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The Reporter

MAJOR GENERAL THOMAS J. FISCUS
The Judge Advocate General of the Air Force

MAJOR GENERAL JACK L. RIVES
The Deputy Judge Advocate General of the Air Force

COLONEL THOMAS L. STRAND
Commandant, Air Force Judge Advocate General School

EDITOR
Captain Christopher M. Schumann

ASSISTANT EDITORS
AFJAGS Faculty

CONTRIBUTING AUTHORS

PRACTICUM
Lt Col Ray T. Blank

CAVEAT
Mr. David Orser

ADMINISTRATIVE LAW
Lt Col James Roan

TORT CLAIMS AND HEALTH LAW
Mr. Joseph A. Procaccino, Jr.

TRIAL BRIEF
Lt Col Timothy J. Cothrel
Maj Christopher vanNatta

FROM THE EDITOR

In this issue of *The Reporter* we are fortunate to have articles written by the individuals with perhaps the best perspective of the military commissions established by President Bush in November 2001. Col Will Gunn, the chief defense counsel in the Office of Military Commissions and Col Frederic Borch III, the chief prosecutor, have provided excellent articles describing the roles and responsibilities of the defense and prosecution as the military tribunals come closer to fruition. In addition to our usual fare, Maj Christopher vanNatta introduces us to the little known world of the Air Force Personnel Council. Lt Col Dawn Eflein addresses the serious issue of suicide. Capt Erik Mudrinich shows us the path to a successful VWAP program. And finally, Maj Wendy Sherman illustrates a plan for facing the rising costs of college tuition. Bon appetite!

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

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The Commandant's Corner...

Col Thomas L. Strand

Twice each year the commandants or deans of the three Service schools (the Navy Justice School includes Marine Corps and Coast Guard) meet at a predetermined venue to discuss collaboration and cooperation among the education centers. The Interservice Legal Education Review Committee (ISLERC) was established in August 1977. The Charter of ISLERC is to facilitate all Services training and education with a goal of eliminating duplication, reducing cost, standardizing instruction and increasing training and education efficiency, consistent with readiness. At the face-to-face meetings, the committee addresses all Services legal education and training requirements and studies and analyzes curricula course development of the Judge Advocate Generals' Schools. This group also discusses and recommends changes to improve legal education and training program quality, to avoid unnecessary course duplication, and maximize cooperation and joint effort including sharing of faculty, course materials and publications. Finally, the three school administrators examine broad educational policy regarding interservice legal education and training to ensure that all curriculum activities are adequately coordinated.

In March 2004, your JAG School hosted an ISLERC session. Following a review of the courses taught at Charlottesville VA, Newport RI and Montgomery AL, the Schools' representatives discussed court reporter training and voice activated equipment, environmental law update courses, benefits of civilian faculty and administrators and the road ahead for distance learning, AKA distance education.

Distance learning is a hot topic among all the JAG Schools as it applies to both attorneys and paralegals. The technology available and course lesson plans are expanding and improving every month. This desirable education format allows DoD students to obtain both basic subject matter education as well as updates without the time and expense of traveling from home station or deployed locations to the brick and mortar education institutions, including the Dickinson Law Center. Much more will be planned and accomplished to make distance learning a more comprehensive and available resource to staff judge advocates and law office managers. Satellite, VTC, CD and on-line web based "Just in Time" productions will provide basic and update education for students to use at times and places convenient to daily mission accomplishment. Interactive exercises and scenarios can be used to expand knowledge and skills without expensive travel and absence from home and duty location. Your thoughts and suggestions are welcome as the Services work to improve the content and processes of professional legal education. Send them to 150 Chennault Circle, Maxwell AFB AL 36112 or e-mail me at thomas.strand@maxwell.af.mil.

Colonel Thomas L. Strand (B.A., Bowling Green State University; J.D., University of Toledo College of Law; L.L.M., George Washington University) is the Commandant of the Air Force Judge Advocate General School, Maxwell AFB, Alabama.

Thomas L. Strand, Commandant

Military Commissions: How Can You *Possibly* Defend Those People?

Colonel Will Gunn

It's the year 2034. My six year-old granddaughter is participating in an interactive holographic presentation on early 21st Century history. As I walk into the room she hits pause and turns to me and we have the following conversation:

Granddaughter: "Grandpa, what did you do in the War Against Terrorism?"

Grandpa Will: "I defended people the United States captured and accused of being terrorists."

Granddaughter: "You mean you were a guard?"

Grandpa Will: "No, I was a defense attorney who was responsible for defending people when they were taken to trial. It was my job to make sure they received the best possible defense."

Granddaughter: "Wow! Were you good at it?"

Grandpa Will: "I'd like to think so."

Granddaughter: [Incredulously] "And you were on our side?"

I recently attended the Annual TJAG Dining-In at Bolling AFB in Washington DC. The guest speaker, Air Force Vice Chief of Staff T. Michael Mosely, gave a rousing presentation emphasizing that we are a nation at war and that judge advocates play a vital role in that war. The general talked about the contributions that JAGs make in military operations to include assisting with targeting decisions, drafting and interpreting rules of engagement, and conducting inquiries pursuant to the law of armed conflict. As General Mosely spoke, it occurred to me that the work now being done in the Office of Military Commissions is quite a bit different from the activities he described but just as vital to the war effort. That's the case because winning a global war on terrorism won't be accomplished merely by dropping bombs on target or by conducting search and destroy missions. Over the long haul, winning this war will require utilizing all aspects of the nation's power to include the intrinsic power that emanates from our system of values—particularly our adherence to the rule of law.

Col Will Gunn (B.S., United States Air Force Academy; J.D. Harvard Law School; L.L.M., Environmental Law, George Washington University) was a former instructor at the Air Force Judge Advocate General School and is currently the chief defense counsel in the Office of Military Commissions.

Since being named Chief Defense Counsel in the Office of Military Commissions in February 2003, I've thought quite a bit about exactly how defense attorneys fit into the war effort. I was selected for this opportunity after being nominated by TJAG and going through a vetting process which lasted several months. The process included a series of interviews with the Department of Defense General Counsel, Mr. William H. Haynes, and other individuals associated with the development of the rules and procedures for conducting Military Commissions. Over the last year, I've encountered a wide variety of reactions from people who talk to me about my job. While nearly everyone has heard that there are detainees in Guantanamo and that some of those detainees may face military commissions at some point, the level of information about the detainees and the proposed commissions often doesn't go much further than that. Because of that lack of information, I agreed to answer a few of the questions I commonly receive in an attempt to provide readers with greater insight into my role, the work of the Chief Defense Counsel's Office, and military commissions.

Who are the Detainees?

There are reportedly approximately 650 persons detained at Guantanamo. While they have a few things in common—all are male and nearly all are Muslim—they are still a diverse group. They come from more than 40 countries and speak more than a dozen languages.

What are Military Commissions?

Under international law, a military commission is a form of trial convened to try individuals accused of violating the law of war.¹ The term military commission goes at least as far back as the Mexican American War.² However, military commissions have been conducted much longer than that under other names.³ The United States used military commissions during nearly every major conflict from the American Revolution to World War II.⁴ The United States has not conducted any military commissions since the period immediately following World War II. However, this could soon change.⁵

What is the Basis for the Proposed Military Commissions?

On 13 November 2001, acting in response to the attack on the Pentagon and the World Trade Center, President George W. Bush issued a Military Order for the “Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism.” This order authorizes military commission proceedings for individuals who the President finds are subject to the order. In order for the President to conclude that an individual is subject to the order, he must find that the person is not a United States citizen and (i) there is reason to believe that the individual is a member of al Qaida; (ii) “has engaged in aided or abetted, or conspired to commit acts of international terrorism, or acts in preparation therefor, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States...” or (iii) has knowingly harbored one or more individuals described in (i) or (ii) above.

What Will Military Commissions be Like?

Military commission procedures are detailed in Military Commission Order No. 1 dated 21 March 2002 and in a series of Military Commission Instructions that have been issued since April 2003.⁶ In many respects military commissions will resemble various forms of military administrative boards. For example, each commission panel will have at least three and no more than seven military officer members. One of the members must be a Judge Advocate who will serve as the Presiding Officer. All members of the commission panel, including the Presiding Officer, will vote on findings and, if necessary, on a sentence.

Some of the procedural aspects resemble those in courts martial. For example, the presumption of innocence applies and the government must prove guilt beyond a reasonable doubt to convict. In addition, an accused has the right to call and cross examine witnesses (subject to some limitations), and an accused has the right not to testify. Despite these similarities, there will be some significant differences. First, there will be a lower evidentiary standard for considering evidence. The Military Rules of Evidence will not apply to the commissions. Instead, evidence will be admitted if it is considered to have “probative value to a reasonable person.” While the judge advocate serving as presiding officer will get to make an initial decision on admissibility, he or she will not function as a judge. For instance, a majority of the other panel members can overrule the presiding officer and admit evidence that has been previously excluded.

As with a court martial, there will be evidentiary and procedural motions. However, unlike a court martial,

anytime the presiding officer encounters an issue that could result in the termination of the proceedings with respect to a charge, he or she must refer the issue to the Appointing Authority for a decision.⁷ Also, it will require an affirmative vote of two thirds of the panel members to convict an accused. This is true for all sentences except that imposing the death penalty requires a unanimous vote by a seven-member panel.

What is the Role of the Chief Defense Counsel?

As Chief Defense Counsel, I’m responsible for overseeing the defense process. This includes assigning counsel to cases, managing personnel and resources, and avoiding conflicts of interest. The rules envision the Chief Defense Counsel serving as a link between the defense counsel, the Appointing Authority, and the DoD General Counsel. In this regard, I serve as an advocate for the defense function in the commissions process. I’m also responsible for ensuring that defense counsel have sufficient training and resources to do their jobs.

What are an Accused’s Rights to Counsel?

Commission rules allow me to appoint a defense counsel “sufficiently in advance of trial to prepare a defense.”⁸ An accused must be represented by military defense counsel at all times in military commissions. However, an accused before the military commissions has options with respect to representation. These options are similar to an accused’s rights in a court martial. First, an accused may request to be represented by a military defense counsel of his own choosing. If the person selected is determined to be reasonably available, he or she will be provided. Second, an accused may choose to be represented by a civilian counsel at no cost to the United States. However, one option an accused does not have is foregoing representation by military defense counsel.

Who is Assigned to the Chief Defense Counsel’s Office?

I have an extraordinarily talented team of judge advocates who are well prepared to represent their clients. They come from each of the services, average more than 11 years of service as judge advocates, and all have extensive litigation experience. My deputy, Lt Col Sharon Shaffer, is a former Air Force Circuit Defense Counsel and Circuit Trial Counsel who prosecuted and defended more than 170 cases. She has also served as a Military Judge and presided over nearly 200 courts martial. LCDR Phil Sundel (USN) has 12

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years of litigation experience including positions as the Deputy Chief of the Navy's Appellate Government Division and as the Chief Defense Counsel for the Naval Legal Service Office Northeast. He also served as one of the first special prosecutors assigned to the Rwanda Tribunals. Major Mark Bridges (USA) has over 12 years active duty service as a judge advocate serving in a variety of criminal law related assignments including as a Trial Counsel, Appellate Defense Counsel, Chief of Military Justice, and Senior Defense Counsel. He has personally prosecuted or defended approximately 100 courts martial, handled over 100 appeals, and supervised the prosecution or defense of hundreds of other cases. LCDR Charlie Swift (USN) has served as defense counsel in approximately 175 courts martial (including more than 25 litigated cases in which his clients have been acquitted of at least one specification), as the officer in charge for the Navy's largest detachment, and as a principal attorney for the Navy in litigation involving the Vieques Bombing Range. Finally, Major Dan Mori (USMC) has eight years of litigation experience, including having defended approximately 100 cases and prosecuted 50 others. His record includes gaining acquittals in 15 contested cases. The team also includes two exceptionally talented paralegals, MSgt Sue LaHoste (USAF) and Legalman First Class Jason Kreinhop (USN) as well as an experienced administrator, Chief Petty Officer Douglas Harris (USN). I expect that the office will expand after the commissions get underway.

How Have Defense Counsel Prepared for Their Cases?

While it is impossible to prepare for a specific case without access to a client and evidence, defense counsel have been involved in general preparation for military commissions for several months. Their preparation has included cultural awareness training; thorough examination of commission rules, orders and instructions; in-depth training in international humanitarian law and the law of armed conflict; and a tremendous amount of background reading.

What is the Status of the Military Commissions?

In July of last year, President Bush designated six individuals as eligible to be tried by military commissions. As I write this article (in March 2004), two of those six individuals have been charged with offenses pursuant to military commission rules. Those individuals are Ali Hamza Ahmed Sulayman al Bahlul of Yemen and Ibrahim Ahmed Mahmoud al Qosi of Su-

dan. Two other detainees that the President designated, David Hicks of Australia, and Salem Ahmed Hamden of Yemen have been assigned counsel and have met with their attorneys. However, neither Hicks nor Hamden has been charged.

What Do I Expect from Defense Counsel?

As with any defense setting, defense counsel must focus first and foremost on achieving his or her client's objectives. While the client's goals are not always achievable, the defense counsel has a professional and moral obligation to pursue those objectives provided they are not inconsistent with legal and ethical constraints. I work to keep this notion at the forefront of everything we do by focusing on our mission. That mission is to vigorously, zealously, and effectively represent individuals brought before military commissions within the bounds of the law, the commission rules, and the standards of professional responsibility.

Will the Commissions be Fair?

Ultimately history will judge whether the proposed commissions were conducted fairly. I'm encouraged by the fact that commission panels are charged first and foremost with ensuring that commission trials are "full and fair."⁹ In contrast to some other legal systems, America uses an adversarial system to try an accused. This adversarial approach—with prosecutors presenting their case and defense counsel opposing the government's position—will also be in operation in the proposed commissions. Under such a system, what defense counsel do and say is critically important to determining fairness.

Some of the press reports I've read over the last year (particularly reports from other countries) have suggested reservations regarding whether American military attorneys would be willing to fight for commission clients. This criticism diminished considerably after the defense counsel sought and received permission to file an amicus brief with the Supreme Court in the case of *al Odah v. Rumsfeld*.¹⁰ I predict that the world will see that military defense counsel will do everything in their power to fight for their clients. Their efforts will promote the perception and reality of fairness.

What Motivates Me?

When I started in this position my office was located near a newly renovated portion of the Pentagon that was damaged in the attacks of September 11th. On a wall over an escalator in that part of the building is a plaque with words that President Bush spoke shortly after the attacks on the Pentagon and the World Trade

Center: “Terrorist attacks can shake the foundations of our biggest buildings, but they cannot touch the foundation of America.” Upholding the President’s vision is a challenge faced by all those involved in the commissions process. Ultimately, the world will judge the commissions and our nation on whether we can hold true to the foundation of America as expressed in the Declaration of Independence--adherence to the rule of law. Defense counsel have the duty of doing their utmost to represent individuals tried under this system to the best of their abilities. As we say in our commissioning oath, we will “well and faithfully discharge” this duty.

¹Major Timothy C. MacDonnell, “Military Commissions and Court-Martial: A Brief Discussion of the Constitutional and Jurisdictional Distinctions Between the Two Courts,” *The Army Lawyer*, March 2002, p. 19.

²Major Michael O. Lacey, “Military Commissions: A Historical Survey,” *The Army Lawyer*, March 2002, p. 43.

³*Id.* at p. 42.

⁴MacDonnell at p. 21 and Lacey at 45.

⁵Provide explanation of Tokyo and Nuremberg and other tribunals.

⁶See <http://www.defenselink.mil/news/commissions.html> for a collection of documents pertaining to military commissions. Documents on the web site include the Presidential Order, all Military Commission Orders, and all Military Commission Instructions.

⁷In many respects the Appointing Authority will function in a manner that is analogous to a Convening Authority in the Military Justice System. For example, the Appointing Authority approves charges that are prepared by the Prosecution. The Appointing Authority also refers charges to a military commission just as a Convening Authority refers charges to a court martial.

⁸Military Commission Order No. 1, 21 March 2002, para. 5D.

⁹Military Commission Order No. 1, 21 March 2002, para. 6B(1).

¹⁰Although the *al Odah* case presents a question which only concerns the United States courts’ jurisdiction over those foreign nationals who are being detained at Guantanamo, it has the potential to affect the rights of any detainees who are ultimately tried by military commission. If the Supreme Court were to rule broadly, the ruling could forever close the doors to federal court jurisdiction for those tried by military commissions. Therefore, in their amicus brief, the military defense counsel highlighted the issues that support federal court jurisdiction for detainees that are tried by military commissions.

Military Commissions: The Chief Prosecutor's View

Colonel Frederic L. Borch III

As the Chief Prosecutor---and Colonel Will Gunn's counterpart in the Office of Military Commissions---I appreciate the opportunity to complement his fine article about the defense role in commissions with some thoughts on the prosecution function. I want to start by agreeing completely with Colonel Gunn that "winning a global war on terrorism won't be accomplished merely by dropping bombs on target" but instead will require using all of America's tools. It follows that the President's November 2001 decision to create military commissions embodies the idea that, by prosecuting and punishing al Qaida members and other terrorists who target America and Americans, we can use the law to protect us and thereby contribute to winning the war on terrorism. This is because the law will permit us to incarcerate those who have committed a criminal act. Additionally, prosecuting terrorists should also deter would be terrorists from committing future war crimes and other war-related crimes against America and Americans. With that statement as an introduction, let me provide some prosecution comments on the following five topics: why military commissions are the right forum; commission practice as a mix of international and criminal law; the role of the panel; the prosecutors in the Office of Military Commissions; and some final thoughts.

Why Military Commissions are the Right Forum for the Prosecution of al Qaida Members and Others Involved in International Terrorism Directed Against the United States

Military commissions are the best method to guarantee a "full and fair"¹ trial because they not only protect national security (by safeguarding classified and sensitive information used as evidence in the proceedings) but also protect all personnel participating in the process, including the accused. Unlike courts-martial, which today are essentially the U.S. Armed Forces' equivalent of Article III² courts, military commissions

Colonel Frederic L. Borch III (A.B., Davidson College ; J.D., University of North Carolina; LL.M., International Law, University of Brussels, Belgium; LL.M., Military Law, Judge Advocate General's School) Col Borch was a Professor of Criminal Law at the Judge Advocate General's School, Charlottesville, VA and is currently the chief prosecutor, Office of Military Commissions.

are special war courts; they exist only during war or in the aftermath of armed conflict.³ Moreover, in contrast to the general criminal jurisdiction of courts-martial and U.S. District Courts, military commissions (whether created by Congress or by the President) are courts of extremely narrow focus, having subject-matter jurisdiction only over war crimes and war-related offenses.⁴ Note also that the military commissions established by the President in November 2001 are even more restricted in scope, in that *in personam* jurisdiction is limited to non-U.S. citizens.⁵ Additionally, by virtue of their military backgrounds, the panel members, prosecutors and defense counsel participating in those proceedings have a real-world expertise that makes them well-suited to handle war crimes and related offenses. Finally, unlike Article I courts-martial, which may be tied to a command's location,⁶ or Article III courts, which must be held in the United States, military commissions may be held at any geographic location.⁷ As the Department of Defense (DoD) intends to begin prosecutions while the armed conflict with al Qaida continues,⁸ the ability to hold commission proceedings at any location allows classified and sensitive information to be better protected and also ensures the safety of all personnel involved in the process---panel members, defense counsel, prosecutors and the accused. In sum, Congress and the UCMJ contemplated the use of military commissions; military commissions are specialized war courts whose limited jurisdiction and military participants makes them best able to deal with criminal offenses arising out of armed conflict; and the commissions are best able to protect classified information critical to national security and safeguard all personnel participating in the process.

Mix of International and Criminal Law

What is exciting for all those attorneys, paralegals and staff involved in the commission prosecution efforts is that the war crimes and other armed conflict-related offenses triable by military commissions require both a solid understanding of the Law of Armed Conflict and criminal law. To successfully prosecute a war crime at a military commission, for example, the prosecutor must establish that the accused's misconduct---his criminal behavior---occurred during an

armed conflict. It follows that knowing--and understanding--what international law says about armed conflict is highly important. Additionally, as the war crimes and other substantive offenses triable by military commission are to be found in either the Hague and Geneva Conventions or customary international law, how those offenses have developed in international law--and how tribunals like the International Criminal Tribunals for Rwanda and the Former Yugoslavia have dealt with them--is part and parcel of the prosecution efforts. In addition to these international law challenges, there is the added challenge of selecting the best theory of liability for prosecution. For the upcoming prosecutions of al Bahlul and al Qosi, the charges reflect our decision to prosecute on the theory that the accused was part of a conspiracy or criminal enterprise, the objects of which were to attack civilians and civilian objects, commit murder by an unprivileged belligerent, and terrorism.⁹

The Role of the Panel

Under the President's Military Order, the panel decides questions of fact and law. Consequently, while Military Commission Order No. 1 provides that the Presiding Officer--the judge advocate who not only provides legal advice to the panel but also is a full-fledged member of it--makes evidentiary rulings, the panel members have the power to overrule any such rulings should they so decide.¹⁰ Additionally, as Military Commission Instruction No. 2 makes clear in referring to its contents as simply "illustrative of applicable principles of the common law of war,"¹¹ it is the commission members who determine what offenses are properly triable before them--to include the elements of each offense. In other words, the commission members not only decide if the prosecution has proved each and every element of the offense beyond a reasonable doubt, but also have the ultimate power to determine the elements themselves. For those prosecutors who are used to having questions of law decided by judges, the involvement of nonlawyer panel members in these issues will require them to take a different approach--although what exactly that approach will be remains to be seen.

Prosecutors in the Office of Military Commissions

Given that we--like Colonel Gunn's folks--are part of a Defense Department entity, it should come as no surprise that the prosecutors come from all the services. The Deputy Chief Prosecutor is a Navy captain (0-6) who has prosecuted hundreds of cases during her career as both a judge advocate and Assistant United States Attorney. We have two other Navy judge advo-

cates--a commander (0-5) and lieutenant (0-3) as well. There are also two Marine lieutenant colonels in the office, two Air Force judge advocates, and one other Army lawyer. We expect to get another Marine judge advocate and three more Army lawyers shortly. In addition, we have a civilian attorney who has a good working knowledge of Arabic, Pashto and Urdu--all languages of considerable interest to us given that these are spoken by more than a few of the detainees at Guantanamo Bay. In the area of paralegal support, we are fortunate to have two Marine and two Air Force noncommissioned officers who are not only running the day-to-day operations of the office, but also using special computer software to organize our evidence for trial. Finally, the prosecution efforts are directly supported by the Criminal Investigative Task Force (CITF) located at Fort Belvoir and Guantanamo Bay. The military and civilian investigators and analysts at CITF work closely with all the prosecutors and paralegals in putting together prosecutable cases and obtaining evidence.

Some Final Thoughts

On more than one occasion, I have said that the real trials will not be in Cuba, but in the court of public opinion. I sincerely believe that to be true: if our fellow Americans, and Allies and friends, are not convinced that the military commission proceedings were full and fair--that the accused was zealously defended and that the prosecutor in fact proved the case against him beyond a reasonable doubt--then we will not have succeeded. After all, convicting an accused or sentencing him to lengthy period of confinement is completely meaningless if the public and the world do not perceive that the accused had a full and a fair trial. Consequently, no matter what we do as prosecutors in the months and years ahead, all of us must be sure that all our actions and deeds keep this objective in sight. Consequently, just as Colonel Gunn and his defense team are "well and faithfully" discharging their duties, we as prosecutors are going to do the same.

¹ The phrase "full and fair" are the President's words and appear in his Military Order of November 13, 2001. Military Order of November 13, 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 § 7(b)(2) (Nov. 16, 2001) [hereinafter PMO].

² U.S. CONST. art. III, § 2. Section 2 defines the power of Article III courts as follows:

The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;--to all cases affecting ambassadors, other public ministers and consuls;--to all cases of admiralty and maritime jurisdiction;--to controversies to which the United

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States shall be a party;--to controversies between two or more states;--between a state and citizens of another state;--between citizens of different states;--between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

Id.

³PMO, *supra* note 1.

⁴*Id.*; Military Commission Order No. 1, 68 Fed. Reg. 39,374-99 (21 Mar. 2002) [hereinafter MCO No. 1]; see also www.defenselink.mil/news/commissions.html

⁵PMO, *supra* note 1.

⁶Note, however, that “[c]ourts-martial have power to try any offense under the code except when prohibited by the Constitution.” MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. II-15 (2002) [hereinafter MCM]. Additionally, “the authority to convene courts-martial is independent of rank and is retained as long as the convening authority remains a commander in one of the designated positions.” *Id.* pt. II-48.

⁷See U.S. CONST. art. III; MCO No. 1, *supra* note 4.

⁸This is an unusual situation given that almost all war crimes and war-related offenses are prosecuted *after* the end of hostilities, when the need to protect national security information and safeguard participants in the trial is greatly reduced. Deputy Secretary of Defense, Paul Wolfowitz, explained the unusual situation created by terrorist hostilities as follows:

Because of the ongoing threat from terrorists, the risks to jurors are of a kind that military officers are trained and prepared to confront but that are not normally imposed on jurors in civilian trials. Indeed, the judge who handled the trial for the first World Trade Center attack is still under 24 hour protection by federal marshals—and probably will be for the rest of his life.

It is also important to avoid the risk of terrorist incidents, reprisals or hostage takings during an extended civilian trial. Moreover, appeals or petitions for habeas corpus could extend the process for years. Military commissions would permit speedy, secure, fair and flexible proceedings, in a variety of locations, that would make it possible to minimize these risks.

See Dep’t. of Defense’s Implementation of the President’s Military Order on Detention, Treatment, and Trial by Military Commission of Certain Non-citizens in the War on Terrorism: Hearing Before the Senate Armed Service Comm., 107th Cong. 68 (2001)

(statements of [Paul D. Wolfowitz, Deputy Secretary of Defense](#) and [William J. Haynes, General Counsel, Dep’t. of Defense](#)), *available at*

http://www.senate.gov/~armed_services/hearings/2001/c011212.htm

[hereinafter President’s Military Order Hearing] (“[M]ilitary tribunals can permit more inclusive rules of evidence, a flexibility which could be critical in wartime. . . . Military commissions allow those judging the case to hear all probative evidence, including evidence obtained under conditions of war, evidence that could be critical to obtaining a conviction.”); Senior Defense Official, U.S. Dep’t of Def., Background Briefing on the Release of Military Commission Instructions, at the Pentagon (May 2, 2003), *available at* <http://www.defenselink.mil/transcripts/2003/tr20030502-0144.html>.

⁹Specifics of each individual’s charges are available at http://www.defenselink.mil/news/Feb2004/d20040224A1_Qosi.pdf and http://www.defenselink.mil/news/Feb2004/d20040224A1_Bahlul.pdf.

¹⁰MCO No. 1, para. 6.D.(1)

¹¹MCI No. 2, para. 3.C.

PRACTICUM

Special Courts-Martial May Lack Jurisdiction in Nonmandatory Capital Offense Cases

Staff Judge Advocates for special court-martial convening authorities must be aware of potential dangers in seeking referral of charges involving potential nonmandatory capital offenses. Failure to properly proceed in cases involving such offenses could result in the set aside of a conviction on such charges and a potential sentence reassessment or rehearing on sentence for any other remaining convictions.

Article 19, UCMJ provides “special courts-martial have jurisdiction to try persons subject to this chapter for any noncapital offense made punishable by this chapter, and, under such regulations as the President may prescribe, for capital offenses.” Rule for Courts-Martial 201(f)(2)(C) [R.C.M.], withholds jurisdiction over mandatory capital cases from special courts-martial, but does provide for jurisdiction over nonmandatory capital offenses under two circumstances: (1) when permitted by an “officer exercising general court-martial jurisdiction over the command which includes the accused”; and (2) when authorized by regulation by the Secretary concerned. R.C.M. 201(f)(2)(C)(ii)-(iii). Examples of mandatory capital offenses are premeditated murder, Article 118(1), UCMJ, and spying, Article 106, UCMJ. Examples of nonmandatory capital offenses are rape, Article 120, UCMJ; mutiny and sedition, Article 94, UCMJ; and assaulting or willfully disobeying a superior commissioned officer in time of war, Article 90, UCMJ.

In the Air Force, the only regulation referencing capital cases is AFI 51-201, paragraph 4.5.2. This provision does not confer any authority upon a special court-martial convening authority (SPCMCA) to refer non-mandatory capital offenses to trial by special court-martial.

Recently, the United States Court of Appeals for the Armed Forces, in *United States v. Henderson*, 59 M.J. 350 (2004), decided a Navy special court-martial lacked jurisdiction to try Henderson for willfully hazarding a vessel and the lesser included offense (LIO) of negligently hazarding a vessel where the Article 110 charge was referred to a special court-martial without consent from the general court-martial convening authority (GCMCA) and there was no authority in a regulation approved by the Secretary of the Navy. Henderson had been charged with, *inter alia*, willfully hazarding a vessel. That charge was referred to trial by SPCMCA by an officer who exercised only special court-martial jurisdiction. The SPCMCA entered into a pretrial agreement (PTA) whereby Henderson agreed

to plead guilty to some offenses, including the lesser-included offense of negligently hazarding a vessel. The greater charge was not dropped from the charge sheet and the LIO was not referred separately.

Willfully hazarding a vessel is a non-mandatory capital offense, punishable by “[d]eath or such other punishment as a court-martial may direct.” Manual for Courts-Martial, United States (2002 ed.) [MCM], Part IV, para. 34.e. Negligently hazarding a vessel is a lesser-included, noncapital offense, punishable by “[d]ishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years.” *Id.*

The Government argued that the special court-martial had jurisdiction, despite the lack of GCMCA permission, for three separate reasons, all of which were rejected by the Court.

First, the Government claimed the convening authority “functionally” referred the LIO by entering into the PTA. The Court held the special court-martial lacked jurisdiction *ab initio*. Because the offense of negligently hazarding a vessel never achieved the status of an independent charge, the court’s jurisdiction over it derived only from the improperly referred capital offense of willfully hazarding a vessel, and thus rises and falls with the jurisdiction over the greater offense. To recognize the pre-trial agreement as the “functional equivalent” of a new referral would require finding jurisdiction where it does not otherwise exist. The Court declined to reach that result.

Second, the Government argued that, even if the PTA was not the functional equivalent of a formal referral, the LIO was still implicitly referred when the SPCMCA referred the capital charge. The Court rejected this argument because the special court-martial had no jurisdiction to try a capital charge without GCMCA or Secretarial authorization. The LIO was never formally referred under RCM 601, and was therefore dependent upon the greater charge. The greater charge was fatally deficient due to lack of jurisdiction.

Finally, the Government argued the failure to get GCMCA permission to refer the capital offense is a nonjurisdictional procedural defect that was forfeited by a failure to raise it at trial. It relied upon a number of recent cases that characterized certain errors in the referral process as nonjurisdictional. The Court, however, relying upon the precedent of *United States v. Bancroft*, 3 C.M.A. 3, 11 C.M.R. 3 (1953), determined the court-martial lacked jurisdiction. There, as in *Henderson*, the officer making the referral exercised only special court-martial jurisdiction and referred a capital charge to a special court-martial without the authorization to do so. Accordingly, the court-martial had no jurisdiction over the capital offense.

THE JUDICIARY

The Court set aside the findings of guilty to the hazardous vessel charge and remanded the case to the United States Navy-Marine Corps Court of Criminal Appeals. That Court was left with the choice of dismissing the Article 110 charge and reassessing the sentence based on the remaining affirmed findings of guilt or ordering a sentence rehearing.

Clearly, offenses that authorize the death penalty are serious offenses. However, the proper disposition of each case is based upon a variety of factors and there may be a valid situation where a commander may justifiably believe a special court-martial is the proper forum to resolve a case that includes a nonmandatory capital offense charge. Air Force practitioners must be aware that the only legitimate way to preserve jurisdiction over a nonmandatory capital offense, absent any future change in Air Force regulations, is to obtain prior permission from the GCMCA over the command of the accused to refer the charge to a special court-martial for trial.

Special Court-Martial Convening Authority Must Exercise Care in Proceedings to Vacate Suspended Punishment

When considering whether to recommend that an accused's suspended court-martial sentence should be vacated, base-level Staff Judge Advocates (SJAs) must recognize that the SPCMCA performs a critical function in assisting the general court-martial convening authority (GCMCA) to evaluate evidence and witness credibility. Staff Judge Advocates must help to ensure the SPCMCA fulfills the requirements of Rule for Courts-Martial (R.C.M.) 1109.

Article 72, UCMJ, applies to the "vacation of the suspension of a special court-martial sentence which includes a bad-conduct discharge, or of any general court martial sentence." Art 72(a) requires that the officer exercising SPCMCA over the accused hold a hearing to determine the factual circumstances surrounding an alleged violation of probation.

R.C.M. 1109(d) sets forth the procedures required to vacate a suspended general court-martial sentence. R.C.M. 1109(d)(1) establishes the procedures for the hearing required by Article 72. The SPCMCA must provide a summarized record of the hearing and a written recommendation to the GCMCA. R.C.M. 1109(d)(1)(D). If, after reviewing the summarized record and SPCMCA's recommendation, the GCMCA determines that the accused violated a condition of suspension and decides to vacate the suspension, he must prepare a written statement explaining the evidence he relied upon and his reasons for vacating the suspension. R.C.M. 1109(d)(2)(A).

Recently, the United States Court of Appeals for the

Armed Forces, in *United States v. Miley*, 59 M.J. 300 (2004), analyzed a Navy SPCMCA's recommendation to the GCMCA and concluded it did not comply with the requirements of R.C.M. 1109. At a general court-martial, Miley pled guilty to and was convicted of larceny and forgery in violation of Articles 121 and 123, UCMJ. She was sentenced by a military judge sitting alone to a bad-conduct discharge, 105 days confinement and reduction to the lowest enlisted grade. In accordance with the terms of a pretrial agreement, the GCMCA suspended the bad-conduct discharge and the confinement in excess of 90 days for a period of 12 months. Approximately nine months into the suspension period, Miley provided a urine sample that tested positive for methamphetamine. As a result of the positive drug test, Miley received nonjudicial punishment. Based on this incident, the GCMCA vacated the suspended court-martial punishment. CAAF found that the record of a first vacation hearing was not "appropriate for appellate review." See *United States v. Miley*, 51 MJ 232 (1999). The record was returned to the GCMCA with the option of ordering a *DuBay* hearing or holding a new vacation hearing.

On remand, the GCMCA decided to order a new vacation hearing. At the second vacation proceeding, Miley presented the same defense she had in the nonjudicial punishment proceeding and the first vacation hearing – innocent ingestion. At the conclusion of the second proceeding, the SPCMCA told Miley that she was not recommending the suspension be vacated. While explaining the basis for her recommendation, the SPCMCA made several statements. Here statements included, ". . . I don't think you're guilty . . . I am not positive whether I buy your story or not . . . Whether you knowingly ingested it or not. I don't know. . . ." The GCMCA rejected the SPCMCA's recommendation. In a written statement prepared in accordance with R.C.M. 1109(d)(2)(A), the GCMCA noted his reliance on a notification letter from the Navy Drug Screening Laboratory, the unbelievable nature of Miley's testimony as to her innocent ingestion defense, and her court-martial conviction for "offenses involving dishonesty and deception." The GCMCA determined the Miley had knowingly used methamphetamine in violation of Article 112a, UCMJ, and vacated the suspension.

In setting aside the vacation action, CAAF found that the SPCMCA had not made any factual determinations whether Miley had violated the terms of her suspension. The Court stated that R.C.M. 1109(d)(1) would have little meaning if the SPCMCA were not required to resolve contested facts. The Court held that the SPCMCA is required to provide the GCMCA an evaluation of contested facts and a determination of

whether the facts, as found, warrant vacation of a suspension.

Finding error, the Court then considered the impact of the error. The Court pointed out that while there are some errors committed by an SPCMCA that can be cured by a GCMCA's compliance with R.C.M. 1109, "failure to evaluate and determine contested facts is not one of them." The conclusions in the GCMCA's written statement were based on conclusion that had not been found or discussed by the SPCMCA. Without an adequate resolution of the contested facts, the GCMCA was left with an insufficient record upon which to base his decision. CAAF set aside the vacation of the suspended punishment.

The purpose behind a vacation hearing is to determine whether or not an accused has violated a condition of a suspended punishment. Staff Judge Advocates and Air Force practitioners must ensure that an SPCMCA understands the importance of this threshold requirement. Without resolution of contested facts, a GCMCA will be in no position to decide the ultimate issue – whether or not to vacate a suspended punishment, and an appellate court will have to remand the case for an additional post-trial procedure that delays final resolution of the case.

CAVEAT

How About a "Mulligan?"

Tried by special court-martial, the accused was convicted of divers use of marijuana and sentenced to a bad conduct discharge and confinement for five months. In due course, the SJA prepared and the convening authority signed an action that stated, *inter alia*, "only so much of the sentence as provides for four months confinement is approved and, except for the bad conduct discharge [BCD], will be executed."

On appeal, the Air Force Court of Criminal Appeals found it unclear whether the convening authority intended to approve the BCD in addition to the confinement. Certain clues certainly pointed in that direction, i.e., the phrase relating to the execution of the sentence "except for the bad conduct discharge," and a provision providing that the accused "will be required under Article 76a, UCMJ, to take leave pending completion of appellate review of the conviction," language which would only be necessary if the BCD was approved. A further factor pointing in that direction was that the staff judge advocate's recommendation and addendum recommended approving the BCD. Compelled to conclude the action was at best ambiguous, the court directed that the record be remanded to the convening

authority for a corrected action and promulgating order.

This case demonstrates the value of careful proof-reading and attention to detail. It also, of course, underscores the need for all responsible for drafting actions to be cognizant of the rules.

Playing the Percentages

In *United States v. Craven*, ACM 34974 (A.F.Ct.Crim.App, 21 Jan 2004), an Air Force case with enlisted members on the court, their percentage of the total membership fell to 28.6 % as a result of challenges. The court then proceeded with that percentage of enlisted members rather than one-third as required by Article 25(c)(1), UCMJ. The imbalance in the enlisted/officer ratio went unnoticed by all trial participants until the panel members had heard the evidence and were in deliberations. At that time the military judge advised the accused that his only options were to proceed with the existing members or add members and proceed anew--he didn't advise the accused of a third option, i.e., a completely new sentencing hearing. On appeal, the Air Force Court of Criminal Appeals remedied that omission by directing a new sentencing hearing.

We must all be aware that the one-third enlisted/officer member ratio requirement pertains to the actual trial of the case, not the percentage initially appointed to the court. To avoid a problem such as the one that befell the parties in this case, it makes sense to appoint sufficient enlisted members at the outset to ensure (in most cases) that after the challenge "smoke" dies away there remains the necessary ratio to forthwith proceed with the trial.

Orderly but Not so Neat

While in the process of conducting a random inspection of a trainee's (soon to be referred to as the accused) dormitory room for neatness and orderliness, the inspector, a technical sergeant assigned as a military training leader, noticed the trainee's open laptop computer on his desk. He also noticed that the computer was powered on and not password protected. The inspector proceeded to open two separate files and found nothing illegal. He then opened a JPEG photo file that had a rather provocative title. The photo that emerged was of a naked woman, potentially less than 18 years of age, who was lying with an older man, engaged in sexually suggestive conduct. The inspector proceeded to open another JPEG file containing a similar photo.

On a roll now, he went to the computer's "C" drive and opened the directory where the file with the provocative title was located. Upon opening the file, he

found a photo of a clothed, but suggestively posed female child. He then opened another file that showed the same child totally nude, except for a digitally generated leaf covering her pubic area. He then closed the files, returned the computer to the original display of icons, secured the room, and reported the incident.

In due course, the accused was charged with one specification of knowingly receiving child pornography, and another of knowingly possessing child pornography, both in violation of federal law and Article 134, UCMJ. Tried by general court-martial for the offenses, the accused was convicted, contrary to his pleas.

On appeal to the Air Force Court of Criminal Appeals, in a case styled *United States v. Astley-Teixera*, (A.F.Ct.Crim.Apps. 21 October 2003), the defense argued that the inspector exceeded the scope of a “neat and orderly” inspection and conducted an illegal search of the laptop computer. Agreeing with the defense that the accused had a reasonable expectation of privacy in the laptop computer and the files stored therein, the Court reversed the conviction and dismissed the charge and specifications.

The court reasoned that although the government had an “institutional right to inspect” that did not necessarily remove Constitutional protection. Reviewing Military Rule of Evidence (M.R.E.) 313(b) and the various instructions admitted into evidence establishing the purpose and limits of such random inspections, the court found it clear that while the stated purposes for the inspection were quite broad, the scope was not unlimited. The court found that the accused’s commander intended the inspection to be limited to the specific purposes of cleanliness, order, décor, safety, and security. Ergo, the scope of the inspection had to be limited to reasonable measures to effectuate those purposes. After evaluating the law and the evidence as to the purpose of the inspection, the court concluded that the inspector was not authorized to peruse the electronic files on the accused’s computer. Thus, at the point where he began opening files on the computer, he exceeded the permissible scope of the inspection.

In inspection situations such as here detailed, it behooves those involved to keep in mind that there are limits to how far they can go. The fact that it may be proper to “thumb through” magazines and files found in dormitory rooms, does not mean that electronic files on personal computers can also be “thumbed through” during a “neat and orderly” inspection.

ADMINISTRATIVE LAW

FOIA Requests for Personnel Information

At one time or another, virtually every base legal office has seen a Freedom of Information Act (FOIA) request for personal information. Most often, the requester is asking for one of three types of information: (1) specific information about a particular individual or group; (2) a list of personnel at the base, or within a particular unit; or (3) verification of an individual’s status (for example, grade, length of service, current position, etc.).

Pre-9/11, personally identifying information (name, grade, duty address, official title and pay information) for military and civilian personnel assigned overseas or to sensitive or routinely deployable units was routinely withheld under Exemption 3 of the FOIA. The same information was released on personnel who did not meet these criteria. But, a 9 Nov 01 memo from Mr. D.O. Cooke, Director of the DoD Office of Freedom of Information and Security Review, announced a new approach. Under the new DoD policy, release of names and other personal information must be more carefully scrutinized and limited. Exemption 6 should be used as needed to further protect personal information, as discussed below.

Here’s how the new standards apply to the three scenarios:

1. Information on specific individuals. Although the case law isn’t perfectly consistent, the prevalent view has been that basic employee information should be disclosed, except where there is some evidence of agency misconduct, or there is no legitimate public interest in disclosure. Thus, where an employee is named in a record in connection with his or her official duties, ordinarily the name should be released. The new DoD policy establishes an exception “in special circumstances where the release of a particular name would raise substantial security or privacy concerns.” This exception has not been tested in court, but appears to be reasonably related to the realities of our post-9/11 increased security posture.

2. Personnel lists. The old rule’s distinction for personnel assigned overseas, or to sensitive or routinely deployable units, has been eliminated. Now, the rule has been broadened to include all active duty, Guard and Reservists, civilian employees, contractors, and even military dependents. Unless there is no “security or privacy concern,” lists containing personal information should not be released.

3. Status verification. The Cooke memo leans toward withholding, but leaves it up to the component services to develop specific guidance. The memo suggests that release is appropriate only if doing so would not raise security or privacy concerns, and the information has been routinely released in the past. In the absence of any Air Force-specific supplemental guidance, the best course is probably to follow the standard suggested in the Cooke memo.

The Cooke memo is available online at <http://www.defenselink.mil/pubs/foi/guidance.html>, under the title “Withholding of Personally Identifying Information Under the Freedom of Information Act (FOIA).” For further guidance, please call AF/JAA.

Public Display of Flags on Base

Inherent in command is the responsibility to act in the best interests of the command. Most often, we characterize this as the commander’s responsibility to maintain morale, good order and discipline. In doing so, commanders can experience a tension between protecting our Constitutional guarantees, such as that of free speech, and taking actions necessary to promote or preserve morale and maintain good order and discipline. Recently, several commanders have had to address issues involving the display of the Confederate battle flag (Stars and Bars) or some form of it, on vehicles or on or in front of base quarters.

For a number of years, some States have incorporated a form of the Confederate battle flag into their official State flags. This has been a matter of controversy with arguments on one side that the flag is a part of their history that deserves to be retained. Others view it for its symbolic ties to the preservation of the institution of slavery and believe it should not be flown. Given the origins of the flag and the ongoing controversy in many states, to include Georgia, Mississippi and South Carolina, display of the battle flag can be potentially divisive and even polarizing. In such a situation, an installation commander has the authority and responsibility to act to preserve morale and maintain discipline and good order--despite placing reasonable restrictions on free speech. The maintenance of morale, good order and discipline provides a legitimate military purpose for command action.

That said, each case must, of course, be evaluated on its specific facts. Flying the flags of all the States in one location or displaying them in a hallway does not present the same dangers to morale, good order and discipline as does displaying the Confederate battle flag in front of one’s quarters or in the back window of one’s car following a racial incident on base or in the local community. In some situations, AFI 36-2706,

Military Equal Opportunity and Training Program, may apply. Under the AFI, installation commanders have an affirmative duty to provide an “environment that is free from unlawful discrimination...” (AFI 36-2706, para 4.1.1) But, in less severe circumstances, a commander may be left with the broader concept of affirmatively maintaining good order and discipline.

An examination of AFI 51-903, *Dissident and Protest Activities*, is also relevant to such issues. Some cases may involve either a manifestation of dissent, a form of protest, or some other activity addressed by that AFI. Paragraph 1 of the AFI emphasizes that, “Air Force commanders have the inherent authority and responsibility to take action to ensure the mission is performed and to maintain good order and discipline.” Specifically, they “must preserve the service member’s right of expression, to the maximum extent possible, consistent with good order, discipline, and national security.” In other words, commanders must balance individual interests in free speech--i.e., Constitutional rights--against the duty to preserve good order, discipline, and national security. Instructive is the AFI’s emphasis on preserving freedom of expression to the maximum extent consistent with maintaining good order and discipline. This creates an obligation to take reasonable actions tailored to the circumstances and recognizes that reasonable limits and restrictions based on time and place are preferable to absolute bans. If nothing short of a ban will alleviate the impact on morale and discipline, then a complete ban is not only appropriate but probably required.

The AFI explicitly recognizes that the Constitutional rights regarding freedom of expression are not unlimited--particularly among service members--and not merely in the context of EOT or dissident and protest activities. For example, military policy requires adherence to dress and appearance standards, prohibits the display of unauthorized items on uniforms, prohibits the display of certain tattoos, and limits the political activities and campaigning of military members. Violations on these restrictions of freedom of expression are, of course, enforceable under the Uniform Code of Military Justice.

While a commander’s authority to restrict certain activities is broad, it is not without bounds. The facts requiring any restrictions on freedom of expression should be carefully documented to defend the action against claims of arbitrary or capricious actions and to establish the reasonableness of the command response. The Staff Judge Advocate’s role is, of course, to assist the commander in taking a reasonable and defensible action.

Adjusting Dates of Rank and Effective Dates of Promotion

In past months, JAA has reviewed several requests to adjust dates of rank and effective dates of promotion. The usual scenario is a first lieutenant will be selected for promotion to captain but post-selection is involved in some type of misconduct. As a result of their misconduct, the commander delays their promotion for six months and then, prior to the six-month delay expiration, recommends promotion and a corresponding date of rank adjustment. The recurring issue is what date did the officer meet standards warranting promotion with a commensurate adjustment to their date of rank.

Title 10, Section 624(d)(2) provides that an officer whose promotion has been delayed and who is subsequently promoted will have the date of rank as he would have had if there had no delay, unless the Secretary (SecAF) determines the officer was unqualified for promotion during any part of the delay. Air Force Instruction (AFI) 36-2501, *Officer Promotions and Selective Continuation*, para. 5.7.3. provides:

“If the commander determines the officer unqualified for promotion during part of the delay period, at the end of the delay the commander recommends an adjustment to the officer’s date of rank and effective date of promotion, *consistent with the date the officer met standards.*” (Emphasis added)

AFI 36-2501 offers no guidance for a commander to determine how and when an affected officer meets standards. Most commanders respond with their standards-based adaptation of Justice Stewart’s classic obscenity standard, “I know it when I see it.”¹ But SecAF has not supported this seemingly arbitrary standard and its corresponding recommended date of rank adjustment. The preferred practice is for a commander to prepare a written memorandum, articulating when and why an officer has demonstrated compliance with Air Force standards warranting promotion. This memorandum should be included in the case file that is forwarded to the SecAF for consideration. For example, following an investigation and administrative action, if the officer acknowledges their wrongdoing, accepts responsibility, etc., then the date of their response could be the recommended adjustment to their date of rank and effective date of promotion. If the commander remains unconvinced but at a later date, based on an officer’s adherence to Air Force core values and duty performance, is persuaded they are “reblued,” then that date may be appropriate for their recommended adjustment to the officer’s date of rank

and effective date of promotion. Regardless of the date, the important lesson is for commanders to be able to clearly articulate or explain why, prior to the recommended adjusted date of rank, the officer was unqualified for promotion; and why the commander was convinced on the recommended adjusted date of rank, the officer met Air Force standards and thus, qualified for promotion. If you have any questions, please call either Lt Cols Roan or Druschel.

¹Jacobellis v. Ohio, 378 U.S. 184, 12 L.Ed.2d 793, 84 S.Ct. 1676 (1964) (concurring).

TORT CLAIMS AND HEALTH LAW

As many of our Military Treatment Facilities (MTFs) are affiliating with local civilian hospitals under external resource sharing agreements or training affiliation agreements, it is important to recognize what a valuable resource 10 USC 1094(d) is. This section of the law is often referred to as the “License Portability Statute.” It allows licensed members of health professions in the armed forces that are working in a Defense Department related mission and who are validly licensed in any one US jurisdiction to practice in any other US jurisdiction. This applies to practice on or off federal installations. MTFs must follow the provisions of DoDI 6025.16 in implementing this statutory provision. If implemented properly, this can be an effective tool in facilitating relationships with off-base facilities.

RES GESTAE

The 2003 Medical Law Consultant Conference was held in Rosslyn, VA from 30 March – 1 April 2004. The conference marked the 35th Anniversary of the Medical Law Consultant Program, and featured The Judge Advocate General and the Deputy Surgeon General as keynote speakers. Attendees included incumbent Medical Law Consultants, graduates of the Medical Law Consultant Course at Malcolm Grow USAF Medical Center, the Medical Law Branch and Health Affairs Branches of JACT, Air Force TRICARE legal counsel, and representatives from the Office of the Surgeon General.

VERBA SAPIENTI

During the Medical Law Consultant Conference noted above, much discussion was devoted to reasons adverse action decisions by Medical Treatment Facility (MTF) Commanders might be overturned or modified. Most often, the reasons are clinical or professional in nature, such as a conclusion by the Surgeon

General that the provider in question may not have been afforded sufficient orientation or remedial training, if such training was reasonable, warranted and available. Other issues may include undue bias of hearing members, improper communication with hearing members, significant lack of opportunity for the provider to review the charges and evidence against him or her, and inconsistencies between allegations of incompetent performance and concurrent written appraisals or commendations for the same individual. While most actions are upheld by the Surgeon General, some do fall short for the reasons noted above, and it is wise to carefully follow the provisions set forth in AFI 44-119 when handling clinical adverse action cases.

ARBITRIA ET IUDICIA

A fact pattern like the following indicates the value of vigilance in reviewing the medical record. A claim for substandard care had been made for an incident that occurred over five years earlier, though the patient only recently had learned of the cause. Specifically cited in the claim was failure to diagnose an injury during an emergency room visit by a "Captain Smith." The records, which were incomplete, confirmed such care by this individual, but the claims officer found it odd that there was not record of a Captain Smith on the base at the time of the incident. The only mention of the individual was made by an Emergency Room nurse at the time the patient was seen.

The claims officer interviewed hospital personnel who were at the facility when the incident took place. Fortunately, one of the long-time civilian employees there recalled that, at the time, some contract workers were being used in the Emergency Room. Further inquiry led to the discovery of a "Cathrine Smith" (not actual last name) who was an independent contractor in the MTF at the time. The patient's attorney was notified, the claim against the Air Force denied, and a separate action was later brought against the contractor. The case demonstrates the importance of legible and accurate medical records, as well as the importance of following up discrepancies.

The Secretary of the Air Force Personnel Council: The Most Important Organization You've Probably Never Heard Of

Major Christopher vanNatta

The what? The Secretary of the Air Force Personnel Council? Personnel Council. Personnel Council. Nope, never heard of it.

Actually, that is not too surprising. It is not as if there are recurrent articles in the paper about the Council; or a TV news story; or even a TV show – you will never see it portrayed on *JAG*. Truth be told, the AFIs themselves barely mention the Personnel Council. The Council does most of its work quietly, tucked away in one corner of a big building on Andrews AFB, and without much publicity. But, there is one significant down side – it is sometimes hard for judge advocates to find out, not just what the Council does, but how they can best help their clients (be it the member or the command) whose cases are going to be heard by the Personnel Council.

The Council is actually one of three quasi-judicial, deliberative boards that make up the Air Force Review Boards Agency (the other two are the Air Force Civilian Appellate Review Officer (AFCARO), which no one except labor and employment lawyers cares very much about, and the Air Force Board for Correction of Military Records (BCMR), which everyone has heard of). The Director of the AFRBA is an SES-5, and he reports to SAF/MR who, in turn, reports to the Secretary. As you can probably see, the Personnel Council is squirreled away in the lexicon of “higher headquarters” where it does its job in relative anonymity.

So, what is the Personnel Council's job? Well, that depends; it has several. It might be helpful first to point out that the Council is governed by AFI 36-2023, which sets forth the organization, membership, and functions of the Council and its component boards. The Council is made up of five component boards (which makes the AFRBA wiring diagram a little nightmarish), all of which are run by a senior Colonel, who is the Director of the Personnel Council. The five component boards are the Department of Defense Civilian/Military Service Review Board, the Air Force Decorations Board, the Air Force Clemency and Parole Board, the Air Force Discharge Review Board,

and the Air Force Personnel Board. The Director of the Council presides over each one of these boards, while the other members of the Personnel Council sit on the boards. The membership of the Council is made up nine active duty and full time reserve and/or guard senior officers (one major, two lieutenant colonels, and six colonels) from varying career fields, including among others, doctors, judge advocates, personnelists, and pilots. A few senior enlisted personnel and Air Force civilians fill out the full time membership of the Council. There are also a number of other senior officers and enlisted personnel, both active duty and reserve, who serve as collateral board members and sit on boards in place of absent board members or when their particular expertise might be helpful. While there are a number of individuals who serve on the Council, any one board is composed of a panel of only five Council members.

Most judge advocates would never have to get involved with the Civilian/Military Service Review Board or the Decorations Board. As for the former, the Air Force is the executive agency for DoD's Service Review Board. The Review Board's function is to review the applications of civilians who served alongside the military during times of conflict and who are now claiming that their quasi-military duties entitle them to the status and benefits normally given to military members who served in combat. This board reviews applications that relate to any of the military services. A couple notable examples of civilians who have received such recognition include the Flying Tigers and the WASPS. While a judge advocate from the Council (typically the senior legal advisor) will serve on the Service Review Board, it would be very rare for any other judge advocate to be involved with an appeal.

The Decorations Board is, as the name implies, the group that reviews and makes recommendations on proposed decorations for Air Force members. Again, while one of the legal advisors from the Council sits on this board, there would be little need for involvement from other judge advocates. By contrast, judge advocates are much more likely to be involved with one of the other three component boards of the Personnel Council.

Major Christopher C. vanNatta (B.S., J.D., Indiana University; LL.M. Georgetown Law Center) is a former Circuit Trial Counsel and Air Force JAG School faculty member. He is presently legal advisor to and member of the Personnel Council, which advises the Secretary of the Air Force on military personnel issues.

The Clemency and Parole Board is, not surprisingly, the board that reviews applications for clemency and parole from Air Force members confined in one of the disciplinary facilities used to house military members. The Board is made up of the Director of the Council, the executive director of the Clemency and Parole Board, a senior Security Forces officer, a representative from JAJR, and one of the legal advisors to the Council. The Board reviews petitions for clemency, which are granted less than one percent of the time, and makes determinations regarding parole, to include offering parole, addressing parole violations, and terminating parole.

The Board is also involved with the Return To Duty Program and mandatory supervised release, two programs unique to military confinement. The return to duty program is a rehabilitation program designed to offer certain enlisted personnel in confinement an opportunity to return to active duty. Although a detailed description is beyond the scope of this article, it should be noted that the requirements for entry are quite rigorous, and the Board examines each case very carefully before making the decision to allow an individual to participate.

Mandatory supervised release, on the other hand, is a relatively new program that makes it possible for inmates close to their minimum release date, to be released and supervised by confinement officials until their term of confinement ends. Although the details of this program are also beyond the scope of this article, it should be noted that judge advocates (and in particular defense counsel) are very likely to be involved in this aspect of the Council's work. Indeed, defense counsel who continue to represent clients in confinement, can do much to help them when their cases come before the board.

The Discharge Review Board (DRB) provides yet another opportunity for defense counsel to help their clients, but legal office judge advocates should also be aware of this board's functions. The DRB's responsibility is to review discharges of former officers and enlisted personnel to determine whether an inequity or impropriety necessitates an upgrade of the discharge. Contrary to one of the most prevalent myths in the Air Force, discharges are not . . . repeat . . . are not automatically upgraded after 6 months. We hear a surprising number of applicants tell us they were informed by their commanders, first sergeants, and, yes, even defense counsel, that their less than honorable discharges will be upgraded. The DRB can upgrade a less than honorable discharge but only if individuals apply for review of their case. Such former military members are entitled to a records review and/or to make a personal appearance (with or without representation) be-

fore the five-member board to review and discuss the facts and circumstances of their case and to plead for relief. The quasi-judicial DRB's hearings and deliberations take place behind closed doors, though the hearings are recorded. If the DRB finds an inequity (*i.e.*, a lack of fairness, substantive deficiencies, significant mitigating circumstances, or other equitable consideration) or an impropriety (a harmful procedural defect) the DRB can upgrade the character of the discharge (*e.g.*, from general to honorable) and change the reason and authority for the discharge (*e.g.*, from minor disciplinary infractions to Secretarial Authority).

There are some important considerations for both defense counsel and legal office personnel. Legal office personnel need to remember that the only information the DRB will see is whatever the individual presents and whatever is in the file. If the evidence supporting a particular Article 15 is not in the file, for example, then the DRB may not appreciate the degree to which evidence supported a particular charge. In addition, to the extent commanders can memorialize their decision-making, it will make it easier for the DRB to understand several years later what the commander was thinking when he or she imposed punishment or initiated the discharge.

Defense counsel, who would not ordinarily be permitted to represent someone before the DRB, can nevertheless help their clients in a couple significant ways. First, make sure your clients understand there is no such thing as an automatic upgrade to one's discharge. Air Force members facing discharge who believe there will be an automatic upgrade may erroneously choose not to contest a discharge they believe will be upgraded in six months anyway. This approach, while very Sun Tzu chic (don't fight the battle unless you have to), will only add insult to injury when the "automatic" upgrade does not materialize.

Second, take some steps to prepare your client for their DRB appearance. Advise them, first and foremost, to apply no matter how well deserved their discharge may have been – to use a soccer metaphor, you will miss 100 percent of the shots on goal that you don't take. Also, personal appearances are the most likely to lead to success. The upgrade rate for individuals who come to Washington DC (Andrews AFB) is ten times higher than for record review cases. Finally, find ways to "represent" them before the DRB even though you can't actually represent them. For example, write a letter on their behalf, draft a checklist of things for them to compile prior to submitting an application, prepare the application for them, and prepare a package for them to submit to the DRB since the board will consider whatever the former member

wishes to present.

Perhaps the most significant of the component boards (at least as far as judge advocates are concerned) is the Personnel Board. This board, again composed of at least one doctor, one judge advocate, the Director or Deputy Director, and two other senior officers, is responsible for advising or acting for the Secretary on personnel issues that require Secretarial action. In other words, for all those situations in the AFIs that call for Secretarial action of some variety, the Personnel Council (in the form of the Personnel Board) will be involved. Of course, there is nothing in the AFIs about the Personnel Board, which is why SAFO 240.8 is so important. Through that Secretarial order, the Secretary has delegated his authority to act in many of these cases to the Director of the AFRBA, who is required to consider the recommendation of the Personnel Board.

Cases typically reviewed by the Personnel Board include, among others, officer discharges, enlisted lengthy service probation cases, dual action cases, officer grade determinations, 2Lt NQP actions, enlisted demotion actions, conscientious objector cases, retirements and resignations in lieu of discharge, and other resignations in lieu of court-martial. Since these cases are the bread and butter of most defense counsel and the *raison d'être* for legal office military justice/adverse action divisions everywhere, it is probably not necessary to discuss presentation of these cases in great detail. But, a few points are worth mentioning.

Don't forget that after the NAFs and the MAJCOMs, there is the Personnel Board; in other words, consider your audience. Anything you write (and defense counsel, this includes you), the Board will read, carefully and critically. If you want to wrap yourself in the hyperbole and sarcasm . . . fine. Just make sure not to do it too tight. Don't assume we have access to anything and everything. If there is a point to make or evidence to present, then present it. This raises the final point. There is no right to appear before the Personnel Board, but the AFIs do not say anything about presenting additional statements from you or your client. No matter which side you are on, thinking creatively can pay huge dividends before the Personnel Board.

The Personnel Council may not be the most well known organization in the Air Force. But, for judge advocates, it is nevertheless an extremely important one. Paying careful attention to the AFIs and thinking creatively (whether government or defense) will only ensure that the Personnel Council has the best information available in a given case to make the important decisions that can have a profound effect on the lives of the people involved.

If you have questions or want to discuss procedures or the like, do not hesitate to contact one of the three legal advisors assigned to the Personnel Council.

Editors note: The Trial Brief will return in the June 2004 edition of The Reporter.

SUICIDE AND THE MILITARY JUSTICE PROCESS

Lieutenant Colonel Dawn Eflein¹

When caught in the crossfire of the military justice process, an accused may begin to feel as though his situation is hopeless and his life is not worth living anymore. No single factor precipitates this; rather, it is a combination of different factors coupled with the accused's own thoughts—and the synergistic effect that results is greater than the sum of the parts. Tragically, that sometimes culminates in a suicide.

In my current position, I was recently involved in a case in which it appears that the accused ultimately committed suicide. This wasn't my first experience with this tragic event. I entered the Air Force as a mental health nurse, and worked on an inpatient unit where some Air Force members were admitted following suicide attempts and where occasionally patients would attempt suicide. This background has affected my work as a legal advocate—sometimes when I was a prosecutor, but always when I was a defense counsel, and I carry that with me in my current assignment as a trial judge. We have all had our suicide awareness training. We are aware that an individual who is facing legal problems can be “at risk” of suicide. We try to be alert to some of the indicators and make (or encourage) appropriate referrals if we are in a position to do so. So why is it always such a shock when a military member facing trial takes his own life? And what can we, as part of the military justice process, do to lessen the risk that an accused may attempt suicide?

To find answers to that question, let's first look at the process through the eyes of an accused: MSgt X has been in the Air Force for 18 years, and it is his life. His EPRs have been firewall 5s. He is married and has two sons, ages 5 and 14. His wife is a full-time mom because his youngest son has severe medical issues and requires her full attention. He is almost finished with his bachelor's degree, and plans to have it done when he retires in two years. About this time last year, MSgt X had his wisdom teeth taken out and was prescribed Tylenol #3 for the pain. He took what he needed and kept the leftovers in his medicine cabinet. Six months ago, he was playing basketball with his friend and they collided during the game. MSgt X hurt

his ankle and his knee—nothing broke, but it sure hurt. His friend landed flat on his back and was in a lot of pain. When MSgt X got home, he took some Tylenol #3 for the pain, and gave two tablets to his friend to take for his back. His friend called him the next morning and asked for some more, so MSgt X took him two more tablets on his way to work. MSgt X also took another Tylenol #3 before he went to work that morning. Unfortunately for him, when he arrived at work he was notified that he had been selected for a random urinalysis. When the result came back positive for codeine, MSgt X panicked. He lied and told OSI that he didn't know how that could happen. The next two days he felt so bad that he went back in and confessed to his own use, but he didn't say anything else. His friend was in another squadron, but got called in about a month later because some of the airmen in his squadron were using illegal drugs. When asked about his own drug use, he told the OSI that MSgt X had given him Tylenol #3 on two occasions for his back.

MSgt X is charged with use and distribution of a controlled substance, both on multiple occasions, and also with making a false official statement. At the Article 32 hearing, he learns that he could go to jail for 25 years and that regardless of what happens he will very likely lose his Air Force career. As the trial date approaches, MSgt X is feeling stressed, and not sleeping at all because he is so worried. It feels like everything is crashing down around him. He becomes withdrawn at work because he realizes that his co-workers soon will know what he is charged with. He is reluctant to seek help from the Commander—after all, she preferred these charges against him. He doesn't want to go to his First Sergeant, because he believes that the Shirt probably already thinks he's a druggie and a liar. Command checks on him once, but he puts on a brave front, and he has continued with his exemplary duty performance. Therefore, Command thinks that he must be okay, and assumes that his defense counsel, his family, and his friends are looking out for him.

Now think about what happens when he goes to see his defense counsel, Capt B. Capt B gives him some options and some advice. He urges MSgt X to “prepare for the worst and hope for the best.” MSgt X doesn't think he could ever be prepared for a punitive discharge, let alone 25 years in jail. Capt B thinks he should plead guilty and then try to get mercy on sen-

Lt Col Dawn Eflein (B.S.N., University of Texas at Austin; J.D., University of California at Davis; L.L.M., International Law, The Judge Advocate General's School, US Army, Charlottesville, VA) is currently a military judge in the Pacific Circuit, Yokota Air Base, Japan.

tencing. But a federal drug conviction? What will happen to his family? How will he provide for them? His wife doesn't have marketable skills, and their son needs her. Eventually he agrees to follow Capt B's advice, but it is a gut-wrenching decision. As they prepare for the *Care* inquiry, MSgt X discovers he has to articulate in a public forum that he intended to use drugs, distribute drugs, and then that he intentionally lied about it. Pretty shameful stuff for a senior NCO... and he's just not sure he can do it. Capt B is also telling him that for sentencing, he must get character statements from former supervisors and commanders. MSgt X just can't do it. How can he tell his former bosses what he has done? How can he ask them to put their names and reputations on the line for him? He gathers up his 'atta boy' folder, and tells Capt B that that will have to suffice.

His situation at home worsens. He feels increasingly guilty about what he is putting his wife through. He is frightened about what will happen to them when he goes to jail and loses his retirement, as well as his future ability to get any kind of a decent job. He can barely look at his 14-year old, because he has tried to teach his boy to always tell the truth and to stay away from drugs. Having always been the "strong" one in the house, he stuffs all his feelings and thoughts and concerns down deep inside and doesn't discuss them at home. He stops his exercise regimen—it's just too hard to run five miles when you only sleep for three fitful hours at night and have no appetite. He becomes isolated from his friends. He is too embarrassed to ask anyone to go to lunch or to do anything with him, and most of his acquaintances avoid him because they don't know what to say. His only 'real' friend was the other NCO that is involved in this mess, and they have each received a "no contact" order that prevents them from talking to or seeing each other. He stops going to the gym and pretty soon his life consists of only leaving the house to go to work. He feels like he doesn't have anyone to talk to.

He thinks about the support services--as a SNCO, he knows he can go to the chaplain or to Life Skills. He makes an appointment with the chaplain, but breaks down crying in the office. Even though the chaplain is very understanding, he feels humiliated. Talking to the chaplain helped, so he makes another appointment. But things are piling up, and he doesn't want to talk about it, so he breaks the appointment. The morning of trial, MSgt X is found on a remote part of the base with a self-inflicted gunshot wound to the head. He leaves a note saying that he loves his family very much and this is the best way he knows to make sure that they are cared for financially.

What are some of the indicators in the above scenario that MSgt X may be slowly deteriorating and that he may begin to think that suicide is a possible solution? First, all of his plans for the future have changed radically in a very short period of time. His self-image has been drastically altered, and he perceives that others see him as a "druggie" and a "liar," which are descriptors that no career military person could ever easily come to terms with. He is frightened about what will happen to his family when he goes to prison, and concerned about his own safety when he is in prison. He can't sleep, can't eat, and has given up going to the gym. He increasingly isolates himself socially. He starts obsessing about how he will provide for his family, and to him, the situation looks hopeless. He has no outlets for the guilt, stress, anger, anxiety, and depression that are beginning to overwhelm him.

Trial counsel may be thinking, "What does any of this have to do with me? I'm not a mental health professional nor do I get to interview the accused, so how am I supposed to notice any indicators?" While the prosecutor's main focus is on preparing the case, he should also be paying attention to information that may indicate that an accused could be suicidal. A thorough prosecutor starts early with interviews, talking to the commander, the first sergeant, the witnesses, the accused's coworkers and supervisors, and if listed as defense witnesses, possibly even some of the accused's family members. If during the course of these interviews the trial counsel is made aware of information that raises questions about the accused's emotional well being, this information must not be ignored. If a witness indicates a concern for the accused due to, for example, changes in behavior or indications of depression, the trial counsel should discuss these concerns with the defense counsel so that the appropriate action can be taken. Defense counsel may not be aware of these changes in their client's behavior and will likely welcome the fact that the prosecutor has brought this to their attention. Of course, in cases where trial counsel receives information from a witness or any other source that the accused may be in imminent danger of harming himself or others, he should not hesitate in notifying the appropriate authorities along with the defense counsel.

Furthermore, trial counsel should be proactive in addressing this issue with the unit. Trial counsel should discuss with the unit whether or not there are any concerns from their end as to the mental well being of the accused. In some circumstances it may be necessary for the unit to designate a friend, coworker or supervisor to essentially "keep an eye" on the accused during trial. It is important that this person's

role be defined as one who is there to help ensure the accused brings no harm to himself during a very stressful time in his life, and not to act as an agent of the prosecution. For example, in a case where an individual may be convicted at the end of the duty day, with sentencing to take place the following day, the prosecutor may want to suggest that the unit designate a friend or coworker to spend time with the accused during that period of time. Just remember to coordinate this with the defense counsel so that they are aware of what actions the unit is taking with regard to their client.

Sometimes when the accused is on administrative hold, the unit decides (generally with the advice of the legal office) that he should not be allowed to take leave. While commanders usually have good reasons for wanting to ensure that an accused is available for trial by denying leave, in many instances there is not a valid basis for this position. Given the fact that trial events and dates are generally coordinated well in advance and the accused's presence is not required 24-7 from pretrial to trial, trial counsel should take into consideration the accused's mental well being in addition to other factors when advising the commander on the issue of pre-trial leave. Often an accused wants to visit with family, old friends, or other support systems, and he should not necessarily be denied this opportunity solely because there is a trial somewhere in the offing. Trial counsel should discuss with commanders that absent an indication that the accused will not return from leave for trial or will commit additional misconduct while on leave, commanders should take into consideration the importance of providing the accused access to this support network.

Defense counsel, of course, is in a position to see the accused, see his family and/or friends, and talk to his coworkers and supervisors. As a defense counsel, when I briefed military members facing court on the process and what they could expect at each stage, I would talk to each one about their mental status, their support system, and their outlets for stress. Also, with each of my court clients, I asked them point blank if they had thoughts of hurting themselves and would elicit a commitment from each one that they would call me if they began to have those thoughts. Surprisingly, some of the accused members that had such thoughts were facing charges that to me weren't the crime of the century...but they were important and life altering to the accused, and the accused's perceptions are what really matter. Each Area Defense Counsel (ADC) should maintain an open channel of communication with his/her Chief Circuit Defense Counsel (CCDC) to get guidance when they face a situation in which they feel suicide may be a possibility.

What if a client reveals an intention to take his own life or otherwise injure himself during the course of a defense counsel's representation of that client? Can the defense counsel disclose this information and not violate the attorney client privilege? Air Force Standards of Criminal Justice, 15 Oct 02, standard 4-3.7, Advice and Service on Anticipated Unlawful Conduct, covers among other topics a defense counsel's obligations as they relate to the disclosure of information relating to the representation of a client. This paragraph was amended to read that a defense counsel may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent the client from attempting suicide or causing serious bodily harm to herself or himself.²

What if the unit comes calling in an attempt to locate the accused? If they are motivated by a concern that the accused may commit suicide or otherwise harm himself, the Standards allow for disclosure. The same paragraph states that a defense counsel may reveal such information to the extent the lawyer reasonably believes necessary to assist Air Force authorities in locating the client when those authorities believe the client may attempt suicide or cause serious bodily harm to herself or himself.³ Obviously the decision to reveal information relating to the representation of a client should not be taken lightly, but defense counsel need to be familiar with the available guidance should a situation arise where a client demonstrates a willingness to injure himself or take his own life.

What options, other than disclosure, are available to you should a client begin to demonstrate the warning signs? One defense counsel related to me that he would ask his court clients the name of the person with whom they talked to for support or when they needed to vent. When the client gave them a name, the defense counsel would say, "can I talk to that person?" In this way, counsel could explain to the accused that it was important that he not go through this process alone. If the named individual was a spouse or a parent, sometimes it helped the accused to have someone else explain the process to them after the accused informed them of the charges. (Of course, if the client did not consent, the counsel never contacted the other person, but continued to encourage the client to maintain a support system.)

As a military judge, in an 802 session, I ask each side if they have any security concerns. I need to know if there are witnesses or family members who have been aggressive or who feel threatened so I can take appropriate measures to ensure the safety of everybody in the courtroom. Some defense counsels choose not to answer that question with respect to the accused, and that is their right. However, I ask the

question to ensure safety, and many times, even if counsel chooses not to answer, at least they are thinking about the issues. One suicide is too many, and it is never appropriate to simply ignore the possibility.

Also, when I brief the bailiff prior to each court, I ask him to maintain situational awareness at all times for all participants in the courtroom. No matter what the charge, generally the court-martial is the most serious event thus far in the accused's life. I express my concern to the bailiff that it is imperative to me to ensure that all parties are safe, and that he needs to be the one that continually visually scans the courtroom so he can inform me if anything looks odd or begins to look odd. I would rather take a break and talk about an issue than have violence or harm befall someone in court.

Military justice professionals, but defense counsel in particular, should also be aware of the Limited Privilege Suicide Prevention Program (LPSP).⁴ This provision creates a limited confidentiality under certain circumstances. The objective of the LPSP program is to identify and treat those members, who, because of the stress of potential disciplinary action under the U.C.M.J. pose a genuine risk of suicide. In order to encourage individuals to get treatment and make it easier for them to obtain that treatment, the LPSP program provides limited confidentiality under certain circumstances.

Members may be entered into the program upon official notification that they are either under investigation or suspected of committing an offense under the U.C.M.J. (i.e. when the member is read their rights). If an individual who is officially involved in processing disciplinary action, such as the first sergeant, a law enforcement official or the member's defense counsel, suspects the member presents a risk of suicide, they must communicate this concern to the member's immediate commander with a recommendation that the individual be placed in the LPSP program. Any information revealed in, or generated by the clinical relationship between the member and the mental health provider may not be used in any *existing or future* U.C.M.J. action or when weighing characterization of service in a separation, *even if an MRE 513 exception applies*.⁵ But, the information can be used for any other "official purpose."

The privilege lasts so long as a mental health provider determines there is a risk of suicide. The protection ceases when the provider notifies the member's commander that the member no longer poses a risk of suicide. Any information generated after disenrollment is not protected.

Some may suggest that if an accused demonstrates suicidal behavior they should be placed in pre-trial

confinement. The argument is essentially that because an accused may be suicidal they have demonstrated a willingness to "not appear at trial."⁶ All parties to the trial should be aware that although an accused's mental condition is an appropriate consideration in deciding whether to place an accused in pretrial confinement, suicide risk alone does not justify pretrial confinement.⁷ While an accused service member's mental condition is an appropriate consideration, it must be relevant to the two basic criteria for pretrial confinement: (1) whether the accused will be present for trial; and (2) whether the accused is a threat to commit other acts of serious misconduct.⁸ The health and welfare of military personnel is a command responsibility. Ordering or continuing an accused in pretrial confinement solely because he is suicidal is not a proper command response.⁹

Suicide is a very real problem facing today's Air Force, and not just for those facing disciplinary action. Those of us working within the military justice system need to understand that enormous stress is placed on an accused. It is imperative that we be aware of indicators and to know where to turn when faced with the serious possibility that an accused is contemplating suicide.

¹Special thanks to Capt Christopher M. Schumann, Air Force Judge Advocate General School Military Justice Division, for his significant contributions to this article.

²Air Force Standards of Criminal Justice, 15 Oct 02, Standard 4-3.7(e)(iii).

³Air Force Standards of Criminal Justice, 15 Oct 02, Standard 4-3.7(e)(iv).

⁴AFI 44-109, *Mental Health, Confidentiality, and Military Law*, 1 Mar 00.

⁵See, AFLSA/JAJM policy letter, 8 Mar 00.

⁶R.C.M. 305(h)(2)(B)(iii)(a)

⁷*U.S. v. Doane*, 54 MJ 978 (AFCCA 2001).

⁸*Id.* at 983. The Court concluded that the intent to commit suicide does not amount to serious misconduct warranting pretrial confinement and noted that there is a "fundamental difference between how we treat an accused who is a threat to himself and an accused who is either a threat to flee the jurisdiction to avoid prosecution or to commit other serious offenses." *Id.* The Court noted that an accused who is a threat to himself is referred to mental health practitioners for evaluation and treatment.

⁹*But see, US v. Wardle*, 58 M.J. 156 (CAAF 2003). In *Wardle*, the Court concluded that the government had properly established that the accused was a flight risk and therefore pretrial confinement was warranted. One of the factors the government and the military judge considered in that case was the accused's suicide attempt after failing to report for duty. In the concurrence, the Court stated "[a] reasonable belief that an accused will commit suicide before trial is a legitimate factor to be weighed, along with all other evidence, in determining whether pretrial confinement is appropriate."

VWAP: A Call to Action (Are You Prepared to Respond?)

Captain Erik Mudrinich

“Can you help me? I have just been raped!” At some point in your career you may hear these words. You may hear them if you are a medical provider, a Security Forces Investigator, a Commander, a First Sergeant, or a Judge Advocate. The question becomes what do you do? Are you prepared to respond? The answer should be a resounding “YES, we can help,” and here is how:

The History of Victim’s Rights

The Air Force Victim Witness Assistance Program (VWAP) arose as a result of the federal government’s efforts in the 1980s and 90s to increase the protection and rights given to crime victims and witnesses in the criminal justice process. In its preamble to the 1982 Victim and Witness Protection Act (VWPA), Congress stated that “without the cooperation of victims and witnesses, the criminal justice system would cease to function; yet with few exceptions these individuals are either ignored by the criminal justice system or simply used as tools to identify and punish offenders.”¹

The Department of Defense followed suit shortly thereafter. In 1994, DoD Directive 1030.1 and DoD Instruction 1030.2 implemented the victim rights directive throughout the armed services. DoD Instruction 1030.2 in particular states that all military services are required to report the number of victims and witnesses who were advised of their rights and established the Victim and Witness Assistance Council, and requiring that similar councils are established on all major military installations.²

The Air Force established its VWAP program in November 1993 and incorporated the program into AFI 51-201, *Administration of Military Justice*.³ Some highlights of these laws include: providing punishments for those who harassed, intimidated, and threatened physical harm against victims and witnesses in order to prevent or hinder them from testifying, providing a crime victim’s fund to help compensate victims, and the creation of a victim’s bill of rights.

Capt Erik Mudrinich (B.A., St. Olaf College, MN; J.D., Hamline University, MN), is currently the chief of environmental law at Luke AFB, Arizona. He is a member of the State Bar of Minnesota. Luke’s VWAP program was recently recognized by AETC’s Sexual Assault Assessment Team (SAAT) as being a model program. Special thanks to Capt Felix Sutanto for his contributions to this article.

Among others, the victim’s bill of rights states that a victim has the right to be treated with fairness and respect for their dignity and privacy. A victim also has the right to reasonable protection from the suspect or the accused.⁴

The victim can expect the Judge Advocate’s Office to notify them of all court-martial proceedings, including conviction, sentencing, confinement, and release, and to confer with the prosecuting judge advocate regarding the case. Victims and witnesses should also expect that the government will make every effort to provide them with information about medical services, social services, restitution, counseling, treatment and support programs.⁵

Installation Level Program: The Three Pillars of Success

It is clear that all installations must ensure that allegations of sexual assault are thoroughly investigated and that victims of such crimes are provided all necessary support, protection and assistance available to them. A critical aspect to prompt and compassionate response is a strong Victim Witness Assistance Program.

The Judge Advocate General, Major General Thomas Fiscus noted the importance of this program: “VWAP must be a cornerstone of an effective military justice system. This vital program ensures that congressionally mandated rights of victims are protected and that the role of victims and witnesses in our disciplinary process are enhanced.”⁶

Three pillars are vital in supporting a robust and cohesive VWAP program, these include: training, coordination and outreach.

Training

The foundation of military effectiveness is training. We train to be the best; we train to handle any situation and we train to keep our people safe. To have a successful VWAP program, training is of paramount importance. Victim Liaison Officers, who under Air Force regulations are appointed “to assist a victim during the military justice process,” must understand the purpose and the workings of the VWAP program. Victim Liaison Officers must be assigned to victims immediately after an assault is reported and must fol-

low through with care until further assistance is not requested. AFI 51-201, *Administration of Justice*, Chapter 7, is the starting point for all Victim Liaison Officers.

Once the Victim Liaison Officer has been adequately trained, the focus shifts to the base command structure. Commanders and First Sergeants are crucial components in the VWAP process. They are deeply involved in ensuring that their troops are promptly taken care of. To do this, they must be provided with adequate resources and training on the VWAP program. This training can be accomplished in numerous mediums and forums. Training can be briefed at Commander's Calls, Status of Discipline meetings, First Sergeants Breakfasts and on a case-by-case basis. One useful tool is the development of a "VWAP CD-Rom" with guidance, forms and VWAP contact information for Commanders and First Sergeants to use as a desktop resource.

In addition to having a robust installation-training program, outside and local agencies also play a powerful role in a successful VWAP Program. Local rape shelters and state VWAP programs can provide excellent on-site training as well as valuable coordination and support. For instance, Luke AFB is a member of the Arizona Sexual Assault Network (AZ-san), which is a nonprofit organization joining state and local sexual assault resources into a cooperative entity.

Coordination

The second pillar is coordination. Coordination is central to a robust VWAP program. Without coordination, even the best-intentioned VWAP program will fail. One crucial step of coordination is the creation of a Victim Witness Assistance Council (VWAC) and Sexual Assault Response Team (SART). The VWAC should be chaired by a senior wing leader such as the installation Vice Commander, and should consist of members from the following agencies: Command Representatives (Commanders and First Sergeants); Law Enforcement (Security Forces and the Air Force Office of Special Investigations); Medical Providers (Emergency Room Doctor & Life Skills); Social services (Family Support Center, Family Advocacy, Chaplain, MEO); Legal Representative (Victim Witness Liaison Officer); Public Affairs and Media Liaisons; and Community Agencies (Local and State Victim Programs, Local Shelters).

Meetings should be held on a regular basis to discuss particular cases as well as provide opportunities for further VWAP training. In addition to reporting training and publicity efforts, the VWAC will report the number of cases currently being handled and the types of services being rendered. The VWAC ensures an

interdisciplinary approach is followed by victim and witness service providers, maintains a vigorous training program and ensures installation-wide awareness of available services.

Members of the SART team (typically comprised of legal, medical and law enforcement council members) coordinate in the event of a sexual assault for immediate response and support of the victim. It is also advised that every installation develop a sexual assault response plan, which is widely disseminated to the base community to facilitate prompt response.

Coordination of services rendered to a victim is also a crucial component of the VWAP program:

"Your programs must include a robust record keeping component to effectively capture victim/liaison interactions. I expect that program monitors or liaisons will establish a file folder on each supported victim and witness, recognizing that such information constitutes a system of records under the Privacy Act. The core document in the folder should be a log sheet that tracks when services were provided to each victim."⁷

With effective record keeping, coordination of services becomes possible. One tool, which is recommended, is an electronic database to supplement the use of paper files. Luke Air Force Base has created such a database by using Microsoft Access. Such a database enables the Luke AFB team to improve coordination of services. The database also allows VWAP Council members to have quick and reliable access to VWAP information; ensuring victims and witnesses are effectively tracked throughout the VWAP process. When the database is updated with new information, an e-mail is automatically sent to all members of the VWAP Council through the use of an incorporated mail merge program. The VWAP database facilitates the detailed documentation of victim liaison support, resulting in enhanced victim services.

The use of a Trial Counsel VWAP Checklist and a Victim Liaison Officer Checklist are also an important part of the coordination process. Such checklists are useful for trial counsel when dealing with victims and monitoring the services rendered in support of that victim. Checklists should include, at a minimum, victim contact information, forms provided and subsequent contacts made with the victim. The use of detailed checklists will facilitate victim care and coordination of services.

Coordination with civilian and state providers is crucial to an effective VWAP program. State and local

victim advocacy groups can provide valuable support, training, and coordination of services. Local shelters can provide safe haven for victims, state VWAP programs can provide counseling and compensation, and civilian victim advocates can provide dynamic training to base volunteers. Your installation should have Memorandums of Understanding (MOU's) or Cooperative Agreements in place with local and state providers.

Outreach

Finally, a robust VWAP program means little if those who it is meant to serve do not know it exists. Public outreach is the crux of an effective VWAP Program. A primary mission of the VWAC is to inform the base community of the services available. Public outreach can be accomplished in numerous ways, but creativity, persistence and innovation are central to the development of a public outreach program.

One recommendation is to have a "Multimedia" team assist in the creation of media and advertising for the VWAP program. This team may consist of web-designers from your local communications squadron, base graphics or photography, public affairs – the possibilities are endless. Developing an installation VWAP webpage is an effective forum to inform the community about your program. Posters, informational tri-folds, VWAP laminated cards, bumper stickers and other media may also be utilized.

Community outreach with your local and state providers is also worth its weight in gold. Community providers can offer great insight in the creation of volunteer advocacy programs.

The Secretary of the Air Force, Hon. James G. Roche noted the importance of the VWAP Program: "As we travel around the world, we are convinced that our Air Force is one of the safest environments in which to live and work, and that is why we find the issue of sexual assault to be most troubling. While the vast majority of our Airman act with great respect, care and honor toward each other, sexual assaults are a societal problem, and, as such, are reflected in our Air Force. That is not an excuse, but it adds importance to solving the problem since our nation properly holds us to a higher standard"⁸

The importance of the VWAP program is clear, the tools and resources are out there, now it is up to you to ensure that when you are asked the question: "Can you help me? I have just been raped!" the answer is a resounding "Yes, we can!"

¹Congressional findings and declaration of purpose, *Act Oct. 12, 1982, P.L. 97-291, § 2, 96 Stat. 1248 Act Oct. 12, 1982, P.L. 97-291, § 2, 96 Stat. 1248*. This portion of the findings appears as a note on 18 U.S.C.S 1512.

²"The Victim and Witness Assistance Program", 39 A.F. L. Rev. 57, Maj. William W. "Zeb" Piscnotte, USAF and Maj Regina E. Quinn, USAF.

³Air Force Instruction (AFI) 51-201, Administration of Military Justice, Ch. 7 (November 2003).

⁴AFI 51-201, *supra*, sec. 7.9 – 7.11.

⁵*Id.*

⁶Special Subject Letter 2004-3: "Victim and Witness Assistance Program", 17 March 2004, Major General Fiscus

⁷*Id.*

⁸"Interim Measure for Victim Support" Policy Letter, 1 April 2004, General John P. Jumper and Hon. James G. Roche



Victim Witness Assistance Program Checklist



1. Victim/Witness Information:

- a. Name: _____
- b. Address: _____
- c. Telephone Numbers: (H) _____ (W) _____
- d. Status: _____ Victim or _____ Witness

2. Case Information:

- a. Date of Incident: _____
- b. Place of Incident: _____
- c. Alleged Offense(s): _____
- d. Name of Alleged Offender: _____
- e. Address of Offender: _____
- f. Telephone Number of Offender: _____
- g. Organization of Offender: _____

Victim/Witness Assistance	Yes	No	N/A
3. Have the following documents been given to the victim/witness:			
a. DD Form 2701, <i>Initial Information for V/W</i>			
b. DD Form 2702, <i>Court-Martial Information for V/W</i>			
c. DD Form 2703, <i>Post-Trial Information for V/W</i>			
d. DD Form 2704, <i>V/W Certification/Election re Inmate Status</i>			
e. _____ AFB VWAP Pamphlet			
f. DD Form 2701 Insert, _____ AFB Points of Contact			
4. Has the victim/witness been personally notified of the following rights:			
a. The right to be treated with fairness and respect for their dignity and privacy			
b. The right to be reasonably protected from the accused offender			
c. The right to be notified of court proceedings			

Victim/Witness Assistance	Yes	No	N/A
5. Has the victim/witness been informed of the place where they may receive emergency medical and social services?			
6. Has the victim/witness been informed of the following counseling, treatment, support programs:			
a. Family Advocacy			
b. Chaplain Services			
c. Family Support Center			
d. Clinical Psychologist and/or Clinical Social Worker (Mental Health)			
e. American Red Cross			
f. Air Force Aid Society Financial Assistance Program			
g. JAG Legal Assistance Program			
7. Has the victim/witness been informed of the status of the investigation of the crime to the extent appropriate?			
8. Has the victim/witness been informed that any attempted intimidation, harassment, or other tampering should be promptly reported to the Law Enforcement Desk of Security Forces?			
9. Has the victim/witness been informed of the following forms of restitution:			
a. State Victim/Witness Assistance Compensation Funds			
b. Article 139, UCMJ			
c. Private Lawsuit			
d. Possible condition of a pretrial agreement or sentencing			
10. Has the victim/witness completed a ____ AFB VWAP customer service survey?			
11. Date we first met with victim/witness:			
a. Subsequent contact (date):			
b. Subsequent contact (date):			

Give Me Shelter: Section 529 Plans and the Legal Assistance Client

Major Wendy Sherman

Many new parents and new grandparents are thinking of starting some sort of college savings plan for their kids' future education. Apart from the obvious benefit of putting away money today for tomorrow's large expense, educational savings plans can also serve as an advantageous vehicle through which your wills client can gift money to children today, yet still retain control over those funds until the minor attends college. There is also a potentially significant advantage for your estate-planning client who may be looking for long-term tax benefits from contributions to educational tax-advantaged savings plans. Want to offer your legal assistance client practical and simple advice about one way to provide for her heirs? Talk to them about Section 529 plans.

History of Qualified State Tuition Plans

In the recent past, college savings vehicles were not particularly advantageous. Either the custodian loses control of the account too early,¹ the rate of return is insignificant,² or the limits on income and contribution rates are prohibitive.³ Then, as part of the Small Business Job Protection Act of 1996,⁴ Congress created what became affectionately known as "Section 529 Plans." However, in 1997, as part of the Taxpayer Relief Act,⁵ Congress clarified the rules on Section 529 Plans and since then, there has been a proliferation of state plans. The original plans were called "prepaid tuition plans." These plans allowed a donor to purchase future tuition credits for a beneficiary at today's prices.⁶ However, most prepaid plans contained limitations and penalties designed to discourage the use of the "tuition credits" at any other institution, or within any other State.⁷ Realizing the need for a greater savings vehicle, Congress broadened the definition of "qualified state tuition plan" to include "savings plans." These savings plans, or Section 529 Plans, and their tax advantages, are the focus of this article.

Major Wendy Sherman (B.A., Western New England College; J.D., Western New England College School of Law) is currently assigned as an Instructor in the Civil Law Division at the Air Force Judge Advocate General School, Maxwell AFB AL. She is a member of the State Bar of Massachusetts.

What Exactly is a Section 529 Plan?

A Section 529 Plan is nothing more than a tax-advantaged savings vehicle for college education. These are programs established and maintained by a state or an agency or instrumentality of a state.⁸ The state plan must meet a few requirements before it can receive the tax benefits conferred by section 529. The program must restrict contributions to those made in cash, it must assess a more-than-de minimis penalty on any refund of earnings, provide separate accountings for each beneficiary, prohibit contributors from directing the control of investments, prohibit the use of any portion of the account to be used to secure a loan, and provide safeguards to ensure the savings does not exceed that which is necessary to provide for higher education expenses.⁹ Should a state satisfy all these requirements, that state may create a program designed to help save for higher education. The state may run the program, or employ a professional financial management corporation, as an agent of the state, to invest and fund the plan.¹⁰

Withdrawals and Maximum Contributions

Unlike other available savings vehicles, the limitations on contributions do not pose an impediment to saving enough money for college. With a Section 529 Plan, a donor can deposit up to \$11,000 per year per beneficiary without incurring any penalty.¹¹ In addition, should a donor wish to deposit more, he or she can place \$55,000 into the account and the money is treated as if \$11,000 was deposited each year for five years (called a five-year averaging election).¹² Of course, that donor, on behalf of that beneficiary, can deposit no other funds, until the five years have passed. Also, there are no income restrictions which would disallow contributions from those who earn over a certain sum of money.

Withdrawals can be made at any time, but if the withdrawal is not used for qualified educational expenses, a penalty is imposed upon the earnings,¹³ plus taxation at the account owner-donor's rate. However, there is an exception should the funds not be needed due to scholarship or disability.¹⁴ In the event a child receives a scholarship, or cannot receive higher education due to a disability, any withdrawals will escape the 10% penalty. However, the withdrawal will be

reported to the account owner-donor, not the beneficiary, thereby increasing the tax rate for the earnings.¹⁵ To get around this, some analysts recommend that, in the case of a scholarship award, pay the money to the educational institution without regard to the scholarship, causing the withdrawals to be reported to the beneficiary.¹⁶ Additionally, there is an exception for attendees of the U.S. Military Naval, Air Force, Coast Guard, or Merchant Marine Academies, to the extent payments do not exceed the cost of advanced education. There is no penalty tax on payments from a 529 Plan that are not used for educational expenses, effective for tax years after 2002.

Tax Benefits of a Section 529 Plan

The best thing about a Section 529 Plan is its tax benefits. Donations are made into a beneficiary's account with after-tax dollars. The money is invested and the earnings are tax-deferred over the life of the account, for both federal and state tax purposes. Some states even allow an income deduction for contributions to a Section 529 Plan.¹⁷ When money is withdrawn for a qualified educational expense, the amount withdrawn is tax free.¹⁸ Likewise, some states do not impose any income tax upon a qualified withdrawal.¹⁹ The funds are deemed a completed gift at the time of transfer²⁰ so, in the absence of exceptional circumstances, issues such as gift taxes and generation skipping taxes and are avoided.²¹ One slight drawback, the tax payments owed on qualified withdrawals must be paid from a different source of funds.²² For that reason, some donors choose to retain a separate savings vehicle to cover the taxes upon withdrawal.

The ten percent tax on payments from a Qualified Tuition Program that are not used for educational expenses does not apply to attendees of the U.S. Military, Naval, Air Force, Coast Guard or Merchant Marine Academies, to the extent the payments do not exceed the costs of advanced education. This provision is effective for tax years after 2002.

Section 529 Plans can also be used for estate planning. The gift tax "exemption" that appears in IRC §529 goes against the traditional gift tax rules contained elsewhere in the Revenue Code.²³ Since contributions are deemed completed gifts at the time of transfer, it qualifies for the annual \$11,000 exclusion.²⁴ As an example, a wealthy couple with six children could each contribute \$55,000 per child (under the five-year averaging election), removing \$660,000 from their taxable estates. The value is removed from the estate, and the money is growing over time, making the estate tax savings even greater.

Qualified Educational Expenses and Beneficiaries

What exactly are "qualified education expenses"? Following the enactment of the Taxpayer Relief Act of 1997, "qualified educational expenses" is defined as tuition, fees, books, supplies, and equipment required for attendance of a designated beneficiary at an eligible educational institution.²⁵ In addition, a limited amount of room and board for a student attending at least half time may also be characterized as a qualified educational expense.²⁶ The funds can be used at any accredited post-secondary educational institution.²⁷ The institution must be eligible for U.S. Federal financial aid programs under Title IV of the Higher Education Act of 1965.²⁸

When a Section 529 account is open, a beneficiary is designated for that account. Because most states do not have residency requirements to purchase their Section 529 Plan,²⁹ the beneficiary can be any person the account owner wishes to name.³⁰ Beneficiaries can be freely changed, without penalty or limitation, to a member of the family of the old beneficiary. As long as the beneficiary is changed (or rolled over) to a family member, there is no "new gift," the account beneficiary is simply changed, and the same tax treatment still applies.³¹ "Family member," with respect to the beneficiary, is broadly defined to include the spouse of the beneficiary, a son or daughter (either natural or adopted), or a descendant of either, a stepson or stepdaughter, a brother or sister (by whole or half blood), a stepbrother or stepsister, the father or mother, a stepfather or stepmother, a niece or nephew, an aunt or uncle, or the spouse of any of the above.³²

With such a broad range of potential rollover beneficiaries, a family will likely be able to allow some family member to use the investment to pay for a post-secondary education.

Effect of Section 529 Plans upon Financial Aid

The use of funds from a Section 529 Plan to pay for high education expenses will not affect a person's eligibility for either the HOPE Scholarships or Lifetime Learning Credit.³³ Stated another way, if a student and his family meet the eligibility requirements for these programs, the existence of a Section 529 Plan will not alter their eligibility. Federal financial aid may be affected by the funds available through Section 529 Plans. Families that expect to qualify for need-based financial aid may find the tax savings from a Section 529 Plan may not be as significant as the amount of aid available.³⁴ Additionally, should a student receive funds from a Section 529 account, a portion of those

funds will likely count as “income” to the student, potentially disqualifying them from need-based financial aid the following year.³⁵ Although federal aid may be affected, state aid is usually not affected.

Typical Section 529 Plan Management

Although there are many different state plans,³⁶ most have the same general investment features. Some well-known investment brokers manage the accounts.³⁷ The funds are typically invested in a broad range of stocks, bonds and funds. The younger the appointed beneficiary, the more aggressive the portfolio; as the child nears college age, the risk will have been gradually removed, to ensure the security of the money to pay for educational expenses. Although the Internal Revenue Code prohibits an account owner from having any control over the investments, some states do allow the account owner to choose among different investment styles.³⁸ For example, an account which carries the same amount of risk throughout its life, a stocks-only portfolio,³⁹ or a progressive account, as described above. There are fees associated with account management, and every state and brokerage firm has differing fee schedules. The fees can range from a percentage of the portfolio value, to a flat fee, to some combination of both.⁴⁰

How Do Section 529 Plans Differ from Some Existing Savings Plans?

Some traditional savings vehicles available for college costs were bank savings account, Uniform Transfers to Minors Act (UTMA), and Educational IRAs. Of course, traditional bank savings accounts are safe, but the rates of return make them a less-attractive savings vehicle.⁴¹ Gifts to minors under UTMA are custodial accounts controlled by state law and taxed currently (and subject to a “kiddie tax” if the child is under 14). They are less expensive and less complicated than establishing trusts but the assets transfer to the child’s control, usually at 18. For some parents, this loss of control causes concern over whether the funds will be properly used for educational expenses. Educational IRAs were then offered by financial institutions. Unfortunately, a donor cannot place more than \$500 per year in such an account. Additionally, an individual with modified gross income above \$150,000 for joint returns may not make a contribution to an Educational IRA.⁴²

Emerging Issues Regarding Section 529 Plans

Are funds contained in a Section 529 Plan attachable by creditors? Potentially, any funds held in such a

plan may be subject to threats of involuntary claims, divorce and child support claims, and bankruptcy claims.⁴³ Some states have implemented express statutory language protecting the plans from involuntary claims. However, in the absence of express statutory protection, courts may be unlikely to protect the plan assets.⁴⁴ Section 529 Plans are also likely to remain vulnerable to divorce and child support claims. Courts may be hard-pressed to accept the argument that the money should be preserved for future educational expenses when a familial need currently exists.⁴⁵ Under today’s law, a contributor’s bankruptcy poses a risk to funds within a college savings plan.⁴⁶ However, federal bankruptcy protection for these accounts may be in place soon. Although bills proposing such protection were vetoed due to other provisions, there is strong bipartisan support for this proposal.⁴⁷ Therefore, Section 529 Plans may eventually be protected in bankruptcy.

Section 529 Plans may not be the proper savings vehicle for all your clients. However, the significant financial and management advantages to be realized through such an account make these plans well worth considering. Given the rising costs of higher education and the decreased availability of need-based financial aid, the best long-term option may very well be a financial portfolio for your child’s future. When advising your legal assistance client about preparing their will, providing for their children, or working towards a stable financial future through estate planning, don’t forget to consider the advantages that can be gained through Section 529 Plans, both for the donor and the donee.

¹Under the Uniform Transfer to Minors Act (UTMA), most states allow the beneficiary to take control of the funds at the age of 18.

²Savings accounts and savings bonds which typically have a low rate of return and no tax benefits.

³Educational IRAs only allow contributions from a couple who, filing jointly, earns less than \$150,000 per year. Additionally, there is a maximum annual contribution of \$500 per beneficiary.

⁴Pub L. No. 104-188, 110 Stat. 1755 (1996).

⁵Pub L. No. 105-34, 111 Stat. 788 (1997).

⁶JOSEPH F. HURLEY, *THE BEST WAY TO SAVE FOR COLLEGE* 57 (2000 Ed.).

⁷HURLEY, *supra* note 6 at 59.

⁸IRC Section 529(b)(1).

⁹Koenig, Rodney C., *Creating College Scholarships with Qualified State Tuition Programs*, 14 *PROBATE & PROPERTY* 46, 47-48 (May/June 2000), HURLEY, *supra* note 6 at 43-48.

¹⁰IRC Section 529 (b)(1).

¹¹IRC Section 529 (c)(2)(B).

¹²HURLEY, *supra* note 6 at 183.

¹³Most states impose a 10% penalty, however, under IRC Section 529(b)(3), the penalty must simply be “more than de minimis.”

¹⁴IRC Section 529 (b)(3)(B) and IRC Section 529 (b)(3)(C).

¹⁵HURLEY, *supra* note 6 at 175-176.

¹⁶HURLEY, *supra* note 6 at 175-176.

¹⁷For example, Iowa, Michigan, Mississippi, Missouri, Montana, New Mexico, New York, Utah, and Virginia. HURLEY, *supra* note 6 at 179.

¹⁸IRC Section 529 (3)(A). There is no federal income tax on qualified withdrawals until 2010. If the law granting this exemption is not extended, the withdrawal will be taxed at the beneficiaries rate – typically much lower than the owner-donor’s rate.

¹⁹For example, Arizona, Arkansas, Colorado, Connecticut, Delaware, Illinois, Iowa, Kentucky, Louisiana, Maine, Maryland, Michigan, Mississippi, Missouri, Montana, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Utah, Virginia, and Wisconsin. HURLEY, *supra* note 6, 87-174.

²⁰IRC Section (c)(2)(A)(i).

²¹26 CFR §1.529-5. If a the new beneficiary is a member of the family of the old beneficiary, as defined in Section 529, and of the same generation as the old beneficiary, there are no gift or generation-skipping taxes. However, if the Section 529 Plan is rolled over to a beneficiary who is not a “family member” or a beneficiary of a different generation, such taxes will be applicable. This point is best illustrated with a grandparent who purchases a Section 529 Plan. Without tax implication, the account can be transferred to a sibling of the original beneficiary, but not a cousin, due to the definition of “family member.”

²²HURLEY, *supra* note 6 at 44.

²³See, for example “Kiddie Tax” and UTMA Tax Rules.

²⁴26 USC §2503(b) (1998).

²⁵IRC Section 529(e)(3).

²⁶IRC Section 529 (e)(3)(B).

²⁷“Eligible educational institution” is defined as “an institution which is described in section 481 of the Higher Education Act of 1965, and which is eligible to participate in a program under title IV of such Act.” IRC Section 529(e)(5).

²⁸IRC Section 529(e)(5)(B).

²⁹The states without residency requirements are Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Hawaii, Indiana, Iowa, Kansas, Maine, Massachusetts, Minnesota, Missouri, Montana, New Hampshire, New York, North Dakota, Oklahoma, Rhode Island, Utah, Virginia, Wyoming. HURLEY, *supra* note 6 at 68.

³⁰There are no limitations on a “beneficiary” per the IRC; however, many states have age and/or educational grade restrictions. HURLEY, *supra* note 6 at 65.

³¹If, however, the beneficiary is of a different generation than the old beneficiary, as defined by IRC Section 2651, the generation-skipping tax may apply.

³²IRC Section 529(e)(2), HURLEY, *supra* note 6 at 40.

³³IRS Notice 97-60, “Qualified State Tuition Programs,” (1999).

³⁴Loewe, Raymond D. & Dempster, K.C., *Three Years Later: Are Section 529 Plans Right for Your Clients?*, 14 JOURNAL OF FINANCIAL PLANNING 2, 90-98, 93 (February 2001).

³⁵*Id.*

³⁶Every state has enacted some form of a Section 529 Plan, with the exception of Georgia and South Dakota (although Georgia is currently drafting legislation to implement such a plan). Washington D.C. also does not have a 529 Plan. Braze, David, *Qualified State Tuition Plans*, FOOL.COM RETIREE PORTFOLIOS (Jan 22, 2001).

³⁷Some of the more popular account managers are Fidelity (operating plans in New Hampshire, Massachusetts, and Delaware), Merrill Lynch (operating a plan in Maine), and TIAA-CREF (operating plans in New York, Kentucky, Missouri, and California). Koenig, Rodney C., *Creating College Scholarships with Qualified State Tuition Programs*, 14 PROBATE AND PROPERTY 46, (May/June 2000).

³⁸Loewe, Raymond D. & Dempster, K.C., *Three Years Later: Are Section 529 Plans Right for Your Clients?*, 14 JOURNAL OF FINANCIAL PLANNING 2, 90-98, 95 (February 2001).

³⁹As operated by Merrill Lynch for Maine plans.

⁴⁰Typical fees which may be assessed include enrollment fees, out-

of-state school transfer fees, designated beneficiary substitution fees, and account maintenance fees. HURLEY, *supra* note 6 at 86.

⁴¹These days, around 2% in the Northern California area.

⁴²HURLEY, *supra* note 6 at 187-188.

⁴³Kwall, Jeffrey L., *Can Creditors Invade Qualified College Savings Plans?*, 14 JOURNAL OF FINANCIAL PLANNING 3, (March 2001).

⁴⁴The Nevada Attorney General has issued an advisory opinion, explicitly stating that fund assets can be reached by creditors in the absence of statutory protection. Nevada Attorney General Opinion No. 99-10, 1999 Nev. AG LEXIS 16.

⁴⁵Kwall, Jeffrey L., *Can Creditors Invade Qualified College Savings Plans?*, 14 JOURNAL OF FINANCIAL PLANNING 3, (March 2001).

⁴⁶In re Darby, 212 B.R. 382 (1997). On appeal, a constructive trust was created for the beneficiaries because a grandparent had created the account. Darby v. McGregor, 226 B.R. 126 (1998).

⁴⁷Kwall, Jeffrey L., *Can Creditors Invade Qualified College Savings Plans?*, 14 JOURNAL OF FINANCIAL PLANNING 3, (March 2001).



A MESSAGE FROM THE EDITOR:

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