*BY ORDER OF THE*
*SECRETARY OF THE AIR FORCE*

*AIR FORCE INSTRUCTION 51-402*

*27 JULY 2011*

*Law*

# *LEGAL REVIEWS OF WEAPONS AND CYBER CAPABILITIES*

**COMPLIANCE WITH THIS PUBLICATION IS MANDATORY**



OPR: AF/JAO Certified by: AF/JAO (Col Craig Miller)
Supersedes: AFI 51-402, 13 May 1994 Pages: 7

This Instruction implements Air Force Policy Directive (AFPD) 51-4, *Compliance with the Law of Armed Conflict*, and is consistent with Department of Defense Directive (DoDD) 2311.01E, *DoD Law of War Program;* DoDD 3000.3, *DoD Policy on Non-Lethal Weapons;* DoDD 5000.1, *The Defense Acquisition System*; and AFPD 63-1, *Acquisition and Sustainment Life Cycle Management*. It prescribes guidance and procedures for the review of Air Force weapons and cyber capabilities to ensure legality under domestic and international law including the Law of Armed Conflict (LOAC). This Instruction applies to all United States Air Force (USAF), Air Force Reserve (USAFR), and Air National Guard (ANG) military and civilian personnel.

Refer recommended changes and questions about this publication to the Office of Primary Responsibility (OPR) using the AF Form 847, *Recommendation for Change of Publication*; route AF Form 847 from the field through appropriate functional chain of command. Ensure that all records created as a result of processes prescribed in this publication are maintained in accordance with Air Force Manual (AFMAN) 33-363, *Management of Records*, and disposed of in accordance with the Air Force Records Disposition Schedule (RDS) located at **https://www.my.af.mil/afrims/afrims/afrims/rims.cfm** . This publication may be supplemented at any level, but all direct Supplements must be routed to the OPR of this publication for coordination prior to certification and approval. No waivers may be granted for any part of this publication.

## *SUMMARY OF CHANGES*

This document has been substantially revised and must be completely reviewed. This revision reflects a change in the Air Force definition of "weapon" and requires a legal review of cyber capabilities intended for use in cyberspace operations.

**1. Functional Responsibilities.** This Instruction establishes the following responsibilities and authorities for weapons reviews and legal reviews of cyber capabilities.

1.1. The Judge Advocate General (AF/JA) will:

1.1.1. Ensure all weapons being developed, bought, built, modified or otherwise being acquired by the Air Force that are not within a Special Access Program are reviewed for legality under LOAC, domestic law and international law prior to their possible acquisition for use in a conflict or other military operation. This authority may be delegated to the Director, Operations and International Law Directorate (AF/JAO).

1.1.2. Ensure all cyber capabilities being developed, bought, built, modified or otherwise acquired by the Air Force that are not within a Special Access Program are reviewed for legality under LOAC, domestic law and international law prior to their acquisition for use in a conflict or other military operation. This authority may be delegated to AF/JAO or to Major Command (MAJCOM) Staff Judge Advocates (SJA). MAJCOM SJAs may not further delegate this authority without the express authorization of AF/JA. A copy of each completed cyber capability legal review will be forwarded to AF/JAO.

1.2. **General Counsel (SAF/GC).** In coordination with AF/JA as appropriate, SAF/GC shall accomplish a legal review of each weapon or cyber capability developed within a Special Access Program.

1.3. **The Operations and International Law Directorate, Office of The Judge Advocate General (AF/JAO) will:**

1.3.1. Upon request, conduct a timely legal review of all weapons and cyber capabilities, whether a new weapon or cyber capability at an early stage of the acquisition process, or a contemplated modification of an existing weapon or cyber capability, to ensure legality under LOAC, domestic law and international law prior to their acquisition for use in a conflict or other military operation.

1.3.2. Maintain permanent files of all Air Force weapons and cyber capabilities legal reviews.

1.3.3. Monitor changes in international law relevant to weapons and cyber capabilities, including treaties to which the United States is a party, and notify appropriate agencies/offices of such changes and the impact on any previous legal reviews.

1.4. **Staff, Operations, Plans, and Requirements (AF/A3/5)** assists AF/JAO in obtaining information on the characteristics and accuracy of weapons and cyber capabilities under review, following the procedures outlined in paragraph 2 below.

1.5. **The Assistant Secretary of the Air Force for Acquisition (SAF/AQ) will:**

1.5.1. Ensure AF/JA reviews for legality all weapons, whether new acquisitions or modifications of existing weapons, at the earliest possible stage in the acquisition process, including the research and development stage.

1.5.2. Assist AF/JA in obtaining information on the lethal characteristics and accuracy of weapons under review, following the procedures outlined in paragraph 2 below.

1.6. MAJCOMs and Field Operating Agencies (FOAs) will:

1.6.1. Through their SJA, ensure commanders/directors of Air Force components engaged in weapons research, development, testing, engineering, manufacturing, or acquisition provide AF/JAO with all the information required to accomplish a thorough and accurate legal review of each new or modified weapon.

1.6.2. Ensure commanders/directors of Air Force components engaged in cyberspace operations provide their SJA all the information required to accomplish a thorough and accurate legal review of each new or modified cyber capability. MAJCOM SJAs will provide AF/JAO with all the information required to accomplish the legal review unless authority is delegated in writing to the MAJCOM SJA to conduct the legal review pursuant to paragraph 1.1.2. of this Instruction. In that case, the MAJCOM SJA will conduct a timely, thorough and accurate legal review and provide a copy to AF/JAO for its files.

1.7. **Air Force Security Forces Center (AFSFC)** assists AF/JAO in obtaining information on the characteristics and accuracy of weapons under review, following the procedures outlined in paragraph 2 below.

**2. Request for Legal Review of Weapons and Cyber Capabilities.**

2.1. Upon cognizant legal authority's request, Air Force personnel will provide the following information, so that a judge advocate, or General Counsel in the instance of a special access program, may complete the reviews required by this Instruction:

2.1.1. A general description of the weapon or cyber capability submitted for legal review.

2.1.2. Statements of intended use (such as types of targets) or concept of operations.

2.1.3. The reasonably anticipated effects of employment, to include all tests, computer modeling, laboratory studies, and other technical analysis and results that contribute to the assessment of reasonably anticipated effects.

**3. Contents of the Legal Review of Weapons and Cyber Capabilities.**

3.1. A legal review conducted under this Instruction will include, at a minimum:

3.1.1. Whether there is a specific rule of law, whether by treaty obligation of the United States or accepted by the United States as customary international law, prohibiting or restricting the use of the weapon or cyber capability in question.

3.1.2. If there is no express prohibition, the following questions are considered:

3.1.2.1. Whether the weapon or cyber capability is calculated to cause superfluous injury, in violation of Article 23(e) of the Annex to Hague Convention IV; and

3.1.2.2. Whether the weapon or cyber capability is capable of being directed against a specific military objective and, if not, is of a nature to cause an effect on military objectives and civilians or civilian objects without distinction.

3.2. The fact that another Service or the forces of another country have adopted the weapon or cyber capability may be considered in determining the legality of such weapon or cyber capability, but such fact shall not be binding for purposes of any legal review conducted under this Instruction.

3.3. Legal issues associated with employment are beyond the scope of a weapon or cyber capability legal review. As part of a targeting analysis, the unit or individual employing the weapon or the cyber capability must ensure that their actions comply with domestic and international law, including LOAC.

RICHARD C. HARDING, Lieutenant General, USAF
The Judge Advocate General

## Attachment 1

## GLOSSARY OF REFERENCES AND SUPPORTING INFORMATION

***References***

AF Policy Directive 51-4, *Compliance with the Law of Armed Conflict*, 26 April 1993

AF Policy Directive 63-1, *Acquisition and Sustainment Life Cycle Management*, 3 April 2009

DoD Directive 2311.01E, *DoD Law of War Program*, May 9, 2006

DoD Directive 3000.3, *DoD Policy on Non-Lethal Weapons*, July 9, 1996

DoD Directive 5000.1, *The Defense Acquisition System*, May 12, 2003

***Adopted Forms***

AF Form 847, *Recommendation for Change of Publication*.

***Abbreviations and Acronyms***

**AFMAN**—Air Force Manual

**AFPAM**—Air Force Pamphlet

**AFPD**—Air Force Policy Directive

**AFSFC**—Air Force Security Forces Center

**ANG**—Air National Guard

**FOA**—Field Operating Agency

**LOAC**—Law of Armed Conflict

**MAJCOM**—Major Command

**OPR**—Office of Primary Responsibility

**RDS**—Records Disposition Schedule

**SJA**—Staff Judge Advocate

**USAF**—United States Air Force

***Terms***

**Cyber Capability.**—For the purposes of this Instruction, an Air Force cyber capability requiring a legal review prior to employment is any device or software payload intended to disrupt, deny, degrade, negate, impair or destroy adversarial computer systems, data, activities or capabilities. Cyber capabilities do not include a device or software that is solely intended to provide access to an adversarial computer system for data exploitation.

**Cyberspace Operations**—. A cyberspace operation is the employment of cyber capabilities where the primary purpose is to achieve objectives in or through cyberspace. Such operations include computer network operations and activities to operate and defend the Global Information Grid.

**Weapons.**—Weapons are devices designed to kill, injure, disable or temporarily incapacitate people, or destroy, damage or temporarily incapacitate property or materiel. Weapons do not include devices developed and used for training, or launch platforms to include aircraft and intercontinental ballistic missiles.

## Attachment 2

## TEMPLATE FORMAT FOR REQUESTING REVIEWS

**Figure A2.1.** ***Sample Request for Weapons or Cyber Capabilities Legal Review***

MEMORANDUM FOR ____/JA
FROM: 123 XXX/CC
110 Wacissa Road
Eglin AFB FL 32542-6807

SUBJECT: Request for Legal Review of the Weapon/Cyber Capability

1. Per AFI 51-402, *Legal Reviews of Weapons and Cyber Capabilities*, request your office conduct a legal review of the _____ be completed by 30 May 2010.

2. Our point of contact for additional information or questions is Lt Amy Nition. She can be reached by phone at DSN 875-7775, ext 222 or by email amy.nition@eglin.af.mil.

JAMES BOSS, Col, USAF
Commander

**Attachments:**

1. Technical Description
2. Concept of Operations
3. Report of Effects Testing
4. Video or Other Information of Actual Results