

# THE REVOLUTION IN MILITARY LEGAL AFFAIRS: AIR FORCE LEGAL PROFESSIONALS IN 21<sup>ST</sup> CENTURY CONFLICTS

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## I. INTRODUCTION

For almost a decade now the American military has been in the throes of what is known as the Revolution in Military Affairs (RMA).<sup>1</sup> The progeny of the larger Information Revolution, the RMA describes the impact of microchip-based technologies—not just on military equipment, but also the doctrine, organization, and strategies of warfighting. The synergistic effect of these impacts has led the U.S. armed forces—and especially the Air Force—to achieve lopsided victories in Iraq, Serbia, and elsewhere.

Paralleling the RMA there is what might be called a Revolution in Military Legal Affairs (RMLA). In a sense, the RMLA is also much the product of the same technological changes as those that caused the RMA. As will be discussed below, advanced communications and other new capabilities already have significantly altered military legal practice and are poised to generate even more change in the future. However, technology has stimulated the velocity of the RMLA in ways beyond merely the mechanics of the practice of law and the organization and doctrine applicable to legal professionals.

Technology has made law, and especially the law of armed conflict (LOAC), a central consideration in modern war. Specifically, international newsgathering organizations equipped with powerful new communications capabilities bring the raw images of war—to include possible LOAC violations—almost instantaneously to publics around the world. Such pictures can have significant impact in democratic states, as well as nations that—if not “democracies” in the American sense—are nevertheless dependent upon

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<sup>1</sup> For a discussion of “the revolution in military affairs” in the information age, see generally, *Select Enemy. Delete.*, THE ECONOMIST, Mar. 8, 1997, at 21; Eliot A. Cohen, *A Revolution in Warfare*, FOREIGN AFFAIRS, Mar.-Apr. 1996, at 37; Andrew F. Krepinevich, *Cavalry to Computers: The Pattern of Military Revolutions*, THE NATIONAL INTEREST, Fall 1994, at 30; and James R. Fitzsimonds & Jan M. Van Tol, *Revolutions in Military Affairs*, JOINT FORCE QUARTERLY, Spring, 1994, at 24.

popular support to wage war. Professors W. Michael Reisman and Chris T. Antoniou explain:

In modern popular democracies, even a limited armed conflict requires a substantial base of public support. That support can erode or even reverse itself rapidly, no matter how worthy the political objective, if people *believe* that the war is being conducted in an unfair, inhumane, or iniquitous way.<sup>2</sup>

In short, the ability of today's communications systems to transmit information to the body politic before leaders can censor or shape it has become one of the most salient features of modern war. In order to maintain the kind of public support the militaries need to prosecute a war, adherence to LOAC in fact and *perception* is essential. Both military and civilian leaders have come to accept that fighting lawfully is not just the proverbial "right-thing-to-do," it is a practical—even Machiavellian—*necessity*.

This phenomenon is a key stimulus for the RMLA. With lawfulness becoming more and more the measure of success of a combat operation, there is a need for professionals who not only know the law, but can apply it appropriately in that unique context. As discussed below, Air Force judge advocates (JAGs) and paralegals are filling that requirement in ways unprecedented less than a generation ago. Unsurprisingly, Air Force legal professionals were among the first to deploy in support of Operation Enduring Freedom's war on terrorism.<sup>3</sup> What the RMLA means in real terms is that today few Air Force commanders would go to war without a JAG. One might conclude, therefore, that the role of legal professionals is fully institutionalized within the armed forces and the Air Force especially.

In truth, the status of military lawyers and paralegals in operational matters is not yet as firmly established as one might expect at this stage. Despite flattering remarks by commanders and others in a variety of forums, there remains an underlying resentment if not hostility among many in the armed forces to the growing presence and, more specifically, the influence of lawyers in the conduct of modern conflicts. Critiques are not commonly articulated for the record, but do exist for operations from Desert Storm<sup>4</sup> to

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<sup>2</sup> W. MICHAEL REISMAN & CHRIS T. ANTONIOU, *THE LAWS OF WAR* xxiv (1994) (emphasis added).

<sup>3</sup> For information on the Air Force's role in Operation Enduring Freedom see Air Force Link, *Enduring Freedom*, available at <http://www.af.mil/news/efreedom/index.shtml> (last visited Nov. 12, 2001).

<sup>4</sup> See e.g., WILLIAMSON MURRAY, *AIR WAR IN THE PERSIAN GULF* 224-226 (1995) (criticizing the alleged role of Air Force lawyers with respect to a proposed bombing of a statue of Saddam Hussein). Murray's version of events is disputed by Colonel Scott L. Silliman, USAF (Ret.), the former Staff Judge Advocate of what was then known as Tactical Air Command (TAC). Murray contends that TAC legal advice that the statue was a protected cultural monument "was simply wrong." Silliman contends that no lawyer ever concluded that bombing the statue was illegal; lawyers only recommended that the target be carefully screened for conformance with existing legal standards. He believes the statue was removed

Allied Force,<sup>5</sup> and have already appeared for Enduring Freedom.<sup>6</sup> As the significance of law continues to grow in international affairs, we should expect such appraisals to become more frequent, penetrating, and potentially antagonistic.

Moreover, despite sporadic references in a number of doctrinal documents, Air Force legal professionals do not as yet have their own doctrine. Its absence produces practical, deleterious effects in that commanders and, just as importantly, planners, have no systemized way of conceptualizing the legal function into the Air Force's warfighting architecture. They are reduced to filling the void with *ad hoc* and idiosyncratic assessments of what is or is not an appropriate use of legal resources. In combat operations this can result in a hodgepodge of arrangements that are often personality-driven, and are therefore—almost by definition—fragile. Though workable solutions are sometimes stumbled upon, there is a real risk that for any number of reasons, in some future operations, legal considerations will not get the attention the exigencies of the RMLA requires. The result could be disastrous for the mission in a world where public perceptions are as important (and arguably *more* important) as battlefield success.

Fortunately, the Air Force does have an energetic effort underway to create doctrine for legal professionals in the operational arena.<sup>7</sup> The purpose of this essay is not to critique that effort. Instead, it will consider the hard-earned experiences of Air Force legal professionals to outline a 'way ahead' in light of the RMLA. How should we think about the role of JAGs and paralegals in tomorrow's conflicts? What do we need to do to ensure that those JAGs and paralegals called upon to perform in future operations have the type and depth of training they need to succeed? What are the challenges that will (and, to an extent, already have) emerged in the 21<sup>st</sup> century?

## II. THE RISE OF AEROSPACE LAW

As already suggested, the involvement of JAGs and paralegals in operations is not, *per se*, especially new. They served in significant numbers

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from the target lists for unrelated reasons. E-mail from Scott L. Silliman to Colonel Charles Dunlap, Staff Judge Advocate, U.S. Strategic Command (Feb. 19, 1998, 10:20:23 EST) (on file with author).

<sup>5</sup> See e.g., Richard K. Betts, *Compromised Command*, FOREIGN AFFAIRS, Jul.-Aug. 2001, at 126, 129-130 (review of WESLEY CLARK, *WAGING MODERN WAR: BOSNIA, KOSOVO, AND THE FUTURE OF COMBAT* (2001)) (arguing that the role of lawyers in the Balkan air war was "alarming" and "constrained even the preparation of options" and marked by a lack of "understanding of operational problems").

<sup>6</sup> See Seymour M. Hersh, *King's Ransom*, THE NEW YORKER, Oct. 22, 2001 available at <http://www.newyorker.com/FACT/?011022fa> FACT1 (last visited Nov. 12, 2001).

<sup>7</sup> The draft doctrine is Air Force Doctrine Document 2-4.5 *Doctrine for Legal Support of Aerospace Operations* (draft). This effort is underway at the Air Force Doctrine Center see <http://www.doctrine.af.mil/>.

in Korea, Vietnam, and later at a variety of fixed overseas bases during the Cold War.<sup>8</sup> However, their function was largely confined to traditional support activities such as military justice, claims, and legal assistance. International law as practiced in the Air Force at the base level was principally concerned with foreign criminal jurisdiction, tax matters, and the occasional immigration issue.

The seeds of the modern concept of JAG operational support are found in Operation Just Cause, the successful 1989 military effort to oust Panamanian strongman Manuel Noriega. Then Colonel Bill Moorman, the 12<sup>th</sup> Air Force Staff Judge Advocate at the time, arranged to get JAGs into the operation center as well as the planning cells, all with good effect.<sup>9</sup> Later, during the Gulf War, JAGs built upon this success and became significant “players” in such operational matters as the evaluation of targets, the development of rules of engagement (ROE),<sup>10</sup> and other vital operational matters.<sup>11</sup> Since that time, a growing number of “steady state” deployments of legal professionals to the Middle East, the Balkans, and occasionally to Asia and elsewhere continue the tradition begun in the 1980s.

Although not well known today, the architecture and precedent for JAG deployments after the Gulf War was much the result of efforts by then Colonel Jim Swanson during his service as the staff judge advocate (SJA) for 9<sup>th</sup> Air Force (1993-96). Colonel (now Brigadier General) Swanson’s advocacy for the inclusion of legal professionals in steady state and contingency deployments established a template for the Central Command Air Forces (CENTAF) Area of Operations (AOR).<sup>12</sup> This is especially significant as Southwest Asia became among the most common deployment locations for Air Force legal professionals.

Of particular note is General Swanson’s establishment—as a result of his experiences during Operation Vigilant Warrior in 1994—of the SJA position at Joint Task Force Southwest Asia (JTF-SWA) as a full-time O-6 billet. The presence of an experienced senior lawyer in the midst of on-going combat operations planning and execution educated a generation of senior Air Force leaders to the contribution a military lawyer can make to mission

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<sup>8</sup> See generally, “Operations Law” in Office of the Judge Advocate General, THE REPORTER, Special History Edition, 1999, at 110-157.

<sup>9</sup> See Lt Col Terrie M. Gent, *The Role of Judge Advocates in a Joint Air Operations Center*, AIRPOWER JOURNAL, Sept. 1999, at 40-55 available at <http://www.airpowermaxwell.af.mil/airchronicles/apj/apj99/spr99/gent.html> (last visited Oct. 27, 2001).

<sup>10</sup> See generally, Chairman, Joint Chiefs of Staff Instr. (CJCSI) 3121.01A, *Standing Rules of Engagement for US Forces* (Jan. 15, 2000).

<sup>11</sup> See generally, *Master Operation Lawyer’s Edition*, 37 A.F.L. Rev. (1994) (containing several articles addressing the deployment of legal professionals, as well as the functions they performed).

<sup>12</sup> This includes much of the Middle East and the Horn of Africa. See generally, the U.S. Central Command website available at [http://www.centcom.mil/new\\_site/web/Default.htm](http://www.centcom.mil/new_site/web/Default.htm) (last visited Nov. 12, 2001).

accomplishment. It has also provided a cadre of senior JAG leadership with authentic operational credentials and a keen appreciation of personal and professional demands occasioned by practicing law in combat zones.

All of this serves to well position the JAG Department to meet the needs of the Expeditionary Air Force (EAF).<sup>13</sup> Although relatively small in numbers at any given moment in time, these deployments – along with those elsewhere - have over time involved a significant number of lawyers and a smaller but still considerable number of paralegals. From that experience a number of lessons emerge, not the least of which is that serving at the tactical level in a wing – where the vast majority of legal professionals find themselves when deployed – is substantively different than serving in a headquarters, and especially an air operation center (AOC).<sup>14</sup> The context of the two environments is sufficiently different so as to warrant the recent separation of the unit type codes (UTCs)<sup>15</sup> to reflect the important differences in the duties to be performed.

Still, both kinds of duty can be considered under the aegis of “aerospace law.” Traditionally, everything that occurred in the deployed arena was lumped together as “operations law.” At one time that might have been appropriate; however, as we now work to focus training to meet the bona fide needs of distinct UTCs, it is necessary to add more fidelity to the lexicon to accommodate the realities of the RMLA. Properly conceived, “aerospace law” embraces the entire spectrum of legal activities that in various ways are *directly* related to operations, and especially combat operations. Within that discipline, the wing level function can be characterized as the practice of “expeditionary law,” while serving in an AOC represents engagement in “operations law.”

Clearly, in the EAF, all uniformed legal professionals ought to prepare to practice expeditionary law. Indeed, one might fairly say that there are three kinds of JAGs and paralegals today: 1.) those that *are* deployed; 2.) those that *have* deployed; and 3.) those that *will* deploy. Just as all JAGs are expected to have basic advocacy skills and be qualified to prosecute and defend<sup>16</sup> courts-martial, so too must virtually the entire Department be expeditionary-ready. The same, however, is not necessarily true with respect to operations law. The requirement for such personnel will never be as large as for those

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<sup>13</sup> For a brief summary of the EAF paradigm and its implementing Aerospace Expeditionary Force structure, see Dep’t of the Air Force, *America’s Air Force Vision 2020* (2000) available at <http://www.af.mil/vision/vision.pdf> (last visited Nov. 12, 2001).

<sup>14</sup> For a general discussion of the role of air operations centers in Air Force doctrine, see Dep’t of the Air Force, Air Force Doctrine Document 2, *Organization and Employment of Aerospace Power*, Feb. 17, 2000 available at <http://www.doctrine.af.mil/>.

<sup>15</sup> For more information about JAG and paralegal UTCs as well as AEF deployments, see the judge advocate portion of the AEF website available at <https://aefcenter.acc.af.mil/AEFC/functionals/JAlinks.htm> (last visited Nov. 12, 2001).

<sup>16</sup> The Judge Advocate General must certify military lawyers before they perform the defense counsel function. See UCMJ art. 27(b) (2000).

expeditionary-qualified. Besides the enhanced knowledge of international law AOC work requires, all persons working in an AOC—to include legal professionals—need to learn specialized computer and communications systems. Thus, it simply does not make sense (nor is it feasible) to attempt to inject that kind of expertise across the Department. That said, there are—nevertheless—aspects of each kind of duty warranting further analysis.

### III. EXPEDITIONARY LAW

“Expeditionary” law is a traditional “wing-level,” comprehensive legal practice conducted in the deployed environment. In most, but not all, respects it mirrors the kind of law typically practiced at a continental United States’ (CONUS) base but with some important differences, especially physical ones. Specifically, the expeditionary law practitioner must be prepared to effectively function in a sometimes austere and possibly hostile situation. This means that the legal team must have good physical conditioning and solid airmanship skills. These would include the ability to set up and maintain living and working facilities, demonstrated proficiency with the designated firearm, the capacity to survive and operate in an environment contaminated by chemical/biological weapons, and more.

Concerning legal personnel, the Department’s concept is to deploy a JAG and a paralegal as a team, and has constructed its principal UTC to that effect.<sup>17</sup> No one would dispute that training together and building good working relationships pays dividends when deployed. Nevertheless, it is important to avoid having the teams become inflexibly idiosyncratic, that is, so dependent upon each other that the JAG and paralegal who compose it are unready to function separately should the need arise. Among other things, UTCs should not be built on the assumption that the respective team members will compensate for a partner’s weaknesses. There may be many instances where the team is deliberately divided, or unexpected, last minute substitutions must be made. As important as the “team” concept is and should remain, the flexibility to rapidly reconfigure as required is an absolute must.

Though there is no consensus on this point, deployed offices are not necessarily intended to be “full service” affairs; that is, they should not be expected to do “legal brain surgery” in, for example, a two-person shop that may represent the total legal presence at a given location. The ratio of attorneys and paralegals to the deployed population will never match that found at a CONUS location. Consequently, there must be prioritization and allocation of resources that might result in certain services simply being unavailable. Thus, for example, such customarily provided services as the annual tax program may not exist in many contingency locations.

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<sup>17</sup> The UTC XFFJ3 is composed of a JAG and paralegal.

Along these lines, our doctrine (along with other Air Force directives) needs to reflect the importance of predeployment legal planning. People cannot be forced to execute wills or powers of attorney, but they can be educated on the utility of such documents. Furthermore, they ought to be given ample opportunity to have them prepared in other than the chaos and pressure of an imminent overseas deployment. The way to accomplish this is for JAGs to be very proactive during the planned spin-up period for a designated Aerospace Expeditionary Force (AEF).<sup>18</sup> At some stage each individual should be counseled by a legal professional concerning potential issues that could arise while deployed. The member should be provided with the available options for addressing them.

Perhaps the most difficult, yet exceptionally important, aspect of expeditionary law is military justice. For many years military justice in the deployed environment meant little more than the occasional Article 15 or letter of reprimand. More serious cases (where court-martial was contemplated) typically resulted in the accused being returned to home station, usually CONUS. In the late 1990s, however, the legal and command infrastructure in contingency areas in the CENTAF AOR was sufficiently robust that more than a dozen cases were tried in-theater.

Philosophically, it is vitally important that the full-range of justice options, to specifically include trial by court-martial, be available to command *in situ*. Few things could be more destructive of morale and discipline than if the commission of misconduct were to become an avenue out of an arduous and possibly dangerous location. Although historically, trials have taken place in combat zones,<sup>19</sup> the rather ill-conceived predilection in recent years to civilianize the military justice system has taken its toll. Today evidentiary rules, representational precedents, and other developments meant to mirror the resources and processes available in CONUS civilian courts have made the conduct of military trials in remote foreign areas under austere conditions extremely difficult and sometimes impossible.

The RMLA should extend innovations to the administration of the disciplinary process at every level. Part of this may require something of a “back to the future” approach. For example, the typical practice today is to deploy defense counsel, military judges, and court reporters only when needed for specific cases. Unfortunately, however well this concept may work for steady-state deployments (and it is cumbersome and complex at best), it will seldom work consistently for dynamic, short-notice contingencies. Inserting unexpected personnel into the intra-theater transportation scheme in a relatively new operation is difficult and will become even more so as sorties

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<sup>18</sup> See note 13, *supra*.

<sup>19</sup> During the Vietnam War, a Marine Corps court-martial was conducted in an underground bunker in the midst of the dramatic siege of Khe Sanh. See GARY D. SOLIS, *MARINES AND MARINE LAW IN VIETNAM: TRIAL BY FIRE* 106-109 (1989).

get ever more carefully managed to fully book them with pre-existing requirements.

One solution may be to make the necessary policy (and statutory if needed) changes to allow the designation of military lawyers already in-theater to serve on a temporary basis as military judges and defense counsel. Admittedly, there would be challenges to ensure that such judges and defense counsel have sufficient independence in fact, but these issues are manageable. Further, some may argue that such an approach would undercut the appearance of impartiality of the judiciary and defense services.

In truth, however, there is virtually no data to demonstrate that the existing structure ever successfully created the desired perception of independence among the military's rank and file, or even—for that matter—accused who are presumably briefed in some detail on the elaborate structure set up for that purpose. The significant numbers of accused that seek civilian counsel would seem to be a melancholy testament to that conclusion. In other words, to the typical airman accused of misconduct, the new arrangement would likely be transparent in terms of his or her expectations. To the contrary, some accused may *prefer* representation by counsel drawn from deployed units because of the anticipated familiarity with the specific area and mission—compared to the potential negative effect of representation by outside counsel who lack such familiarity.

Other changes reflective of the technology that underpins the RMLA ought to be made. For example, evidentiary rules (and statutory underpinnings where appropriate) that take advantage of such new communications capabilities such as video teleconferencing are plainly overdue. Inevitably, such changes would be tested in the courts, but it is a mistake to assume—as is too often the case today—that they would be rejected. Constitutional standards applicable to the trials of members of the armed forces for uniquely military offenses (and those directly related *by their facts* to a specific military mission *in contingency areas* during hostile action) may very well permit the use of advanced communications means as a substitute for live testimony.

The RMLA would also seem to suggest changes in nonjudicial punishment actions. For example, persons assigned to naval vessels can be required to accept nonjudicial punishment even when they otherwise might wish to demand trial by court-martial.<sup>20</sup> An element for this practice lies in the special status of a ship's captain that comes from naval traditions. In the main, however, it reflects the logistical problems with trying cases aboard ship should the respondent refuse nonjudicial punishment. Today, however, the difficulty of trying such cases in some of the remote locations where an AEF may find itself will equal—if not exceed—the justification that warranted the rule for naval vessels in the first place. Thus, it may make sense to extend the policy to contingency locations under certain circumstances. In short, the

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<sup>20</sup> 10 U.S. C. § 815(a) (1998).



entire Uniform Code of Military Justice<sup>21</sup> and associated administrative procedures need re-examination to facilitate its application—and relevance—in the deployed environment.

The differing issues presented by the administration of military justice constitute just one illustration of how “expeditionary” law within the aerospace law discipline differs from received wisdom of what constitutes “operations law.” Another example that the JAG deploying with the typical AEF will find is that the expeditionary law practice requires in-depth knowledge of contracting and fiscal law principles. It has been the universal (albeit somewhat unexpected) experience of deployed JAGs that these matters present the thorniest issues. The natural tendency of commanders to make things happen quickly, the absence of contractors knowledgeable of government procurement procedures, and differing cultural orientations in host areas, are just a few of the things that make resolving these issues so difficult. In any event, addressing contract and fiscal law problems is central to the practice of the expeditionary law.

Of course, expeditionary law does require a general appreciation for international law, especially as it applies to status of forces agreements (or the absence thereof). The JAG must know, for example, the procedure for dealing with foreign criminal jurisdiction cases, as well as foreign claims. Concerning operational matters, the JAG should expect to provide rules of engagement training, along with LOAC instruction as needed. What the wing-level JAG typically will *not* do is review targets and operational plans. The vetting of those issues in-theater is the responsibility of the AOC legal team. Among other things, the JAG at the wing-level will rarely have access to the overall plan or the supporting intelligence to make a proper evaluation. However, if for whatever reason the JAG becomes concerned about a targeting or other LOAC matter, that concern should be immediately transmitted to the AOC’s JAG cell.

The role of the paralegal in the expeditionary environment finds many parallels with that of a law office manager. This means the paralegal must be able to perform the range of tasks accomplished by paralegals in the typical, full-service wing legal office. Experience reveals, however, some areas worth special emphasis. For example, the paralegal should be familiar with report of survey procedures because the loss or damage of property is not uncommon in deployed areas. The paralegal must also know how to process a Foreign Claims Act<sup>22</sup> case. As previously mentioned, complicated contracts and fiscal law issues often arise during deployments. The paralegal should become expert in the instructions governing the use of appropriated and nonappropriated funds for health, welfare, and morale purposes.<sup>23</sup> This is

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<sup>21</sup> 10 U.S. C. §§ 801-946 (1998).

<sup>22</sup> See Foreign Claims Act, 10 U.S.C. § 2734 (1998).

<sup>23</sup> See e.g., *Appropriated Funds*, Op. JAG, Air Force, No. 23, (Apr. 1, 1999) (discussing appropriate funding sources for commanders’ coins).

another issue that seems to frequently arise in deployed situations, and one which paralegals could provide great assistance in resolving.

A tremendous opportunity also exists for paralegals in military justice and other investigatory matters. Beyond the need to be able to fully process all kinds of military justice actions, it appears that the paralegal in future operations will need to have court-reporting skills. The Department's current reliance upon civilian court reporters volunteering as needed continues to be problematic<sup>24</sup> and can never provide the certainty those responsible for military planning demand. The nature of 21<sup>st</sup> century Air Force missions requires a cadre of *uniformed* court-reporters who can be directed to go into harms' way anywhere in the world, and who have the training and physical stamina to survive and function once there.

A key to developing this aspect of the RMLA is to take advantage of the new court-reporting technologies. With the right systems, mastering court reporting will not be the onerous task it has been in the past. Indeed, delays in court-martial transcriptions throughout the Air Force may be related to reliance on parochial legacy systems instead of newer, faster ones. Once this technology-facilitated skill is integrated into the paralegal community, it will be in demand not just in contingency areas, but at home stations as well. Empowered paralegals will likely find themselves part of the team supporting such activities as Accident Investigation Boards (AIBs) and the proliferating number of commander-directed investigations (CDIs).

With respect to the last topic, it would seem that paralegals are primed to fill a critical need in contingency locations (as well as home station): that of investigator. Counter-terrorism and force protection responsibilities have caused a steady erosion of investigative support from both the Air Force Office of Special Investigations (AFOSI) and Security Forces (SF) to the point that today investigative support of routine criminal matters is very much the exception. Paralegals are already familiar with the legal considerations involved, and some have learned, *ad hoc*, investigative techniques (often when assigned as defense paralegals). With some additional training, paralegals could be of immense assistance to those assigned to conduct CDIs, as well as to trial and defense counsel preparing cases for court. In certain instances, paralegals may themselves be the principal investigators. Clearly, the RMLA is not just a technological concept, but rather one that seeks to incorporate new ways of thinking to meet 21<sup>st</sup> century needs.

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<sup>24</sup> See e.g., Lt Col Mary Beth Harney, *After-Action Report—Operation Southern Watch*, Oct. 6, 2001, at para 9a(1) (“The major obstacle [to conducting a court-martial] was finding a court reporter available to travel to the AOR.”).

#### IV. OPERATIONS LAW

As described above, the integration of Air Force legal professionals into AOC operations is a process that now has some years experience upon which to draw. Conceptually, the issue is no longer finding an explicit rationale for access to AOCs and the planning process. Even if JAG support is not sought by a concerned commander (not likely in the RMLA era) both international law<sup>25</sup> and U.S. regulations<sup>26</sup> provide ample authority for getting military lawyers into the process (though more acculturation of planners and operators in this regard is always desirable). Today's problem is a practical one: determining exactly where and how to most efficiently and productively interface in the operational planning and execution process.

What is needed is an agreed upon template that assures and regularizes JAG input at various points in the air tasking order (ATO) cycle. The precise methodology for doing so may well be driven by the integration of such computer systems as the Theater Battle Management Core System (TBMCS), as well as the nature of the operation itself. It is important, however, that the importance of human interaction and physical presence not be underestimated. To the extent possible, JAGs working in AOCs ought to have *physical presence* in the strategy division, the Guidance, Apportionment, and Targeting (GAT) shop, among the Major Air Attack Plan (MAAP) developers, and the Information Operations (IO) shop, as well as the "battle cab" (or its equivalent).

Obviously, a JAG working in an AOC needs a solid understanding of the theory of the ATO process, along with the decision support systems that make it work. This knowledge must be placed in the larger context of warfighting, particularly at the strategic level. Today's savvy commanders very often welcome the JAG in the AOC, but they want the JAG to be a complete *military* officer. General Hal M. Hornburg captured the expanded expectations in a speech in June of 2001:

[JAGs] need to understand the big picture. I was in the CAOC during Desert Fox. Who do you think was standing right behind me? It was my JAG. That person needs to know the law and the rules of engagement, but he or she also needs to understand things bigger than just the law. They've got to understand combat.<sup>27</sup>

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<sup>25</sup> See e.g., Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, Dec. 12, 1977, art. 82, 1125 U.N.T.S. 609 (entered into force Dec. 7, 1978) (commonly known as Additional Protocol II).

<sup>26</sup> See e.g., CJCSI 5810.01A, *Implementation of the DoD Law of War Program*, para. 6(c)(5) (27 August 1999) (mandating that "all operation plans . . . concept plans, rules of engagement, execute orders, deployment orders, policies, and directives are reviewed by the command legal advisor to ensure compliance with domestic and international law").

<sup>27</sup> General Hal M. Hornburg, *The Importance of Legal Professionals in the Air Force*, (June 27, 2001), available at <http://www.aetc.randolph.af.mil/pa/Library/speeches/cc06.htm> (last

This highlights the importance of professional military education (PME) for JAGs intending to practice operations law. Rarely would a JAG who has not completed intermediate service school be suitable to serve in a senior position on an AOC legal team. What is more is that the RMLA demands that Air Force legal professionals re-think the concept of "PME." No longer is it sufficient to assume that completing periodic formal courses is adequate. The Air Force legal professional must take on the unending responsibility for *self-education* in every aspect of the client's "business." This means studying military history, world politics and culture, Air Force weapons systems, grand strategy, the mechanics of combat operations, and much, much more. Unless the JAG has an understanding of the multiple dimensions of what General Hornburg calls the "big picture," he or she will never truly succeed as a legal advisor in combat operations.

Unlike the expeditionary law practitioner, the legal professional practicing operations law must have a thorough understanding of LOAC and related facets of international law. He or she must also be familiar with the interpretations given LOAC by such entities as the International Criminal Tribunal for the Former Yugoslavia.<sup>28</sup> Because the Air Force will usually operate within a coalition, understanding which coalition members are parties to what LOAC agreements is vital. In the context of the RMLA, JAGs working in AOCs must carefully distinguish between what the law mandates and what is merely prudent warfighting. For example, striking a particular target may be legally and morally permissible notwithstanding collateral damage, yet still not wise strategically in particular circumstances because of the political consequences. This, once again, underlines the importance of fully understanding the "big picture."

The AOC JAG also must be forensically adept. He or she must be able to rapidly and lucidly explain complex legal matters under circumstances of great stress. This includes the ability to very quickly draft cogent memoranda on a wide-variety of issues, and prepare equally as sound presentations that are visually effective. With respect to ROE, the AOC lawyer must not only be *the* expert, but also able to instruct operators on its application in a range of realistic combat situations. Additionally, the JAG will likely be tasked to draft, or assist in drafting, that part of the special instructions (SPINs) that concern ROE. Further, when collateral damage incidents do arise, the JAG may be called upon to marshal the evidence, analyze it, and "make the case" to the public if necessary. For all these reasons, the skills of the trial practitioner—and not necessarily the international law academic—will often be among the most desired traits of the operations law attorney.

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visited Oct. 22, 2001).

<sup>28</sup> See e.g., International Criminal Tribunal for the Former Yugoslavia, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia (13 June 2000) available at <http://www.un.org/icty/pressreal/nato061300.htm> (last visited June 12, 2001).

How does the paralegal work into AOC operations? While there has been much written about the role of the JAG in the AOC, rather less has been discussed about the paralegal's function. This is still an evolving area, but it seems clear that the paralegal's importance in the AOC will only continue to grow. The paralegal's role need not, however, necessarily be interchangeable with that of the lawyer (though sometimes that may be the case). Ideally, it is a complimentary role, and one that builds on existing skills. Nevertheless, it will be necessary—just as with the attorneys—for paralegals to develop new capabilities.

The paralegal must have a working knowledge of the ATO process marked by a clear understanding of when and how legal analysis is typically injected. The reason for this is that the AOC paralegal, who must be an experienced NCO, should be the “triage” director, that is, responsible for tracking and managing the multiple demands on attorney time. The paralegal must have a sufficient understanding of international law and other AOC issues, not to resolve them *per se*, but to clarify and prioritize them for the attorneys. The paralegal also needs to be able to re-direct queries as appropriate, and to quickly assemble the relevant research materials.

In practical terms, the paralegal must have a “hands-on” technical capability with respect to the AOC computer systems. He or she must be able to help set up the system, understand its capabilities, and perform basic maintenance and repairs. In addition, the paralegal must know how to properly manage classified material, as well as have a substantive understanding of the foreign disclosure rules applicable to the particular operation. Although the AOC legal team usually would not be concerned with such combat support matters as legal assistance or claims, they inevitably arise among AOC personnel, and smart client relations dictates they be addressed promptly. The paralegal should be the principal point of contact for these issues, resolve them where possible (e.g., preparing a simple power of attorney or performing a notarization), and ensure proper referral to the supporting legal office when necessary.

The challenge today is to develop the right kind of training programs for Air Force legal professionals destined to practice operations law in AOCs. Given the Air Force's stated intention to treat the AOC as a weapons system, JAGs and paralegals should expect to attend many of the same formal programs that all AOC personnel must complete.<sup>29</sup> In addition, specialized training for lawyers and paralegals (already extant within Air Combat Command) is needed. Air Force legal professionals should expect a testing and certification regime, though it is vitally important that the ultimate

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<sup>29</sup> These courses are conducted by the Air Force Command and Control Training and Innovation Group at Hurlburt Field, FL, *see generally* <http://www2.acc.af.mil/afc2tig/> (last visited Nov. 13, 2001).

decision as to who is—or is not—qualified to practice law in an AOC (as well as anywhere else in the Air Force) be reserved to The Judge Advocate General.

## V. REACHBACK AND THE RISE OF THE “VIRTUAL” OFFICE

A key feature of the emerging Air Force way of war is the notion of “reachback.” This is keeping with the idea that the size of the forward deployed force will be kept as small as possible. Instead of having all the experts and other specialists go forward, people can remain at home stations and “participate” via computer, video teleconferencing, and other advanced communications links. AOCs are already engaged in this kind of high-tech leveraging of Air Force resources. By replacing people with “reachback” technology, a “light, lean, and lethal”<sup>30</sup> AOC can deploy much more quickly and thus begin air operations sooner.

Reachback is also a feature of the RMLA. In a sense, JAGs have been using reachback for years. The numerous resources available through the Federal Legal Information Through Electronics (FLITE) program bring all kinds of information and resources to JAG computer terminals everywhere. Of course, in certain deployed areas the communications “pipe” cannot always support or sustain access to FLITE (or access to other legal databases). Consequently, the International and Operations Law Division (HQ USAF/JAI), the Air Force Judge Advocate General School, and others record more and more materials onto CDs for ease and reliability of access.

Most significant is the growth of legal cells that are fully staffed during contingency operations at command posts in rear areas. It is very often the case that, notwithstanding distance or time zones, the forward-deployed JAG always has immediate access to another military lawyer, and frequently at multiple levels of command. In addition to greater access to legal resources in the rear area, the type of dynamic exchange that can take place among the lawyers linked in real time by modern communications systems can often solve problems more quickly and accurately than could a JAG otherwise isolated by time and distance.

Still, there is a fine line between reachback support and back channel “stovepipes.” Although operators are becoming accustomed to the concept of reachback, its application to JAG activities is not yet always fully accepted. In part this is because there is the perception (and one not altogether bad) among many clients that a good lawyer can handle any issue. Consequently, it is not always readily understood that assistance in specialized areas of the law is required. Further, the sensitive nature of JAG business is such that command, and others, are often reluctant to share the information with higher

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<sup>30</sup> The Air Force’s development of the new AOC concept is part of a broader effort called Joint Expeditionary Force Experiment (JEFX). *See e.g.*, <http://www.af.mil/news/airman/1199/world7.htm> (last visited Nov. 12, 01).

headquarters. By law, JAGs are free to communicate “directly” with each other without intervention of the chain of command.<sup>31</sup> However, as a practical matter, JAGs need to engage command as to how JAG reachback can help accomplish the mission most efficiently.

Another aspect of the RMLA is the concept of the “virtual office.” That is, a way of operating whereby the small footprint, forward deployed legal office has a different kind of relationship with the supporting office at higher headquarters. Specifically, the forward office would be principally responsible for serving immediate needs of clients, as well as spotting issues. When the deployed JAG is confronted with an issue not capable of immediate resolution, he or she would have the option of shipping it via e-mail, fax, or other means to a supporting legal office in the rear (usually the numbered Air Force).

Substantive research, to extend even to draft-opinion preparation when appropriate, would be accomplished and then re-transmitted to the contingency location. In other words, unlike the typical relationship in CONUS where the subordinate office is expected to exhaust their research and analytical capability before turning for assistance to higher headquarters, the higher headquarters JAG office itself forms a “virtual” research branch of the forward-deployed JAG. The creation of “virtual offices” through the exploitation of emerging communications capabilities will allow the delivery of very high-quality legal work to even the remotest locations.

## VI. HOMELAND DEFENSE

Actually, the newest trend in aerospace law runs somewhat counter to the expeditionary concept emphasized in the Air Force in recent years. After the September 11 attacks, the Quadrennial Defense Review (QDR)<sup>32</sup> was rewritten to push “Homeland Defense” to the forefront. The use of military force in domestic situations has long raised complex legal issues. Since Colonial times Americans have been suspicious of the threat to liberty presented by military forces used for internal security purposes.<sup>33</sup> As a result, there are a plethora of statutes—the *Posse Comitatus Act*<sup>34</sup> foremost among them—that regulate the military’s authority in CONUS to execute the laws. There are exceptions to these prohibitions,<sup>35</sup> but they should be read in a

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<sup>31</sup> 10 U.S. C. § 806(b) (1998).

<sup>32</sup> Dep’t of Defense, Quadrennial Defense Review Rep. (Sept. 30, 2001) available at <http://www.defenselink.mil/pubs/qdr2001.pdf> (last visited Oct. 29, 2001).

<sup>33</sup> See Charles J. Dunlap, Jr., *Revolt of the Masses: Armed Civilians and the Insurrectionary Theory of the Second Amendment*, 62 TENN. L. REV. 643, 646-653 (1995).

<sup>34</sup> 18 U.S. C. § 1385 (1998).

<sup>35</sup> See generally, Jeffrey D. Brake, *Terrorism and the Military’s Role in Domestic Crisis Management: Background and Issues for Congress*, CONGRESSIONAL RESEARCH SERVICE, Apr. 19, 2001.

limiting fashion—one that recognizes that there are few models in history where military forces were successfully used in both a domestic policing role and in an external warfighting mode.

Of particular concern is determining the legal parameters of domestic intelligence gathering, especially where U.S. citizens are involved.<sup>36</sup> The events of September 11 have, at least in the short term, diminished the once robust resistance in the public mind to such government surveillance. Moreover, as the Air Force—along with Americans generally—become more computer-dependent, cyberterrorism is another type of 21<sup>st</sup> century threat that mixes law enforcement and national security interests in ways not yet fully delineated. Nevertheless, significant limitations on the proper role of the armed forces remain in place—for good reason. It will be especially important in the coming years for Air Force legal professionals to ensure the letter and spirit of the restrictions are fully respected in domestic operations.

Such operations may also include CONUS counterair efforts. What is really unprecedented for the Air Force in the aftermath of the September 11 attacks is not enhanced CONUS air defense *per se*. Rather, it is the use of American fighters to possibly shoot down commercial airliners under the control of terrorists that is wholly unprecedented. Crafting appropriate ROE and SPINS for such situations is exceptionally challenging. Beyond this formidable task we should expect to see a multiplication of requests for support to civil authorities in situations where biohazards are suspected, as well as consequence management in the event of terrorist attacks having catastrophic impact. In the worst case scenario, Air Force legal professionals must be prepared to advise even on such previously unfathomable matters as martial law.

## VII. FINAL OBSERVATIONS

Since the horrific events of September 11, 2001 many have expressed the view that nothing will ever be the same for Americans. In a very real way this is especially true for the Air Force Judge Advocate General Department. Already in the midst of the RMLA, the Department now has an abundance of aerospace law issues of first impression to address. We may be at the inception of a RMLA even greater than already discussed. In the future, the need for aerospace law practitioners for both deployed and homeland operations may require a re-allocation of the Department's resources.

For example, the Department's civilian lawyers may bear increasing responsibility for "steady state" taskings in specialized legal disciplines like labor, environmental, privatization, and more. These are areas of law best

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<sup>36</sup> See *e.g.*, National Security Act of 1947, 50 U.S.C. §§ 401- 441d; the Intelligence Oversight Act of 1980, 50 U.S.C. § 413; Exec. Order No. 12333, U.S. Intelligence Activities, 46 Fed. Reg. 59941 (Dec. 4, 1981).



addressed by consistent representation over long periods of time. The uniformed part of the Air Force's legal team must be prepared to focus on aerospace law issues that by their very nature are peripatetic in scope, intensity, and duration. A division of labor that recognizes and accepts counsel availability as a factor in the efficient delivery of legal services may become a watershed in the RMLA.

For judge advocates, along with other military officers, the greatest responsibility in coming years may be to temper the emotions of the moment with reflective, professional advice. We will face opponents who will not shrink from using any method to inflict harm upon us, however bestial. Replacing emotionalism (and all the obtuse and undisciplined decisions it can generate) with the sort of cold fury that is eminently clear thinking and aggressively rational, may well be one of the most important contributions a military professional can make in 21<sup>st</sup> century conflicts. Only by doing so can we be assured that the effective use of armed force honors the legal and moral ideals that the American military exists to defend.