

**First Place Winner
2005 LAMP Essay Contest**

**Back to the Future:
A Return to First Principles**

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On 27 May 2003, the *New York Times* published a controversial Op-Ed piece by author Robert Coram alleging that the Air Force planned to decommission its fleet of A-10 Warthogs. According to Coram, the reason “why the corporate Air Force so deeply loathes the A-10” is its “philosophical aversion to the close air support mission,” a “humiliating” and “bitter reminder” of the service’s Army roots and its former subservience to Army commanders.

Whatever the accuracy of Coram’s hotly rebutted arguments, his distinction between the “muddy boots” nature of close air support and the high-technology, high-altitude sleekness of the interdiction mission provides an apt analogy for the unglamorous role of legal assistance in the military justice/operations law-centric world of the Air Force Judge Advocate General’s Corps. The 50th anniversary edition of *The Reporter* (Vol. 26, Special History Edition, 1999) dedicated eighteen pages to Military Justice and forty-six pages to Operations Law. Legal assistance did not make an appearance. The “JAG Corps Vision Document” does not bestow legal assistance with the elevated status of a core competency, but rather lists “legal and income tax assistance” under the broad heading of “Robust Legal Programs.” At the Judge Advocate Staff Officer Course, the section entitled “Legal Assistance, Notaries, Powers of Attorney, Wills, and Preventive Law” comprises one two-hour lecture block and one twenty-four-page chapter within the Civil Law Desk Book. Most telling of all, perhaps, is the fact that “Chief of Legal Assistance” is a title most commonly held by newly-minted judge advocates in their first job

rotation during their first base assignment. The message is simple and unmistakable: If you're going to mess up, let it be in legal assistance.

Legal Assistance at the Crossroads

In reaction to these perceived slights, the tendency among well-intentioned reformers has been to critique the current state of military legal assistance by decrying its failure to sufficiently transform since its inception during World War II. The charge leveled against legal assistance by its most dedicated advocates is that the program, as is, constitutes a noble but emasculated relic badly in need of a tune-up. BrigGen David C. Hague, USMC (Ret.), former Chair of the LAMP Committee and a visionary proponent of a more robust legal assistance paradigm, believes that “we are applying a mid-20th century template on 21st century warriors,” largely because “the World War II mindset prevails with regard to personal preparedness.” (“From the Chair,” *Dialogue*, Summer 2002, Vol. 6, No. 3). Steven Chucala, the winner of the inaugural LAMP Essay Contest in 2002, similarly noted the failure of legal assistance “to evolve and adjust organizationally in order to cope with current professional needs.” The Army’s legal assistance program, Chucala wrote, “has continued to function in the same realm for over 50 years without substantive improvements.” (“Do We Dare to Think Outside the Box?” *Dialogue*, Winter 2003, Vol. 7, No. 1).

As is bound to happen, however, innovative ideas, if left unchallenged, can quickly become the conventional wisdom. The perceived deficiencies of legal assistance have so often and so forcefully been phrased in terms of the need for evolutionary expansion that we have largely overlooked the possibility that the exact opposite holds true: Perhaps JAG has been evolving too much, beyond our historically circumscribed role as uniformed attorneys supporting military commanders. My contention in this essay is that the future of legal assistance should be

a return to its past. In particular, I intend to make the case that legal assistance should become a statutory entitlement, but not for the reasons or in the ways most often cited by supporters of the entitlement option. Firm statutory guidance has the enormous potential to rein the program in, producing a net benefit for both the client and the practitioner. By narrowing the scope and eligibility of legal assistance in a manner that comports with the original intent of the program as reflected by contemporary documentary evidence, we will simultaneously increase competency in our core legal assistance practice areas and provide a better quality of service to the client. Thus legal assistance can and should be a guaranteed benefit for military members, but only if coupled with restrictions that define precisely what legal assistance is and who receives it. Entitlement and expansion need not go hand-in-hand.

Runaway expansion of the legal assistance program as part of every service member's "total compensation package" threatens to let our compassion for the client undermine our organizational purpose as JAGs. Indeed, it is hardly a new argument in the field of political theory that the exponential growth of any bureaucratic entity becomes a self-fulfilling prophecy when it continually strives to maximize its turf and justify its area of assigned responsibilities. Today's judge advocate has become the staff officer of last resort. "Why don't you run that by legal?" is so common a refrain that "JA," as the saying goes, now stands for "Just Ask." As judge advocates, part of us relishes this role at the same time that it overwhelms us, because it imbues us with an elevated status as the overarching gateway for a wide variety of initiatives – no Staff Summary Sheet is complete without a visit to JA. The danger of mission creep, however, is very real. If our primary reason for being JAGs is to serve as legal advisors to commanders, ensuring operational freedom of command and the fair administration of military justice, then it follows that our organization must be agile and efficient. Unrestrained growth

without due deference to our past threatens to undercut our very reason for being. While proposing an overhaul of the undergraduate curriculum, former Harvard University President A. Lawrence Lowell once quipped, “Every educated man should know a little of everything and everything about something.” The JAG, unfortunately, is supposed to know everything about everything, and usually feels like he knows only something about nothing.

Legal assistance fits squarely into this debate because the program, while oftentimes frustratingly restrictive when we’re trying to help a client, is simultaneously such an expansive and amorphous endeavor. For example, there is no clear reason why the income tax assistance program – a behemoth in its own right which has been folded into the legal assistance function even though it’s technically an installation commander’s program – should be a JAG function at all. If the tax center rationally belongs to anyone, shouldn’t it be Finance? Moreover, on a day-to-day level, it is no rarity for the legal assistance attorney to see several clients in a row before encountering the first one with an actual “legal” issue. To blame the problem on ineffective client screening is to unfairly place the burden of systemic confusion on the shoulders of front desk personnel. Receptionists are too busy checking military IDs for eligibility and trying to ferret out potential criminal issues to worry about whether the client will be asking the legal assistance attorney to perform a function better suited to Pass and Registration, Finance, or Travel Management.

The arguments of those who advocate an expanded, statutorily guaranteed legal assistance program often rest on an analogy drawn between medical and dental care, physical fitness, and weapons training on the one hand, and service members’ “legal health” on the other. For judge advocates to fulfill “their mission of comprehensive legal support,” BrigGen Hague wrote, legal assistance should be included “among [these] other individual readiness-related

requirements.” (“From the Chair,” *Dialogue*, Summer 2003, Vol. 7, No. 3). This analogy is powerful because it strikes at the heart of legal assistance practitioners’ sincere desire to help heal their clients’ legal ills. But the analogy, on closer inspection, is not particularly apt for the basic reason that the judge advocate practicing legal assistance – unlike the physician treating patients, the health-and-wellness officer overseeing physical fitness tests, and the weapons expert conducting 9mm training – is not serving in the function for which his billet was originally conceived. If the rejoinder from the advocates of legal assistance expansion is that this problem could easily be resolved by making legal assistance a sweeping statutory entitlement or by creating a separate DoD legal assistance agency with its own fully developed career path, then their response only reinforces the weakness of the analogy. What the legal assistance expansionists are really proposing, then, is not only a reworking of 10 USC § 1044, but a fundamental reformulation of what it means to be a judge advocate.

There is no indication, however, that any of the JAG Corps, or the DoD in general, is ready to accept such a sea change. The advice of then-Colonel George Washington to the captains of the Virginia Regiments – “discipline is the soul of an army” (Letter of Instruction, 29 July 1757) – still forms the basis for how others see JAGs, and how JAGs see themselves. Former Air Force TJAG, Maj. Gen. (Ret.) William A. Moorman, refers to Washington’s statement as “one of my favorite quotes.” (Commentary, AF News Service, 16 February 2001). Nearly 250 years after Washington’s words of wisdom, only operations law has managed to gain a foothold alongside military justice in the JAG pantheon, largely due to the part the Corps played in the Nuremberg prosecutions.

The fact of the matter is that for the vast majority of judge advocates, legal assistance is a collateral duty. The minority whose primary job is legal assistance are usually the ones chosen

to be tasked with the kinds of all-encompassing additional duties that swallow up their primary duty. Moreover, there is no indication this will change anytime soon. The DoD talk about "tooth-to-tail ratio" and adding "trigger pullers" at the expense of "paper pushers" is a not-so-subtle hint that the days of JAG billets remaining constant as the military downsizes will not continue indefinitely, regardless of what administration is in office. (Bill Gertz and Rowan Scarborough, "Inside the Ring: Army JAG cuts," *The Washington Times*, 30 May 2003). These realities of manpower and mission help to explain the concerned reaction of Former Navy TJAG, RADM (Ret.) Michael F. Lohr to the proposals for a Congressionally-mandated expansion of legal assistance: "We must be able to prioritize legal assistance services amongst all legal services." ("In Response," *Dialogue*, Spring 2003, Vol. 7, No. 2). It is understandably hard for any TJAG or MAJCOM SJA to take the expansionists at their word when they promise that "the argument for mandating legal assistance is not a challenge to the decision-making authority of military commanders and the services' senior legal leadership." (Prof. Christo Lassiter, "Military Legal Assistance as an Entitlement", *Dialogue*, Winter 2003, Vol. 7, No. 1). As far as senior leadership is concerned, a congressional mandate takes the power to prioritize scant resources out of their hands.

The Path Ahead

There is, however, a way to cut the Gordian knot. First, we should push to enshrine as an entitlement those aspects of legal assistance that are critical to operational readiness. BG Hague's legitimate complaint that "Congress has authorized estate planning and other legal support of military personnel but failed to demand and fund it" could be resolved in a way that preserves the discretionary use of resources by JAG senior leadership. ("From the Chair," *Dialogue*, Fall 2002, Vol. 6, No. 4). The key is to make only readiness-related legal assistance

for members on active duty an entitlement, and to define the scope of that entitlement narrowly. As Prof. Christo Lassiter has written, “Military service requires service members to put their lives at risk on behalf of their country. Accordingly, the first concern of service members coming on active duty is being prepared to die.... the second concern of service members is delegating the authority to others to handle those affairs through the preparation of powers of attorney.” (*Dialogue*, Winter 2003, Vol. 7, No. 1). A statutory entitlement ensuring that these concerns are met through the preparation of wills, living wills, and POAs would give legal assistance the privileged status of a mandate, while simultaneously defining that mandate restrictively enough to leave the senior JAG leadership in control of its resources.

Since service members are asked to risk and sacrifice their lives every day, the preparation of basic wills should not be subject to “the limits of available resources.” (*DoDD 1350.4*, Para. 4.1.2, 28 April 2001). Basic testamentary instruments are the minimum the military departments owe to their members in uniform. The LAMP Committee’s 2003 Draft Revision of 10 USC § 1044 effectively attempted to resolve this gap by substituting the word “shall” for “may” in subparagraph (a). Creating a statutory entitlement to readiness-related legal assistance should be acceptable to senior leadership because it essentially reduces to writing what the various JAG Corps are already committed to in practice, despite the current discretionary language in 10 USC § 1044. Yet it is too drastic a step to statutorily require legal assistance for all “personal civil legal affairs” without regard to subject matter, as the LAMP Committee’s draft revision purports to do. JAG leadership must retain the ability to prioritize tasks.

Moreover, if our top legal assistance priority is defined by statute as the preparation of readiness-related documents, then we can make sure to concentrate our resources on doing that

well, without cutting corners. A recent version of the Air Force TJAGC Online News Service (25 May 2005) praised one base legal office for a self-service POA program in which a stand-alone computer in the office lobby allows clients to walk in and create a custom POA anytime.

The lone quality-control check is the requirement to talk with a member of the legal office staff before having the POA notarized. “A great initiative and a creative way to do work smartly!” the Online News Service raved in announcing that the office had been nominated for a LAMP Distinguished Service Award. One need not be a slippery-slope hysteric to speculate that the next step is do-it-yourself wills, and to cringe at the thought of a truly “creative” legal assistance program comprised of user-friendly software and an automaton with a notary stamp. Or better yet, just send every service member a CD-Rom loaded with WebLIONS, DL Wills, and TaxWise, prefaced by a brief welcome message from the appropriate TJAG. When a prescription for rampant malpractice is hailed as a best practice, legal assistance seems perilously close to entering a Seinfeldian “bizarro world” where up is down and down is up. A narrowly drafted statutory entitlement could clear the haze and result in a better product for clients.

Having conservatively defined and statutorily protected readiness-related legal assistance, the second step should be to refine the scope of discretionary legal assistance in a way that returns to the program’s founding principles. The development of legal assistance into “a sophisticated provider of a panoply of legal services” is invariably defined as “progress,” whereas mutation might be a better description. (Daniel Bean, “Celebrating the 60th Anniversary of Military LA,” *Dialogue*, Fall 2003, Vol. 7, No. 4). The legal assistance program created by War Department Circular No. 74 was never intended to be touted alongside pay and benefits as a retention tool. Its goal was to improve morale, and therefore effectiveness, by enabling the service member to concentrate on the mission. As the Under Secretary of War wrote to the ABA

president in December 1942, “Anything which can be done to keep a soldier from worrying about his personal and family problems is a definite contribution to morale. I believe that this effort will contribute materially to the war effort.” AFPD 51-5 acknowledges this original function by stating, “The primary legal assistance priority is to support the Air Force mission.” (§ C, Para. 10, 27 September 1993). In practice, however, this principle has been lost as legal assistance has come to be seen as a benefit of service rather than a tool for mission success.

Third and finally, the eligibility for legal assistance should be narrowed in terms of rank so as to serve those service members who need it most. The Standing Committee on Legal Assistance for Military Personnel (LAMP) falls within the ABA Division for Legal Services, an organization dedicated to the delivery of legal services to low and moderate income people. In a world of limited JAG resources, the use of legal assistance and tax preparation programs by those who can clearly afford comparable outside services puts further strain on already overburdened resources.

The legal assistance program, much like the SSCRA that developed alongside it, is a noble program designed to “protect those who have been obliged to drop their own affairs to take up the burdens of the nation.” (*Boone v. Lightner*, 319 U.S. 561, 575 (1943)). In order to secure the program’s future, the best strategy is to look to its past.