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General Ira C. Eaker

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The Reporter

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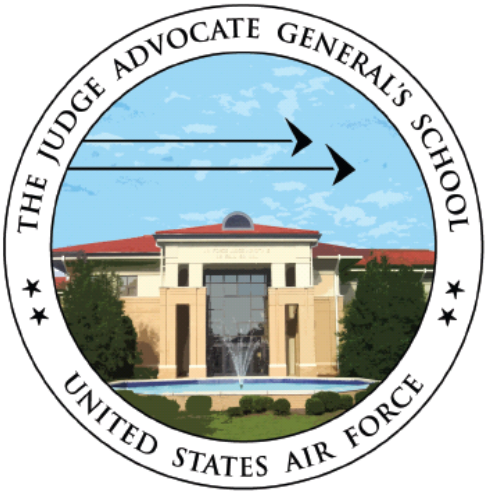

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FROM THE EDITOR

Leadership is at the forefront of this edition of *The Reporter*. Brigadier General (ret) Roger A. Jones shares invaluable leadership lessons from his many years as a staff judge advocate. Gen Jones bring those leadership lessons to life, while infusing them with practical advice for all JAG Corps leaders. This edition of *The Reporter* also boasts an article from a future commander. Major Frederick D. Thaden, on his way to be the MSS/CC at Hill AFB, tackles the timely issue of blogs and restrictions on the freedom of speech. Major Thaden wrote this article while attending Air Command and Staff College. He offers an insightful analysis, with practical application for JAGs as well as commanders. Not bad for a non-JAG! We would like to thank all of the contributing authors for the great work they do every edition. We could not do it without you!

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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 Judge Advocate General's Corps. Items or inquiries should be directed to The Judge Advocate General's School, AFLOA/AFJAGS (150 Chennault Circle, Maxwell AFB AL 36112-6418) (Comm (334) 953-2802/DSN 493-2802).
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The Commandant's Corner...

For many years, our School has been an important component of the Ira C. Eaker College for Professional Development, and Air University. We enjoyed our association with the other schools in the College and AU and we grew as officers, NCOs and civilian professionals thanks to leadership by outstanding officers like the current commanders, Col Howie Short and Lt General Steve Lorenz. But our Air Force is undergoing a critical transformation, not unlike that advanced by General Eaker as our Air Force was established as a separate Service following World War II and the JAG School is transforming as well. On 31 May 2006, the School transferred from Air Education and Training Command to the newly-created Air Force Legal Operations Agency and it has been redesignated The Judge Advocate General's School. These changes are part of the *JAG Corps 21* initiative and open many exciting possibilities for the faculty and staff of the JAG School. More importantly, they enable the funding, manning, freedom of action, and intellectual firepower to accomplish things our predecessors could only dream of doing.

Our staff is working hard to complete the mechanics of the transition to our new command while we maintain the steady volume of courses that are the School's bread and butter. We've just completed the SJA and LOM Courses and both were very successful learning opportunities for new leaders and others who are returning to leadership posts throughout the Corps.

This transition is designed to give the Corps a better training program. When completed, we'll be able to devote more time to scholarship and direct support to the field. We will have the resources to provide tailored instruction in a timely fashion to those just about to deploy. We will more successfully capture the lessons of those returning from deployments and rapidly and effectively incorporate those lessons into course content. We will add new courses and revise the content of others more rapidly than we have in the past. In short, we will be more current and relevant.

Change on this scale is not easy. It has been and is being accomplished by the tireless efforts of your faculty and staff, with strong support from the Air Staff and AFLOA. All of us want your School to have a continuous dialog with the field on what sort of training products are needed and how those already in the inventory are working for those who carry out the mission. Please take us up on our offer to talk about the courses and their content. We need your ideas about what to teach and how it should be taught. There are no limits to the discussion; only a strong desire to ensure we use education and training to make you a more effective member of the Air Force.

Our Corps has accomplished many things in the last six months that would have seemed impossible just a year ago. With your help, the School can continue to be a powerful ally in the Corps' efforts to improve the quality of our practice and the lives of the Airmen and commanders we serve. These are achievements worthy of the effort and they are things General Eaker would have been quite proud of!

David C. Wesley, Commandant

Leadership Lessons for Staff Judge Advocates

Brigadier General (ret) Roger A. Jones

We are all in a position to contribute to our great Air Force and to the JAG Corps. We contribute in many ways, but perhaps our most important responsibility is to build the leaders of tomorrow's Air Force.

Never miss an opportunity to learn or teach a leadership lesson. The last seventeen years of my 29-year JAG career were as an SJA. During that time, I applied the leadership lessons I had learned during the first part of my career, and I found the "lessons learned" never ceased until the day I retired—lessons from both those above me and those below me.

I have long recognized that leadership is not about position or rank; it is about contributing to the overall mission and striving to make things better. The greatest rewards from my JAG career were not those I achieved personally, such as rank or position. Instead, the greatest rewards came when I worked to make improvements for those who served, including "cultivating" and supporting those young JAGs who followed me and who progressed to leadership positions. I would like to take this opportunity to share some of those leadership lessons with you.

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Integrity —Always!

Integrity is the core of leadership. We all know that integrity means doing the right thing even when no one is looking; however, integrity issues are not always so easy to identify. Integrity also means honesty—with supervisors, commanders, peers, and even yourself. Telling the truth is not always easy and often requires moral courage. I believe one of the most challenging issues we face in the JAG Corps is the delivery of bad news. Whether you are on the receiving or delivering end of the negative information, it is never comfortable, but we all have to experience it. Delaying or avoiding the conveyance of such information is simply poor leadership.

During my assignment as the SJA at Nellis AFB, my supervisor was a major general. It is never easy to deliver bad news to a two-star. On one occasion, I was faced with the challenging task of questioning the general's actions. He had publicly denied the existence of a video involving a serious aircraft accident. Unfortunately, the video did exist. I felt his actions were potentially perilous to himself and the Air Force; I knew I had to address my concerns with him. I dreaded the task, looked for any reason to avoid the encounter. Initially he was unhappy, but he soon opened up and discussed the entire accident situation with me. He did not specifically thank me for being frank, but he knew I was protecting him and the interests of the Air Force. It was an anxious moment in my career, but also a defining one because he appreciated my honesty. From that point forward, I could do no wrong in the general's eyes. I became his confidant because I had not been afraid to speak the truth and convey adverse information. Leaders must have the strength and will to always say and do what is right.

Leaders must also encourage others to speak the truth. As an SJA, I always encouraged my staff to bring me any bad news immediately. I promoted dialogue by including my staff in discussions of major issues. Whenever I faced a challenging situation, I would call the best thinkers into my office and ask their input. I believe they trusted me enough to be completely candid, even though sometimes I could tell they were nervous. They all knew I would respect their opinions and would never hold it against them if they said "Boss, you are crazy" (which they did on

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more than one occasion). I endeavored to create an atmosphere where people felt they could speak their minds, even if contrary to my views. A leader cannot realize the full potential of his or her followers if those who follow are reticent to speak the truth.

Develop the Talent

The worst thing an SJA can do is hide talent, and/or try to be a one-person office. The development of leaders in the JAG Corps is a long-term process--you must think beyond the present. While it is tempting to hang on to a smart, hard-working captain because he or she is a major asset to the office (and you), you must recognize that person's potential for future contributions to the Corps and the Air Force. Young JAGs need visibility and confidence. As an SJA, I insisted that captains have face-time with the senior leaders on base. If a captain worked an issue, that captain would be the one to brief it to the leadership. This was important for many reasons. First, that young JAG generally knew the issue a great deal better than I did; secondly, it provided the captain with visibility; and, thirdly, it cultivated confidence in his/her ability to research and present issues. Too often, leaders want to dominate the limelight with commanders, much to the detriment of their subordinates. Remember, it is a major responsibility of leadership to cultivate the next generation. A leader develops through training, education and practical application.

Successful development of talent includes pushing people out of their comfort zone. I insisted that the young JAGs rotate jobs within the office every six months. This inevitably brought protests from the staff; and, quite frankly, my own comfort level would have been enhanced had they remained in one job indefinitely. I knew, however, from my own experience as a young JAG that learning all facets of a legal office was essential in cultivating and developing future SJAs. Initial base-level assignments may be the only real opportunities JAGs have to round out their knowledge and experience. My staff would complain, "But Boss, I was just starting to figure it out and become proficient." Exactly! A great SJA and leader is proficient in many areas, but not necessarily an expert in any one area. There is nothing wrong with becoming an expert, but that should be saved for later in a career, when the judge advocate has become competent in all areas.

Eliminate the Non-Performer

Perhaps the most difficult SJA task of leadership is recognizing those individuals who do not have a future in the blue uniform—who simply do not measure up. The easy response is to ignore the problem, as we are inclined to do, and push that individual along. No one wins in that situation, least of all the Corps and the Air Force. You must have the courage to eliminate members of the team when they do not perform to expectations. A non-commissioned officer arrived at Nellis while I was the SJA. He came from his last assignment with a decoration and strong performance reports. I immediately started seeing cracks in his performance. He would arrive late for work and would be missing during the day for two or three hours at a time. During the same period, we were investigating a rash of false claims at Nellis. As a preventative measure, we met with finance once a month to reconcile our books, and I would receive status reports from this claims NCO advising me that the books had been reconciled with no irregularities. One afternoon I received a call from finance asking why we had not met with them for several months to reconcile the books. My NCO had lied to me. When confronted, he admitted he had a drinking problem. He had been advanced by previous supervisors because no one had the courage to confront him. He received an Article 15 and was encouraged to retire, which he did. I knew that the JAG Corps and the Air Force would pay a thousand times over if this NCO continued to serve.

Know Your Boss

If you do not know your boss, you will be fired. You may not be fired in the technical sense, but you will lose the confidence and respect of your boss if you fail to sit back and figure out what makes him or her tick. At Nellis, I saw the commander fire four chiefs of staff in six months. They simply did not take the time to understand what was important to him and how he operated. He was a very detail-oriented person and had a tendency to micromanage. (I once jokingly called him a "micromanager." He turned, looked straight at me and replied, "The only people who use that term are those who don't have the responsibility." He was right, as usual, and I never forgot his words.) When he asked a question, he wanted the right answer, not necessarily a quick reply. I soon learned that he appreciated it when I said, "I don't know, but I'll be back." He wanted solid advice, not a "shoot-from-the-hip" response. Some of his staff just never learned that. I also quickly realized that it was impossible to talk to him in the morning; he was temperamental then. Mornings were the worst time to communicate with him--and Friday afternoons were the best. He was always in a great mood on Friday afternoon. Needless to say, I scheduled my most important and challenging issues on Friday afternoon. Know your boss!

Reward Your People

When you see top performers, you must reward them and push them. In the Air Force, we have limitations on how we can reward our people. We have two obvious avenues: promotion and awards, which you must use to their full potential. You should never fail to reward someone simply because you were too busy to put together the award package. I believe very strongly in the "Pin 'em where you win 'em" concept. I always made sure that commanders pinned awards on my people before they left. I would then write a letter to their gaining supervisors, telling them about the individual and the great contributions they had made.

Rewards are also available in more subtle forms. I always took time to walk around and visit with the staff when I had no specific reason to do so. They appreciated it. As a further example, if I reviewed a captain's work at night, I would place a note on his/her desk with a simple, "Good work." This note was the first thing to greet the captain when he/she came in the next morning and he/she would start the day feeling appreciated. Never underestimate the power of appreciation.

Challenge your people and support them when they work hard. A JAG who PCSd to our office was devastated because she had not received career reserve status. I told her to work hard and I would worry about her career status. It worked. She was a stellar performer and was selected as Junior Officer of the Year—on a fighter base. She went on to make major and then lieutenant colonel below the zone. It was a win-win-win situation for her, for me, and for the Air Force.

Make Your Deputy Your Trusted Agent

Deputies are SJAs in training. You must trust them and challenge them. Let your deputy handle the tough issues and ensure he/she interacts with the commander. You have to be willing to relinquish control to your deputy and let him or her work with your staff to accomplish the job. Too often I have seen SJAs fail to use the talents of their deputies. I recall one SJA who was ultimately fired because he did not trust his people and insisted on reviewing everything himself. His work piled up and he would not let his deputy—or anyone else—review it for him. He was wholly ineffective as an SJA.

You cannot keep your deputy in the closet like a mushroom. I always included my deputy, even when my boss instructed me to work a matter myself. I felt more comfortable having someone to discuss issues with, and I inevitably learned something from the discussions. In turn, I always supported my deputies. I gave them the power to make decisions, and then never second-guessed them. While there were occasions I cringed internally at the advice they had given, I supported them publicly. There was always a way to resolve the legal issue correctly, while at the same time working within the advice given by the deputy. As a result, my deputies gained confidence and were extremely effective in running the office during my absence. Hopefully, their deputy experience made them better SJAs when their opportunity came.

Conclusion

Leadership lessons are all around you. From the general or colonel you work for, to the brand new two-striper in your office, you can learn something. Seek leadership opportunities and never close your mind to lessons about leadership. In seventeen years as an SJA I never stopped learning —and neither should you!

Deputies are SJAs in training. You must trust them and challenge them. . . .You cannot keep your deputy in the closet like a mushroom.

PRACTICUM

Major Jennifer A. Hays

POST-TRIAL RECOMMENDATIONS AND THE OPPORTUNITY TO REPOND

As we know, the findings and sentence of a court-martial are subject to review by the convening authority. Article 60, UCMJ, 10 U.S.C. Section 860 (2000). If the case was tried before a general court-martial or before a special court-martial in which a bad conduct discharge or confinement for one year or more was adjudged, then the convening authority must obtain the recommendation of their staff judge advocate (SJA) before taking action. RULE FOR COURTS-MARTIAL (R.C.M.) 1106(a). The SJA must serve the SJA recommendation (SJAR) on the accused and defense counsel and provide them the opportunity to comment. After the defense has the opportunity to comment, the SJA should prepare an addendum to the SJAR for the convening authority. If the addendum contains a "new matter," the addendum must be served on the accused and counsel, again giving them the opportunity to comment on the addendum. R.C.M. 1105(c)(1). *United States v. Catalini*, 46 M.J. 325, 326 (1997). It is at this point complications often ensue.

Catalini did not attempt to define "new matter." We turn to the manual for our best definition. R.C.M. 1106(f)(7) in the discussion section states:

> "New matter" includes discussion of the effect of new decisions on issues in the case, matter from outside the record of trial, and issues not previously discussed. "New matter" does not ordinarily include any discussion by the staff judge advocate or legal officer of the correctness of the initial defense comments on the recommendation.

In *United States v. Denegre*, (2006 CCA LEXIS 99) a recent United States Air Force Court of Criminal Appeals case decided 18 April 2006, an appellant contended the addendum to the SJAR contained "new matter" that was not provided to defense counsel for comment. The court held the SJAR did contain "new matter" and returned the case for new post-trial processing. The action of the convening authority was set aside.

In *Denegre*, the accused was convicted, contrary to his pleas, of wrongful use of cocaine on divers occasions. He was sentenced to a bad conduct discharge (BCD), confinement for 2 months, and reduction to E-1. In his post-trial clemency submission, the accused and his defense counsel asked the convening authority to disapprove the BCD. As in trial, the accused presented numerous mitigating personal circumstances explaining his illegal drug use. The SJA was then prompted to contact trial defense counsel to inquire whether the accused would consider a change to the nature of the punishment imposed. The possibility of converting the BCD to more confinement time was discussed. The accused was not receptive. An addendum to the SJAR was then prepared and included language specifically stating the accused "was unwilling to consider proposed alternatives to a bad conduct discharge." The addendum also went on to state the SJA had queried the defense counsel on whether the accused would be prepared to serve additional confinement in lieu of the BCD. The addendum then stated the SJA took the accused's failure to agree to serve additional confinement time in lieu of the BCD as an indication of a "lack of commitment to do whatever is necessary to remit his BCD." The addendum recommended the convening authority approve the sentence as adjudged, which in fact occurred.

The standard of review for determining whether the addendum to the SJAR contains a "new matter" is de novo. *United States v. Key*, 57 M.J. 246, 248 (2002). The appellant's additional burden is to demonstrate prejudice has occurred by stating what would have been submitted to either deny, counter, or explain the "new matter." If the "new matter" is neutral, neither derogatory nor adverse to the appellant, or if it is so trivial as to be nonprejudicial, failure to serve the new matter on the defense is not prejudicial. *Catalini*, 46 M.J. at 326 (citing *United States v. Jones*, 44 M.J. 242, 244 (1996)). The critical message being, "If an appellant makes some colorable showing of possible prejudice, we will give that appellant the benefit of the doubt and we will not speculate on what the convening authority might have done if defense counsel had been given an opportunity to comment," (quoting *Jones*, 44 M.J. at 244). The threshold is low in establishing such prejudice has occurred. *United States v. Chatman*, 46 M.J. 321, 323 (1997)

In *United States v. Amador*, 61 M.J. 619 (A.F. Ct. Crim. App. 2005) the court found that statements in the addendum made by the SJA were directly attributable to evidence in the record, or were a discussion of the correctness of the trial defense counsel's comments in response to the SJAR. Basically, the appellant must also demonstrate the proffered response to the unserved addendum "could have produced a different result." *United States v. Brown*, 54 M.J. 289, 293 (2000).

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The appellate court in *Denegre* analyzed the "new matter" issue and concluded, "This is not a close call." The SJA informed the convening authority in an addendum to the SJAR about discussions with defense counsel which were directly related to the sentence adjudged and under consideration by the convening authority. The court stated, "The one-sided recitation and interpretation of that discussion and its aftermath certainly were outside the record." The representation that the accused was "unwilling to consider proposed alternatives" was labeled "inexact, at best" and "flatly, misleading at worst." The comments even reflect that the accused and his counsel considered the overture. The court stated, "Unwillingness to agree does not mean unwillingness to consider." The comment amounted to "new matter." See *United States v. Komorous*, 33 M.J. 907, 910-11 (A.F.C.M.R. 1991). Further, the case was considered unusual in that the court continued to find a colorable showing of possible prejudice was established by the addendum's comments alone. The general court-martial convening authority received advice from his senior legal advisor who presented one side of a post-trial negotiation regarding clemency issues. The convening authority "needed to know" the details of the discussion between the SJA and defense counsel to put the accused's decision regarding changing the punishment into context and allow the accused the opportunity to explain his position about serving additional confinement. The action of the convening authority was set aside and the record of trial was returned for new post-trial processing.

In another recent appellate case, *United States v. Frederickson*, No. 04-0720, decided by the Court of Appeals for the Armed Forces (C.A.A.F) on 7 April 2006, an appellant contended that an addendum contained a new matter by incorrectly implying the appellant was unrepentant, profited financially from his thefts, and personally used the stolen items. The appellant also contended the tone of the addendum constituted a "new matter" because it characterized appellant's conduct in a derogatory and condescending manner.

The background of the case included an Air Force appellant who had been convicted at a general court-martial, pursuant to his pleas, of conspiracy to open and steal mail matter, unlawful entry with intent to steal mail matter, unlawful opening of mail matter, and unlawful opening and stealing of mail matter (four specifications), in violation of Articles 81, 130, and 134, UCMJ. The adjudged and approved sentence included a dishonorable discharge, confinement for twenty-two months, forfeiture of all pay and allowances, and a $15,000 fine.

The deputy SJA prepared a post-trial recommendation to the general court-martial convening authority under R.C.M. 1106, which he served on the defense. The recommendation noted the plea of guilty pursuant to a pretrial agreement. The deputy SJA also summarized the case, stating the accused had committed the offenses with a coworker at a military mail facility. Apparently, the accused and the coworker entered a secured building at night without authority on several occasions and opened sealed mail. They also removed $15,000.00 worth of electronic equipment and jewelry. Most of the items were kept in the coworker's dorm room. The SJA's recommendation noted the accused admitted to stealing the property with intentions of pawning the items.

Defense counsel submitted a clemency request following receipt of the recommendation. In the clemency package, the accused provided a personal memorandum requesting clemency. The defense also requested the dishonorable discharge be reduced to a bad conduct discharge and disapproval of the $15,000 fine.

Once clemency matters were submitted, the deputy SJA then prepared an addendum to the SJA recommendation. The addendum was endorsed by the SJA. The addendum was not served on the defense counsel or the accused. In the addendum, the convening authority's attention was directed to the submissions of the accused and defense counsel. There was a detailed summary of the defense request for clemency. After the detailed description of the defense submissions, the deputy SJA then offered numerous observations, including: (1) The accused would not be asking for a change in discharge if he had thought of the consequences before he committed the offenses; (2) issuance of a dishonorable discharge is not limited to cases of violence, but instead is determined under the circumstances of each case; and, (3) the fine was appropriate in view of the value of the property. The United States Air Force Court of Criminal Appeals affirmed. *United States v. Frederickson*, No. ACM 35442, 2004 CCA LEXIS 181, 2004 WL 1539555 (A.F. Ct. Crim. App. June 30, 2004).

C.A.A.F granted review and considered whether the proffered defense responses to the unserved addendum could have produced a different result by the convening authority. The Court assumed, without deciding, that the implications and tone of the addendum constituted "new matter," which should have been served on the defense. To determine if the appellant had made a colorable showing of prejudice, the Court considered whether the proffered defense responses to the addendum could have produced a different result. The proffered defense responses basically mirrored what the defense submitted to the convening authority during initial post-trial proceedings. The Court concluded the appellant didn't establish the req-

uisite showing of prejudice by their lack of receipt of the addendum.

In *Frederickson*, the Court states that SJAs can preclude unnecessary appellate litigation by following a very simple guideline and only providing convening authorities with an addendum to the SJAR when necessary. However, Air Force Instruction (AFI) 51-201, *Administration of Military Justice (26 November 2003)*, paragraph 9.6.3., *Addendum to the SJA's Recommendation*, states an SJA should prepare an addendum to the recommendation for the convening authority whenever the SJA receives matters from the accused or defense counsel under RCM 1105 or 1106(f)(4). The AFI further states the addendum can address matters raised by the defense, but is required to advise convening authorities that they must consider all matters submitted by the defense prior to taking action on the findings and sentence.

It is agreed that SJAs are best served in broadly construing the term "new matter" for purposes of providing the defense and the accused with an opportunity to respond to an SJAR's addendum. In the event an addendum is prepared containing a "new matter" and served on the accused and defense counsel, they are given ten additional days from service of the addendum in which to submit comments.

Therefore, legal advisors to convening authorities should proceed cautiously in the language construction of an addendum to the SJAR. The safest route for military justice practitioners is to broadly construe the term "new matter" as the courts recommend. When in doubt, serve an addendum on the defense and the accused, forgoing appellate issues and potential set asides of court-martial actions. All parties and the ends of justice are best served by erring on the side of caution in the addendum arena.

CAVEAT

Paula B. McCarron

GETTING THE *CARE* INQUIRY RIGHT ISN'T AS EASY AS IT LOOKS

In an unpublished opinion, *United States v. Doolin*, ACM 35825 (14 Dec 05), the Air Force Court of Criminal Appeals reviewed factual discrepancies between the accused's pleas of guilty to two specifications of conduct unbecoming an officer under Article 133, UCMJ, for use and distribution of 1-(3-triflouomethyphenyl) piperazine (TFMPP) and his answers to the military judge during the providence inquiry. The military judge's questioning elicited conflicting responses as to the "wrongfulness" of the use and distribution of this "legal Ecstasy." Trial counsel noted that the problems with the accused's *Care* inquiry resulted from the confusion over the wrongful nature of the substance, which presumably led to the preferral of an Article 133 charge in lieu of Article 112a.

The Air Force Court found the military judge erred by accepting the pleas as to those specifications where the accused had apparently thought it was a legal, prescription drug he obtained through the internet, albeit for the purpose of taking and distributing them for its mood altering qualities. Although the Air Force Court set aside the findings as to that charge, it found no reason to adjust the sentence of a dismissal and confinement for six months.

Clever charging can get charges to court, but military judges and trial counsel must ensure the providence inquiry conforms to the elements of the offense for which the accused has been charged and be on guard against an accused providing information inconsistent with the pleas.

IS AN ALPHA ROSTER (SLIGHTLY MODIFIED) ENOUGH?

Critical to the perception of fairness in our system of military justice is the process for the selection of court members. For many years, SJAs have struggled with the best way to assist the convening authority in that process without running afoul of the prohibition against unlawful command influence by "court stacking." In *United States v. Carr*, ACM 35300 (25 Aug 05), the Air Force Court of Criminal Appeals addressed the issue of whether simply providing the convening authority an alpha roster of all officers assigned to the installation, with a small modification, provides enough information for the convening authority to satisfy Article 25, UCMJ.

In *Carr*, the SJA advised the convening authority in his pretrial advice that he had removed from the alpha roster "all officers who are not eligible to serve as court members (i.e., JAGs, chaplains, IGs or officers in the accused's unit.)" The SJA directed the convening authority to write the names of those officers selected from the modified alpha roster. The Court found no error in the selection process, but discouraged the practice of "merely providing the convening authority the alpha roster" as perhaps not "the best way of ensuring the convening authority complies with Article

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25, UCMJ." The Court noted that even though the legal office used this practice to eliminate the criticism that the convening authority did not personally select the members, ironically, the process actually created the *impression* that the convening authority violated Article 25.

With regard to the SJA eliminating JAGs, chaplains, IGs and officers from the accused's unit from the roster, the Court stated that with the possible exception of chaplains, none of the removed officers were *per se* prohibited from court member service, and, therefore, the SJA's statement in the pretrial advice was incorrect. While the Court found error, it did not find prejudice to the appellant because while JAGs, IGs and officers from the accused's unit are *eligible* to serve as court members, they are likely to be *challenged* by counsel if selected by the convening authority. The better practice is to allow the convening authority to give appropriate consideration to all categories of members who may legitimately be assigned to court-martial duty.

TO INFORM OR NOT TO INFORM?

The Air Force Court of Criminal Appeals addressed, in *United States v. Hoagland*, ACM S30795 (28 Feb 06) whether the military judge's opinion, expressed at trial, that the accused could successfully complete the Air Force Return to Duty Program (RTDP) should have been included in the staff judge advocate's recommendation (SJAR).

Rule for Courts-Martial 1106(d)(3)(B) requires the SJAR to inform the convening authority of any "recommendation for clemency by the sentencing authority, made in conjunction with the announced sentence." The court found that the military judge's comments did not amount to a recommendation and therefore, were not required to be included in the SJAR. As an aside, the court noted that any possible prejudice to the accused was erased when the military judge later submitted a written recommendation for entry into the RTDP, which the accused included in his clemency submission.

What does this mean for practitioners? One might consider whether the prudent practice would be to mention comments, such as the military judge's here, in the SJAR. The convening authority is not obligated to follow a recommendation for, or an opinion about, clemency and making mention of such comments in the SJAR, be they recommendations or opinions, would eliminate a potential issue on appeal.

IT'S THE MILITARY JUDGE'S CALL

Among several issues raised on appeal in the case of *United States v. Moran*, ACM 35755, (Oct. 20, 2005), the Air Force Court of Criminal Appeals examined whether the military judge had abused his discretion, and thereby deprived the accused of his Sixth Amendment rights, by prohibiting re-cross of a witness by trial defense counsel. In this case, the military judge cut off trial defense counsel and instructed members of the standard procedure for examination of witnesses. The Court noted that, taken out of context, the military judge's curt exchange could raise concern. In context, however, the Court found that the only time the judge did not permit re-cross was on the fifth of sixteen government witnesses, permitting re-cross and questions by members on several others. Trial defense counsel did not request re-cross on other witnesses and was permitted to re-cross after members' questions in other instances. In affirming the judge's broad discretion to impose reasonable limits on cross-examination, the Court sent out a reminder to counsel that only unreasonable limitations, not *perceived* ones, will withstand abuse of discretion on appeal.

ADMINISTRATIVE LAW

Lieutenant Colonel Phillip J. Kauffman
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RECOUPMENT 2006

I. Background

Service members are often given special pays for a variety of reasons ranging from reenlistment to educational assistance. In exchange, service members agree to fulfill certain service requirements, usually to serve for a specific period. When a service member fails to meet his or her end of the bargain, the service member must, in most circumstances, repay a pro rata share of the special pay.

The qualifying criteria for dispensing special pays and their repayment (or recoupment) are established by federal statute. Each special pay is established in a separate statute. Several of these statutes contain terms open to more than one reasonable interpretation. They also grant discretion to the agency in defining exemptions.

In the interest of uniformity, the Office of the Secretary of Defense (OSD) issued several policy memoranda articulating a single, unified view. The first of these memoranda appeared in 1994 (the Deutch Memo) and addressed when to seek recoupment in homosexual conduct discharges where the separation was "voluntary" or because of "misconduct."

Two memos issued by OSD in 2005 superseded the 1994 Deutch Memo and sought to clarify application of recoupment statutes in all cases, not just those based on certain types of homosexual conduct. They urge aggressive pursuit of recoupment while giving the Service Secretaries authority to grant exceptions to repayment. Recoupment may be waived by the Service Secretaries under such exceptional circumstances as death, illness, injury or other impairment of a service member not due to his own misconduct; elimination of a service member's occupational specialty; or the needs of the Service.

Finally, the FY06 National Defense Authorization Act (NDAA) added a catch-all statutory provision standardizing certain aspects of recoupment. The changes made by the FY06 NDAA also formally granted the Secretary of Defense discretion to determine additional exceptions to the triggers for repayment. As of this date, the Secretary of Defense has not identified exceptional circumstances warranting waiver of recoupment.

The changes made by the FY06 NDAA apply only to special pays made after 1 Apr 06. For recoupment cases involving special pays paid on or before 1 Apr 06 the 2005 OSD memos apply, as well as the statutes specific specific to each type of special pay.

As mentioned before, the 1994 Deutch Memo was officially superseded by the 2005 OSD memos. However, some special pay statutes name "misconduct" as a trigger for recoupment, and this key statutory term was interpreted succinctly by the Deutch Memo. The Memo says "misconduct" triggers recoupment if a characterization of under other than honorable conditions is authorized or the conduct is punishable under the UCMJ. The AF Administrative Law Division finds the interpretation of "misconduct" contained in the Deutch Memo to be the agency interpretation and continues to advise that it be followed.

II. Suggested Approach to Recoupment

As we await further implementation guidance from OSD regarding the discretion granted in the FY06 NDAA, we suggest use of this guide for cases involving recoupment issues.

1. Ascertain the type of bonus, special pay, or other benefit the respondent has received.

2. Find and read the statute which authorized the pay in question. If repayment hinges on voluntariness or misconduct and the basis for separation is homosexual conduct, require repayment if the misconduct in question could result in a UOTHC characterization or is punishable under the UCMJ. [Note: Statements of homosexual orientation, homosexual marriage and attempts at homosexual marriage, standing alone, do not trigger recoupment for misconduct.]

3. For cases involving special pays obligated after 1 Apr 06, apply the triggers governing repayment contained in the relevant statute and the generic guidance provided in 37 U.S.C. §303a(e).

4. Appeal to the Secretary of the Air Force if circumstances merit an exception to repayment.

III. Summary of Effects of FY06 NDAA on Recoupment (Repayment) Provisions

Each pay provision in Titles 10, 37 and 14 affecting members of the uniformed services has been

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amended to conform to standard guidelines for recoupment. These are articulated in the newly enacted 37 U.S.C. §303a(e). As before, the trigger for repayment varies by type of pay. Most depend on service for a specified period while others add requirements related to job qualification. For homosexual conduct cases, the Deutch Memo no longer has formal effect. Instead, practitioners should look to the statute governing the type of pay involved and determine whether the Deutch Memo definition of "misconduct" as a recoupment trigger applies.

A. Generic Guidance on Recoupment Applicable in Every Bonus and Special Pay Case 37 U.S.C. §303a(e): *Repayment of Unearned Portion of Bonuses and Other Benefits When Conditions of Payment not Met*

A member of the uniformed services who receives a bonus or similar benefit and whose receipt of the bonus or similar benefit is subject to the condition that the member continue to satisfy certain eligibility requirements shall repay the United States an amount equal to the unearned portion of the bonus or similar benefit if the member fails to satisfy the requirements, except in certain circumstances authorized by the Secretary concerned.
The Secretary concerned may establish, by regulations, procedures for determining the amount of the repayment required under this subsection and the circumstances under which an exception to the required repayment may be granted. The Secretary concerned may specify in the regulations the conditions under which an installment payment of a bonus or similar benefit to be paid to a member of the uniformed services will not be made if the member no longer satisfies the eligibility requirements for the bonus or similar benefit. For the military departments, this subsection shall be administered under regulations prescribed by the Secretary of Defense.
An obligation to repay the United States under this subsection is, for all purposes, a debt owed the United States. A discharge in bankruptcy under title 11 does not discharge a person from such debt if the discharge order is entered less than five years after—
(A) the date of the termination of the agreement or contract on which the debt is based; or
(B) in the absence of such an agreement or contract, the date of the termination of the service on which the debt is based.
[This subsection applies to cases commenced under title 11 after 30 Mar 06.]
In this subsection:
(A) The term "bonus or similar benefit" means a bonus, incentive pay, special pay, or similar payment, or an educational benefit or stipend, paid to a member of the uniformed services under a provision of law that refers to the repayment requirements of this subsection.
(B) The term "service," as used in paragraph (3)(B), refers to an obligation willingly undertaken by a member of the uniformed services, in exchange for a bonus or similar benefit offered by the Secretary of Defense or the Secretary concerned—
To remain on active duty or in an active status in a reserve command;
To perform duty in a specified skill, with or without a specified qualification or credential;
To perform duty at a specified location; or
To perform duty for a specified period of time.

B. Pay Statutes Organized by Repayment Criteria

1. Repayment based on failure to complete a specified period of service only: Repayment of these bonuses and similar benefits are based solely on failure to complete a period of service specified in the payment agreement.

37 U.S.C. §301b: Aviation officer retention bonus.
37 U.S.C. §301d: Medical officer multiyear retention bonus.
37 U.S.C. §301e: Dental officer multiyear retention bonus.
37 U.S.C. §302: Medical officer special pay.
37 U.S.C. §302a(b): Optometrist retention special pay.
37 U.S.C. §302b: Dental officer special pay.
37 U.S.C. §302e: Nurse anesthetist special pay.
37 U.S.C. §302f(c): Reserve, recalled, or retained health care officers special pay.
37 U.S.C. §302g: Selected reserve health care professionals in critically short wartime specialties special pay.
37 U.S.C. §308b: Reenlistment bonus for selected reserve.
37 U.S.C. §308h: Ready reserve reenlistment, enlistment, and voluntary extension of enlistment bonus.
37 U.S.C. §314: Enlisted members extending duty at designated locations overseas.
37 U.S.C. §315: Engineering and scientific career continuation pay.
37 U.S.C. §317: Critical acquisition positions.
37 U.S.C. §321: Judge advocate continuation pay.
37 U.S.C. §322: 15-year career status bonus.
37 U.S.C. §325: Savings plan for education expenses and other contingencies.
10 U.S.C. §510: Enlistment incentives for pursuit of skills to facilitate national service.
10 U.S.C. §2007: Tuition for off-duty training or education.

10 U.S.C. §2105: Advanced training; failure to complete or to accept commission.
10 U.S.C. §2123(e)(1): Health professions scholarship and financial assistance program for active service.
10 U.S.C. §2200a: Scholarship program for degree program or degree or certification in information assurance.
10 U.S.C. §16303: Loan repayment program for chaplains serving in selected reserve.

2. Repayment based on failure to complete a specified period of service or become and remain appropriately licensed: Repayment of these bonuses are triggered by failure to be commissioned (except §302d), become and remain appropriately licensed, or to complete a period of active duty specified in the payment agreement.

37 U.S.C. §302d: Accession bonus for registered nurses.
37 U.S.C. §302h: Accession bonus for dental officers.
37 U.S.C. §302j: Accession bonus for pharmacy officers.

3. Repayment based on failure (voluntary or due to misconduct) to complete specified period of service: Repayment is triggered by failure to serve for a specified period. Repayment is required whether the failure to complete the specified period of service is brought about "voluntarily or because of misconduct."

37 U.S.C. §307a: Assignment incentive pay.
37 U.S.C. §327: Transfer between armed forces incentive bonus.

4. Repayment based on failure to complete specified period of service or is not technically qualified: Repayment of these bonuses are triggered by failure to serve for a specified period or when not technically qualified in the skill for which the bonus was paid.

37 U.S.C. §308: Reenlistment bonus for active members.
37 U.S.C. §309: Enlistment bonus.
37 U.S.C. §323: Critical military skills retention.

5. Repayment based on failure to commence or participate satisfactorily for a specified period: Repayment of this bonus is triggered by failure to commence service in the Selected Reserve or to participate unsatisfactorily in the Selected Reserve for the total period of service specified in the agreement. If triggered, repayment is governed by 37 U.S.C. §303a(e).
37 U.S.C. §308c: Selected reserve affiliation or enlistment bonus.

6. Repayment based on failure to serve satisfactorily or to serve in the combat or combat support skill for the specified period: Repayment of this bonus is triggered by failure to serve satisfactorily in the element of the Ready Reserve in the combat or combat support skill for the period specified in the bonus agreement.

37 U.S.C. §308g: Ready reserve enlistment bonus.

7. Repayment based on failure to serve satisfactorily during a specified period in the Selected Reserve: Repayment of this bonus is triggered by failure to serve satisfactorily during a specified period in the element of the Selected Reserve with respect to which the bonus was paid.

37 U.S.C. §308i: Prior service enlistment bonus.

8. Repayment based on failure to serve for a specified period in a specified position or with specified duties: Repayment of these bonuses are triggered by failure to complete a specified period of service in a certain type of position or within a specified career field.

37 U.S.C. §312: Special pay for nuclear-qualified officers extending active duty.
37 U.S.C. §318: Special warfare officers extending period of active duty.
37 U.S.C. §319: Surface warfare officers extending period of active duty.

9. Repayment based on failure to complete nuclear power training: Repayment is triggered by failure to commence or complete nuclear power training.

37 U.S.C. §312b(a): Nuclear career accession bonus.

10. Repayment based on failure to satisfy all foreign language pay eligibility requirements for the entire certification period:

37 U.S.C. §316: Foreign language proficiency pay.

11. Repayment based on failure to be commissioned or complete specified period of service: Repayment is triggered by failure to be commissioned or to commence or complete a specified period of service.

37 U.S.C. §324: Accession bonus for new officers in critical skills.

12. Repayment based on failure to convert and complete specified period in AFSC: Repayment is triggered by failure to convert to a specified military occu-

pational specialty and serve a specified period in that specialty.

37 U.S.C. §326: Incentive bonus for conversion to military occupational specialty.

C. Other Pay-Related Statutes That Now Incorporate 37 U.S.C. §303a(e):

10 U.S.C. §2005: Advanced education assistance.
10 U.S.C. §2173: Education loan repayment program.
10 U.S.C. §4348: Army cadet agreement to serve as officer.
10 U.S.C. §6959: Midshipmen agreement for length of service.
10 U.S.C. §9348: Air Force cadet agreement to serve as officer.
10 U.S.C. §16135: Educational assistance for members of selected reserve.
10 U.S.C. §16203(a)(1): Health professions stipend program penalties and limitations.
10 U.S.C. §16401: College tuition assistance program for Marine Corps Platoon Leaders class.
14 U.S.C. §182: Coast Guard cadets, obligation to serve.

CONGRESSIONAL REQUESTS FOR PRIVACY ACT PROTECTED INFORMATION

When you receive a request from a member of Congress for Privacy Act protected records, it can be difficult to analyze. This article is a practical overview as a starting point for your analysis.

Congressional requests for Privacy Act protected information can be divided into three types: I - Committee, II - Constituent, and III - all other types. For all of these requests, the Privacy Act prohibits the release of Privacy Act records unless the subject of the record consents in writing, or the disclosure fits one of the twelve exceptions.[1] Different exceptions apply to each type of request.

I. Committee Requests

Committee requests are controlled by exception 9.[2] The Air Force must disclose Privacy Act records when properly requested by a Congressional committee. The requirements are:

(1) The request is from: either house of Congress, a committee, a subcommittee, a joint committee,[3] or a subcommittee of a joint committee,

(2) For a matter within their jurisdiction,[4] and

(3) From the chairman of the committee or the ranking minority member.[5] There is no requirement the chairman sign the request, a letter from a staff member requesting records on behalf of the committee chairperson (or ranking minority member) for the committee is sufficient.

Assuming these requirements are met, you turn over all portions of the file that were requested (without any redactions). You should include a transmittal letter stating: what information is sensitive and the need to safeguard the information.[6]

II. Constituent Requests

Frequently, members of Congress ask for Privacy Act information regarding a constituent based on a request for help from that constituent. Please note these rules apply to a request from a constituent for help from their Congressional representative regarding an issue *in the constituent's own records only*. If the information comes from records other than the constituent requesting help, then the request should be analyzed under section III following (a request from a parent regarding their adult child who is a member of the Air Force would fall under section III, not this section). Constituent requests are either for general or sensitive information.

General Information. If you get a request from a Congressional member on behalf of (at the request of) a constituent for general information, you may answer it without permission from the subject of the record.[7] The authority for this disclosure is the *Routine Use* exception. *Routine Uses* are defined in each Privacy Act System Notice,[8] and establish the proper uses of the records in that system. In addition to the specific uses enumerated in each system notice, the *blanket routine uses*[9] are incorporated. In other words, you must review both the specific system notice involved and the blanket routine uses. The Routine Use for Congressional Inquiries is located in the blanket routine uses and states, "Disclosure from a system of records maintained by this component may be made to a Congressional office from the record of an individual in response to an inquiry from the Congressional office made at the request of that individual."[10]

A good rule of thumb for making the distinction between general and sensitive information is found in the Privacy Act instruction. If the information can be released without the permission of the subject of the record, it is general information.[11]

Please note that some Congressional representatives may require a release from the requestor (even for general information). This is permissible, but not required, at the discretion of the Congressional representative.

Sensitive Information. If the request is for sensitive rather than general information, you must get a separate release statement.[12]

III. Other Requests

All other requests from members of Congress are analyzed under exception 2 of the Privacy Act, which permits disclosure of Privacy Act records only when required by the Freedom of Information Act (FOIA).[13] The consequence of this Privacy Act exception is that all other Congressional requests are analyzed under the Freedom of Information Act.[14]

Many people mistakenly think Privacy Act records are uniformly exempt from disclosure to a FOIA request, or that the Privacy Act is a FOIA exemption 3 statute. The Privacy Act does not generally prohibit release under the FOIA, nor is it a FOIA exemption 3 statute. Rather, only those portions of a Privacy Act record that fit one of the nine FOIA exemptions are protected from disclosure to a proper FOIA request.[15]

IV. Notes for all types of requests

For each of these requests there are a few things to keep in mind. First, you should not charge fees to a member of Congress for request types I and II.[16] For type III requests, Privacy Act fees apply to first party requests for Privacy Act protected records,[17] all other types of requests fall under the FOIA fee system.[18] Second, a requester's failure to cite either act (i.e. FOIA or Privacy Act) does not make either type of request invalid.[19] Third, you must account for disclosures.[20] Finally, prior to release of Privacy Act information, you must ensure the accuracy of the information in the record.[21]

ENDNOTES

[1] 5 U.S.C. 552a(b); 32 CFR § 310.40(c); and DoDD 5400.11, paragraph 4.6.
[2] 5 U.S.C. 552a(b)(9); AFI 90-401, paragraph 1.4; AFI 33-332, paragraph 12.4.9.
[3] *Id*.
[4] *Id*.
[5] *Id*.
[6] AFI 90-401, paragraph 1.4.
[7] 5 U.S.C. 552a(b)(3); *see also* AFI 33-332, paragraphs 12.4.3, 12.4.9.1, and 12.4.9.2.
[8] You can find these system notices at http://www.defenselink.mil/privacy/notices/usaf/
[9] The blanket routine uses can be found at http://www.defenselink.mil/privacy/notices/blanket-uses.html For a more detailed explanation of System Notices see AFI 33-332, Ch 9.
[10] AFI 33-332, A5.1.4.
[11] AFI 33-332, paragraph 12.2 lists information that may be released without the permission of the subject.
[12] AFI 33-332, paragraph 12.4.9.1.
[13] 5 U.S.C. 552. The Privacy Act AFI sets out a test for disclosure to third parties (AFI 33-332, para 12.3). This paragraph is a recitation of exemption 6 of the FOIA. While exemption 6 will be applicable to FOIA analysis of PA protected records, this is somewhat misleading because you must also consider all other FOIA exemptions.
[14] AFI 33-332, paragraph 12.4.9.
[15] See DoDR 5400.7/AF Supp, C1.5.13 for details on the FOIA and PA interface. *See also* Freedom of Information Act Guide & Privacy Act Overview, pp 937-940.
[16] 32 CFR §310.33(e); see also DPO opinion #6.
[17] Privacy Act fees, see AFI 33-332, para 4.3; FOIA fees see DoDR 5400.7/AF Supp, Ch 6. *See also* Defense Privacy Office (DPO) opinion #6.
[18] *Id*.
[19] DoDR 5400.7/AF Supp, C1.5.13 & C1.3.1.1.
[20] 32 CFR § 310.44; AFI33-332, paragraph 12.6; DoDD 5400.11, paragraph 4.6; 32 CFR § 806b.35; DPO opinion #8.
[21] 5 U.S.C. 552a(e)(6); AFI 33-332, paragraph 12.1.

REFERENCES:

- 5 U.S.C. 552 - Freedom of Information Act
- 5 U.S.C. 552a(b)(2) - Privacy Act
- 32 CFR Subchapter O - Privacy Program § 310.1 - 310.114
- DoD 5400.11-R, *DEPARTMENT OF DEFENSE PRIVACY PROGRAM*
- DoDD 5400.11, *DoD Privacy Program*
- DoDR 5400.7/AF Supp, *DoD Freedom of Information Act Program*
- AFI 33-332, *Air Force Privacy Act Program*, 29 Jan 2004
- AFI 90-401, *Air Force Relations with Congress*, 1 Jul 1998
- AF Privacy Act System Notices - http://www.defenselink.mil/privacy/notices/usaf/
- Blanket Routine Uses - http://www.defenselink.mil/privacy/notices/usaf/usaf_preamble.html
- DPO Opinions: http://www.defenselink.mil/privacy/opinions/index.html
- *Freedom of Information Act Guide and Privacy Act Overview*, May 2004 Ed.

ENVIRONMENTAL LAW

Lt Col Linda L. Richardson

SOIL VAPOR INTRUSION: A RISING CONCERN

Traditionally, remediation (clean up under either CERCLA, a.k.a. "Superfund" or RCRA, the federal law governing proper storage and disposal of hazardous waste) has concerned itself with the hazards presented when people come in contact with the contaminated soil or contaminated groundwater. For years, soil vapor intrusion has slipped through the cracks of this environmental foundation (pun intended). In the past five years, however, an increasing shift has brought soil vapor intrusion concerns to the forefront of regulators' and industries' attention.

What is Vapor Intrusion?

Liquid chemicals evaporate when left open to the atmosphere; the rate of vaporization is related to its vapor pressure (i.e. "volatility"). Carbon-based chemicals with high vapor pressure are known as "Volatile Organic Compounds" (VOCs). VOCs such as trichloroethylene (TCE, a solvent that was often used for parts cleaning), perchloroethylene (PCE, a solvent that was used in dry cleaning) and petroleum constituents, such as benzene, are some of the more common sources of soil vapor. Because of their volatility, VOCs in groundwater vaporize more quickly than the groundwater itself. The particles travel through air pockets found in the soil. They will penetrate any other air spaces such as gaps in a foundation for utility corridors or cracks in the concrete caused by age and settling. Dirt floors and stone foundations are more porous than poured concrete and can also admit vapors. Once in the building, the VOCs tend to accumulate and can cause health problems within the building. Vapor intrusion is more of a problem in colder climates due to the relationship of indoor heating to pressure variants between indoors and out.

Why is Vapor Intrusion a Concern Now?

Vapor intrusion has become a greater concern recently for two reasons. First, when CERCLA-based cleanups began in the early 1980's, they focused primarily on removing the source of the contamination. Later research and technology allowed scientists to understand how plumes of groundwater were affected by contaminants. Understanding how vapors travel below ground followed from that. Because of the time that passes from the initial spill to the development of underground contamination plumes and their often extensive spread beyond the boundaries of an initial clean up site, regulators did not always have the engineering or economic resources to fully investigate the problem. The second reason soil vapor intrusion has become an item of greater interest is because of the continuing evolution in federal and state regulators' clean up approaches. Instead of insisting that every site be restored to full residential (unlimited) use, regulators are looking at innovative solutions for "Brownfield" industrial sites. By imposing land use covenants that restrict use and exposure, the regulators allow for the protection of human health without requiring the site to be cleaned up to pristine conditions. The corollary to this perspective, however, is there must be a way to ensure that the remaining contaminants do not penetrate indoor industrial workspaces or residential homes in surrounding communities as a soil vapor problem.

What Are Some of the Difficulties in Studying Soil Vapor Intrusion?

In 1991, Johnson & Ettinger published one of most commonly used mathematical models (Johnson-Ettinger Model or "JEM") used to predict vapor intrusion. JEM's formula assesses numerous data points from the type of soil, the particular VOC, soil vapor and groundwater measurements and specific facts about the building where soil vapor is believed to occur. Although widely used, JEM has many detractors. Some assert that it under-predicts potentially hazardous exposures; others that it leads to logical inconsistencies, such as groundwater with contamination below the Maximum Contaminant Level (MCL) for drinking water (established by the EPA as a maximum level for safe exposure) may still be calculated to result in unacceptable soil vapor levels. The reason for this divergence is because JEM is only as good as the data used in the formula, but it is frequently used in situations where exact measurements are unavailable and only estimates can be applied. Due to this problem, Johnson has published extensive further discussions giving highly technical analyses of how to calculate the degree of uncertainty of the JEM predictions. Additionally, the EPA has now made available a software program that helps predict uncertainty when JEM is used.

There are also technical and practical problems with deciding whether to evaluate vapor intrusion

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using mathematical modeling or actual indoor monitoring. As discussed above, modeling is very dependent upon the accuracy of measurements and input of information into complex formulae. Monitoring, however, has idiosyncratic problems as well. Many indoor air pollutants from non-soil sources (cigarette smoke, gasoline fumes from a garage, paint, varnish and carpet fumes from hobbies or home improvement work, even nail polish and hairspray) will skew indoor air measurements. The accuracy will depend upon proper placement of the monitors in relation to "airflow currents and eddies" within the home. Finally, while homeowners may feel that monitoring is more trust-worthy, they may resent the intrusion into their daily life and the limits placed on activities or hobbies.

How Does the EPA Evaluate Soil Vapor Intrusion?

In 2002, the EPA's Office of Solid Waste and Emergency Response (OSWER) published draft Vapor Intrusion Guidance. This guidance (superseding prior RCRA guidance published in Dec 2001) was designed to address some of the limitations in the first Johnson-Ettinger vapor intrusion model and to strike a balance between the problems posed by modeling versus the more intrusive monitoring. The draft guidance is a three-tier structure. It begins with the premise that there is no health concern if there is no completed exposure pathway. In the context of vapor intrusion, a completed exposure pathway requires that there are VOCs emanating from the ground and penetrating into a building where humans are present. Therefore the first tier is determining if a completed exposure pathway exists. The first tier also asks the question, "Is emergency cleanup action warranted?" The second tier is a flow chart of questions which, when answered, provide data for a conservative modeling calculation. This model, based upon factors such as groundwater volume and depth, concentration of VOCs and other technical/geologic/engineering factors, serves as a screening tool. If the model predicts, based upon its conservative assumptions, that potential exposure exists, then the third tier is warranted. The third tier uses direct measurement of contaminant concentrations (i.e. monitoring) coupled with mathematic modeling that uses site-specific input.

How Do You Determine Whether EPA Vapor Intrusion Limits or OSHA Permissible Exposure Levels (PELs) Apply?

OSHA PELs are the level of safe exposure for chemical vapors set for occupational safety and health, for example the fumes in a dry cleaning operation. First, it is important to understand that OSHA PELs do not simply automatically apply to all indoor air VOC exposure. OSHA PEL calculations assume a safe exposure for a healthy adult male in the workplace being exposed for eight hours a day, five days a week with knowledge of, and consent to, the exposure. They were never calculated to stand as exposure levels for potentially vulnerable populations (children, pregnant women, elderly or infirm). EPA, in contrast, sets its acceptable risk values to accommodate all potentially exposed populations. Therefore, in residential settings, OSHA PELs do not apply. On industrial sites that manage the same contaminant, OSHA PEL levels apply to what is the acceptable air level within the building, regardless of whether the source is from internal industrial applications or emanating from soil vapor through the building's foundation. This level is measured through monitoring because mathematical modeling would have to incorporate calculations from how much of the VOC is off-gassing in the particular industrial process. In industrial areas that manage different VOCs from those in the soil vapor, OSHA levels apply but the additional contaminant will likely require the revision of current plans, procedures, training programs and employee notifications. Managers must consider if the contaminants have a cumulative or synergistic effect. In mixed-use scenarios, safeguards must ensure that the most vulnerable and exposed populations are adequately protected.

What Are the New Trends in Soil Vapor Intrusion Law?

The EPA met throughout the spring of 2006 to discuss revisions to the 2002 draft guidance. New draft guidance might be out by the end of 2006. The Air Force, Army and Navy are also working on vapor intrusion guidance because vapor intrusion often becomes an issue at BRAC facilities. Several states have established, or are proposing, vapor intrusion programs – including AK, CA, CO, CT, MA, ME, MI, MN, NH, NJ, NY, OH, PA, WA and WI. New York's recent initiative led the state to start reviewing all sites where remedial decisions were finalized before 1 January 2003 in order to determine if further data collection is required. (That determination will prioritize sites where there is either a current completed exposure pathway or anticipated new future uses through redevelopment that could lead to exposure.) This data collection might lead to discovery of latent soil vapor intrusion problems and, consequently, more remediation. California's state guidance also includes consideration of potential future buildings. Where specific information is not available as to building size and air flow, California's default input into the calculation uses very

conservative assumptions. New Jersey's proposed approach (Oct 2005 Draft Guidance) to vapor intrusion could become one of the most difficult for compliance – New Jersey has proposed contaminant screening values for groundwater plumes which will automatically trigger indoor air investigation, monitoring and sampling. This proposal would skip the tiered "modeling first" approach and could be very expensive to implement. The Draft NJ Guidance explains that modeling is not appropriate where the groundwater is within 5 feet of the surface and that much of New Jersey is low-lying with groundwater close to the surface.

Practical Implications

The new focus on vapor intrusion has practical implications for five-year reviews at CERCLA sites where there is either ongoing remediation or land use covenants have been imposed. Sites where there were determinations of "no further action" may also be revisited. It will also become a consideration in property transfers and redevelopment. Sometimes architectural mitigation factors can be included in the plans for redevelopment with new construction, but do not forget to consider what sort of monitoring will be needed to ensure the mitigation is, and remains, an effective barrier.

HELPFUL WEBSITES

http://www.epa.gov/ttbnrmrl/presentations.htm

http://www.abanet.org/environ/programs/teleconference/nosearch/vaporintrusion/

http://www.geosyntec.com/vi_links.asp

http://www.epa.gov/correctiveaction/eis/vapor.htm

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Blogs v. Freedom of Speech: A Commander's Primer Regarding First Amendment Rights As They Apply to the Blogosphere

Major Frederick D. Thaden

If you would not be forgotten, as soon as you are dead and rotten, either write things worth reading, or do things worth the writing.

Benjamin Franklin

The blogosphere as we know it today is a powerful medium and is growing in readership and creators daily. Just imagine if survivors from the Battle of Gettysburg were able to immediately send their thoughts and first-hand reports to the citizens of a young nation at war. How would public opinion of the war have changed and how would that change have affected the will of the American people? What additional political pressure would these changes have imposed on civilian leadership of the military?

The inter-connectedness which the internet provides humans today makes it possible for soldiers in Iraq to do just that—post their thoughts and reflections regarding an upcoming or recently accomplished mission, to include pictures and video, on a blog in Iraq and within seconds this news from the front can be read by thousands if not millions of people worldwide. This relatively new capability gives great power to the blogger and commander alike. The critical take-away for military leaders to understand is our speech within the military is limited for sound reasons and the blogosphere simply presents one more method for those limits to be tested, and one more tool for commanders to lead their troops.

Blog Basics

Who's reading and who's creating blogs? The U.S. population is roughly 295.7 million and approximately 75% of these individuals use the internet at home, school, or work.[1] Of these internet users, 4% read blogs daily, 5% read blogs a few times per week, 10% read blogs a few times a month, and 18% read them less than monthly.[2] This represents slightly more than one-third of internet users that are at least familiar with blogs.

As for the age of bloggers, almost one in five internet users under the ages of 18-19, which represents 19% of this group, indicate they read blogs frequently. Additionally slightly more than 25% of this age group read blogs at least occasionally.[3] According to a Gallup Poll conducted in December of 2005, blog readership is significantly higher among adults 29 years of age and younger, than those 30 years of age and older. Similar studies show blog readership has been increasingly on the rise since March of 2003.[4] Likewise, the number of internet users who create blogs has been steadily rising since June of 2002.[5]

"Blogpulse.com" indicated that as of 6:30pm (Central Standard Time) on 23 February 2006, there were 23.1 million identified blogs, 62,330 blogs created within the previous 24 hours, as well as 717,011 blog postings within the previous 24 hours.[6] As stated earlier, the blogosphere is most frequented by the young and, in fact, 92.4 percent of 4.1 million blogs surveyed by the Perseus Development Corporation in 2003 were created by people under 30 years old.[7]

As you might imagine, military personnel are not strangers to the blogosphere and the remaining paragraphs in this section will address some military-specific blog data. In a survey of Air University students in March of 2006, 232 respondents replied to a variety of blog related questions. This survey made one overall assumption which was that, given

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the nature of the military's reliance on the internet, all respondents were internet users. The results of this uniquely military audience are similar in nature to the studies cited above and support the author's notion that mid to senior-level military leaders are less familiar with blogs than the younger troops they are called to lead. Survey demographics included 202 male and 30 female participants, two participants 30-32 years old, 215 participants 33-44 years old, 14 participants 45-50 years old, and one over 50 years old. One captain, 184 majors, 37 lieutenant colonels, 4 colonels, and 4 civilians participated in the survey.[8]

Of the total respondents, 60 replied that they rely on blogs either, "always," "frequently," or "sometimes" for information, while the remaining 172 "never" or "rarely" rely on blogs. These 60 individuals represent 26% of all survey respondents and correlates with the study above citing 37% of internet users indicating they are blog users.[9] Additionally, of the 232 respondents, 4 indicated they maintain a blog. This represents 1% of respondents which is slightly lower than the above study which shows 9% of internet users indicating they have created a blog.[10] When these Air University survey results are considered in combination with the number of younger folks involved in the blogosphere discussed earlier, it should serve as an indicator for commanders that at least an awareness of blogs would be beneficial to understanding the current and future culture of our military troops.

Military Blogs, or "Milblogs" as they are commonly called, represent a unique genre in the blogosphere. One such milblog, "mudvillegazette.com," provides a directory, of sorts, linking approximately 170 milblogs from around the world. Most of these types of blogs are authored by military members in the U.S. or overseas, troops' family members, retired military and other civilians interested in military issues.[11]

The 2005 Weblog Awards recognized 15 weblogs written by deployed service members among the top contenders competing for the title of best military blog. This new and unprecedented form of battle-front news has numerous advantages and disadvantages which will be explored further in this article. However, it is worth mentioning at this point that senior military leaders in general view blogs as a healthy form of communication between troops and family members, while at the same time they express concern that blogs potentially pose an operational security risk.[12] With this brief introduction to the basics of the blogosphere and milblogs, we'll now turn to a discussion of free speech within the military and then relate that to the blogosphere.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

The Bill of Rights, Amendment I

Military Limits to Free Speech

Some protections found in The Bill of Rights are specifically inapplicable to military members as noted in the text of the document itself. For example, the Fifth Amendment specifically excludes military personnel from the grand jury indictment requirements for capital or infamous crimes.[13] Other protections found in the Bill of Rights are not specifically excluded for military personnel in the text, rather "interpreted differently" in the context of the military, such as, the Fourth Amendment's search and seizure protection for which the Court of Appeals for the Armed Forces has historically instituted a separate society rationale for the military.

The First Amendment right to freedom of speech falls within the latter category above, that of a "different interpretation," within the military. The military limits speech of its members at three specific levels, 1) punitive articles of the Uniformed Code of Military Justice (UCMJ), 2) regulations and instructions from the Department of Defense and separate services, and 3) lawful general orders of commanders.[14]

First, within the UCMJ, two articles are commonly cited by courts in free speech decisions; Article 88, which prohibits contemptuous words against specific government authorities and Article 134, which prohibits disorders to the prejudice of good order and discipline, and conduct that discredits the armed services.[15] One such case involved Major General Harold N. Campbell who reportedly referred to President Clinton, while giving a speech in 1993 in the Netherlands, as a "dope smoking," "skirt chasing," and "draft dodging" Commander in Chief.[16] The Air Force determined Campbell had violated Article 88 and was administered a written reprimand under Article 15.[17] Clearly in this case Campbell's remarks fall within Article 88's "contemptuous words" clause and therefore violate the article's intent. However, if Campbell were a civilian at the time of his speech, Article 88 would not have applied and his free speech would have been protected.

Second, regarding regulations and instructions, Air Force Instruction (AFI) 33-129 and AFI 36-2909 refer to free speech in the areas of internet use and unprofessional relationships. Also, AFI 51-902 addresses restrictions of Airmen in political activities.[18]

These AFIs place lawful limits on the type of speech permitted while in the military and serve as a reminder to all military that while the Bill of Rights grants free speech to all, free speech within the military is certainly limited. Additionally, AFI 51-903 states that, "commanders must preserve the service member's right of expression, to the maximum extent possible, consistent with good order, discipline, and national security" and grants commanders authority "to ensure their mission is performed while maintaining good order and discipline."[19] The purpose of these regulations is twofold, to "avert clear and present dangers to military order and discipline" and to "maintain a politically disinterested military that remains safely under the control of civilian superiors."[20]

In one such case, Capt Glines contested Air Force regulations after circulating a petition amongst the populace of Guam AFB complaining about Air Force grooming standards with the intent of sending the petitions to members of Congress and the Secretary of Defense. Glines did not seek prior approval from the base commander in direct violation of Air Force regulations. Glines was reassigned and the case was brought to court on the basis of free speech violation. In *Brown v. Glines*, the court determined that this speech was indeed not protected and the regulations in question "protect a substantial government interest unrelated to the suppression of free expression."[21] The court further noted the regulations "prevent commanders from interfering with the circulation of any materials other than those posing a clear danger to military loyalty, discipline, or morale." And finally, the court stated that prior approval was required and lawful because, "if the commander did not have the opportunity to review the material, then he 'could not avert possible disruption among his troops.'"[22] This is precisely the basis for newly established policies with regard to blog entries as they relate to service in a combat zone. These policies will be discussed further in this paper.

Third, military commander's have the authority to limit speech within their command through the issuance of lawful general orders. As demonstrated in *Ethredge v. Hail*, the Commander of Robins Air Force Base issued a lawful administrative order banning, "bumper stickers or other similar paraphernalia that embarrass or disparage the Commander in Chief."[23] Ethredge was a civilian employee of the base who had affixed a bumper sticker to his vehicle stating, "HELL WITH CLINTON AND RUSSIAN AID."[24] While the 11th Circuit Court determined the order was lawful, one could argue with the specific wording and raise potential vagueness claims. For example, the order prohibits specific items that "embarrass or disparage" the President. The problem becomes, who determines what "embarrasses" the President? Must the President be consulted in all such cases? As a suggestion to commanders, orders of this nature must be easily interpreted by third parties so as to facilitate enforcement of expected standards. Perhaps borrowing the phrase "contemptuous words" from Article 88 itself would have made the Robins AFB order easier to interpret and enforce.[25]

Arguments for Current Limits on Speech

Two common arguments raised in support of the current limitations on military member's free speech focus on, 1) good order and discipline and, 2) maintenance of proper relationships between military and civilian leaders.[26] First, military forces serve a unique role in our society and must be prepared to immediately defend national interests. Given that mission, military members are entrusted with powerful weapons and technologies, "capable of destroying not only towns and countries, but human civilization as we know it."[27] This distinction was acknowledged by the Supreme Court in *Solorio v. United States*, where the court described military induction, "not merely as a job but a change in status."[28] Senator Nunn explains that military service, either voluntary or involuntary, requires a high level of training and unit readiness because, "the soldier that is behind a comfortable desk today might be in a hostile and physically challenging field environment on very short notice."[29] Dissenting speech could quickly undermine unit morale and cohesion and weaken command authority during very critical times when the unit must perform its mission. Thus the current limits on speech maintain needed good order and discipline. General (ret) Colin Powell emphasized this point as follows, "*We create cohesive teams of warriors who will bond so tightly that they are prepared to go into battle and give their lives if necessary for the accomplishment of the mission and for the cohesion of the group and for their individual buddies. We cannot allow anything to happen which would disrupt that feeling of cohesion within the force.*"[30]

Second, the military is ultimately under civilian control and civilian leaders can be threatened by dissenting speech. Given the power described above, vested in the military, the potential threats posed to civilian leaders by the military, "range from the seizure of power by a military coup to the refusal to obey orders."[31] The military's role is to enforce policy as given by civilian leadership. Statements made by military authorities which violate the intent of Articles 88 and 134 of the UCMJ could be interpreted by the public as "official military statements" and could weaken the national, and international, integrity of civilian leadership.

Arguments for Increased Tolerance of Speech

While there are arguments that support current limits to free speech in the military, there are also at least two arguments for increased tolerance of speech which, if adopted, would relax current limits. These two arguments are as follows, 1) intellectual development, and 2) free flow of information to the public and military authorities.[32]

First, the greatest attributes of the US military are its members and more specifically the great intellect and self-awareness that the military culture promotes in its members. There are a number of professional military courses which focus on the development of communication and intellect with the intent of fostering leadership. Free speech reminds us of our, "uniqueness and self-worth."[33] A free and open exchange of ideas is encouraged throughout a military career for both officer and enlisted alike. In fact, the Air Command and Staff College mission statement reads as follows, "To our students … Inspire critically thinking Airmen to lead Air & Space forces in Joint/Combined operations."[34] The question becomes, how can a culture purport to "inspire critical thinking" among it's personnel while at the same time limit and restrict the very tool which humans have to express their thinking and point of view—their speech?

Second, permitting a free flow of thoughts and ideas through more relaxed limits to speech could in fact lead to more informed decisions among military and civilian leaders. Through more relaxed speech limits, information which would have been stifled in a restrictive environment could provide decision-makers with the appropriate detail needed to make more informed and reasonable policies. Detlev F. Vagts, Bemis Professor of International Law, Emeritus, at Harvard Law School, argues, "preventing unofficial opinions from competing in the military marketplace of ideas [grants] a dangerous monopoly to official dogma that may shelter a stagnation and inefficiency we can ill afford in these swift and perilous times."[35]

Good order and discipline is paramount to any military organization but the intellectual development of military members, to include challenging the status quo, is essential for continued growth and improvement of our military forces in these budget-restrained and globally challenging times. Military commanders must strike a balance between the two for the good of their individual troops and the mission which they are charged to carry out.

Free Speech, The Military, The Blogosphere

What constitutes free speech in a military context has entered a new dimension given recent operations in Iraq and the introduction of the blogosphere. Anyone, with an opinion, a desire to share it and access to a computer can now publish their thoughts to the world with little effort on their part. For example, Army reservist Jason Hartley was ordered to shut down his blog, "Just Another Soldier" soon after he posted comments such as this, "Being a soldier is to live in a world of sh**. From the pogues who cook my food and do my laundry to the Apache pilots and the Green Berets who do all the Hollywood stuff, our lives are in a constant state of suck."[36] This posting and similar others prompted Pentagon officials to order the shut down. Hartley complied with the order for a short time but resumed soon thereafter and as a result was administratively reduced in grade from sergeant to specialist for defying a direct order. Hartley did not appeal his case.[37] The story does not end there, in October of 2005, Hartley's blog transformed into a book and is now available for purchase—a sort of "rags to riches" ending.

In a similar scenario Major Michael Cohen, a doctor formerly based at the 67th Combat Support Hospital in Mosul, described his wartime experience to the world via his blog, "67cshdocs." One account in particular details his perspective of the effects of a suicide bombing incident where 22 people were killed. The account described, "washing out wounds, removing shrapnel, and casting fractures."[38] He also cited specific statistics related to this incident, "91 total patients arrived … 18 were dead on arrival … 4 died of wounds shortly after arrival." This account caused concern within his chain of command and his boss indicated there were some who believed the blog content violated Army regulations. The Army asked Cohen to shut down his blog and the satellite network he had personally constructed which was supporting 42 other military families and related blogs. However, the Army decided against this course of action because in Cohen's own words, "they didn't want a hornet's nest."[39] Rather than shut down the site and network, Cohen agreed to stop blogging. As with Hartley, Cohen decided not to challenge the order, he was too close to returning home and instead complied.

Commentary

This, the author believes, is the essence of the issue at hand concerning blogs and the military. As cited earlier, more than sixty-two thousand blogs were created in one 24-hour period. Of course, it is nearly impossible that all of these blogs were created by military authors delving into questionable topic areas such as described above. However, it is neither unreasonable to suppose that some blogs created daily are done so under assumed names by military individuals who

have become disgruntled with their current situation and are determined to undermine the mission and leaders at every possible moment.

Perhaps these are modern day interpretations of what Justice Oliver Wendell Holmes referred to as a "clear and present danger" when he asserted in Schenck v United States, in 1919, "The question in every case is whether the words are used in such circumstances and are of such a nature as to cause a clear and present danger … When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight."[40] This clear and present danger test is commonly referenced today by courts concerning military members and their First Amendment right to free speech.

Warnings to Milbloggers

In light of situations such as those described above, the military has recently issued formal warnings and instructions specifically to military bloggers. In August of 2005, Army Chief of Staff General Peter Schoomaker sent a memo to all Army personnel declaring, "We must do a better job [at operational security]."[41] He went on to state, "Some soldiers continue to post sensitive information … on the internet … such as photos depicting weapon system vulnerabilities and tactics, techniques and procedures … Such OPSEC violations needlessly place lives at risk and degrade the effectiveness of our operations." [42]

Additionally, Schoomaker's deputy, General Richard Cody stated that, "Iraqi insurgents and foreign Jihadists are using pictures of roadside bomb strikes, firefights, injured or dead U.S. soldiers or enemy and destroyed or damaged vehicles and other equipment as propaganda and terrorist training tools."[43] Cody provided as an example, "annotated photos of an Abrams tank penetrated by (a rocket propelled grenade) are easily found on the internet." An Army spokesman, Lt Col Paul Pierett clarified the comments in the following manner, "By showing the effect on a vehicle that way, you are revealing its vulnerabilities."[44]

In an interview with USA Today, Captain Alison Salerno, a spokesperson for U.S. Central Command states that, "being able to access the internet enhances mission effectiveness [and] quality of life … though it must be used responsibly by servicemembers."[45] Salerno further stated that what should not be posted by troops, "would basically center around … information that could give our adversaries insight into current and future operations, and anything that could put coalition forces at risk."[46] In reaction to past OPSEC violations in the blogosphere, and in an attempt to reduce further violations a policy was implemented in the spring of 2005 requiring, "military bloggers inside Iraq to register with their units."[47] The policy, "directs commanders to conduct quarterly reviews to make sure bloggers aren't giving out casualty information or violating operational security or privacy rules."[48]

Contractor Case

There is recent concern with a blog created by a former contract employee for the DoD. The blog details on-going security team operations in Iraq to include how they are trained. There are also pictures and descriptions of improvised explosive devices (IEDs) along with instructions of how to assemble such devices. Finally, the site contains pictures showing the impact of IEDs on vehicles and armor. Obviously, there is a desire among the military community to shut this site down as it poses a very probable threat to force protection of coalition troops and the potential harm that could be done if this information slips into enemy hands. The problem in this case is the blogger is a "former" DoD contract employee and is currently not affiliated with the US government in any manner.[49] What recourse is available to limit this type of speech? There may be some value added in considering the following four historical references.

First, when faced with a freedom of speech challenge by a civilian opponent to the Civil War, President Lincoln referred to three criteria he used to lawfully limit free speech during war, specifically, 1) does the person intend to cause unlawful conduct, 2) does the speech interfere with military activities, and 3) does the speech discourage unlawful conduct? In Lincoln's case, this was his "test" to determine the validity of Mr. Clement Vallandigham's arrest.[50]

Second, in Pickering v. Board of Education, 1968, the Supreme Court adopted a "two-part balancing test," commonly called the "Pickering test" in determining if a government employee's speech was protected. As per the Pickering test, "the speech must address a matter of public concern. If it does, then a court must determine whether the employee's interest as a citizen 'in commenting on matters of public concern' is outweighed by the government's interest as employer."[51]

Third, while the "clear and present danger" test as articulated by Justice Holmes may seem to fit, and is still widely used in military cases, it has been replaced in the civilian sector by the "imminent lawless action" test as presented *per curiam* in Brandenburg v. Ohio, 1969. In this case the court determined that speech is protected unless, "it is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[52] As of this writing, the imminent lawless action test continues to be applied in

civilian free speech decisions.[53]

Fourth, the "forum analysis" as used by the Supreme Court in Flower v. US, 1972, takes into consideration the location of the speech and what government interest applies to this location. Specifically, in Flower v. US, the court held, "that a base commander could not prohibit the distribution of leaflets by a previously 'barred' civilian on a street within the base that was open to the public."[54] The blogosphere is so widespread it would be difficult determine exactly "where" the speech occurs. Furthermore, a particular blog's host server could likely be located outside US jurisdiction complicating the matter even more.

Commentary

Given the relative "youth" of the blogosphere, there may not be precedent at this time to review which fits nicely within the constraints of the "contractor case" described previously. However, the preceding four references might assist in formulating a decision as to whether or not this blog content is considered protected speech. It is the author's opinion that this type of blog content will continue to plague military operations as the blogosphere continues its projected growth. Furthermore, given the current US involvement in the Global War on Terror, and in anticipation of future armed conflicts, it would behoove military commanders, as well as civilian legislative and judicial powers, to determine appropriate limits of speech on US citizens (military and civilian alike) within the blogosphere while balancing the safety and security of US troops and national security interests. Such analysis merits a comprehensive review and is therefore a recommendation for further research. We'll now review two official blogs hosted by military leaders within their respective organizations.

Chaplain Service Institute

In the spring of 2002 the USAF Office of the Chief of Chaplain Service (HQ USAF/HC) launched a blog as an extension of its website. The intended purpose of the blog was to enable communication among approximately 2,500 active duty USAF chaplain (USAF/HC) personnel as well as appropriate personnel within the Guard, Reserve, and Civil Air Patrol. The blog was only accessible via a secure website with a by-name, restricted log-in. Discussion threads were initiated by HQ USAF/HC staff and capability was added for any USAF/HC users to begin discussions. Unlike most traditional blogs, comments were not anonymous given the author's username appeared on the blog attached to the applicable discussion thread initiation or comments. Finally, a disclaimer was placed on the blog stating the forum was not to be used as a "soapbox" to espouse complaints and grievances rather as a venue to exchange "best practice" information regarding USAF/HC needs and discussions would be monitored by system administrators as well as the Chief of Chaplains office.[55]

In the summer of 2003 a handful of registered users (approximately ten) began to use the forum as a means of expressing dissatisfaction with their supervisors and co-workers. Initially the comments were relatively discreet (although the identity of the authors was readily available via their username) however, the comments evolved into direct personal attacks of character. Interestingly enough, other users "reprimanded" the authors on-line in an effort to quell the apparent abuse of the blog and disregard for its purpose. HQ USAF/HC weighed in with a strong warning to cease and desist or face possible expulsion from the site. During this time, blog comments decreased from several hundred posts per quarter to less than 50 per quarter. The blog abuse continued. Fearing potential freedom of speech complaints, HQ USAF/HC decided to pull the entire blog in the fall of 2003 rather than restrict certain users.[56]

No formal administrative action was taken against anyone in this particular case. However, the chaplain's blog experience does indicate what can potentially happen in an on-line blog forum and should put commanders, currently using or considering a blog, on alert. Incidentally, the chaplain's blog relaunched in the spring of 2004 with more strict registration criteria and formalized restrictions on discussion protocol. There have been approximately 1,200 blog comments posted over a recent 12 month period with no violations of protocol.[57]

Four-Star Blogger

The Commander of US Strategic Command (USSTRATCOM), Marine Corps General James Cartwright, has caught the vision of the blogosphere and has adapted it to suit his command's needs. Since taking command in July 2004, Cartwright noted that one of the problems of the multiple organizations he led was that they "were built extremely well to make sure that they didn't talk to anybody."[58] Cartwright's challenge was to overcome a cultural bias against sharing and build a collaborative tool which would establish a connection.[59] Enter the blogosphere. Cartwright's internal STRATCOM blog, known as "SKIWeb" (pronounced sky-web) and available only with a Secure Internet Protocol Router Network (SIPRNet) account, provides a common location within the command where anyone can pose a question and people will respond with answers.[60] Cartwright ex-

plained his blog philosophy in this manner, "*We have this culture, this vertical culture, this Napoleon command and control structure. It doesn't do well with the information age we live in. We have undertaken a lot of effort out there to get people to understand how to communicate – chat rooms, blogs, things like that. It's more about culture than it is about technology, but what you can do is empower an incredibly larger crowd than in this vertical structure … and getting that crowd empowered."*[61]

The idea of a 4-star general soliciting direct responses from all ranks across his command via a tool such as a blog is quite foreign to many military members. In fact, such an idea seems to radically contradict the traditional chain of command concept which is so ingrained into military culture. For example, one can only suppose how General George S. Patton would have reacted to suggestions from "Private Snuffy" regarding the General's apparent failure during the Lorraine Campaign, in which Patton faced an entrenched, static enemy rather than the more traditional swift moving battles for which he was known.[62] Based on Patton's documented "slapping behavior" he would likely not have received "Snuffy's" critique warmly and openly. Rather, he would likely have expected and demanded that "Snuffy" adhere to traditional military culture which dictates that suggestions, grievances and complaints be routed through the proper chain of command before being aired in front of the commanding General Officer.

Initially, Cartwright found that those who posted responses to his questions on the blog had to, "clear it with the boss first before they could blog back."[63] This was not the reaction, nor the response, Cartwright wanted from SKIWeb. Cartwright states, "I got what I would call 'tethered goats'," insinuating that people who answered his blog postings were really, "blogging for the boss" rather than providing the right answer.[64] To further emphasize his intent, Cartwright made the following statement at his Commander's Call in March of 2005 to USSTRATCOM leadership, "*The metric is what the person has to contribute, not the person's rank, age, or level of experience. If they have the answer, I want the answer. When I post a question on my blog, I expect the person with the answer to post back. I do not expect the person with the answer to run it through you, your OIC, the branch chief, the exec, the Division Chief and then get the garbled answer back before he or she posts it to me. The Napoleonic Code and Netcentric Collaboration cannot exist in the same space and time. It's YOUR job to make sure I get my answers and then if they get it wrong or they could have got it righter [sic], then you guide them toward a better way … but do not get in their way."* [65]

In a recent interview with Major James Miller, USSTRATCOM, Project Manager, Command and Control Modernization, he indicated that SKIWeb is creating a "culture change" within USSTRATCOM manifested by a "flattening of the traditional organizational structure."[66] In fact, Miller indicates there are approximately 6,000 registered users of SKIWeb and 58% of those are internal to the USSTRATCOM building. The remaining 42% are external users, not necessarily assigned to USSTRATCOM, but who contribute to this cultural change.[67] Recall from the two quotes above, Cartwright referred to a Napoleon-like command structure, and how that system, in his opinion, does not work in the information age where news, ideas, and events travel extremely fast. Cartwright's intentions and employment of his blog are reminiscent of Col (ret) John Boyd's OODA Loop concept where the idea is to "get inside the opponent's decision cycle" and act/react faster than the enemy is able to accommodate.[68] Additionally, Cartwright seeks what he calls "the right answers," unfiltered and uncensored, straight from the experts in the field. This is a paradigm shift for the military culture and is facilitated in large part by the blogosphere.

The preceding example, from the Chaplain Service Institute, demonstrates that the Air Force is not protected from what Karl Rove, Deputy White House Chief of Staff, once described as the "ugliness and viciousness" in the blogosphere.[69] Perhaps commanders and the Air Force as a whole would do well to follow in General Cartwright's footsteps, and take the advice of Stephen Baker, technology commentator for "BusinessWeek Online" when he says, "Is there a way to ensure that the growing blogosphere embodies our highest ideals and not our worst fears? Jump in."[70] As we add more sensible "voices" to the blogosphere less power and credibility will be given to those ne'er-do-wells (military and civilian alike) propagating unintentional, or intentional, untruths.

Recommendations and Conclusions

As a conclusion to this article here are some recommendations for current and future commanders. First, blogging is a reality and, if you've not taken the opportunity to learn more, you would do well to experience the blogosphere. Bloggers tend to be young, intellectually savvy, and uninhibited from expressing their points of view. While this is a great asset for a young troop, it can lead to trouble for troops and commanders. The advice given above to "jump right in" is the best way to understand the power of blogs. Additionally, further research should be conducted regarding the proper balance of free speech in the blogosphere and security of US troops.

Second, while serving as a commander, it is

imperative you understand appropriate guidelines and policies with respect to blogs. For example, you should know who is actively blogging and you should review the content of their blog for the good of your troop, unit, and mission. You should be familiar with what is acceptable blog content and what the appropriate limits are. Understand that in many cases blogging is the troop's chosen method of connecting with familiar people and escaping the horror of war or simply the mundane of long deployments. If conducted properly, blogging is healthy and is also a huge boost to morale. However, it is always incumbent on the commander to ensure the troops are aware of and following proper procedures.

Third and similar to the previous recommendation, maintenance of good order and discipline within your unit rests squarely on your shoulders. As discussed above, the US military culture encourages critical thinking which implies open communication. As commander, it is incumbent upon you to preserve the right to free speech for your troops while at the same time guard against dissenting speech which could undermine your mission. Perhaps the historical examples provided above specifically the "Lincoln Test," "Pickering Test," "Clear and Present Danger Test," and the "Forum Analysis" will aid in your determinations of appropriate limits to speech. Additionally, the base legal office (JA) is an invaluable resource to any commander faced with this dilemma and you should develop a good working relationship with the JA staff.

Fourth, when issuing formal orders, take care to ensure what your words say, and what you intend to say, are the same. As described previously, vagueness in wording can definitely send a confusing message to the troops and can be used as a legitimate defense should one of your orders be contested. Again, the JA office is available to provide guidance to commanders and will assist in crafting a statement which reads as you intend.

Fifth, official military blogs are not unprecedented and can prove beneficial to an organization. However, some things to consider when implementing a blog are clear guidance as to the purpose for the blog and understand that the culture of the unit may resist. Prior to launching an official blog, you should consult with the Public Affairs and Communications offices to ensure you comply with regulations. In spite of potential issues to overcome, you could experience a fresh wave of energy and ideas as your troops openly communicate in a professional manner.

As with most intelligence and resources known to mankind, they can be used for productive or destructive purposes. The blogosphere is no different. Anyone with a computer and an internet connection can produce a blog and freely express their thoughts to whoever will read. This relatively new capability gives great power to the blogger and commander alike. The critical take-away for military leaders to understand is our speech within the military is limited for sound reasons and the blogosphere simply presents one more method for those limits to be tested, and one more tool for commanders to lead their troops.

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ETS And Administrative Discharge: Beware!

Colonel Allan L. Detert

Since arriving at the Air Force Personnel Center legal office, I've been surprised at the number of times issues have arisen concerning administrative discharge of members whose enlistments are about to expire or whose enlistments have been involuntarily extended by the Air Force. In each instance, commanders and legal offices were facing situations where, in their opinion, members were about to receive honorable discharges that were not warranted. Regrettably, in their determination to prevent that from happening, we've seen courses of action taken in some instances that we didn't think were consistent with applicable authority. The purpose of this article is to review the existing authority and to provide suggestions on how to deal with these unique situations.

The effect of expiration of term of service (ETS) is set forth clearly in AFI 36-3208, paragraph 2.1, *Eligibility for Separation*: "Airmen are *absolutely* entitled to separation from active duty at ETS unless there is a specific authority for their retention." (emphasis added) Paragraph 2.1.1 gives additional amplification: "As a rule, separate airmen on the date ETS occurs, … Retain airmen only when their enlistments are extended by law or when one of the conditions described in paragraphs 2.3 through 2.7 exists." Note 1 of AFCSM 36-699 Volume 1, Table 5.24 adds: "When the condition that required retention terminates … separate the airman as soon as possible. … no authority exists to delay the separation." That latter statement applies to incomplete involuntary discharge actions: "Do not retain airmen beyond ETS involuntarily for completion of involuntary discharge processing." AFI 36-3208, paragraph 2.8.

It may be a lack of awareness or failure to keep in mind this authority that led to the situations I referred to at the outset. Perhaps the most complex and problematic of these situations arises when a member's ETS is looming and the person is under investigation by the Air Force Office of Special Investigations (OSI) for offenses that could result in court-martial. AFI 36-3208, paragraph 2.4, *Retention for Action by Court-Martial*, specifically identifies the SJA as the one who "determines what type of appropriate action is sufficient to authorize retention pending the preferral of charges. If there is sufficient time, the Staff Judge Advocate (SJA) or a member of the SJA's staff will notify the MPF separations unit in writing to involuntarily extend the member's ETS."

The quoted language from the AFI, particularly the words "appropriate action," is the means by which the Air Force has specifically empowered SJAs to perfect the jurisdiction covered by Rules for Courts-Martial (RCM) 202, *Persons subject to the jurisdiction of courts-martial*. RCM 202(c)(1) specifies in part that court-martial jurisdiction attaches over a person "when action with a view to trial of that person is taken." Explanation of that phrase is provided in RCM 202(c)(2): "Actions by which court-martial jurisdiction attaches include: apprehension, arrest, or confinement; and preferral of charges." RCM 202(c)(2). Use of the word "include" in RCM 202(c)(2) means the actions listed are not meant to be all-inclusive. *See* MCM Appendix 21, RCM 202(c)(2), Analysis, at A21-12 ("This list is not exhaustive."); *e.g. United States v. Self*, 13 MJ 132, 138 (C.M.A. 1982)("considering the attendant circumstances … when the CID 'targeted' appellant as a suspect, summoned him for an interview, apprised him of the charges, and advised him of his rights, the Army had taken sufficient 'action with a view to trial'"); *US v. Sentance*, 2004 CCA LEXIS 27 (A.F.C.C.A. 2004), *review denied, US v. Sentance*, 60 M.J. 334 (C.A.A.F. 2004)("We concur with the determination of the military judge that the initiation of the formal criminal investigation and [OSI] placing the appellant on administrative hold was action with a view to trial, which attached court-martial jurisdiction.") (citing, inter alia, *Self*).

As suggested above, this close connection between personal jurisdiction for court-martial and involuntary ETS of the member can be confusing and lead to problems. Assume under the scenario I've described, that the SJA requested and the MPF involuntarily extended the ETS of the member suspected of a UCMJ offense. A special court-martial was held and the member was convicted. He was sentenced to be

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confined for 6 months, to forfeit 2/3 pay per month for 6 months and reduction to E-1, but no bad conduct discharge.

The reason for involuntary extension of the member's ETS was the court-martial. Now that it's done, does the involuntary extension automatically terminate? The answer is no, because paragraph 1.9.1 of AFI 36-3208 prohibits administrative discharge until "[a]fter conviction, the appellate review is final." AFI 36-3208, paragraph 1.9.1.4. Given the member's sentence above, appellate review will take the form of review by a judge advocate, as provided in 10 U.S.C 864. Will the involuntary extension expire then upon completion of the appellate review with no corrective action required? The answer is yes, in light of the quoted material above from AFI 36-3208, paragraph 1.9.1.4 and AFCSM 36-699, Volume 1, Table 5.24.

Recall that a member is absolutely entitled to separation upon ETS unless some specific authority or recognized condition exists to involuntarily hold the member. When that condition terminates, however, the involuntary ETS extension terminates as well and the member must be discharged as soon as possible thereafter. A member may not be held past ETS to complete processing of an involuntary separation.

Some have argued that any unfulfilled or unserved portion of a convicted member's sentence provides authorization to further involuntarily extend the member's ETS. It's my opinion the proponents of such arguments are confusing continuing UCMJ personal jurisdiction over members in prisoner status, see 10 USC 802(a)(7); RCM 202(B)(iii)(c), with circumstances that authorize involuntary ETS. Their arguments are not supported by a review of AFI 36-3208, paragraph 1.9., *How Incomplete Actions Under the Uniform Code of Military Justice (UCMJ) Affects Separation.*

Paragraph 1.9 does not list unserved confinement or fulfillment of any other adjudged sentence as a basis for involuntary extension of ETS. In fact, paragraph 1.9.4 encourages remission of any unserved portion of a sentence "(except confinement at hard labor or a fine) before a discharge, but this is not a prerequisite to discharge." Paragraph 1.9.4 further specifies "do not retain an airman solely to serve restriction, hard labor without confinement, or to satisfy a forfeiture." Finally, regarding confinement remaining to be served, paragraph 1.9.4.1 explains, "An airman discharged with unserved, unsuspended confinement is required to finish serving the sentence. While confined after discharge, the individual is a military prisoner and no longer an Air Force member."

It should be clear from the above that if it isn't there already, one of the first items on a legal office's checklist of things to do concerning any member facing administrative discharge or court-martial is to check the member's ETS: How much time before the Air Force loses the ability to take any action against the member, let alone characterize the person's discharge as other than honorable? If it's simply an administrative discharge action with no action with a view toward court-martial and ETS is imminent, then immediate attention should be turned to the options listed in AFI 36-3208, paragraph 2.8., *Extension of Enlistment When Discharge for Cause is Pending.*

As indicated in the discussion of authority above, paragraph 2.8 leads off with a prohibition on retaining Airmen involuntarily beyond ETS for completion of involuntary discharge processing. It then suggests actions that can be taken if it appears the processing won't be complete before ETS, but finishes with this requirement of the member's commander, "Separates, on ETS, the airman who declines to extend." Bottom line, if ETS is imminent all reasonable efforts must be made to obtain the separation authority's review and approval of the discharge package prior to the member's ETS. If it appears that may not happen, the commander should discuss with the member his/her situation and the ramifications of separating while a discharge for cause is pending, with a view toward obtaining a voluntary extension of the member's ETS. If that too fails, then the member must be separated upon ETS with an honorable discharge.

Legal offices should be way out in front in this regard when a member with an imminent ETS or whose ETS has already been involuntarily extended is being taken to a summary court. A quick review of 10 USC 820 (Article 20 of the UCMJ) discloses that a punitive discharge is not an available punishment option at a summary court. Therefore, if it's thought the member should be administratively discharged following a conviction and that the characterization should be less than fully honorable, another checklist item should have the legal office putting a discharge package together at the same time it is preparing for court. The package should identify the misconduct that is the subject of the summary court proceedings as the basis for, or one of the bases for discharge.

If the court does result in conviction, the discharge package should be served on the member immediately with notice (1) that it will be processed through to completion, which means approved and signed by the separation authority, but will not be executed pending appellate review of the court proceedings, and (2) that the discharge will be executed immediately after appellate review is final and there is no reversal of the conviction. The separation authority's letter to the MPF directing separation and discharge characterization should be tailored accordingly. Such a delay is authorized in AFI 36-3208 at paragraph 1.11.2: "Execute involuntary dis-

charges as soon as possible but within 10 calendar days after the separation authority makes the final decision.

NOTE: There must be a bona fide military reason for establishing a date of separation beyond 10 days." (emphasis in original) For our situation, that "bona fide military reason" is the prohibition expressed in paragraph 1.9.1.4 of AFI 36-3208 not to discharge a convicted member until appellate review of his or her case is final.

While that process should work in notification cases where the member to be discharged is not entitled to a discharge board hearing, see AFI 36-3208, paragraphs 6.22 & 6.23, in my experience the latter would present a real challenge to get completed before the appellate review process for the summary court was finalized. In this vein, where appellate review of a special or general court-martial case that didn't result in punitive discharge is involved, some might think they have more time to process the subsequent administrative discharge action. They might think this, because in their experience the review of special or general court cases takes longer than for a summary court. That type of thinking could backfire, however, should the convicted member decide to waive appellate review, as authorized at 10 USC 861. I submit the better approach in these "ETS" cases is to follow the checklist and process the discharge as quickly as possible through to completion in the manner suggested. Otherwise, a commander and legal office might find themselves in the situation I described at the outset and take those courses of action that prompted this article.

Transition From Military to Civilian Paralegal

MSgt Shanti Leiker

About a year and a half ago I was talking with a fellow mom at a child's birthday party discussing what career path I might engage in after my military career. She gave me a funny look and asked me why I hadn't considered being a paralegal, since I've devoted a large part of my career in the military as a paralegal. I thought about this question that evening and the reason I hadn't considered it was simple. During my paralegal interview process, in 1992, I was told that being a military paralegal would not help me to get a job as a paralegal in the civilian world, and that the best I could hope for would be a job as a claims adjuster for an insurance firm. I didn't put much credence in the CCAF degree that I'd obtained because aside from the credit for going to the Paralegal Craftsman Course, I'd only had to take a couple of non-legal classes to obtain it. This thinking had stuck with me until that day.

After realizing where this idea had come from, I began looking into what it took to be a paralegal in the civilian world and from that information I decided to pursue my paralegal bachelors' degree. I wanted to be competitive upon entry into the civilian world.

The following is a brief synopsis of some of the information that I discovered:

Civilian paralegals are not licensed or regulated by any official means at this time. There are various private organizations such as the National Federation of Paralegal Associations (NFPA), National Association of Legal Assistants (NALA), and the American Bar Association (ABA) that have established guidelines for paralegals to follow. Several of them offer certification programs that, when completed, indicates a certain level of competency that a private firm may look for. Association with these organizations is not required, but could be looked upon favorably by a firm when making hiring considerations. Some states do include rules for paralegals practicing in that state, so please research your state rules for specific requirements.

- The following is a job description for baseline civilian paralegals: Provides support to attorneys. Under the direction of an attorney, resolves routine legal issues. Researches and analyzes law sources such as statutes, recorded judicial decisions, legal articles, treaties, constitutions, and legal codes to prepare legal documents, such as briefs, pleadings, appeals, wills, contracts, etc. May require an associate's degree or its equivalent and 0-2 years of experience in the field or in a related area. Has knowledge of commonly-used concepts, practices, and procedures within a particular field. Relies on instructions and pre-established guidelines to perform the functions of the job. Works under immediate supervision; typically reports to an attorney. (http://swz.salary.com/salarywizard/layouthtmls/swzl_compresult_national_LE11000024.html) Can you see the similarities?

- A college degree is not mandatory although a two-year degree is becoming the standard, as indicated in the job description above. Experience can count for more than the degree in some situations. The level of starting pay rises proportionally to the amount of experience and education.

From the classes I have taken so far in my educational pursuit, I have learned more information. Civilian paralegals are expected to adhere to the same levels of Professional Responsibility and Ethical Considerations as attorneys. Most states mirror the accepted Model Rules and Ethical Canon's published by the ABA. Areas of particular concern are confidentiality, ethical conduct, avoiding the unauthorized practice of law, and the direct supervision of paralegals by attorneys. Prior to taking these classes I couldn't have explained these principles or explained how they apply to our military duties. I had the basics down, such as confidentiality and not giving legal advice, but these classes expanded my level of understanding as it applies to my current responsibilities. Additionally, I've learned that the characteristics of integrity, loyalty, and the continuous pursuit of education in our chosen profession are the same characteristics of successful civilian paralegals.

So, how does our experience as military paralegals help in transitioning to the civilian sector? It is definitely a great starting point. The CCAF degree I originally discounted took two years off my degree requirements for my bachelors program. Our professional responsibilities as military paralegals are clearly

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defined within the TJAG Policy letters, which, by the way, model the ABA Rules of Professional Conduct and Civility. Those of you who have the opportunity to supervise and/or perform duty as NCOIC's or Superintendents have gained management experience—a bonus for those resumes.

So, do our duties as military paralegals automatically ensure a job in a law firm as a paralegal? I say not. There are subtle yet distinct differences in the skill set required to perform as a civilian paralegal. But these differences can be overcome by attending some additional legal courses. Likewise, the benefit of experience as a military paralegal is priceless.

I've shared my experiences and information learned for several reasons. First, it's important to realize that although we currently are not certified or regulated by civilian law, there is written guidance regarding the rules and standards we must follow as paralegals. Secondly, I hope that if you have a dream or goal that you research what it takes to accomplish it, and then make an informed decision about whether or not you are going to pursue it based on the facts—not some preconceived notion. And finally, I believe it's important to understand the characteristics of integrity, loyalty and competence, which are consistently displayed by paralegals in the military, are also valued in the civilian world.

This is just the tip of the iceberg regarding information on this subject. I encourage you to research and explore the vast information available if you are interested in this career choice or any other. I wish you boundless energy and great successes in whatever future endeavors you pursue!

HELPFUL WEBSITES

National Federation of Paralegal Associations - http://www.paralegals.org/
National Association of Legal Assistants - http://www.nala.org/
American Bar Association - http://www.abanet.org/legalservices/paralegals/

(Please note that there are many paralegal associations available with information, the websites below are just a sampling and their listing is not to be taken as an endorsement by either the author or the Air Force!)