admissible photographs because of the significance of a potential claim. If the base has no other alternative than to use digital cameras, the following guidelines are recommended to establish as much of a foundation as possible for ad-

missibility. Initially, implement the best practice recommended above by safeguarding the source media that shows the original directory with dates, file size and file names automatically generated by the digital camera, as well as retaining both the source media and image in a secure area, perhaps the evidence safe. Additionally, document the following:

(1) who took the digital image;
(2) what type of digital camera was used to create the digital image (make, model and identifying characteristics);
(3) what type of computer was used to open the stored digital image (be specific as to make, model and identifying capabilities);
(4) who operated the computer which transformed the digital image into a digital photograph;
(5) when the digital image was converted into a digital photograph, what computer software was used on the computer at the time the digital image was converted to a digital photograph (specifically identify program edition number);
(6) whether the person operating the computer had any training in the specific software being used;
(7) whether the digital photograph was printed at the time;
(8) what type of printer was used to print the digital photograph (make, model and identifying capabilities); and
(9) how a digital photograph was stored, if the digital photograph (converted from the digital image) was saved separately from the digital image created by the digital camera.

By following the guidance of all ten recommended steps, as well as noting the educational information summarized in this article, claims officers can benefit their base level programs both defensively and offensively. Defensively, we protect the government's ability to effectively use digital photographs over plaintiff's evidentiary objections. Taking the offense, we can prevent misuse of easily manipulated digital photographs presented by claimants as "proof" of their damages.

[1] *People v. Diaz,* 111 Misc.2d 1083, 445 N.Y.S.2d 888, 889.
[2] Information at www.shortcourses.com/book01/chapter02.htm, Dennis Curtin, 2000.
[3] *ACTONet, Ltd. v. Allou Health & Beauty Care*, 219 F.3d 836, 848 (8th Cir. 2000).
[4] Paul, George, "Fabrication of evidence: a click away," The National Law Journal, February 21, 2000.
[5] Galves, Fred, "Where the Not-So-Wild Things Are: Computers in the Courtroom, the Federal Rules of Evidence, and the Need for Institutional Reform and More Judicial Acceptance," 13 Harv.J.Law & Tec 161, pp. 231,232.

• ARBITRIA ET IUDICIA

The following are synopses of two recent fatal aircraft accidents.

On 3 October 2001, AFMC/CC approved the Accident Investigation Board (AIB) Report on the 17 July 2001 crash of an F-16B aircraft on the China Lake Naval Weapons Station Range, California, in which the Air Force pilot and a civilian aerial photographer were killed. The aircraft was assigned to the 412th Test Wing at Edwards AFB, California. The mishap aircraft was flying a photo/safety chase for a second F-16 aircraft on a test mission to demonstrate reliability improvements of a Miniature Air Launched Decoy (MALD). Following launch, the MALD's engine failed to start and descended in a 20 degree dive to 8,996 feet above mean sea level, deployed a drogue parachute, followed by a recovery parachute, and then drifted to a ground landing. The mishap aircraft was videotaping the launch and flight profile. During the descent of the MALD, the pilot twice executed barrel roll maneuvers to avoid passing the MALD. On the third roll, the pilot entered a very steep inverted dive at high airspeed and was unable to recover from the dive before ground impact. The cause of the mishap was pilot error caused by channelized attention on the MALD and loss of altitude awareness.

On 19 October 2001, AETC/CC approved the Accident Investigation Board (AIB) Report on the 24 August 2001 midair collision between two T-38 aircraft, 59 miles west of Sheppard AFB, Texas, in which the solo Italian Air Force (IAF) student pilot in the first aircraft was killed. The IAF instructor pilot and IAF student pilot in the second aircraft successfully ejected, sustaining only minor injuries. Both aircraft were assigned to the 90th Flying Training Squadron at Sheppard AFB. The squadron is a multinational flying training squadron responsible for providing advanced jet training for fighter pilot candidates in support of the Euro NATO Joint Jet Pilot Training (ENJJPT) program. The solo student pilot in the first aircraft was leading a two-ship basic formation sortie to practice formation and rejoining maneuvers. The second aircraft momentarily lost sight of the first aircraft when the solo pilot initiated a right hand barrel roll maneuver. The position of the sun interfered with the ability of the second aircraft to see the first aircraft during this maneuver. The second aircraft's vertical tail collided with the left fuselage and cockpit area of the first aircraft, immediately killing the solo pilot. The cause of the collision was due to several crew errors to include

the crew's failure to correctly assess their positions and rates of closure in time to avoid the collision.

Claims are both pending and anticipated from these incidents. It is important to note that, in both these cases, a Judge Advocate served as an integral part of the Accident Investigation Board. The legal advisor's role of insuring compliance with the statutory and regulatory requirements (e.g. witness interviews, findings of causation, collection and preservation of evidence, etc.) for these investigations is a central one. Further, these reports serve as the factual basis for claims arising from aircraft mishaps. The Accident Investigation Board Legal Advisor Course noted above is an excellent tool in this preparation process.

CHANGING THE PARALEGAL MOLD

Technical Sergeant Larry G. Tolliver

- **WHERE ARE WE HEADED AS A PROFESSION?**

When I became a paralegal in 1996, that was not a very important question. Now, that question is unequivocally the most important question a paralegal can ask. Why is this? Due to military downsizing and the process of reengineering our Claims functions, we will be searching for jobs to maintain our manning levels.

Previously, I worked as an Air Traffic Control Radar Maintenance Technician in a Communications Squadron. It was a very fulfilling career, however, the paralegal profession was a field that definitely piqued my interest. I began my retraining as most of us did, at Maxwell AFB, which is where I was first introduced to the idea that we may lose the Personnel Property Claims (PPC) portion of our business. As an inexperienced 3-level paralegal, that was the least of my worries. I was more concerned with completing upgrade training and working in military justice. However, in our changing Air Force, those tasks we considered ourselves masters at (PPC, hospital recovery, administrative discharges) are slowly slipping away and we must stand up and create our own future.

- **Now, how will we create our own future?**

We all know that claims and military justice make up a vast majority of our business. Keeping in line with AF Vision 2020 and EAF concepts, we must be prepared for deployments anytime, anywhere. This concept will open numerous positions for paralegals to step in and occupy. Nevertheless, it will be on our own merits that these opportunities become known. The nontraditional roles our military will be involved in will require the paralegal to evolve and become a warrior. Peacekeeping and humanitarian actions will ask us to deploy to bare bases and set up as if we are JAG ready. Clients will not want to hear "give me a couple of days." They want and deserve our assistance immediately. The EAF and AEF concept characteristics are power, range, speed, flexibility and precision. Of those characteristics paralegals will have to emulate the power to work under duress, the range to reach back to their home base for assistance, the speed to accomplish difficult tasks in a minimum amount of time, and the flexibility and precision to do it correctly the first time, all from a tent, if need be. We will have to take a very strong and determined approach at becoming more involved in our operational law side of the house. Many new challenges are starting to be placed in front of us and accepting these challenges as opportunities to excel will infinitely benefit our profession. More importantly, the pride we will receive when a mission is completed will be immeasurable.

Operational law, Law of Armed Conflict (LOAC), Contract law, Ethics, legal research, and trial team participants, are sections where we must make our presence known. These areas will give us continuous business while assisting us in honing our true paralegal skills that are lying dormant and waiting to blossom.

On the operational side, today's paralegal must be ready to brief a deploying unit on LOAC, or assist military members with reporting alleged LOAC violations. We must also be ready to handle any issue stemming from that deployment, such as claims relating to our convoys or deploying troops. You and I know that if an accident can happen it will. Which will bring up issues involving liability, requiring paralegals to become familiar with Status of Forces Agreements, international agreements, host nation laws and treaties. Every military deployment and/or war-like scenario will render certain behavioral patterns, which may have to be addressed in a military justice arena.

Offenses, which are punitive articles, such as AWOL and desertion, will most likely be associated with a deployment or contingency.

Procurement law issues will need addressing, especially if we are setting up a bare base. Just imagine, if the tissue does not come in on the next flight! Are we allowed to locally purchase toiletries? Well, someone had better have the answer or there will be big trouble in little China. These are some of the small things behind the scenes that we can have a big piece of, if we volunteer, step forward, and learn the rules of the game.

Other issues such as ethics and military justice will definitely come into play, when foreign diplomats bestow gifts upon our commanders on behalf of their

TSgt Tolliver is currently the Law Office Manager at the Electronic Systems Center at Hanscom Air Force Base, Maine.

nations. What would we recommend for military members who may accept gifts from other nations without declaring them or even seeking legal advice? The Joint Ethics Regulation provides guidance for DoD employees on the limits established for gifts from outside sources and subordinates, to include scholarships and grants. These are not issues that paralegals deal with on a daily basis, however, they are issues we can assist our attorneys in being able to provide an answer to a client in a timely manner.

We need to become proficient in preparing trial briefs and legal research. This is the work that we deem paralegal certified. These are the "Lawyer Level" tasks that will truly set us apart from that "Glorified Administrative" label that I have frequently heard in my career. When we are proficient in becoming part of the trial team, then, and only then, we will be where so many paralegals before us wanted us to be. In a sense, it will be our duty to determine where we are headed as a profession. It is now time for us to become the paralegals we have wanted to be for so long.

Where are we headed as a profession? Wherever we want to go

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


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