

The Reporter

THE JUDGE ADVOCATE GENERAL'S CORPS

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(334) 953-2802/DSN 493-2802
AFLOA.AFJAGS@us.af.mil

[LIEUTENANT GENERAL
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*Deputy Judge Advocate General
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THOMASA T. PAUL
Illustrator/Editor



Message from The Commandant

This edition of *The Reporter* features several articles dedicated to the issues surrounding sexual assault prevention and response in the JAG Corps. We hope this proves to be a valuable resource to JAG Corps practitioners as they navigate through the quickly-changing universe of sexual assault legislation and policies.

We begin with the military justice Foundational Leadership pillar and an overview of the newly-created Special Victims' Counsel Program by Captain Allison DeVito which highlights steps taken by the JAG Corps to strengthen support of sexual assault victims. Mr. Tom Becker follows with a critique of the STOP Act which proposes to remove the disposition authority over sexual assault allegations from commanders. Major Ryan Oakley then discusses registration requirements for convicted sex offenders. Lieutenant Colonel Dawn Hankins next provides a review of the preferral and referral process for sexual assault allegations following SecDef's withholding of initial disposition authority from certain commanders. Finally, Major Daniel Mamber provides a summary of several Joint Services Committee for Military Justice proposed MCM amendments, focusing on Art. 120, UCMJ offenses.

Transitioning to the Training pillar, Colonel Paul Pirog and Professor Howard Eggers offer an in-depth outline of how to prepare commanders to deal with complex legal issues. Next, Mr. Tom Becker and Mr. John Martinez offer insight into some of the JAG School's new education programs. AF/JAG's Lieutenant Colonel Christopher Brown concludes with a primer on how to successfully navigate the Article 6 Part I inspection process.

Turning to Legal Assistance, Captain Bob Brady details how the Expanded Legal Assistance Program has taken shape at Scott Air Force Base, and Captain Dave Blomgren provides an excellent primer on adoption law.

Major Ryan Hoback and Technical Sergeant Mark Lathinghouse kick off the Teaming section with a look at the teaming capabilities of instructors at the USAF Expeditionary Center at Joint Base McGuire-Dix-Lakehurst. Technical Sergeant Jay Leighton follows with a discussion of the stovepipe mentality that often afflicts legal offices. Airman First Class Catherine Westervelt and Captain Robert Burlison close with an example of teaming in the Magistrate Court program at Barksdale Air Force Base.

In addition to the four Foundational Leadership pillars, we have several articles dedicated to fields of practice. We start with Captain Christopher Sanders' piece detailing his experiences while serving in the Rule of Law Field Force—Afghanistan. Also included is Technical Sergeant Bryan Hawk's overview of a Rule of Law Field Support Officer's role in Afghanistan. Mr. Christoph Mlinarchik then explains the nuts-and-bolts of drafting a compelling contracting officer's final decision. We conclude with two book reviews. One by Major Matthew Dunham who examines *Justice and the Enemy: Nuremburg, 9/11, and the Trial of Khalid Sheikh Mohammed* and one by Major Matthew Burriss who provides commentary on *Eisenhower in War and Peace*.

SAYING GOODBYE TO A MAN OF MANY NAMES



MR. JAMES W. RUSSELL, III

On 3 March 2013, Mr. James W. Russell, III passed away unexpectedly. It was a day the Air Force Judge Advocate General's Corps lost a treasured member of its family. Five days later, more than 250 friends, family, and colleagues packed into the Joint Base Andrews Chapel to celebrate his life. As those in attendance learned, he was known by many names, but regardless of which name you knew him by, he was a true friend to all.

Born James W. Russell, III, the son of an Air Force Colonel and WWII prisoner of war, to those he served with for 30 years on active duty, he was known as Colonel Russell. He began his career in literally the lowest possible place you can go in the Air Force—the bottom of a missile silo. He quickly launched into the JAG Corps. As Major General Moorman stated, “[Jim] was so much a part of the JAG Corps it’s unimaginable to think of it without him.” He served all over the world, taking care of people, helping to solve complex issues and winning friends and admirers everywhere he went.

For the last 12 years, many in the JAG Corps knew him as Mr. Russell, AFLOA's Associate Chief of Military Justice and the Air Force's resident military justice expert. He was a mentor to so many, teaching at nearly every JASOC, GATEWAY, SJAC, KEYSTONE, TDAC, and ATAC. You couldn't miss him: the tall, bearded man in his signature brown leather bomber jacket. The man you could call with a question and in return receive much more than just the answer. You'd get guidance on what it was you didn't even realize you were missing.

Professionally and to many friends, he was well known as “Jim.” As Colonel Ken Theurer pointed out at Mr. Russell's memorial service, Jim Russell was one part “cranky old geezer” and one part “soft fuzzy guy,” both qualities that endeared him to all of us. The man whose office always seemed to resemble a paper jungle, yet from which he could always retrieve whatever it was you thought you needed from the organized chaos...but you had better not try to find it yourself. He had many “fuzzy friends” in the advocacy community who helped our JAG Corps integrate the best possible victims' services into our programs. He was the

father of the Air Force JAG Corps' victim support programs, programs he cared for very deeply.

For those who knew him the longest, he was fondly referred to as “Rip.” Rip was a moniker given to him as a young boy to help tell the difference between father and son. It was also the name his fellow Aggies knew him by. Rip, the guy who lived life to the fullest...Rip, the guy who had a knack of finding a measure of fun in everything, will certainly be missed. He only knew one way to approach everything he did—“all in, all the time,” according to one of his oldest friends. Simply put, Rip loved life, its challenges and its rewards.

Rip attended Texas A&M where he was a member of the famed Corps of Cadets. As such, he possessed a love for all things Aggie and to his great joy, was rewarded for his loyalty by personally witnessing his Aggies, led by the eventual Heisman trophy winning quarterback, defeat the defending national champion and previously undefeated Alabama Crimson Tide this past college football season. He looked forward to attending the SEC Women's Basketball Championship where his Lady Aggies were crowned champions. While he was not able to be there in person, it is safe to say he was smiling down during their championship run (particularly since they beat Kentucky). The airline industry will surely be missing James W. Russell, III's frequent trips to Aggie sporting events nationwide.

To Vicki, his wife of close to 40 years, he was simply “Russell”—the other half of their very special team. The man whose love for cats meant always having several roaming their home; the man who took leave to be her caregiver while she recovered from a medical procedure; the man whose heart and willingness to help others knew no bounds.

No matter if you knew him as James, Jim, Colonel, Mr. Russell, Rip, or just Russell, he made a positive, profound difference in your life—even in the lives of those who never had the honor of meeting him. His impact and influence permeates not just our JAG Corps, but the Air Force and beyond. When you give more of yourself than you receive, you guarantee one thing: your legacy will last forever. Godspeed good friend. You will be dearly missed. 🦋

An Introduction to the SPECIAL VICTIMS' COUNSEL PROGRAM



The Air Force succeeds because of the professionalism and discipline of our Airmen. Sexual assault undermines that professionalism and discipline, harming not only the individuals involved, but also their unit, their mission, and our Service. When a fellow Airman is sexually assaulted, it is devastating. It destroys trust. It demoralizes families. And we're doing it to ourselves. We MUST do more to protect one another from this crime by...strengthening our support of victims and making a culture of trust and respect a reality for everyone in our Air Force.

- General Mark A. Welsh III, Air Force Chief of Staff, 18 November 2012

by Captain Allison A. DeVito

As [General Welsh](#) notes, sexual assault causes material harm to the individuals affected, units and their mission, and to the Air Force as a whole. Sexual assault in the Air Force also erodes the trust that the American people and our civilian leadership have placed in us.

As part of a larger Air Force program to combat sexual assault, the JAG Corps has worked to find ways to support victims of sexual assault. Fielding Special Victims' Counsel to represent victims of sexual assault is a key step forward in strengthening our already robust support of sexual assault victims through the military justice process. These counsel will provide the added benefit of reducing the barriers that keep victims from reporting assault in the first place.

THE SPECIAL VICTIMS' COUNSEL PROGRAM HAS FOUR OVERLAPPING OBJECTIVES:

1. **Provide Support to Sexual Assault Victims through Independent Representation.** The interests of sexual assault victims and the Government are frequently aligned, and trial counsel, case paralegals, and victim liaisons do an outstanding job of working with victims of crime. However, even when interests coincide, trial counsel are unable to provide legal representation to victims or advice outside the scope of the Victim and Witness Assistance Program.
2. **Build and Sustain Victim Resiliency.** When victims come forward and make an unrestricted report, a sizeable portion elects to opt out and declines to participate in the military justice process. Special Victims' Counsel will build and sustain resilience among sexual assault victims by helping them understand the investigatory and military justice processes, and by advocating for their interests to command or to the court when necessary.
3. **Empower Victims.** Victims have several enumerated rights in the military justice process, but are not always aware of these rights or do

As part of a larger Air Force program to combat sexual assault, the JAG Corps has worked to find ways to support the goals of combating sexual assault.

not feel they have a voice to enforce these rights. Special Victims' Counsel will provide professional and knowledgeable counsel to victims in voicing their concerns and complaints with the process and enforcing these enumerated rights.

4. **Increase the Level of Legal Assistance Provided to Sexual Assault Victims.** In the 2010 Gallup Survey entitled the *Prevalence/ Incidence of Sexual Assault in the Air Force*, when asked whether or not they received any type of help after a sexual assault, such as legal counseling, mental health services, or medical care, the vast majority of victims (79.5% of women and 92.5% of men) reported not receiving any of these forms of help. Currently, the JAG Corps is providing legal assistance to victims of crime for "personal civil legal matters." The Special Victims' Counsel program is an enhancement of this service designed to support victims through the challenges of participating in an investigation and prosecution.

While we each have opportunities to exhibit excellence in our daily practice, there are likely fewer points in our careers where we can make a profound, positive difference for an *individual* experiencing a significant amount of pain. *This* is one of those opportunities. And for that reason, I am both proud and excited to be part of the initial effort to field this program. I hope the JAGs who have been selected as Special Victims' Counsel share my excitement and I am looking forward to working with them to build this program into a success in the months and years to come. 🙌

[Visit the AF Special Victims' Counsel Facebook Page](#)

In Defense of AMERICAN MILITARY JUSTICE... AGAIN:

Is Congress Giving the Military Justice System a Fair Shake?



by Mr. Thomas G. Becker

***Editor's Note:** Upon retiring from active duty as a judge advocate in 1999, Mr. Becker served as the State Public Defender for the State of Iowa until 2008. In 2003, Mr. Becker wrote an article for the National Institute of Military Justice entitled "In Defense of American Military Justice," responding to an investigative report in U.S. News & World Report attacking the fairness of the military justice system. In this current article, Mr. Becker continues his defense of American military justice in light of current initiatives in Congress to change the rules for disposition of alleged sexual offenses in the military. Mr. Becker emphasizes that the opinions expressed in this article are his own, and do not necessarily reflect those of the AFJAGS Commandant, the Commander of the Air Force Legal Operations Agency, or The Judge Advocate General.*

Back to the future. A former JAG School commandant used to say, "It's back to the future," whenever someone came up with a "new" idea that, in reality, was a rehash of something someone had already tried and discarded years before. Well, it's "back to the future" time again. Now it's a pending initiative in Congress, the so-called "STOP Act," which would strip military commanders of disposi-

tion authority over allegations of sexual assault.¹ The arguments in support of the STOP Act, and the anecdotes cited as evidence for the need for this legislation, are reminiscent of Russell Carollo's 1995 newspaper series, "Military Secrets,"² which

¹ See H.R. 3435, 112th Cong., 1st Sess. § 5(b) (2011), the "Sexual Assault Training and Prevention Act" or "STOP Act," which would create a "Director of Military Prosecutions" at the Department of Defense level that would "have independent and final authority to oversee the prosecution of all sexual-related offenses... and shall refer cases to be tried by courts-martial."

² Russell Carollo, *Escaping Justice: Sex Offenders Find Lenient Treatment in Military Justice*

***The first rule of criminal law is to never confuse truth with proof.
It's not about what happened, it's about what a prosecutor can prove
happened beyond a reasonable doubt.***

described, according to one commentator, “how the military branches routinely allow sex offenders to avoid conviction or serious prison time...”³ In contrast, a few years after the Carollo articles, there was an “exposé” in a national news magazine by Edward Pound to the effect that the military justice system is stacked to convict, inundated by unlawful command influence, and hammers low-ranking offenders while letting the “brass” go unpunished.⁴

As noted in my own response to the Pound article,⁵ written while I was State Public Defender for Iowa, it seemed that the military justice system had done a complete turnaround from Carollo’s time. The system that once let everyone go with a hand slap was now sending people to prison regardless of guilt or innocence. The truth was—and is—that neither Carollo nor Pound was right. And now the STOP Act faces some criticism as well.

Military commanders, with advice from their servicing judge advocates, address allegations of sexual assault the same way that civilian prosecutors do, and reach similar results. The same is true for courts-martial and civilian trials. If there are decisions not to prosecute, or acquittals at trial, it’s because the evidence isn’t there.

NEVER CONFUSE TRUTH WITH PROOF

The first rule of criminal law is to never confuse truth with proof. It’s not about what happened, it’s about what a prosecutor can *prove* happened beyond a reasonable doubt. When military judges and juries sit in judgment of competing accounts of events, they apply the same standards as civilian judges and juries. It’s not about who is or isn’t telling the truth. It’s about whether guilt of any offense

has been *proven* beyond a reasonable doubt. That may mean a sex offender will avoid punishment. Also, that may mean a victim will walk away with an unwanted result. That’s the product of the Due Process Clause.⁶ It’s the same Due Process Clause that applies in administering the Criminal Code of Alabama where I now live, the Criminal Code of Iowa, where I worked in the state’s criminal justice system, and the Uniform Code of Military Justice.

CONFLICT OF INTEREST?

The STOP Act seemingly assumes that the military justice system has a conflict of interest that predisposes the people involved to find in favor of the accused.⁷ Such a conflict, were it to exist, would be no different than its parallel in the civilian justice system. In either system, the judge and jury are pulled from the same community as the alleged offender and the victim.

During my first SJA job, I learned a valuable lesson about civilian justice from my IMA (“Steve”) who was the elected District Attorney. During one of his IDTs, we went to the O’Club for lunch and Steve struck up a very friendly conversation with one of the servers. I asked him if the server was a family acquaintance. Steve replied that he had previously prosecuted and convicted the server. When I expressed surprise at how friendly they had been, Steve remarked that in his world, criminals and their families continue to vote. The same is true about victims—they vote and so do their families. Accordingly, the civilian prosecutor’s “conflict of interest” is cancelled out. He or she has no choice but to rely on the quality of the evidence and the standards of due process. And

System, DAYTON DAILY NEWS, 1 Oct 1995 at 7A, and following articles through 5 Oct 1995.

³ Christopher P. Beall, Note, *Exaltation of Privacy Doctrines Over Public Information Law*, 45 DUKE L.J. 1249 (1996).

⁴ Edward T. Pound, *Unequal Justice*, U.S. NEWS & WORLD REPORT, 16 Dec 2002.

⁵ Tom Becker, *In Defense of American Military Justice*, NAT’L INST. FOR MIL. JUS. (2003).

⁶ “[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.” *In re Winship*, 397 U.S. 358, 364 (1970).

⁷ The proposed STOP Act includes Congressional “findings” that include, “[t]he military adjudication system itself lacks independence, as military judges depend on command. . . .” . . . the United States has fallen behind countries such as Canada and the United Kingdom in terms of its military justice system,” and “[t]he great deference afforded command discretion raises serious concerns about conflicts of interest and the potential abuse of power.” H.R. 3435 § 2(3), (4), (6).

An assumption behind the STOP Act is that the military doesn't prosecute acquaintance-rape cases as aggressively as civilian prosecutors.

it's the same thing that a commander does when considering a case in light of advice from the staff judge advocate.

In the military, a commander isn't worried about reelection, but he or she is worried about making the right decision for everyone involved in a sexual assault allegation. The proponents of the STOP Act state they want to do away with this "conflict of interest." In fact, the STOP Act seems to encourage commanders and JAG Corps advisors to take virtually all sexual assault allegations to trial by court-martial, despite questions of proof and due process. Under the STOP Act, the question of prosecution may become increasingly politicized. Decisions currently made by commanders will be given to appointees, who may be influenced by politics.⁸

MORE ASSUMPTIONS

Another assumption behind the STOP Act is that the military doesn't prosecute acquaintance-rape cases as aggressively as civilian prosecutors. In this type of case, where the encounter is typically fueled by excessive alcohol use by both the victim and the accused perpetrator, consent and the capacity to consent are real issues. They are among the most difficult cases a prosecutor will ever have to prove. Despite this difficulty, in my experience, Air Force commanders prefer and refer charges to courts-martial more aggressively than civilian prosecutors.

⁸ During my tenure in the DoD General Counsel's Office in 1996-1997, there was enormous political pressure to prosecute several officers associated with the Black Hawk "blue-on-blue" shootdown in 1994, the Khobar Towers bombing in 1996 (in particular, Brig Gen Terry Schwalier), and Secretary of Commerce Ron Brown's fatal aircraft crash in Croatia in 1996. Concerning the Black Hawk shootdown case, Congress even attempted to subpoena convening authorities to explain why they had made decisions not to refer charges against the F-15 pilots. In Brig Gen Schwalier's case, there was no court-martial but, on the recommendation of Secretary of Defense William Cohen, President Clinton removed him from the two-star promotion list, prompting then-Air Force Chief of Staff Gen Ronald Fogelman's resignation. The Air Force Board for Correction of Military Records (AFBCMR) ruled to restore Brig Gen Schwalier's promotion to major general in 2004, finding the Secretary's action to have been an injustice. In 2005, however, the Secretary of Defense overturned the AFBCMR decision. Brig Gen Schwalier has filed suit to reinstate AFBCMR's determination. Litigation is still pending.

I can't prove this empirically because nobody keeps reliable statistics.⁹ But I can relate my experience.



My second trial as an Air Force prosecutor, in March 1978, was a rape charge involving two enlisted friends partying in the barracks at Kadena. Both were very drunk. According to the alleged victim's testimony, she went to sleep and woke up with the accused having sex with her. His testimony was that while they were both intoxicated, neither was incapacitated, and she willingly consented to having sex. There was no evidence of physical trauma and witnesses at the party testified that the victim, while clearly drunk, did not appear incapacitated. The finding of my second trial was "Not Guilty." Since that time, I've prosecuted (or supervised the prosecution) and defended many similar cases, some resulting in convictions, but many not.

⁹ As part of the STOP Act debate, I hear discussions of relative conviction rates of civilian jurisdictions and the military. I question any such statistics for a civilian jurisdiction that purports to include complaints that do not result in charges. For eight years, I was involved in counting just about everything my jurisdiction did in the area of criminal and juvenile justice. We did not, however, count things we did not do, and neither did the prosecutors or judges.

STOP Act proponents believe that changing military procedure will result in more sexual assault convictions than would otherwise occur.

In contrast, in my eight and a half years as Iowa's State Public Defender, I can only remember one acquaintance-rape case involving adults coming to trial. That was the case of a major college football player who had sex with another college student at a frat party. Both were drunk. The victim testified she was incapacitated and unable to give her consent. The defendant and his friends testified otherwise. The verdict was "Not Guilty."¹⁰

ADVICE TO SJAs

Though my experience has been that the military prosecutes difficult sexual assault cases more aggressively than civilian prosecutors, I have been involved with Air Force cases that either weren't charged or, if charged, weren't referred to trial. As SJA, my policy was to break this news to victims personally and not leave it to a staff member, the commander, VWAP advocate, or anyone else. I was called upon to do this twice, once to an Airman victim and the other time to a civilian victim. This gave me the opportunity to explain the legal reasons why the case wasn't going to trial, and emphasize this was a judgment only on the quantum of legal proof and not the truthfulness of the victim's version of events. I urge all SJAs to take this approach, as many of the military's bad public relations cases have been more the product of insensitivity and poor communications than flawed legal judgment.

WHAT CONGRESS CANNOT CHANGE

Aside from assumptions about military justice, the logic behind the STOP Act has another fatal flaw. STOP Act proponents believe that changing military procedure will result in more sexual assault convictions than would otherwise occur. I do not believe that will happen, even if the STOP Act becomes

law. That's because Congress cannot change two critical attributes of military law: the requirements of due process and the typical facts of these cases. Congress has tried before to increase the likelihood of conviction in sexual assault cases where alcohol is involved, only to run afoul of the Due Process Clause.¹¹ As long as there is a Due Process Clause, consent by an adult participant will always be a defense to sexual assault and the prosecution will always carry a burden of proving lack of consent beyond a reasonable doubt. Further, as long as young people attend parties involving alcohol consumption, excessive drinking will occur. Such excess will affect the decisions and perceptions of alleged perpetrators, victims, and witnesses. This combination of confusing and conflicting evidence, plus the high bar for criminal conviction set by the Due Process Clause, will result in many decisions not to charge and many findings of "Not Guilty" for those cases that go to trial. That's the American criminal justice system, both in and outside the military.

LET THE PROFESSIONALS STAY IN CHARGE

Some parts of the STOP Act are sound—we can always use more awareness, improved reporting, and better investigation.¹² There is no denying that sexual assault in America is a problem. And it follows that sexual assault in the American military is also a problem, perhaps more so because the armed forces are top heavy with young men and drinking when off duty remains part of our culture. The solution is not to take authority away from the Air Force and give it to politicians. The military system must continue to mirror the civilian system by retaining the authority and prosecutorial process within the community unique to the alleged perpetrator and victim. ✈

¹⁰ So, why did this case go to trial while many others with similar facts didn't? You'll have to ask the county attorney responsible, but I would surmise it might have had something to do with the victim being the daughter of a prominent politician. I concede there may have been other similar cases that did go to trial that I might not remember or have been aware of, especially if the defendants had the means to hire lawyers and didn't rely on public defenders. As stated above, no one keeps reliable statistics on this.

¹¹ *United States v. Prather*, 69 M.J. 338 (CAAF 2011) (holding the provisions of Art 120, UCMJ, that shifted the burden of proving victim consent in such cases to the accused violated Due Process).

¹² See H.R. 3435 S 4 (establishing the DoD Sexual Assault Oversight Office).

A Lifetime of Consequences:

REGISTERING CONVICTED MILITARY SEX OFFENDERS

by Major Ryan D. Oakley

The final gavel strike convicting an accused of sexual assault is only one milestone in fulfilling our obligations to crime victims, civil society, and the interest of justice. Nowhere is this more evident than in how we notify local communities about convicted sex offenders. As such, all judge advocates need to know the basics about sexual offender registration for several reasons. Military justice teams and SJAs must ensure post-trial reporting and notification requirements are carried out according to federal law. Defense counsel must carefully advise clients about the lasting impact of a conviction of a qualifying offense.¹ And as legal professionals, we may be relied upon to explain how our detailed, multilayered notification system works in concert with state and local jurisdictions—whether in advising commanders, teaming with law enforcement, assisting sex assault victims, or educating concerned citizens about the rigorous public safeguards in place.

¹ United States v. Miller, 63 M.J. 452 (C.A.A.F. 2006). For a detailed state-by-state analysis of sex offender registration laws, see Major Andrew D. Flor, *Sex Offender Registration Laws and the Uniform Code of Military Justice: A Primer, Army Law.*, (August 2009).

BACKGROUND

The Department of Defense (DoD) established a mandatory listing of reportable sexual offenses for military personnel convicted under the Uniform Code of Military Justice (UCMJ).² Military personnel convicted of a qualifying offense are required to register as a sex offender in the jurisdiction where the offender resides pursuant to the Adam Walsh Act, also known as the Sex Offender Registration and Notification Act (SORNA), 42 U.S.C. § 16911 *et seq.*³ SORNA provides a new comprehensive set of minimum standards for sex offender registration and notification. Furthermore, the U.S. Department of Justice (DOJ) set national SORNA guidelines, creating a “floor, not a ceiling” for registration standards. These standards cover all 50 states, the District of Columbia, principal U.S. territories, and Indian

² See Department of Defense Instruction (DoDI) 1325.7, Administration of Military Correctional Facilities and Clemency and Parole Authority. The forthcoming reissuance of this instruction will be renumbered DoDI 1325.07.

³ The pertinent federal laws regarding sex offender registration are available at the U.S. Department of Justice (DOJ) website at <http://www.ojp.usdoj.gov/smart/legislation.htm>

tribal governments.⁴ Effectively, SORNA provides a blueprint to promote cooperative efforts among states, local law enforcement, and federal agencies in immediately identifying, registering, and tracking convicted sex offenders across the United States.⁵

A sex offender is defined under SORNA § 111(1) as a person who is convicted of a covered sex offense.⁶ This includes sex offenses under the UCMJ, as specified by the Secretary of Defense. So what UCMJ offenses require reporting? The list of qualifying offenses is captured in Air Force Instruction (AFI) 51-201, Figure 13.4, in accordance with DoD policy.⁷ An updated listing is currently being incorporated into the reissuance of DoD Instruction (DoDI) 1325.07 (formerly DoDI 1325.7) to include recent changes to Article 120, UCMJ as of June 28, 2012.⁸ Remember that it is the *conviction* of a qualifying sex offense, regardless of the sentence adjudged, that will trigger mandatory reporting requirements.⁹

If an accused has been convicted of sexual assault or certain other offenses against a minor, the Air Force is required to provide notice to the receiving jurisdiction's officials prior to the member's release from confinement. The service member will then be required to register as a sex offender based on state, local, or tribal law.¹⁰

Registration is required upon a service member's conviction (if not confined) or release from confinement. Therefore, appropriate DoD officials must inform sex offenders of their duty to register and must inform local law enforcement in the offenders' stated jurisdiction of residence. Subsequent registration must take place within three days of release from

confinement or within three days of conviction, if not confined. The member must be notified about these registration requirements and acknowledge them in writing, typically done via a DD Form 2791, *Notice of Release/Acknowledgment of Convicted Sex Offender Registration Requirements*.¹¹

Offenders should also be advised by reporting officials that the individual jurisdictions in which they live, work, or attend school may have additional registration requirements because each jurisdiction sets its own sex offender policy and laws. Although offenders will register in their local jurisdiction, there is no separate federal sex offender registry. The DOJ operates only a national sex offender registration database. The Dru Sjodin National Offender Public Website collects and consolidates available data from all state, territorial, and tribal registries.¹²

REPORTING OFFICIALS

Who are the "appropriate DoD reporting officials" responsible for making the necessary notifications? Each Service has developed its own systems, instructions, and procedures, which are all similar in nature.¹³ In the Air Force, the local Security Forces (SF) corrections officer, or the designee at the facility where the accused is detained, is responsible for ensuring compliance with federal and state laws in accordance with AFI 31-205, which covers the Air Force Corrections System. Accordingly, reporting officials will use a DD Form 2791 to document notification and acknowledgment. Typically, the three critical notifications will be communicated to the state attorney general, local law enforcement, and the state sex offender registration official where the offender will reside.¹⁴

NO CONFINEMENT?

But what happens when there is no post-trial confinement adjudged (or it is offset by pre-trial confinement credit)? In these instances, the SJA

⁴ *Id.*

⁵ OFFICE OF THE ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE, THE NATIONAL GUIDELINES FOR SEX OFFENDER REGISTRATION AND NOTIFICATION 3, 27, available at http://www.ojp.usdoj.gov/smart/pdfs/final_sornaguidelines.pdf (hereinafter DOJ National Guidelines).

⁶ *Id.* at 15.

⁷ The term "sex offense" is not used to refer to any and all crimes of a sexual nature, but rather to those covered by the definition of "sex offense" appearing in SORNA § 111(5). Military offenses are specified by the Secretary of Defense under section 115(a)(C)(i) of Public Law 105-119 (10 U.S.C. 951). The listing of UCMJ offenses is in accordance with an Office of the Under Secretary (Personnel & Readiness) (OUSD (P&R)) memorandum dated 16 November 2009.

⁸ MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt IV, ¶ 120 (2012).

⁹ *Id.*

¹⁰ U.S. DEP'T OF AIR FORCE, INSTR. 51-201, Administration of Military Justice, Incorporating Change 1, para. 13.16 (Feb. 2010) (hereinafter AFI 51-201).

¹¹ U.S. DEP'T OF AIR FORCE, INSTR. 31-205, THE AIR FORCE CORRECTIONS SYSTEM (7 Apr 2004) (hereinafter AFI 31-205). See also AFI 51-201 at para. 13.17.

¹² Dru Sjodin National Offender Public Website, <http://www.nsopw.gov>

¹³ See U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 24-3 (3 Oct. 2007); U.S. DEP'T OF NAVY, SEC'Y OF NAVY INSTR. 5800.14, NOTICE OF RELEASE OF MILITARY OFFENDERS CONVICTED OF SEX OFFENSES OR CRIMES AGAINST MINORS (24 May 2005) (hereinafter SECNAV Instruction 5800.14); and Memorandum from the Secretary of the Navy for the Commandant of the Marine Corps and Chief of Naval Operations, subject: Policy for Sex Offender Tracking and Assignment and Access Restrictions within the Department of the Navy (7 Oct. 2008).

¹⁴ See AFI 31-205 at para. 3.3.

must notify the appropriate corrections officer (or the Security Forces commander, if there is no corrections officer), in writing, within 24 hours of the accused's conviction. The corrections officer or SF/CC will then make the required notifications, as outlined above.¹⁵

Judge advocates assigned to joint bases should note that the Army, Navy, and Marine Corps have similar, but unique, procedures in place which rely on JAG and law enforcement support.¹⁶ Per SECNAV Instruction 5800.14A, the convening authority shall provide notice and necessary documentation to the Naval Criminal Investigative Service (NCIS) when offenders are not sentenced to confinement, or receive a suspended sentence.¹⁷ Comparatively, per Army Regulation 27-10, *Military Justice*, when this sentencing result occurs, the trial counsel, in the presence of defense counsel, must immediately provide notice that the military sex offender is subject to a registration requirement, by requiring the military sex offender to complete the acknowledgement of sex offender registration requirements.¹⁸

BASE-LEVEL RESPONSIBILITIES

If a member is convicted of a qualifying offense, the base legal office should indicate that sex offender notification is required in the "SENTENCE" block the AF Form 1359, *Report of Result of Trial*.

¹⁵ *Id.* at para. 13.18.1.

¹⁶ Per AR 27-10, *MILITARY JUSTICE*, when a court-martial finds an accused guilty of a covered offense, but the sentence does not include confinement, the trial counsel (a judge advocate), in the presence of defense counsel, will immediately provide notice that the military sex offender is subject to a registration requirement, by requiring the military sex offender to complete the acknowledgement, DA Form 7439, *Acknowledgment of Sex Offender Registration Requirements*.

¹⁷ See SECNAV Instruction 5800.14A. NCIS, upon notification from the convening authority, must ensure required notifications to state or local law enforcement officials are made within ten days of completion of judicial proceedings, in accordance with Enclosure 2 of the instruction. NCIS must ensure written notice of an offender's return is provided to the community to appropriate officials, both for offenders returning to a destination inside the United States, or a destination outside of the United States.

¹⁸ Per AR 27-10, the trial counsel will ensure all essential paperwork is provided, along with the record of trial, to the installation provost marshal where the offender is assigned or will be assigned, are filed in the offender's official military personnel file and unit file. Copies will be forwarded to the Office of The Judge Advocate General, Criminal Law Division and to the Army Human Resources Command. Installation provost marshals will ensure a copy of the offender's acknowledgment is filed in the United States Army Crime Record Center along with any report of investigation related to the military sex offender. The installation provost marshal in the United States will provide written notice of the conviction or transfer it to the chief law enforcement officer of the State, the chief law enforcement officer of the local jurisdiction in which the offender will reside, the state or local jurisdiction responsible for the receipt or maintenance of a sex offender registration in the state or local jurisdiction in which the offender will reside, and officials of foreign countries upon request.

As AFI 51-201 notes, sex offender registration requirements vary by state and may be triggered by offenses not listed in DoDI 1325.07 or AFI 51-201. Consequently, both trial and defense counsel should understand that a service member convicted of an offense that does not automatically trigger sex offender notification requirements (such as indecent exposure), may still be required to register as a sex offender under specific state laws.

When questions arise whether or not a service member's conviction triggers notification requirements, SJAs should seek guidance from their higher headquarters legal offices. Further questions regarding notification requirements may also be directed to AFLOA/JAJM.¹⁹

OVERSEAS ISSUES

What happens if the service member is convicted of a sex offense by a foreign court? Is registration still required? For starters, foreign-court convictions must be obtained with sufficient safeguards for fundamental fairness and due process for the accused, according to the DOJ Guidelines.²⁰ Sex offense convictions under the laws of any foreign country are deemed to have been obtained with sufficient safeguards if the U.S. State Department, in its Country Reports on Human Rights Practices, concludes that the country has an independent judiciary and enforced the right a fair trial in the year that the conviction occurred.²¹ Cases prosecuted under the laws of the United Kingdom, Canada, Australia, and New Zealand automatically satisfy this standard. Once this test is passed, a foreign conviction is on the same footing as a similarly-situated domestic offense.²²

This does not mean that local jurisdictions must register all foreign sex offense convictions. As the DOJ National Guidelines make clear, these stated criteria "only define the minimum categories of foreign convicts for whom registration is required for compliance with SORNA...jurisdictions are free to require registration more broadly than the

¹⁹ See AFI 51-201, para 13.18.

²⁰ SORNA, § 111(5)(B). See *U.S. Marshals Service Fact Sheet*, U.S. MARSHALS SERVICE (Dec.7, 2011), http://www.usmarshals.gov/duties/factsheets/fugitive_ops-2012.html

²¹ See DOJ National Guidelines, *supra* note 5 at 16.

²² *Id.*

SORNA minimum.”²³ In unusual situations involving offenders convicted outside the United States, the Headquarters, Air Force Security Forces Center, can provide further assistance, in addition to higher headquarters legal offices and AFLOA/JAJM.

Remember that SORNA does not apply extraterritorially, or outside U.S. borders. Overseas bases may also be located in countries which lack public sex offender reporting requirements. For example, Germany and many European nations do not maintain public sex offender registries (Germany does have a private database for law enforcement use).²⁴ While it is unlikely that a convicted active-duty sex offender would remain in service, much less remain stationed overseas, overseas installations still have to periodically address the issue of military family members or civilian employees who are convicted sex offenders and who may have access to base housing. This requires creative solutions on the part of commanders and their judge advocates.

For example, a recent *Stars and Stripes* [article](#) highlighted how “the military services are making it much harder for convicted sex offenders to live in base housing.”²⁵ In late 2011, U.S. Air Forces in Europe (USAFE) implemented a policy change requiring base housing applicants at USAFE installations to fill out a sex offender disclosure form.²⁶ USAFE installation commanders can now use this information to deny government housing, or otherwise restrict a registered sex offender from living near where children may play or attend school or daycare on base. Moreover, the Navy and Marine Corps have gone so far as to preemptively bar any service members or sponsored family members who are sex offenders from being assigned overseas, absent a waiver. Sex offenders are also prohibited from occupying USN/USMC base housing, per command guidance issued in 2008.²⁷

²³ *Id.*

²⁴ See Nicole Atwill, European Court of Human Rights / France: Registration in French National Sex Offender Database Does Not Violate Rights, LIBRARY OF CONGRESS, Nov. 20, 2012 at 2, available at http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l205401799_text

²⁵ Jennifer H. Svan, *USAFE keeps track of registered sex offenders on base*, STARS AND STRIPES, July 26, 2012, available at <http://www.stripes.com/news/usafe-keeps-track-of-registered-sex-offenders-on-base-1.181399>

²⁶ *Id.*

²⁷ Policy Letter, Commandant of the Marine Corps, subject: Registered Sex Offenders Prohibited Occupancy and Access to Marine Corps Government-Owned, Leased or

DEFENSE DUTIES

In a meticulously-researched article in *The Army Lawyer*, Major Andrew D. Flor [outlines a step-by-step method](#) for how defense counsel can advise clients about their potential sex offender status.²⁸ Proactively, defense counsel should seek to identify where the client will reside after release from confinement and research the corresponding state registration requirements. Furthermore, defense counsel should conduct a side-by-side comparison of the charge sheet and qualifying reportable offenses outlined in [DoDI 1325.07](#) and [AFI 51-201](#), then analyze what offenses under the UCMJ require registration in that state. After being advised of the applicable state requirements based on the charged offenses, clients should sign a memorandum for record advising them of the probable requirement to register as a sex offender.²⁹

While a defense counsel’s failure to advise an accused charged with a sex offense of the potential sex offender requirements on the record does not automatically amount to “per se ineffective assistance of counsel,” appellate courts may weigh it as one circumstance in evaluating an IAC complaint.³⁰ Regardless, as Major Flor emphasizes, “[d]ue to the harsh realities and lasting impacts of sex offender registration, military clients deserve the best advice from their trial defense counsel, not just the bare minimum standard required by CAAF.”³¹ Likewise, trial counsel should be on guard for “savvy” guilty pleas or pretrial agreements which seek to negotiate a conviction for offenses that do not require sex offender registration.³²

LIFELONG CONSEQUENCES

How long will a convicted service member have to be registered as a sex offender? The answer ranges from 15 years to life, depending on the offense. SORNA establishes three tiers of sex offenders, which can be seen as a rising scale of severity. The duration of time

Privatized Family Housing (31 Dec. 2008) and Memorandum from the Secretary of the Navy, subject: Delegation of Authority to Issue Debarment Letters (11 June 2008).

²⁸ See Flor, *supra* note 1 at 13.

²⁹ *Id.*

³⁰ See Miller, 63 M.J. 452.

³¹ See Flor, *supra* note 1 at 14.

³² *Id.* at 13.

an offender must be registered depends on the tier.³³ This classification scheme is based on the offense committed, the age of the victim, and the offender's history of recidivism.³⁴

Tier I includes the "least serious" sex offenders who do not fall under Tiers II and III.³⁵ Generally, this includes offenders convicted of: (a) qualifying offenses not punishable by imprisonment of more than one year; (b) the receipt or possession of child pornography; or (c) sexual assault against an adult that involves sexual contact but not a completed or attempted sexual act. Offenders convicted of a prior Tier I sex offense who are subsequently arrested for a felony sex offense, will be classified at least as a Tier II sex offender.³⁶

Comparatively, Tier II and Tier III offenses are for more severe felony offenses punishable by confinement for more than one year. Tier II treatment is required for victims under age 18, while Tier III treatment is required for victims below 13 years of age. Generally, Tier II offenses include offenses against minors involving sexual contact as well as the production and distribution of child pornography. Tier III offenses include sex acts by force or threat, engaging in a sex act with a victim rendered unconscious or involuntarily drugged, sexual acts with children under the age of age 12, and non-parental kidnapping of a minor.

Tier I sex offenders are required to register for 15 years with their local jurisdiction, renewing their registration annually. Tier II sex offenders must register for 25 years while renewing their registration every six months. Tier III sex offenders must register for life, renewing their registration every three months.³⁷

COMPLIANCE

The failure on the part of responsible DoD officials to notify offenders of their duty to register as a sex offender does not relieve offenders of their legal responsibility. To prevent such an occurrence, there

are many fail-safes built into the reporting system, to include law enforcement notifications to local authorities, U.S. Marshals Service and its database, and regular law enforcement databases. SORNA created a new federal felony offense for failing to register as a sex offender.³⁸ Per [18 U.S.C. § 2250](#), those who knowingly fail to register or update a registration required by SORNA will face a fine and imprisonment up to ten years. As an operational arm of the U.S. Marshals Service, the National Sex Offender Targeting Center (NSOTC) serves as an interagency intelligence and operations center, supporting the identification, investigation, location, apprehension, and immediate prosecution of non-compliant sex offenders.³⁹ The DoD works closely with NSOTC and the Army has dedicated two permanent personnel to support registration compliance efforts.

In November 2010, NSOTC began an initiative called Operation Tarnished Service to identify, locate, register, and/or apprehend former service members who fail to comply with registration requirements following discharge from the military.⁴⁰ With this close partnership of federal and local law enforcement officials, the DoD ensures that all sex offenders released from military confinement, or discharged from the Service, register where they live or face severe consequences.

SUMMARY

On both sides of the courtroom, JAG Corps members should understand how sex offender reporting and notification procedures work across the DoD. Each Service relies on a robust, multi-disciplinary team involving commanders, JAG Corps members, military law enforcements, and corrections officials, to ensure notifications are made to receiving jurisdictions, so that all required military sex offender registrations take place. Our communities and fellow Wingmen are counting on us, and every day, judge advocates are delivering on that promise. 🦋

³³ See DOJ National Guidelines, *supra* note 5 at 21.

³⁴ *Id.* at 23.

³⁵ Lori McPherson, *Practitioner's Guide to the Adam Walsh Act*, NATIONAL CENTER FOR PROSECUTION OF CHILD ABUSE UPDATE, Vol. 20, No. 9 & 10, 2 (2007).

³⁶ See DOJ National Guidelines, *supra* note 5 at 24-25.

³⁷ See McPherson, *supra* note 35 at 2.

³⁸ *Id.* at 1.

³⁹ In FY 2011, the U.S. Marshals Service apprehended 12,144 sex offenders; initiated 2,720 investigations; issued 730 warrants for registration violations; and arrested 586 fugitives for other violations of the Adam Walsh Act.

⁴⁰ *The Reauthorization of the Adam Walsh Act: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 112th Cong. 3 (2011) (statement of Stacia A. Hylton, Director, U.S. Marshals Service, U.S. Department of Justice).

PREFERRAL AND REFERRAL PROCESS FOR SEXUAL ASSAULT ALLEGATIONS

by Lieutenant Colonel Dawn D. Hankins

Effective 28 June 2012, the Secretary of Defense withheld initial disposition authority (IDA) from all commanders within the Department of Defense who do not possess at least special court-martial convening authority (SPCMCA) *and* who are not in the grade of O-6 or higher with respect to allegations of: (1) rape in violation of Article 120, UCMJ; (2) sexual assault, in violation of Article 120, UCMJ; (3) forcible sodomy, in violation of Article 125, UCMJ; and (4) all attempts to commit such offenses, in violation of Article 80, UCMJ. This withholding of IDA also applies to all other alleged offenses arising from or relating to these sexual assault incidents.

The SPCMCA is now responsible for determining what initial disposition action is appropriate in these sexual assault cases to include whether further action is warranted and if so, whether the matter should be resolved by court-martial, nonjudicial punishment, or adverse administrative action. The SPCMCA must base his/her decision on a review of the evidence, recommendation received, proposed court-martial charges, if any, and consultation with a judge advocate. Subordinate commanders are encouraged to provide the SPCMCA with recommendations regarding initial disposition. If the SPCMCA decides that further action is warranted and that action includes taking the case to a court-martial, the SPCMCA will need to prefer charges against the accused.

There are three essential elements for preferral: (1) The person preferring the charges must be a sworn person to the code, (2) that individual was sworn before a commissioned officer of the armed forces authorized to administer oaths, and (3) the signer must have personal knowledge of or investigated the allegations *and* believe the allegations are true in fact to the best of the signer's knowledge and belief. It is not necessary that the signer be convinced beyond a reasonable doubt of the accused's guilt or every

legal element of the specification of the charges. The purpose of these requirements is to guarantee charges are not frivolous, unfounded, or malicious, and are founded in good faith. It is necessary that the SPCMCA or higher prefer the charges to avoid any issues with unlawful command influence, as that may be an issue if the SPCMCA is the IDA and wants the subordinate unit commander to prefer the charges.

It is important to remember that if a sexual assault allegation is not preferred, you must be able to articulate the facts and circumstances that led to that decision.

The next step in the court-martial process is referral. The four essential elements for referral are (1) a non-disqualified convening authority; (2) preferred charges received for disposition; (3) court to which to refer the charges; and (4) for GCMs, an Article 32, UCMJ investigation (unless waived) and pre-trial advice. Under Article 34, UCMJ, the convening authority may not refer a specification to a GCM without advice in writing by the SJA that states the specification is warranted by the evidence indicated in the Article 32 report of investigation. The standard of proof for the pre-trial advice is probable cause. In addition, if the convening authority finds or is advised by a judge advocate that there are reasonable grounds to believe an offense triable by a court-martial has been committed and that the accused committed it, and that the specification alleges an offense, the convening authority may refer it. R.C.M. 601(d)(1).

In GCMs where the IDA is at the SPCMCA level, the SPCMCA can still appoint an Article 32 investigation officer if the SPCMCA was the person who preferred charges, however, the GCMCA would be the referral authority. If after the Article 32 investigation the GCMCA decides the misconduct should not be referred to a court-martial, make sure you are able to articulate the reasons why. 🦋

JOINT SERVICES COMMITTEE FOR MILITARY JUSTICE

PROPOSED AMENDMENTS TO THE

MANUAL FOR COURTS-MARTIAL

FOR THE 2013 EXECUTIVE ORDER

by Major Daniel C. Mamber

On 12 October 12, the [Joint Services Committee for Military Justice](#) (JSC) opened the 2013 Executive Order recommending amendments to the *Manual for Courts-Martial* (MCM) for public comment. After comments and the public hearing, the changes to the amendments will be routed through the service Secretaries and the Secretary of Defense for coordination. Then, the EO will be forwarded to the President for signature. Although there may be substantial changes before the process is complete, this article is intended to help military justice practitioners prepare for likely amendments by previewing the proposals and, where appropriate, discussing the case law that gave rise them.

SEXUAL ASSAULT

Several of the proposed amendments to the MCM relate to last year's overhaul of Article 120. With respect to Articles 120, 120b, and 120c, the following proposed amendments are worth noting:

ARTICLE 120 – RAPE AND SEXUAL ASSAULT, GENERALLY

Proposed changes include adding subparagraph (a) (5) which would state in pertinent part that a person is guilty of rape if they commit a sexual act upon another person without the consent of that person. In addition, subparagraph (c)(4) would state that “[l]ack of consent is not an element of any offense under [Article 120] unless expressly stated.” The proposed

amendment to R.C.M. 916 deletes subparagraph (b) (4), *Mistake of fact as to consent*. However, *Mistake of fact, generally* is still listed as a defense under R.C.M. 916(j)(1). The intent of this proposal is not to eliminate mistake of fact as to consent as a potential defense, but to emphasize that mistake of fact as to consent is only a potential defense *if* lack of consent is the theory upon which the Government has alleged rape.

ARTICLE 120b – RAPE AND SEXUAL ASSAULT OF A CHILD

Currently, if an alleged victim is a child under the age of 12, the child cannot consent. It need not be proven that the accused knew the child's age. If the child is between the ages of 12 and 16, the child still cannot consent, but mistake of fact that the child was old enough to consent may be raised by an accused. If mistake of fact as to the child's age is successfully raised, consent or reasonable mistake of fact as to consent may be an available defense. Under the proposal, subsections (b)-(f) would be added to include elements of the crime, explanations, lesser included offences, maximum punishment, and a sample specification similar to other UCMJ articles.

ARTICLE 120c – OTHER SEXUAL MISCONDUCT

The addition of subsections (b)-(f), identical to those noted above, have been proposed. Furthermore, R.C.M. 920 and 1004 have been amended to comport with the changes to Article 120, 120b, and 120c.

This article is intended to help military justice practitioners prepare for likely amendments to the Manual for Courts-Martial by previewing the proposals and, where appropriate, discussing the case law that gave rise them.

ARTICLE 125 – SODOMY

When the JSC drafted its proposal for Article 120 amendments under the FY12 National Defense Authorization Act (NDAA), the group proposed changing the definition of “sexual act” to include sodomy. In doing so, the change would allow forcible sodomy to be charged as rape or sexual assault. Additionally, in light of *Lawrence v. Texas* decriminalizing consensual sodomy and *U.S. v. Marcum* essentially requiring a good order and discipline nexus for consensual sodomy to be criminalized in the military, the JSC proposed rescinding Article 125. The new Article 120 was passed into law, however, the proposal to rescind Article 125 was met with opposition. Opposition came not from proponents of the ability to charge consensual sodomy, but from animal rights activists who concluded the military was attempting to decriminalize bestiality.

ARTICLE 134 – ANIMAL ABUSE

In response to the concern that repealing Article 125 would legalize bestiality, the JSC has proposed modifying Article 134, *Abusing a public animal*. The proposed amendment criminalizes sexual acts with animals and includes sexual contact in the definition of abuse. It would also extend protection to all animals—vice just public animals—the abuse of which is prejudicial to good order and discipline or is service discrediting. In addition, the maximum punishment for abuse of a public animal would be raised. Although the portions of this article that criminalize bestial acts would be preempted by Article 125 as long as it remains on the books, this amendment would clear the way for a repeal of Article 125.

ARTICLE 134 – INDECENT CONDUCT

To some extent a resurrection of the old *Indecent acts with another* offense, the proposed addition of

an *Indecent conduct* article would serve as a catch-all for all indecent conduct not otherwise addressed in the UCMJ. The suggested definition of “indecent” was taken from the *Indecent acts with another* article but modified to conform to the new Articles 120b(a)(h)(5)(D) and 120c(a)(d)(6). Additionally, subparagraph (c)(2) was added to address the word “conduct” as opposed to “act,” and to highlight to practitioners the fact that indecent conduct with child victims may be preempted by Article 120b.

OTHER PROPOSED AMENDMENTS

U.S. v. CAMPBELL

In *U.S. v. Campbell*, the Court of Appeals for the Armed Forces (C.A.A.F.) sought to resolve the confusion surrounding multiplicity and unreasonable multiplication of charges. With regard to multiplicity, “...there is only one form of multiplicity, that which is aimed at the protection against double jeopardy as determined using the *Blockburger/Teters* analysis. As a matter of logic and law, if an offense is multiplicitous for sentencing, it must necessarily be multiplicitous for findings as well.”¹

References to multiplicity for sentencing are misleading and should not be used. The unnecessary multiplication of charges does not enforce a constitutional protection like multiplicity does. In fact, in his dissenting opinion Judge Stucky advocates eliminating the military concept of unnecessary multiplication of charges altogether.² Rather, unnecessary multiplication of charges is a uniquely military vehicle for protecting against “overreaching in the exercise of prosecutorial discretion.”³ As such, the JSC has recommended amendments to R.C.M. 307(c)(4),

¹ *U.S. v. Campbell*, 71 M.J. 19, 23 (C.A.A.F. 2012).

² *Id.* at 25.

³ *Id.* at 23.

Until these amendments are enacted, military justice practitioners must remain mindful of the current state of the law.

906(b)(12), 907 (b)(3)(B), and 1003(c)(1)(C) in an effort to comply with the clarification in *Campbell*.

R.C.M. 307(c)(4) – PREFERRED OF CHARGES

A line was added to the end of this section to direct the reader to R.C.M. 906(b)(12) for unreasonable multiplication of charges, R.C.M. 907(b)(3) for multiplicity, and R.C.M. 1003(c)(1)(C) for sentence limitations.

R.C.M. 906(b)(12) – MOTIONS FOR APPROPRIATE RELIEF

R.C.M. 906(b)(12), which currently lists “[d]etermination of multiplicity of offenses for sentencing purposes” as grounds for a motion for appropriate relief, is rewritten to apply to findings and sentencing in subsections (i) and (ii), respectively. Under subsection (i), the judge may, at their discretion, dismiss the lesser of two unreasonably multiplied charged offenses at findings if they determine them to be unreasonably multiplied. To the same extent, under subsection (ii), if the judge determines an unreasonable multiplication of charges has caused harm to the accused more appropriately dealt with at sentencing than at findings, the judge may merge the two charged offenses for sentencing, making the maximum sentence that of the charged offense with the higher maximum offense.

R.C.M. 907(b)(3)(B) – MOTIONS TO DISMISS

Where multiplicity is listed as a permissible ground for dismissal, the line “[a] charge is multiplicitous if the proof of such charge also proves every element of another charge” was added to the section to align

with *Campbell* and the proposed R.C.M. 1003(c)(1)(C)(i) changes.

R.C.M. 1003(c)(1)(C) – PUNISHMENTS

This subsection is proposed to be renamed *Multiple Offenses vice Multiplicity* to make clear its consideration of both multiplicity and unreasonable multiplication of charges as separately enumerated in subsections (i) and (ii) respectively.

U.S. v. FOSLER

In order to establish a violation of Article 134, the Government must prove beyond a reasonable doubt that the accused’s conduct was either (1) prejudicial to good order and discipline, (2) service discrediting behavior, or (3) a non-capital crime or offense (the terminal element). In *U.S. v. Fosler*,⁴ C.A.A.F. held that in an Article 134 charge and specification, the Government must, either expressly or by necessary implication, allege the terminal element. If the Government fails to do so, the terminal element is absent and the charge and specification may be dismissed for failure to state an offense under R.C.M. 907(b)(1)(B).⁵ To address the holding in *Fosler*, the JSC has drafted amendments to R.C.M. 307(c) and Article 134, *General article*, paragraph 60; and added an annex to Article 134, *General article*, paragraphs 61-113.

ARTICLE 134, PARA. 60 – GENERAL ARTICLE

Although the *Fosler* holding does not require that the terminal element be expressly alleged in the

⁴ 70 M.J. 225 (C.A.A.F. 2012)

⁵ *Id.* at 233.

specification (a specification is still legally sufficient if it alleges the terminal element by necessary implication), the JSC has proposed requiring that the terminal element be expressly alleged. Such a requirement simplifies the process by removing the need to analyze a specification to see if it implicitly states the terminal element. This change is reflected in subsection (c)(6) along with sample specifications in the discussion sections there under. Additionally, subsection (b) is amended to comport with *Fosler*.

ARTICLE 134, PARAS. 61-113 – GENERAL ARTICLE

The proposed requirement that Article 134 specifications expressly include the terminal element would require an amendment to each enumerated offense under Article 134 to add the terminal element to each sample specification. Therefore, the JSC draft amendment includes the language “...and that said conduct was (to the prejudice of good order and discipline in the armed forces)(and was)(of a nature to bring discredit upon the armed forces)” at the end of each sample specification for paragraphs 61-113.

U.S. v. JONES

In *Jones*, C.A.A.F. reaffirmed the Supreme Court’s holding from *Schmuck v. U.S.* that “one offense is not ‘necessarily included’ in another unless the elements of the lesser offense are a subset of the elements of the charged offense...”⁶ The court further stated, a military judge has a *sua sponte* duty to instruct panel members on lesser included offenses reasonably raised by the evidence. To address the holding in *Jones*, the JSC has drafted amendments to R.C.M. 307(c)(3)(G) and Article 79, and suggested the addition of an annex to Article 134, paragraphs 1-113 and an Appendix 12A.

ARTICLE 79 – CONVICTION OF LESSER INCLUDED OFFENSES

In addition to amendments reflecting the holding in *Jones*, the paragraph on specific lesser included offenses (LIOs) under subsection (b) proposes a change in how LIOs are listed. Lesser included

offenses would no longer be listed in subsection (d) of each enumerated offense of Article 134. They would instead be listed in the new Appendix 12A, entitled *Lesser Included Offenses*. As the onus of performing the elements test still falls on the practitioner, Appendix 12A would appropriately be used as a reference and not an exhaustive list.

ARTICLE 134, PARAS. 1-113 – GENERAL ARTICLE

The text of each subparagraph (d) in paragraphs 1-113 is deleted and replaced with “See paragraph 3 of this part and Appendix 12A.”

ARTICLE 47 – REFUSAL TO APPEAR OR TESTIFY

The FY12 NDAA amended Article 47 to allow for the issuance of subpoenas duces tecum at Article 32 hearings. The JSC has proposed an amendment to R.C.M. 703(f)(4)(B) to address this change.

ARTICLE 48 – CONTEMPTS

The FY12 NDAA also amended Article 48 to expand a military judge’s ability to punish contempt of court. Under the amendment, the military judge may additionally punish willful disobedience of lawful writs, processes, orders, rulings, or commands of the court-martial. The maximum fine a judge may levy was also raised from \$100 to \$1,000. The JSC proposed an amendment to R.C.M. 201(c) to reflect the change.

ARTICLE 54(E) – RECORD OF TRIAL

Subsection (e) was added to Article 54 in the FY12 NDAA to require the Government to provide a free copy of the record of trial to a victim of sexual assault and certain other offenses if the victim testified during the proceedings. The JSC proposed amendments to R.C.M. 1103 and 1104(b)(1) to implement the change.

Of course, until these amendments are enacted, military justice practitioners must remain mindful of the current state of the law and act accordingly. ➔

⁶ *U.S. v. Jones*, 68 M.J. 465, 469 (2010) [citing *Schmuck v. U.S.*, 489 U.S. 705, 716 (1989)]



LEGAL EDUCATION OF AIR FORCE COMMANDERS: **TIME FOR ANOTHER REVIVAL?**¹

by Colonel Paul E. Pirog and Professor Howard C. Eggers (Colonel, USA, Retired)

The purpose of this article is to identify what the goal of legal education of Air Force commanders should be and to recommend how best to accomplish this goal in the next five to ten years.

What do we mean by “legal education of commanders?” Generally, we are referring to the nature of the legal advice, training, and education that officers receive from “their environment” and from government lawyers before they take command, as well as during and after tour(s) as commanders. Although the traditional view of “legal education of commanders” is primarily concerned with military justice and discipline matters, it has also come to include exposure to the whole panoply of modern legal issues an officer is likely to face as commander—from commander-directed mental health examinations to fiscal limitations to civilian personnel matters and environmental regulation.

THE GOAL OF EDUCATING COMMANDERS IN THE LAW

What should be the goal of a commander’s formal legal education? If one looks to the past twenty or so years, it would likely be defined as, “Ensuring commanders are familiar with a wide variety of legal issues so that they don’t get in trouble or fired.” Why do we make this statement? Because:

1. There has really been no centralized look at legal education of commanders in order to formulate a goal;
2. When judge advocates get together to discuss commanders’ courses, the conversation invariably turns to “what topics do we need to cover?”; and
3. The actual legal education presented over the past twenty-seven years essentially focused on covering a wide range of legal topics.²

¹ Based on the call by The Air Force Judge Advocate General, Lt Gen Richard Harding, in Oct 2010, for a “Military Justice Revival to Reflect the New Attitude We are Bringing to Our Efforts to Improve Military Justice Case Management.” TJAG On-Line News Service, 20 Oct 10, A Message for the Corps, available at [https://afjag.af.mil/FLITE/WebDocs/jag\(JAG\)/ONS/10_20_10.pdf](https://afjag.af.mil/FLITE/WebDocs/jag(JAG)/ONS/10_20_10.pdf)

² After a 1-star judge advocate gave a 2-hour lesson at the AFJAGS to new group commanders, the Deputy Commandant of AFJAGS presented a 4-hour lesson to the same audience to ensure that all the other legal areas “were covered.” Personal recollection.

Having good order and discipline is an absolute necessity for any fighting force. Without it, one cannot accomplish the mission, which is priority number one.

Is this good or bad for the Air Force and how does this affect the parties in question (individual commanders and judge advocates)? In our opinion, it depends upon the background and experiences of the commander involved. If you have experienced commanders who have respect for the law, are used to dealing with and obtaining information from judge advocates and law enforcement agencies, and understand what it means to put the mission first, then it makes sense to merely inform them about the myriad of problems they may face as commanders and how to identify legal issues before they get stung. On the other hand, if you have inexperienced commanders who are more likely to discount a JAG's legal advice and to proceed on their own, who expect some scientific evidence of guilt in virtually every case, and who make disciplinary decisions based primarily on how their determination affects the morale and welfare of the Airmen in trouble, then legal education consisting of legal topic coverage makes them more knowledgeable about legal subtleties, but not better at thinking like a commander.

Ultimately, the goal of legal education of commanders should be to produce officers who: (1) are able to think like a commander who has respect for the rule of law; (2) are accustomed to obtaining and understanding basic legal advice about a problem of command; and (3) are able to appropriately incorporate the law to make good decisions for the Air Force.³

What does “thinking like a commander” mean? In our view, thinking like a commander means that the commander puts mission first, with good order and discipline following close behind. The Oath of Office for commissioned officers reinforces this concept as it expects officers to “support and defend the Constitution of the United States against all

enemies”⁴ and that an officer “will well and faithfully discharge the duties of the office upon which [they are] about to enter.”⁵ To do one's duty is the ultimate mission of all officers.

Having good order and discipline is an absolute necessity for any fighting force. Without it, one cannot accomplish the mission, which is priority number one. This is why one duty of enlisted personnel under their Oath of Enlistment is to “obey the orders of the President of the United States and the orders of the officers appointed over [them], according to regulations and the Uniform Code of Military Justice.”⁶ If troops don't obey the orders of the officers who are discharging the duties of their office, they are subject to UCMJ discipline. Although it is fashionable these days to say that the goal of commanders is “mission first, people always,” people are not “always” a priority. For example, sometimes a commander needs to send someone into harm's way, needs to punish someone severely to deter others' misconduct, or needs to reduce the force to pay for weapons systems⁷ by separating trained and capable troops who may not easily find another job.⁸ “Thinking like a commander” needs to start no later than the commissioning day of an officer because it

⁴This is also contained in the Oath of Enlistment, 10 U.S.C. 502.

⁵Oath of Office, 5 U.S.C. 3331

⁶Oath of Enlistment, 10 U.S.C. 502

⁷Force modernization and recapitalization was a big focus during Michael Wynne's stint as Secretary of the Air Force. In Sep 2007, he “publicly announced that the 40,000 personnel reduction taken by the Air Force to pay for new airplanes was not reaping the rewards envisioned—[and] stated bluntly, “It isn't working.” The purpose of the drawdown in Air Force personnel strength to 316,000 by fiscal year 2009 was to free up money to modernize the Air Force's aging aircraft fleet—average age of 24 years, 14 percent of which is either grounded or possesses mission-limiting restrictions. This type of drawdown, a method commonly used in private industry, is used to liquidate assets to gain the resources needed to recapitalize the company's asset base.” Future Air Bases: Power Patches or Military Communities? Air Force Journal of Logistics, Volume XXXII, Number 3, page 16.

⁸“The labor market started to slide during the second half of 2007 and continued sliding throughout 2008. The National Bureau of Economic Research identified December 2007 as the beginning of a recession.” James M. Borbely, U.S. Labor Market in 2008: Economy in recession, Monthly Labor Review, March 2009, page 3.

³This also happens to be similar to the course objective of Law 421, Law for Commanders, taught to senior cadets at USAFA by the authors.

Respect for the rule of law is not accomplished by making a commander a lawyer, but instead by insuring that he/she respects their counsel and can work with lawyers to obtain and understand the law.

is hard to inculcate a mission-first attitude when the rest of society is accustomed to the opposite.

Thinking like a commander also means that the officer possesses a good judicial temperament⁹ and has practiced using it. This is one of the criteria for selection of court members prescribed in Article 25, Uniform Code of Military Justice. Without practice and seeing the long-term effects of different command tools and philosophy, an officer is not able to hone his/her “judicial” skills.

What do we mean by “respect for the rule of law?” A former Air Force Chief of Staff highlighted the essentials of the rule of law for commanders when he said, “[T]he standards must be uniformly known, consistently applied, and non-selectively enforced.”¹⁰ We think that a commander must have respect for the rule of law. To do otherwise is to run the risk of anarchy.¹¹ This is an especially risky proposition when one is responsible for subordinates who have access to weapons and weapons systems. Some might argue that in the current environment of terrorists bent on our destruction, legal rules should be relaxed in order to defend ourselves.¹² However, the type of commander needed today should think that, “Laws and principles are not for the times when there is no

temptation: they are for such moments as this, when body and soul rise in mutiny against their rigour; stringent are they; inviolate they shall be. If at my individual convenience I might break them, what would be their worth?”¹³

Respect for the rule of law is not accomplished by making commanders lawyers, but instead by ensuring that commanders respect their counsel and can work with lawyers to obtain and understand the law. This is the exact opposite view of a former Secretary of Defense who encouraged the Department of Defense to “[R]educe the number of lawyers” because “they are like beavers—they get in the middle of the stream and dam it up.”¹⁴ We agree that over the years, some lawyers did earn the reputation for being obstructionists. Nevertheless, the damage done by those who twisted the law to ensure “nothing gets in the way of the boss” may be more devastating to the reputation of government attorneys, and to the War on Terror, than any dam ever built.¹⁵

There are at least three major ways that commanders may work with attorneys—and they are not mutually exclusive.

1. The commander asks the attorney for advice after identifying a legal problem. It is our experience that many younger and untried commanders of the current era tend to adopt this paradigm. This method depends upon the ability of the commander to detect and isolate legal issues and then to ask the attorney the correct question to solve the problem. This works well with a commander who has encountered,

⁹ The American Bar Association defines “compassion, decisiveness, open-mindedness, sensitivity, courtesy, patience, freedom from bias and commitment to equal justice” as characterizing temperament. ABA Standing Committee on Federal Judiciary: What It Is and How It Works, American Bar Association, 1991, page 4.

¹⁰ From the text of a video tape on the topic of Air Force Standards and Accountability produced following administrative actions taken against officers involved in the shoot down of two U.S. Army helicopters. Air Force Standards and Accountability, Gen. Ronald R. Fogleman, Air Force Chief of Staff, 10 Aug 1995.

¹¹ “Crime is contagious. If the Government becomes a law breaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy.” Louis D. Brandeis, *Olmstead v. United States*, 277 U.S. 438 (1928).

¹² “In the age of modern advanced technology, when the criminal can avail himself of every new invention, law enforcement officers are denied even the simplest of electronic devices, even though they will be under the supervision of the Courts. The result is like asking a champion boxer to fight a gorilla and insisting that the boxer abide by the Marquis of Queensbury Rules, while the gorilla is limited only by the law of the jungle.” Miles F. McDonald, *Law Enforcement—Have we Gone Too Far in Protecting the Accused?* NY State Bar Journal, Oct 1967.

¹³ Charlotte Bronte, *Jane Eyre*, 1847.

¹⁴ Donald Rumsfeld’s Rules, *Advice on government, business and life*. The Wall Street Journal, 29 Jan 01.

¹⁵ See Memorandum re “interrogation methods to be used during the current war on terrorism” to Alberto R. Gonzales, Counsel to the President, from John C. Yoo, Deputy Assistant Attorney General, dated 1 Aug 2002.

Understanding the legal advice that a judge advocate gives is also important to a commander. Lack of understanding of what the lawyer is saying can lead to mistakes by the commander.

and been successful with, a wide variety of legal and command issues.

2. The attorney is a member of a committee or committees that are involved directly or indirectly in decision-making for the base or unit. This allows the attorney to identify legal issues and problems that are brought up at the committee level in order to remedy them prior to a decision or recommendation of the committee to the commander. Most bases have evolved over the years to this approach because it is not dependent upon the personal abilities or experience of the current commander. This method naturally depends upon: (1) the level of detail that the committee sees; (2) whether the attorney assigned to serve on the committee has the experience and ability to issue-spot legal problems; and (3) the time allowed to develop the solution.

3. The commander has a close, professional relationship with the attorney such that they discuss and view operational plans as they are developed. This method allows the attorney to be in on the ground floor to help shape the project so that legal issues are avoided or easy fixes developed to accomplish the mission with minimal legal risk. This approach works well in all situations, but especially when one of the team members is inexperienced and that team member takes the opportunity to learn from the other member. A prominent example of this latter method is the way that General Steven Lorenz used his judge advocates, often saying that if he could only have one advisor on his staff, it would be his JAG.¹⁶

Understanding the legal advice that a judge advocate gives is also important to a commander. Lack of understanding of what the lawyer is saying can lead to mistakes by the commander. This is exacerbated when, to insure accuracy, the JAG uses a double negative in his/her advice. In addition, true understanding of the advice will help the commander know when he/she must re-engage the JAG to see if changes in the problem, or the passage of time and possible changes in the law, have taken place and affect the decision. The more a commander practices working with the JAG on these matters, the better he/she will progress at knowing when to seek help.

Finally, we must define what we mean by “making good decisions for the Air Force.” First of all, a commander must make a decision¹⁷ at times without having 100% of the information needed and possibly with doubts about the reliability of some of the information he/she does have. Commanders must get accustomed to dealing with this “fog of war” as it is present nearly all the time. They must also understand that the Air Force’s needs should control their approach. Too many commanders and staff start out thinking that the accused’s needs, or the family’s needs, should take precedence in a decision. The Air Force’s needs do include the family, but supporting the family must not come at the cost of losing good order and discipline, or diminishing morale, readiness, consistency, or justice. Next, the commander must realize that there are a variety of tools/solutions that can be used to solve legal problems. Strong advisors, including the JAG, who are unafraid to speak up or who provide innovative ideas are key to developing this concept. It is also important to keep track of the results and effectiveness of the different tools used. People and their reactions to a commander’s decisions evolve over time. Commanders need to know there is no

¹⁶ Spoken by General Stephen Lorenz soon after his change of command, to a group of JAGs at an executive conference, June 2008. Personal recollection.

¹⁷ But apparently not in all cases. In 1989, a 2-star told a group of junior officers that the key to success for him was to “never be responsible for a big decision.” Personal recollection.

universal antidote or checklist solution to a problem. The effect of a tool on a person who has been in the service for two years is usually different than that effect on a person who has 18 years of service.

If the Air Force can set up its legal education of commanders to support officers who will think like the commander as mentioned in the definition proposed above, then the Air Force will be in good hands for the next generation.

The traditional way of developing an officer to take command was to mentor that individual.

HOW SHOULD WE EDUCATE COMMANDERS IN THE FUTURE?

We have adopted a comprehensive definition of “legal education of commanders,” which includes “legal advice, training, and education that officers receive from ‘their environment’ and from government lawyers before they take command, as well as during and after their tour(s) as commanders.” However, the foundation for how command authority is likely to be exercised is usually laid before this time, during the eighteen-plus formative, usually civilian years, prior to the university experience. This foundation could also be established in a future commander as he/she rises in grade and responsibility, but not yet assuming a command position. This developmental time warrants altering how such commanders are educated to think like a commander when dealing with disciplinary and other legal decisions. Individuals who grow up in an environment where law enforcement is more concerned with individual rights and liberties and the rehabilitation of the lawbreaker than with the orderly functioning of society, have a different way of thinking about command than individuals who have a more traditional approach to law enforcement and the military’s need for good order and discipline.

Many other factors contribute to the effectiveness with which a commander makes decisions, including what motivated him/her to join the Air Force. Both

the officer who sees the protection of individual rights as dominant and the traditionalist who sees the need for good order and discipline as eclipsing individual rights are motivated by a desire to serve their country and keep the military strong in its defense. Most people entering the military have decision-making, discerning, and communicating skills to varying degrees; it should be the goal of those developing commanders to identify these abilities and help to nurture and improve them during the course of a military career. People who enter the military at the same time may also have different levels of preparedness. The extent of a person’s military experience or knowledge varies by the different types of accession processes, the nature of their education before joining the military, and the education they receive specific to their AFSC.

The traditional way of developing an officer to take command was to mentor that individual. Mentorship took into account that the person being mentored might be starting at a level different than other officers in the unit. It was understood that an officer engaged in a disciplinary action or other legal proceeding would generally think like a commander, as we have defined that term, when they had regular opportunities in a garrison environment to observe and reflect on how others command. In this stable environment, such officers are more regularly mentored and have a more traditional view of legal matters than those who have frequent deployments and a high operational tempo. The former officers, now more senior, had a longer opportunity to observe commanders’ decisions on a wider variety of legal issues, had to deal with much less complicated issues, and generally had a sense of the value of having an experienced judge advocate advising and guiding the commander through all legal actions, especially complex ones. Such commanders were predisposed to use the judge advocate as an independent advisor and guide. Rather than an obstructionist, the judge advocate was seen as someone who kept the commander on the right path, providing a “north star” to steer by. We believe a significant step in educating the younger officers assuming commands now and in the future to think like a commander, is to educate them to adopt the view (i.e., trust and deference on legal matters) of the more senior commanders towards judge advocates. At the same time, no commander

should ever abdicate responsibility for the mission by laying blame on a subordinate for bad advice or poor mission execution—despite some reported precedence.¹⁸

Every phase of officers' education should take into consideration the need to develop the officer's ability to think like a commander. The officer, for example, should be acquainted with the mechanical aspects of making a decision. This means that a commander should: (1) understand the nature and purposes of criminal law and the need for good order and discipline; (2) have some working understanding of investigations and how to interpret information based on the underlying principles of the rules of evidence; (3) maintain cognizance of "the going rate" of punishments for various offenses so that a targeted hard or soft disciplinary hit is truly calibrated; and (4) know the best ways to utilize his/her JAG so that they operate as a smooth and efficient team when it comes to problem-solving and advice.

This is not to say that commanders should learn the intricacies of the law. Rather they should be exposed to different aspects of the law and have a working knowledge of them. The focus is on using the law to get officers to think like a wiser commander, not to think like a better lawyer. By what method should this be accomplished? We believe that use of practical exercises and realistic scenarios which others have actually faced are a worthy substitute for the experience and mentoring received in previous times.¹⁹

Case studies and scenarios that are current, realistic, and relevant to the individual's AFSC seem to be the most effective means of teaching law to commanders. A future commander could see a situation raised in

¹⁸"An example of a judge advocate unfairly blamed for a superior's tactical decision occurred during the early stage of the conflict in Afghanistan. In October 2001, a Taliban convoy suspected to include Taliban leader Mullah Omar was sighted. Expedited permission for an armed Predator to fire on the convoy was denied by Central Command's Commanding General Tommy Franks. His reported reply to the request to fire was, "My JAG doesn't like this, so we're not going to fire." Thereafter, Gen Franks' "JAG," a Navy judge advocate Captain who had voiced her qualms about noncombatants who might be in the convoy, was heavily criticized in the unknowing media, sometimes by name." From *The Law of Armed Conflict: International Humanitarian Law In War*, Gary D. Solis, page 499, footnote 42.

¹⁹ According to Barry Schwartz and Kenneth E. Sharpe in *Practical Wisdom: Aristotle Meets Positive Psychology*, *Journal of Happiness Studies* (2006) 7: 377-395 at 388, "Aristotle suggested that wisdom is learned but cannot be taught—at least not didactically. This means that wisdom is the product of experience. One becomes wise by confronting difficult and ambiguous situations, using one's judgment to decide what to do, doing it, and getting feedback." We believe that case studies and scenario-based discussions are the next best substitute for actual experience.

an educational environment and be given sufficient time to reflect on the scenario, on the options that were proposed to resolve the situation, and on what might have happened if another alternative had been chosen. In the area of evidence, for example, scenarios would provide an operational explanation of concepts such as "circumstantial evidence," developing the ability of an officer to assess and give proper weight to evidence presented, and to recognize the factors influencing how much credibility the commander should give the information. We believe that this process would be a proper substitute for learning which previously took place in the garrison environment. It is not the solution that we are suggesting, but a methodology and the critical thinking necessary to arrive at a solution. Many situations have more than one answer and the good commander should be ready to identify the clearly reasonable alternatives and select the ones which are optimal. A well-written scenario or case study with a guided discussion is a good way to afford an opportunity to improve commander-like thinking when the individual is an active participant.

The process of educating commanders must be continuous. Over the last decade, computer based training or "a briefing" seemed to be the universal solution to any problem identified.²⁰ Although one-time training is a valuable tool to produce limited-focus knowledge, what we are looking for here is a transformational change in the way commanders think. We think this can best be accomplished by the following:

1. Designate junior judge advocates to be unit legal advisors to learn all they can about the unit and its mission, people, problems, and resources. SJAs and commanders should foster and encourage professional relationships between junior line and JAG officers so that all parties can learn how the other person thinks in order to give and accept better legal advice;
2. Look for opportunities for JAGs to mentor, and be mentored by, other officers, senior NCOs, and commanders during everyday activities at

²⁰"The less practice people get, the worse their judgment will be, and the worse their judgment is, the more people in charge will perceive the need for rules—rigid bureaucratic procedures. This in turn will mean less practice, which will mean more rules, and so on. *Id.* at 390.

From accession to assumption of command of a unit, very few Air Force commissioned officers have the opportunity to acquire the type of legal knowledge, experience, and especially thinking needed by a commander in today's Air Force.

a typical wing (e.g., wing stand-up meetings, senior staff meetings, commander succession discussions, etc.);²¹

3. Adopt the Appendix A suggested template as a source for future legal education of commanders. Scenarios to drive home the objectives should be AFSC and experiential-driven;
4. Include for the status of discipline meetings not only a calibration component for commanders and first sergeants (reviewing past cases), but also an educational component whereby the JAG alternates between a Block 1 or 2 scenario (see Appendix A) so that there is a discussion on thinking like a commander or a legal topic of coverage at every meeting; and
5. Insure that current and future commanders gain an opportunity to participate in the Block 3 high-impact activities of Appendix A. Choose wise commanders as mentors and involvement in meaningful cases in order to create the best learning environment.

The legal education program developed for commanders must be comprehensive and include defined goals and an established methodology. Operational or technical expertise of aircrews and others should be combined with the expertise of lawyers to develop realistic scenarios which will give future commanders an opportunity to reflect on true-to-life situations. Credible scenarios which have been pre-considered during the course of a career are an effective method for developing officers who can think like command-

²¹ The JAG Corps must also be ready to produce attorneys with the knowledge and experience necessary to mentor young JAGs and commanders—a subject which is beyond the scope of this article.

ers. These scenarios and roundtable discussions may also serve to provide the means of developing judicial temperament in situations where the officers had little chance to experience all the attributes of command or had no opportunity to sit on actual boards and courts-martial.

One of the benefits of adopting this strategy is that it will contribute to the good order and discipline essential to effective teamwork, and effective teamwork is a force multiplier. In addition to exercises involving scenarios and problem-solving seminars, self-study should also be encouraged. Self-study might be encouraged by developing a professional reading list, similar to the Chief of Staff's reading list. Commanders and judge advocates should both be involved in the creation of such a list.

From accession to assumption of command of a unit, very few Air Force commissioned officers have the opportunity to acquire the type of legal knowledge, experience, and especially thinking needed by a commander in today's Air Force. We believe that it is now time to look thoroughly at how commanders are educated in the law, to come up with a new strategy which defines the goals and objectives of such education, and to optimize their achievement using the methods mentioned above, including seminar-based scenarios and reflections for today's commander and tomorrow's leader. Air Force leadership should encourage legal education early in an officer's career and support commander-like thinking whenever it can. If leadership can call for a revival to produce officers who are able to think like a commander as defined herein, the Air Force will benefit greatly and the JAG Corps will continue to be on the leading edge of legal education. 🦋

APPENDIX A: LEGAL EDUCATION OF COMMANDERS TEMPLATE***BLOCK 1: THINKING LIKE A COMMANDER***

1. The mechanical aspects of making a decision.
2. The nature and purposes of criminal law and the need for good order and discipline.
3. Investigations.
4. How to interpret information based on the underlying principles of the rules of evidence.
5. Calibrated punishments.
6. The best ways to utilize a judge advocate.
7. Use of commanders' disciplinary tools.

BLOCK 2: TOPICAL COVERAGE (ISSUE IDENTIFICATION)

1. Lawful and unlawful command influence.
2. Reprisal.
3. Search and seizure.
4. Rights advisement.
5. Sexual assault issues.
6. Fiscal limitations.
7. Joint Ethics Regulation—misuse of position and endorsements.
8. Private organizations and fundraising.

BLOCK 3: HIGH IMPACT PRACTICES

1. Article 15 process (audit one being given by another commander).
2. Court-martial process (serve on court-martial).
3. Conduct Commander-Directed Investigation.
4. Participate in AFSC-specific investigation (e.g., Flying Evaluation Board recorder, Anti-Deficiency Act investigation, security violation investigation, etc.).
5. Serve in other legal processes: Administrative discharge board member; Summary Court-Martial Officer; Line of Duty Determination Officer; Report of Survey Officer; etc.



JAG SCHOOL 2013: A New Path to Meeting JAG Corps Needs

by Mr. Tom G. Becker and Mr. John J. Martinez, Jr.

The [Judge Advocate General's School](#) (AFJAGS) is taking new directions in meeting the JAG Corps' education and training needs. The School is partnering with the TJAG Action Group to solidify the School as the linchpin of a JAG Corps-wide Requirements-Based Training System (RBTS). As a key element in this effort, the School reorganized to enhance and maintain academic rigor in its course offerings, utilize its personnel resources more efficiently, and set out a professional development path for its faculty.

THE LINCHPIN OF RBTS

A requirements-based training system is a process that builds training by first identifying the tasks that JAG Corps personnel perform. Then, determine who needs to do them at what level of capability (the "mission linkage" stage). That is followed by designing, developing, and delivering the training needed for them to perform the tasks satisfactorily. Throughout the entire process, there must be a periodic revalidation of tasks and their associated training requirements. Most importantly, there also should be a continuous evaluation of the quality of instruction and the levels of learning actually achieved.

The first stage is critical. It is of paramount interest to our commanders and clients because they want

us to know how to do our jobs properly so we can help them accomplish the mission. Getting there is the hard part, and that's where AFJAGS steps in. Creating the right training for the right people and delivering it at the right time is challenging in and of itself. But the training environment is dynamic: the nature of tasks and associated training requirements change constantly. Also, our "student body" is diverse and highly mobile and training media are constantly being improved. The following are a few of the major initiatives AFJAGS has implemented to keep pace with multiple demands.

ACE & THE PARALEGAL DEVELOPMENT ACADEMY

The School's paralegal courses, faculty, and curriculum have been reorganized under two divisions. The members of the Academics, Curriculum, and Evaluation Division—"ACE"—are the guardians of the School's paralegal degree accreditation by the Community College of the Air Force and certification by the ABA. ACE is the pointy end of the stick in staffing for the Utilization and Training Workshop—the U&TW—which determines the direction and priorities for paralegal training. ACE continually assesses the relevance of curriculum for the School's paralegal courses and the effectiveness of instruction. ACE also includes the JAG Corps' paralegal Career Development Course writer, responsible for the OJT volumes that bridge the training

gap between the Paralegal Apprentice Course and Paralegal Craftsman Course (PAC and PCC).

The new Paralegal Development Academy focuses on the professional development of the School's paralegal faculty. When new paralegal faculty members are assigned to the School, they attend the Basic Instructor Course at Keesler Air Force Base, Mississippi and become members of the Paralegal Development Academy. Their first instructional assignment is to PAC, where they earn their spurs as instructors in a year-long teaching internship and then continue to hone their teaching skills and subject-matter expertise in the PAC classroom. As new paralegal instructors are assigned to PAC, their predecessors—now seasoned instructors—move to instructing PCC. Eventually, the paralegal instructor “graduates” from the Paralegal Development Academy and takes that experience and expertise into the curriculum oversight responsibilities of the ACE Division.

The goals of the Paralegal Academy and ACE are not only oriented toward excellence in the PAC and PCC classrooms. Their goals include returning a paralegal to the field from the Schoolhouse as a true subject-matter expert with highly refined skills in passing on that knowledge and wisdom to others.

STAN/EVAL AND RESERVE FACULTY

The School's reorganization efforts haven't just addressed paralegal development. The School's new Standards and Evaluation Division (Stan/Eval), under the supervision of the Academic Director, provides similar development opportunities for attorney faculty.

Two experienced attorney faculty are assigned to the Stan/Eval Division. However, they remain attached to subject-matter divisions for instructional duties. In addition to teaching, they now also assist the Academic Director in curriculum development and oversight, instructor evaluation, assessments of instructional effectiveness, and construction of test questions and other instruments used to evaluate student performance. In performing these duties, the Stan/Eval instructors will collaborate closely with School division chiefs and other instructors, as well as the Academic Director.

With the stand up of the Stan/Eval Division, the School has a professional development track for attorney faculty over the course of their (typical) three-year assignment to the School. In their first year, they learn and develop skills as an instructor. The second year, they solidify their subject matter, teaching, and course administration expertise. And in their third year, they are an expert resource for the rest of the faculty in maintaining academic rigor in School course offerings.

Consistent with the goals of academic rigor, professional development of faculty, and efficient utilization of resources, the School's Reserve attorney faculty have been reorganized under the supervision of the Academic Director and the Reserve paralegal faculty under the ACE Division. In coordination with the School's division chiefs, the faculty Reserve Coordinator, and the Reserve faculty members, there will now be a schedule for Reserve attorney faculty utilization over the course of a fiscal year. The goals of this new procedure are to plan out Reserve attorney faculty commitments, reduce ad hoc scheduling while maintaining flexibility to deal with the inevitable changes in availability, and take better advantage of Reserve attorneys' expertise while broadening their teaching experience. The School's Reserve paralegal faculty member will assist active duty paralegals in the ACE Division while maintaining the regular OJT schedule required of all JAG Corps paralegals.

MORE IN STORE FOR 2013 AND BEYOND

These are not the only changes at the JAG School. Curriculum validity and instructional effectiveness are now front and center in the School's priorities in all operations, including regular Faculty General Meetings to address academic issues. An already robust faculty enrichment program has been reengineered to focus on increasing faculty expertise in the art and science of teaching. The School's distance education programs are undergoing transformation to make them more relevant and student friendly. No matter what the priorities are—and they are certain to change with the times—The Judge Advocate General's School is well positioned to serve as the linchpin for meeting the educational and training needs of the JAG Corps. 🦋

The Article 6 Inspection Process: Lessons Learned in the First Year

by Lieutenant Colonel Christopher A. Brown

It has been over a year and a half since the Training and Readiness Directorate (AF/JAI) was created and the Article 6 Inspection process was revised. During this time, I have often been asked: What is the secret to performing well on an inspection and what is the best part of my job? As I will attempt to outline below, there is no secret to a successful inspection; your success depends on proper preparation and documentation. The latter question is easy to answer; the best part of my job is interacting with the enthusiastic JAGs and paralegals while they are telling us about all the good work they do on a daily basis to serve their clients and accomplish their missions.

THE PROCESS AS A WHOLE

Before I get to how to prepare for an Article 6 Part I Inspection, I'd like to quickly summarize where we are in shaping the process as a whole. In summer

2011, AF/JAI began to create a core checklist for Article 6 Inspections. The idea was to take all the existing checklists, scrub them, and come up with the best questions that would allow offices to review their processes, not only to prepare for the actual inspection, but also to identify and fix any issues during their self-inspections. Once the checklist was created, it was vetted through the MAJCOM/SJAs and Air Staff Directorates. The end result was a comprehensive 300-question checklist that encompassed all of our fields of practice. While the checklist was being created, AF/JAI drafted an AFI outlining the Article 6 Inspection Process (both Part I and Part II), including its requirements, policies, procedures, and responsibilities. The AFI is currently in coordination at the Air Staff level. In conjunction with Lieutenant Colonel Dave Houghland, we designed an electronic version of our checklist in CAPSIL. This allows offices to conduct self-inspections in

What is the secret to performing well on an inspection? It's all about creating a consistent approach to handling mission requirements, preparation, and documentation



The key to your self-inspection is to identify areas where your office might be deficient and then put processes in place to address them.

CAPSIL. By using the electronic checklist, offices are automatically linked to all of the references for the questions. Personnel can also view how other offices have answered questions, and they can assign questions to personnel in their office. Office leadership can then review the answers prior to determining if its office is in compliance with each item.

The electronic checklist and the AF/JAI Learning Center in CAPSIL promote collaboration and the cross-flow of information. In the learning center, you are able to view all of the results of closed inspections along with “hot notices” of issues we find during inspections and any changes to inspection items. As of March 2013, we have conducted 36 inspections. Our inspections include looking at your checklist answers and documentation, interviewing office personnel, and interviewing people from outside agencies and squadrons your office interacts with as you provide legal services. In general, what we have found is that everyone is busy, working hard, and wants to do well, not only on their Article 6 Part I and II Inspection, but also in their roles advising commanders and supporting the mission.

SECRETS TO SUCCESS

So what are the secrets to success on your inspection? As I said earlier, there are none...it’s all about creating a consistent approach to handling mission requirements, preparation, and documentation. The first thing you will want to do is to run a thorough self-inspection. I think too often we are afraid that someone will look down on us if we don’t say we are compliant on every item. The key to your self-inspection is to identify areas where your office might be deficient and then put processes in place to address them. It is far better to say we didn’t complete all of our Article 137 briefings over the inspection period, but here is our plan to ensure we meet the requirement in the future, than to have the inspection team identify the deficiency. We realize it would be very difficult to be compliant on all 300

questions: either you wouldn’t be doing any other work or your inspectors wouldn’t be looking very deeply into your programs! So while it is great to strive for perfection, understand that you are going to find issues on self-inspections. The most important thing is to have a plan on how you intend to fix them.

SELF-INSPECTION

As you are going through your self-inspection, try to fully answer the question and then demonstrate compliance. Look at the references to the questions so you understand what the requirements are for compliance. For example, offices often struggle with enlisted training documentation and using Training Business Area (TBA). However, if you read [AFI 36-2201](#), Chapter 6 and Attachment 13, the requirements are clearly stated. Remember, your checklist answer should not just state “yes, we comply.” The answer should clearly state how you comply, identify a POC, and provide adequate documentation demonstrating compliance. Please show us how you have complied over the entire inspection period; not just the past few months or the current year. If you are completing your self-inspections correctly and developing a history documenting compliance, preparation for the actual inspection should be a snap. On the other hand, if you wait until two months prior to your Article 6 Part I Inspection to complete your self-inspection, you will probably face an uphill battle.

Offices that have excelled on inspections are the ones that have provided detailed answers and clear documentation over the entire inspection period. When you are creating your binders, divide the inspection up just like the checklist is written with a binder (or two for the longer sections) for each checklist section. Have your answer with the documentation right behind it or clearly state where the documentation can be found. When providing documentation, make sure what you provide doesn’t have errors in it. This may sound simple, but we often find that

the documentation provided either doesn't actually show compliance or it has obvious errors. This will only cause the team to look for more documentation which normally is not a good thing. While preparing for your inspection, it might be helpful to look at the reports of previously inspected bases located on our CAPSIL Learning Center. This will help you identify programs with common deficiencies such as Article 137 briefings, UIF reviews, G-Series orders, OGE Forms 450, enlisted training documentation, and post-trial processing, to name a few.

INSPECTION PROCESS

During the actual inspection, we don't expect you to stop doing your job; we will work around your schedule, including PT and legal assistance. We also don't expect you to stay late just because we are there going over your files. We will interview office personnel during regular duty hours. During our interviews, make sure to brag about your people and programs. Tell us what you're most proud of what makes your programs run well, and who is performing at a high level. We want to know about the great programs your office has so they can be shared with other offices. If you have a best practice or an outstanding performer, give us detailed information on the program or person. In terms of outstanding performers, we are looking for people who have excelled at their duty position or managed great programs, not simply the folks who did the most inspection preparation.

INSPECTION UPDATES AND RESULTS

At the end of each day, we will meet with leadership to update them on where we are in the inspection. We will brief them on the issues we have discovered and give them a chance to present additional documentation if needed. After the inspection is complete, AF/JAI will take all of the inspectors' observations on deficiencies, recommended improvement areas, strengths, and best practices and incorporate them into a draft report. This report will be sent back to the SJA for validation. This will give the office one last chance to present any additional documentation about deficiencies and observations. Once the SJA's comments are incorporated into the report, it is scored and sent to TJAG for final approval. The report is then sent to your office, MAJCOM/

SJA, and your wing commander. It is important to understand that the Article 6 Inspection process is not meant to be an expedited one. Process improvement can take time and the Article 6 Inspection does not end when the Part I inspectors depart your base. Instead, follow up occurs through the Part II Inspection giving your office the opportunity to demonstrate consistent performance over time in a deficient area.

CONCLUSION

We understand that you all are very concerned about the score you receive...everyone wants to do well, as they should. But please keep in mind, more important than your score is how you address the findings of your inspection. During the Part II Inspection, you will brief TJAG or DJAG on your progress with any deficiencies and recommended improvement areas as well as the status of your strengths and best practices. The purpose of the Article 6 Inspection process is to improve legal services across the JAG Corps, so while your score is important, improving your processes is the ultimate objective. We use a 100 point scoring system and offices have scored anywhere from 78 to 87. That is not a huge point spread, indicating the JAG Corps is performing pretty well, although some offices have a better handle on their programs than others. This is where the collaborative effect of CAPSIL is a huge benefit. This may allow you to avoid common issues. Similarly, it may help identify a base with ideas to help you improve one of your programs.

So what have we learned in past year and a half? The new inspection process is working well. Most offices are performing at a high level, although there are certain common pitfall areas. To perform well on your Part I Inspection, you need to do thorough self-inspections, document deficiencies, and follow up on your plan to fix them. Remember, just don't answer that you are in compliance, instead point us to the documentation that demonstrates compliance. Don't re-invent the wheel, look at CAPSIL and see what issues others are facing and borrow their good ideas and programs. Proper preparation will ensure your office's success on both parts of your Article 6 Inspection. 🦋



Divorce Decree

Uncontested Divorces:

What We Can Do For Our Clients

by Captain Bob J. Brady

For the past year, the [375th Air Mobility Wing Legal Office](#) at Scott Air Force Base, Illinois has undertaken a pilot program to provide Airmen representation for divorces in civilian courts through a TJAG-approved Expanded Legal Assistance Program (ELAP). Through our representation of 22 clients, including 12 who completed the divorce process in St. Clair County courts, we have learned a considerable amount about paralegal/JAG teaming, training, and practice in civilian courts.

All too often as JAGs, our ability to provide legal assistance is constrained by the limitations placed upon us by federal statute, state law, state supreme court rules, and service regulations. Traditionally, Air Force attorneys acting in an official capacity may not enter into an attorney-client relationship to represent

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a client in a court or administrative proceeding. (AFI 51-504, para. 1.2.9) In 1998, the Supreme Court of Illinois issued an order allowing active duty JAGs to appear in civil matters in state court. The court required written authorization from a senior legal officer before a JAG could appear on behalf of a client.

With this in mind, the plan advanced by AMC/JA was to take advantage of the paralegal/JAG teaming experience in will preparation and apply it to other areas where there was a pressing need for assistance. 375 AMW/JA chose uncontested divorce proceedings for this pilot program based on client interest and available training. In August 2011, TJAG granted Scott Air Force Base a provisional waiver to provide ELAP under AFI 51-504, *Legal Assistance, Notary and Preventive Law Programs*.

TRAINING

With the provisional waiver approved and the Illinois Supreme Court's order in hand, it was up to us to obtain the necessary training before even thinking about taking on our first client. Reservists played a key role in training our active duty personnel on Illinois divorce law. We were fortunate to get training from Captain Amy Morgan, 932 ARW/JA, who practices as a civilian divorce attorney in Illinois. She trained our team on the procedures for divorce in St. Clair County and provided specific resource materials for the circuit in which we were to practice. Capt Morgan was also available to field questions as they arose. In addition, the office conducted ethics training as it related to our new ELAP program. Attorneys and paralegals who did not attend the initial training received hands-on instruction from a trained JAG or paralegal to learn the process.

DETERMINING THE SCOPE OF THE PROGRAM

Pursuant to TJAG's direction, the program is confined to uncontested, simple divorces. We do not accept clients who have real property or child custody issues. We crafted the parameters of our program to mirror the assistance provided to pro se applicants by the Clerk of the St. Clair County courthouse, our local circuit court. As noted by the Illinois order, representation was limited to those "who might not otherwise be able to afford proper legal assistance."

Originally, the scope of the program did not have any grade limitations. Without such limits, the county bar association was concerned about the impact of our program on their client base. At approximately \$1500 per uncontested divorce filing, their concern was understandable. While we were already concentrating our efforts on representing

those who could not afford proper legal assistance, we refocused our program to only include Airmen in the ranks of E-1 to E-5 or their dependents. Since we limited the scope of our representation, we have received more support from the local county bar association and our first sergeants have a clearer understanding of the program.

We developed a system of checklists to streamline the process and ensure we accomplished the required documents prior to a court hearing.

TEAMING IN ACTION

Teaming between attorneys and paralegals is a critical component of this program, and frankly, we would not have been successful without it. Paralegals were trained to perform conflicts checks and conduct initial screenings to determine if legal assistance clients met the qualifications for the program. This gave the attorney greater insight as to what type of legal assistance meeting would follow—ELAP or traditional legal assistance. If a client provisionally qualified for ELAP, the attorney and paralegal would conduct an interview and gather basic information about the client's case. An important facet of this initial meeting was to explain the limited scope of representation agreement with the client. Practically, each client retained 375 AMW/JA as their "law firm," analogous to what occurs in private practice.

A paralegal would then explain to the client what forms were necessary for the client to complete and return to the office. The paralegal was responsible for reviewing those forms, preparing additional court documents, and ensuring all documents were signed by the client and his or her spouse. With this arrangement, any JAG could complete the initial intake interview with the client during normal legal assistance hours. The paralegals would then track contact with the client and conduct all necessary follow-up meetings. If the intake attorney became

unavailable to continue the representation, any JAG on the authorizing letter signed by AMC/JA (the senior legal officer in Illinois) could then review the documents and represent the client in court to complete the filing process.

On average our legal team dedicated approximately six to eight hours to every client, including both in and out of court time. We developed a system of checklists to streamline the process and ensure we accomplished the required documents prior to a court hearing. Paralegals prepared the documents, JAGs reviewed them, and when timing allowed for it, we all went down to court together, sometimes with multiple clients. Then, the best part came, representing real Airmen in court.

CAN WE EXPAND ELAP?

As with most great ideas, there's a catch—the rules that allow for such a program in Illinois are by no means common among all 50 states. Legal authority permitting judge advocates to provide legal counsel outside of their state of licensure is derived from [10 U.S.C. § 1044\(d\)](#), which explicitly authorizes attorneys providing “military legal assistance” to practice in any state irrespective of contrary state authority. It's been left up to the services (and the willingness of the states) to describe the limits of this “military legal assistance.” The Army (AR 27-3, para 3-7g) and Navy (JAG instruction 5800.7E, para. 0711) permit, but do not require, legal assistance attorneys to represent clients in civilian courts.

Some states welcome this venture with an expansive view of 10 U.S.C. § 1044(d), while others provide no special access for military legal assistance attorneys. For example, in North Carolina Army legal assistance attorneys are allowed to practice in their local courts through a Memorandum of Understanding (MOU) between Fort Bragg and the Cumberland County Bar Association. Other states, such as Washington, require legal assistance attorneys to complete a 15-hour continuing legal education (CLE) requirement before being permitted to practice in civil courts. California restricts representation of military members to issues arising from the Servicemembers Civil Relief Act (SCRA).

Unfortunately, other states share an even more restrictive view—not permitting any out-of-state legal assistance attorneys to practice in their courts. For JAGs to have access to civil courts nationwide, an application would need to be made to the highest courts in each state to recognize the federal statute's superseding authority over state licensure rules.

Once you've gone through court proceedings, it's a lot easier to advise a client face-to-face.

PROVIDING BETTER LEGAL ASSISTANCE

I thoroughly enjoyed our ELAP practice. First and foremost, it was the closest thing I have seen in the JAG Corps which mirrors paralegal and attorney teaming in the private sector. The sincere gratitude I received from my clients made this effort worthwhile. It also helped that the local bench fully supported our efforts and remarked on multiple occasions how pleased they were with our representation of our clients. I had more than one judge remind my clients how lucky they were to receive such comprehensive (and free) legal assistance.

The most important side-effect of ELAP has been the benefit to non-ELAP clients. Put simply, our ELAP participation has improved the legal assistance we provide other divorce clients. For example, when I have a walk-in legal assistance client who does not qualify for ELAP but wishes to file for divorce *pro se*, I can give much better information on Illinois law based on my experience in civil court. Once you've gone through court proceedings, it's a lot easier to advise a client face-to-face.

With the support of the local bench, we're already investigating what opportunities exist to expand this program to include other uncontested family law proceedings, such as name changes and domestic adoptions. While rolling out this program Air Force-wide is a long way from fruition, from the success of our program, I would fully endorse such a venture if the State Bar rules in your state allow you to do so. 🐦



A LEGAL ASSISTANCE ATTORNEY'S PRIMER ON ADOPTION LAW

by Captain Dave C. Blomgren

Adoption can be a complicated legal assistance topic, even for an experienced judge advocate. Once the word “adoption” comes out of your legal assistance client’s mouth, there may be a tendency to start thinking about referring the client elsewhere. However, our legal assistance instruction states that our attorneys will research and provide general information on state adoption laws and requirements, coordinate with appropriate adoption agencies, advise on questions derived from adoption documents, and provide guidance regarding the DoD’s reimbursement program.¹ This article will summarize the common adoption issues you should be aware of and will provide you with some practical guidance to pass along to your client.

¹ U.S. DEP’T OF AIR FORCE, INSTR. 51-504, LEGAL ASSISTANCE, NOTARY, AND PREVENTIVE LAW PROGRAMS, para. 1.4.6 (27 Oct. 2003).

Once the word “adoption” comes out of your legal assistance client’s mouth, there may be a tendency to start thinking about referring the client elsewhere.

ADOPTION GENERALLY

While there are differing methods of adopting a child, most are quite lengthy and expensive,² and all are emotional for everyone involved. One of the first steps prospective adoptive parents should make

² According to a 2010-2011 survey from *Adoptive Families*, the average cost for a domestic adoption is \$27,500 while the average cost for an international adoption is \$30,000.

The first step to any adoption must start with the termination of parental rights of the biological parents.

is to choose an adoption agency.³ This step is crucial, unless the prospective parents have the knowledge and ability to navigate the process independently. Next, whether it is a domestic or international adoption, parents must participate in a required home study. While the particular requirements of a home study vary from state to state, the general purpose is to evaluate a family's fitness to adopt. Typically, this is accomplished through paperwork, background checks, and a visit to the family's home by a social worker. Steps taken after the home study vary widely depending on the type of adoption and state of jurisdiction.⁴

DOMESTIC ADOPTION

In order to be eligible for federal funding, states must pass laws consistent with federal adoption laws. Consequently, while the law will vary from state to state, adoption law in the United States is driven primarily by federal legislation. Courts have long held that parents have a fundamental, constitutional right to enjoy a relationship with their children. Therefore, the first step to any adoption must start with the termination of parental rights of the biological parents. This process can occur either voluntarily or involuntarily.

VOLUNTARY TERMINATION OF PARENTAL RIGHTS

The laws for voluntary relinquishment of parental rights have an overarching consistency throughout the United States. However, clients should be aware of their state's law, as statutes differ in significant areas affecting those going through the adoption process. For instance, many states require the birth parents to appear with legal counsel before a judge to relinquish their rights, while others simply allow parents to execute a signed document with their adoption agency. Likewise, states differ on when

the termination can take effect, with some allowing it before the birth of the child and others requiring birth parents to wait several days after the birth before they can relinquish their rights.⁵ Most importantly, who must consent to the relinquishment of parental rights, and whether or not that consent can be revoked, varies based on state law. While the general rule is that living biological parents must relinquish their parental rights prior to a child being eligible for adoption, some states do not require an unwed father to consent (though all do require proper notice if paternity is established), particularly when it comes to step-parent adoption.⁶ Whether or not a parent can revoke his or her consent depends on the jurisdiction, with some allowing revocation months after consent.⁷

INVOLUNTARY TERMINATION OF PARENTAL RIGHTS

Provided due process requirements are met, courts can involuntarily terminate parental rights if warranted by the circumstances. Unlike custody battles between parents where the "best interest of the child" is the dominating factor in the court's decision, the rights of the parent are also considered when determining whether to transfer custody of children to non-biological parents. Courts are required to find, by clear and convincing evidence, that a parent is "unfit" before they can involuntarily extinguish parental rights.⁸ The standard used to find a parent unfit vary from state to state.⁹ However, a consistent theme is that parents who are unable to provide necessary care for their children, either intentionally or unintentionally, subject themselves to a termination of parental custody. More specifically, common

³ Lori L. Klockau, *A Primer on Adoption Law*, FAMILY ADVOCATE, Winter 2009 (Vol. 31, No. 3) at 21.

⁴ The U.S. Supreme Court has upheld statutes not requiring the consent of unwed fathers who have neither significantly supported nor established a relationship with the child. See *Quilloin v. Walcott*, 434 U.S. 246 (1978).

⁵ Klockau, *supra* note 5, at 21.

⁶ *Santosky v. Kramer*, 455 U.S. 745 (1982).

⁹ For a summary of state law on the topic, see U.S. Department of Health and Human Services, Child Welfare Information Gateway, *FOUNDATIONS FOR INVOLUNTARY TERMINATION OF PARENTAL RIGHTS* (Feb. 2010), available at www.childwelfare.gov/systemwide/laws_policies/statutes/groundtermin.pdf

³ A listing of accredited agencies is maintained by the U.S. Department of State, available at http://adoption.state.gov/hague_convention/agency_accreditation/agency_search.php

⁴ It should be noted that an adoption of a child who is a member of a Native American tribe, or eligible to be, falls under the Indian Child Welfare Act of 1978, and has unique rules that must be followed that won't be discussed in this article.

In fiscal year 2011, Americans adopted 9,319 children from 103 different countries.

grounds include child abandonment or neglect, severe child abuse or mistreatment, long-term mental illness of the parent, or long-term confinement. Additionally, federal law requires state agencies to file petitions to terminate parental rights when certain conditions exist, the most notable being if a child has been in foster care for 15 of the most recent 22 months.¹⁰



BACKGROUND INFORMATION AVAILABLE TO ADOPTIVE PARENTS

As a parent is going through a domestic adoption, questions will undoubtedly arise regarding how much access to background information they'll have, as well as what contact, if any, the birth parents will have with the child post-adoption. Answers will depend on the desires of the parties involved coupled with state law. Generally, courts will seal adoption records, including original birth certificates. Most states will allow non-identifying information, such as medical and social background, to be provided to the adoptive parents, with identifying information only available with mutual

consent of the parties.¹¹ For parents interested in an open adoption (or one in which the child has the potential to develop a future relationship with his/her birth parents), agreements can be written to clarify the expectations of post-adoption contact by the birth parents, to include visitation rights. The enforceability of such agreements varies by jurisdiction.¹²

INTERNATIONAL ADOPTIONS

In fiscal year 2011, Americans adopted 9,319 children from 103 different countries.¹³ With approximately one-third of all adoptions in the U.S. involving foreign-born children, chances are good that a legal assistance client may come to your office seeking advice on international adoption. The process of an international adoption will vary based on the country where the child is born. The first step in international adoption is determining whether a prospective parent is eligible to adopt a child from their country of choice. Many nations have strict criteria for adoptive parents, including restrictions related to age, marriage, and fertility.

The second step is determining whether or not the country from which they'll be adopting is a member of the [Hague Convention](#).¹⁴ All adoptions between the United States and other nations that have joined the Hague Convention must follow the terms of that international law. The purpose of the Convention is to provide transparency in the process, thereby strengthening the protections of children, birth parents, and adoptive parents. Critics of the Hague Convention argue that the strict guidelines have prompted the United States to freeze adoptions from certain countries and have forced some adoption

¹¹ Klockau, *supra* note 5, at 18.

¹² *Id.* at 17.

¹³ U.S. Department of State, FY 2011 ANNUAL REPORT ON INTERCOUNTRY ADOPTION (Nov. 2011), available at http://adoption.state.gov/content/pdf/fy2011_annual_report.pdf

¹⁴ Formally known as The Hague Convention on the Protection of Children and Co-operation in Respect of Inter-Country Adoption. The Convention entered into force for the United States in April 2008.

¹⁰ The Adoption and Safe Families Act of 1997 § 675(5)(E), Pub. L. No. 105-89, 111 Stat. 2115 (1997).

Like many legal matters, being in the military adds some unique complexities to the adoption process.

programs to shut down, leaving children orphaned. Critics cite the fact that international adoptions in the United States have declined over 60% since 2004, when Americans adopted over 24,000 children from foreign countries. However, in a time when adoption fraud and child trafficking is unfortunately extensive, the Hague Convention is a necessity. The decline in international adoption may also be attributed to a number of factors, including the depressed American economy and foreign nations placing a greater emphasis on domestic adoption.

When adopting a child from a non-Hague Convention country, the most significant differences a parent will face will be related to the paperwork filed with the U.S. government for immigration purposes. Hague Convention adoptions will finalize in the foreign country, while non-Hague Convention adoptions may require finalization in a U.S. state court.¹⁵ Once a child's adoption is finalized, either domestically or abroad, they automatically naturalize into the United States, provided that they reside in the U.S. and at least one parent is a U.S. citizen.¹⁶ In 2008, federal legislation waived the requirement for children of servicemembers to be physically present in the U.S. if their parent(s) are serving abroad.¹⁷

MILITARY SPECIFIC ISSUES

Like many legal matters, being in the military adds some unique complexities to the adoption process. With frequent moves worldwide and deployments, many prospective adoptive parents may question whether they are even eligible to adopt while in the military. Although it's imperative that adoption agencies are made aware of the potential for a permanent change of station (PCS) or deployments, those wishing to adopt should not let their military affiliation stop them, as there are methods in place to assist with these complexities.

For those stationed overseas, U.S. adoption agencies work abroad and specialize in the unique issues that arise while adopting OCONUS. Families facing a PCS should anticipate a few extra steps in their process if they move before their adoption completes. First of all, they should expect another visit from a social worker, as any major life change requires an amendment to a home study. Secondly, if adopting domestically and moving to a new state, they will have to work through their adoption agency to receive prior approval to transfer their child into a new receiving state, as required by the Interstate Compact on the Placement of Children (ICPC). The ICPC is a uniform law enacted by all 50 states, the District of Columbia, and the U.S. Virgin Islands that establishes procedures for ensuring the safe placement of children that will be adopted in a state outside their birth state. ICPC also recognizes the placement of a child from the U.S. into the family of a servicemember stationed OCONUS. Parents stationed overseas who adopt a child that requires finalization in state court will most likely accomplish that in their state of legal residency. However, they should check with their stateside court to determine if they can appear via video-teleconference.¹⁸ Prospective adoption parents should also inform their chain of command on their adoption process. A dual military parent or a single airman who has recently adopted a child and faces a remote assignment may receive a six-month deferment.¹⁹

Adopting while in the military certainly has its challenges, but it also has advantages. Chiefly, paid time off and the availability of immediate and comprehensive healthcare coverage. Unlike most civilian employers, the Air Force allows unit commanders to authorize up to 21 days of authorized absence (permissive TDY) in conjunction with adoption.²⁰

¹⁵ It should be noted that some parents choose (or are forced to per state law) to "re-adopt" children in U.S. state courts even if they finalized abroad.

¹⁶ Child Citizenship Act § 320, 8 U.S.C. § 1431 (2000).

¹⁷ National Defense Authorization Act for Fiscal Year 2008 § 674, 8 U.S.C. § 1430 (2008).

¹⁸ The National Center for State Courts surveyed the use of video conferences in state courts across the country in September 2010. A compiled list of states and the corresponding statutes that allow the use of video conferences can be found at <http://www.ncsc.org/services-and-experts/areas-of-expertise/technology/ncsc-video-conferencing-survey.aspx>

¹⁹ U.S. DEP'T OF AIR FORCE, INSTR. 36-2110, ASSIGNMENTS, paragraph 2.19.2 (22 Sep. 2009).

²⁰ U.S. DEP'T OF AIR FORCE, INSTR. 36-3003, MILITARY LEAVE PROGRAM, Table 7, Rule 47 (26 Oct.

Given the legal complexity of certain adoptions, it is no wonder there are attorneys that specialize in this area of the law...Even if a referral is appropriate, our clients should have more tools in their toolbox by the time they walk out your legal assistance office.

In addition, adopted children are immediately granted access to military healthcare. In order to be seen as a patient, adopted children (or children placed into homes pending adoption) need to first be enrolled into DEERS. The sponsor must provide a certified copy of their child's birth certificate, as well as the record of adoption or letter of placement by the adoption agency.²¹ As long as another family member is enrolled in TRICARE Prime, adopted children are automatically covered for 60 days from the date of adoption or placement, and subsequent enrollment in TRICARE must be established within that timeframe for continued coverage.

MONEY

The most common client you will see regarding adoption will be seeking information about reimbursement. You should be familiar with two programs that may apply to them. First, the DoD will reimburse up to \$2,000 of "qualifying adoption expenses" (per child under the age of 18) to servicemembers serving on continuous active duty for at least 180 days, up to \$5,000 per calendar year.²² In order to qualify for this program, the adoption must be finalized while the member is on active duty, and must be submitted within one year of the finalized adoption. Along with a DD Form 2675, the member must submit to DFAS certified copies of the adoption decree, substantiating receipts of expenses, and in the case of international adoptions, proof of U.S. citizenship of the child. If your client's dependent spouse is employed outside of the home, you should advise him or her to determine whether their company likewise has adoption grants or incentives.

2009).

²¹ In some cases, the parents will not have access to the birth certificate of their foreign-born child. If this is the case, the sponsor should provide MPS a letter from the adoption agency or attorney stating why they are not privy to the birth certificate.

²² 10 U.S.C. §1052 (2006) and DoDI 1341.09, DoD ADOPTION REIMBURSEMENT POLICY (Nov. 2007).

Secondly, your client may be eligible to claim the adoption tax credit on their federal tax return. For tax year 2011, the credit of up to \$13,360 per child was the largest refundable credit available to individual taxpayers. In January 2013, Congress made permanent the adoption tax credit. For tax years 2012 and 2013, the maximum credit per adopted child is \$12,650 and \$12,970, respectively. However, it is now subject to modified adjusted gross income limits. Moreover, all current and future credits will be non-refundable (meaning any unused credit must be carried over and applied to future returns over a 5 year period.) Depending on the type of adoption, the adoption tax credit may be claimed before the adoption is finalized. Therefore, clients should consider amending previous tax returns if they were eligible for a credit they did not claim. A thorough analysis of the Internal Revenue Service's regulations on when the credit can be claimed, how much can be claimed, and what supporting documentation is required, is crucial.

CONCLUSION

Given the legal complexity of certain adoptions, it is no wonder there are attorneys that specialize in this area of the law. Our legal assistance program is not intended to provide comprehensive advice to those contemplating or going through adoption. However, a general understanding of the state and federal laws discussed above, and a specific understanding of the DoD rules and regulations pertaining to adoption, can be of great help to our clients. Even if a referral is appropriate, our clients should have more tools in their toolbox by the time they walk out your legal assistance office. 🐦



Students in the Combat Airman Skills Training (CAST); photo by Staff Sergeant Robert Sizelove

CAREER BROADENING SERIES

USAF Expeditionary Center Legal Instruction Team

by Major Ryan N. Hoback and Technical Sergeant Mark T. Lathinghouse

You can feel your heart pounding against your chest. You become acutely aware that you can hear your quickened breaths and that adrenaline is coursing through your body. Suddenly your training takes over. You can clearly hear the instructor from your Combat Airman Skills Training (CAST) course in your head. “Scan for threats...scan for threats...scan for threats!” Someone yells “GUN!” Are you ready and prepared to act?

Many JAGs and paralegals have attended, or at least know about, the CAST course conducted at Joint

Base McGuire-Dix-Lakehurst, NJ, along with the judge advocate specific deployment training course which is conducted in conjunction with CAST. The [USAF Expeditionary Center](#) (EC) at the Joint Base reports to Air Mobility Command, but works for and is responsible to all MAJCOMs for executing assigned advanced expeditionary skills training, incorporating lessons learned, tactics development, and air mobility capability. The responsibility for supporting the training of over 24,000 students annually on how to build “Airpower...from the ground up—from the Flightline to the Frontline” is successfully met by a single JAG/paralegal instruction team.

Our hope is, of course, that none of our students will ever face the life and death situations that the EC's CAST and CAST JA courses train you to handle.

INSTRUCTOR TRAINING

Before the EC permitted us to assume instructor duties, we had to successfully complete an Academic Instructor Course. This course involved an online portion focused on instructor methodology requirements, concluded by a comprehensive examination. Then we had a one-week resident portion which focused on lesson planning, interpersonal skills, and activity-based learning. As part of the resident portion of the course, we were required to develop, personalize, and deliver two graded presentations focused on our area of subject matter expertise. Even after obtaining our instructor qualifications, we must deliver two additional presentations each year which are evaluated by members of the EC staff to ensure we have maintained our proficiency. Instructing is our primary duty at the Expeditionary Center.

As instructors, we take very seriously our obligation to prepare students for any host of situations they may face down range such as the ever growing “green-on-blue” or insider threat. Our hope is, of course, that none of our students will ever face the life and death situations that the EC's CAST and CAST JA courses train you to handle. Situations where your familiarity and proficiency with your weapon(s), along your ability to exhibit fundamentally sound tactics, techniques, and procedures, will be put to the test. However, should that day come, when called upon to make decisions in only fractions of a second, we know that our students will be ready and prepared to act.

COURSES

In addition to the training we provide in CAST and CAST JA, our instructor team supports a host of other courses. Some of these courses include Military Working Dog Operations Course, AMC Phoenix Raven Qualification Course, AFCENT Fly Away Security Team (FAST), Contingency Response Mission Orientation (CR-MOC) Course, Office

of Special Investigations Deployment courses, and Advanced Logistics Readiness Officers Course (ALROC)...just to name a few. Beyond providing our bread and butter instruction regarding rules of engagement and rules for the use of force, we expand students' horizons so they will recognize other legal considerations they may face during a deployment.

TEAMWORK

Our teamwork as a two-person instruction team maximizes our support capability to the EC and the Air Force at large for the multitude of courses just mentioned. Technical Sergeant Mark Lathinghouse focuses on provisions of the rules of engagement training classes. Major Ryan Hoback's primary instruction focus is on broader deployed legal considerations. However, this is not simply a tactic of “divide and conquer.” Rather, each of us is independently capable of teaching each other's classes to ensure continuous coverage and routinely observe each other's presentations to offer suggestions for teaching improvement and enhancement.

Similarly, with regard to CAST JA, Maj Hoback serves as the course director and attends to all the technical and administrative needs a course of this nature demands. TSgt Lathinghouse has been empowered to create our course schedule, secures the attendance and travel of the many guest lecturers the course requires, and coordinates all weapon needs for our signature judgment-based simunition training day.

Occasionally, we receive requests from the field to enhance the training we provide at CAST JA. For example, we were recently asked to incorporate integrated base defense training as some of our Rule of Law JAGs and paralegals are finding themselves tasked with guard duties at remote forward operating bases (FOBs). Upon receiving this request, our instruction team immediately leapt into action to deliver this training at the next CAST JA course, a

In the end, whether it is a training course or field exercise, our team remains committed to helping other Airmen not only survive, but excel in high-stress tactical environments.

mere 21 days away. TSgt Lathinghouse coordinated additional weapons familiarization training for the M-240B and other crew-mounted weapons. Maj Hoback began working with our Special Weapons and Tactics Instructors to develop scenarios to incorporate into our judgment based simulation training day. Without a unified team effort, we would never have been able to rapidly turn an urgent request into on-target training for deployers.

BEYOND THE CLASSROOM

One of the benefits of instructor duty at the Expeditionary Center is that a large part of what we do is not confined to a classroom or even an office for that matter. Take for example the role we play in the USAF Chief of Staff-directed EAGLE FLAG exercise. EAGLE FLAG is designed for developing, testing, and rehearsing the expeditionary combat support library of capabilities. Traditionally an air base opening exercise, it has evolved into a proof of concept and mission rehearsal for Joint Task Force-Port Opening, aero-medical evacuation operations, defense support to civil authorities, humanitarian operations, and other contingencies faced by our nations and its allies.

As imbedded cadre for these exercises, we are involved in them from “cradle to grave.” During the planning stages, we provide realistic contemporary legal injects to incorporate into a master scenario events list (MSEL) which will test all exercise participants, not just the deployed JAG or commander. We draw upon our own diverse experiences to ensure we are capturing the broad spectrum of issues exercise participants may face one day.

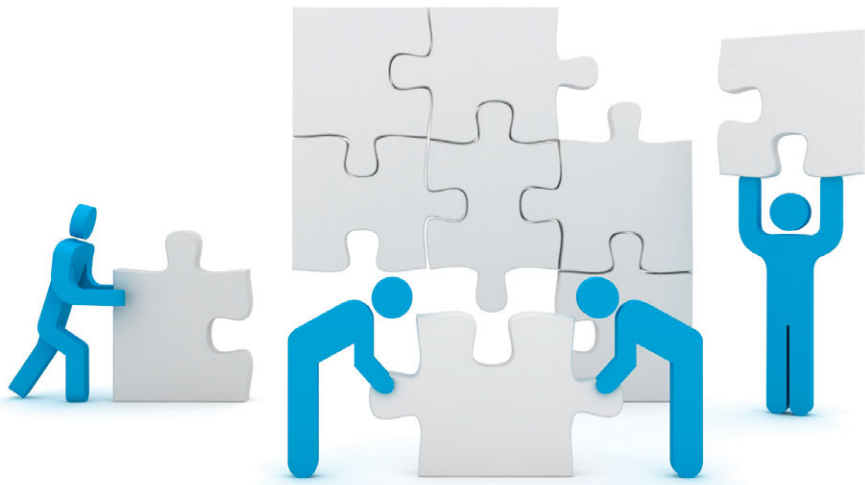
While the exercise is underway we act as observer controllers to monitor the participants’ handling of the legal challenges presented and, where necessary, provide immediate corrective feedback to ensure the exercise is value-added to their overall training.

Working as a team we are able to be physically present in multiple locations. Oftentimes one of us is present at the location of the legal inject (e.g., at the site of a customs violation) while the other is present with the deployed JAG to observe how he/she is notified of the legal challenge and how he/she immediately begins to work the issue. As a result of our ability to “compare notes” during and after a legal inject, we are able to see the issue from a colorful, three-dimensional perspective that enhances our ability to dissect the performance of the tested participant(s).

Finally, at the conclusion of the exercise, we collectively deliver a comprehensive after-action report that addresses participants’ strengths and weaknesses along with suggested improvement actions. This after-action report is slowly built by both of us as the exercise unfolds and we continually challenge our own assessments and recommendations. The synergy we build from one another is evident in the quality of the final product which is routinely touted by exercise organizers as one of the most thorough and thoughtful after-action reports any functional area submits.

CONCLUSION

In the end, whether it is a training course or field exercise, our team remains committed to helping other Airmen not only survive, but excel in high-stress tactical environments. As an increasing number of JAGs and paralegals can attest, the training the EC provides has proved invaluable to overcoming the psychological and physiological reactions to combat situations. We consider ourselves lucky to have been selected as the sole legal component of the hundreds of EC instructors charged with providing expeditionary combat support capabilities to combatant commanders in support of their strategic objectives. We also are confident our duty illustrates a pretty good example of JAG-paralegal teaming! 🦋



UNDIVIDING THE DIVISIONS:

Breaking Down Paralegal Stovepipes for Effective Teaming

by Technical Sergeant Jay L. Leighton

I vividly remember sitting at my desk, watching the seconds snake slowly by. At the time I was preoccupied with anything and everything other than work. There were plans for the weekend running through my head: barbecuing on Saturday, preparations to be made for an upcoming birthday celebration, along with plans for a party during Sunday's big game. In addition, the heat wave had finally broken and the sun was shining on a cool fall day. The *last* place I, or anyone, wanted to be was in the office on a Friday afternoon. I grabbed the set of master keys and proceeded to wander the halls locking doors, securing file cabinets, and shutting off lights. I noticed that the light from the SJA's office was still shining, but the front desk was dark. General Law had cut loose for the day and Adverse Actions was silent. After securing the main offices, I walked down the hall to Military Justice.

If you saw them at 1500 on this particular Friday, you may have thought it was bright and early Monday morning. The entire team was hard at work. After swapping a few pleasantries, I discovered they were preparing for a motions hearing; the trial was scheduled to kick off on Monday morning. During the conversation, I could not help but stare at the

clock glaring at me from its perch on the wall. I had just told my wife I would be home in twenty minutes and did not want to be late. I hastily wished my co-workers the best of luck, asked if they needed me to lock any of the doors on their side of the building, and quickly headed back to return the keys and go home. My final fleeting thought was a simple one, "What a terrible time to be in Justice."

I have purposely failed to mention where this, one of many similar incidents (I'm sad to say), took place. When all is said and done, the location is irrelevant. Think back to your own offices, your own experiences, and I believe you will find occurrences like this to be common. While I cannot and will not speak for everyone, I think it is safe to say that the majority of us get wrapped up in labels. She is an attorney. He is "just" a paralegal. He works Justice. She works General Law. "They" are getting ready for court while "they" are going home early on a Friday. I think we have a tendency to lose sight of the *we*.

As we go about labeling everything and anything, we find ourselves trapped. We become stuck in our comfortable routines and we try not to look outside our comfort zone. How many times have you heard

The unfortunate fact is that it appears we have become divided by our own divisions.

someone use the phrase, “Stay within your lane?” While I agree we all have our own jobs to accomplish, I feel it is appropriate to truly evaluate what *our* lane might actually be. In order to glean honest insight, we must be willing to face the truth: the unfortunate fact is that it appears we have become divided by our own divisions.

TEAM ONE! TEAM ALL?

We should all be aware by now that TJAG has established teaming as one of our primary principles of foundational leadership. Yet, while our focus has been to ensure attorney-paralegal teaming, we must not lose sight of legal offices teaming in all facets of the mission. To understand the issue, let’s examine basic definitions. Merriam-Webster defines two words as follows:

- *Division*: the act, process, or an instance of separating or keeping apart.
- *Divided*: directed or moved toward conflicting interests, states, or objects; separated by distance.

Right from the gate we have set ourselves up for struggle. By drawing internal boundary lines, we potentially cause internal strife. It is easy to say, and we often do, that whatever issue comes up is not my problem. This particular problem is not something my division is responsible for, so it is not something I have to worry about. Yet in the end, we are only causing problems for the team as a whole. On June 16, 1858, Abraham Lincoln delivered what would later become known as his “House Divided” speech. In the address, he quoted Mark 3:25 which states, “If a house be divided against itself, that house cannot stand.” This concept applies to our legal offices. If we are not *all* working together, we will never succeed as a whole, as a team.

I am not suggesting that everyone should be involved in everyone else’s business. Separation is often integral to what we do and the idea is not necessarily a

bad thing if applied in the appropriate context. In certain instances we need to ensure our processes remain transparent and independent of themselves. For example, those responsible for cases in Military Justice should be keeping case information out of public view. I would not expect someone outside of Military Justice to pick up the case file and start involving themselves just for something to do. Yet, sometimes we go too far in segregating the various sections from each other. Aiding Military Justice in courtroom preparation, preparing member folders, assisting in photocopies, picking up witnesses, making food runs are all examples of ways those outside the Justice division can aid their coworkers. This is a much better approach than shutting off the lights, locking the doors, and abandoning our team members to fend for themselves. And, the examples provided transcend rank or position.

Additionally, we should keep in mind that this issue is not always about justice. I have had the opportunity to hear Lieutenant General Harding speak to the AFJAGS’s Will Preparation for Paralegal’s Course on several occasions recently. To each class, he points out that there has been some resistance or lack of implementation in having paralegals drafting wills. TJAG has cited the reason as although there are offices with trained 7-level paralegals, those individuals are not drafting wills because they are assigned to Military Justice and not to General or Civil Law. This is a prime example of divisions dividing offices and it is an unprecedented approach. As TJAG pointed out time and time again, this is not a stance attorneys take when it comes to providing legal assistance. Every attorney in the office is required and expected to do their part. The same should be expected of every staff member, regardless of rank or position, and in some cases, regardless of task. Ask yourself: if you can do it, what is the harm in offering to help?

WHOSE SIDE ARE WE ON?

I believe there are a number of reasons why we do not get involved in things outside of our comfort

Together we have a mission, and that mission will not be accomplished without the complete effort of all involved.

zone. Reasons might include fear of making mistakes on products that are not our own, lack of desire to do work that is not our responsibility, personality conflicts, and even differences in goals and opinions. This list is not all inclusive, but it highlights some of the issues with dividing ourselves. We need to resolve fear and self interest in order to fully benefit and participate in the team mentality.

I am glad that our Corps has included teaming as a principle of leadership; I am glad that we have placed an increased focus on the concept. Yet I often find myself wondering why. Not because I disagree with the concept of teaming, quite the opposite actually. It just seems that in a perfect world, teaming would happen without prompting; without the need to focus on it and evaluate it. I have never understood the possibility of teaming *not* existing within our offices. It is simply my opinion that an office cannot function if all members are not working toward the same goal. Attorneys need paralegals, paralegals need attorneys, attorneys need other attorneys, and paralegals need other paralegals.

CONCLUSION

Together we have a mission, and that mission will not be accomplished without the complete effort of all involved. We are dependent on each other to accomplish the mission. The question should never be, “Are we teaming?” I say this only because we should *always* be teaming. If the answer to the previous question is “No,” we are not accomplishing the mission to the best of our ability. We are, in essence, fundamentally failing ourselves.

In closing, I am reminded of a scene from the Disney movie, *Miracle*. It is a biographical film about the 1980 U.S. Men’s Hockey Team headed by the famed Hal Brooks. After playing a game in which the team demonstrated a lackluster performance, Coach Brooks (portrayed by Kurt Russell) has his team practice late into the night. In a brutal exercise, he has the men skating wind sprints up and down

the ice. During this practice, the coach makes several key statements. First, he tells them that when they put on their jersey they represent both themselves and their teammates. He also reminds them that the name on the front of their jersey, USA, is much more important than their own name on the back. He does not end the practice until one team member volunteers that they play for the United States of America. The message was received, and the players realized just what team they were on.

We need to realize who our team is. We all wear the uniforms of the United States Air Force, representing the United States of America. On a smaller scale, each one of us represents the Judge Advocate General’s Corps, in everything we do. We sometimes lose sight of the bigger picture. I would encourage you, on a regular basis, to walk outside your comfort zone. You do not have to barrel headfirst into other’s direct lanes, but walk beside them. Lend a hand to those whose duty requires a bit more sacrifice than yours on a particular day. Do not be afraid to show a little unity in working with other divisions. 🦋

TEAM

T – Together
E – Everyone
A – Achieves
M – More

ATTORNEY-PARALEGAL TEAMING

MAGISTRATE COURT

by Airman First Class Catherine L. Westervelt, in collaboration with Captain Robert C. Burlison

Six defendants stand in a line before a chest-high mahogany bar looking up at the robed figure above them. Behind the magistrate judge hangs the seal of the United States District Court on the wall, a sign that the motley collection of misdemeanors and petty offenses set for trial that day are not so petty to the man in the robe. As the magistrate judge reads the defendants their rights and prepares to arraign them, the attorney turns to the paralegal behind him. “Airman Westervelt, pass me those initial appearance files please.” “Yes, Sir,” I reply, as I hand the files to him. Captain Burlison takes the files to the podium as the rights advisement finishes, opens a file, and calls the first case.

As a first term airman and a paralegal, I found myself immediately inducted into the process of teaming the moment I stepped into the Magistrate Court program. Teaming is so much more than anyone can explain. It’s all about learning to use individual skill sets and overcoming personality differences and communication barriers. The end result is a legal effect that is greater than the sum of the paralegal and the attorney’s individual efforts. Simply put, teaming is synergy, and it is vital to the Magistrate Court program. Magistrate Court is an opportunity for judge advocates and paralegals to team across all four foundational paralegal skill sets: (1) legal research, (2) legal writing, (3) interviewing, and (4) discovery management.

LEGAL RESEARCH

Our process begins when a civilian breaks the law on Barksdale Air Force Base. For example, let’s say Mr. Smith, a civilian federal employee, decides to get drunk on his lunch break then steal some DVDs from the Base Exchange (BX). When security tells him to stop, he instead runs and is eventually caught in his car with the stolen property and drunk. He has an open container of alcohol next to him and a switchblade knife in his pocket. He blows a 0.25 on the breathalyzer and provides an expired license. Mr. Smith is in trouble. He is issued a DD Form 1805, *Violation Notice*, for each crime and a summons to appear in federal magistrate court.



Security Forces escort a handcuffed individual; photo by Senior Airman Alexandra Sandoval

The next day, Capt Burlison reads the base blotter, finds Mr. Smith's entry, and forwards me the information. That's where my job starts. I dig into the process of figuring out what crimes we can charge. That is where legal research plays a key role. I begin with the offense classification table which lists the common violations we see and the statute for each crime. I know that driving drunk and stealing from the BX are illegal, and I locate the statutes on the table in short order. The open container statute is also there, but there isn't anything on expired licenses. Before I jump down the Westlaw rabbit hole, I take the case file to Capt Burlison. We sit down at the computer and dive into our Westlaw search together, Capt Burlison pointing out the best search strings and the best places to look. It does not take me long to find a statute on point. I am not done yet. Issue-spotting is a critical part of the legal research process, and Capt Burlison reminds me that there might be more to find here. What about that switchblade knife Mr. Smith had in his pocket? What about his flight from the security officials? It turns out that both of these are crimes in Louisiana and I soon find what Capt Burlison needs.

LEGAL WRITING

After I have finished "charge spotting," I draft a Case Summary and a Bill of Information. The Case Summary is a one page summary of the facts and the Bill of Information is the charging document. After I have both, I give the file to Capt Burlison for review. If corrections need to be made, we will sit down and talk about what needs to be fixed and how I can make it better next time. After we have addressed any issue that came up, the Bill of Information is forwarded to the court clerk for filing. When I started out drafting Bills of Information and Case Summaries, the hardest part for me was the legal language and understanding what Capt Burlison needs when he is in court. Through trial and error and an open line of feedback from the attorney, I have learned the jargon and become familiar and confident with the legal terms of art.

INTERVIEWING

Most cases end in a guilty plea. Less frequently, we will go to trial. This is where the paralegal's interviewing skills can be a crucial force multiplier. We might have a dozen witnesses who can tell us that

Mr. Smith stole the DVDs and ran off, but what did each witness actually see and how credible are they? Enter the paralegal. Working independently, I can contact the witnesses and determine if the case is a winner or a loser before the attorney even sees the Bill of Information. The attorney can then decide whether to conduct follow-up interviews or simply proceed with the information obtained by the paralegal. Good interviewing requires good people skills. The attorney and paralegal can work together to develop those skills.

DISCOVERY MANAGEMENT

The paralegal can also be a crucial force multiplier in discovery management. Just like the interviewing process, paralegals can independently gather and manage evidence. For example, security camera footage needs to be saved before it is recorded over and recovered, and stolen items will eventually need to be taken into court while maintaining the chain of custody. At some point, the evidence needs to be handed over to the defense counsel for review. At the end of it all, AAFES is going to want its stolen property back, which means Security Forces is going to need authorization from the legal office to log it out of the evidence locker and return it. All this requires good discovery management practices and a good attorney-paralegal team to come up with a plan to organize and track their discovery.

CONCLUSION

We have streamlined our Magistrate Court process through effective teaming. It is trust between the attorney and paralegal that have allowed us to get the job done efficiently—the attorney's trust in the paralegal's ability to get the job done right and the paralegal's trust in the attorney to provide the right support. Individual skill sets are coordinated, not assigned, so that the attorney and the paralegal can conquer the tasks they are individually strongest at and combine efforts on the rest. Teaming does not mean the paralegal needs to become an attorney. However, they do need to know what the attorney will need to know so they can arm them with the tools they will need to succeed in court. The same holds true for the attorney—if they do not understand the paralegal's needs, they cannot help them succeed. The pinnacle of teaming is the mastery of this dichotomy. ↘



Working with the warden of a provincial prison; photo contributed by Captain Christopher L. Sanders

RULE OF LAW FIELD FORCE AFGHANISTAN

by Captain Christopher L. Sanders

The effective development of rule of law is critical to accomplishing our mission in Afghanistan

- General David Petraeus¹

On 20 September, 1994, an Afghan family traveling from Herat to Kandahar was stopped at a checkpoint along their route. Before murdering the family and burning their bodies, the mujahideen manning the checkpoint raped the girls and molested the boys. In response to this atrocity, Mullah Omar began visiting mosques where he successfully solicited support for his young student-centered movement.²

¹ Memorandum from COMISAF to members of the NATO International Security Force (3 July 2011).

² KAMAL MATINUDDIN, *THE TALIBAN PHENOMENON, AFGHANISTAN 1994-1997* 25-26 (1999).

This emerging group, calling themselves the “Taliban,” were able to win over the local population, in large part, by promising to rid the country of the corrupt warlords who had filled the post-Cold War vacuum and to provide justice to the citizens. This justice included a ruthless form of Sharia law. The fact that the citizens welcomed this reveals just how desperate they were for a system resembling a nation ruled by laws and not men (or warlords). As Seth Jones pointed out in his book, *In The Graveyard of Empires*, “The group promoted itself as a new force for honesty and unity and many Afghans, particularly Pashtuns, saw the Taliban as the desperately needed balm of peace and stability.”³

The Rule of Law mission in Afghanistan aims to establish a stable system of laws within that country. From May 2011 to November 2011, I had the opportunity to serve with the Rule of Law Field

³ SETH G. JONES, *IN THE GRAVEYARD OF EMPIRE* 60 (2010).

The biggest challenge in working with the Afghan government officials was the corruption that seemed to permeate every government office, from top to bottom.

Force-Afghanistan (ROLFF-A). Attached to the Army's 3/4 Cavalry Squadron from the 25th Infantry Division, I was based out of forward operating base (FOB) Shinwar, in the eastern part of Nangarhar, approximately 12 miles from the infamous Afghanistan-Pakistan border. The mission was to work with local and district level Afghan officials to support and assist them in establishing and legitimizing a formal Afghan legal system. The longer I was in country, the more I realized that this is exactly what the typical Afghans longed for—a system that was fair and predictable. In this regard, they are like citizens of every country in the world. Sarah Chayes⁴ said it best in her insightful book, *The Punishment of Virtue*:

From my discussions with these elders and with countless others, I have found that Afghans know precisely what democracy is—even if they might not be able to define the term. And they are crying out for it. They want from their government what most Americans and Europeans want from theirs; roads they can drive on, schools for their kids, doctors with certified qualifications so their prescriptions don't poison people, a minimum of public accountability, and security: law

⁴ Sarah Chayes covered the initial invasion of Afghanistan as an NPR correspondent. She left NPR in 2002 and moved to Afghanistan to run a nongovernmental aid organization, Afghans for Civil Society. She has lived and worked in Afghanistan since 2001 and served in various rolls with NGOs and NATO forces. She was a special advisor to General Stanley McChrystal while he was serving as the Commander of ISAF forces in Afghanistan.

and order... Under the Taliban there was a system: there was law and order.⁵



Captain Sanders with a company commander before heading out on a mission

Most of my time with ROLFF-A was spent working with officials in four Key Terrain Districts (KTDs). The mission required frequent trips with Army platoons who took me to Key Leader Engagements (KLEs) with Afghan officials. I had the honor of being the first JAG to take the rule of law mission to these districts. Combined, these four KTDs had not held a public trial since the commencement of Operation Enduring Freedom (OEF). Almost a decade after

the initial invasion of Afghanistan, I was the first attorney from coalition forces with whom these Afghan judicial officials consistently worked. The Taliban were providing local justice for the citizens of these four districts via their “shadow courts.” Since 2001, the Taliban have been able to create an “institutionalized” judiciary system, generally considered by Afghans to be independent and free from corrupt influences. Chief judges in the districts answer to provincial judicial shuras who are subordinate to a judicial shura in Pakistan.⁶

The biggest challenge in working with the Afghan government officials was the corruption that seemed to permeate every government office, from top to bottom. Not surprisingly, Transparency International ranked Afghanistan as the third most corrupt country

⁵ SARAH CHAYES, *THE PUNISHMENT OF VIRTUE* 192-193 (2006).

⁶ Antonio Giustozzi, *Hearts, Minds, and the Barrel of a Gun: The Taliban's Shadow Government*, NDU Press (Mar. 2012), http://cco.dodlive.mil/files/2014/02/prism71-80_giustozzi.pdf

***Public trials provided a unique opportunity
for local Afghans to see their government
working for them.***

in the world in 2011.⁷ This widespread corruption was coupled with very complex tribal relationships to create a culture not naturally amenable to rule of law. An example of how corruption and deeply-rooted tribal loyalties intersected was demonstrated in one of the biggest problems in my area of operation: land disputes. Two tribes would fight over a large piece of land. From the FOB, we would hear small arms fire from fighting positions that each faction constructed around the land.

One of the most interesting aspects to conflicts like this was the fact that the land being fought over was owned by the Government of the Islamic Republic of Afghanistan (GIRoA). Despite the exhaustive efforts of our forces, the GIRoA officials would simply not get involved in the land disputes. They had the means and the support to put an end to these disputes. However, when confronted, the blame-game would start. The police chief would blame the sub-governor, who would blame the police chief or the district governor, each accusing the other of being corrupt. What we eventually discovered was that both tribes were paying all of the relevant GIRoA officials at the district and provincial levels to stay out of the land dispute. So the pointless disputes were fueled by thousands of years of tribal history and modern day corruption.

Corruption and instability are certainly not new to Afghanistan; Rory Stewart has pointed out the fact that “every Afghan ruler in the 20th century was assassinated, lynched or deposed...There is almost no economic activity in the country, aside from international aid and the production of illegal narcotics.”⁸ This bleak history has created a culture where corruption and instability is the norm.

Despite these challenges and the Taliban shadow courts, I did see some success during my time in country. Within months of my initial visits, two of the four KTDs held public trials. Because GIRoA officials are almost never from the districts they serve in, they are disconnected from the local community and are not trusted by the tribal elders who are the true source of authority within the communities. Public trials provided a unique opportunity for local Afghans to see their government working for them. These public trials were a significant democratic step for the communities. However, the real question is whether or not they are sustainable beyond our presence there. The ROLFF-A mission began in September of 2010. How much further along would the formal Afghan legal system be today if this mission had started in 2003 instead of 2010?

We in the JAG Corps think of our mission as supporting and enabling the war fighter. There is no doubt that is and will always be mission number one for us. But we do ourselves and our country a disservice when we fail to realize the importance of the legal mission beyond simply providing legal services to the troops. The long term successes of our nation’s military endeavors in countries like Afghanistan are absolutely dependent upon the legitimization and transparency of that society’s legal system. This is how the work of judge advocates can be of great consequence.

The Taliban took advantage of the lack of a legitimate formal legal system within the country to garner the support from the local population and create a grass roots movement that resulted in their rise to power in the mid-1990s. A society’s economy and

⁷ TRANSPARENCY INTERNATIONAL, <http://cpi.transparency.org/cpi2011/results/> (last visited Nov. 26, 2012).

⁸ Rory Stewart, *Afghanistan: A War We Cannot Win*, *The Telegraph*, Jul. 10, 2009, available

at <http://www.hks.harvard.edu/news-events/news/news-archive/stewart-oped-jul09>

In these asymmetrical engagements, there is not a more important mission, when it comes to long-term success, than that of assisting and supporting a legitimate formal legal system within the host nation.


culture will only flourish and thrive when they are a nation ruled by laws. The rule of law provides a stable business climate that protects the rights of its citizens. It provides for predictability in the daily lives of the common people, which results in more productive citizens. If a nation's formal legal system does not provide this consistency and predictability, then its population will look elsewhere, like the Taliban.

The revival in counterinsurgency (COIN) doctrine over the last decade has centered on the idea that we cannot kill our way to victory in every conflict. Furthermore, in order to succeed by winning the hearts and minds of the locals, we cannot “commute” to the fight. We must live among the populace to be a long-term presence of stability forces. Rule of law operations take place as a subset of an overall [COIN campaign](#).⁹ As reflected in the opening quote by General Petraeus and AFMAN 3-24, rule of law operations are critical to the success of COIN operations. A NATO major general I met while in Afghanistan stated that research conducted by his agency throughout Afghanistan showed that 75% of the insurgency was based on local grievances and somewhere between 70% and 80% of insurgents were fighting near their home districts. Imagine the impact a fair and effective government-supported dispute resolution system could have on that insurgency. The importance of this mission may not have been realized during the early stages of OEF, but once it was realized it resonated at the highest levels, as shown by this 2011 statement from U.S. Secretary of Defense Robert Gates:

Unfortunately, a vacuum of governance remains in key areas. We must support the Afghan government in its efforts to

establish basic dispute resolution in key districts in order to facilitate improvements in security, to create the conditions that foster the reintegration and reconciliation of former insurgents, and to combat corruption that undermines trust in the Afghan government.¹⁰

So what does that mean for those of us in the JAG Corps? It means that we can use our specialized education and training to effectively contribute to an essential element of “victory” for our missions in combat zones. The reality is that Antietam, Flanders Field, Normandy, and Midway are battlefields of the past. Those types of battles will be rare in the future, if occurring at all. Our military is much more likely to find itself in asymmetric warfare similar to conflicts in Mogadishu, Libya, Saigon, Baghdad, or the villages of Afghanistan. In these asymmetrical engagements, there is not a more important mission, when it comes to long-term success, than that of assisting and supporting a legitimate formal legal system within the host nation. Rule of law should never be an afterthought resulting in a last ditch effort to salvage an enormous expenditure of blood and treasure.

The age-old maxim “inter arma silent leges,”¹¹ should be challenged; law is never more necessary or relevant than during war. As a JAG Corps, we owe it to our country to always be prepared to carry out this mission and to be persistent advocates of its inclusion in strategic war planning from the onset. We should be ready to get out from behind our desk, gear up, and get outside the wire so that we can contribute to an eventual better state of peace by laying the cornerstone for any developed society, the rule of law. 

⁹“Over time, counterinsurgents aim to enable a country or regime to provide the security and rule of law that allow establishment of social services and growth of economic activity.” U.S. DEP’T OF ARMY, FIELD MANUAL, COUNTERINSURGENCY para.1-1 (15 Dec. 2006)

¹⁰ Remarks from U.S. Secretary of Defense Robert Gates Remarks to Defense Ministers of ISAF Troop Contributing Nations March 11, 2011 in Brussels, Belgium.

¹¹ The English translation of this maxim is, “In war, the law is silent.”



Public hearing held at Camp Shaheen, Afghanistan; photo by Technical Sergeant Casey Martin

ROLES OF A RULE OF LAW FIELD SUPPORT OFFICER

by Technical Sergeant Bryan K. Hawk

On September 11, 2001, the will of America and its allies was tested when al-Qaeda terrorists launched a coordinated attack on the United States that was planned, in part, in Afghanistan. As a result, the United States conducted military operations in the region, resulting in the collapse of the Taliban regime and the establishment of the Government of the Islamic Republic of Afghanistan (GIROA). In an effort to counter the previous Taliban system, a plan was created to create

an independent Afghan justice system capable of delivering judicial services to the Afghan populace, thereby enhancing the stability of GIROA.

The primary mission of a Rule of Law Field Support Officer (ROLFSO) is to provide support and coordination with civilians (both U.S. and international), coalition forces, and local rule of law personnel to enhance the Afghan justice sector in designated provinces and districts. The purpose of this article is to provide a brief description of the primary mission

The designated field support officers' primary duties are to train, advise, and assist Afghan legal actors involved in the prosecution of justice within an established region. Simply put, we serve in a Senior Trial Counsel capacity to assist local administrators develop their judicial process.

of a ROLFSO and the efforts towards counterinsurgency and stability operations in their respective Area of Responsibility (AOR).

GIRoA's stated objective is "to restore the faith of Afghans in the ability of the law to protect and defend their best interests as individuals and as a nation." This reflects the intent to expand the quality and quantity of justice delivered daily to our Afghan counterparts. In order to achieve functionally integrated, essential, and sustainable rule of law and enduring stability of the justice system to conform with Afghan National Priority Programs (NPP), the Rule of Law Field Force-Afghanistan (ROLFF-A) established four main charters:

- Assist in sustainable development of Afghan human capacity.
- Build sensible, sustainable infrastructure that unlocks Afghan capacity.
- Promote public awareness of the law and access to justice.
- Facilitate increased justice sector security.

The designated field support officers' primary duties are to train, advise, and assist Afghan legal actors involved in the prosecution of justice within an established region. Simply put, we serve in a Senior Trial Counsel capacity to assist local administrators develop their judicial process. To accomplish the mission, ROLFSOs and their counterparts regularly travel "outside the wire" risking their lives to help

develop Afghanistan's newly developed legal system. Every day we work alongside some of the most committed and determined people in Afghanistan.

Currently, the [NATO Rule of Law Mission \(NROLFSM\)](#) and [ROLFF-A](#) facilitate change in 50 districts and municipalities located across Afghanistan, principally aligned with GIRoA's identified 48 districts. Field teams consist of a field grade officer Team Chief located at a field platform usually within close proximity to the provincial capital. This enables the Team Chief and other rule of law players to support engagements with Afghan provincial leadership. Each Team Chief has a designated number of O-3s, O-4s, NCOs, and SNCOs serving as ROLFSOs that directly support district-level rule of law enhancement activities.

There are myriad dedicated mission partners involved in this process. As paralegals, we play a crucial role in the development of the local government and judicial stability. For example, in Jalalabad, we play a leading role in improving and extending conditions at local district centers and prisons, in addition to supporting prosecutors, courts, and the judicial process from arrest to prosecution. While deployed, don't expect to conduct typical paralegal duties. Out here you're a mentor helping to facilitate development of an Afghan judicial system that will one day be capable of delivering first-rate judicial services to the people of Afghanistan. I am thankful to have had the opportunity to work alongside some of the most committed and determined Soldiers, Sailors, Airmen, and Afghan legal professionals the world has to offer. 🦋



CRAFTING COMPELLING CONTRACTING OFFICER'S FINAL DECISIONS

by Mr. Christoph A. Mlinarchik

No matter the type of contract or service provided, from time to time contractors can be expected to ask for more money, beyond the sum stated in the contract. A contractor can make a claim for additional funds for any reason. However, most successful claims are for actions by the Government that cause additional expenses for the contractor during the performance of the contract. For example, a contractor may sustain additional expenses if the contracting officer issues a stop work order for an extended period of time. An important part of the claim process is the official response from the contracting officer. In contract law, this response is called the Contracting Officer's Final Decision.

The Contracting Officer's Final Decision (hereafter "Final Decision") is an incredibly important document because it is the Government's initial response

to a contractor's claim under the Contract Disputes Act. It serves as the Government's opening move in the claim process and sets the stage for future litigation. The Final Decision is binding and conclusive unless the contractor appeals it, so it deserves careful consideration.¹

The Final Decision has five substantive requirements. It must (1) describe the claim or dispute, (2) refer to the relevant contract terms, (3) outline the facts, (4) state the decision and rationale of the contracting officer, and (5) advise the contractor of its appeal rights. The Final Decision must demand payment if it finds that the contractor is indebted to the Government. Finally, the Final Decision must be submitted to the contractor in writing.²

¹ 41 U.S.C. §605(b).

² 41 U.S.C. §605(a); FAR 33.211(a)(4)(i)-(vi).

The initial, information-gathering stage of responding to a claim under the Contract Disputes Act is the ideal time to seek knowledge, advice, and insight from the entire acquisition team.

SHINE THE SPOTLIGHT ON THE FOCAL POINTS

Beyond the skeletal requirements, the Final Decision should address only the relevant facts and claims. Contractors may include personal opinions or superfluous complaints about perceived mistreatment. However, the Final Decision must only address proper claims under the Contract Disputes Act. The Final Decision should concentrate on the relevant disputes and dismiss non-justiciable complaints. Also remember that the Final Decision need not include specific findings of fact and that such findings are not binding in subsequent appellate proceedings, which will review the factual record *de novo*.³

ENGAGE THE ENTIRE ACQUISITION TEAM IN THE PROCESS

The initial, information-gathering stage of responding to a claim under the Contract Disputes Act is the ideal time to seek knowledge, advice, and insight from the entire acquisition team. At a minimum, the Government attorney must play a significant advisory role in crafting the Final Decision, and most contracting officers recognize this requirement of [FAR 33.211\(a\)\(2\)](#). Beyond legal assistance, do not neglect the expertise of other acquisition team members like engineers, logisticians, program managers, budget analysts, or auditors. Their expertise will provide specialized knowledge to compute expenses, compare the contractor's performance to the contractual requirements, and analyze the sequence of events leading to the dispute. Contracting officers need not operate in a vacuum, and indeed, they draft better Final Decisions in a collaborative environment. In fact, [FAR 1.602-2](#) mandates contracting officers to consider the advice of "specialists" as appropriate. Contracting officers should seek assistance from any and all members of the acquisition team who can contribute.

DOCUMENT, DOCUMENT, DOCUMENT

The Final Decision is the starting point for future litigation, so seize the opportunity to create a favorable record of documentation from the outset. Do not make the common mistake of relying upon oral communications in a Final Decision. Take the time to comb the record for written memoranda or emails that spell out the facts and background. Systematically arrange the documents in a way that allows a third party to grasp the factual background immediately. For relatively simple or one-dimensional claims, chronological ordering is optimal. Multifaceted or especially complex claims may call for topical ordering.

Assemble all relevant documents in a single file. This will help the contracting officer craft a commanding argument that marshals the data in a logical and compelling sequence. An additional benefit to this early planning is that for future litigation, many of the necessary documents for a "Rule 4 file" will already be prepared should the contractor decide to appeal.⁴ Plan, prepare, document, and organize as soon as possible to gain a tactical advantage in the claims process.

ALWAYS INCLUDE BOILERPLATE APPELLATE RIGHTS LANGUAGE—VERBATIM

FAR 33.211(a)(4) requires specific language to be included in all Final Decisions. This language outlines the contractor's rights to appeal, so it should be included verbatim. Do not be fooled by the misleadingly permissive language of FAR 32.211(a)(4): "substantially as follows." This is not the time to get creative. Use the boilerplate language, precisely as it is stated in the FAR, to avoid the risk of creating thorny procedural issues in future litigation.

³ 41 U.S.C. §605(a); 41 U.S.C. §609(a)(3); *see also* *Wilner v. United States*, 24 F.3d 1397 (Fed. Cir. 1994)(admissions favoring contractor are not evidence of Government liability), citing *Assurance Co. v. United States*, 813 F.2d 1202 (Fed. Cir. 1987).

⁴ Named after the fourth court rule of the Armed Services Board of Contract Appeals, a Rule 4 file is a factual compilation of all documents the Government holds concerning the contract claim; in the Court of Federal Claims it is called the Administrative Record.

Missing the mark on advising the contractor of appeal rights has serious consequences. If the rights notification is lacking, the “appeals clock” does not start because the Final Decision is deficient. The contractor would then have the opportunity to extend the appeals timeline by proving that its detrimental reliance upon the deficient Final Decision prejudiced its ability to appeal within the time limits.⁵

COMPLY WITH MANDATORY TIMELINES

Contracting officers must be aware of the timelines for responding to claims under the Contract Disputes Act. FAR 33.211(c)(1) requires the contracting officer to issue a Final Decision on claims of \$100,000 or less within 60 days of the contractor’s written request, or within a reasonable time if no such request is made. Within 60 days of claims exceeding \$100,000, FAR 33.211(c)(2)(d) requires either a Final Decision or notification to the contractor of when the decision will be issued.⁶ If the contracting officer fails to comply with these mandatory timelines by not issuing a timely Final Decision, this inaction can be construed as a “deemed denial.” A “deemed denial” is treated the same as an actual denial and opens the door for appeal to the Armed Services Board of Appeals or the Court of Federal Claims.⁷

The Government’s position is severely prejudiced by a “deemed denial” because it forgoes a valuable opportunity for initial claims review. The Final Decision is a powerful tool to frame issues for future litigation; to skip this process is a procedural blunder that must be avoided. A comprehensive Final Decision will include relevant facts, evidence, and authorities to buttress the Government’s argument for disposition. A “deemed denial” precludes this documentation, instead requiring it to be proffered later as part of the litigation process. As soon as a claim is received, an attorney from the legal office and the contracting officer should consider the mandatory response timelines. Set strict deadlines for gathering documents, questioning acquisition team members, and writing and editing the Final Decision.

USE ARISTOTELIAN SYLLOGISMS FOR PERSUASIVE ADVOCACY

Aristotle invented the syllogism—a well-structured and powerful method of argumentation that gracefully guides the reader to a convincing conclusion. Use this rhetorical device to streamline, simplify, and strengthen the focal points of the Final Decision. Aristotelian syllogisms follow a basic formula: major premise or rule, minor premise or facts, and a conclusion that follows necessarily from the premises. This formula can be custom-tailored for Final Decisions in Government contract disputes.

The major premise is a citation to a regulation, statute, or federal case law. The minor premise outlines the factual scenario involving the contractor. The conclusion or “takeaway” is the most important part. It follows as a logical consequence from the synthesis of the rule and facts. No further argumentation is necessary because the initial premises provide all the logical groundwork.

As an example, consider a scenario wherein the contractor fails to deliver and blames the default on rainy weather, claiming that it is an excusable delay. One section of the Final Decision will prove that the default is not covered by the Excusable Delays clause. Major premise: The Excusable Delays clause, FAR 52.249-14, provides that contractors shall not be in default if the failure to deliver is due to unusually severe weather (rule). Minor premise: Two consecutive rainy days in Seattle, Washington is not unusually severe weather (facts). Conclusion: Therefore, the contractor’s failure to deliver is a default under the terms and conditions of the contract and is not excused by FAR 52.249-14.

This method of writing is clear, concise, convincing, and commanding. The conclusion rests upon controlling authority and follows from an orderly chain of thought. Writing with precision, logic, and persuasion illuminates the arguments, provides a roadmap for the reader, and brands the Final Decision as the product of a professional. 🦋

⁵ See *Decker & Co. v. West*, 76 F.3d 1573 (Fed. Cir. 1996).

⁶ 41 U.S.C. §605(c).

⁷ 41 U.S.C. §605(c)(5); FAR 33.211(g). See *Aerojet Gen. Corp.*, ASBCA No. 48136, 95-1 BCA ¶127,470.

JUSTICE AND THE ENEMY

NUREMBURG, 9/11, AND THE TRIAL
OF KHALID SHEIKH MOHAMMED

WILLIAM SHAWCROSS

Reviewed by Major Matthew E. Dunham

The judgment of evil is never simple.

On 5 May 2012, the trial of Khalid Sheikh Mohammed (KSM) began before a military commission in Guantanamo Bay, Cuba.

The arraignment occurred one year after the killing of Osama bin Laden (OBL) during a raid in Pakistan and on the same day insurgents in Pakistan were killed by remotely piloted aircraft. Not surprisingly, these types of events have reinvigorated the debate on how to administer justice to members of Al Qaeda and its associates. In his 2011 book, *Justice and the Enemy: Nuremburg, 9/11, and the Trial of Khalid Sheikh Mohammed*, William Shawcross discusses the dilemmas and difficulties of

bringing Islamist terrorists to justice. He argues that the success of the Nuremburg trials, despite their flaws, serves as valid precedent for trying terrorists before military tribunals.

Eloquently written and full of careful observation, *Justice and the Enemy* persuasively illustrates the value of military commissions by evaluating them in their historical context. The book is an overall success. However, like the Nuremburg trials, it is not flawless. Specifically, Shawcross balks at tackling the philosophical and moral question of what it means to “do justice.”

This review looks at the successes of *Justice and the Enemy*. Particularly, this review discusses the author’s credibility and the value of the book as a historical

Shawcross takes particular issue with organizations and defense attorneys more concerned with combating America in the courtroom than doing justice.

narrative. It also discusses Shawcross' treatment of those who seek to undermine the American justice system and his persuasive argument for military commissions. Next, this review examines the book's main flaw: Shawcross' failure to delve into the meaning of justice.

Justice and the Enemy provides an intellectually honest assessment of the difficulties in bringing war criminals and terrorists to justice from a credible author. Shawcross is the ideal author to draft this sort of book as he is a British journalist with no apparent political agenda. While sympathetic to President Bush and Prime Minister Blair's policies, he is no neo-conservative. In fact, during the Cold War, Shawcross was a vehement "left-wing critic of the American establishment."¹ Rather, his interest and faith in military tribunals is personal—his father, Hartley Shawcross, was the lead British prosecutor at the Nuremburg trials.² Thus, the author's citizenship, résumé, and lineage lend legitimacy to *Justice and the Enemy*.

Justice and the Enemy succeeds in establishing a succinct historical narrative. Beginning at Nuremburg, Shawcross shows how a special court, convened for a special moment in history, achieved justice despite divergent opinions on how to deal with the Nazis. It continues with discussions of major events in the evolution of modern military commissions such as *Hamdan v. Rumsfeld* and *Boumediene v. Bush*. Shawcross elegantly unpacks these milestones, educating the reader and showing how the events impact the broader narrative. This feature of the book is valuable for judge advocates.

Within his historical narrative, Shawcross identifies the use of "lawfare" by the extreme political left to hijack the perception of American justice. He chal-

lenges readers to recall the precedent for war crimes tribunals established at Nuremburg. Shawcross does well reminding readers of the similarities between radical Islamists and the Nazis. His tone reveals his concern that critics have become anesthetized to the evil imbued by Al Qaeda and men like KSM and OBL.

Though careful not to take positions on the appropriateness of Bush-era policies, Shawcross argues that some "lawfare" challenges to the military commission system are clearly biased and in some cases, absurd. For example, Shawcross notes the media's eagerness to report that a Guantanamo interrogator flushed a Koran down a toilet even though the report was wrong and the violence it incited resulted in the deaths of seventeen people. Conversely, the media underplayed a European expert's opinion that "Guantanamo inmates were treated much better than any in Belgium's jails."

Shawcross takes particular issue with organizations and defense attorneys more concerned with combating America in the courtroom than doing justice. The most stunning example is a recounting of the Center for Constitutional Rights (CCR)'s reaction to the verdict and sentence of Ahmed Khalifan Ghailani. Ghailani was tried in federal court and found guilty of conspiracy to destroy U.S. embassies in Kenya and Tanzania but not guilty of 284 counts of murder. After Ghailani received a life sentence, CCR declared it "questions the ability of anyone who is Muslim to receive a truly fair trial in any American judicial forum post 9/11." Shawcross decries the "nonsense" of this position, as it advocates against the entire American legal system and essentially calls for the dismissal of all Islamist terrorism cases.

The ultimate success of *Justice and the Enemy* is Shawcross' ability to guide the reader to common sense conclusions. Shawcross recognizes that even

¹ William Shawcross, BRITISH COUNCIL: LITERATURE, <http://literature.britishcouncil.org/william-shawcross>

² See generally WILLIAM SHAWCROSS, <http://www.williamshawcross.com/> (last visited Dec. 3, 2012).

though America has made mistakes, “it is a nation of laws founded on individual liberty.” He illustrates the progress the U.S. has made since the Nuremberg trials. Today KSM and others are presumed innocent, are entitled to military and civilian counsel who can cross examine witnesses and analyze evidence, have the right to challenge judges, and can appeal to the Supreme Court.

Shawcross argues the need for military commissions. One of his principle points is “that the problems the U.S. government has faced since 9/11 in bringing its enemies to court are far more difficult than its critics, at home and abroad, are prepared to acknowledge.” He argues, that like post-war Germany, the United States needs military commissions for radical Islamists to accommodate the complexity of battlefield captures, the need for greater flexibility in gathering intelligence to prosecute the war, and because United States criminal law did not always apply to non-U.S. citizens outside the United States.

Though not opposed to federal trials for terrorists, Shawcross successfully illustrates that federal trials are not proper for every terrorist. He details a Senate Judiciary Committee hearing where Senator Lindsey Graham asked Attorney General Eric Holder what the Obama Administration planned to do if Osama bin Laden were captured. Holder equivocated with replies of “it depends,” and ultimately ducked the question by suggesting OBL would never be taken alive. His comments were prescient, but his non-responsiveness supports Shawcross’ point.

Despite the overall success of *Justice and the Enemy*, it is not flawless. The blemish flows from the book’s title and tantalizing introduction. Shawcross opens his book with a synopsis of George Steiner’s controversial 1981 book, *The Portage to San Cristobal of AH*. In that book, Steiner created an alternate history where Adolf Hitler escaped Nazi Germany to South America only to be discovered by Israeli agents decades later and then subjected to an unpublicized summary trial in the middle of the jungle. The novel challenged readers to think about what it means to do justice for those who personify evil. In his introduction, Shawcross notes that terrorists like OBL and KSM embody evil just as Adolf Hitler

did. He summarizes Steiner’s “discomfiting meditation on the ambiguity of dispensing justice in an imperfect world” to introduce the moral dilemmas and ideological difficulties of bringing modern-day terrorists to justice.

Though *Justice and the Enemy* discusses justice in many forms, the book lacks a deeper discourse on what it means to “do justice.” It fails to ask questions such as, “Is justice only justice when brought about by certain methods or in a certain way?” “Is justice defined by the outcome or in how the outcome is achieved?” or “What is the role of justice in war?”

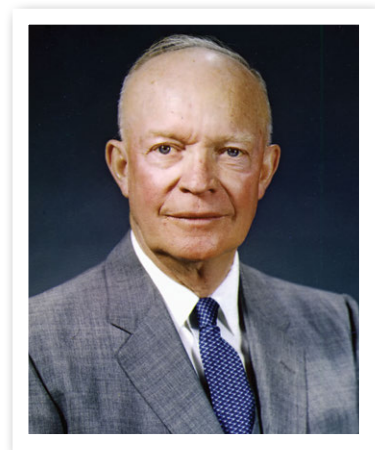
Chapter Nine is labeled “Justice.” However, it exclusively deals with the May 2011 OBL operation in Abbottabad, Pakistan. In that chapter, Shawcross cites to individuals who argue justice was done during the raid and he cites others who say justice was not served because there was no trial and conviction. For his part, Shawcross notes that Nuremberg chief prosecutor Robert Jackson “would have accepted both the killing of bin Laden and the arraignment before a military court of [KSM].” Unfortunately, these statements are merely assertions of justice and Shawcross makes no attempt to conduct a more meaningful discussion.

Justice and the Enemy is a great success and a valuable read for judge advocates. Shawcross presents an elegant narrative on the difficulties of bringing the worst of war criminals and terrorists to justice. Though it lacks a deeper discussion on the meaning of justice, this omission does not detract from the book’s overall value. Comparing Nazis and Islamist terrorists, Shawcross reminds his readers of an important truth: “Mutable and persistent, evil has not been discouraged by the progress of reason or the taming of nature.” By illustrating the problems of the arguments from military commission opponents, Shawcross urges his readers to consider truth over legalistic nonsense and he convincingly argues that sometimes there is a need for a special court to deal with special circumstances. As the trial of KSM begins, *Justice and the Enemy* proves itself timely, pertinent, and thought provoking. It is a must-read book for all judge advocates. 🦋

EISENHOWER

IN WAR AND PEACE

by Jean Edward Smith (Random House, 2012)



You boys must be crazy. We can't use those awful things against Asians for the second time in less than ten years. My God.

-President Dwight Eisenhower, 1 May 1954

Reviewed by Major Matthew D. Burris

When Dwight David Eisenhower was sworn in as the 34th President of the United States on the 20th of January 1953, it was by no means preordained that the bomb would come to be viewed as existential—a weapon valued more for its psychological impact on potential adversaries, than for the kinetic impact of its actual use. To the contrary, conventional wisdom at the Departments of Defense and State indicated both a willingness and a need to employ nuclear weapons as a means of balancing against the expansionist communistic threat. At the same time, the Cold War's disquieting bi-polarity fueled a number of high-profile political reactionaries who made sport of excoriating those whose anti-communist orthodoxy was insufficiently rabid. It was a paradoxical era: one of *I Love Lucy*, Elvis Presley, and soaring automobile tail fins on one hand; Strategic Air Command, McCarthyism, and *Sputnik* on the other.

Yet between that January day in 1953 and the 20th of January 1961, President Eisenhower kept the Cold War cold, resisted pressure to employ the bomb, and repeatedly rejected calls to intervene militarily in hotspots around the world. Placed in his shoes, other presidents may have done the same, but few—perhaps only George Washington or Ulysses S. Grant—had the military bona fides to do so with the full confidence of the populace. In spite of the times, the American people trusted “Ike” and had good reason to do so.

As described in Jean Edward Smith's fine biography, *Eisenhower in War and Peace*,¹ fortune shone on Dwight Eisenhower throughout his life. Born in 1890 to a family of few means, he gained admission to West Point by competitive academic examination

¹ I combined its reading with a trip to the Eisenhower Presidential Library in Abilene, Kansas and found it a useful compendium for the visit. If you ever find yourself traveling on I-70 (note, Eisenhower was largely responsible for the Interstate Highway system) across central Kansas, I highly recommend it as a stopover point. The Library and Museum are exquisitely maintained and the small Victorian-styled town of Abilene is un-ironically reminiscent of a seemingly simpler era.

(having lied about his age on the entrance application—he was too old at nearly 20) and thereafter excelled at the decidedly non-academic pursuits of football, card playing, and smoking. Graduating in the now vaunted class of 1915, World War I ended before Eisenhower and many of his West Point classmates had the opportunity to deploy. He spent the inter-war years navigating within a diminutive and little regarded peacetime force—a force wholly unrecognizable from its massive and well-funded Cold War successor. He nevertheless lived well. Like his West Point contemporary George Patton, Eisenhower married into means and enjoyed a lifestyle that set him apart from his fellow officers.

Eisenhower held the rank of Major for 16 years and yet the connections and associations he forged as a field grade officer foretold of a meteoric rise.² During this time, he distinguished himself not as a battlefield commander, skilled military tactician, or leader of men, but as an unflaggingly politic staff officer. His proximity to Army leadership during the inter-war years was near constant. Major Eisenhower served as an executive officer to Brigadier General Fox Conner, as a writer of World War I battlefield history under General John J. Pershing, as an executive assistant to Major General George Van Horn Moseley, and as an executive officer to General Douglas MacArthur. These officers repeatedly, and of their own volition, intervened in Eisenhower's career, as when Fox Conner saved him from court-martial on charges of false official statement in 1921. But Eisenhower was also not shy about exercising these connections when his desires and those of the Army diverged—particularly in the realm of assignments.

Eisenhower's innate, learned, and demonstrated political acuity—both in the Army and in the White House—is the dominant theme of *Eisenhower in War and Peace*. Any single volume biographer of a life such as Eisenhower's, by force of economy, must make choices about what relationships and events to highlight. While thematically sound, some of Smith's choices seem somewhat gratuitous, to include his (over) emphasis on then General Eisenhower's

² Sixteen years as a Major was an unremarkable tenure in the peacetime Army of the day. Remarkable was the speed at which Eisenhower promoted in the run-up to, and during, World War II. In March of 1941, Eisenhower was promoted to full Colonel; less than four years later he would be the General of the Army (five-star).

relationship with Kay Summersby, a young British driver, who would become a companion of sorts throughout the European campaign. Smith offers salacious details of the relationship—and one in particular that feels both forced and unnecessary.

But by and large, Smith fairly portrays the glorious and the inglorious, painting Eisenhower as a pragmatic and decisive leader who received more credit than was due for certain accomplishments and, yet, was greatly underappreciated in his time for others. Smith's is not a work of hero worship, but the hero emerges nonetheless. As Supreme Allied Commander in Europe, Eisenhower presided over the defeat of Nazi Germany, but abhorred war, remarking, "I hate war only as a soldier who has lived it can." As President, he understood the need for a strong national defense, but warned against "the acquisition of unwarranted influence, whether sought or unsought, by the military industrial complex," wherein, "the potential for the disastrous rise of misplaced power exists and will persist." He lamented, "God help the nation when it has a President who doesn't know as much about the military as I do."

Yet Eisenhower's prescience is no more felt, whether wittingly or unwittingly, by those alive today than as it relates to nuclear weapons. While his "New Look" national security strategy emphasized the bomb as both a means of balancing against the Soviets and of shrinking the overall U.S. defense budget, Eisenhower never employed these potentially decisive weapons—and affirmatively pushed back against those within the national security establishment who advocated their use. This begs the question: how different might the world be if use of the bomb had been normalized during the 1950s, e.g., in Korea over the 38th parallel, in China over the Formosa Strait crisis, in Vietnam over the French defeat at Dien Bien Phu, or in Egypt over the Suez crisis? The legacy of Eisenhower's leadership, to this reader, is that these are merely counterfactual imaginings, rather than potentially dystopian realities. For this reason alone, we should all still "like Ike." 🐦

CONTRIBUTORS



Colonel Paul E. Pirog (B.S., United States Air Force Academy; J.D., University of Michigan Law School) is the Chair, Social Sciences Division and Head of the Department of Law at the United States Air Force Academy, Colorado Springs, Colorado.



Lieutenant Colonel Christopher A. Brown (B.A., Bridgewater State College; J.D., Suffolk University Law School) is the Deputy Director, Training and Readiness Directorate, Headquarters Air Force, Joint Base Andrews, Maryland.



Lieutenant Colonel Dawn D. Hankins (B.A., Louisiana State University; J.D., Syracuse University College of Law) is the Chief of Justice and Court Activities, Military Justice Division, Air Force Legal Operations Agency, Joint Base Andrews, Maryland.



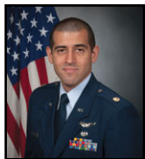
Major Matthew D. Burris (B.A., University of Tulsa; J.D., University of Tulsa; LL.M., McGill University) is the Chief of Space Law at United States Strategic Command (USSTRATCOM), Offutt Air Force Base, Nebraska.



Major Matthew E. Dunham (B.A., Messiah College; J.D., Pennsylvania State University, Dickinson School of Law; LL.M., The United States Army Judge Advocate General Legal Center and School) is the Staff Judge Advocate for the Office of Military Cooperation—Kuwait, Embassy of the United States, Kuwait City, Kuwait.



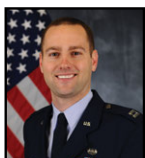
Major Ryan N. Hoback (B.S., University of Delaware; J.D., University of Baltimore School of Law) is the Chief of Operations Law and Adverse Actions, U.S. Air Force Expeditionary Center, Joint Base McGuire-Dix-Lakehurst, New Jersey.



Major Daniel C. Mamber (B.A., Lynchburg College; J.D., Pennsylvania State University, Dickinson School of Law) is the Chief of Joint Service Policy and Legislation, Military Justice Division, Air Force Legal Operations Agency, Joint Base Andrews, Maryland.



Major Ryan D. Oakley (B.A., Huntingdon College; J.D., Samford University, Cumberland School of Law) is the Deputy Director, Legal Policy, Office of the Secretary of Defense, Personnel and Readiness (P&R), Pentagon, Virginia.



Captain David C. Blomgren (B.A., Taylor University; J.D., University of Illinois College of Law) is the regional Medical Law Consultant for USAFE, Ramstein Air Base, Germany.



Captain Robert J. Brady, Jr. (B.A., Colby College; J.D., University of San Diego School of Law) is an Assistant Staff Judge Advocate assigned to the 375th Air Mobility Wing, Scott Air Force Base, Illinois.



Captain Robert C. Burlison, III (B.S., Boston University; J.D., Loyola Law School) is the Chief of Administrative Discharges, 86th Airlift Wing, Ramstein Air Base, Germany.



Captain Allison A. DeVito (B.A., University of Notre Dame; J.D., Fordham University) is the Chief of the Victim Issues and Policy Branch, Military Justice Division, Air Force Legal Operations Agency, Joint Base Andrews, Maryland.



Captain Christopher L. Sanders (B.S., Mississippi College; J.D., Wake Forest University School of Law) is currently serving as an Area Defense Counsel, Air Force Legal Operations Agency, Minot Air Base, North Dakota.



Technical Sergeant Bryan K. Hawk (A.A., Community College of the Air Force) is the NCOIC of Military Justice, 36th Wing, Andersen Air Force Base, Guam.



Technical Sergeant Mark T. Lathinghouse is currently assigned as the Program Manager/Instructor for Judge Advocate Functional Combat Skills Training, U.S. Air Force Expeditionary Center, Joint Base McGuire-Dix-Lakehurst, New Jersey.



Technical Sergeant Jason L. Leighton (A.A., Community College of the Air Force) is an instructor in the Civil Law Division at The Judge Advocate General's School, Maxwell Air Force Base, Alabama.



Airman First Class Catherine L. Westervelt is a Military Justice paralegal for the 2d Bomb Wing, Barksdale Air Force Base, Louisiana.



Mr. Thomas G. Becker, Col, USAF (Ret.) (B.A., Washburn University; J.D. Washburn University School of Law; LL.M., George Washington University School of Law) is the Academic Director for The Judge Advocate General's School, Maxwell Air Force Base, Alabama.



Mr. Howard C. Eggers, COL, USA (Ret.) (B.S. and J.D., University of San Francisco; LL.M., Georgetown University Law Center) is an Assistant Professor of Law at the United States Air Force Academy, Colorado Springs, Colorado.



Mr. John J. Martinez, Jr., Col, USAF (Ret.) (B.A., Rutgers College; J.D., New York University Law School) serves in the Policy and Special Projects Branch of the TJAG Action Group, Office of The Judge Advocate General, Headquarters United States Air Force, Pentagon, Virginia.



Mr. Christoph Mlinarchik (B.A., University of Virginia; J.D., American University) is a Procurement Analyst and member of the Policy Committee of the Air Force Space Command, Space and Missile Systems Center, and previously served as a Visiting Attorney for the 21st Space Wing Legal Office at Peterson Air Force Base, Colorado.

Where in the World?



Photograph of Captain Simone Davis taken by Captain Jake Nist

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PROFESSIONAL OUTREACH DIVISION
The Judge Advocate General's School
150 Chennault Circle
Maxwell AFB, AL 36112-5712



Looking out the back of a C-130H Hercules; U.S. Air Force photo by Technical Sergeant Samuel Morse