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The Reporter

THE JUDGE ADVOCATE GENERAL'S CORPS

THE MONEY ISSUE

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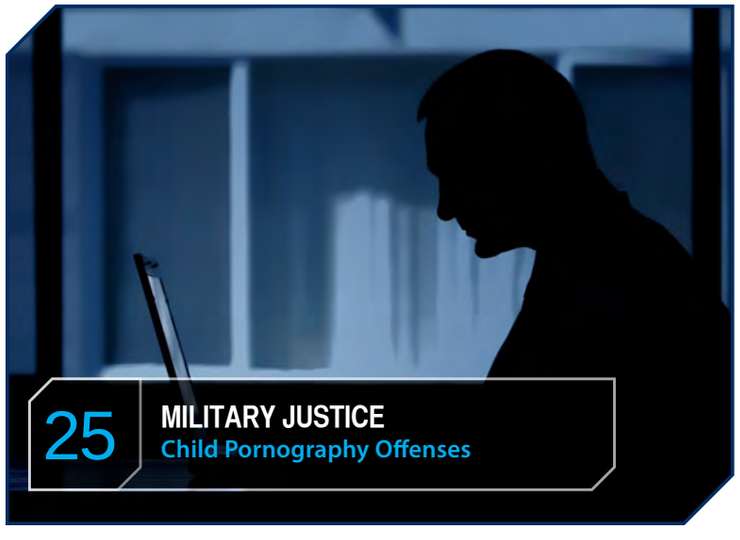

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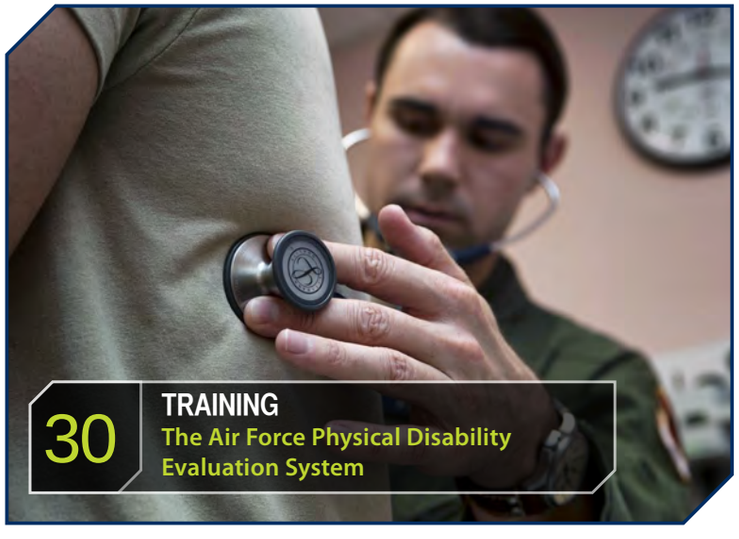

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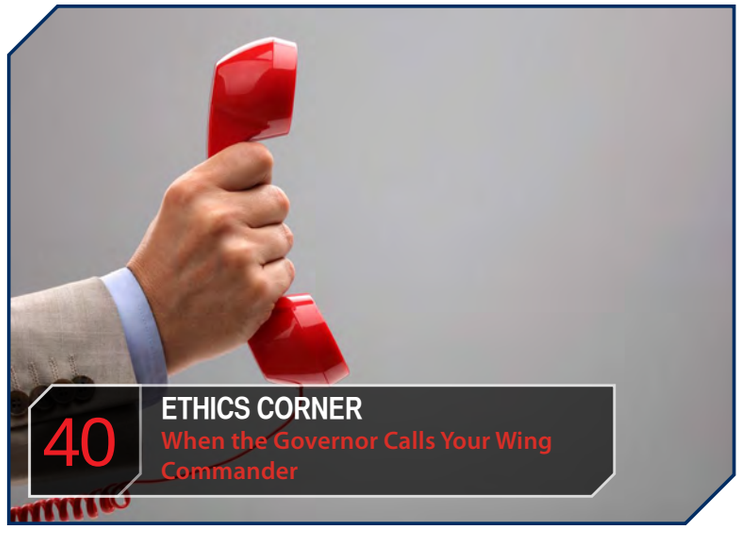

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The Reporter

The Reporter is published by The Judge Advocate General's School for the Office of The Judge Advocate General, United States Air Force. Contributions from all readers are invited. Items are welcomed on any area of the law, legal practice, or procedure that would be of interest to members of The Judge Advocate General's Corps. Items or inquiries should be directed to The Judge Advocate General's School, AFLOA/AFJAGS, 150 Chennault Circle, Maxwell AFB, AL 36112.

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Message from The Commandant

In this issue of *The Reporter*, we are pleased to feature Lieutenant General Christopher F. Burne's comments and photos from the investiture ceremony where he was officially named the 17th Judge Advocate General of the Air Force. I am excited to see what the Corps will accomplish under Lt Gen Burne's leadership. Also featured in this issue is a discussion of contracts and fiscal law. Air Force JAGs have developed a reputation among our sister services as having a certain level of expertise in the fields of contract and fiscal law, especially in the expeditionary environment. We have filled countless deployed contract and fiscal law billets during recent conflicts and have provided timely and accurate advice to commanders in various joint and coalition environments. Our featured articles are authored by Lieutenant Colonel Theresa Love and Captain Danielle Crowder, who demonstrate our expeditionary fiscal law expertise; while Major John Page and Captain James Krauer teamed up to write an article on basic contract review. These articles, along with Ms. Christy Barry's article on extended de-briefings, provide guidance for attorneys reviewing contracts and advising contracting officers from a base legal office or in a deployed setting.

The balance of this issue offers unique insight into the familiar topics of: training, military justice, operational and expeditionary law and ethics. Leading off our military justice section, Colonel Dan Higgins and Major Shad Kidd provide a thought provoking counterpoint to the former director of the Air Force Sexual Assault Prevention and Response Office, Major General Margaret Woodward's, request to commanders "to start by believing the victim." Mr. James Young, the Senior Legal Advisor to the Honorable Scott W. Stuckey recommends broad changes to the court-martial process in order to make it a more efficient and just system. Finally, Ms. Melinda Johns, a recent intern with the 460th Space Wing legal office and current J.D. candidate at Notre Dame Law School, suggests utilizing Federal Sentencing Guidelines for child pornography in developing effective sentencing cases in Air Force courts-martial.

In our training section, Major Hugh Spires synthesizes multiple sources into one concise but comprehensive article that walks the reader through the Air Force's Integrated Disability Evaluation System. Major Christopher Goewart shares his experiences with the rule of law mission in Liberia under the operations and expeditionary law banner. Captain Rodney Glassman discusses the potential for ethical issues with political/military cooperation between states and the military bases that operate within their borders. Lastly, Captain Scott Adams provides a thoughtful review of Malcom Gladwell's book, *Outliers*.

I want to personally thank all of the authors for their contributions to this issue. I encourage each of you to write and submit your work to Major Sam Kidd for consideration to be published in future editions of *The Reporter*.

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Investiture Ceremony

15 August 2014, presiding official General Mike Hostage, Commander, Air Combat Command

ABRIDGED INVESTITURE REMARKS—NATIONAL ARCHIVES, WASHINGTON D.C.
LIEUTENANT GENERAL CHRISTOPHER F. BURNE

I am thankful for many things this morning…for great commanders and spiritual chaplains, for dedicated co-workers and for a country I am proud to serve, and for the First Amendment to the document enshrined behind me that allows me to thank a very benevolent God, who gave me a life filled with rich blessings.

I am thankful for wonderful and loving parents. They gave me everything I truly needed, most especially unconditional love and support and role models to always guide my path; my dad was his unit's lead bombardier in the mighty 8 AF during World War II. His Distinguished Flying Cross and Air Medals hang in a shadow box in my office. His medals inspire me and remind me that my worst day in the Pentagon is better than even his best day in his B-24 surrounded by enemy flak and fighters.

I am also thankful to God for a beautiful and loving wife, who has supported my career and uplifted my life for over 25 years. Thank you, Robin, for allowing your husband to pursue his passion of being an Air Force JAG. Thank you for the countless care packages you've sent to our deployed JAGs and paralegals. Thank you for understanding the never-ending stream of good-byes…and for your strength in getting through anxious moments when I was in Riyadh during a terrorist bombing or in the Pentagon on 9-11. Thank you for everything.

I am thankful for two sons, Christian and Connor, who give us such joy and pride and happiness. And for friends and colleagues and Air Force family who helped me along the bumpy trail of life. All of these and many others are responsible for my selection as the 17th TJAG. Those that instructed me, implemented my ideas, or told me I was crazy in taking on a particular issue…these 3 silver stars reflect the help, encouragement, hard work and dedication of family, friends, officers, enlisted and civilian members of our Air Force that have carried me here today on their shoulders.

I have been legal counsel for some 15 commanders and now, the Chief of Staff and Secretary of the Air Force. I have started each assignment with the words of St Paul; "Let my words have none of the persuasive force of wise argumentation, but the convincing power of truth."

I pledge to my fellow members of our Air Force JAG Corps to advance the truth, to take on the tough challenges and work the difficult issues. We will negotiate to reach a just settlement, but we will fight to ensure a just result. Our JAG Corps 21 Vision requires active, committed participation by every airman worthy of that title.

What we do matters. It is a privilege to support and defend the Constitution…I pledge in the words of Teddy Roosevelt to continue to do whatever I can, with whatever I have, wherever I am…to advance the Air Force mission and the rule of law and the principles embodied in these documents surrounding us this morning.

The Role of Foreign Excess Personal Property in the Drawdown of Forces in Afghanistan

BY CAPTAIN DANIELLE H. CROWDER, USAF

C-17 Globemaster (U.S. Air Force photo/Major Brandon Lingle)

Captain Danielle H. Crowder, USAF
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When I was tasked to deploy, I was told I would be focusing on the areas of international and operational law. Like most things in the Air Force, flexibility is key, and within one-month of arriving in theater I found myself thoroughly engulfed in fiscal law topics like Foreign Express Personal Property (FEPP).

As I am writing this, I am currently deployed as an augmentee to the legal office at United States Forces-Afghanistan (USFOR-A), which is the headquarters for all U.S. forces in the Combined Joint Area of Operations – Afghanistan. In this role, we conduct legal reviews of a variety of packages from subordinate units; many of which focus on fiscal law issues related to the drawdown of forces. Before I deployed, I knew that we were decreasing the number of boots on the ground in Afghanistan and of the logistical problems of transporting all of our equipment back to the United States However, I did not realize the extent of the property issues until I began getting FEPP packages to review.

Foreign Express Personal Property (FEPP)

FEPP is defined as U.S. owned personal property located outside the United States that is no longer required by the federal agency.[1] In the context of the Afghan retrograde mission and the drawdown of forces, FEPP refers to almost all equipment, supplies, and items that the United States used in Afghanistan that is not real property. In 2011, the Department of Defense delegated the USFOR-A Commander authority to transfer FEPP to the Government of the Islamic Republic of Afghanistan (GIRoA) if he determines that there is a substantial U.S. interest in doing so.[2] With limited exception, U.S. forces must no longer require use of the property in theater and the property must be of a type for which retrograde is cost prohibitive or infeasible due to security and transportation problems.[3] The USFOR-A Commander, or his delegated official, may transfer property worth up to a depreciated value of $30 million in any single transfer or closing of a forward operating base (FOB), while commanders beneath him may transfer lesser amounts.[4] In Fiscal Year 2014, the USFOR-A legal office reviewed over 570 FEPP packages that totaled just over $228 million.

The war in Afghanistan has cost the United States an extraordinary amount of money. At first glance, it seems as though we are losing even more by transferring equipment and supplies to the GIRoA, but this is not the case.

[1] 41 C.F.R. § 102-36

[2] Memorandum from the Assistant Sec'y of Def, to Commanding General USFOR-A, subject: Authority to Transfer U.S. Foreign Excess Personal Property (FEPP) in Afghanistan, (May 11, 2011)

[3] *Id.*

[4] *Id.*

As part of the FEPP package, the requesting unit must include the cost of transporting the items back to the United States versus the depreciated value of the items. The savings realized by leaving the items in Afghanistan are normally substantial.

Resources

CIA World Factbook:Afghanistan

United States Central Command Website

As part of the FEPP package, the requesting unit must include the cost of transporting the items back to the United States versus the depreciated value of the items. The savings realized by leaving the items in Afghanistan are normally substantial. For instance, it would cost $226,400 to transport seven non-tactical vehicles (NTVs) back to the U.S., when the vehicles had an original acquisition cost of $209,500 and a current depreciated value of $83,800. Therefore, it makes little financial sense to ship the old vehicles when brand new ones can be purchased at a lesser cost in the United States." In fact, according to the FEPP Program Manager, the program has saved the United States over $1.7 billion in transportation costs since it began in 2012.

Correct disposal of FEPP to the GIRoA has many benefits to U.S. Forces, beyond just saving money in transportation costs. For example, one of the most important goals for the drawdown of forces is to leave GIRoA in a position to successfully protect and defend its own country without the support of the U.S. military. We have spent a lot of money to train and equip them to do this, but if we were to completely tear down and pack up all of our FOBs, they would have nowhere to fight from and nothing to fight with. Another, more practical, consideration when forces are drawing down is the logistical difficulty in packing up equipment and supplies while still conducting operations. Not every item can be the "most important" or the "last item to go" and tough choices have to be made. For example, when is perimeter security equipment packed and shipped, and how much risk are the troops on the ground facing when they are left unprotected? Disposing of property through FEPP mitigates some of these risks.

The ease of the process also makes it a preferred method to dispose of property. The processing of FEPP packages has become almost seamless due to the constant repetition of base closures in Afghanistan and the need to retrograde personal property quickly. The process begins with units in the field identifying their excess property. They create a spreadsheet with all of the items—which can number in the thousands—and the unit commander signs a memorandum detailing the proposed transfer. The unit transmits these documents to the FEPP Program Manager, who contacts the Department of State (DoS) for its concurrence. Due to the same items appearing consistently in FEPP packages in Afghanistan, the DoS has preapproved certain property for the FEPP process, like generators, containerized housing units, and tents, to streamline this step.

Legal Review

The FEPP Program Manager then requests a legal review. Each package is unique, but there are a number of common areas the legal office focuses on. First, the commander is required to provide justification that the benefit to the United States of disposing of the property as FEPP is "tangible, appreciable, and commensurate" with the value of the property to be transferred.[5] Normally, this may be satisfied by the amount of money the United States saves on transportation costs. If there are no transportation savings, then other factors, such as troop safety or negative impact on the drawdown process, have to be present. Then, we ensure that the items are being transferred to an actual group or agency in the GIRoA, versus an individual. Over 80 percent of items are transferred to the Afghanistan Ministry of Defense, which makes sense because most of the property has specific military uses. We also check that none of the items are restricted from being transferred because they do not have the correct demilitarization code or are on the Commerce Control List. These are normally items like weapon systems, computers, and communication equipment. Finally, if the package meets all of the legal thresholds, we include a statement in the legal review that the items must be accepted "as is, where is."[6] Since the purpose of disposing of property as FEPP is to benefit the United States, we are not going to spend any money or time to improve the items or to move them to a different location for pick-up.

Transferred to GIRoA

When the legal review is complete, the package is routed for further concurrence and eventual signature by the appropriate authorizing official based upon the depreciated dollar value of the items. At this point, the items are transferred to GIRoA, and the United States no longer has any control over how they are used. Since the FEPP program began in 2012, the United States has transferred to the GIRoA the equivalent of over 56,000 twenty-foot shipping containers full of equipment. As the drawdown in Afghanistan continues, and larger bases begin closing their doors, the disposal of FEPP to the GIRoA will increase significantly and continue to provide substantial cost-savings to the United States while also providing the needed equipment and supplies for Afghanistan.

[5] *Id.*

[6] *Id.*

AIR FORCE
Launches Extended Debriefing Program

BY MS. CHRISTY BARRY

Frustrated, unsuccessful offerors often file bid protests in an attempt to gain insight into why they did not win a government contract. While a standard debriefing may provide limited feedback on strengths, weaknesses, and deficiencies in an offeror's proposal, it does not generally provide a cohesive explanation of the rationale underlying the Government's evaluation conclusions and contract award decision. This frequently leaves unsuccessful offerors very frustrated and often causes them to speculate as to why they were eliminated from a competitive range or did not otherwise receive the contract award. In an effort to dissuade unsuccessful offerors from filing protests (particularly those filed solely as a means to obtain government documents), the Air Force is conducting a pilot program encouraging contracting officers (CO) to use extended debriefings in appropriate cases.

> Frustrated, unsuccessful offerors often file bid protests in an attempt to gain insight into why they did not win a contract.

(Image courtesy of iStock)

The Government Accountability Office (GAO) has stated, "The primary function of a debriefing is not to defend or justify selection decisions, but to provide unsuccessful offerors with information that would assist them in improving their future proposals."[1] Unfortunately, standard debriefings provided pursuant to FAR 15.505 and FAR 15.506 often do not provide unsuccessful offerors with enough information to ascertain whether their proposal was properly evaluated by the government. These standard debriefings often lead unsuccessful offerors to submit a protest simply as a fishing expedition—to obtain Government documents setting forth the rationale for the award. Extended debriefings are a possible solution to the problems created by these types of protests.

Extended debriefings offer a transparent debriefing process whereby the Government provides an unsuccessful offeror's outside counsel, pursuant to an Extended Debriefing Agreement (EDA), access to specific, protected source selection documents to better explain the Government's decision. Usually, the bulk of the information disclosed pursuant to the EDA is that which the protester would receive pursuant to a GAO protective order in a bid protest. The EDA is the Air Force's version of the GAO protective order and it is executed with the consent of and participation by the Awardee's outside counsel, who is also a party to the EDA. By putting the discovery cart before the horse—that is by offering up the agency record before a GAO bid protest can be filed—an offeror's counsel is provided with enough information to ascertain that the evaluation process was fair and impartial and consequently that the award decision is rationally based. Thus far, as described in detail below, the Air Force's extended debriefings have usually resulted in the offeror's counsel dissuading the offeror from filing a protest or withdrawing an already filed protest.

How does an Extended Debriefing Work?

The first step in an Extended Debriefing is to have the parties execute an EDA. The EDA contains confidentiality and nondisclosure provisions with language similar to that used in a protective order used by the GAO. The EDA permits outside legal counsel to review core selection decision documents and source selection sensitive information that the Air Force is not otherwise permitted to disclose during a standard debriefing. It is absolutely essential to make sure that the awardee consents to the extended debriefing—and if possible, have the awardee's outside counsel participate.

After disclosing the documents to outside counsel under the EDA, the next step of an extended debriefing entails having the Air Force invite the unsuccessful offeror's counsel to participate in a Question and Answer (Q&A) session. The Q&A session is almost always led by the CO, but any other personnel involved in the evaluation process, including the Source-Selection Authority (SSA) or members of the technical

[1] AWD Tech., Inc., Comp. Gen. Dec. B-250081.2, 93-1 CPD ¶ 83, at 6, n.2 (1999).

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Extended debriefings are not appropriate for all procurements.

evaluation team, are encouraged to participate, as their knowledge and presence enable a more robust discussion of the issues.

Extended debriefings are not appropriate for all procurements. Air Force counsel and contracting staff must work together to ascertain whether an extended debriefing should be performed in a specific case. Factors to be considered include: (1) whether there are any irregularities in the procurement process that could give an unsuccessful offeror the impression that the award decision may be flawed; (2) whether the SSA approves using an extended debriefing; (3) whether the unsuccessful offeror is receptive to an extended debriefing; and (4) whether the awardee consents and the Government is able to provide sufficient information to the unsuccessful offeror without destroying the competitive advantage of the remaining offerors (i.e., not disclose trade secrets or proprietary information crucial to other proposals that those offerors do not wish to be passed to a competitor).

Why Participate in an Extended Debriefing?

There are two simple reasons to participate in an extended debriefing: (1) avoid protest litigation and mission disruption; and (2) be better-prepared, in the event a protest proves to be unavoidable.

While some may believe that providing more information to an unsuccessful offeror increases the likelihood of a protest, the Air Force's repeated successful use of extended debriefings demonstrates otherwise. Before the official launch of the extended debriefing pilot program, the Air Force conducted five extended debriefings to test this concept. All five debriefings resulted in the unsuccessful offeror either withdrawing its protest or refraining from submitting a protest. On October 17, 2013, the Air Force proved successful again, when the Agency conducted the first "official" test case of the pilot program. This extended debriefing involved a $28 million contract where the source-selection documents readily evidenced that the protester was not an interested party. In order for a contractor to file a protest they must qualify as an interested party.[2] After all parties signed the EDA, the protester's outside counsel received selected source-selection documents. The protester's outside counsel quickly agreed that the protester was not an interested party. As a result, the protester's counsel declined the oral debriefing and the disappointed offeror declined to move forward with protest litigation.

Even where an unsuccessful offeror elects to submit a protest following an extended debriefing, the Air Force has found itself better poised to defend against the protest. Moreover, preparing for an extended debriefing enables the contracting officer, source selection team, and their Air Force counsel to re-examine the decision-making process and ascertain whether any critical mistakes exist. The extended debriefing also limits a protester's ability to speculate about why it did not receive the award because it has been given all the relevant facts during the extended debriefing. This frequently narrows the issues that can be protested, saves valuable resources, and reduces supplemental protests.[3]

In many cases, using an extended debriefing provides a win-win benefit for both the Air Force and the unsuccessful offeror. Through this "facts are facts" transparent process, the unsuccessful offeror is provided reassurance that its proposal was treated fairly and evaluated properly. The extended debriefing also provides more efficient resolution of potential protest issues in a much shorter time than if the protester had proceeded to litigate at either the GAO or Court of Federal Claims. In turn, the Air Force reaps huge rewards by avoiding protracted litigation and mission disruption—and by securing the offeror's confidence in the source-selection evaluation and contract award process.

[2] GAO Bid Protest Regulations define an interested party as "an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract." 4 C.F.R. § 21.0(a)(1), *available at* http://www.gao.gov/legal/bids/bibreg.html.

[3] Supplemental or amended protests add one or more new grounds to an existing protest. This can occur as an offeror who has filed a protest is provided information related to the procurement through the agency report or by requesting additional relevant documentation from the agency.

Resources

For further information regarding the extended debriefing program, please contact Ms. Christy Barry, AF/JAQ, at (240) 612-6710.

OVERSEAS CONTINGENCY OPERATIONS

The Danger of Fiscal Mission Creep

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AC-130 Hercules
(U.S. Air Force photo/Second Lieutenant Kay Nissen)

BY LIEUTENANT COLONEL TERESA G. LOVE, USAF

Military personnel must exercise discipline when determining which appropriation ("pot" of money) to use, especially in the dynamic deployed environment.

Judge Advocates who deploy face a wide array of possible issues as part of the deployed practice. One area of practice is frequently military justice, and its concomitant focus on "good order and discipline." Another area of law in the deployed arena is fiscal law, which carries its own version of "good order and discipline." Discipline in the fiscal environment is driven by the need to be properly responsive to Congress and the American people. More specifically, military personnel must exercise discipline when determining which appropriation ("pot" of money) to use, especially in the dynamic deployed environment. It is the duty of military attorneys to ensure military decision-makers in the deployed environment understand the need for strict discipline and accountability as a function of responsiveness to civilian oversight. This article discusses the need for Judge Advocates at all levels of command—whether permanently-assigned or deployed—to ensure robust command discipline when advising commanders on categorizing operational requirements as budgeted baseline activities or incrementally funded contingency activities.

Contingency Operations

Since 11 September 2001, the United States has been involved, to various degrees, in contingency operations throughout the globe. A "contingency operation" is a "military operation that is designated by the Secretary of Defense as an operation in which members of the armed forces are, or may become, involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force."[1]

When the Secretary designates (i.e., "names") a military operation as contingency, a new set of fiscal parameters arise. While day-to-day, or "steady state", DoD activities must be planned and budgeted for well in advance, a contingency operation is by definition a relatively sudden, unanticipated occurrence. Congress has historically allowed for relatively relaxed budgetary restrictions during such times. While this relaxation of the normal planning rules creates much-needed flexibility for the dynamic deployed environment, it also creates the possibility of fiscal mission creep, as described in this article. If command discipline is not maintained, operations are at risk of being improperly characterized as contingencies for funding purposes when they are or should be more deliberately planned and funded.

[1] 10 U.S.C. § 101(a)(13)(A). Section (a)(13)(B) states that "contingency operations" also occur as a result of the call or order to, or retention on, activity duty of members of the Reserve or Guard.

To understand the requirement for discipline and accountability, one must first contemplate the core foundation of fiscal law, which comes from the United States Constitution. The Constitution assigns authority to Congress to provide for the "common Defense."[2] Article I, Section 9 of the Constitution provides that "[N]o Money shall be drawn from the Treasury but in Consequence of an Appropriation made by Law."[3] As such, the Department of Defense (DoD) relies on Congress to provide for its fiscal needs, and the DoD is not authorized to spend funds without Congress' explicit authorization.[4] This context must be kept in mind at all times when making fiscal determinations, especially in the contingency environment.

Funding

Before discussing what amounts to fiscal "mission creep," a few words are in order to describe how funding flows through the DoD. First, while the combatant commands (and, as delegated, their Service component commands) execute contingency operations, Congress does not separately fund them. Instead, funding for almost all combatant command missions comes through Service channels via an annual DoD Appropriation Act. Every year, each of the Services requests funding from Congress to train and equip their personnel. Inherent in this "train and equip" function are the costs of maintaining a baseline capability for a steady state existence. These basic costs of maintaining a Service at a certain level of preparedness amount to a Service's "baseline."

The DoD Financial Management Regulation (FMR) defines baseline costs as "continuing annual costs of DoD operations funded by the Component's base appropriations. Baseline costs are those costs that would be incurred whether or not the Component is participating in a contingency operation."[5] In contrast, costs associated with activities above and beyond steady state operations are considered "incremental" operational costs. The DoD FMR defines "incremental costs" as "additional costs to the DoD Component appropriations that would not have been incurred had the contingency operation not been supported."[6]

From Fiscal Year 2002 to Fiscal Year 2007, the incremental costs of contingency operations were primarily funded outside the annual budgetary process, relying on supplemental appropriations passed in a relatively *ad hoc* manner. In an attempt to impose more fiscal discipline on the DoD, the John Warner National Defense Authorization Act for Fiscal Year 2007 required operations in Iraq and Afghanistan after Fiscal Year 2007 to be funded as part of the annual budget and appropriation process, and required inclusion of a detailed justification of the funds requested.[7] As such, the Executive Branch could no longer rely on a contingency budget that was appropriated outside the normal budgetary process.

Congress thus began appropriating these "Overseas Contingency Operations" (OCO) incremental funds in Title IX of the DoD Appropriations Act (DoDAA).[8] In the 2013 DoDAA; Section 2, Division C, of the Consolidated and Further Continuing Appropriations Act of 2013, Congress appropriated several "baseline" appropriations.[9] It then provided, in Title IX, for a separate "additional amount" of funds under the rubric of OCO to supplement each of the appropriations, including Operation and Maintenance (which, in addition to the Service-specific designated supplements, includes the OCO Transfer Fund, Afghanistan Infrastructure Fund, and Afghanistan Security Forces Fund).[10]

Despite the fact that Congress began to use this more robust process of explicitly appropriating the cost of incremental expenses in the annual budget, the Government Accountability Office (GAO)[11] repeatedly expressed concern about the continued lack of transparency inherent in this process.[12] Specifically, when DoD re-characterized much of its mission in contingency areas (and elsewhere) as a "longer war on terror," in contrast to more immediate "battles," GAO criticized this approach as being too vague. By presenting this critique, GAO was flexing its fiscal muscle on behalf of its congressional parent, indicating that when the DoD begins to see contingencies as more than immediate emergencies, GAO expects much more coordination—to include specific budgetary approval—from Congress. "If the administration believes that the nature of the security challenges facing the United States has changed such that we are engaged in a long-term conflict, the implications—for example, in terms of force structure, investment priorities, and long-term versus short-term costs—should be the focus of discussion with Congress."[13]

By 2009, GAO expressed considerable consternation with DoD accounting mechanisms despite the promulgation of DoD financial regulations that mandated the DoD make "every effort possible to capture and accurately report the costs" of contingency operations.[14] In a 2009 report, GAO emphasized the need to distinguish long-term expenses from short-term emergency expenses by properly separating incremental costs from baseline costs. In so doing, GAO indicated that the DoD should no longer be granted unfettered discretion in operational spending without more congressional oversight.[15] In light of the "competing priorities for an increasingly strained federal budget," GAO opined that a robust debate should take place surrounding

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[2] U.S. Const. art. I, § 8

[3] *Id.* at art. I, § 9.

[4] *United States v. MacCollom*, 426 U.S. 317, 320 (1976) ("The established rule is that the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress.").

[5] DoD FMR Volume 12, Chapter 23, para. 231403.B.

[6] DoD FMR Vol 12, Ch 23, para. 231403.A; para. 230406; para. 230902.

[7] John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. 109-364, § 1008, 102 Stat. 2083, 2374 (2006).

[8] Beginning in 2009, the Obama Administration began referring to funds for the wars in Iraq and Afghanistan as Overseas Contingency Operations funds instead of Global War on Terrorism funds. GAO 09-791R, page 1.

[9] Military Personnel (Title I), Operations and Maintenance (O&M) (Title II), Procurement (Title III), Research, Development, Test and Evaluation (RDT&E) (Title IV), Revolving and Management Funds (Title V), Other DoD Programs (Title VI), Related Agencies (Title VII), General Provisions (Title VIII).

[10] Though improperly using OCO instead of baseline funding does not technically violate the Purpose Statute (31 U.S.C. § 1301) (which is part of what is commonly termed the Antideficiency Act), because, for example, the O&M/OCO expense is taken from the same O&M appropriation as an O&M/baseline expense (e.g., in the Air Force, both are coded as "3400"), using an improper appropriation designation nonetheless violates the intent of Congress, as expressed through the GAO, OMB promulgated policy, and DoD regulations, which must be avoided. *See also* 10 U.S.C. § 127a(c) and DoD FMR Volume 14, Chapter 2, para. 020202.

[11] "The U.S. Government Accountability Office (GAO) is an independent, nonpartisan agency that works for Congress. Often called the "congressional watchdog," GAO investigates how the federal government spends taxpayer dollars," http://www.gao.gov/about/index.html, last viewed Dec. 9, 2013)

[12] GAO-08-68, *GLOBAL WAR ON TERRORISM: DOD Needs to Take Action to Encourage Fiscal Discipline and Optimize the Use of Tools Intended to Improve GWOT Cost Reporting*, November 2007 ("Continuing to fund the GWOT through emergency funding requests reduces transparency and avoids the necessary reexamination and discussion of defense commitments and the trade-offs among funding needs that may be required." (page 22)).

[13] GAO-08-68, page 7.

[14] DoD FMR Vol 12, Ch 23, para. 230904.B.

[15] GAO-09-302, *GLOBAL WAR ON TERRORISM: DOD Needs to More Accurately Capture and Report the Costs of Operation Iraqi Freedom and Operation Enduring Freedom*, March 2009 ("Obtaining an accurate picture of DOD costs is of critical importance given the need to evaluate trade-offs and make more effective use of defense dollars in light of the nation's long-term fiscal challenge and the current financial crisis. In the past, we have reported on the need for DOD to become more disciplined in its approach to developing plans and budgets, including building more GWOT costs into the base defense budget." (page 1)).

these costs.[16] GAO recommended that DoD identify costs related to this "longer" war and build those costs into the base defense budget, along with some incremental costs of the ongoing, perhaps more temporary operational missions that could be moved into the base budget. It also recommended that DoD work with the White House Office of Management and Budget (OMB)[17] to consider limiting emergency funding requests to "truly unforeseen or sudden events."[18]

Criteria

In March 2009, OMB compiled a list of criteria to be used "in evaluating whether funding properly belongs in the base budget or in the budget for overseas contingency operations."[19] This memo was reissued in September 2010, with minor modifications.[20]

The memorandum provides that OCO appropriations may be used during contingency operations specifically in "[g]eographic areas in which combat or direct combat support operations occur." Those locations include "Iraq, Afghanistan, Pakistan, Kazakhstan, Tajikistan, Kyrgyzstan, the Horn of Africa, Persian Gulf and Gulf nations, Arabian Sea, the Indian Ocean, the Philippines, and other countries on a case-by-case basis."[21] Thus, for a requirement to be eligible for OCO, it must be part of a contingency designated by the Secretary of Defense,[22] which must be located in one of the named countries or regions.[23] If a requirement is not connected to such a designated operation, it is not eligible for OCO funds.

In addition to being in support of the named contingency operation in one of the listed locations, the requirement must meet specific substantive criteria.[24] For example, major equipment may be purchased with an OCO appropriation, but only if the equipment is specialized, theater-specific equipment or is needed to replace losses during the operation.[25] Also authorized is replacement or restoration of equipment returning from theater to its original capability. However, the incremental cost of non-war related upgrades to such equipment should be included in the baseline budget.[26] Other criteria address the funding of equipment modifications—specifically, that OCO is appropriate only for "operationally-required modifications to equipment used in theater or in direct support of combat operations, for which funding can be obligated in 12 months, and that is not already programmed in" the Fiscal Year Defense Plan (FYDP).[27] For military construction, OCO may only be used to construct "facilities and infrastructure in the theater of operations in direct support of combat operations."[28] The table attached to the OMB memorandum lists other inclusions, with the implication that expenses not meeting criteria must be budgeted in and funded from the baseline appropriations.

In terms of funding operations, the memorandum's table lists OCO as being authorized for "direct war" costs. These costs include *only* (1) transport of personnel, equipment, and supplies to, from and within the theater of operations; (2) deployment-specific training and preparation for units and personnel (military and civilian) to assume their directed missions as defined in the orders for deployment into the theater of operations; and (3) within the theater, the incremental costs above the funding programmed in the base budget to (a) support commanders in their missions; (b) build and maintain temporary facilities; (c) provide food, fuel, supplies, contracted services and other support; and (d) cover the operational costs of coalition partners supporting US military missions, as mutually agreed.[29]

The criteria provide several explicit *exclusions* from war/overseas contingency funding. These exclusions include, *inter alia*, training equipment, family support initiatives, recruiting and retention bonuses, and support for the personnel, operations, or construction or maintenance of facilities at U.S. Offices of Security Cooperation in theater. These requirements should be funded in the baseline budget.[30]

Armed with this guidance, finance officers and military attorneys should be able to effectively advise their leadership on determining, for each of the command's requirements, whether the requirement should be funded in the baseline or in the OCO budget. It is this discipline that is imperative to preserving and maintaining public confidence. The DoD FMR instructs that each organization supporting a contingency operation "shall capture" related obligations "at the lowest possible level of the organization."[31] Indeed, it is imperative that accurate determinations be made at the most local field level, as this level of command is best situated to determine whether a requirement is truly an emergent one.

Without an accurate accounting of what costs go in the baseline budget verses what are actual incremental expenses, Congress receives an inaccurate report regarding what contingencies actually cost. This in turn affects planning for future budgets. Additionally, by inaccurately using OCO appropriations instead of steady state ("baseline") appropriations, DoD overstates its true war costs. For example, when the Air Force, through one of its Component-Numbered Air Forces++, funds what amounts to a system or weapons program with an OCO appropriation (whether

[16] *Id.* at 21.

[17] "The core mission of OMB is to serve the President of the United States in implementing his vision across the Executive Branch. OMB is the largest component of the Executive Office of the President. It reports directly to the President and helps a wide range of executive departments and agencies across the Federal Government to implement the commitments and priorities of the President." http://www.whitehouse.gov/omb/organization_mission/, last viewed on Dec. 9, 2013.

[18] GAO-09-791R, Overseas Contingency Operations, *Reported Obligations for the Department of Defense*, July 10, 2009, page 3.

[19] OMB Memo, Criteria for War/Overseas Contingency Operations Funding Requests, Mar. 5, 2009.

[20] OMB Memo, Criteria for War/Overseas Contingency Operations Funding Requests, Sept. 9, 2010.

[21] OMB personnel indicated in a telephone conversation that OMB, not DoD, shall make the "case-by-case" determination. However, *see also* Department of the Army Financial Management Guidance for Contingency Operations, June 4, 2012, page 4 ("Commanders have the responsibility and authority to approve the use of OCO funds for direct combat support operations in support of OEF [Operation Enduring Freedom] in countries not identified above on a case-by-case basis while keeping within the intent of the OMB/OSD [Office of the Secretary of Defense] guidance.").

[22] 10 U.S.C. § 101(a)(13)(A).

[23] OMB Memo, Criteria for War/Overseas Contingency Operations Funding Requests, Sept. 9, 2010.

[24] These criteria augment, and align with, the list of allowable incremental costs in DOD FMR Vol. 12, Ch 23, para. 230902.

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] In response to the issuance of these criteria, GAO praised the DoD in a briefing to Congressional Committees, but continued to push for DoD to move OCO costs into the base budget. GAO 10-288R, Overseas Contingency Operations: Funding and Cost Reporting for the Department of Defense, 17, Dec. 18, 2009. ("To build more discipline into the budget process, the administration should continue to look for opportunities to move other OCO costs into the base budget,").

[31] DOD FMR Vol 12, Ch 23, para. 230702 and 230904.C; *see also* DOD FMR Vol 12, Ch 23, para. 230902; GAO 09-302, page 8 ("Individual obligation data that are coded as being in support of GWOT are recorded and sent through the component's chain of command where they are aggregated at successively higher command levels.")

Operations & Maintenance or Procurement), it removes what should be a steady-state budgeted item from the oversight of authorities who have been specifically tasked with building and maintaining such programs. Doing so risks duplication of effort and produces tremendous waste if the program is ultimately scrapped in favor of a more deliberately funded and produced program.

When commanders improperly categorize baseline requirements as incremental, second and third order effects can arise. For example, during a shutdown of the federal government, it is common for incremental wartime costs to be exempt from furlough or shutdown due to their emergent nature. If a requirement has been erroneously classified as "incremental" when it should have been diverted to and included in the non-exempt Service baseline budget, that requirement will end up being erroneously exempted from ceasing operations. By allowing those requirements to continue functioning, the DoD will be out of compliance with Congressional allowances on continuing government functioning.

Wartime commanders are under tremendous pressure to get the mission done. As such, it is very tempting to use the pot of money that is most readily available. This creates a tendency to "ride the OCO train" as long as possible. Doing so when not in compliance with OMB and DoD policy, however, removes the activities from the Congressional and DoD oversight needed to ensure unified and effective direction of the military Services. It also sets a negative precedent in that later rotations of personnel simply assume that their predecessors correctly classified the funding for the requirement. Changing pots of funds several years into the requirement, without an evident change in circumstances (the "we've always done it that way" syndrome), generates frustration and intransigence that could have been avoided if the funding had been correctly classified earlier.

Conclusion

In sum, commanders and other decision-makers would be well-advised to consider what the state of their organizations would be if all OCO funds suddenly ceased. Under such a scenario, the organization should be able to maintain a functioning operational capability with a healthy, if not robust, steady state baseline operating budget. If, however, an organization is in a state of heavy dependence on the OCO supplements, the organization is in an unhealthy state. It is thus incumbent upon military attorneys to assist command and other organizational leadership to see the larger picture. The advice should convey that, though it would be easier for decision-makers to continue spending OCO and thereby avoid the tough fiscal decisions, Congress and OMB require a more detailed, informed picture of where federal appropriations are being spent. Though it would be easier and faster to "ride the OCO train" as long as possible, DoD decision-makers must have the discipline and integrity to make correct fiscal choices.

Though it would be easier and faster to "ride the OCO train" as long as possible, DoD decision-makers must have the discipline and integrity to make correct fiscal choices.

(Image courtesy of iStock)

Basic Contract Legal Reviews

BY MAJOR JOHN M. PAGE, USAF, AND CAPTAIN JAMES J. KRAUER, USAF

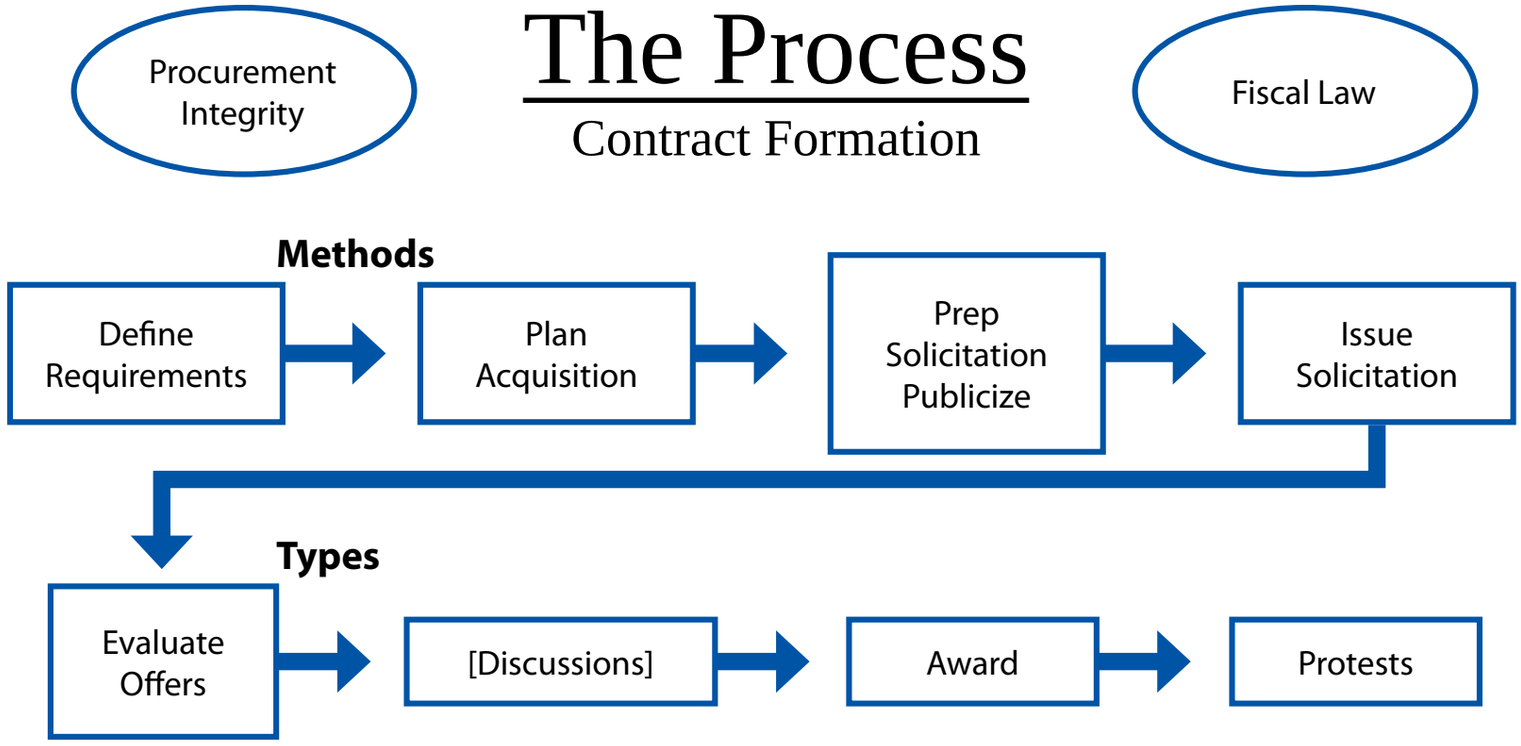
CONGRATULATIONS!

You have not reviewed a contract before but you are now the Chief of Contract Law…

You have just been named the Legal Office's new "Chief of Contract Law!" One evening, just as you're about to head out of the office, you get a call from the contracting office: the new construction solicitation is ready for review. This is the wing commander's top priority, and the contracting office has been under extreme pressure to get a contract together quickly. The draft solicitation is finally finished! The last significant step is your legal review. The contracting squadron commander asks if you can make that review your top priority; could you get it done in the next day or two? You have not reviewed a contract before but you are now the Chief of Contract Law so you (reluctantly) agree.

The contracting officer shows up and drops off a whopper of a construction contract: ten inches thick, three separate folders full of small type and unintelligible plans and blue prints. What in the world are you going to do with this?

(Image courtesy of iStock)



Reviewing contracts at any stage of a procurement can be overwhelming, even downright daunting at first, and you can easily find yourself lost in the maze of folders that has overtaken your desk. This article is here to help. We will begin by discussing how the contracting process works, to make sure you have the full picture when you open that file. Next, we'll suggest some resources you can use to make your review much easier. Then we'll discuss how to review a contract solicitation, suggesting certain areas to which you should pay close attention. Finally we will discuss your review of a contract award and what you should focus on.

The purpose of this article is not to discuss everything. Government contracting is an enormous subject and there is no way we can cover it all in this article. Rather, we hope to give you a good starting point before you open that massive file.

The Life of a Contract: an Overview

Before we move into the actual contract review process, let's spend a moment discussing the life of that contract on your desk. How and why did all of that paper get in there, anyway? Take a look at the above graph developed by the Army JAG School, which provides a basic overview of the procurement process.[1]

A contract is just a tool to procure a service, supply, construction or so on. Thus, the very first step in the contract process, as shown in the diagram, is to determine a need. A unit (known to contracting as "the customer") will have a need for something, such as lawn care services or building construction, and the contracting squadron will help them get it.

As you can imagine, the expert in what the customer needs is the customer. The customer is tasked with defining its requirements so the contracting office knows what to buy. Once those requirements are defined, the customer and the contracting office make a plan to meet those requirements, asking questions like: how much will this cost? What "color" of money will we use? What is the best way to meet this requirement and are there capable vendors available?

Once the acquisition has been planned out, the contracting office puts out a notice, also known as a solicitation, to potential businesses that the Air Force will be looking for contract "offerors" to fill the need. The solicitation is almost always issued by posting it to the internet, usually at the Federal Business Opportunities website, www.fbo.gov.[2] Offerors are given a certain amount of time to respond by submitting their offers to the contracting office. Once those proposals are received, the source selection evaluation team, which is usually made up of contracting office personnel and technical representatives from the customer's organization, will review and select the proposal that best meets the source selection criteria listed in the solicitation. If the evaluation team is unclear about something in the respective offers, it can open discussions with the offerors and allow the offerors to revise their offers. Eventually though, the evaluation team will select a winner and the contracting officer will make an award. Watch out, though: if the losing offerors think the contracting officer's decision was unfair, they have the right to protest the award and attempt to have it overturned. Obviously making the right decision and having the appropriate documentation to support that decision is important.

Once the contract is awarded, the contract enters the administration stage. There are all sorts of legal problems that can occur in this stage; however, we won't discuss them here because this article is about reviewing contracts up to the award stage. Suffice it to say, the award stage is just the beginning.

Ideally, the attorney will be involved with the contract process right from the start. For instance, if the attorney is involved with the planning process, he or she can help the contracting office avoid potential legal mistakes early on. The attorney may also be asked to answer legal questions during the drafting and

[1] Cont. & Fiscal L. Dep't, The Judge Advoc. Gen.'s Legal Center & Sch., U.S. Army, 166th Contract Attorneys Course Deskbook (July 2013), 1-4.

[2] *See* FAR 5.101.

evaluation processes. Not only is your legal advice valuable, but you may also provide business advice to the contracting officer that can help improve the acquisition process.

Often times you will not be involved in the acquisition planning and the first time you see the contract will be when you are asked to review the solicitation before it is issued. You will see that file again when you are asked to review the contracting officer's award decision. So let's now turn to the process of reviewing those folders on your desk.

Tools of the Trade

The Federal Acquisition Regulation (FAR) is the regulation on which to base your legal review. It is the law of government contracting and can be found on the web at http://www.acquisition.gov/far/. Hill Air Force Base also has a FAR site available at http://farsite.hill.af.mil/, but be aware that it is not official. Only acquisition.gov contains the most up-to-date official version of the FAR.

Other resources include the Army's Contract Attorneys Deskbook and Fiscal Law Deskbook.[3] These are great resources to help you review any portion of the contract. Among many other things, the Contract Attorneys Deskbook at Chapter 2, Attachment 1 provides a helpful sample contract review checklist that is user-friendly and great for beginners.[4] You can also view a wide variety of resources at the AF/JAQ Contract Law Homepage[5] and at the Air Force Contracting Central homepage.[6] All of these resources are invaluable and you should bookmark these pages for future reference.

In addition to the digital resources, live help is available in the form of the Field Support Branch (FSB) of AFLOA's Contract Law Field Support Center (AFLOA/JAQK). The FSB is a team of contract and fiscal law experts whose mission is to provide reach back support on contract and fiscal law matters. This group of experts is available to assist in all phases of a procurement and accepts all questions. You can call them at DSN 612-6700, or commercial at 240-612-6700. As with any communication outside of your legal office, be sure to get your SJA's approval first.

Reviewing the Solicitation

When a solicitation is submitted for review, take a moment to first review the Form 9. This is the document that has the funding information on it. The Form 9 will tell you how much the contract is funded for and what type of funds are allocated.[7] You are looking to see whether sufficient funds will be available for this contract and what type they will be. Check out the Army Contract Attorney's Guide, Chapter 4, for a good discussion on how to read fund cites. (NOTE: There has been a movement lately away from using traditional fund citations. If the accounting codes don't appear in the accounting classification box or if the codes on the continuation sheet look different from those discussed in the guide, call either the contracting officer or the finance POC listed on the Form 9 for help.)

Normally, wing level projects will use Operations and Maintenance (O&M) funds (accounting code 3400). O&M funds are the least restrictive type of funding, so commanders have a lot of flexibility in spending them. If you find that another type of funding has been listed, that may be okay, but you will want to contact the contracting officer and find out more information to determine if the specific fund type is appropriate. Similarly, if the project has not been funded at all, be sure to follow-up with the contracting officer and find out what is going on. There may be a reasonable explanation, but the key thing is to ensure we do not award a contract without any funding. That is a violation of the Anti-Deficiency Act (ADA), which will create a significant problem for your command.

Finally, check to ensure "proper year money" is available. Using funds from the proper fiscal year is also important to ensure the procurement complies with the ADA. The Army's Fiscal Law Deskbook has an entire chapter (Chapter 3) on how to determine whether a contract is funded using the proper fiscal year funds. There is also a short discussion of this issue in Chapter 4 of the Contract Attorney's Deskbook.

Once you have established that the project is properly funded, you will want to briefly review the statement of work (SOW) or performance work statement (PWS). The SOW/PWS explains exactly what the contractor will be expected to do. The customer is the real expert on this; nevertheless, you will want to review it to make sure it makes sense and does not pose any potential legal problems.

Next, review the contract line item numbers (CLINs). In a service contract, for example, each CLIN will be for specific work to be performed for a period of time. Specifically, a ground maintenance contract could have a CLIN to mow grass for a period of one year. If the contract will have option years, which are additional years of service that may be exercised if the contracting officer determines it is in the best interest of the government to do so, there will be a CLIN for each option year too. The number of CLINs a solicitation has depends upon the length and complexity of the project. Again, review them to make sure they make sense and there are no obvious errors.

The next portion of the solicitation you will want to focus on is the "Instructions to Bidders." In many contracts, this is located in Section L. If the contract is for a commercial item[8], it will be located in clause 52.212-1. Here, the contracting officer details the format in which the offeror must submit its bid or proposal. Pay close attention to this section and ask yourself a lot of questions when reading it. For example, can offerors email proposals or must they send them by mail? If email is allowed, what file formats can they use? Will Microsoft Word documents be accepted? What about PDFs? Are .zip files allowed? Does your base server even permit .zip files? What about the file's size limit? And so on. As you can see, it can be easy to get into the weeds here, but it is important to do so. An offer that does not conform to the prescribed format in the instructions will be rejected, so you need to make sure the instructions are clear and you must anticipate potential issues.

The "Evaluation Criteria" section of the solicitation is the next section you should review. In

[3] Both documents are available at https://www.jagcnet.army.mil/. Click on "Legal Center and School," and then on "Publications."

[4] Cont. & Fiscal L. Dep't, The Judge Advoc. Gen.'s Legal Center & Sch., U.S. Army, 166th Contract Attorneys Course Deskbook (July 2013), 2-10 – 2-18.

[5] https://aflsa.jag.af.mil/AF/CONTRACT_LAW/index.html

[6] https://cs.eis.af.mil/airforcecontracting

[7] The Army calls these "Purchase Requests and Commitments." They look different, but they do the same thing as the Form 9.

[8] Commercial items are items, excluding real property, that are customarily offered for sale or lease to the general public and are customarily used by the general public or non-government entities. Basically, if you can find it online to purchase for personal use, it is most likely a commercial item. *See* FAR 2.101.

some contracts, this is located at Section M. Commercial contracts use clause 52.212-2. Pay *very* close attention to this section. This section states the method that the source selection evaluation team will use to evaluate the offers. Only the factors discussed in this section may be considered when awarding the contract. If non-disclosed factors are considered during the award phase, a losing offeror may successfully protest the award, subjecting the project to costly delays in funding and time. Thus, the contracting officer must be sure to use clear and unambiguous evaluation criteria.

When reviewing the evaluation criteria, compare them to the purpose of the project. Typically if the contract is for basic services or a routine product, the main concern is price. Thus, price may be the most important evaluation criterion. If the contract is going to require a degree of sophistication, a specific skill set, or be vital to the mission, past performance or the technical plan may be more important than price. Further, the solicitation must indicate whether evaluation factors others than price are significantly more important than price, approximately equal to price, or significantly less important than price.[9]

In your review, you should provide input as to the appropriateness of the evaluation criteria. Is this a basic routine service contract such as grounds maintenance? If it is and the evaluation factors make past performance or the technical plan more important than price, ask the contracting officer why. Conversely, consider the importance of a Bird Aircraft Strike Hazard (BASH) contract, which can affect the safety of aircraft. Does it make sense to award to the cheapest offeror without any consideration of past performance or technical plan? The contracting officer should have a valid reason for his or her evaluation criteria, but be sure to identify any potential issues and discuss the various options available to determine what evaluation factor(s) should be included in the solicitation.

[9] FAR 15.304(e).

There are also other, more general areas to consider when reviewing the solicitation. Is this a full and open competition or has competition been limited in some way? If competition has been limited, find out why and make sure it is appropriate. Is this a solicitation for small businesses? If so, be sure to read up on the small business rules.[10] Is this a solicitation for construction? If so, check out the special rules for construction contracting.[11]

Most importantly, *write down a detailed legal review of your findings*. Many attorneys pencil-whip the process by simply writing "legally sufficient" on the review sheet, but provide no additional information. Don't do that! While the contracting office may be fine with it, you will need this review when it comes time to review the award.

Which brings us to…

[10] FAR Part 19.

[11] FAR Subpart 36.2.

Reviewing the Award

Once all of the offers have been received and evaluated, you will get another chance to review the package, this time reviewing the contracting officer's award decision. The first thing to review: your legal review of the solicitation. What issues did you see with the solicitation? How did the contracting office handle your recommendations? What should you be looking out for when you review the award? Your legal review of the solicitation, if written well, will be a road map to your review of the award. This may be important because often the contract award will not be ready for your review until months after you reviewed the solicitation, so you may not remember it very well.

Most importantly, ***write down a detailed legal review of your findings.*** Many attorneys pencil-whip the process by simply writing "legally sufficient"... but provide no additional information.

Second, review the solicitation. Often, contracting officers will neglect to give you the solicitation itself. Make sure you ask for the solicitation if it is not provided. You cannot review the award without having the solicitation in front of you for reasons that will become clear below.

Look to see if there have been any amendments to the solicitation. Amendments obviously change the original solicitation, so be sure you are looking at the most up to date version. After all, you don't want to base your review on outdated facts. If the solicitation was amended, verify the amendment was properly provided to all potential offerors. Any offeror that did not have the opportunity to see an amendment will be put on an unfair playing field, which is grounds for a protest.

Third, see whether the contracting office engaged in "discussions" with the offerors. If the Government had discussions with one offeror it must open discussions with *all* offerors. Note that there is a difference between a "discussion" and a "clarification." Basically, a discussion could cause a substantive change to an offer. A clarification is a minor, administrative change. Check out the Contract Attorney's Guide, Chapter 8, for a thorough discussion of this distinction.

The awardee's proposal format and time of submission is the fourth item your legal review should address. Verify the successful offer conformed to the solicitation instructions. Then, verify the contracting office received it on time. Unless it was the Government's fault, if the offer was even one minute late, it cannot be considered. This is a bright line rule that has almost no flexibility. A late offer simply cannot be considered. The contracting officer should note any late submissions in his or her decision document. If there are late submissions associated with the contract, verify the contracting officer has properly addressed the situation in accordance with FAR 14.4 (Sealed Bid) or FAR 15.208 (Negotiated Contract).[12]

Fifth step: review the contract funding again. Remember the Form 9? This time, compare it to

[12] Cont. & Fiscal L. Dep't, The Judge Advoc. Gen.'s Legal Center & Sch., U.S. Army, 166th Contract Attorneys Course Deskbook (July 2013), 2-16 – 2-17.

the awardee's base year price. It should match, even if it means that funding needed to be increased. Again, if sufficient funding has not been approved, you cannot award the contract because to do so would be an ADA violation.

> When writing your review, be sure to be thorough. Again, a one line "legally sufficient" review doesn't do anyone any good.

Sixth, compare the contracting officer's decision document to the solicitation evaluation criteria. Did the source selection team focus on the right things? For example, if the solicitation said that the technical plan is more important than price, then the offer with the best technical plan should win. If instead the award decision focuses entirely on price, awarding to the cheapest offeror even though better technical plans were offered, that's an unfair award decision and will probably be protested. Pay close attention and make sure the award is based entirely on the evaluation criteria. Also note that the contracting officer may *not* consider any factors other than those discussed in the solicitation. Reliance on unstated evaluation factors makes the award ripe for protest and must be avoided. It's up to you to send the award decision back if it is in any way flawed. Your failure to do so will only cause major headaches and delays down the road.

Finally, when writing your review, be sure to be thorough. Again, a one line "legally sufficient" review doesn't do anyone any good. Even good awards sometimes get protested, and your legal review should make it easier for the Air Force litigator defending your award to know exactly what to expect. There is nothing more frustrating for a litigator than a meaningless legal review. Therefore, if you see any potentially controversial or protestable issues, provide a thorough discussion of the way your team resolved them.

Conclusion

When contracting drops a "hot" contract on your desk, don't panic. You now possess the basic knowledge to systematically perform your legal review. By using this article as a guide, you can feel confident that you have performed a quality review of the key contracting and fiscal areas associated with a contract solicitation or award.

If you are still in doubt about a contracting issue, ask for help. Your MAJCOM has procurement attorneys who can assist you. Additionally, AFLOA/JAQK, the Contract Law Field Support Center, is available to help. Attorneys in AFLOA/JAQK can be reached by phone at the main number of 240-612-6700 or DSN 612-6700. They can also be reached via the organizational e-mail address at usaf.pentagon.af-ja.mbx.afloa-jaqk-andrews@mail.mil.

RESOURCES

AF/JAQ Contract Law
https://aflsa.jag.af.mil/AF/CONTRACT_LAW/index.html

AFLOA/JAQK Learning Center
https://aflsa.jag.af.mil/apps/jade/collaborate/course/view.php?id=1387

Air Force Contracting Central
https://cs.eis.af.mil/airforcecontracting

Deskbooks: Army's Contract Attorneys Deskbook and Fiscal Law Deskbook available at
https://www.jagcnet.army.mil/

Federal Acquisition Regulation (FAR)
http://www.acquisition.gov/far/

Federal Business Opportunities
www.fbo.gov

LIVE HELP
Contact the Field Support Branch (FSB) of AFLOA's Contract Law Field Support Center (AFLOA/JAQK) DSN 612-6700, commercial at 240-612-6700, or organizational e-mail address at
usaf.pentagon.af-ja.mbx.afloa-jaqk-andrews@mail.mil

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START BY BELIEVING— THE ACCUSED

BY COLONEL DANIEL J. HIGGINS, USAF AND MAJOR SHAD R. KIDD, USAF

A news article on the Air Force's homepage reporting on the summit the Chief of Staff hosted last December to address sexual assault and discuss the aims and perspective of Major General Margaret Woodward, then director of the Headquarters Air Force Sexual Assault Prevention and Response Office.[1]

> "[General] Woodward wants all commanders to "start by believing." Believe there is a problem, and **believe victims when they come forward**. This doesn't go contrary to "innocent until proven guilty," but balances the rights of the accused with **the critical act of believing the victims throughout the process**, she said.[2]

[1] Randy Roughton, *CSAF Hosts Summit to Address Sexual Assault*, U.S. Air Force (Dec. 18, 2013), http://www.af.mil/News/ArticleDisplay/tabid/223/Article/467782/csaf-hosts-summit-to-address-sexual-assault.aspx

[2] *Id.*

(Image courtesy of iStock)

To quote from the first comment on the webpage carrying this article, "How does that paragraph make the slightest bit of sense?"[3]

One of the fundamental tenets of our criminal justice system requires that we start by believing, not the accuser, but the accused—a concept more commonly known as the presumption of innocence.

Presumption of Innocence

One of the fundamental tenets of our criminal justice system requires that we start by believing, not the accuser, but the accused—a concept more commonly known as the presumption of innocence. The United States Supreme Court has said; "The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law."[4] While some of the protections available to civilians in this country are not available to military members, the presumption of innocence is not among them. "The presumption of innocence is a longstanding feature of both military and civilian law. It is a critical part of our tradition of justice and deeply imbedded in our culture as well as our systems of justice."[5]

"The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice."[6] "In strict legal terms, the presumption of innocence flows from the fundamental right to a fair trial…."[7] Article 51(c) of the UCMJ demonstrates both the relationship between the presumption of innocence and the requirement of proof beyond a reasonable doubt and the military's adherence to both principles as it requires all military panels to be instructed "that the accused must be presumed to be innocent until his guilt is established by legal and competent evidence beyond reasonable doubt…."[8] Although the standard of proof beyond a reasonable doubt is distinct from the presumption of innocence, the two are closely related in that the former "provides concrete substance for the" latter.[9]

The justification for the presumption of innocence and the requirement that it be afforded to those accused of crimes far predates the creation our own criminal justice system. "The *Coffin* Court traced the venerable history of the presumption from Deuteronomy through Roman law, English common law, and the common law of the United States."[10] In explaining the necessity of requiring proof beyond a reasonable doubt in criminal cases, Justice Harlan explained that the requirement is "bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free."[11] These tenets of our criminal justice system are too important to be threatened by the political whims of the day.

Our criminal justice system was formed and maintained by those who took great care and effort to preserve and protect this presumption by mandating procedural safeguards designed to ensure that mere allegations could not suffice to incur the disapprobation and condemnation of the state. Truth and justice were to be sought and served, not personal vendettas or political campaigns. The Constitution we have sworn to defend and the law we are duty-bound to follow and enforce demand that we start by believing the accused and continue by ensuring him or her a just and fair process—before and, if necessary, during and after a trial.

Imagine a military judge instructing court members that allegations were presumed to be true. Any Constitution-loving lawyer (or American, for that matter) would be appalled and disgusted by such a flagrant violation of due process. Such an instruction would completely undo the presumption of innocence and the burden of proof beyond a reasonable doubt. The problem with starting by believing an alleged victim of sexual assault, as Maj Gen Woodward urges, is that the message may be intended for commanders to utilize as a prevention and counseling tool, but listeners (including subordinate commanders and potential witnesses and court members, not to mention JAGs entrusted with ensuring due process) may not be differentiating between prevention and counseling on the one hand and administering justice on the other. Commanders can respond to an alleged victim by offering him or her care and resources without making a commitment to believe the accuser or conducting training that admonishes other Airmen to believe the accuser.

Commander's Role

Maj Gen Woodward's admonitions do not end with "start by believing"—she goes on to assert that it is critical that alleged (my word, not hers) victims be believed by commanders throughout the process. In the criminal justice setting, commanders must adhere to our constitutional and statutory duties and not to trends or slogans. Despite the politics and the related career implications, commanders must not follow Gen Woodward's advice and must differentiate between their roles in dealing with someone who alleges a crime occurred and in the actual administration of criminal justice.

Psychologists do something similar to this compartmentalized approach all the time. Clinicians have little to no interest in forensic preservation of memory. Indeed, some of the treatments they use intentionally revise and re-inform memories in order to achieve the goal of counseling—the good mental health of the patient. Starting by believing a patient who claims he or she was the victim of a sexual assault is necessary and appropriate in this setting.

Forensic psychologists, however, have a very different purpose. Forensic psychologists tend to focus on "objective reality, whereas a clinician generally focuses on a patient's subjective reality."[12] While they are not seeking to harm the mental health of the patient in any way, ensuring their mental health is also not their goal. Rather, a forensic psychologist, like any other type of forensic examiner, is tasked with providing an impartial review of the evidence

[3] *Id.*, comment by "Radioedit".

[4] *Coffin v. United States*, 156 U.S. 432, 453 (1895).

[5] *United States v. Kaiser*, 58 M.J. 146, 150 (C.A.A.F. 2003), citing *United States v. Washington*, 57 M.J. 394, 402 (C.A.A.F. 2002) (Baker, J., concurring).

[6] *United States v. Kaiser*, 58 M.J. 146, 150 (C.A.A.F. 2003), citing *Estelle v. Williams*, 425 U.S. 501, 503 (1976).

[7] *U.S. v. Kaiser*, 58 M.J. 146, 150 (C.A.A.F. 2003), citing *Drope v. Missouri*, 420 U.S. 162, 172 (1975).

[8] 10 U.S.C. § 851(c); *see also* MANUAL FOR COURTS-MARTIAL, UNITED STATES [hereinafter MCM], R.C.M. 920 (e)(5)(A)(2012).

[9] *In re Winship*, 397 U.S. 358, 363 (1970).

[10] *Taylor v. Kentucky*, 436 U.S. 478, 483 (1978).

[11] *In re Winship*, 397 U.S. 358, 372 (1970).

[12] Denise R. Hugaboom, *"The Different Duties and Responsibilities of Clinical and Forensic Psychologists in Legal Proceedings,"* 5 UNDERGRADUATE REVIEW: A JOURNAL OF UNDERGRADUATE STUDENT RESEARCH 27-32 (2002), *available at* http://fisherpub.sjfc.edu/cgi/viewcontent.cgi?article=1121&context=ur, citing D. Faust and J. Ziskin, *"The Expert Witness in Psychology and Psychiatry"*, SCIENCE 241 (1988).

available (e.g., memory, behavior, attitudes, beliefs) and providing an objective analysis based on their particular area of expertise.

"The major role of psychologists working in clinical settings, whether as psychotherapists or as psychological evaluators, is to help the *client*. What is learned about the patient is used to benefit the patient in terms of personal growth and support. However, in forensic psychology the role of the expert is significantly different. Forensic psychologists are charged with using the results of their assessment to help or educate the *court*, without regard to the potential benefits to the examinee."[13] The goal is to develop evidence and work toward truth—whether that is easy for the patient to experience or not. Both roles are important. Both roles are necessary. But they are distinctly different roles.

Psychologists have recognized this issue and addressed it in guidelines published for forensic practitioners.[14] In shaping our policy on sexual assault prevention and response, the military should also clearly delineate between commanders' and other members' roles and responsibilities in the military justice context and in other contexts.

The Air Force and its members have many responsibilities related to sexual assault, including prevention, counseling and justice. These responsibilities are not always contradictory. For example, participating in a fair trial may have a therapeutic effect for a complaining witness, and the proper administration of justice may serve to deter and thus prevent future sexual assaults. However, there are many (probably more) cases in which these goals are contra-indicated, by which I mean that working toward one will adversely affect one or more of the others.

[13] Irving B. Weiner, ed. Handbook of Psychology, 4 (2003).

[14] American Psychological Association, *Specialty Guidelines for Forensic Psychology,* 11 (2013), *available at* https://www.apa.org/practice/guidelines/forensic-psychology.pdf ("Assessment in forensic contexts differs from assessment in therapeutic contexts in important ways that forensic practitioners strive to take into account when conducting forensic examinations").

Justice

The dangers of contaminating our justice system with a mindset that may be appropriate for counseling purposes stem from the fundamental problem of starting any justice proceeding from the position of believing the accuser rather than the accused. Our beliefs, whether based on facts or not,[15] inform our assumptions, perspectives and decisions. On an individual level—be it a commander, a JAG, an investigator, a potential witness or a panel member—this can result in confirmation bias, in which a person accepts a hypothesis and then looks for evidence to support it rather than considering other possibilities.[16] The kind of training currently being advocated for and provided by the Air Force's SAPR program can contribute a number of cognitive biases,[17] none of which should have any place in our justice system.

**Imagine a military judge instructing court members that allegations were presumed to be true….
Such an instruction would completely undo the presumption of innocence and the burden of proof beyond a reasonable doubt.**

In such cases, Air Force leaders, and those tasked to advise them, should first look to context. If the context is justice (e.g., determining disposition of allegations, trial matters), "starting by believing the victim" should have absolutely no place in their decision-making or advice. If, on the other hand, the context relates to Special Victim Capability (e.g., humanitarian moves, VA services), "starting by believing the victim" may be appropriate.

There are areas of overlap between these duties where a contextual analysis will not be sufficient to determine the appropriate mindset and considerations for a decision maker. In these areas, we must remember that due process requires that in any setting in which we are determining whether to employ the power of the state to the detriment of the accused, we are not only duty-bound but Constitutionally required to give the accused, not the accuser, the benefit of the doubt. Therefore, if something has to give, it must not be the rights of an accused.

In addition to the problems this type of training can create on an individual level, the negative effects of the spread of biased information (such as a policy requiring we give the accuser rather than the accused the benefit of the doubt) can be magnified when presented on a larger scale. In this regard, the availability cascade is particularly relevant to the recent SAPR training with which the AF has been inundated.

"An availability cascade is a self-reinforcing process of collective belief formation by which an expressed perception triggers a chain reaction that gives the perception increasing plausibility through its rising availability in public discourse."[18] Professors Kuran and Sunstein's article on availability cascades deals with other contexts, but many of the methods of creating them and the risks and harms associated with them can be seen in today's Air Force. For example, Professors Kuran and Sunstein explain that "[a] common method for triggering availability cascades is for a group to pass carefully sifted information to selected journalists, who then rush to release hot stories that justify the group's work."[19] The perceived mishandling of a couple of cases based on incomplete information has shaped most of the rhetoric and, unfortunately, much of the thinking about the military's approach to sexual assault in recent years. Professors Kuran and Sunstein also discuss the use of media and political institutions to perpetuate availability cascades.[20] If you have seen voir dire in a sexual assault case in the military in the past two years you have witnessed an availability cascade in our military.

Training that erodes or undermines the fundamental tenet that people accused of crimes are innocent until proven guilty beyond a

[15] Regarding what are often presented as facts in the context of SAPR training and the veracity of those assertions, *see* Major Matthew Burris, *Thinking Slow about Sexual Assault in the Military,* 22 Buff. J. Gender, L., & Soc. Pol'y ____ (forthcoming 2014-2015), *available at* http://ssrn.com/abstract=2414494.

[16] James W. Kalat, Introduction to Psychology, 9e ed. (2008/2011).

[17] Information about and sources on numerous cognitive biases are available at http://en.wikipedia.org/wiki/List_of_cognitive_biases#cite_note-13. Even a cursory review of these biases raises significant causes for concern in the context of providing "start by believing the victim" training to commanders, judges, counsel, investigators, members, witnesses, etc.

[18] Timur Kuran and Cass R. Sunstein, *Availability Cascades and Risk Regulation* 51 Stan. L. Rev. 683 (1999).

[19] *Id.* at 734.

[20] *Id.* at 735-736.

reasonable doubt is antithetical to the fair and proper administration of criminal justice. Commanders, court members, judges, judge advocates, and investigators who administer our military justice system (or any American criminal justice system) must not "start by believing the victim" in the context of criminal justice proceedings. Doing so would turn a foundational principle of American justice on its head and violate an accused's constitutional and statutory rights to a fair trial, trampling on the Constitution we have sworn to defend.

In addition to violating the core tenets of our justice system and the Constitution, sending the message to those involved in the justice process to "start by believing the victim" seriously risks violating another statutory protection provided to military members accused of crimes—the prohibition against unlawful command influence.

> No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts.[21]

When generals and other senior leaders are heard admonishing commanders, potential court members, investigators, witnesses, etc. to start by believing the accuser, there is a very real possibility that our system of justice is being influenced unlawfully.

Influenced Reality

This possibility became reality during a recent sexual assault case I tried. The pressure felt by the special court-martial convening authority was evinced in the push note that accompanied his referral recommendation. He clearly recognized the weakness of the case (late reporting, no forensic evidence, alleged victim with a very poor character for truthfulness, etc.) and the likelihood of acquittal, but he wrote that the Air Force "owed" her a court-martial. His thinking, as should be obvious to anyone familiar with the basic precepts of criminal law, was completely off-base. The military justice system owes society justice and the accused due process; it does not "owe" an accuser a court-martial. This convening authority's statement is nonsensical from a military justice perspective but understandable from a services or treatment perspective—the problem is that the note was written in a military justice context.

This example is illustrative of the problems related to unlawful command influence when commanders and other senior leaders are providing and endorsing training that advocates Air Force members start by believing accusers. Another example of the negative affect this type of commander-backed training is having on the Air Force is that investigators treat suspects and accusers very differently, even if the evidence indicates the accuser is not being truthful. Additionally, less and less potential panel members come to a court-martial as a blank slate—rather, they come with incorrect preconceptions based on inaccurate information and legal standards taught in training. As a result of this training, potential witnesses are also affected, becoming more likely to give credence to claims of accusers, even if they are internally inconsistent and inconsistent with or contradicted by other evidence.

These concerns are particularly poignant in the military where those who defend the nation and the Constitution are deprived of some of the Constitution's basic guarantees[22], such as a grand jury[23] and jury trials[24]. The typical response is that the Article 32 process and panels are adequate substitutes. That may have been true of the Article 32 process in the past; it is not clear whether it will remain true after the recent changes to that article take effect.[25] Similarly, the accused's statutory right to clemency consideration by his or her commander has been largely eviscerated.[26]

As for jury trials, panels requiring only a two-thirds vote have never served a sufficient protection. Sexual assault cases, where conviction brings sex offender registration and can bring a maximum penalty of life imprisonment, serve as an excellent example. In a SPCM where wrongful sexual contact is alleged, an Airman could be convicted, labeled a sex offender, be given a punitive discharge, and be imprisoned for a year if the prosecutors are able to convince as few as two members such actions would be appropriate. In a GCM for rape, an Airman could be convicted and sentenced to a lifetime of confinement by a mere four members. Civilians do not face such drastic consequences with so little protection. Where our Airmen are more vulnerable, their commanders and the military justice system should be looking to uphold the protections they do have, not undermining them by turning the presumption of innocence on its head.

> As the guardians of the military justice system, it is our duty to ensure we provide America's Airmen a fundamentally fair and impartial process.

Conclusion

As the guardians of the military justice system, it is our duty to ensure we provide America's Airmen a fundamentally fair and impartial process. Doing so requires that we ensure all Air Force members are properly trained that in the criminal justice context, we must all start by believing the accused and never vary from that presumption unless and until his or her guilt has been proven by legally competent evidence beyond a reasonable doubt. Permitting any training to undermine these guarantees would constitute a failure of our most fundamental duty as judge advocates.

[21] 10 U.S.C. § 837(a).

[22] *See, e.g.*, Edward T. Pound, *Unequal Justice: Why America's Military Courts are Stacked to Convict*, U.S. News and World Report, Dec. 8, 2002.

[23] *See Johnson v. Sayre*, 158 U.S. 109 (1895).

[24] *See, e.g.*, *United States v. McClain*, 22 M.J. 124 (C.M.A. 1986) ([c]ourts-martial have never been considered subject to the jury-trial demands of the Constitution"), citing *Ex parte Milligan*, 71 U.S. (4 Wall) 2 (1866).

[25] *See, e.g.*, *United States v. McDowell*, 2014 WL 1323102 (A.F.C.C.A. 2014), citing Pub. L. No. 113-66, FY 2014 National Defense Authorization Act, § 1702 ("[W]e note that the Article 32 process will soon be more limited in scope, with explicit statutory language that the victim may not be required to testify at the preliminary hearing").

[26] *See* Pub. L. No. 113-66, FY 2014 National Defense Authorization Act, § 1702, and compare the current version of 10 U.S.C. § 860.

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Court-Martial Procedure: A Proposal

BY COLONEL (RET.) JAMES A. YOUNG, USAF

On October 18, 2013, the Secretary of Defense directed his General Counsel to conduct a comprehensive review of the UCMJ and the military justice system; members of the public were invited to submit recommendations...

The Uniform Code of Military Justice (UCMJ) is more than sixty years old. Except for capital cases, court-martial procedure has not changed significantly since the UCMJ was enacted in 1950.

On October 18, 2013, the Secretary of Defense directed his General Counsel to conduct a comprehensive review of the UCMJ and the military justice system;[1] members of the public were invited to submit recommendations by July 1, 2014.[2] In response to the invitation, I propose several changes as outlined below to streamline the military justice system while being fair to the accused and meeting the needs of good order and discipline in the armed services.

[1] Memorandum from Secretary of Defense to Secretaries of the Military Departments et al., Comprehensive Review of the Uniform Code of Military Justice (Oct. 18, 2013), *available at* http://www.caaflog.com/wp-content/uploads/SECDEF-Memo-Comprehensive-Review-of-UCMJ.pdf (last viewed June 8, 2014).

[2] 79 Fed. Reg. 28,688 (2014).

RECOMMENDATION ONE:

Remove authority from the convening authority to select court members, approve the findings and sentence, grant clemency, and preside over vacation proceedings.

To many commentators, a troubling aspect of the military justice system is the omnipresence of the convening authority, to include: deciding which charges go to trial and whether to accept an offer for a pretrial agreement, determining which court members will sit on the court-martial that decides the accused's guilt or innocence, whether to approve the findings and sentence, whether to defer confinement or forfeitures resulting from the sentence, and whether to grant clemency.[3] I recommend limiting the role of the convening authority to: (1) determining whether to send a case

[3] *See e.g.* James A. Young, *Revising the Court Member Selection Process*, 163 Mil. L. Rev. 91, 92 (2000) (listing critiques of the court member selection process).

(Image courtesy of iStock)

Creating and maintaining correctional custody facilities, separate from prisons, is costly in both financial and manpower resources that the military can no longer afford.

to a preliminary hearing under Article 32;[4] (2) referring charges to trial but not to a specific court-martial panel;[5] (3) negotiating and approving pretrial agreements;[6] (4) deferring sentences to confinement or forfeitures;[7] and (5) determining whether to vacate a suspended sentence after receiving a recommendation from a military judge.[8]

I also recommend amending the UCMJ to make the service Secretaries responsible for establishing a random selection procedure for court members and the clemency process.[9] After trial and preparation of the record of trial, the accused could either waive appellate review or have the case forwarded to the service's appellate defense shop without action by the convening authority approving the findings and sentence or granting clemency. Clemency would be the prerogative of the service Secretary and the service clemency and parole board.[10]

Further, the duty to conduct hearings to vacate suspended sentences should be transferred to military judges, who would find facts and recommend action, but the convening authority should retain decision-making authority.[11]

[4] 10 U.S.C. § 832 (2012).

[5] 10 U.S.C. § 825 (2012); MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 407(a)(4) and (6) (2012) [hereinafter MCM].

[6] MCM, *supra* note 5. R.C.M. 705.

[7] 10 U.S.C. § 857a (2012).

[8] 10 U.S.C. § 872 (2012).

[9] 10 U.S.C. § 825 (2012). Discussed more fully below at Recommendation # 6.

[10] *See* 10 U.S.C. § 874 (2012) (providing service secretaries with powers of remission and suspension).

[11] *See* Recommendation # 6.

RECOMMENDATION TWO:

Eliminate summary courts-martial and grant field grade officers authority to impose confinement for 30 days as a nonjudicial punishment under Article 15.

In 1962, Congress increased the punishments available to commanders under Article 15, UCMJ.[12] In congressional hearings, Major General Albert M. Kuhfeld, the Judge Advocate General of the Air Force, speaking for the Department of Defense, asserted that commanders wanted increased punishment authority to avoid sending cases to summary courts, where a conviction would result in a criminal record.[13] He opined that increasing the commanders' nonjudicial punishment (NJP) authority to approximate those available in a summary court-martial could lead to the eventual elimination of summary courts.[14] It has not: FY 2012 was the first year in which the services convened fewer than 2,000 summary courts-martial.[15]

The major difference between punishments available in a summary court and those in an Article 15 proceeding is that a summary court-martial can adjudge a sentence to confinement for 30 days, while a field grade commander

[12] Pub. L. No. 87-648, § 1, 76 Stat. 447 (1962).

[13] Nonjudicial Punishment: Hearings on H.R. 7656 Before a Subcomm. of the H. Comm. on Armed Servs., 87th Cong. 4901–03, 4917 (1962); *see* S. REP. NO. 87-1911 (1962), *reprinted in* 1962 U.S.C.C.A.N. 2379, 2380.

[14] *Id*. at 4909. The Army estimated it could reduce the number of summary courts-martial by 75%. S. REP. NO. 87-911 (1962), *reprinted in* 1962 U.S.C.C.A.N. 2379, 2382.

[15] Reports of the Judge Advocates General to the Committees on Armed Services of the Senate and House of Representatives. *See* 10 U.S.C. § 946 (2012). In FY 1984, the Navy and Marine Corps combined convened 4,699 summary courts-martial.

Confinement guard (U.S. Air Force photo/Jeff gates)

can impose correctional custody for 30 days. Correctional custody was a new form of punishment, the purpose of which was "to exercise close supervision over the individual to the end that the cause of his behavior that resulted in the commission of an offense may be corrected without stigmatizing him with a sentence to 'confinement.'"[16] The stigma of confinement, in part, was thought to result from a term of confinement being "lost time,"[17] which would extend the military member's enlistment until it was made up.

More recently, correctional custody has fallen from favor (and is not often utilized by commanders). Creating and maintaining correctional custody facilities, separate from prisons, is costly in both financial and manpower resources that the military can no longer afford.

Thus, I recommend that a field grade commander be given the authority to impose NJP consisting of confinement for up to 30 days. After all, a company grade summary court-martial officer subordinate to the convening authority may adjudge confinement not to exceed 30 days. Of course, an accused not attached to or embarked in a vessel could still refuse to have the case adjudicated in the NJP forum.[18]

The concern about the accused having to make up lost time if sentenced to confinement as a result of NJP is unfounded. Lost time results when "[a]n enlisted member of an armed force … is confined by military or civilian authorities for more than one day *in connection with a trial*, whether before, during, or after the trial."[19] Therefore, confinement as a result of NJP would not result in lost time.

RECOMMENDATION THREE:

Establish standing courts.

A court-martial is not a court of continuing jurisdiction. It is transitory, brought into being by order of a convening authority.[20]

I propose amending the UCMJ to require the service Secretaries to establish standing courts. Issues arise before and after trial that could best be resolved by a military judge. For example, an accused placed in pretrial confinement would not have to wait until trial to obtain a judicial determination on the legality of his pretrial confinement. A military judge would be better able than a military magistrate to determine whether to grant search authorizations in complicated cases—such as requests to search offices of military defense counsel.[21]

RECOMMENDATION FOUR:

Modify special courts-martial to judge alone trials.

Currently, a special court-martial may consist of—

(A) not less than three members; or

(B) a military judge and not less than three members; or

(C) only a military judge, if one has been detailed to the court, and the accused…so requests.[22]

It is time to eliminate special courts-martial that do not include a military judge. It does not appear that any such court-martial has convened in many years. In addition, no lay court-martial president is familiar with the rules of procedure and evidence such as to ensure that an accused gets a fair trial.

I further recommend eliminating court members in special courts-martial and there appears to be no constitutional impediment to establishing special courts-martial as judge-alone tribunals for two reasons.[23]

(1) The Sixth Amendment right to a jury trial does not apply to petty crimes and offenses,[24] i.e., offenses for which imprisonment for more than six months is not authorized.[25] An accused charged with multiple petty offenses is not entitled to a jury trial despite the possible aggregate sentence exceeding six months.[26]

(2) "The Sixth Amendment right to a jury trial does not apply to courts-martial."[27]

Eliminating court members in special courts-martial would streamline the military justice system and make it more compatible with the federal civilian system.[28]

RECOMMENDATION FIVE:

Except in capital cases, require sentencing by the military judge. The military judge should be required to impose any sentence agreed to by both the convening authority and the accused.

Court member sentencing is an anachronism,[29] a vestige of a system that until 1969 had no judges to perform that function.[30]

When judge alone sentencing was rejected thirty years ago in the Military Justice Act of 1983 Advisory Commission Report,[31] one of the Commission's members, Professor Kenneth F.

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[16] S. Rep. No. 87-1911 (1962), *reprinted in* 1962 U.S.C.C.A.N 2379, 2384.

[17] *Nonjudicial Punishment: Hearings on H.R. 7656 Before a Subcomm. of the H. Comm. on Armed Servs.*, 87th Cong. 4901, 4918 (1962).

[18] 10 U.S.C. § 815(a) (2012).

[19] 10 U.S.C. § 972(a)(3) (2012) (emphasis added).

[20] *See* McClaughry v. Deming, 186 U.S. 49, 62 (1902); Reid v. Covert, 354 U.S. 1, 36 (1957); United States v. Burnett, 27 M.J. 99, 104 (C.M.A. 1988).

[21] *See, e.g.*, Julie Watson, *Marines Say Raid Did Not Taint Cases*, Associated Press, May 23, 2014, http://bigstory.ap.org/article/apnewsbreak-marines-say-raid-did-not-taint-cases (last viewed May 30, 2014) (Marines search military defense counsel's office for cell phone); United States v. Calhoun, 49 M.J. 485 (C.A.A.F. 1998).

[22] 10 U.S.C. § 816(2) (2012).

[23] For those enamored with the Canadian military justice system, certain offenses there punishable by imprisonment for less than two years are referred to a standing court-martial—a military judge alone court-martial. National Defence Act, R.S.C. 1985, c. N-5, §§ 165.192, 174, http://laws-lois.justice.gc.ca/eng/acts/N-5/index.html (last viewed June 8, 2014).

[24] Duncan v. Louisiana, 391 U.S. 145, 159 (1968).

[25] Baldwin v. New York, 399 U.S. 66, 69 (1970).

[26] Lewis v. United States, 518 U.S. 322 (1996).

[27] United States v. Easton, 71 M.J. 168, 175 (C.A.A.F. 2012), *cert. denied*, 133 S. Ct. 930 (2013); *see Ex parte* Quirin, 317 U.S. 1, 39–41 (1942) (dictum).

[28] Lately, there has been much praise for the Canadian military justice system, at least in removing from the commander the decision to refer a case to court-martial. *See, e.g.*, Alex Seitz-Wald, *Answer to military's sexual assault problem may be overseas*, Salon, June 5, 2013, http://www.salon.com/2013/06/05/answer_to_militarys_sexual_assault_problem_may_be_overseas/ (last viewed Apr. 10, 2014); Editorial, *No Hope of Justice*, N.Y. Daily News, Mar. 17, 2014, at http://www.nydailynews.com/opinion/hope-justice-article-1.1722347 (last viewed Apr. 10, 2014).

Under the Canadian system, certain offenses punishable by imprisonment for less than two years are referred to a standing court-martial—a military judge alone court-martial. National Defence Act, R.S.C. 1985, c. N-5, §§ 165.192, 174, http://laws-lois.justice.gc.ca/eng/acts/N-5/index.html (last viewed Apr. 8, 2014).

[29] Jurors in only six states sentence felons—"beginning with Virginia at the eastern end, and proceeding west through Kentucky, Missouri, Arkansas, Texas, and Oklahoma." Nancy J. King & Rosevelt L. Noble, *Felony Jury Sentencing in Practice: A Three-State Study*, 57 Vand. L. Rev. 885, 886 (2004).

[30] The office of military judge was established under the Military Justice Act of 1968, Pub. L. No. 90-632, § 2(9), 82 Stat. 1336 (1968).

[31] Available at http://www.loc.gov/rr/frd/Military_Law/pdf/ACR-1983-I.pdf (last viewed June 8, 2014).

Ripple,[32] made the case against court member sentencing: "Society has an overwhelming interest in a professionally imposed sentence tailored as far as possible to meet the several goals of any modern penal sentence. It simply cannot leave the task to amateurs."[33]

Statistics support Professor Ripple's view of court members as amateurs. In FYs 2011 and 2012, judge-alone trials comprised 70 percent of all courts-martial.[34] In those two years combined, fewer than 1,550 courts-martial in all of the services were conducted with members. That does not provide much opportunity for court members to gain sufficient experience to adjudge consistent and just sentences.[35]

Military judges have the training, experience and judicial temperament to render sound sentences. Judge alone sentencing would also eliminate the need for special qualifications for court members and permit the adoption of a more random method of court member selection.[36]

In cases with pretrial agreements, the military judge should be required to impose the sentence agreed upon by the convening authority and the accused. A sentencing hearing would still be held to provide a formal record for the clemency and parole board.

[32] Now Senior Judge, U.S. Court of Appeals for the Seventh Circuit.

[33] Statement of Professor Kenneth F. Ripple, The Military Justice Act of 1983, Advisory Commission Report, vol. I, at 74 (1984).

[34] *See* Reports of the Judge Advocates General, 71 M.J. CXIII, CXXXVIII, CLIX, CLXVI–CLXVII; 70 M.J. CXIII, CXXXIX, CLIX, CLXVII–CLXVIII. In both FY 2012 and FY 2011, approximately 82% of Army general and special courts-martial were tried by a judge sitting alone. *Id*.

[35] Some even admit as much. *See* YOUNG, *supra* note 3, at 111 n.112 (noting instances where court members expressed uncertainty about their ability to divine an appropriate sentence).

[36] *See* Recommendation # 6.

RECOMMENDATION SIX:

Require the service Secretaries to establish a system for randomly selecting court members.[37]

The requirement that the convening authority detail court members "as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament"[38] stems from the rapid mobilization of civilians into the Army during World War I, resulting in a large cadre of new officers unaccustomed to command and unfamiliar with the military justice system. Unsure of themselves and with an "undue fear of showing leniency," they imposed severe sentences but recommended clemency, "attempting thereby to shoulder onto higher authority the responsibility for determining the proper quantum of punishment."[39] Transferring the sentencing function to judges will eliminate the need for court members to meet these qualifications, which will make it easier to adopt a more random system for selecting court members.

As it currently stands, unless an enlisted accused agrees, enlisted personnel cannot be detailed to a court-martial.[40] I recommend elimination of this provision. Enlisted personnel who are neither members of the accused's unit nor junior to the accused should not be excluded from court-martial service at the whim of the accused.

[37] The system could require a certain number of field grade officers, company grade officers, and enlisted members be detailed, but the selection of those members within each category would be random from a pool of all eligible members.

[38] 10 U.S.C. § 825(d)(2) (2012).

[39] JONATHAN LURIE, ARMY MILITARY JUSTICE: THE ORIGINS OF THE UNITED STATES COURT OF MILITARY APPEALS 1775-1950, 46 (1992) (quoting William C. Rigby, Draft of Report on Court-Martial Procedures, in Records of the Judge Advocate General, NARC, RG 153, entry 26, box 20. N.p. (1919)).

[40] 10 U.S.C. § 825(c)(1) (2012).

The service Secretaries would need to establish specific guidelines for the composition of court membership, depending on the rank of the accused, and set up a system for random selection of the members within each rank. As part of those guidelines I suggest the following personnel should be ineligible to sit as members:

- Less than four years active service[41]
- Inferior in rank to the accused
- Assigned to the accused's unit
- Report directly to another court member
- Convicted by court-martial of any offense
- Punished under Article 15 in the previous 4 years
- Judge advocates
- Chaplains
- Performing law enforcement duties

These proposed restrictions will streamline voir dire and appellate review of for-cause challenges. Military members with less than four years of service are often in training and just becoming familiar with the military. Certain personnel, such as chaplains, judge advocates, and members assigned to law enforcement duties, should not be eligible to sit on courts-martial because their military duties are either incompatible with rendering judgment on the accused (chaplains) or there is a strong perception they cannot be fair and impartial because of their duty positions (judge advocates and law enforcement personnel).

[41] The number four is strictly notional.

RECOMMENDATION SEVEN:

Require all counsel to be qualified and certified under Article 27(b).[42]

Currently, special courts-martial may be tried by counsel who are not in fact lawyers.[43] There is no reason either party should be represented by persons not qualified and certified under Article 27(b), and I know of no case in which this occurred in the past 30 years. The services are adequately manned with qualified and certified judge advocates to provide legal counsel for every accused. In addition, it is doubtful that persons unable to meet the qualification requirements of Article 27(b) would be able to try a court-martial in a manner that would withstand scrutiny on appeal.

RECOMMENDATION EIGHT:

Modify the military appellate court system by: (1) granting all accused convicted of an offense at a general or special court-martial the right to appeal to an appellate court; (2) eliminating the service Courts of Criminal Appeals; (3) changing the Court of Appeals for the Armed Forces from a discretionary appellate court sitting en banc to a court comprised of panels of three judges, operating in a manner similar to the U.S. circuit courts of appeals; and (4) removing restrictions from appeals to the Supreme Court.

[42] 10 U.S.C. § 827(b) (2012).

[43] 10 U.S.C. § 827(c) (2012). As far as I have been able to discover, there have been no such courts-martial with counsel who are not qualified under Article 27(b) in many years.

Currently, an accused whose court-martial does not result in a sentence to death, a punitive discharge or confinement for one year or more has no right of direct appeal to an appellate court.[44] Instead, lawyers in the office of the service Judge Advocate General review such cases.[45]

I recognize that a person convicted of an offense does not have a constitutional right to appeal a criminal conviction.[46] "The right [to appeal a conviction] 'is purely a creature of statute,' and a defendant wishing to avail himself of that right 'must come within the terms of the applicable statute.'"[47] Nevertheless, it makes little sense to grant an accused sentenced to only a bad-conduct discharge the ability to appeal his case to the service Court of Criminal Appeals (CCA), the Court of Appeals for the Armed Forces (CAAF), and possibly the Supreme Court, while an accused sentenced to confinement for 364 days, reduction to the lowest enlisted grade, and forfeiture of all pay and allowances with no punitive discharge is not entitled to review by any appellate court. I recommend granting every accused convicted by a special or general court-martial the right to appeal to an appellate court.

Before the Military Justice Act of 1983, an accused convicted under the UCMJ had two levels of direct appeal: review by the service appellate court to ensure the findings were correct in law and fact and a discretionary appeal to the Court of Military Appeals (now the Court of Appeals for the Armed Forces).[48] The review by the service courts was essential in a system in which, until 1969, had no independent judges presiding over trials. As the Court of Military Appeals was the court of last direct appeal, it considered itself as, "[i]n essence, ¼ the Supreme Court of the Military Justice system."[49]

Since 1984, an accused has had a limited right to seek Supreme Court review, except for "any action of the CAAF in refusing to grant a petition for review."[50] The CAAF is no longer the Supreme Court of the military justice system.[51]

There is no need for three levels of military appeals. A trained and independent military judge presides over a court-martial. It is unnecessary for an appellate court to review the facts of the trial *de novo*.[52] I recommend eliminating the CCAs,[53] turning the CAAF into a court consisting of three-judge panels to which an accused has a right to appeal, abolishing a factual sufficiency review, and removing the restrictions on Supreme Court review of military cases.

The CAAF is a court searching for cases to decide. It has not issued 50 opinions in any of the past five fiscal years,[54] and it appears likely to issue only 32 opinions in FY 2014. In FY 2013, 806 petitions for review were filed, but only 776 were complete petitions with supplements. Of those 776 cases, no errors were alleged by either the appellant or counsel in 165 (21%),[55] the appellant but not counsel raised issues in 300 cases (39%), and counsel asserted issues in 311 (40%).[56]

This is a waste of judicial resources. The CAAF could be better employed as the first level of appellate review. And with less than 3,000 special and general courts-martial being tried each year, most of which are judge alone trials, the CAAF should be able to handle the new workload. The CCAs served a useful purpose when the CAAF was the final court of direct review for courts-martial. But such is no longer the case.

With the elimination of the CCAs and the transformation of the CAAF into a non-discretionary court of three-judge panels, the restrictions on the Supreme Court hearing military cases should be eliminated.[57]

RECOMMENDATION NINE:

Require a verbatim record for every court-martial conviction.

As every conviction should be appealable, a verbatim record for every conviction is necessary.[58] A verbatim record would not be required in cases in which the accused was acquitted of all offenses.

RECOMMENDATION TEN:

Consolidate the government appellate divisions so that when counsel purports to speak for the United States, it does so with one voice.

The Judge Advocate General of each service is required to detail appellate Government counsel "to represent the United States."[59] In fact, appellate government counsel are more parochial. As they normally do not coordinate with the other services before presenting argument to the appellate courts, their position is often that of the particular service, not necessarily the United States. There have been instances where appellate Government attorneys of one service even filed an amici brief for the accused at the CAAF. A consolidated government appellate division would end this practice and result in the appellate Government counsel truly speaking for the United States.

CONCLUSION

Many of my recommendations for modifying court-martial procedure are not new or novel. What I have endeavored to do here is suggest a comprehensive review and update to our military justice system that will streamline it while remaining fair to the accused and consistent with the needs of good order and discipline.

[44] 10 U.S.C. § 866(b) (2012).

[45] 10 U.S.C. § 869(a) (2012). The Judge Advocate General may refer such a case to the service Court of Criminal Appeals. 10 U.S.C. § 869(d) (2012).

[46] Abney v. United States, 431 U.S. 651, 656 (1977).

[47] United States v. Parrish, 887 F.2d 1107, 1108 (D.C. Cir. 1989) (quoting Abney v. United States, 431 U.S. 651, 656 (1977)).

[48] 10 U.S.C. § 867 (2012).

[49] United States v. Armbruster, 29 C.M.R. 412, 414 (C.M.A. 1960).

[50] 10 U.S.C. § 867a (2012); *see* 28 U.S.C. § 1259 (2012).

[51] *See* Clinton v Goldsmith, 526 U.S. 529, 533–35 (1999) (noting that the CAAF is an Article I court of limited jurisdiction).

[52] The members of the service court must themselves be convinced beyond a reasonable doubt of the accused's guilt. United States v. Turner, 25 M.J. 324, 325 (C.M.A. 1987).

[53] And with it, any review of the findings and sentence to ensure it is correct in fact. *See* 10 U.S.C. § 866(c) (2012).

[54] FY 2013—39; FY 2012—33; FY 2011—46; FY 2010—43; FY 2009—46. All figures from Clerk of Court, U.S. Court of Appeals for the Armed Forces.

[55] When Congress authorized the CAAF to grant petitions for review "on good cause shown," 10 U.S.C. § 867(a)(3) (2012), it is unlikely its members envisioned a court that would review records of trial in cases in which neither the accused nor counsel could find an error to allege. Nevertheless, the CAAF still reviews such cases.

[56] Statistics provided by Clerk of Court, U.S. Court of Appeals for the Armed Forces.

[57] 28 U.S.C. § 1259 (2012).

[58] 10 U.S.C. § 854(c)(1) (2012).

[59] 10 U.S.C. § 870(b) (2012).

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Child Pornography Offenses

Applying Federal Civilian Sentencing Standards to Military Justice Cases

BY MS. MELINDA L. JOHNS

The sentencing phase of the court-martial can often become the lowest priority for trial counsel, as there is so much focus on obtaining a conviction; sentencing can easily become an afterthought.

(Photo Illustration courtesy of iStock)

Introduction

In the federal civilian system, and in many state systems, prosecutors, defense counsel, and judges have some form of sentencing guidelines at their disposal to help them anticipate and argue for an "appropriate" sentence for any given crime. Trial counsel prosecuting courts-martial, unlike their civilian counterparts, receive little formal guidance when it comes to the sentencing phase of a court-martial. This article focuses on sentencing for the crime of *possession* of child pornography.[1] Specifically, this article discusses how trial counsel might use the United States Sentencing Guidelines for child pornography offenses to develop more effective sentencing cases in military courts.

We will in turn discuss the importance of the sentencing phase of the court-martial, examine how trial counsel currently calculate sentences in these cases, briefly explain how the sentencing guidelines function, examine the current guidelines for possession of child pornography, highlight some criticisms of the guidelines as they currently stand, identify alternative factors which could be used as aggravating offense characteristics, and discuss how trial counsel can apply those factors to create compelling arguments at sentencing in child pornography courts-martial.

The Sentencing Phase of the Court-Martial

What is the significance of the sentencing phase? The sentencing phase of the court-martial can often become the lowest priority for trial counsel, as there is so much focus on obtaining a conviction; sentencing can easily become an afterthought. In a 2007 training article entitled "Some Thoughts on Sentencing Argument," Colonel Tim Cothrel, a former Air Force Judge Advocate General's School instructor, argues the importance of sentencing, going so far as to say that sentencing should be "the single most important training topic for Air Force trial advocates."[2] He explains that

[1] Receipt, Possession, Distribution, and Production of child pornography is criminalized in the Military system by Article 134 of the Uniform Code of Military Justice. Receipt, Possession, and Distribution of child pornography are federally criminalized in the civilian system by 18 U.S.C. §2252A and Production is criminalized separately by 18 U.S.C. §2251.

[2] Tim Cothrel, *Some Thoughts on Sentencing Argument* (2007) (unpublished training essay) (available to Air Force Judge Advocates at:

In sentencing, the counsel virtually always have a chance to genuinely affect the outcome. For example, in findings, the members generally provide a simple response—yea or nay, up or down, heads or tails. In sentencing however, they construct a complex remedy, combining various elements and weighing competing interests, factoring past, present and future, with few useful instructions, and no formal standards or guidelines... [C]onviction is…little more than a statement of status regarding both actor and action. A sentence, on the other hand, more fully reflects that severity and impact of the crime, and provides a retort to it in some way by punishing and reforming the criminal, protecting society, deterring future would-be criminals, and reinforcing good order and discipline in the military.[3]

When conceptualized in this way, the significance of the sentencing phase becomes evident; military justice sentencing approaches deserve a critical look.

How Do Military Justice Attorneys Determine What Sentence to Argue For?

Determining what sentence to argue for in military courts-martial can be confusing and disorderly. Most Uniform Code of Military Justice (UCMJ) offenses have been assigned mandatory maximum sentences, but absent is official guidance from the President, Congress or the Department of Defense on approximate sentencing ranges. Rather, trial counsel are left to search through historical data and consult with their leadership to try to determine what an appropriate sentence would be in any given case.

A common way that trial counsel determine what sentence they will argue for is by running a report using the Automated Military Justice Analysis and Management System (AMJAMS) to access sentencing data for similar crimes committed in a given time period in the Air Force. For example, trial counsel might look to identify all child pornography convictions in the past four years to see how long the average sentence has been for an offense similar to the case they are working on. Unfortunately, there is very little detail in the system. For example, not all entries include information on how many images an offender possessed, and most have no information about how the pornography was obtained or how long the defendant had engaged in the collecting behavior. As a result, it can be extremely difficult to extrapolate enough information to meaningfully determine where a current offender fits into the spectrum of previously adjudged sentences. An additional hurdle is that AMJAMS information is further limited, because child pornography offenses are not common enough in the Air Force to provide a large "bank" of information to draw from.

The other way that trial counsel may determine what sentence to ask for is by consulting with their Staff Judge Advocate and Senior Trial Counsel, or others who will offer guidance based on personal experience with similar cases. This still leaves military justice attorneys in uncertain territory with regard to what sentence to ask for, but trial counsel can turn to the federal civilian system for guidance to help them construct meaningful sentencing arguments for these cases.

The Federal Sentencing Guidelines: How do the guidelines work?

The United States Sentencing Guidelines are a product of the Sentencing Reform Act of 1984, which Congress enacted in order to achieve three goals: first, to combat crime through an orderly, "effective, fair sentencing system;" second, to achieve "reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders;" and third, to ensure "proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of differing severity."[4]

At their most basic level, the sentencing guidelines use two variables to produce a range of months of imprisonment, which reflects Congress' judgment as to what an appropriate sentence for any given crime should be. The first of these variables is the individual offender's "criminal history category." Judges look at past criminal conduct to assign the defendant a criminal history category, which forms the "X" axis on the sentencing grid. This is determined by the number of previous convictions and length of sentences imposed for those convictions. The second variable is the "offense level," assigned by Congress, which attempts to capture the seriousness of the particular offense by looking at individual "specific offense characteristics" and forms the "Y" axis of the sentencing grid.[5] Each crime in the United States Code is assigned a base offense level in the sentencing guidelines as well as various "specific offense characteristics" which function as aggravating and mitigating factors. All of these variables are taken into account to produce the final offense level.[6] For example, an offense with a base level of 6 might be elevated to a level 8 if a firearm was used to aid in the commission of the crime. The Judge then uses the sentencing table and, combining the offense level and criminal history category, arrives at a range of months that are deemed the appropriate term of imprisonment for that defendant.[7] While the judge is not bound to accept and impose a sentence within the guidelines range, she is required to begin her analysis with this method.[8]

Current Guidelines for Possession of Child Pornography

The crime of possession of child pornography has a base offense level of 18, and six "specific offense characteristics" that serve as aggravating factors, which may elevate the crime's offense level. Those factors include the age of the children in the materials, the manner in which the materials were received or distributed, whether or not the materials contain depictions of violence, whether the defendant actually sexually abused or exploited a minor, whether the defendant used a computer, and the total

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https://aflsa.jag.af.mil/FLITE/WebDocs/jahansco(66ABG-JA)/TRIALS%20Team%20Andrews%20AFB/Some%20Thoughts%20on%20Sentencing%20Argument.pdf).

[3] *Id.* at 2-3.

[4] U.S. Sentencing Guidelines Manual ch 1, pt. A.3 (2013).

[5] *Id.*

[6] *Id. at* ch. 5, pt. A, cmt. n.1.

[7] *Id.* For a more thorough explanation of the operation of the United States Sentencing Guidelines, *see* Henry J. Bemporad, An Introduction to Federal Sentencing (13th ed. 2011).

[8] United States v. Booker, 543 U.S. 220, 226, 245 (2005); Bemporad, *supra* note 7 at 2.

The "typical" child pornography possession offense today includes many of the aggravating factors, leading to sentencing guidelines that many view as being draconian. As a result, many defense lawyers and judges have voiced criticism of the guidelines.

number of images the defendant possessed.[9] If all aggravating factors are present, the offense level can be as high as 43.[10] The sentencing guidelines for a level 18 offense suggest an appropriate sentence is 27-33 months in prison for an offender with no criminal history, while a level 43 offense would result in a recommendation for life imprisonment.[11]

The "typical" child pornography possession offense today includes many of the aggravating factors, leading to sentencing guidelines that many view as being draconian.[12] As a result, many defense lawyers and judges have voiced criticism of the guidelines.[13] In fiscal year 2011, the percentage of cases that received within-guidelines sentences dropped to only 32.7 percent, with judges generally departing downward from the recommended sentencing range.[14] The data was similar in fiscal year 2012; "a situation unique to this category of federal crime."[15] "The steady decrease in the rate of sentences imposed within the applicable guideline ranges…indicate that a growing number of courts believe that the current sentencing scheme in non-production offenses is overly severe for some offenders."[16] It is also resulting in wide variation among sentences for similar offenders, something the guidelines were specifically developed to prevent.[17]

[9] U.S. Sentencing Guidelines Manual §2G2.2(b)(2)-(7) (2013).

[10] *Id*.

[11] U.S. Sentencing Guidelines Manual ch. 5, pt. A, sentencing table (2013).

[12] Mark Hansen, *A Reluctant Rebellion*, 95 A.B.A. J. 54, 56 (2009).

[13] *Id*.

[14] U.S. Sentencing Comm'n, Report to the Congress: Fed. Child Pornography Offenses ii (2012) [hereinafter Fed. Child Pornography Offenses]

[15] Hamilton, *supra* note 2, at 378.

[16] Fed. Child Pornography Offenses, *supra* note 14, at ii.

[17] *Id*. at 245; U.S. Sentencing Guidelines Manual ch 1, pt. A, original introduction to the guidelines manual (2013).

Criticism of the Current Guidelines

One of the biggest complaints about the current child pornography sentencing guidelines is that four out of six of the available sentencing enhancements, "those relating to computer usage and the type and volume of images possessed by offenders, which together account for 13 offense levels—now apply to most offenders and, thus, fail to differentiate among offenders in terms of their culpability."[18] I will examine each of these most-criticized enhancements in turn.

Computer Use

The guidelines provide for a two level increase in the offense level if the use of a computer is involved.[19] In the 1980s, when the guidelines were created, post mail was the primary means used for the distribution of child. The rise of computers and the internet have led to a dramatic shift in the way that child pornography is created, distributed and possessed.[20] "By 2006…97 percent of child pornography defendants committed the offense using a computer."[21] Because computer use is virtually a part of the crime itself in the modern technological era, it seems reasonable to conclude that computer use should be included in the base offense level.

Type of Image Possessed

The Guidelines provide for a two level increase in the offense level if the images portray prepubescent children (children under the age of 12) and a four level increase if the images portray "sadistic or masochistic conduct or other depictions of violence."[22] In a 2009 Department of Justice memo responding to guideline criticisms, the DOJ cites a 2008 case where the "defendant's collection included a video of an adult male raping an infant girl and a picture of an adult male having sex with a toddler who wore a dog collar around her neck" and explains that this is a good example of the type of images that are typical in child pornography prosecutions today.[23]

Does the fact that these types of images are the norm in modern child pornography mean that a corresponding sentencing enhancement is unwarranted? When considering the harm done to children exploited in the creation child pornography, the enhancement makes sense despite the fact that it applies to most prosecutions. However, once again, because victims of child abuse are so prevalent in today's child pornography, to the point where child abuse is inherent in the production of child pornography, this harm should already be accounted for in the base offense level as part of the crime itself. If the nature of the images associated with an individual case is no longer a distinguishing factor, it is not likely going to be considered a credible sentence enhancer.

Number of Images Possessed

The sentencing guidelines provide for an increase in offense level of up to five levels, depending on how many images are involved.

[18] *Id*. at iii.

[19] U.S. Sentencing Guidelines Manual § 2G2.2(b)(4) (2013).

[20] Jelani Jefferson Exum, *Making the Punishment Fit the (Computer) Crime: Rebooting Notions of Possession for the Federal Sentencing of Child Pornography Offenses*, 16 Rich. J.L. & Tech. 8, ¶ 35 (2010).

[21] *Id*.

[22] U.S. Sentencing Guidelines Manual §2G2.2(b)(2),(7) (2013).

[23] *Id*. at 2, citing *United States v. Pugh*, 515 F.3d 1179, 1193 (11th Cir. 2008).

The sentencing commission suggests changing the guidelines to be able to account for "a broader range of offenders' sexual dangerousness and provide for a more nuanced approach depending on the number and type of acts of sexually dangerous behavior in an offender's history."

Ten to 149 images results in a two level increase, 150 to 299 images a three level increase, 300 to 599 images a four level increase, and 600 or more images, a five level increase.[24]

The main criticism of this enhancement is that virtually all child pornography possession cases involve hundreds, if not thousands of images due to the fact that the internet makes it so easy to access and download images that contain child pornography. Therefore, most offenders today will have enough images to qualify them for at least a two offense level increase. Furthermore, there are two major concerns that deal with how the actual peer-to-peer networks most offenders use to access child pornography work. The first of these concerns is that images are frequently downloaded from web sites or peer to peer file sharing networks in large "bundles" without the receiver necessarily knowing what or how many images they are downloading.[25] The second concern is that there may be hidden files that download automatically without the computer user's knowledge when they open a webpage.[26] These technological issues make it difficult to be sure exactly how many images a defendant has actually accessed, or knowingly possessed, and therefore should be held accountable for at sentencing. Thus, the use of the number of images enhancement, while defensible in theory, is problematic in practice.

[24] U.S. Sentencing Guidelines Manual § 2G2.2(b)(7) (2013).

[25] Exum, *supra* note 20, at n.154.

[26] *Id*. at ¶ 37.

Proposed Changes to the Guidelines for Child Pornography

Acknowledging the widespread dissatisfaction with the child pornography sentencing guidelines, the United States sentencing commission undertook an in-depth study of the problem, publishing a 331 page report in 2013.[27] In the report, the commission proposed changes they believed would help judges better differentiate between more and less culpable defendants.[28] They proposed that, rather than the current sentencing scheme which applies enhancements based primarily on the size and content of the collection, the following three considerations should be used as aggravating factors: the offender's collecting behavior, the offender's engagement in child pornography communities, and the offender's known history of sexually dangerous behavior.[29] These changes, the commission says, will result in fairer outcomes that better capture the culpability and dangerousness of the offender.[30]

The Offender's Collecting Behavior

The sentencing commission has proposed combining many factors related to child pornography collecting behavior, which currently comprise three of the six available enhancements, into one "category."[31] The judge would consider the "volume, the types of sexual conduct depicted in the images, the ages of the victims depicted, and the extent to which an offender has organized, maintained, and protected his collection over time, including through the use of sophisticated technology" as a single specific offense characteristic.[32] This would help to account for and differentiate in a meaningful way between offenses prosecuted today and those handled when the guidelines were first utilized in the 1980s.

For example, the new proposed guidelines would distinguish culpability between the following two offenders: offender A, who has casually downloaded 600 or so images over the course of two months because he was "curious;" and offender B, who has amassed a collection of thousands of images and videos over the course of several years, which he has stored on its own computer or drive and protected with complicated encryption software, and which he has organized by topics such as age, gender, or type of sexual activity depicted.[33] Most would agree that offender B is probably more culpable and deserves different punishment than offender A, however the current guidelines would not differentiate between these two offenders.[34]

By combining all the collection factors into one "category" or specific offense characteristic which encompasses more individual aspects of the collecting behavior than the current guidelines, judges may more accurately differentiate offenders based on actual culpability. This is a vast improvement over the current system of enhancements.

[27] Fed. Child Pornography Offenses, *supra* note 14.

[28] *Id*. at 320.

[29] *Id*.

[30] *Id*. at 321.

[31] *Id*. at 320.

[32] *Id*.

[33] *Id*.

[34] As discussed above, under the current scheme both offenders would receive a five offense level increase because they both have more than 600 images.

The Offender's Engagement in Child Pornography Communities

The next factor which the sentencing commission suggested is "the degree of an offender's engagement with other offenders—in particular, in an Internet 'community' devoted to child pornography and child sexual exploitation."[35] The rationale for this enhancement is that participation in a group or community validates and normalizes the sexual exploitation of children, reassures the child pornography collector, and provides a forum for exchanging child pornography, all of which tend to show increased culpability and are therefore be relevant to determining the appropriate punishment.[36]

This enhancement is valid. It is logical that participation in a group dedicated to child pornography indicates that an offender is playing a more active role in the exploitation and abuse of children and should be held accountable for that conduct. The "community" sentencing enhancement, which encompasses a variety of offender behaviors is more effective than a technology-specific enhancement. This new enhancement would help ensure the guidelines are focused on culpable conduct while remaining relevant despite inevitable technological changes in years to come.[37]

[35] *Id*.

[36] *Id*. at 324.

[37] *Id*.

The Offender's Known History of Sexually Dangerous Behavior

Finally, the sentencing commission suggested that courts consider "whether an offender has a history of engaging in sexually abusive, exploitive, or predatory conduct in addition to the child pornography offense."[38] The current guidelines do, in some instances, account for past sexually dangerous behavior through criminal history and the "pattern of activity" enhancement in §2G2.2(b)(5), that is, if the defendant has been convicted of prior sexual crimes.[39] However, offenders with a history of non-criminal sexually deviant behavior often receive no enhancement, despite the fact that they are engaged in conduct that suggests higher culpability and a higher risk of recidivism.[40] An example of such conduct could be recording sexual fantasies about children.[41] The sentencing commission suggests changing the guidelines to be able to account for "a broader range of offenders' sexual dangerousness and provide for a more nuanced approach depending on the number and type of acts of sexually dangerous behavior in an offender's history."[42]

This enhancement is also valid, especially given that one of the goals of punishment for crimes against children is often specific deterrence. If an offender has a history of engaging in sexually devious conduct that does not quite rise to the level of a crime, it follows that they may be closer to crossing the line and physically harming children and are thus a longer term of imprisonment is necessary to protect society.

[38] *Id*. at 320.

[39] *Id*. at 325.

[40] *Id*. at 325 n.72 (citing *United States v. Cunningham*, 669 F'3d 723, 727, 735-36 (6th Cir. 2012) (Finding that sentencing did not err in considering as relevant conduct that defendant filmed "himself masturbating to [non-pornographic, legal] photographs of. . . a young child" and "sen[ding] [the] video to another offender. . . along with lascivious audio commentary of the act")).

[41] *Id*.

[42] *Id* at 325.

Application to Military Justice

While the federal sentencing guidelines are clearly not mandatory in the military justice system, the rationale behind the newly proposed guideline enhancements discussed herein applies with equal force to child pornography offenders being prosecuted in the military as they do to offenders in the civilian system. As discussed earlier, there is very little guidance provided to trial counsel regarding sentence recommendations, which requires effective prosecutors to draw from as many resources as are available in order to craft persuasive sentencing arguments that provide the court members with actual reasons to implement the desired sentence.

The utility of the current federal sentencing guidelines in military justice prosecutions presents certain problems. First, an enhancement based on the number of images charged is impractical. Unlike in the federal system where there is a "guaranteed" benefit for charging greater numbers of images, the great deal of time and cost required to prove that the images are child pornography mean that military justice prosecutions usually charge a smaller number of images because there is no definite advantage to proving additional images. Additionally, like in the civilian system, extremely violent images and computer use are a part of virtually every charge of possession of child pornography, so arguing that those factors deserve extra punishment is difficult.

However, prosecutors can argue, utilizing the rationales for the recently proposed changes to the federal sentencing guidelines, for longer sentences than have typically been administered in child pornography possession cases in the military. Rule for Court-Martial 1001(b)(4) allows trial counsel to introduce evidence in aggravation to be considered in determining an appropriate sentence. Trial counsel should argue that collecting behavior, community participation, and sexually dangerous behavior are aggravating factors that should thus be considered under RCM 1001. A successful argument based on these aggravators is one that emphasizes how a longer sentence will help to protect the community by preventing the normalization of the possession and viewing of child pornography and by incapacitating those individuals who demonstrate a higher likelihood of further victimizing children based on past sexually deviant behavior.

While trial counsel may not be able to introduce the federal sentencing guidelines themselves during sentencing argument, the rationale behind the revised sentencing enhancements in the Congressional report make sense irrespective of whether the offender is being prosecuted in the military or the civil sphere. The same considerations may help trial counsel to supplement their AMJAMS research and consultations with leadership as they try to come up with a meaningful, supportable sentence and are therefore an appropriate tool to add to the military justice attorney's arsenal.

Most people think of wounded warriors at the mention of physical disability separations, but **less than 5%** of the over 5,500 Air Force disability cases in FY13 **involved combat-related injuries.**

Health Exam (U.S. Air Force photo/ Airman First Class Timothy Young)

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The Air Force Physical Disability Evaluation System:

What Every Attorney Should Know Before They Practice

BY MAJOR HUGH A. SPIRES JR.

Overview

Air Force members with physical injuries or mental impairments that render them unfit for duty may be involuntarily separated from the Air Force under the disability evaluation system.[1] Most people think of wounded warriors at the mention of physical disability separations, but less than 5 percent of the over 5,500 Air Force disability cases in FY13 involved combat-related injuries.[2] In recognition of the need to maintain a fit and vital force, Congress granted the secretaries of the military departments the discretion to retire or separate a service member who is found "unfit to perform the duties of the member's office, grade, rank, or rating because of physical disability incurred while entitled to basic pay."[3] In the Air Force, the Physical Evaluation Board (PEB), which falls under the Air Force Personnel Center (AFPC) Disability Division, is the forum in which an Airman is determined to be fit or unfit to perform his or her duties.

Understanding the Air Force disability evaluation system can be an arduous task due to the numerous controlling authorities that create and implement the disability system, to include federal statutes, Department of Defense Instructions (DoDI), Department of Defense Manuals (DoDM), Air Force Instructions, and policy letters. To understand the Air Force disability process, all of these sources need to be studied because none provides a complete review of the entire disability system.[4]

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[1] DoDI 1332.18, *Disability Evaluation System* encl. 3, app. 6, para. 2a(1) (Aug. 5, 2014).

[2] Data provided by HQ AFPC/DPFD.

[3] 10 U.S.C. §1201 (2008).

[4] On Aug. 5, 2014, DoDI 1332.18 and DoDM 1332.18, Volumes 1, *Disability Evaluation System (DES) Manual: General Information and Legacy Disability Evaluation System (LDES) Time Standards* and Volume 2, *Disability Evaluation System (DES) Manual: Integrated Disability Evaluation System (IDES)*, were published and revoked many long-standing rules and procedures.

Things should be made as simple as possible, but not any simpler
—Albert Einstein

The purpose of this article is to provide a complete overview of the Air Force disability evaluation system in one document, with citations to references, to ensure those who represent our Airmen have a basic understanding of the system. In following the advice of Albert Einstein, this article is an attempt to make the Air Force disability system as easy to understand as possible.

Integrated Disability Evaluation System (IDES)

In the National Defense Authorization Act (NDAA) of 2008, the Department of Defense (DoD) disability evaluation process was significantly modified and renamed the "Integrated Disability Evaluation System" (IDES) because it integrated the DoD and the Veterans Administration (VA) systems.[5] The IDES is the joint DoD-VA process by which the DoD determines whether wounded, ill, or injured service members are fit for continued military service and, if unfit, determines appropriate benefits for members who are separated or retired due to a service-connected disability.[6] The VA will provide a disability examination, rating and code for the medical condition. The Secretary of Defense set the goal for processing cases of active duty members (from referral to notification of VA benefits decision) to no more than 295 days.[7] Prior to referral to the IDES process, service members are subject to a pre-IDES screening.

Pre-IDES

In order to minimize inappropriate referrals to the IDES there is a two-step pre-IDES screening process of all potential disability cases.[8] The first step is conducted by the base Deployment Action Working Group (DAWG) and the second is conducted by the AFPC Medical Standards Branch (AFPC/DPANM).[9]

DAWG: When a primary care manager identifies an Airman with a medical condition that may be inconsistent with retention standards or may make an Airman non-deployable, the medical provider must notify the Medical Standards Management Element at the medical treatment facility. This is done so the DAWG can review the Airman's information for potentially disqualifying medical conditions and determine whether the condition may preclude an Airman from performing duties or deploying.[10] The DAWG distinguishes between conditions that are "unfitting," which are eligible for a pre-IDES referral, and those identified as "unsuiting," which must be handled using administrative actions in a separate forum. Unsuiting conditions are conditions not meeting the definitions of "disability" as defined in DoDI 1332.18 and AFI 36-3208, *Administrative Separations of Airmen*, and do not qualify for disability processing. Unsuiting conditions include sleepwalking, attention deficit hyperactivity disorder, and personality disorder, among others.[11]

Unfitting conditions are determined by reference to the Medical Standards Directory, which identifies medical conditions that potentially preclude continued military services due to their impact on duties and deployments.[12] However, these standards are not all inclusive, and other conditions can be cause for referral to the pre-IDES process based upon the judgment of the examining medical provider.[13] If the DAWG determines that a condition interferes with retention standards, the case is referred to AFPC/DPANM for the second part of the pre-IDES process called the "Initial Review-in-lieu of a Medical Evaluation Board," referred to as the "i-RILO" screening.[14]

i-RILO: The purpose of the i-RILO screening process is to determine whether the Airman meets retention standards and will be returned to duty or whether a Medical Evaluation Board (MEB) should be initiated by the base medical treatment facility.[15] AFPC/DPANM considers both the medical and non-medical factors in deciding whether the Airman meets retention standards and eligibility criteria.[16]

In order to process through the disability system, Airmen must meet specific eligibility criteria set forth in DoDI 1332.18, *Disability Evaluation Systems*, para. E3.A1.2a, such as having a medical condition that may prevent the member from performing duties for more than one year, or one that is an obvious risk to the member or the health or safety of others, or one that imposes an unreasonable requirement on the military to maintain or protect the member. Airmen are ineligible for IDES processing if they are pending an approved, unsuspended, punitive discharge or dismissal, or pending separation under provisions that authorize a service characterization of Under Other Than Honorable Conditions (UOTHC).[17]

If an Airman is facing administrative separation, AFPC/DPANM will evaluate whether to "dual process" the case for both an administrative discharge and disability review only when the disability evaluation is "warranted as a matter of equity or good conscience."[18]

The Medical Evaluation Board (MEB)

The MEB begins after the Pre-IDES is completed and the AFPC/DPANM determines the case is eligible for IDES processing.[19] The MEB documents the medical status and duty limitations of members who meet referral eligibility criteria.[20] As part of the MEB, the VA conducts a medical examination, which serves as the medical examination for the Informal Physical Evaluation Board (IPEB) process, and will assist the VA when the Airman applies for post-separation VA benefits.[21] Upon receipt of the VA's physical examination and documentation, the MEB will then convene and recommend one of two actions: (1) Return to Duty or (2) Refer to IPEB.[22]

The physical evaluation board liaison officer (PEBLO) at the member's base provides the Airman a copy of the MEB findings and counsels the Airman that he has an option to request a different physician conduct an "impartial

[5] In FY14 99.7% of all disability cases were processed under the IDES. Very few cases were processed under the Legacy Disability System (LDES) or the Expedited Disability Evaluation System (EDES), so this article focuses on the IDES. Data provided by AFPC/DPFD.

[6] DoDI 1332.18, glossary; DoDM 1332.18-V2, encl. 3, para. 1.

[7] DoDM 1332.18-V2 encl. 7, para. 2(a).

[8] AFI 41-210, *Tricare Operations and Patient Administration Functions* para. 4.51 (June 6, 2012).

[9] *Id*.

[10] *Id.* para. 4.52.1.2.

[11] AFI 36-3208 paras. 5.11.1-5.11.8 and DoDI 1332.18 glossary, pt. II at 53.

[12] AFI 48-123, *Medical Examinations and Standards* para. 5.3 (Nov. 5, 2013).

[13] *Id.* para. 5.1.

[14] AFI 41-210 para. 4.51.1.2.1.

[15] *Id.* para. 4.53.

[16] *Id.*

[17] DoDI 1332.18 encl. 3, app. 1, para 4a.

[18] *Id*. encl. 3, app. 1. para. 4b.

[19] AFI 41-210 para. 4.51.1.3.

[20] DoDI 1332.18 encl. 3, para. 2a.

[21] *Id*. encl. 3, para. 1d; DoDM 1332.18-V2 encl. 3.

[22] AFI 41-210 para. 4.63.

The FPEB gives Airmen recommended for separation or retirement the opportunity to appear in person before the FPEB, to be represented by counsel, and to present evidence and call witnesses.

medical review" and/or rebut the findings.[23] The impartial review would determine if the MEB findings adequately reflect the complete spectrum of the member's medical conditions.[24] This ensures the PEB considers all the medical conditions the member believes are relevant.

The Physical Evaluation Board (PEB)

The PEB can be broken down into two boards: the Informal Physical Evaluation Board and the Formal Physical Evaluation Board.

Informal Physical Evaluation Board (IPEB): After the MEB makes a recommendation, the case is forwarded to the AFPC Disability Division, AFPC/DPFD, and is assigned to a case manager. The IPEB is composed of at least two members in the grade of major or civilian equivalent or higher. In cases of a split opinion, a third voting member will be assigned to provide the majority vote.[25]

The Airman is not present when the IPEB is reviewing the case file. The IPEB's role is to determine whether an Airman is unfit, due to a physical disability, and unable to reasonably perform the duties of his or her office, grade, rank, or rating, to include duties during a remaining period of Reserve obligation.[26] General officers and Medical officers, however, are not found unfit without SECAF approval if they are being processed for retirement due to age or length of service.[27]

When the IPEB assesses an Airman's fitness it considers all relevant evidence and not just the member's medical records.[28] The IPEB categorizes each condition as "unfitting" (medical conditions that interfere with the Airman's ability to perform their military duties) or "not currently unfitting" (medical conditions that do not interfere with their ability to perform their military duties) and lists them on an AF Form 356, *Findings and Recommended Disposition of the USAF Physical Evaluation Board*.[29] The military only compensates for the conditions that make the Airman unfit to perform their military duties and are determined to be in the line of duty; the VA compensates for all conditions that are service connected, even if it is not a career ending injury.

Generally, for a condition to be compensable, the PEB must find the Airman incurred it while entitled to basic pay.[30] Injuries or illnesses that existed prior to service (EPTS) are not compensable unless there is medical evidence that the condition was permanently aggravated by military service.[31] However, there are many favorable presumptions the PEB is required to give Airmen in determining whether the injury or disease EPTS and whether an injury was aggravated by military service.[32] In addition, Airmen nearing 20 years of active duty service are not exempt from the disability process, but those pending retirement will be provided a rebuttable presumption of fitness.[33]

Determining whether an injury or illness was incurred in the line of duty while entitled to basic pay is seldom problematic for active duty Airmen, but can be for reservists. Reservists performing military duties on orders for a period of 30 days or less are required to show that the physical disability was the proximate result of military duties or was aggravated while performing military duties.[34] If the reservist has over eight years of active military service and is diagnosed with a medically disqualifying physical disability that was incurred before serving on the current military orders of greater than 30 days, he will be allowed to process through the disability system as if the physical disability did not EPTS.[35]

After categorizing the conditions, the IPEB forwards the AF Form 356 to the VA, where the Veterans Affairs Schedule for Rating Disabilities (VASRD) is used to identify the code and the percentage of disability for each medical condition.[36] When the IPEB receives the VA disability ratings, it will compute the total percentage of the unfitting conditions and determine the appropriate disposition. Under the IDES, the Air Force does not conduct its own rating determinations but uses the VA's codes and ratings.[37]

Although the Airman is not present for the IPEB hearing, the IPEB's rationale is included on the copy of the AF Form 356 provided to the Airman. The IPEB forwards the form to the

[23] *Id*. para. 4.65.1.
[24] DoDM 1332.18-V1 encl. 3, para. 2.
[25] DoDI 1332.18 encl. 3, para. 3d.
[26] *Id*. encl. 3, para. 3a.; encl. 3, app. 1, para. 2a(1).
[27] DoDI 1332.18 encl. 3, app. 2, para. 4b.
[28] *Id.* encl. 3, app. 2, para. 3.
[29] AFI 36-3212 para. 3.28.
[30] *Id*. para. 3.22.
[31] DoDI 1332.18 encl. 3, app. 3, para. 2b(2)(a), *et seq*.
[32] *Id.* para. E3.A3.7
[33] DoDI 1332.18 encl. 3, app. 2, para. 5.
[34] *Id*. encl. 3, app. 3, para. 2.
[35] 10 U.S.C. §1207a; DoDI 1332.18 encl. 3, app. 3, para. 7c.
[36] DoDI 1332.18 encl. 3, app. 3.
[37] There are exception for Basic military trainees (BMTs), cadets and other trainees processed under the legacy system. DoDM 1332.18-V1 encl. 5.

It is important to distinguish the PEB from other military forums. The PEB is not a medical board and cannot make or change a medical diagnosis under the IDES.

PEBLO at the Airman's base along with the AF Form 1180, *Action on Physical Evaluation Board Findings and Recommended Disposition*, which he uses to formally accept the IPEB's findings or appeal the IPEB's findings to the Formal Physical Evaluation Board (FPEB). The Airman has 10 days to notify the PEBLO in writing of his choice to accept or appeal the IPEB's findings.[38] At this point the Airman is entitled to assigned government counsel from the Office of Airman's Counsel (OAC) at Joint Base San Antonio-Randolph at no cost to the Airman, or the Airman can provide his own attorney at no cost to the Air Force.[39] The assigned counsel can assist the Airman with his options. The Airman also has the option to request the VA reconsider his ratings.[40]

The Formal Physical Evaluation Board (FPEB): The FPEB gives Airmen recommended for separation or retirement the opportunity to appear in person before the FPEB, to be represented by counsel, and to present evidence and call witnesses. The hearings are not adversarial but administrative in nature; therefore, there is no party at the hearing opposing the Airman's position.[41] To emphasize the administrative nature of the proceedings, the hearings are held in a conference room on Joint Base San Antonio-Randolph. The FPEB provides the full and fair hearing required by 10 U.S.C. §1214 for Airmen recommended for a disability separation or retirement. It is comprised of at least three members: a president who "should be" a colonel or civilian equivalent, a medical officer, and a line officer.[42]

The Board president will set the hearing date at least 10 days in advance, and the member's military unit will provide travel orders to allow the Airman to arrive a minimum of one day prior to the hearing to review the available records and prepare the case.[43] Ideally, the majority of the case preparation is performed by telephone coordination between the Airman and the OAC attorney before the Airman's arrival. Prior to the hearing, the Airman or his attorney submits a copy of the exhibits and the contention to the FPEB. When the FPEB president calls the board to order, he will explain the purpose of the hearing, and offer the Airman the opportunity to *voir dire* the members and challenge them for cause. The FPEB president will rule on challenges. The FPEB president has legal counsel available to call for advice if needed. The FPEB president will allow the Airman's counsel to call witnesses in person or by telephone. Each member of the FPEB will be given an opportunity to ask the Airman questions under oath. The Airman's counsel will be given an opportunity to make a closing summary prior to FPEB deliberating in closed session.

It is important to distinguish the PEB from other military forums. The PEB is not a medical board and cannot make or change a medical diagnosis under the IDES. Unfortunately, civilian attorneys unfamiliar with the IDES process perform a disservice to their client when they argue, for example, that the Airman does not actually have the diagnosed personality disorder. Personality disorders, and other "unsuiting" conditions do not constitute "disabilities" and therefore, are not considered by the FPEB as being relevant in the disability process. They may, however, form a basis for an administrative discharge, which is handled through a separate process in a different forum not involving the PEB.[44]

PEB Recommendations

Both the IPEB and the FPEB have the following options for case dispositions:

1. ***Return to Duty:*** If the PEB determines the Airman is physically fit for continued military service then he is returned to duty.

2. ***Permanent Retirement:*** Permanent Retirement is a disposition based on an Airman having at least a 30 percent disability rating under the VASRD or at least 20 years of total active service.[45]

3. ***Temporary Disability Retirement:*** Airmen rated at 30 percent disability or higher under the VASRD, but with a physical disability that is unstable, may be placed on the temporary disability retirement list (TDRL).[46] On TDRL, an Airman receives retirement pay and benefits. At least every 18 months, for up to five years, they will receive a medical exam by the nearest military treatment facility and have their case reviewed by the IPEB to determine if the medical condition has stabilized and will allow for a case disposition of either

[38] *Id*. encl. 6, para. 4b.

[39] DoDM 1332.18-V1 encl. 5, para. 4.

[40] DoDM 1332.18-V2 encl. 4, app. 1, para. 2.

[41] DoDI 1332.18 encl. 3, para. 7; DoDM 1332.18-V2 encl. 3, para. 1.

[42] *Id.* encl. 3, para. 3d

[43] *Id.* encl. 6, para. 5.

[44] AFI 36-3208 para. 5.11.9.

[45] 10 U.S.C. §1201 or §1204 (2001).

[46] *Id*. §1202 (2008) or §1205 (1986).

return to duty, discharge with severance pay, or permanent retirement.

Post-Traumatic Stress Disorder (PTSD) is deemed an unstable disability. Therefore, when PTSD is severe enough to prevent an Airman from performing his or her duties, the Airman is placed on the TDRL at a minimum rating of 50 percent for the first six months.[47]

4. ***Separation with Disability Severance Pay:*** Airmen with less than a 30 percent disability rating for a compensable physical disability and less than 20 years of active service will receive severance pay as financial compensation when they are found unfit.[48] Severance pay is a lump sum payment calculated by doubling the Airman's monthly base pay multiplied by the number of years of active federal service, not to exceed 19 years.[49]

5. ***Separation without Severance Pay:*** Under some circumstances an Airman can be found unfit for continued military service but not be entitled to disability benefits because either his condition EPTS and was not permanently aggravated by military service, or was incurred while on TDRL.[50]

Appealing FPEB Decisions

The FPEB typically provides the Airman its findings on the same day of the hearing through the attorney. Like the IPEB, the FPEB explains the rationale for its decisions on the AF Form 356. An Airman who does not concur with the FPEB findings may appeal the findings through an administrative process to the Secretary of the Air Force Personnel Council (SAFPC) by providing any additional evidence, including the Airman's rebuttal letter, to the FPEB within 10 days of the FPEB findings.[51]

Secretary of the Air Force Personnel Council (SAFPC)

The Air Force Personnel Board (AFPB), within the SAFPC, reviews all disability cases forwarded by AFPC/DPFD on appeal.[52] The board consists of five voting members, two of which are typically Medical Corps officers. In addition to the cases forwarded on appeal, AFI 36-3212 and SAFPC Policy Memorandum set forth other circumstances in which AFPC/DPFD must forward cases for SAFPC review, such as when a member has met a PEB and AFPC/DPFD believes the member is not eligible for disability processing or when a grade determination is required.[53]

The AFPB conducts a *de novo* review of the case, but the Airman may not appear before the board except by specific invitation. The board reviews all the records evaluated by the PEB, records of the PEB hearings, plus any rebuttal or additional documents submitted by the Airman or requested by SAFPC. When the AFPB reviews cases, it may change the findings and recommended disposition of the PEB.[54] SAFPC may defer final determination until receipt of additional records, return the case with specific directions, direct an administrative discharge or direct some other disposition of the case, if not specifically prohibited by law.[55] In dual process cases, SAFPC will evaluate the findings and recommendations from both the disability case and the administrative discharge case and determine which discharge to execute.

Final Action

AFPC/DPFD will announce SAFPC's final action and establish a disability separation or retirement date, usually within 90 days.[56] If the Airman believes the disposition of the case constitutes an error or injustice, the Airman may appeal to the Air Force Board for Correction of Military Records (AFBCMR) and the U.S. Court of Federal Claims.[57] However, the Airman's date of separation will not be delayed for the appeal process.

The Airman does not have to exhaust administrative remedies by appealing the SAFPC decision to the AFBCMR.[58] The Airman can appeal directly to the U.S. Court of Federal Claims; however, doing so has consequences. If the Airman appeals to the AFBCMR, he is allowed to supplement the record. If he goes directly to the Court of Federal Claims, without appealing to the AFBCMR, it indicates the Airman was satisfied with the existing records and he will not be allowed to supplement it with discovery.[59]

Conclusion

The Air Force Physical Disability System is esoteric, but it is the mechanism we use to maintain a vital and fit force while simultaneously determining separating and retiring Airmen's entitlement to disability benefits. The Air Force partners with the VA to ensure that any service connected injury/illness that does not impact duty performance is also evaluated during the disability process for more efficient post-service benefit claims processing.

There are several forums the Air Force uses to maintain a capable force structure. The IDES is one that bestows many protections upon the Airmen who have become injured or ill while serving their country and provides them disability compensation. Although an outcome may not be consistent with what the Airman feels is right,[60] each entity within the IDES construct strives to comply with the complexities of the ever-changing federal laws, DoD regulations and Air Force policies as it fairly evaluates and compensates, when appropriate, career ending disabilities in order to ensure the SECAF is able to maintain a vital and fit force.

[47] 38 CFR § 4.129 (2014).

[48] 10 U.S.C. § 1203 (2011) or §1206 (2001).

[49] *Id*. §1212 (2008).

[50] DoDI 1332.18, encl. 3, app. 6, para. 5e.

[51] AFI 36-3212 para. 3.49.1.

[52] AFI 36-3212 para. 3.84.4.

[53] *Id*. para. 5.4.; SAF/MRB Policy Memo, Feb. 10, 2014, *Function and Authority of Special Assistants to the Director, SAFCPC, for Finalizing Physical Disability Actions.*

[54] *Id*. para. 5.8.

[55] *Id*. para. 5.9.

[56] *Id*. para. 5.19.3.

[57] 10 U.S.C. §1552 (2008); 28 U.S.C. § 1491 (2011).

[58] *Heisig v. United States*, 719 F.2d 1153 (Fed. Cir. 1983).

[59] *Bateson v. United States*, 48 Fed. Cl. 162 (2000).

[60] For example, it may not even fall within the discretion of the PEB.

Resources

- Disability Evaluation System (DES)
- Introduction to the Integrated Disability Evaluation System (IDES)
- Health.mil
- TriCare Programs and Resources for Injured Service Members
- Veterans Benefits Administration
- Warrior Care Blog

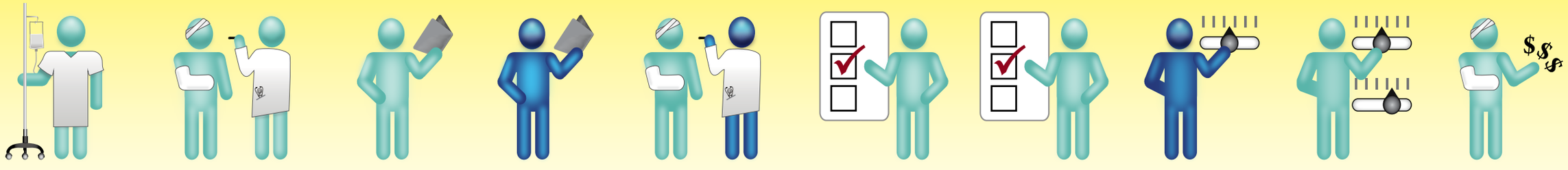
IDES Timeline[1]

	Medical Evaluation Board Phase (MEB)	Physical Evaluation Board Phase (PEB)		Transition Phase	Reintegration Phase
		DoD	VA		
Service members are referred within 1 year of being diagnosed with a medical condition that does not appear to meet medical retention standards	**Referral** AC—10 days RC—30 days ↓ **Claim Development** AC—10 days RC—30 days ↓ **Medical Evaluation** AC—45 days RC—45 days ↓ **MEB Stage** AC—35 days RC—35 days Service member can appeal MEB decision	**Informal Physical Evaluation Board (IPEB)** 15 days ↓ Service member can rebut IPEB decision ↓ **Formal Physical Evaluation Board (FPEB)** 30 days ↓ Service member can rebut FPEB decision ↓ **FPEB Appeal** 30 days	**UNFIT** ↓ **Preliminary Rating Board** 15 days ↓ Service member can request rating reconsideration ↓ **Rating Reconsideration** 15 days	**Finalize DES Disposition** Assign to unit or process for separation **The 45 day goal may be exceeded to allow the service member to take authorized leave and permissive temporary duty (TDY)**	**Return to Duty** **OR** **Separate** VA benefits letter one month following separation Veteran can appeal VA benefits ↓ **VA Appeals**
		Administrative and record transit—15 days			
Active Component (AC)	**100 calendar days**	**120 calendar days**		**45 calendar days**	**30 calendar days** **Total Process = 295 calendar days**
Reserve Component (RC)[2]	**140 calendar days**	**120 calendar days**		**45 calendar days** **Total Process = 305 calendar days**	

Service Member Decision Point **IDES Stages**

[1] Created from charts available at http://warriorcare.dodlive.mil/disability-evaluation/ides/ and http://www.wtc.army.mil/modules/soldier/s6-ides.html

[2] Reserve component member entitlement to VA disability begins upon release from active duty or separation



Service member in treatment up to a year

Clinician identifies condition that may render member unfit for duty—places in DES

PEBLO counsels on the DES

VA counsels on benefits/identifies additional conditions /schedules exams

VA examines all conditions

MEB identifies all conditions that may make member unfit for duty

PEB identifies conditions that make the member unfit for duty

If unfit, VA rates unfitting as well as all other service connected conditions

PEB uses VA ratings for unfitting conditions to determine service benefits

Member receives DoD and VA benefits shortly after discharge

Air Force JAGs in Liberia:

The Patient Labor of DoD's Rule of Law Mission Bears Fruit

BY: MAJOR CHRISTOPHER J. GOEWERT, USAF

Between 1989 and 2003, the Republic of Liberia endured constant paroxysms of civil war and unrest. This resulted in the deaths of as many as 250,000 human souls, the displacement of one third of its population, many as refugees to bordering countries, and the devastation of much of its former commercial resources and infrastructure.[1] Many of the civil wars that were endemic to western Africa in this era were attributed to the concurrent ethnic conflicts and politico-gangsterism in Liberia, especially the notorious rebel factions in neighboring Sierra Leone, who were reviled for their campaign of brutal maiming of villagers during a war that was supported and financed by Liberia's then President, Charles Taylor.[2]

The Armed Forces of Liberia (AFL) participated in the violent civil wars often as a partisan faction, willfully committing violations of the Law of Armed Conflict, looting and terrorizing civilians and opponents. The history of the AFL as a destabilizing force in the country had early roots, reaching back to its history as enforcers of the hut tax, conducting punitive expeditions against villages often involving acts of vandalism and sexual assault. In 1980 elements of the AFL were responsible for overthrowing the duly constituted government in a coup d'état in which then President Tolbert was murdered by soldiers in his bed. Faced with this ignominious history, after the end of the civil war in 2003, the United States sought to rebuild the AFL in a manner consistent with international norms. The United States initiated security sector reform by contracting for the reconstitution and vetting of new AFL recruits in 2006. Realizing that this would be insufficient to provide the AFL with a role-model for a military that is subservient to civilian authority, obedient to the rule of law, and technically capable, the United States deployed its military forces as Operation ONWARD LIBERTY (OOL).

The current OOL mission in Liberia kicked off in January 2010 and has been functioning in an environment where the average gross domestic product has been between $600-$700 per capita, ranking it as the 223rd poorest country in the world.[3] Its population experienced 85 percent unemployment.[4] By every major social indicator Liberia was in the bottom ten percent of nations globally; there were fewer sadder places on the planet.[5]

Mentorship

It was in this context that OOL began placing U.S. service personnel alongside their AFL counterparts to serve as mentors. The missions included developing the AFL into an operationally capable force respectful of the rule of law, infusing ethics within AFL officers and enlisted personnel, facilitating AFL's staff to assume command responsibility, establishing a military justice system and judicial staff, improving AFL logistical support, and helping the AFL improve relationships with civilians.

U.S. military members were drawn from all service branches to provide mentorship to the AFL in their respective areas of expertise. They spent tours of six months to one year in length, living on AFL bases, in day-to-day conditions quite similar to those of their AFL counterparts.

The Armed Forces of Liberia participated in the violent civil wars often as a partisan faction, willfully committing violations of the Law of Armed Conflict, looting and terrorizing civilians and opponents.

[1] Malan, Mark, Security Sector Reform in Liberia: Mixed Results from Humble Beginnings (2008).

[2] Ellis, Stephen, The Mask of Anarchy: The Destruction of Liberia and the Religious Dimension of an African Civil War, (2006).

[3] *The World Factbook*, Cent. Intelligence Agency, https://www.cia.gov/library/publications/the-world-factbook/geos/li.html (last visited Sept. 24, 2014).

[4] *Id.*

[5] Legatum institute, Legatum Prosperity Index (2012).

U.S. joint personnel were assigned to billets relating to the functioning of a modern armed force, including command, infantry, medical, engineering, communications, legal, military police, and headquarters staff.

U.S. Air Force JAGs were tasked with filling the legal mentor billet. They helped develop AFL regulations, trained legal clerks and officers, sent legal officers to law school and shepherded a Liberian UCMJ into being. Their efforts were complimented by numerous additional U.S. military trainers sponsored by The Defense Institute for International Studies (DIILS). DIILS sent reservist and active duty military members to train the AFL on the basics of trial advocacy and military justice. These training events focused not only on AFL legal personnel but were aimed at large cross-sections of AFL leadership.

U.S. military members were drawn from all service branches to provide mentorship to the AFL in their respective areas of expertise.

Armed Forces of Liberia Disciplinary Board (AFLDB)

As a resource poor military from a patronage society, the AFL had a unique set of problems that often rubbed against the principals that the U.S. government encouraged. Minor crimes such as AWOL, disrespect, larceny, and occasionally drug use were not being handled by civilian authorities. Launching a military criminal justice system from scratch would not occur overnight. Frustrated commanders and NCOs had seized their troop's rice and used confinement without due process to combat these minor infractions. U.S. Air Force JAGs strongly advocated against these practices, urging adherence to due process, educating troops on their expectations of behavior, and creating a simplified tool for commanders to use—the AFL disciplinary board (AFLDB). The AFL had not yet implemented a court-martial system to address its soldier's infractions. The AFLDB gave the soldier an opportunity to challenge evidence against them, present matters in mitigation and extenuation, and be heard by a panel of AFL officers who could take into account the unique circumstances of a military that would be quickly reintegrating most of these offenders while publicly trying and holding to account the accused. OOL legal mentors had developed and nurtured this system for several rotations when I arrived.

Most of the offenses tried by AFLDB were minor with only one officer case. The officer maltreated a subordinate in a spate of excessive disciplinary zeal. He was quickly rehabilitated and returned to command. There was no precedent for holding the more well connected commanding officers to account for corruption related offenses; offenses many thought were occurring often with little repercussion.

Put to the Test

About four months into my deployment I received a phone call from the Office of Security and Defense Cooperation. A U.S. Coast Guard officer had received a call from a Liberian Coast Guard (LCG) boat crew member who had cryptically alluded to knowledge of bribery by senior officers. I had been mentoring the AFL investigators, which mostly involved me giving them rides to various locations, watching them artfully interview witnesses and then providing feedback from a legal perspective. I whisked their lead investigator over to the LCG headquarters. The LCG had been the beneficiary of U.S. largesse as we attempted to build their capability to patrol their waters and counteract illegal fishing. We met a timid sailor lurking by an outbuilding who told us that over the weekend a patrol boat had encountered a flagless merchant fishing vessel that had stalled in Liberian waters. It would not allow the LCG to board so the LCG patrol boat called in a second gun boat to forcibly board the vessel. The second boat was led by the LCG's Executive Officer (XO). The vessel was registered in Sierra Leone and was piloted by a Korean captain who spoke little English. The captain called his onshore agent to speak to the XO. The XO referred him to the LCG's Commanding Officer (CO). The boarding party searched the ship and waited for an hour and a half while the CO and the onshore agent discussed matters. A call came over to the XO from the CO who told him to let the ship go. He had received a cash purse of $2,000 USD from the onshore agent and the fishing boat would provide the men with fish. The two boats took five cartons of fish and sailed back to port. The next morning the chief petty officer made his rounds with the men, disbursing $20 USD from the purse and 500 LD (approximately $7 USD) from the sale of the fish. The sailor was insulted by the meager cut and decided to blow the whistle.

A second sailor was contacted and he corroborated the first's account. The next day the CO appeared at AFL headquarters with $1,500.00 and a receipt for the money from

The Command Rep received numerous phone calls from an anonymous number. The voice asked him to back away from the prosecution…. He was reminded that this was "an African army and that the Americans would one day be gone."

the shipping agent. He claimed that the money was to be used to compensate the LCG for fuel consumed while they assisted the merchant vessel. The investigators interviewed the crewmembers. There were eight sailors on the two ships including the XO and the chief petty officer. Two of the sailors stated they were seasick the entire time and saw nothing but the white interior of their cabin. A third meekly danced around the questions and let the investigators know that "this is Africa" and he couldn't go against the "bossman" without great personal risk. He denied any knowledge of the transfer of fish or money. The chief petty officer was interviewed and adamantly denied taking money or fish. The CO and XO were both read their rights and both elected to speak. They both denied taking fish and breezily explained away the money as a clumsy but well-intentioned reimbursement to the government for expenses. Their stories were uncannily in-sync; both denying speaking to one another while the XO was at sea onboard the merchant vessel. It was this falsehood that would be their undoing. Unbeknownst to them, one of the sailors was texting an authority within the AFL the evening of the incident. The facts he texted could only have been learned if had been on the boat while the phone calls were occurring. It was this detail that caused the investigator to charge them with graft and conduct unbecoming an officer.

Rule of Law mentorship meant far more than the actions of the legal mentor and was exemplified by the advice of senior OOL members who encouraged the AFL to follow U.S. military protocols when a credible allegation is made against a commanding officer. The CO and XO were temporarily relieved of command and within two weeks an AFLDB was convened. It was a joint trial of both the CO and XO. In the interim all of the witnesses were re-interviewed. The sailor that had previously denied all knowledge recanted, relating that on the weekend the boat returned, the CO had approached him under a tree and warned the sailor not to cross him.

The AFLDB was prosecuted by a talented Corporal who served as the Command Representative (CR), with the co-accused defended by a sharp, canny staff sergeant who excelled at rhetoric. Both had done outstanding in DIILS advocacy training, absorbing the lessons and feedback with great relish. It was a clear reminder that having a law degree does not make one an advocate. The CR called eight witnesses and wove a theory of consciousness of guilt and criminal opportunity throughout the questioning and argument. The CO took the stand and repeated his story which seemed evasive and arrogant. His story accorded well with the general atmosphere of the hearing as the room became crowded with onlookers, including almost all fellow headquarters officers who lightheartedly joked with the accuseds. It was rumored that the CO had a special relationship with AFL's senior leaders which had landed him his command position. He seemed untouchable and in despair I wondered whether the board members would comprehend the CR's nuanced arguments.

After the first night of the trial, with one accused still likely to testify and findings arguments to be made, the Command Rep received numerous phone calls from an anonymous number. The voice asked him to back away from the prosecution and not go so hard after the CO. He was reminded that this was "an African army and that the Americans would one day be gone."

The next morning brought not only the XO's testimony but also the CPO who surprisingly testified that I had aggressively tried to compel him to testify against the CO, even throttling him to get him to change his account. That certainly never happened, and I suppose truth is relative to the speaker. The defense had brilliantly shifted the focus away from the offense and had made the case about the U.S. legal mentor's involvement advising the prosecution and investigation, egging on a weak case. It was very clever and I was simultaneously filled with pride by his zealous defense and hurt by the accusation.

> The defense had brilliantly shifted the focus away from the offense and had made the case about the U.S. legal mentor's involvement…

The Verdict

When the guilty verdict came down the board room was silent with shocked disbelief. The officers were reprimanded, and penalized with forfeitures and hard labor. All of the board members, the CR, and the Defense Assistant fulfilled their roles and the AFL's largest and most important disciplinary board up to that point happened because they developed a confidence in their legal system. They developed a truth-seeking body modeled in a U.S. court-martial that had publicly ferreted out corruption amongst their ranks. In that success I saw the culmination of the incremental contributions of every Air Force legal mentor who trained the legal clerks, pushed through regulations, briefed AFL commanders and acted as role models. Evidence to me that rule of law work, though it might be discouraging in its daily endeavors, is the optimistic labor of many. U.S. service members, and especially JAGs, should embrace opportunities to create these incremental achievements that advance the rule of law and hopefully contribute to a greater future peace.

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Outliers

The Story of Success

BY MALCOM GLADWELL, REVIEWED BY CAPTAIN R. SCOTT ADAMS

"You will find the key to success under the alarm clock.
– Benjamin Franklin

Malcom Gladwell provides a provocative and interesting explanation of success in his newest book, *Outliers*. Gladwell argues that exceptional achievement is a result of luck and hard work. In many ways, *Outliers* serves as a counter argument to conventional American wisdom, which commonly focuses on individual achievement and extraordinary talent.

Gladwell begins by providing data on Canadian hockey players. He interviews the father of a talented young player, whose birthday is in early January. The father attributes his son's success to passion, hard work and talent. Gladwell then shows that nearly half of all professional hockey players were born in January, February or March, while fewer than 10 percent were born in the last three months of the year. At the young ages when boys begin playing hockey in Canada, a few months of age can be a significant advantage. The bigger, stronger young boys are then placed in the best training programs where they obtain a real advantage. The conclusion is that, although the best players are talented and have worked exceptionally hard, they are also beneficiaries of a fortunate series of events which, in this case, began arbitrarily with a birthdate.

Gladwell argues–

> outliers cannot look down from their lofty perch and say with truthfulness, 'I did this, all by myself.' Superstar lawyers and math whizzes and software entrepreneurs appear at first blush to lie outside ordinary experience. But they don't. They are products of history and community, of opportunity and legacy. Their success is not exceptional or mysterious. It is grounded in a web of advantages and inheritances, some deserved, some not, some earned, some just plain lucky—but all critical to making them who they are. The outlier, in the end, is not an outlier at all.

In short, he argues that exceptionally successful people became that way through a combination of luck and hard work. Unusual opportunities came their way, ripe for the taking and, having been prepared through a succession of fortunate circumstances, they seized them. But Gladwell also extensively emphasizes the value of work. Gladwell introduces what he refers to as the "10,000 hour rule." Under this rule, he argues that in order to master a difficult skill, it must be practiced for 10,000 hours. This would apply, for example, to playing a musical instrument or computer programming. He establishes the soundness of the rule through a series of data sets and anecdotal examples.

In short, he argues that exceptionally successful people became that way through a combination of luck and hard work.

The case of Bill Gates serves as an effective summary of Gladwell's cumulative theory of success. Most Americans see Gates as a risk-taking genius, whose computer skills and business savvy made him the richest man in the world. Instead, Gladwell illustrates how Gates' love for a nascent technology, his extraordinary work ethic, the extremely fortunate access he had to computers at a young age and hard work all contributed to the enormous success that makes him an outlier. Gladwell reveals that Bill Gates attended a high school with a computer club at a time when almost no other school had one. Gates, also lived within walking distance of the University of Washington, where he was able to use the on-campus computers that were so rare at the time. In addition, Gates ascended to the top of the computer world at the perfect time. As a young man, he was not settled on a career and had become practiced and experienced in computer programming. This allowed Gates to begin his company at the best possible time, right at "the dawn of the personal computer age." Even Gates describes himself as the product of "an incredibly lucky series of events." Yet Gladwell does not overlook the fact that not every teenager with the same circumstances would have walked to campus, logged onto the computers and programmed for hours and hours every weekend. Gladwell is a pleasure to read and every page is filled with interesting, provocative information, as well as sound logic. Some have accused Gladwell of being an armchair psychologist. For example, he argues, with little support, that J. Robert Oppenheimer was wildly successful at everything in life because he learned social behavior from his wealthy parents. By contrast, Gladwell tells of similar geniuses who cannot hold a job because they were raised in low-income families where they never learned to properly interact with others. Such speculative theories tend to show that Gladwell clouds the complexity of some issues through oversimplification and concealment of competing research. But on the whole, Gladwell's conclusions are generally well researched and supported by evidence and logic.

Weighing in at 285 easy pages, *Outliers* is absolutely worth the marginal investment of time it will take to read the book. This book will not likely serve as a how-to-guide on becoming successful, but it may have a major impact on how success is perceived and understood in America.

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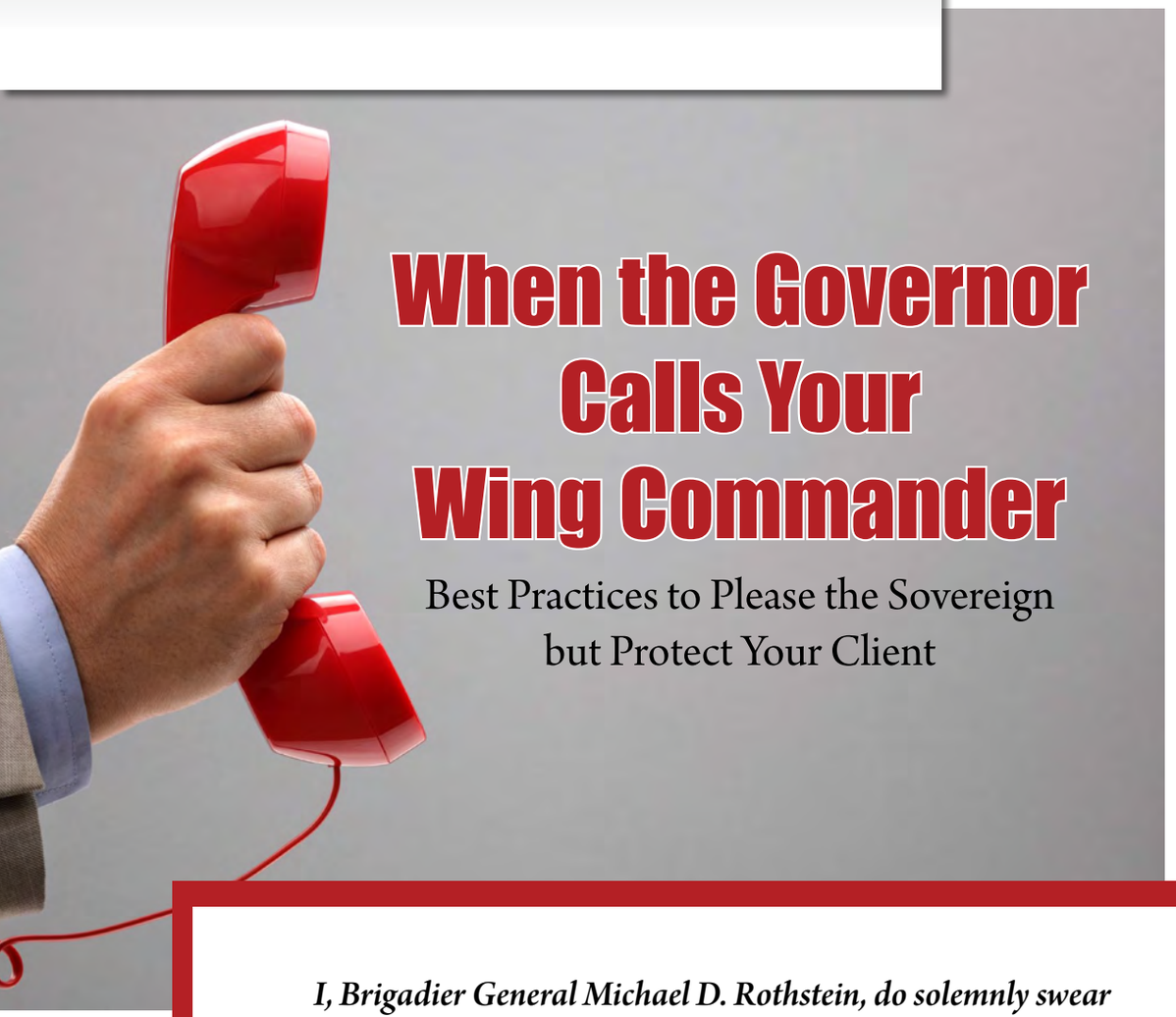


When the Governor Calls Your Wing Commander

Best Practices to Please the Sovereign but Protect Your Client

I, Brigadier General Michael D. Rothstein, do solemnly swear that I will support the Constitution of the United States and the Constitution and laws of the State of Arizona, that I will bear true faith and allegiance to the same and defend them against all enemies, foreign and domestic, and that I will faithfully and impartially discharge the duties of the office of a member of the Governor's "State Council on the Education for Military Children" according to the best of my ability, so help me God??????

(Image courtesy of iStock)

BY CAPTAIN RODNEY B. GLASSMAN, USAFR

Since August 2008, over forty-six states have adopted the Interstate Compact on Educational Opportunity for Military Children ("Interstate Compact"). The mobile military lifestyle creates tough challenges for military children who, according to the American School Superintendent's Association, attend, on average, six to nine different school systems from kindergarten to 12th grade. The Office of the Secretary of Defense collaborated with the Council of State Governments to create the Interstate Compact as a means to address the widely varying treatment of transitioning military students and to provide a comprehensive and uniform policy in every school district in every state.

One element of the Interstate Compact is that each member state is required to appoint a State Council, including at least one representative from a military installation within the state, to assist in developing recommendations. This has created a unique legal issue because many states require individuals who participate on state boards or commissions to take a loyalty oath to that State. This is particularly problematic because it creates a conflict of interest with the military oath of office as illustrated by the conflicted fictional oath at the beginning of this article. The legal team at Luke Air Force Base, Arizona, recently addressed this unique legal challenge.

The Thoughtful Invitation

Upon the Arizona State Legislature's passage of Arizona Revised Statute 15-1911, adopting the Interstate Compact, Arizona Governor Jan Brewer signed Executive Order 2012-05 creating the Arizona State Council on the Education for Military Children ("State Council"). Dale Frost, Governor Brewer's Education Policy Advisor, described the newly required State Council's make-up: "The compact required only one representative from a military installation on the state council. However, Governor Brewer wanted the unique perspectives from each of Arizona's military installations to be represented." Therefore, the Governor's Executive Order called for Commander representation from "every major military installation in Arizona." At the time of the Council's creation, Arizona was home to seven military installations employing more than 83,000 active-duty personnel, reservists, and civilians across the State. The Governor's office estimated that over 9,890 children from military families attended Arizona K-12 schools.

In August of 2012, the phone in the office of the Luke Air Force Base Community Initiatives Team (CIT) began to ring. The CIT is a civilian led Commander's program, established to address the issue of urban encroachment surrounding Luke Air Force Base and to work in areas across the state that are vital to the base's continuing mission. Arizona Governor Jan Brewer's Office was calling to invite Brigadier General Michael D. Rothstein, Commander of the 56th Fighter Wing, to serve on the Governor's State Council. As the commander understood it, the Governor's request was simple: take our oath and join the State Council.

The Ethical Challenge

Pursuant to 5 U.S.C. § 3331, "when appointed or elected to an office of honor or trust under the Government of the United States, individuals are required to subscribe an oath of loyalty

to the United States." As members of the Air Force, we were each required to take the oath as part of our enlistment or commission.

In order to accept the Governor's invitation and be a voting member of the board, the commander would have to comply with Arizona Revised Statute 38-231, which requires an oath to be taken by all officers of all boards, commissions, and agencies, and independent offices for each board, commission, agency, and independent office of the state, swearing loyalty to the State of Arizona.

With the Governor's request to General Rothstein, two potential issues were analyzed:

1. Could the commanders or their designees be voting members of the State Council and attend the State Council meetings?

2. Could the commanders or their designees represent the Department of Defense as a voting member in an official capacity on a state level council or committee?

The Joint Ethics Regulation, DoD 5500.07-R Chapter 3, Section 2, *Official Participation in Non-Federal Entities* squarely addresses both issues:

3-200 Attendance

a. Agency Designees may permit their DoD employees to attend meetings, conferences, seminars, or similar events sponsored by non-Federal entities in their official DoD capacities at Federal Government expense if there is a legitimate Federal Government purpose in accordance with 5 U.S.C. § 4101 et seq. (Reference (b)) and 37 U.S.C. § 412 (Reference (c)), such as training a DoD employee beyond maintaining professional credentials or gathering information of value to the DoD.

3-201 Membership

a. DoD employees may serve as DoD liaisons to non-Federal entities when appointed by the head of the DoD Component command or organization who determines there is a significant and continuing DoD interest to be served by such representation. Liaisons serve as part of their official DoD duties, under DoD Component memberships, and represent only DoD interests to the non-Federal entity in an advisory capacity. Liaisons may not be involved in matters of management or control of the non-Federal entity. Liaisons may officially represent DoD in discussions of matters of mutual interest with non-Federal entities provided it is made clear to the non-Federal entities that the opinions expressed by liaisons do not bind DoD or any DoD Component to any action.

Based upon a review of the Joint Ethics Regulations, commanders invited to participate in councils such as the State Council, can only serve as liaisons in an advisory capacity and not as voting members.

The Solution

At Luke Air Force Base, General Rothstein ultimately delegated responsibility for participation in the State Council to Colonel Nathan C. Mooney, 56th Mission Support Group Commander. At Luke Air Force Base, the School Liaison Officer (SLO), who is responsible for coordinating with parents, educating districts, highlighting challenges, and promoting good news stories, is located within the 56th Force Support Squadron. Colonel Mooney explained to the State Council that he could only participate in an advisory capacity and would need to skip taking the State of Arizona's loyalty oath. Fortunately, this ended up not being an issue. Due to the fact that the State Council was created solely by Executive Order and members served at the pleasure of the Governor, the state law did not require Colonel Mooney, or any member of the Council, to take the traditional oath required for commissions created by statute. He was, therefore, able to fully participate in the Council and represent the base and its Airmen.

"From the perspective of an active duty member with a wife who has been teaching for 17 years, there are unique challenges for military members working with the education community," said Colonel Mooney, describing the value of the council. "Two very different organizations had to learn to understand each other, and then formulate and translate speech to be able to work together on addressing issues. We were educating Arizona's educational leadership on our vernacular like, 'What's a PCS season?'"

Colonel Mooney continued, "When you are a member with a special needs child or students that are honor roll and doing very well, access to consistently quality programs is a challenge. Your son can have good grades, be a great athlete, and do a great job as a model student in one state but then move and the football coach cannot decide what to do." By participating in the Governor's council, "the SLOs are now talking, identifying issues and concerns from a cross-services perspective to identify trends, and compiling the information, and driving discussion for new solutions."

Ethics Issues Regarding Oaths Moving Forward

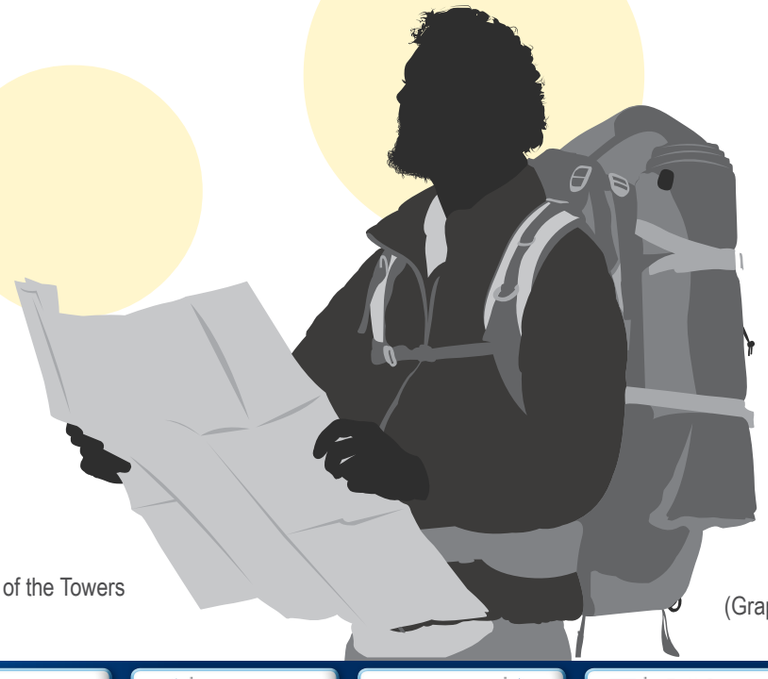
In the case of the Arizona Governor's State Council, by working with the local JAG office and looking to the Joint Ethics Regulation, the Air Force installation commander was able to accept the Governor's invitation, maintain the duty of loyalty to the Constitution and Commander-in-Chief, and enable the Air Force to participate in this unique and valuable opportunity to advocate on behalf of the needs of children in active duty military families. While the oath was ultimately not required because of the "advisory" nature of the commander's role on the State Council, the issue of loyalty oaths to non-federal entities should be monitored carefully as communities and states across the country, and sovereigns around the world, continue to cultivate collaborative relationships with leadership from military installations situated within their borders.

(Graphic courtesy of iStock)

WHERE IN THE WORLD?

Photo courtesy of Christina Dennison

If you have a unique, funny, or poignant photograph of your travels in the JAG Corps for inclusion in "Where In The World?" please email the editors at AFLOA.AFJAGS@us.af.mil.



(Graphic courtesy of iStock)

Answer: Technical Sergeant Justin Dennison and his dog Dakota hiking in Wind River Range, Wyoming near the Cirque of the Towers

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The Judge Advocate General's School
150 Chennault Circle
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Air Force firefighters fighting a controlled fire (U.S. Air Force photo/Senior Airman Jose L. Hernandez-Domitilo)