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The Reporter

The Judge Advocate General's Corps

The JAG Corps Turns 60

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Maj Gen Albert M. Kuhfeld moves for admission of new judge advocates to the U.S. Court of Military Appeals, circa 1953

Members of Judge Advocate Staff Officer Course 09-A are sworn in to the U.S. Court of Appeals for the Armed Forces, December 2008

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The Reporter is published quarterly 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 welcome 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 36112-6418) (Comm (334) 953-2802/DSN 493-2802).

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Message from the Commandant

Colonel Tonya Hagmaier

This edition of *The Reporter* celebrates the 60th anniversary of the Judge Advocate General's Corps. This significant milestone affords us not only an opportunity to reflect on where we have been, but also a chance to look forward to the future of the Corps.

Distinguished leaders from Congress, the Air Force, and the JAG Corps offer their thoughts and congratulations on this important occasion. Additionally, the JAG School's own Major Jeffrey Palomino reflects on the leadership of the first Judge Advocate General of the Air Force, Major General Reginald Harmon, and offers his thoughts on the modern-day lessons we can learn from General Harmon's service.

Major Brian Thompson responds to an article on judge-only sentencing that appeared in the Summer 2008 edition of *The Reporter* and offers his views on the benefits of member sentencing in courts-martial. Major Jeremy Weber reviews the appellate decision in a recent Navy case that highlights why convening authority actions are so important, and he offers suggestions to base legal offices to ensure case actions are correct.

Lieutenant Colonel Lee Gronikowski offers a practical perspective on the importance of keeping client confidences. Using real-world examples of inappropriate disclosures, he demonstrates how even casual conversations may violate professional responsibility rules and standards.

This issue is also filled with other articles and columns, including Developments from the Field, Legal Assistance Notes, Appellate Corner, Military Justice Pointers, Ask the Expert, and Books in Brief. These features demonstrate the breadth and scope of modern-day service in the JAG Corps, and they make clear how much our practice has evolved over the last 60 years.

Tonya Hagmaier

THEN AND NOW: The JAG Corps Turns 60

The following remarks, which have been edited for this publication, were made by Lieutenant General Jack L. Rives on 23 January 2009 during the Annual Survey of the Law in Denver, Colorado.

Judge advocates at HQ 7th Air Division (Strategic Air Command), South Ruislip, England, circa 1952

On 25 January 1949, General Hoyt Vandenberg established the Department of the Judge Advocate General -- what is now the Judge Advocate General's Corps. A huge number of things have changed through the years, but there have been many constants, as well. When I travel around the JAG world and meet with our commanders and Airmen, they tell me how much your service –- not just now, but through the years –- means to their ability to accomplish their jobs. They talk about the dedication, the incredible service, the innovation, and the skills that judge advocates, paralegals, and civilian employees of the Total Force JAG Corps provide. They really appreciate Air Force legal services: always professional, candid, and independent.

This legacy was built day by day through hard, dedicated work by the men and women who have served in the JAG Corps, whether they were civilians, with the reserve components, or active duty. Wherever they served and in whatever pay grade, they made incredible contributions to the mission of the United States Air Force. That's what we celebrate on the occasion of our 60th Anniversary.

When you view photographs from the JAG Corps through the years, you see that uniforms have changed, some of our bases have changed, and many of our missions have evolved. However, one critical thing that has not changed is the dedication of the men and women of the JAG Corps. Through the years, they have lived up to the Guiding Principles of the JAG Corps -- Wisdom, Valor, and Justice. Our principles are not new; our people who have served through the years have always exemplified those qualities.

This is an exciting time to be active in the JAG Corps, or to be family or friends of members of the JAG Corps. We have a new Administration and many exciting developments and challenges around the world. And the United States Air Force depends on what you do, every single day.

So I ask you to please join me in a toast:

We are here today because of the hard work and dedication of judge advocates, paralegals, and civilian employees who came before us. We look forward to a bright future where all of us can continue the proud tradition of service to our nation and respect for the rule of law. Ladies and gentlemen, to our 60th anniversary!

JAG Corps members serving in the Law and Order Task Force, Baghdad, Iraq, April 2008

Senator Lindsey Graham and General Norton Schwartz Reflect on the 60th Anniversary of the JAG Corps

Senator Lindsey Graham
United States Senator, South Carolina

Mr. President, I wish to congratulate the men and women of the Air Force Judge Advocate General's Corps on the occasion of its 60th anniversary. On January 25, 1949, under the authority of the Air Force Military Justice Act, the Air Force issued General Order 7 creating the Air Force Judge Advocate General's Department, later changed to the Judge Advocate General's Corps.

Since that time, the men and women of the Judge Advocate General's Corps have become the living embodiment of their guiding principles of wisdom, valor, and justice. They have provided countless commanders, policymakers, and clients with the benefit of invaluable professional, candid, and independent counsel. Further, they have done so while living the core values of the Air Force: integrity, service before self, and excellence in all they do.

The hallmark of their service to this great country is a profound respect for, and adherence to, the rule of law. Their steadfast dedication to the rule of law allows the U.S. Air Force to conduct itself in the best traditions of America and retain the highest moral ground.

The men and women who currently serve in the Judge Advocate General's Corps, and those that came before them, can be exceptionally proud of their service and the contributions they have made to our national security. As a former active duty Judge Advocate, I am intensely proud of my association with the Judge Advocate General's Corps. I am pleased to acknowledge this great achievement and congratulate the Corps for their service to this Nation.

Senator Graham's remarks were made in the Congressional Record on 22 January 2009.

General Norton A. Schwartz
Chief of Staff of the United States Air Force

Over the past 60 years, you and your predecessors have provided tremendous support to your commanders and clients . . . typically our fellow Airmen. Thank you for all you've done—and are doing—in support of our Air Force family and the Nation.

Today, Airmen at home and around the world are advancing American interests and helping to bring security and stability to millions. As the Air Force's legal team, you are essential to our ability to complete effectively and in compliance with the law. In modern military operations, the rule of law is a strategic imperative; it brings credibility and legitimacy to our efforts, and forms the foundation from which Airmen can act with confidence.

Use this anniversary to renew your commitment to your traditions: helping Airmen find the best and legally sound way to accomplish their missions, working as partners with commanders in handling disciplinary cases fairly and as efficiently as possible, and doing your jobs with consummate precision and reliability.

For 60 years, your successes have been a reflection of your constant focus on our mission, our people, and our Constitution. I know commanders will continue turning to the JAG Corps to anticipate and help resolve their most pressing challenges, and that you will continue working with our Airmen in exemplary fashion to address their legal needs.

We all appreciate what you do every day and the Secretary and I extend our sincere congratulations on your 60th Anniversary.

General Schwartz's remarks were originally published in the 28 January 2009 edition of The JAG Corps Online News Service.

MODERN DAY LESSONS FROM THE FIRST TJAG

The following remarks, which have been edited for this publication, were made by Major Jeffrey G. Palomino at a luncheon hosted by the Judge Advocate General's School on 28 January 2009 to celebrate the 60th Anniversary of the JAG Corps.

While I was deployed to Iraq this past summer, my then 4-year old son Ben became enamored with a television show from my childhood days. What was the show? It was *The Super Friends*. You remember *The Super Friends*. If you don't, it was an animated television series in the 70s and 80s. It originally featured Superman, Batman and Robin, Wonderwoman, and, my favorite, Aquaman. Ultimately, though, it expanded to include characters such as the Flash, Plastic Man, the Green Arrow, the Wonder Twins, and Gleek. And who could forget their loveable canine companion Wonderdog? As you remember, the Super Friends worked out of the Hall of Justice and they, of course, fought supervillians and other societal evils, all the time resolving massive world conflicts within about 15 minutes. In addition, between segments they did short spots giving basic safety lessons, providing basic first aid advice, demonstrating magic tricks, and presenting a two-part riddle featuring the week's primary plotline.

Today, we have occasion to reflect on the 60th Anniversary of the Air Force Judge Advocate General's Corps. When we do this, we inevitably think about the leaders of the JAG Corps both past and present. We think of names like Kuhfeld, Cheney, Vague, and Swigonski. I think of names like Moorman and Rives. Many of these leaders are forever enshrined around the JAG School with rooms named after them and commissioned portraits hanging in the hallways. Unfortunately, what happens when we see them in this perspective is that we start to think of these leaders more like the Super Friends—heroic figures who worked out of the Hall of Justice and resolved massive world conflicts within about 15 minutes. When we do this, we forget that these leaders were, in reality, regular people who simply did the best they could do for the Air Force and its JAG Corps at their appointed time in history.

No one better illustrates this point—the point of the JAG Corps consisting of regular people doing the best they could at their time in history—than the first Judge Advocate General, Major General Reginald Harmon. Today, I'd like to focus my comments on General Harmon. First, I'll talk briefly about his background and how he became the first TJAG. When you hear how it happened, you'll be surprised. Second, I'll quickly list some of the more interesting positions he held on different topics facing the JAG Department of his day, and I'll ask you to compare these views to life in the modern-day JAG Corps. Finally, after we look at these things, I'll give you two points we can we can learn from all of this and, hopefully, take with us as we leave here today.

Background of General Harmon

General Harmon was born in 1900 on a farm in Olney, Illinois.[1] Olney, Illinois is a town kind of like Eclectic, Alabama; unless you're from there, you've probably never heard of it. General Harmon did ROTC at the University of Illinois and graduated from the University of Illinois College of Law in 1927. One fact is very important to understanding General Harmon. If you understand this one fact, it will give you a context into the many decisions he would later make as TJAG. In 1929, when he was only two years out of law school, General Harmon was elected mayor of the city of Urbana, Illinois, which is where the University of Illinois is located. He was the youngest mayor in the

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*Major Jeffrey G. Palomino (B.S. University of Illinois at Urbana-Champaign; J.D. DePaul University) is an instructor in the Civil Law Division, The Judge Advocate General's School, Maxwell AFB, AL.

[1] All historical references and quotes are taken from Lt Col Patricia A. Kerns, THE FIRST 50 YEARS OF THE U.S. AIR FORCE JUDGE ADVOCATE GENERAL'S DEPARTMENT (1999).

history of the city, and he served as mayor from 1929-1933, right during the heart of the great depression.

In 1940, General Harmon was called to active duty as a major. Later that decade, of course, the Air Force formed out of the Army Air Forces and the Air Force JAG Department would form out of the Army JAG Corps. There was widespread speculation that the Air Force's first legal office would be an abysmal failure. Army JAG officers were also actively discouraged from moving to this fledging Air Force. One officer recalled that when he told the Army TJAG, Major General Thomas Green, he wanted to move to the Air Force JAG Corps, Maj Gen Green called his decision, "unpatriotic, traitorous, and immoral." General Harmon had a similar memory of being discouraged from moving to the Air Force. He speculated that Maj Gen Green decided to let him move just to get him out of his office.

The story of how General Harmon became TJAG is very interesting. There were four or five candidates ahead of him. No one thought he would get the job, especially him. In the book *The First 50 Years of the U.S. Air Force Judge Advocate General's Department*, Lt Col Patricia A. Kerns tells the story of then-Colonel Harmon's interview for the TJAG position:

> Colonel Harmon recalled being directed to travel from Wright Field, where he was the SJA, to Washington, D.C., to interview for the position. He was annoyed at having to make the trip since he considered his chances minimal and believed he was being considered only to make it look like the selection team had done a thorough job. On the day of the interview, he was kept waiting in the Office of the Secretary of the Air Force, Stuart Symington, until about three o'clock in the afternoon. He finally announced to the Executive Officer that he could not stay much longer because he had to catch a train back to Wright Field. His main concern during the interview was whether or not it would end soon enough for him to catch his train. When asked by the interviewers if he thought he had any special assignments that would be of interest to the group, he answered, "no," simply to get out of the interview more quickly.

Even though many believed he was not a serious candidate, he had worked on some high visibility projects in the Air Force and had received the attention of the Commanding General of Air Materiel Command. This General, who was actually senior in rank to the Chief of Staff, General Vandenberg, was well respected and lobbied for him to get the job. General Harmon was then appointed TJAG on 8 September 1948. He would serve as TJAG for 12 years, until 1960. He was reappointed to the position twice, both times against his own recommendation. In fact, one of his reappointments he learned about in the newspaper and didn't hear about it directly.

General Harmon's More Interesting Positions

While he was TJAG, General Harmon held some extremely interesting positions on a variety of topics facing the new Air Force JAG Department. Before I mention these positions, I must say General Harmon achieved a great deal as TJAG. He addressed a huge backlog of cases and came up with a standardized way of reporting cases, which is still used today. He also worked on codifying Title 10 and getting rid of some of its unnecessary provisions. General Harmon also secured a large portion of civilian attorneys from the Army and greatly assisted in training within the Air Force reserves. That said, let's look at some of his more interesting positions.

The UCMJ. The first and, probably, the biggest is that General Harmon absolutely opposed the Uniform Code of Military Justice (UCMJ). He didn't want it. In an interview later in his life, General Harmon said, "I was not for the Uniform Code of Military Justice and I'm not for it now." In a 1952 speech, General Harmon compared the changes happening in the military justice system to at train being pulled too far down a track by too much momentum unable to stop when needed. In a 1954 report to Congress, General Harmon opined that the UCMJ was inferior to the Elston Act, which we know were

Colonel A.W. Tolen, Major General Reginald C. Harmon, and Brigadier General A.W. Rigsby at the 15th AF Judge Advocate Conference, March Air Force Base, California, 22 Aug 1958

the first reforms to Articles of War. He noted that courts-martial processing times were 40% higher with the UCMJ, and he cited the higher cost of appellate review. He simply felt the appellate process gave too many rights. General Harmon was especially critical of the Court of Military Appeals (COMA), which we know today as the Court of Appeals for the Armed Forces. He didn't like it and felt civilian oversight of the military justice system was unnecessary. Ultimately, General Harmon believed that if we were to face another World War, the UCMJ would be virtually impossible to administer. It should be noted that in 1960, General Harmon's last year as TJAG, the Air Force did 20,000 courts-martial, so he had some perspective on his position.

Attorney Training. Another interesting position—one we hold near and dear at the JAG School—was that General Harmon believed formal training was unnecessary for new JAGs in the department. He wanted to run the department like a law firm, and he knew of no law firm in the country that paid to train its new attorneys. OJT is what he wanted! By 1950, with the start of the Korean War, the influx of new JAGs, and the new UCMJ, General Harmon finally gave in and allowed some new attorney training. This is when the Judge Advocate General Staff Office Course or JAGSOC started. By 1953, though, General Harmon felt most new attorneys were proficient, and in 1954 he decided to close the JAG School at Maxwell AFB. The school did in fact close in 1955. General Harmon's rationale was pretty simple: New JAGs at that time had two-year active duty service commitments; it just wasn't cost effective to train them. The commander of Maxwell AFB objected to the school being closed and said that everyone from the Chief of Staff's office down was shocked the school closed. According to the commander, "They hadn't had anybody ever stop anything." It would be over a decade before formal training would start again for new JAGs.

FLEP. General Harmon also opposed something we call the Funded Legal Education Program or FLEP. This is a program where the military takes officers from other career fields, sends them to law school, and they come back to active duty as JAGs. General Harmon called FLEP attorneys "synthetic lawyers," and he refused to participate in the program. In fact, he told Congress it should be stopped and the program was curtailed until 1974.

Professional Pay. General Harmon also opposed professional pay for attorneys. In fact, he said publicly that he could get legal brains for "a dime a dozen," and, honestly, he probably could at that time due to the draft. Again, his views prevailed and it would be over 50 years from that time until the JAG Department obtained special pay for retention. Thankfully, it was right about the time I came into the Air Force.

Specialized Law Degrees and PME. Lastly, General Harmon also opposed specialized law degrees, and he opposed professional military education or PME for JAGs. No rationale was given for this, but it's likely his views were fiscally motivated – he didn't want JAGs to be away from the career field.

As you can imagine many of General Harmon's views were very unpopular and many were criticized. Ultimately though, General Harmon did what we all do; he used his background, training and worldview to do the best he could do for the Air Force and its JAG Corps at his time in history. It was a time in history that we can barely imagine—a time when the slate was clean, but resources were scarce.

In *The First 50 Years of the USAF JAG Department*, Lt Col Kerns said, "As the

Department developed and grew, General Harmon exerted a much a stronger and lasting impression on it than would any subsequent TJAG." Even so, it's interesting to consider his views on these subjects in light of what we know actually happened. With the benefit of 60 years of history, we can see that there were new and better ways of doing business. In the Air Force and in the JAG Corps there is always a better way of doing things on the horizon.

Modern Day Lessons Learned

As we look at General Harmon and some of his more interesting positions on the issues of his day, there are two points we can learn. The first is simply this: The JAG Corps transcends one person. This is true whether that person wears stars or stripes. The JAG Corps was ultimately bigger than General Harmon. It's bigger than you, and it's bigger than me. This point humbles us as we seek to do our work in the Air Force.

Brigadier General Albert M. Kuhfeld and Major General Reginald C. Harmon

Many times we get wrapped up into our careers, our performance reports, and our awards. What we constantly do is compare ourselves against our peers. Instead of comparing yourself against your present day peers, I urge you to compare yourself against your peers of the past. As our Judge Advocate General, Lieutenant General Jack Rives said when he pinned on his third star, "Those who came before us built the foundation on which we stand today, and I salute them. This is their moment."[2] The JAG Corps was around a long time before you showed up. It will be around a long time after you leave. This is so because the JAG Corps transcends one person.

The second point we learn is this: The JAG Corps is its people. In essence, the sum of the JAG Corps is its parts, its people. You see, the JAG Corps is not a person. The JAG Corps is not a program. People have been and always will be the JAG Corps. Our best resource, our finest innovation, and our most valuable asset has been, and always will be, our people.

Our mission is to deliver professional, candid, independent counsel and full-spectrum legal services to command and the war fighter. That's something generals do, and it's something captains do. It's something chief master sergeant's do, and it's something senior airmen do. It's something active duty military do, and it's something reservists, guardsmen, and civilians do. The JAG Corps doesn't depend on one person; it depends on all of us. It depends on you. Your job is to internalize the mission, and as a general I met in Iraq said, to take it personally, and make it your JAG Corps, a better JAG Corps. So, I ask you: What are you doing today to make it better?

In conclusion, we've seen today that the Judge Advocate General's Corps doesn't come down to a few Super Friends working in the Halls of Justice. It comes down to you, me, and us—regular people doing the best we can do for the Air Force and its JAG Corps at our appointed time in history.

In December, I received in invitation to a change of command ceremony from a friend of mine, Lt Col Chris Colbert. Lt Col Colbert and I had met at Altus AFB, when then-Major Colbert was a C-5 instructor pilot. In the middle of December, Lt Col Colbert was taking command of the 22nd Airlift Squadron, Travis AFB, California. I couldn't attend the ceremony out there so I called him to congratulate him. Lt Col Colbert is a friend of mine. He told me he was nervous about taking command the next day. He was going to be asked to make decisions on a whole host of issues that he'd never had to make decisions on before. His views may not be popular with the friends he once had in the squadron. But, he said, completely unsolicited by me, "I've been told that the JAG will be my right hand man."

Ladies and gentlemen, that is your mission. May the JAG Corps of the next 60 years be even better than its first 60 years. The future of the JAG Corps depends on you!

[2] *Lieutenant General Rives Reflects on His Promotion*, THE REPORTER, Fall 2008, at 5.

ASK THE EXPERT

What is President Obama's policy on releasing Government records under the Freedom of Information Act (FOIA) and how will it impact application of specific FOIA exemptions to requested records?

Policy: One of President Obama's first memorandums involved the release of Executive Agency records requested under the FOIA. In pertinent part, his memorandum states:

> The Freedom of Information Act should be administered with a clear presumption: In the face of doubt, openness prevails. The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears. Nondisclosure should never be based on an effort to protect the personal interests of Government officials at the expense of those they are supposed to serve. In responding to requests under the FOIA, executive branch agencies (agencies) should act promptly and in a spirit of cooperation, recognizing that such agencies are servants of the public.

The Department of Justice, Office of Information Privacy (OIP), which is charged with implementing the President's FOIA policy government-wide and sets policy with respect to the FOIA, notes the President's memorandum is effective immediately and supersedes Attorney General Ashcroft's FOIA memorandum of 12 October 2001. As a result, agency personnel "should immediately begin to apply the presumption of disclosure to all decisions involving the FOIA, as the President has called for."

Impact: Any doubt on whether to apply an exemption is resolved in favor of disclosure. The President's more transparent FOIA policy will most likely effect application of a discretionary FOIA exemption, such as exemption 5. FOIA exemption 5 allows—*but does not require*—an Agency to withhold information for which the Agency, in our case the Air Force, could assert a recognized privilege against an opposing party in civil litigation. The privileges most commonly asserted in connection with FOIA exemption 5 are those relating to intra and inter-agency pre-decisional, deliberative information; the attorney-client privilege; and the attorney-work product doctrine.

For instance, under the deliberative process privilege of exemption 5, information proposed to be withheld must be both deliberative in nature (a recommendation/opinion/analysis) and "pre-decisional," i.e., the recommendation/opinion/analysis pre-dates a final or proposed final agency decision on a related matter. The privilege is designed to protect the quality of agency decisions in three main ways: (1) to encourage open, frank discussions on matters of policy between subordinates and superiors; (2) to protect against premature disclosure of proposed policies before they are finally adopted; and (3) to protect against public confusion that might result from disclosure of reasons and rationales that were not in fact ultimately the grounds for an agency's action.

If deliberative information released to the public will not significantly impact agency recommendations and opinions in one of three negative ways, then the information is releasable under the FOIA. And, under the President's FOIA policy, doubts about whether to apply exemption 5 to requested information will be resolved by disclosing the information. Accordingly, it is anticipated that if a decision is made to withhold information under exemption 5 by a release authority, that authority will need to clearly and un-ambiguously articulate how release of the pre-decisional, deliberative information *will* discourage personnel from providing open, frank discussions in the future, to the detriment of an Air Force interest; or prematurely disclose proposed policies in a way that will confuse the public. Look for DOJ guidance, when issued, at http://www.usdoj.gov/oip/oip.html.

DO YOU HAVE A QUESTION TO ASK THE EXPERT?

Please e-mail your question to Captain Jodi Velasco, jodi.velasco@maxwell.af.mil.

Who is required to get homosexual conduct policy training, and where can I get the training materials?

There are two categories of personnel required to receive homosexual conduct policy training. The first are military and civilian raters of military personnel, informally referred to as "Supervisors." These persons are to get one-time training within 60 days of assuming rating responsibilities. The second group consists of commanders, JAGs, and law enforcement (OSI and SF) investigators. These persons are required to receive training annually.

Training materials are available from two sources. The materials are identical regardless of source. In most instances, the superior source will be the Advanced Distributed Learning Service (ADLS). This is a training website that can be accessed through a link on the Air Force Portal. On the ADLS site, the materials appear on the "Course List" under "Miscellaneous." The advantage of training through ADLS is that the system automatically makes a record of those who've taken the training. Unit training monitors can either access member records to confirm training completion or request personnel to print off copies of the course completion certificate. Alternatively, the materials are available as a set of PowerPoint slides located on JAA's website under "Personnel Actions," "Homosexual Matters."

Note that required homosexual conduct policy training may only be accomplished through use of the ADLS or JAA materials. Adherence to a uniform set of headquarters materials ensures not only substantive accuracy, but also an ability to confidently answer queries from members of Congress and the media as to what the Air Force tells its people when training them on this very sensitive and controversial subject.

The source document for homosexual conduct policy training is a 10 March 2000 CSAF policy memo available on the JAA website.

Thanks to Lieutenant Colonel Todi Carnes, Air Staff Counsel for Personnel Actions Law, AF/JAA, for these responses.

Administrative Law Division (HQ USAF/JAA) Resources

A wealth of information on personnel actions, including homosexual matters, is available through the JAA webpage on FLITE.

On the FLITE home page, under the *HAF/AFLOA* drop down menu, click on *JA STAFF*, then *JAA*. Under *Fields of Practice*, click on *Personnel Actions*, then *Homosexual Matters*. You'll find DOD and AF Regulatory Materials; Civil Law Opinions; CSAF's Guidence on Homosexual Conduct Policy; and TJAG's Special Subject Letter 2002-03, *Reporting Homosexual Conduct Cases*.

The site provides general information regarding recoupment of unearned portions of bonuses, special pay, and educational benefits or stipends. You'll also find several DOD-approved training slides for specific audiences, such as the mandated Article 137, UCMJ, training; training for commanders, JAGs, and investigators; and training for supervisors.

Also included on the JAA page is contact information for Lt Col Carnes, Air Staff Counsel for Personnel Actions Law at JAA.

Recent Developments

Congressional measures to stimulate the economy and provide benefits to homeowners have dominated the media in recent months. Some of the recent legislation includes significant provisions that could benefit American homeowners, and some provisions are specific to military homeowners. The most prominent of these measures are the American Recovery and Reinvestment Act of 2009 (ARRA) and President Obama's Homeowner Affordability and Stability Plan. Legal assistance attorneys that research and gain an understanding of the benefits associated with these measures may greatly benefit military clients affected by the decline in the housing market.

The American Recovery and Reinvestment Act of 2009

President Obama signed the American Recovery and Reinvestment Act of 2009 (ARRA) on 17 February 2009, the stimulus bill that garnered so much media attention. The ARRA includes some military-specific provisions that could provide benefits for military members who are facing financial pressures from home mortgages and the decline in the housing market. Specifically, the ARRA expands eligibility for the Homeowner's Assistance Program (HAP), a program historically designed to provide some reimbursement to servicemembers and federal employees who face financial loss when selling their primary residence homes in areas where real estate values have declined because of a base closure or realignment announcement.

Under the new ARRA, certain servicemembers and DOD civilians who suffered deployment-related injuries or sickness and are reassigned in furtherance of medical treatment or medical retirement are eligible for assistance. Spouses of servicemembers and DOD employees dying during, or as a result of, a deployment are also eligible if the spouse relocates within two years of the death. P.L. 111-5, § 1001(a)(2).

The greatest expansion in eligibility is "for members of the Armed Forces permanently reassigned during specified mortgage crisis." *Id*. at § 1001(a)(3). Generally, this provision provides for some reimbursement of financial losses sustained by servicemembers as a result of selling a home due to a PCS. The key eligibility requirements outlined in the ARRA include: (1) home was purchased by servicemember before 1 July 06; (2) home is the primary residence of the servicemember; (3) servicemember was reassigned to duty station outside 50-mile radius of previous base or installation; (4) reassignment occurred between 1 July 2006 and 30 September 2012; and (5) the home was sold between 1 July 2006 and 30 September 2012. Concerning compensation, the ARRA offers the servicemember a choice between (1) the difference between 95 percent of prior fair market value and the fair market value at the time of sale, or (2) selling the property to the federal government at 90 percent of the prior fair market value.

It is extremely important to realize that despite the ARRA's enactment, DOD is given broad discretion in implementing this program. There are many details to resolve and DOD is currently in the process of drafting regulations to implement these benefits. At this time, there is no process for servicemembers to follow in seeking these benefits. As a resource you can monitor, the Army Corps of Engineers' website (http://hap.usace.army.mil/) contains information on the Homeowner's Assistance Program with application procedures for the "old" version of the HAP. The website currently mentions that no action will be taken on the new law until DOD provides guidance.

The Homeowner Affordability and Stability Plan

For clients delinquent on mortgage payments or facing foreclosure, your best avenue for assisting a client may lie in helping determine which mortgage servicer actually holds the loan. In many situations, original loans have been sold to other servicers, creating an immediate roadblock for

the client seeking to refinance or restructure mortgage payments. Determining the mortgage servicer may even be helpful for clients that are struggling to make payments, but still current, in light of the recently released Homeowner Affordability and Stability Plan (HASP).

On 18 February 2009, President Obama announced the plan designed to help 7-9 million families restructure or refinance their mortgages to avoid foreclosure. On 4 March 2009, the U.S. Department of Treasury (DOT) released details of the program which essentially consists of two separate plans that may be of use in educating and assisting clients.

The first plan, the "Home Affordable Refinance Plan," is targeted at struggling homeowners that are current on their mortgages. Designed to assist "responsible homeowners" who put money down on their home but are unable to refinance to lower interest rates due to declining home values, the plan applies only to those mortgages owned or guaranteed by Fannie Mae or Freddie Mac. Phone numbers are provided in the websites below to assist homeowners in determining whether their mortgage is owned or guaranteed by Fannie Mae or Freddie Mac. This plan may be particularly helpful to homeowners in adjustable rate mortgages that are seeking a more stable fixed rate loan.

The second plan, the "Home Affordable Modifications Plan," is designed to assist "at-risk homeowners" already delinquent. Essentially a foreclosure preventative initiative, the plan allows for restructuring the mortgage to ensure the monthly payment is no more than 31 percent of gross monthly income for a five-year period. After five years, the interest rate can be gradually stepped up by 1 percent a year to the rate in place at the time of the modification.

These plans are extremely detailed. Further information can be found at http://www.financialstability.gov and http://makinghomeaffordable.gov.

Legal Assistance Webcasts and the Current Economy

In response to the declining economy and the increased need for legal assistance in areas such as real estate, credit, and bankruptcy, The Judge Advocate General's School began a series of webcasts in January 2009 which will continue through at least May 2009. Col Bill Swanson gave webcasts on basic financial planning and an overview of the current economy in January and February 2009. Lt Col Lance Mathews and Maj Jeff Green gave webcasts on foreclosures, tenant rights, and rental home tax consequences in February and March 2009. These webcasts may be accessed through CAPSIL on the Judge Advocate General's webpage. Expect further webcasts on bankruptcy and credit issues through May 2009. If there are specific areas that you are encountering at your base related to the economy, and would like to see them covered in a webcast, please notify Maj Jeff Green, DSN 493-3428, jeffrey.green@maxwell.af.mil.

CAPSIL
Capturing Wisdom

New as Chief of Legal Assistance?

The Judge Advocate General's School has developed division chief courses, including a Chief of Legal Assistance Course. This three-hour course provides guidance for leading the base legal assistance program and offers key substantive law pointers on will drafting, consumer law, and Veteran's Administration benefits. By TJAG direction, completion of the course is mandatory before a judge advocate may assume any division chief position within the legal office.

Your Legal Assistance Chief

Thank you for all of the hard work you are performing for our legal assistance clients. The current economy and new stimulus plans enacted by Congress present a challenging environment for legal assistance attorneys. If your office is successful in assisting clients with issues related to the economy, please let The Judge Advocate General's School know so that we can better assist legal assistance attorneys in the field.

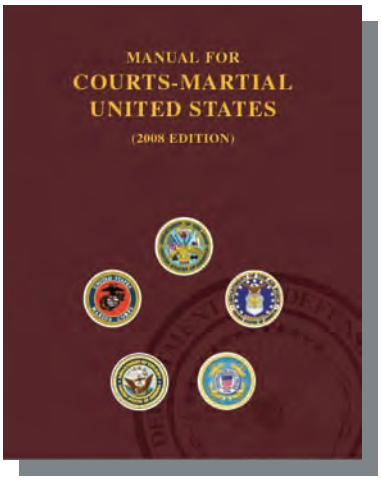
If you have specific legal assistance questions, please contact Maj Jeff Green, DSN 493-3428, jeffrey.green@maxwell.af.mil.

JUDGE-ONLY SENTENCING: Judicial Power Grab?

by Major Brian M. Thompson, USAF*

A recent article in *The Reporter* presented a proposal to mandate judge-only sentencing in noncapital cases.[1] The premise of the proposal is that court-martial members do not have sufficient military-justice experience, "no frame of reference," to guide them in arriving at an "appropriate" sentence. The asserted benefits of judge-only sentencing are more consistent, "appropriate" sentences, and a reduction in litigation costs as fewer cases will proceed to general court-martial.

I respectfully disagree. The judge-only sentencing proposal is a classic solution in search of a problem that, at its heart, suffers from two major deficiencies: (I) there is no problem; and (II) if there is a problem, the proposed solution is inadequate to address it fairly.



Perceived Problem -- Defining "Appropriate" Sentence

The perceived problem, according to the author, is that members in a "substantial number" of cases adjudge sentences that are not "appropriate."[2] These inappropriate sentences, then, "undermine confidence in the fairness of the military justice system." The problem with the problem, however, is that it focuses on result to guide the definition of what is an appropriate sentence, and then only one type of result. Rather than result, however, the foundation of any definition of an appropriate sentence should focus on the process of arriving at it.

a. Result Oriented: Except in that rarest of circumstances when the members adjudge an illegal sentence, focusing on the result of member's sentencing—the actual adjudged sentence—to determine whether a sentence is appropriate is, well, inappropriate. When the result guides the definition, then an appropriate sentence becomes one that is not "too hard" or "too soft," but is "just right" (*i.e.* a *Goldilocks v. Three Bears* sentence). A "just right" definition, however, will be impossible to agree upon, because whether a particular result is an appropriate sentence depends on the subjective weighing of a countless number of facts and factors.

For example, consider the conviction for divers use and divers distribution of cocaine for which the author suggests a sentence of 8-months confinement and a bad conduct discharge (BCD) might be appropriate. Consider the nearly unlimited facts and factors the sentencing authority must weigh before settling on an appropriate sentence. The sentencing authority must consider the strength or weakness of all the evidence presented in the case, not just that evidence directly relevant to the findings of guilt, but also factors such as to whom and where the accused distributed cocaine (e.g., civilians and/or military members, on base or off, a couple friends at a party or regular business endeavor), whether money changed hands during the distribution and, if so, whether the accused made any profit. Once answered to his or her satisfaction, the sentencing authority must determine what difference, if any, those answers make to settling on a particular sentence.

Moving past consideration of the facts adduced at findings, the sentencing authority must employ the "whole person concept" in weighing the countless factors in mitigation and aggravation and evidence offered in extenuation and mitigation. As but a few examples—whether the accused has a strong or weak

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[1] Colonel Steven J. Ehlenbeck, *Court-Martial Sentencing with Members: A Shot in the Dark*, THE REPORTER, Summer 2008, at 33.

[2] Without providing a definition, the article uses the term "appropriate" seven times, "fair and just" three times, and "extreme" four times in relation to members-decided sentences.

service record, whether the accused has demonstrated particular instances of bravery (combat medals), and the effect of the accused's actions on third parties (his family, the lives of those to whom he or she provided cocaine). Again, once answered to his or her satisfaction, the sentencing authority must determine what difference, if any, those answers make to settling on a particular sentence.

Even after considering potentially hundreds of findings and pre-sentencing facts and weighing their relative importance, the sentencing authority is not yet done. He or she must consider application of the five principles of sentencing: rehabilitation, punishment, protection of society, preservation of good order and discipline in the military, and deterrence,[3] deciding which principle(s) is most important in this particular case and which aspect of punishment (confinement, discharge, forfeiture) best embodies the chosen principle(s).

But the decision is still not done! The sentencing authority must consider the types of punishment available and rank their potential effectiveness in a particular case. Is a punitive discharge harsher punishment than substantial confinement? Is a hit to the pocketbook (forfeitures) more effective that an imposition on liberty (confinement, restriction) for a given accused? Does the visibility of hard labor really send a stronger message to the community than the asserted invisibility of confinement, as often asserted by defense counsel?

Only after weighing all of these, and many more, facts and factors can a sentencing authority determine the "just right" sentence. A BCD and 8-months confinement might be right, but it might not. No two people will weigh every fact or factor the same, so one individual may find that a BCD and 8-months confinement for a particular divers-use-and-divers-distribution-of-cocaine case is "just right," while another will find it to be "too soft," while another will find it to be "too hard." Thus, the resulting adjudged sentence alone says nothing about whether a sentence in a particular case is appropriate.

b. Process Oriented: On the other hand, focusing on the process of member's sentencing—how members get to an adjudged sentence—to determine whether a sentence is appropriate is, well, appropriate. That process is a collective one where individual determinations of a "just right" sentence are presented, scrutinized, and deliberated against others in the cauldron of jury room. Extreme positions, on the high end or the low end, are tempered as the group marches towards consensus. In the end, after a full and open discussion of all relevant facts and factors, the group collectively agrees on a sentence. That deliberative, collective process ensures that whatever the sentence is, it is, by definition, appropriate.

In fact, the aspects of members sentencing sometimes derided as weaknesses actually shine as strengths. With limited exceptions, court-martial members are both book and street smart, highly educated people who are at least somewhat diverse in characteristics (age, gender, race, national origin), and substantially diverse in life experiences. To a large degree, these members come to court with the best frame of reference they need for sitting in judgment on others—they typically have considerable command and supervisory experience dealing with military-justice issues at all levels and routinely make difficult decisions affecting the lives of their subordinates. Because they are a diverse group, their collective decision on findings and sentence reflect the "conscience of the [military] community."[4] Or as better stated by the Military Justice Act of 1983 Advisory Commission:

> Because the military community is both distinct as an entirety and varies from place to place and command to command, court members are in the best position to act as the conscience of the military community and to adjudge an appropriate sentence.[5]

Further, the member's lack of a prior-results frame of reference is a positive, not a negative. Because of the countless unique facts and factors present in every case, no two cases can possible

[3] *See* U.S. DEP'T OF ARMY, PAM. 27-9, LEGAL SERVICES: MILITARY JUDGES' BENCHBOOK (15 Sep. 2002), para. 2-5-21 and para. 2-6-10.

[4] Jeffrey Abramson, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY 183, 195-96 (1994).

[5] *United States v. Gilbreath*, 57 M.J. 57, 61 (2002) (quoting The Military Justice Act of 1983 Advisory Commission, Advisory Commission Report at 1172).

be similar enough to provide members useful guidance. Rather, each member arrives in the courtroom with an open mind, without preconceived ideas about what a particular kind of case is worth, and remains unpolluted from the irrelevancy of similar case results as they conscientiously consider the offense and offender before them.

The process before members reach the courtroom works to ensure that these members in reality fit this theoretical standard. Unlike the random selection of jury members in civilian courts, court-martial panels are "blue ribbon" assemblies specifically selected because of their "education, training, experience, length of service, and judicial temperament."[6] Experience teaches that we succeed in selecting unfailingly smart and conscientious members.

Once members reach the courtroom, the process continues to work to ensure they fit the theoretical standard. The voir dire process works, arguably, to weed out, or at least educate, those members who may have some preconceptions or who hold inelastic ideas about particular sentences (e.g., that all drug cases deserve confinement or all distribution cases deserve a punitive discharge).

Nor do we simply throw members to the wolves (trial or defense counsel, take your pick), without guidance on how to apply the law to the facts and arguments presented. Rather, we provide members with detailed guidance on the roles of the parties, how they consider evidence, the principles of sentencing, the range of available punishments, and the procedures they use to vote. What we do not instruct on, however, is what their result should be, which is exactly what giving them the results of fabled "similar" cases would do.

Focusing on the process guides the best definition of an appropriate sentence from members. An appropriate sentence is one arrived at collectively, after careful deliberation, regardless of whether a third-party would subjectively consider it "too soft," "too hard," or even "just right." If that is your definition of an appropriate sentence, then there is no problem with member's sentencing—the adjudged sentence is by definition appropriate. In fact, the benefits inherent in the process of member's sentencing underscore a persuasive argument that the military-justice system should move to members-only sentencing rather than judge-only sentencing . . . a proposal for another day.

Rather than focus on process, however, the argument for judge-only sentencing focuses on the results of certain cases where the outcome was not as anticipated to assert that there is a problem. But inherently, that asserted problem can only be with one type of result—a sentence that is subjectively "too soft." Congress has already put into place mechanisms to correct sentences that are subjectively perceived to be "too hard." If the convening authority believes an otherwise legal adjudged sentence is "too hard," then he or she has the power under Article 60(c)(1) to show mercy and reduce it. If the judges of a reviewing court find that an approved sentence is "too hard" (i.e., excessive), then they have the power under Article 66(c), drawing on their collective wisdom, to reduce it.[7]

With that in mind, the real problem that judge-only sentencing aims to fix becomes clear. It is not sentences that are "too hard," as those can be reduced; rather, it is sentences that are "too soft," as those cannot be increased. Thus, so goes the argument, "too soft" sentences are irreparable, must be avoided, and only judge-only sentencing avoids them.

Inadequate Solution

Assuming for purposes of argument that the potential for "too soft" sentences is a problem that needs to be fixed, the next question is whether judge-only sentencing is the right fix. It is not. In addition to the benefits of member's sentencing noted above, the authorities that have examined the issue have found no "persuasive evidence that judge sentencing produces more consistent sentences than court-member sentencing for similarly situated accuseds."[8] More than that, judge-only sentencing was the very proposal considered,

[6] Article 25(d)(2), UCMJ.

[7] That this rarely occurs demonstrates that, at least on the "too hard" side, the process of court-martial members' sentencing leads to "appropriate" sentences.

[8] Military Justice Act of 1983 Advisory Commission, Advisory Commission Report at 4-5 (1984).

and soundly rejected, by the Military Justice Act of 1983 Advisory Commission.[9]

If judge-only sentencing does not "fix" the perceived problem, is there anything else? Fortunately or unfortunately, depending on your point of view, none of the other potential fixes to "too soft" sentences are particularly appealing.

a. Mandatory-Minimum Sentences: A more obvious fix would be to add more mandatory-minimum sentences to the UCMJ. Currently, only Article 106 (spying) and Article 118 (murder) have mandatory-minimum sentences.[10] Mandatory-minimum sentences offer a simple solution—just pick a crime and then pick a minimum penalty. Such an alternative takes away discretion, but it certainly adds certainty.

A favorite of legislators hoping to look tough on crime, mandatory-minimum sentences exploded in the mid-1980s in response to the War on Drugs.[11] The advocates cited "better justice, and more appropriate sentences" as justification for mandatory-minimum sentences.[12] But over time, numerous studies and commentators "concluded that mandatory sentencing has failed to alleviate sentencing disparities; [and] in certain areas, mandatory sentencing has even exacerbated the problem."[13] With now almost universal distain for mandatory-minimum sentences, they may not be, on reflection, such a good fix for the perceived problem of "too soft" sentences.

b. Sentencing Guidelines: The military-justice system could adopt a guideline-type sentencing scheme, similar to that in place in federal courts. Under such a scheme, offenses are categorized from least to most severe on one axis of grid, an offender's criminal history scored on the other axis, with the intersection of the two providing a range of appropriate confinement. For example, a violation of 18 U.S.C. § 2252A for possessing more than 600 images of child pornography on a computer (Offense Level=25) by an offender with a no prior criminal history (Offender Score=0) would result in a 57-71 month guideline range. The scheme provides departures from this range, up or down, based on a variety of factors (e.g., acceptance of reasonability (down) or abuse of a position of trust (up)). Under a guidelines scheme, there is a lengthy pre-sentence investigation during which a report is prepared laying out all of the computational possibilities.

Guideline-sentencing systems are not without problems. First, the Supreme Court recently ruled unconstitutional basic aspects of the Federal Sentencing Guidelines, and the Guidelines are now more advisory in nature.[14] Second, Congress specifically exempted the UCMJ from application of the Sentencing Guidelines, primarily due to the unique nature of the military justice system and the logistical challenges of lengthy pre-sentencing investigations.[15] Third, like mandatory-minimum sentences, criticism of the Federal Sentencing Guidelines is widespread throughout the federal bench and bar (including prosecutors), as well as within the military justice community.[16] So, on reflection, formal sentencing guidelines may not be such a good fix for the perceived problem of "too soft" sentences either.

c. Modifying Procedures: There are also lesser changes that could steer members toward

[9] *Id.* at 6, 19, 27 (The Commission "strongly recommended against mandatory judge-alone sentencing" and concluded that court-martial members "clearly comprise a 'blue-ribbon' decision-making body when compared to civilian juries.").
[10] For Article 106 violations, the maximum and mandatory-minimum sentences are the same—death. *See* R.C.M. 1004(d), (e). For Article 118(1) and (4) violations, the mandatory-minimum sentence is life with the possibility of parole.
[11] *See generally* Christopher Mascharka, *Mandatory Minimum Sentences: Exemplifying the Law of Unintended Consequences*, 28 FLA. ST. U.L. REV. 935 (Summer 2001).
[12] 116 CONG. REC. H33,314 (1970), reprinted in 3 FED. SENTENCING REP. 108 (1990) (Comments of then-Congressman George H.W. Bush).
[13] Mascharka, *supra* note 11, at 943.
[14] *United States v. Booker*, 543 U.S. 220, 243 (2005).
[15] 18 U.S.C. § 3551.
[16] U.S. Army Legal Assistance Report, *The Advocate for the Military Defense Counsel*, ARMY LAW., April 1989, at 31; Captain Denise K. Vowell, *To Determine An Appropriate Sentence: Sentencing In The Military Justice System*, 114 MIL. L. REV. 87, 174-75 (1986); *see also* Schwender, *Sentencing Guidelines for Courts-Martial: Some Arguments Against Adoption*, ARMY LAW., Aug. 1988, at 33. *But see* Grove, *Sentencing Reform: Toward a More Uniform, Less Uninformed System of Court-Martial Sentencing*, ARMY LAW., July 1988, at 26.

more "appropriate" results. One would be to revise the current least-to-most procedure of RCM 1006(d)(3)(A) and instruct members to vote on the most severe proposed sentence first, and then work their way down until a sufficient number (two-thirds or three-fourths, depending on length of confinement) agree.[17]

Members could also be instructed to vote on all proposed sentences, with the "winning" sentence being the most severe proposal receiving a sufficient number of votes. The fairness of modifying sentencing procedures with an eye toward affecting results is debatable at best, so such changes also seem an inappropriate response to "too soft" sentences.

d. Unintended Consequences (Unanimous Juries): Eliminating members' sentencing could also have greater unintended consequences to the military justice system. While most civilian jurisdictions have abandoned jury sentencing in noncapital cases, even more jurisdictions have abandoned non-unanimous juries in all instances. In fact, only two jurisdictions (Oregon and Louisiana) still maintain non-unanimous juries, and those systems are constitutionally suspect.[18]

While courts to date have not found a Fifth or Sixth Amendment requirement for non-unanimous juries in courts-martial, one of the bases of these holdings is the unique role members play in the military justice system, particularly in sentencing: "members are drawn exclusively from the accused's own profession based on specified qualifications (such as judicial temperament), with specialized knowledge of the profession. . . . Their functioning differs, too. For example, it includes the questioning of witnesses and the determination of sentences."[19] Given the numerous benefits of unanimous juries—more reliable verdicts, serious consideration of dissenting viewpoints, community confidence in results—and studies demonstrating that the problem of "hung juries" is overstated, moving to unanimous juries in courts-martial deserves serious consideration.[20] If the uniqueness of members' sentencing were eliminated from the military justice system in favor of mirroring the federal system, reconsideration of the constitutional basis for non-unanimous juries will follow close behind.

e. Cost Savings: Finally, there is the argument that judge-only sentencing will result in fewer general courts-martial, thus saving Article 32 costs, because SJAs will recommend, and convening authorities will refer, more cases to special courts-martial. Judge-only sentencing may save time, but not money.

This argument appears to presume that convening authorities now refer cases to general courts-martial so trial counsel can appear more reasonable during sentencing arguments (i.e., assuming a 10-month sentence recommendation appears more reasonable in a general court-martial because it is only one-sixth of a 5-year maximum versus the same recommendation when it is five-sixths of the maximum for the same crime in a special court-martial). No SJA recommends a case proceed to general court-martial just so counsel can pursue a "factor" argument, and no convening authority refers a case to a particular forum for tactical advantage. In fact, "factor" arguments are generally not persuasive and poor substitutes for reasoned analysis. Machiavellian motives aside, cases are referred based on their merits and judge-only sentencing will not change that fact.

As currently structured, the proposal for judge-only sentencing is an idea whose time has not come. It addresses a problem ("too soft" sentences) that does not exist and would be workable only with major substantive modifications to the fundamental nature of military justice. It should be back to the drawing board for advocates of enhanced judicial oversight of court-martial sentences.

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[17] "All members shall vote on each proposed sentence in its entirety beginning with the least severe and continuing, as necessary, with the least severe, until a sentence is adopted."

[18] *State v. Lee*, 964 So.2d 967 (La. 2007), *cert. denied*, 129 S.Ct. 130 (2008).

[19] *Mendrano v. Smith*, 797 F.2d 1538, 1445-46 (10th Cir. 1986) (quoting *United States v. Guilford*, 8 M.J. 598, 602 (A.C.M.R. 1979)).

[20] Brief of Amicus Curiae American Bar Association, *Lee v. Louisiana*, U.S. Supreme Court Dkt No. 07-1523 (July 7, 2008)(discussing opposition to non-unanimous juries).

Military Justice Pointers

With implementation of the "new" Article 120, UCMJ, Lt Col Eric Mejia, AFLOA/JAJM, addresses which offenses require base legal offices to annotate the AF Form 1359, Report of Result of Trial, with "SEX OFFENDER NOTIFICATION REQUIRED" IAW AFI 51-201, Administration of Military Justice, para. 13.18.

Art 120 and the Sex Offender Registry

Article 120, UCMJ, amended by Congress and effective for offenses occurring on and after 1 October 2007, replaced several Article 134 offenses and increased the number of Article 120 offenses from two—carnal knowledge and rape—to fourteen. However, the current sexual offender registry laws, the Department of Defense, and Air Force regulatory guidance which implement them predate the changes to the UCMJ. This is especially significant in that both DODI 1325.7, *Administration of Military Correctional Facilities and Clemency and Parole Authority,* and AFI 51-201 include a list of offenses which trigger the notification requirement. Neither list has been revised to reflect the new provisions of Article 120.

As noted in AFI 51-201, current federal law requires registration of offenders convicted of sexually violent offenses and certain offenses against minors. These two categories of offenses are defined in 42 U.S.C. § 14071. Generally, these offenses are those that involve sexual offenses against a minor, kidnapping or false imprisonment of a minor (except by a parent), sexual acts against any person committed through the use of force, threats, or by rendering them incapable of consent, and sexual acts with another person who is incapable of consent, as well as attempts to commit these types of offenses. A 1997 amendment to 42 U.S.C. § 14071 included among potential registrants those sentenced by court-martial. The amendment also directed SECDEF to specify conduct punishable under the UCMJ which met the statutory definition of sexually violent offenses and certain offenses against minors. The DODI and AFI lists represent those UCMJ offenses which SECDEF determined most closely match the offenses referred to in 42 U.S.C. § 14071. While DODI 1325.7 and AFI 51-201 are in the process of being amended, we recommend registration for the following UCMJ offenses which encompass the type of conduct described in 42 U.S.C. § 14071:

ARTICLE	OFFENSE	ART	OFFENSE
120(a)/(b)	Rape/Rape of a child	134	Assault with Intent to Commit Rape
120(c)/(d)	Aggravated sexual assault/Aggravated sexual assault of a child	134	Assault with Intent to Commit Sodomy
120 (e)/(g)	Aggravated sexual contact with a child	134	Kidnapping of a Minor (by a person not parent)
120(f)	Aggravated sexual abuse of a child	134	Pornography Involving a Minor
120(h)/(i)	Abusive sexual contact/abusive sexual contact with a child	134	Conduct prejudicial to GOAD/service discrediting sexually violent offense/criminal offense of a sexual nature against minor or kidnapping a minor)
120(j)	Indecent liberty with a child	134	Clause three offenses with sexually violent offense/criminal offense of a sexual nature against a minor or kidnapping a minor
120(l)	Forcible pandering	80	Attempt (to commit any of the foregoing)
120(m)	Wrongful sexual contact	80	Conspiracy (to commit any of the foregoing
125	Forcible sodomy/sodomy with a child	81	Conspiracy (to commit any of the foregoing
133	Conduct unbecoming an officer (sexually violent offense/criminal offense of a sexual nature against a minor or kidnapping a minor)	82	Solicitation (to commit any of the foregoing)

It is important to note that this list is a guideline and not an all-inclusive list of those offenses that require registration.

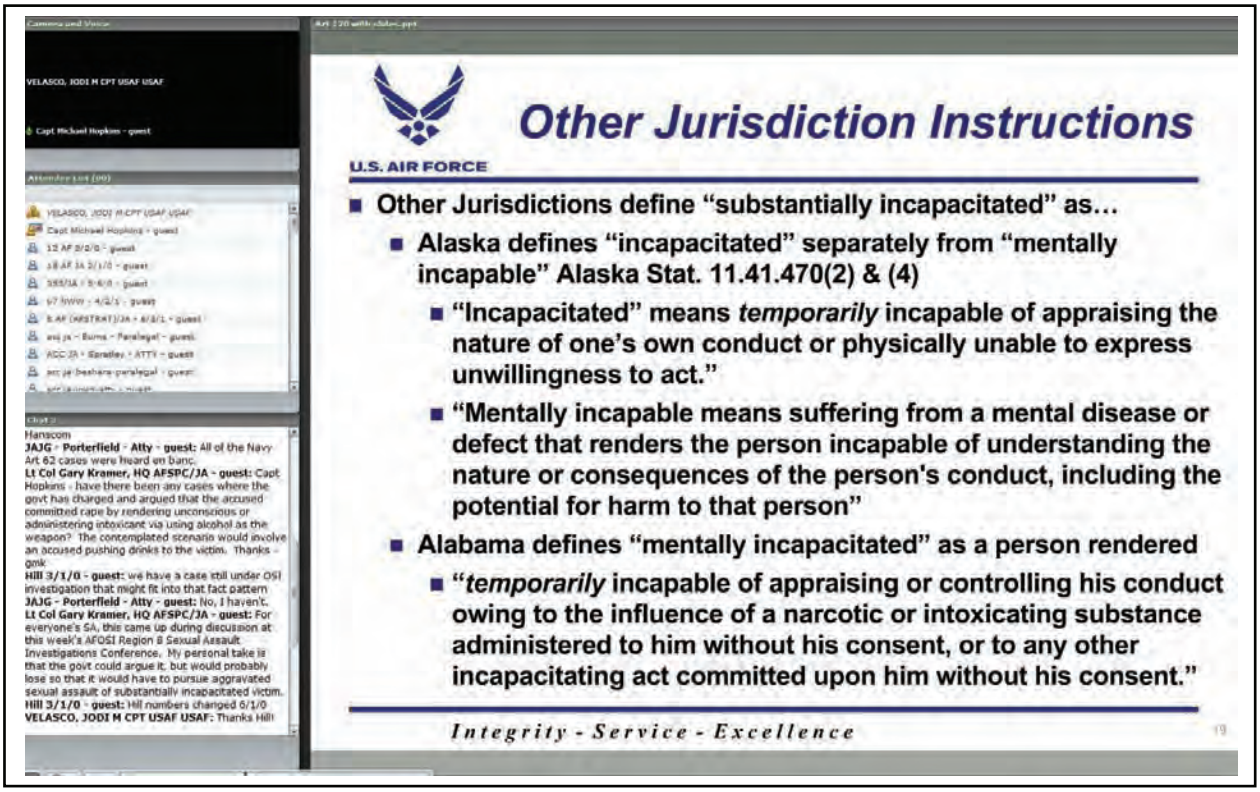
JAJM has also been asked about accepting an offer to plead for the purpose of avoiding registration requirements. For example, an accused charged under Article 120(j), Indecent Liberty with a Child, may offer to plead guilty to Article 120(n), Indecent Exposure, in order to avoid registration. The general objective of the registration requirement is to assist law enforcement and protect the public from convicted child molesters and violent sex offenders. In our opinion, accepting the plea is not acceptable if the purpose is to defeat the application and intent of the legislation. However, accepting the plea may be appropriate if, for example, it is not possible to prove an element of the charged offense.

Further questions about whether an offense triggers registration requirements may be directed to AFLOA/JAJM.

Interested in learning more about current trial issues with Article 120?

On 19 March 2009, Captain Mike Hopkins, AFLOA/JAJG, presented an outstanding webcast on "Current Issues with Article 120, UCMJ." A link to the recording of Capt Hopkins' presentation is available on CAPSIL. The CAPSIL learning center also has Capt Hopkins' presentation slides available for download.

To view Capt Hopkins' webcast or his slides, simply search for "Article 120" in the keyword search in CAPSIL or visit the JAG School webcast center in CAPSIL.



Appellate Corner

MILITARY RULE OF EVIDENCE 505(i): Defining the "Interests of Justice"

A Case Note on United States v. Murphy

The United States Air Force Court of Criminal Appeals recently took up the question regarding the outer boundaries of a military judge's discretion in determining remedies "in the interests of justice." The question arose when the Government appealed the trial judge's imposition of a remedy he imposed for discovery violations in *U.S. v. Murphy* (A.F. Ct. Crim. App. 2008).

Background

The case arose from an Article 62 appeal filed by the government in the case against Colonel Michael Murphy,[1] who was then pending trial by general court-martial.[2]

Col Murphy was assigned as General Counsel at the White House Military Office (WHMO) from December 2001 through the end of June 2005. During his time there, Col Murphy worked on several classified programs and was required to agree that he would not disclose his accomplishments without prior written authorization from the WHMO. Col Murphy's OPRs during this time period do not reference any of his classified work although they contain comments lauding Col Murphy's efforts and indicating that the WHMO viewed his accomplishments as being instrumental to the security of the nation. Col Murphy was also awarded the Defense Superior Service Medal in December 2004 for his work at the WHMO and attributed the "safety and security of millions of Americans" to those efforts.

Col Murphy and his defense counsel began to obtain permission from the WHMO to discuss the specifics of his work at the WHMO for use at his trial in June 2007. While his lead defense counsel was briefed on the specifics by WHMO, he was required to also sign a non-disclosure agreement. In April 2008, the convening authority requested that Col Murphy and the parties to the trial be "read in" to the Special Access Program (SAP). The request was denied by the WHMO in May 2008. In June 2008, the accused filed a Motion to Compel.

At an Article 39 hearing on the motion, the trial judge found that the information was "relevant and necessary." The judge further ordered that trial counsel arrange release from the WHMO or the trial would be continued pending release of the information if the government continued to pursue Specifications 1 and 2 of the original Charge I.

Not surprisingly, trial counsel was unsuccessful in obtaining the information due to WHMO's steadfast refusal to release the accused and counsel from their non-disclosure agreements. On July 1, 2008, the convening authority dismissed Specification 1 and 2 of Charge I. Subsequently, the accused was read-in to the SAP and subsequently provided the WHMO with a detailed list of the information he wanted to disclose to his defense counsel for potential use at his trial. After a review by the classification authority, the request was denied as was the request by trial counsel for the military judge to review the accused's list of requested information which was classified by the WHMO.

After further proceedings, the military judge issued an order in September 2008 in which he ruled that because of the WHMO's refusal to provide the requested information, the maximum sentence the accused would face at trial was "no punishment." The sanction was

[1] The government appealed the military judge's ruling under Article 62(a)(1)(D), UCMJ. The accused raised a jurisdictional question that was addressed by the Air Force Court of Criminal Appeals. The Court of Criminal Appeals determined that it had jurisdiction and that issue will not be addressed in this article.

[2] The original charges include three specifications of conduct unbecoming, three specifications of larceny, and one specification of violating a lawful order, in violation of Articles 133, 121, and 92.

imposed pursuant to the court's authority as provided in MRE 505(i)(4)(E) for the government's failure to provide the classified information for an *in camera* review in order to insure a fair trial for the accused. The ruling was based on the court's finding that the accused's right to present mitigation evidence of specific acts of "good conduct, bravery or duty performance" IAW RCM 1001(c)(1)(B), should only rarely be limited. Because it is difficult to know what military members would do if they were able to consider the evidence in sentencing, the military judge determined that the only appropriate remedy was to limit the maximum punishment to no punishment.

Military Rule of Evidence 505 and Permissible Sanctions

MRE 505 was drafted to address cases when there is a need to balance the government's interest in protecting classified information from unnecessary disclosure against the accused's right to a fair trial. The rule imposes upon the military judge the responsibility of preventing improper disclosure of classified information. However, the rule does not provide the military judge unfettered ability to compel release of relevant information, indeed, the authority to decide on the release of classified information is retained by the "head of the executive or military department or government agency concerned."[3]

MRE 505(i)(4)(E) defines the sanctions a military judge may impose if she determines that "alternatives to full disclosure may not be used and the Government continues to object to disclosure of the information." The rule provides that a military judge can impose sanctions that "the interests of justice require." The rule provides a non-exhaustive list of possible sanctions including dismissal of all charges and specifications.[4]

Defining The "Interests Of Justice"

On appeal, the government argued that the court's limitation on sentence was an abuse of discretion. The government argued that the military judge's ruling essentially created just the situation Congress was trying to avoid in drafting MRE 505 and that the military judge placed too much emphasis on the fact that he was not permitted to review the records *in camera* in order to determine whether a reasonable alternative was available. The government argued that it was an abuse of discretion for the military judge to impose a sanction with a net result ensuring the accused would not be punished for any wrongdoings if he was subsequently convicted of the remaining offenses. The accused argued on appeal that the sanction was within the proper range of remedies available to the military judge and was not *clearly erroneous*.

Pursuant to Article 62, UCMJ, the appellate court was limited to an abuse of discretion review of only "matters of law." "[W]hen judicial action is taken in a discretionary matter, such action cannot be set aside by a reviewing court unless it has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors." *United States v. Sanchez*, 65 MJ 145, 147-148 (2007) *citing United States v. Houser*, 36 M.J. 392, 397 (C.M.A. 1993). Military judges have wide latitude to fashion appropriate remedies and generally will not be reversed provided their decision remains within the applicable legal framework. *United States v. Gore*, 60 M.J. 178, 187 (2004); *United States v. Griffin*, 50 M.J. 278, 284 (1999).

The Air Force Court of Criminal Appeals determined that the military judge did not abuse his discretion and that his remedy was in the "interests of justice" standard established in MRE 505(i). The Court found the findings of facts made by the military judge were not clearly erroneous, nor was he influenced by an

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[3] MRE 505(c) provides: *"Who may claim the privilege*. The privilege may be claimed by the head of the executive or military department or government agency concerned. . ."

[4] MRE 505(i)(4)(E) provides the following list of sanctions: " . . . Such an order may include an order: (i) striking or precluding all or part of the testimony of a witness; (ii) declaring a mistrial; (iii) finding against the Government on any issue as to which the evidence is relevant and material to the defense; (iv) dismissing the charges, with or without prejudice; or (v) dismissing the charges or specifications or both to which the information relates."

erroneous view of the law. *U.S. v. Murphy* (A.F. Ct. Crim. App. 2008). The court relied in part on the fact that "no punishment" is a permissible form of sentence under the UCMJ. The appellate court's view was that it was at least conceivable that a panel of senior members would sentence the accused to no punishment if given the opportunity to review the jobs he performed while assigned to the WHMO. The court also held that the government could avoid this sanction if it were somehow able to produce the information requested by the accused and thereby complying with MRE 505. The Court did not appear to give any weight to the fact that it was not the fault of the prosecution that the discovery was not produced.

Conclusion

Cases involving classified information are not the "garden variety" court-martial, however they do arise and the *Murphy* opinion is instructive in establishing the latitude of the discretion of a military judge faced with a similar situation. MRE 505 would have permitted the trial judge in *Murphy* to dismiss the charges with prejudice.[5] The Air Force Court of Criminal Appeals determined, given this outer range of remedies, the court's discretion would necessarily include the lesser remedy assessed of limiting the punishment available. It is clear from the opinion that the accused's right to a fair trial will not be sacrificed simply because the releasing agency has different priorities than the requesting agency. Thus, the "interests of justice" available to military judges under MRE 505 appear to include any remedies that are provided for in the UCMJ, even if not specifically delineated in the rule itself. Certainly, this standard will ensure that courts-martial continue to protect the "interests of justice" for all parties concerned.

Thanks to Lieutenant Colonel Beth A. Townsend, Military Judge, Air Force Trial Judiciary, Randolph AFB, TX, for this submission.

[5] MRE 505(i)(4)(E)(iv).

United States v. Murphy

Court-Martial Result

Colonel Michael D. Murphy's court-martial began 30 March 2009 at Bolling Air Force Base, D.C., and lasted three days. On 1 April 2009, a panel of officers convicted Col Murphy on all charges and specifications, as follows: one charge and three specifications of conduct unbecoming and officer and gentleman by (1) accepting the positions and performing duties as the Commandant to the Air Force Judge Advocate General's School, Commander of the Air Force Legal Operations Agency, and Staff Judge Advocate for Pacific Air Forces and providing legal advice without a license; (2) presenting himself publicly as a judge advocate while performing trial advocacy training, and (3) failing to notify HQ USAF/JAX of the termination of his license to practice law; one charge and three specifications of stealing money from the Air Force by filing fraudulent vouchers for a total amount of over $4000; and one charge and one specification of wrongfully failing to maintain compliance with applicable licensing requirements.

The court members sentenced Col Murphy to a sentence of no punishment, the maximum sentence available (as previously ruled by the military judge and affirmed by the Air Force Court of Criminal Appeals.

Thanks to Colonel Rodger Drew, Staff Judge Advocate, Air Force District of Washington, for this submission.

CONVENING AUTHORITY ACTIONS: Why It's More Important Than Ever to Get Them Right

by Major Jeremy S. Weber, USAF*

Introduction

On the night of 15 April 2000, Hospitalman Sean Wilson entered his neighbor's house on base at Guantanamo Bay, made his way to the bedroom, and forcibly raped his neighbor's wife, Mrs. N. Mrs. N, who had returned home from a spouse appreciation dinner to complete a college homework assignment, was lying in bed with her two-year-old son sleeping next to her when Hospitalman Wilson entered the room. Her husband, SSgt N, remained out with friends.

Ample evidence placed Hospitalman Wilson at the scene of the crime, and despite his claims that she consented to intercourse, officer members convicted him of rape, assault, adultery, and unlawful entry into a dwelling. The members sentenced Hospitalman Wilson to confinement for eight years, forfeiture of all pay and allowances, reduction to E-1, and a dishonorable discharge.[1]

Hospitalman Wilson, whose grave crimes were proven beyond a reasonable doubt, will spend the rest of his life without the stigma of a punitive discharge. The worst part is this was preventable.

This sentence should have closed a chapter in this sad case. However, for reasons entirely unrelated to the merits of the case, Hospitalman Wilson reaped a major windfall when a poorly drafted action caused the government to lose the dishonorable discharge. Hospitalman Wilson, whose grave crimes were proven beyond a reasonable doubt, will spend the rest of his life without the stigma of a punitive discharge. The worst part is this was preventable.

In the past two years, the Court of Appeals for the Armed Forces (CAAF) has imposed tighter standards on the government in interpreting court-martial actions, making it much more likely that imprecise language may lead to similar windfalls for convicted servicemembers. CAAF's recent decisions serve as a warning to everyone involved in post-trial processing: do it exactly right or suffer the consequences.

The Convening Authority's Action: Basics

After conclusion of a court-martial, the military's unique and significant post-trial process begins. After completion and authentication of the record of trial, drafting of a staff judge advocate's recommendation (and possible addenda), and after the convicted member and defense counsel have had an opportunity to submit matters in clemency, the convening authority acts upon the sentence of the court-martial.[2] In taking this action, the convening authority exercises "command prerogative" and "in his sole discretion, may approve, disapprove, commute, or suspend the sentence in whole or in part."[3] The convening authority has "virtually unfettered power to modify a sentence in an accused's favor, including disapproval of a punitive discharge, on the basis of clemency or any other reason,"[4] and may act in the convicted member's favor "for any or no reason."[5] This broad grant of authority renders the convening authority "the accused's best hope for sentence relief."[6]

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[1] The facts of Hospitalman Wilson's crime are detailed in the Navy-Marine Corps Court of Criminal Appeals decision in his case. *United States v. Wilson*, NMCCA 200102056 (7 February 2006) (unpub. op.).

[2] *See generally* R.C.M. 1101-1106 (covering stages of post-trial processing); Article 60, UCMJ, and R.C.M. 1107 (covering action by the convening authority).

[3] *United States v. Davis*, 58 M.J. 100, 102 (2003) (quoting Article 60(c)(1)-(2), UCMJ).

[4] *United States v. Catalini*, 46 M.J. 325, 329 (1997).

[5] R.C.M. 1107(d)(1).

[6] *Davis*, 58 M.J. at 102.

Rule for Courts-Martial (R.C.M.) 1107 covers what information the convening authority's action must include. Regarding a convening authority's action on the sentence, the rule states, in relevant part:

> The convening authority may for any or no reason disapprove a legal sentence in whole or in part, mitigate the sentence, and change a punishment to one of a different nature as long as the severity of the punishment is not increased. The convening or higher authority may not increase the punishment imposed by a court-martial. The approval or disapproval shall be explicitly stated.[7]

The rule also requires a convening authority's action to "state whether the sentence adjudged by the court-martial is approved. If only part of the sentence is approved, the action shall state which parts are approved."[8]

Thus the convening authority's action, as well as language used in drafting it, is of critical importance. The convening authority is responsible for taking action upon the findings and sentence. He bears the burden of acting upon the convicted member's clemency request and deciding whether to grant clemency by "bestowing mercy—treating an accused with less rigor than he deserves."[9] He may even grant relief for any reason—or no reason at all—completely unrelated to clemency. His action must explicitly approve or disapprove a sentence, but his reasoning behind his action is his alone and need not be explained—in fact, he is not even required to have a reason for his action. Thus, the only document available that explains what the convening authority intended in the exercise of this awesome power is the action itself.

Correcting Convening Authority Actions

What if, after the convening authority has signed an action, an inaccuracy or imprecision is noted? May the convening authority recall the first action and simply insert a new action in its place? The answer depends on what has happened since the first action was signed. At any time before the action has been published or the accused has been officially notified of it, the convening authority may recall the initial action and modify it.[10] The Rules for Courts-Martial set out no specific limitations upon the convening authority's ability to recall and modify the initial action in this stage.

If the action has been published or the accused has been officially notified, but the action has not been forwarded for further appellate or judge advocate review,[11] the convening authority may still recall and modify the action. In this situation, however, the convening authority may do so only if "the modification does not result in action less favorable to the accused than the earlier action."[12] In addition, the rule states that in a special court-martial, the convening authority may "recall and correct an illegal, erroneous, incomplete, or ambiguous action" at any time before completion of the judge advocate review that takes place after waiver or withdrawal of appellate review.[13]

If, however, the convening authority's legal office has forwarded the case for further review, the matter is taken out of the convening authority's hands. After a record of trial has been forwarded, the convening authority cannot modify the action unless a higher reviewing authority (such as an appellate court) directs the convening authority to "modify any incomplete, ambiguous, void, or inaccurate action" contained in the record of trial.[14] Thus, once the legal office forwards the case for appellate review, even if the problem is discovered, the convening authority and his legal staff are unable to take any corrective measures unless the higher reviewing authority finds the action to be incomplete, ambiguous, void, or inaccurate and directs the convening authority to modify it.

Because of the important role the convening authority plays in the court-martial process,

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[7] R.C.M. 1107(d)(1).
[8] R.C.M. 1107(f)(4)(A).
[9] *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988).
[10] R.C.M. 1107(f)(2).
[11] A sentence that includes death, a punitive discharge, or one year or more of confinement is referred to the service's Court of Criminal Appeals for appellate review. Article 66(b), UCMJ.
[12] R.C.M. 1107(f)(2).
[13] *Id.*; R.C.M. 1112.
[14] R.C.M. 1107(f)(2).

reviewing courts "have required a *clear and unambiguous* convening authority action" to be present in the record of trial.[15] An action that is clear and unambiguous will be enforced; one that is not will be returned for modification. Because of the stakes that are often involved in this issue at the appellate level, military appellate courts have invested significant effort in defining what "clear and unambiguous" really means.

Appellate Courts' Interpretation of "Ambiguous" Actions

Up until 2007, CAAF allowed the services' Courts of Criminal Appeals faced with inartfully drafted actions to use surrounding documentation to help determine whether an action clearly and unambiguously reflected the convening authority's intent. *United States v. Loft*[16] is an excellent example of this approach. In *Loft*, the appellant was convicted at a special court-martial of three specifications of absence without authority. He was sentenced to confinement at hard labor for four months, forfeiture of $200 pay per month for four months, reduction to E-1, and a bad conduct discharge (BCD). The convening authority then took an action which stated as follows:

> In the foregoing case of Electrician's Mate Third Class Richard E. Loft, U.S. Navy, only so much of the sentence as provides for confinement at hard labor for 120 days; forfeiture of $200.00 pay per month for three months is approved and will be duly executed. The forfeiture of $200.00 pay per month for one month and the execution of the bad-conduct discharge are suspended for 12 months from date of trial at which time unless sooner vacated the suspension portion of the sentence will be remitted without further action.[17]

Judge advocate review of the action noted that the action "could have been more artfully drafted," but concluded that the action did approve and suspend the BCD even though it contained no language specifically approving the BCD. As a result, a supervisory authority then issued an action that explicitly approved and suspended the BCD.[18] On appeal, the appellant argued the second action increased the punishment in part by approving a BCD that had not been approved in the first action. The Court of Military Appeals (the forerunner to CAAF) disagreed. The Court found the only reasonable interpretation of the first action was that the convening authority approved the BCD, since he did act to suspend it, and act that would not be required if he had not approved the BCD. The Court also found that since the case was forwarded for appellate review—an act that would not be proper if the BCD was not approved—this indicated the first action approved the BCD. Finally, the Court examined the terms of a pretrial agreement which provided for approval and suspension of the BCD, and found this indicated the first action intended to approve the BCD.[19]

United States v. Politte[20] is another example of appellate courts' willingness to find actions ambiguous and thus return them for modification. In *Politte*, the appellant pled guilty at a special court-martial to making a false statement, introducing cocaine onto a military installation, wrongfully using cocaine, and soliciting another to use cocaine.[21] A pre-trial agreement limited the appellant's sentence exposure but did not limit the convening authority's ability to approve a punitive discharge.[22] The military judge sentenced the appellant to a reduction to E-1 and a BCD.[23]

In clemency submissions, the appellant's trial defense counsel asked the convening authority to suspend the bad conduct discharge for one year from the date of the action. The staff judge advocate's recommendation (SJAR) advised against suspending the punitive discharge and proposed the convening authority

[15] *United States v. Politte*, 63 M.J. 24, 26 (2006) (emphasis added); *see also* R.C.M. 1107(g).
[16] 10 M.J. 266 (C.M.A. 1981).
[17] *Loft*, 10 M.J. at 266.
[18] *Id*. at 267.
[19] *Id*. at 267-68.
[20] 63 M.J. 24 (2006).
[21] *Id*. at 24-25.
[22] *Id*. at 25.
[23] *Id*.

sign an action that would read as follows:

> [T]hat the sentence as adjudged be approved and executed, except for that portion extending to a Bad Conduct Discharge, which cannot be executed until the completion of appellate review.[24]

As a result, the convening authority signed an action that read:

> In the case of Hospital Corpsman Second Class Michael J. Politte, U.S. Navy, . . . the sentence is approved except for that part of the sentence extending to a bad conduct discharge.
>
> Prior to taking this action the Convening Authority did consider the results of trial, the recommendation of the staff judge advocate, and the 17 June 2004 clemency letter submitted by defense counsel on behalf of the accused.
>
> The record of trial is forwarded to the Navy-Marine Corps Appellate Review Activity, 716 Sicard Street SE Suite 1000, Washington Navy Yard, Washington, DC 20384-5047, pursuant to JAGMAN 0153b(1), for review under Article 66, UCMJ.[25]

Even though the first paragraph of the action read "the sentence is approved except for that part of the sentence extending to a bad conduct discharge," CAAF nonetheless found the action did not clearly disapprove of the punitive discharge. In part, CAAF based its decision on the third paragraph of the action, forwarding the case for appellate review under Article 66. If the convening authority did not approve the punitive discharge, the Court reasoned, there would be no grounds to forward it for appellate review as the approved sentence would not have met the necessary criteria of Article 66(b) to qualify for appellate review.[26]

CAAF, however, did not limit its analysis to the language of the action itself. The Court also examined "surrounding documentation," such as the pretrial agreement allowing for approval of a BCD, the SJAR recommending the punitive discharge be approved but not executed, and the clemency submission which did not request disapproval of the punitive discharge.[27] Thus, the Court found the action ambiguous and ordered the action returned to the convening authority for clarification.[28]

In 2007, however, CAAF took a decidedly tougher stand in interpreting convening authority actions. In *Wilson*, after Hospitalman Wilson was convicted of his disturbing crimes, the convening authority issued an action that read as follows:

> In the case of Hospitalman Sean A. Wilson, U.S. Navy . . . that part of the sentence extending to confinement in excess of 3 years and 3 months is disapproved. The remainder of the sentence, with the exception of the Dishonorable Discharge, is approved and will be executed.[29]

The issue on appeal was apparent. The convening authority's action approved confinement of 3 years and 3 months, and the "remainder of the sentence, with the exception of the Dishonorable Discharge." The appellant argued this language clearly and unambiguously disapproved the punitive discharge such that the Court could not return it to the convening authority for modification.[30]

In a 3-2 decision, CAAF agreed with the appellant. The majority stressed that the convening authority's action specifically excluded the dishonorable discharge from approval by stating "with the exception of the

[24] *Id*.
[25] *Politte*, 63 M.J. at 25.
[26] *Id*. at 26.
[27] *Id*.
[28] *Id.* at 27.
[29] *Wilson*, 65 M.J at 140-41.
[30] The appellant did not raise this issue before the Navy-Marine Corps Court of Criminal Appeals, and the Court simply affirmed the findings and sentence "as approved by the convening authority." *United States v. Wilson*, NMCCA 200102056 (7 February 2006) (unpub. op.); *Wilson*, 65 M.J. at 141.

Dishonorable Discharge, is approved." The Court stated:

> The first sentence explicitly disapproves a portion of the confinement. The second sentence explicitly approves the "remainder of the sentence, with the exception of the Dishonorable Discharge." In announcing that the "remainder of the sentence, with the exception of the Dishonorable Discharge, is approved and will be executed," the convening authority used facially clear and unambiguous language that excluded the dishonorable discharge from approval. Under the plain meaning of this language, the dishonorable discharge was not approved.[31]

The mere fact that the Court disapproved the punitive discharge is a warning in and of itself to staff judge advocates. The reason it did so, however, is even more important. While the *Wilson* Court did not explicitly overrule the prior approach of looking to surrounding documentation for assistance in interpreting actions, the fact that the Court chose to look at the "facially clear and unambiguous" language alone, with no reference to any surrounding documentation, suggested that CAAF will now not look to surrounding documentation in determining whether the language on the convening authority itself is clear and unambiguous.

The mere fact that the Court disapproved the punitive discharge is a warning in and of itself to staff judge advocates . . . [the ruling] suggested that CAAF will now not look to surrounding documentation in determining whether the language . . . is clear and unambiguous.

The dissenting opinions in this 3-2 decision also support the Court's new approach, though they differed in the outcome of that particular case. Chief Judge Effron's dissent argued that the convening authority's action only explicitly disapproved the confinement in excess of three years and three months. It did not explicitly approve or disapprove of the dishonorable discharge. However, at no time did the Chief Judge rely upon surrounding documentation to make his point.[32] Judge Baker, dissenting, provided an even clearer view of the meaning of the *Wilson* decision:

> I agree with the majority's statement of the law. "[W]hen the plain language of the convening authority's action is facially complete and unambiguous, its meaning must be given effect." In contrast, in [*Politte*], this Court looked to the surrounding documentation in concluding that an otherwise clear action was ambiguous. Here, the Court sets the law straight.[33]

Judge Baker concluded that the convening authority's action in the *Wilson* case was ambiguous, not because of any surrounding documentation, but because he believed the "with the exception of the Dishonorable Discharge" language neither approved nor disapproved the punitive discharge; it merely left it in "limbo between that which the convening authority expressly disapproved and that which he expressly approved."[34] The result, according to Judge Baker, was an ambiguous action.

Thus, regardless of the way they ultimately ruled, all five CAAF judges reversed the Court's history of looking to surrounding documentation to determine whether an action is ambiguous and signaled a new, tougher approach to interpreting convening authority actions. CAAF's recent opinion in *United States v. Burch*[35] reaffirms this new approach. In *Burch*, the convening authority suspended confinement

[31] *Wilson*, 65 M.J. at 142.

[32] *Id.* at 143 (Effron, J., dissenting).
[33] *Wilson*, 65 M.J. at 144 (Baker, J., dissenting).
[34] *Id.*
[35] 67 M.J. 32 (2008).

in excess of 45 days, provided the appellant committed no further misconduct during the period of suspension. The appellant was released, then committed further misconduct and was returned to confinement after the government took steps to vacate the suspension. While the appellant was serving this additional confinement, the convening authority then issued a new action that stated, "Execution of that part of the sentence adjudging confinement in excess of 45 days is suspended for a period of 12 months . . . ."[36] The appellant served about seven months in confinement in excess of the 45 days as a result of this action, despite the fact the language of the action itself indicated the additional confinement was to be suspended, not that the suspension was to be vacated.

On appeal, the parties agreed the action was clear and unambiguous, but the government argued the courts could look to other documentation apart from the action to determine whether the appellant was prejudiced. The Navy-Marine Corps Court of Criminal Appeals (CCA) agreed with the government, holding that the appellant was not prejudiced by remaining in confinement after the action, because despite the "plain language" of the convening authority's action, a review of the entire record (including the vacation paperwork) indicates the convening authority did not intend to release the appellant from confinement when he issued the action.[37] CAAF, however, overturned the Navy-Marine Corps Court, citing *Wilson*:

> The CCA's conclusion that Appellant was not prejudiced explicitly rests on facts extrinsic to and predating the convening authority's action, ignoring the significance and timing of the action itself and our holding in *Wilson*. The CCA cited no legal authority for the novel precept that confinement not authorized by a convening authority's action does not prejudice an accused because events preceding the action suggest that at one time the convening authority did not intend to release Appellant from confinement prior to completion of his adjudged sentence."
>
> "[W]hen the plain language of the convening authority's action is facially complete and unambiguous, its meaning must be given effect," without reference to circumstances not reflected in the action itself. *Wilson*, 65 M.J. at 141. If the convening authority's action is to be given effect, as required by R.C.M. 1107, attendant circumstances preceding the action may not be utilized to undermine it.[38]

Again, all five CAAF judges in this unanimous opinion reaffirmed the Court's commitment to examining only the "four corners" of the convening authority's action to determine the convening authority's intent. No surrounding documentation may be examined to "cure" a clear and unambiguous action, even if the action directly contradicts what other evidence indicates the convening authority intended.

The clear import of CAAF's decisions in *Wilson* and *Burch* is this: where a convening authority signs an action, the plain language of which clearly and unambiguously takes some action on a part of an adjudged sentence, appellate courts will not look beyond that plain language to determine the convening authority's intent. Even if other evidence exists to show the convening authority's action was a mistake, that mistake will be carried out if it is clear and unambiguous.

Application and Cautions

The lesson from this analysis should be both obvious and familiar: pay attention to detail and use precise words. Sloppy drafting of convening authority actions does not just raise unnecessary appellate issues and expend unnecessary resources in appellate litigation. Poorly worded actions create a substantial risk that the government can lose part of a sentence—including a punitive discharge, a particularly

[36] *Id*. at 32-33.

[37] *United States v. Burch*, 2007 WL 2745706 (N.M. Ct. Crim. App 2007) (unpub. op.)

[38] *Burch*, 67 M.J. at 33-34.

severe sentencing option.[39] This should not be palatable prospect for anyone involved in the court-martial process, except for an appellant eager for a windfall.

Apart from the obvious advice to pay attention to detail and use precise words, employing proper tools can reduce this risk. The Manual for Courts-Martial provides templates precisely to avoid ambiguity in drafting convening authority actions. Appendix 16 of the UCMJ provides 34 examples of language to use in different scenarios to capture a convening authority's intentions. While CAAF has noted that the forms in Appendix 16 are not to be blindly followed,[40] they provide useful guidance from which staff judge advocates and their staffs should begin their analysis.

Military justice practitioners are advised that precision in drafting actions is imperative. Appellate courts post-*Wilson* are likely to review imprecise language in actions skeptically and will be apt to hold imprecision against the government, the party that drafted the action. As one commentator sagely noted, legal offices particularly should take note of *Wilson*:

> The Wilson case represents a cautionary tale for military justice managers. While the CAAF can caution convening authorities about "drafting" their actions, the court doubtlessly knew it was really directing its caution toward post-trial paralegal noncommissioned officers and Judge Advocates. The error in this case arose because the drafter of the appellant's action did not follow the form language provided in Appendix 16 of the Manual for Courts-Martial (MCM). Specifically, the individual who prepared the action put the word "approved" after, rather than before, the phrase "with the exception of the dishonorable discharge." Unfortunately, this small error resulted in the convening authority disapproving a dishonorable discharge he probably intended to approve. Had the individual who prepared Hospitalman Wilson's action accurately followed the sample language contained in Appendix 16 of the MCM, a convicted rapist would have received the dishonorable discharge he was adjudged and by all accounts, save the action itself, deserved.[41]

Attention to detail, using precise words, a careful editing process—all of these are obvious and time-honored principles. Now, they are more important than ever in post-trial processing.[42] The fight for justice does not just rest with those involved in the trial itself. The fate of a hard-fought case rests just as much upon the diligence of those who process the case after the gavel drops.

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[39] *See, e.g.*, *United States v. Burt*, 56 M.J. 261, 264 (2002) ("It is well settled that a punitive discharge from a component of the armed forces is severe punishment.")

[40] "We note that the model 'Forms for Action' in [Appendix 16] could be revised so that the model actions use separate sentences for each of the elements listed above, rather than multiple clauses, in order to treat the different elements of a sentence as different actions." *Politte*, 63 M.J. at n.11; *see also* Appendix 16 Introduction: "The forms in this appendix are guides for preparation of the convening authority's initial action. Guidance is also provided for actions under R.C.M. 1112(f). . . . The forms are guidance only, and are not mandatory. They do not provide for all cases. It may be necessary to combine parts of different forms to prepare an action appropriate to a specific case. Extreme care should be exercised in using these forms and in preparing actions."

[41] LTC James L. Varley, *The Lion Who Squeaked: How the Moreno Decision Hasn't Changed the World and Other Post-Trial News*, ARMY LAW. (June 2008), pp. 89-90.

[42] According to a study by AFLOA/JAJG, post-trial errors continue to be a recurring pattern in Air Force military justice practice. JAJG studied all 386 Air Force Court of Criminal Appeals opinions issued in 2008 and found that 85 of these cases contained a total of 110 post-trial errors, which means just over 22 percent of Air Force cases reviewed at the appellate level contained at least one post-trial processing error. Of these errors, 13 involved erroneous convening authority actions. "Division Chief's Perspective," *JAJG Perspective*, vol. III, issue 5, at 2. Available at https://aflsa.jag.mil/AF/JAJG/LYNX/jajg_perspective_dec08.pdf.

Developments From The Field

A Quick Look at Global Climate Change and Environmental Impact Analyses

Following the decision in *Center for Biological Diversity (CBD) v. Nat'l Highway Traffic Safety Admin* (*NHTSA*),[1] NEPA attorneys and practitioners have struggled with how to address global climate change (GCC) in NEPA documents. While, for certain large projects, courts in other circuits have required agencies to address GCC impacts under NEPA,[2] the 9th Circuit's holding, that the impacts associated with GCC should be part of a cumulative impacts analysis, remains the most expansive interpretation of the law. One of the primary questions left open by the court concerned how to determine whether an impact rises to a level of significance[3] under NEPA. To date, there is no guidance on how to determine what constitutes a significant impact under NEPA. Practitioners in the 9th Circuit should be aware of the holding in *CBD v. NHTSA*. The Environmental Law Field Support Center will provide assistance to achieve compliance with the 9th Circuit's requirements for those NEPA projects that implicate GCC.

[1] 538 F.3d 1172 (9th Cir. 2008). This case was initially decided in November of 2007, *See Center for Biological Diversity v. Nat'l Highway Traffic Safety Admin.* 508 F.3d 508 (9th Cir. 2007). The initial decision ordered the agency to complete an Environmental Impact Study, on reconsideration the court directed the agency to correct the deficiencies in the Environmental Assessment and prepare an EIS if necessary.

[2] *See e.g., Mid States Coalition for Progress v. Surface Transportation Board*, 345 F.2d. 520 8th Cir. 2003); *Border Power Plant Working Group v. Dept' of Energy*, 467 F.Supp. 2d. 1040 (S.D.Cal. 2006).

[3] NEPA applies to "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C). The term "significantly" is specifically defined at 40 C.F.R. § 1508.27.

Thanks to Major Marvin Tubbs, Environmental Law FSC, Planning and Sustainment, for this submission.

A New "Three Letter" Designator for Commercial Litigation

On 15 September 2008, the Secretary of the Air Force (SECAF) and the Chief of Staff of the Air Force (CSAF) issued the Air Force Mission Statement with "acquisition excellence" as one of the five top priorities for the Air Force. The SAF Public Affairs office continues to publish "recapture acquisition excellence" as one of its reoccurring talking points for airmen. Consistent with this refocus on the acquisition mission of the Air Force, the Judge Advocate General changed the designation of the Air Force Legal Operations Agency Commercial Law and Litigation Division, AFLOA/JACQ, a "four letter" division under the Civil Litigation Division to a separate "three letter" directorate of its own, the Commercial Litigation Directorate (JAQ) under AFLOA. This elevation to a separate directorate under AFLOA emphasizes the JAG Corps' support of the Air Force acquisition community's initiative to improve the acquisition process. JAQ consists of the Commercial Litigation Field Support Center (FSC) providing litigation support for contract issues at the Armed Services Board of Contract Appeals, the Court of Federal Claims, the Federal Circuit, and the Government Accountability Office in the contract claims and bid protest areas. The Contract Law FSC is the other entity within JAQ and provides contract advice to installation and major command attorneys around the world on a variety of contract formation issues.

A new function that JAQ will support with personnel from the Secretary of the Air Force General Counsel's office is the Multi-function Independent Review Teams (MIRT). These teams will provide multi-step independent reviews of large Air Force procurements during key junctures of the solicitation and source selection process. The acquisition community is undergoing substantial reorganization, and thus JAQ will be changing its organization to ensure its clients meet their challenges with substantial legal support and ensuring that the SECAF and CSAF's goals of "return to acquisition excellence" is fully supported by the JAG Corps.

Thanks to Major Mark Allen, Trial Attorney, Air Force Commercial Litigation Division, for this submission.

Labor Law Field Support Center

In 2007, TJAG initiated the Field Support Center concept, creating bodies of experts with missions in specific fields, but also with responsibilities for providing "reach-back" to installation legal offices and activities. One of the first was the Labor Law Field Support Center (LLFSC), which stood up in July 2007.

The LLFSC's mission is litigation of most Air Force administrative and all federal court labor and employment law cases. It also provides labor and employment law advice and training across the Air Force. The LLFSC grew out of AFLOA/JACL's Central Labor Law Office and Federal Litigation Branch. The mission was broadened and its personnel strength significantly augmented.

LLFSC attorneys defend the Air Force before the Equal Employment Opportunity Commission (EEOC), the Merit Systems Protection Board (MSPB), the Federal Labor Relations Authority, and the Federal Service Impasses Panel. They also represent Air Force interests in U.S. District Court and Courts of Appeal cases.

To fulfill its advisory role, LLFSC attorneys counsel installation legal offices, local commanders and agencies, and headquarters agencies on labor and employment substantive and policy issues. The LLFSC also conducts training in annual courses and ensures the Air Force legal, personnel, and equal opportunity communities are well-informed regarding labor and employment law issues.

The LLFSC currently has 37 personnel in Rosslyn, Virginia, and 4 regional offices with a total of 12 individuals at Lackland AFB, Scott AFB, Eglin AFB, and Los Angeles AFB. This number of JAGs in the LLFSC allows for the training of military law labor experts and provides them leadership opportunities while the almost 40 percent civilian employee workforce ensures continuity and long-term expertise. The LLFSC Rosslyn Office's five branches include the Administration Litigation Branch—East, the Administrative Litigation Branch—West, which defend the Air Force against discrimination complaints before the EEOC and the MSPB, the Federal Litigation Branch, the Labor Relations Law Branch, and the Special Action Branch, which handles Office of Special Counsel cases, agency grievances, drug testing program issues, workers' compensation issues, and unemployment compensation issues, internal and external training, and other projects and cases as assigned. The regional offices are responsible for the full spectrum of cases at their assigned installations.

In 2008, the LLFSC closed 78 EEOC discrimination complaints and 64 MSPB appeals. The LLFSC reviewed 273 formal EEO complaints and 175 proposed MSPB-appealable personnel actions. The LLFSC opened 34 cases and closed 40 cases in federal court. The LLFSC also closed 159 unfair labor practices and 5 representation cases, and litigated 2 negotiability appeals.

LLFSC attorneys instructed at the Air Force JAG School, Air Force Human Resources School, the Army JAG School, and the DOD Employment and Labor Relations Symposium, to name just a few.

Attorneys in the LLFSC provide guidance and counsel to a variety of Air Force and DOD organizations at the installation and headquarters level. The LLFSC advises labor relations officers and civilian personnel professionals on its dealings with unions representing Air Force civilian employees. Likewise, the Administrative Litigation Branches advise installation legal offices on all types of disciplinary actions.

The LLFSC has been actively involved in planning for joint basing. The LLFSC has assisted at the policy-making level to the Joint Basing Implementation Guidance Command Authorities Sub Working Group. Additionally, a team of LLFSC attorneys worked extensively with the legal office and the civilian personnel office at McGuire AFB, NJ to prepare for their joint basing challenges. The LLFSC is also assisting DOD in creating a system to evaluate the effectiveness of the new National Security Personnel System.

While the consolidation of labor and employment law expertise has met with considerable success, the LLFSC continues to strive to improve processes and service. One such area in which we will be focusing is communication with local legal, personnel, and EO offices. We are working hard on this issue.

The LLFSC is near full operating capacity and has two years experience. Our customers uniformly recognize the expertise in our organization and appreciate having a cadre of highly trained experts to answer their questions and litigate their cases. We are confident we will continue building a history of excellence in the labor and employment law arena. Reference the LLFSC Handbook for further details.

Thanks to Mr. David Chappell, Chief, Labor Law Field Support Center, for this submission.

Environmental Field Support Center

Air Force Lessons in the Navy Sonar Case

In *Winter, Secretary of the Navy v NRDC, Inc.*, the Natural Resources Defense Council (NRDC) argued the Navy violated the National Environmental Policy Act (NEPA) by using mid-frequency active (MFA) sonar in training exercises. The NRDC asserted the Navy should have prepared an Environmental Impact Statement (EIS) for the training, and the exercises would cause irreparable harm to marine mammals. The District Court granted NRDC a preliminary injunction that imposed several restrictions upon the Navy. In response, the Navy challenged two of the restrictions to the Ninth Circuit and to the Council on Environmental Quality (CEQ). The Ninth Circuit upheld the injunction, ruling the irreparable harm to marine animals outweighed the military readiness concerns. The Ninth Circuit described the Navy's Environmental Assessment (EA) as cursory, stating the NRDC would likely prevail in its claim and the Navy should have prepared an EIS.

At the same time, CEQ, an advisory office to the President, held: (1) the Navy proved its MFA sonar training was critical to national defense, and (2) the two restrictions hampered the Navy's training creating an "emergency circumstance" under 40 C.F.R. § 1506.11. CEQ authorized the Navy to implement "alternative arrangements" to NEPA compliance, which had the effect of waiving the two restrictions the Navy unsuccessfully challenged in the lower courts. Upon receiving these favorable CEQ determinations, the Navy returned to the District Court and Ninth Circuit to vacate the preliminary injunction.

Both courts refused to do so, with the Ninth Circuit asserting that CEQ's interpretation of emergency circumstances was questionable and possibly unlawful. The Ninth Circuit also questioned the CEQ's quasi-judicial activity, given its intended role as an environmental advisor to the President. In its own decision, the Supreme Court's majority decision sidestepped an in-depth discussion of CEQ's self-expanded role and its interpretation of "emergency circumstances" and "alternative arrangements" under § 1506.11. As a result, some Air Force program managers and teams might wonder if they, like the Navy, can now seek CEQ determinations of their fast track projects under this "emergency" provision.

The following are questions Air Force lawyers might confront in their legal practice along with some responses to consider and evaluate:

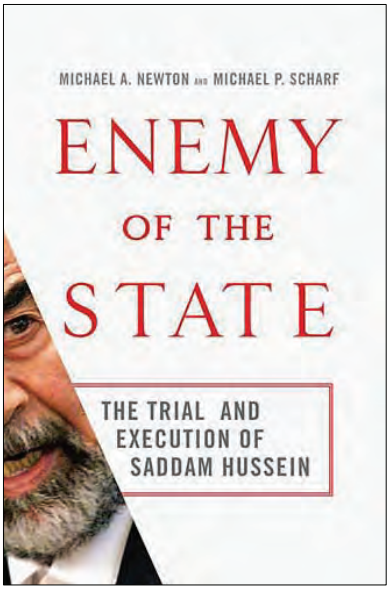
(1) ***How can the Air Force avoid similar program obstacles encountered by the Navy?*** The answer is by planning programs in advance and ensuring timely compliance with the environmental impact analysis process. The Navy initially avoided preparing an EIS, but NRDC's lawsuit essentially guaranteed the need to complete one, even an untimely one. In hindsight, had the Navy completed one sooner the litigation risk might have been reduced or eliminated. As the Court's dissenting opinion states: "If the Navy had completed the EIS before taking action, as NEPA instructs, the parties and the public could have benefited from the environmental analysis—and the Navy's training could have proceeded without interruption. Instead the Navy acted first, and thus thwarted the very purpose an EIS is intended to serve."

(2) ***Has the emergency provision of 40 C.F.R. § 1506.11 been expanded?*** It may appear from the Court's decision that it has, but Air Force program personnel should be cautious about rushing to such a conclusion. The dissent's opinion reveals CEQ only considered the limited information the Navy offered in the *ex parte* proceeding, while the majority's opinion notes the Ninth Circuit ". . . questioned whether there was a true 'emergency' in this case, given that the Navy has been on notice of its obligation to comply with NEPA from the moment it first planned the . . . training exercises."

(3) ***What should the Air Force expect since CEQ's quasi-judicial role and its 40 C.F.R. § 1506.11 interpretation have generated concern from dissenting Justices and constitutional lawyers?*** The unique role the CEQ took on behalf of the Navy is evident although not widely accepted. Any similar activity by CEQ will likely generate controversy and legal challenge. In an *amici curiae* brief, law professors stated that CEQ ". . . exceeded separation of powers boundaries . . . seeking to vitiate a district court's injunction through a later contrary administrative ruling . . . that redetermined the factual issues decided by the district court." Until these issues are clarified, an Air Force lawyer's best advice to program managers remains unchanged—compliance with NEPA, Air Force policies, regulations, and instructions is essential. Clarifying interpretations may be forthcoming in the future, but until then, it is best to travel on a paved rather than an unpaved road.

Thanks to Ms. Debra Felder, Environmental Law Field Support Center, for this submission.

BOOKS IN BRIEF



Enemy of the State: The Trial and Execution of Saddam Hussein
Michael A. Newton and Michael P. Scharf (Macmillan, $26.95)

Review by Major J. Chris Johnson, Chief, Operations and International Law Division, The Judge Advocate General's School

In July 1982, Saddam Hussein's regime wrought a terrible vengeance on the Iraqi town of Dujail in response to an apparent assassination attempt against the dictator. In the broad sweep of the Baath regime's brutality against its own people and against Iraq's neighbors, the razing of Dujail, arrest and imprisonment of hundreds of civilians, and death by torture or execution of 148 Dujailis was a relatively minor event. Yet it was the fate of Dujail that sealed Saddam's own fate over two decades later. The trial and execution of Saddam Hussein was a landmark not only in the history of Iraq, but in the history of international criminal law prosecutions. Fraught by criticism and controversy both within Iraq and in the international community, the trial was a remarkable event, whatever one's view of the efficacy of the trial or the legitimacy of the result. Michael A. Newton and Michael P. Scharf, well-known scholars with extensive experience in international criminal law, were both directly involved in training and advising the Iraqi judges of the Iraqi High Tribunal (IHT)—the court created to try Saddam and other former Ba'ath regime leaders. Their recently-published book, *Enemy of the State*, offers an insiders' view of the creation of the IHT and the progress of its first and most famous trial.

Newton and Scharf set the stage by swiftly recounting the fall of the Ba'ath regime, capture of Saddam Hussein, and the brutal measures taken by the former regime against the Dujail which would be the basis for Saddam's trial. The bulk of the text describes the creation of the IHT, the training of its judges, and the progress of the trial itself, through the investigation, court sessions, appeal, and execution of the sentence. At the conclusion, Newton and Scharf offer their thoughts as to the success, fairness, and consequences of the trial. Throughout, the authors' tone is generally supportive of the Iraqi judges' efforts to be fair and to apply international criminal law within a basically Iraqi procedural framework. Although they acknowledge several shortcomings of the proceedings, the authors defend the IHT with some success against the criticisms of Human Rights Watch and others who condemned the trial as essentially unfair.

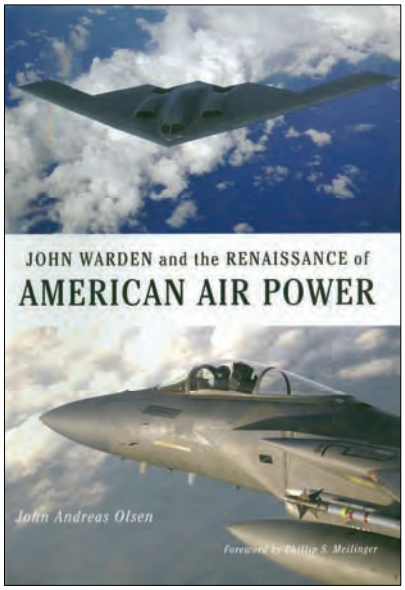
Several themes run through Newton and Scharf's writing. One is the symbolic importance of the Dujail trial to the people of Iraq. Although flawed in a number of ways, the authors emphasize the significance of deciding Saddam's fate by a relatively transparent trial, broadcast in its entirety to the people of Iraq. The authors admit the trial was frequently messy and not very successful in bringing peace to Iraq. Yet they contrast the IHT's demonstration of commitment to the rule of law with the gross perversions of justice that occurred in Saddam's reign—to include the trial and execution of the Dujailis themselves, presided over by Awad Hamad al-Bandar, one of Saddam's co-defendants at the IHT. A second theme is the authors' respect for the ability and sincerity of the majority of the IHT judges involved in the trial. Rather than focusing on the chaotic displays at trial or speculating about political maneuvering around and within the IHT, Newton and Scharf emphasize how well-grounded in fact and law the trial chamber's decision was.

Perhaps the book's greatest value is in its thorough summary of events in the courtroom. The heart of the book consists of a day-by-day summary of the events at each public session of the trial—not so much the theatrics by Saddam, the other defendants, defense counsel, or other actors, but the substance of the case. As the authors observe, media coverage of the trial tended to focus on the behavior of the accused and defense

counsel and tumult in the court. With no public record of trial per se, the authors perform a great service for those who wish to understand the progress of the trial, nature of the evidence, and procedures of the court.

On the other hand, while focusing on events in the courtroom, the authors seem to only scratch the surface of the inner workings of the IHT. Readers seeking a close, critical, behind-the-scenes look at the court will not find it here. Relatedly, although the authors acknowledge some failings in the trial process—such as the rushed appellate judgment and the unruly partisan atmosphere at Saddam's execution—other flaws are dealt with in a more cursory fashion, or presented in an innocuous light. The authors analyze the trial as a legal event, and seem reluctant to closely examine the politics of the situation or the visceral motivations of the participants.

Enemy of the State is a valuable read for members of the JAG Corps for several reasons. First, and most generally, it offers substantial background information on the modern history of Iraq. Second, it is a thorough account and analysis of the public aspects of the Dujail trial, a landmark effort by a national court to prosecute widespread violations of international criminal law. Third, by examining the flagship criminal tribunal in contemporary Iraq, it provides considerable insight into the Iraqi legal culture and criminal procedure that Air Force JAG Corps members practice in every day. Fourth, it describes a number pitfalls and lessons for U.S. military members and host nation counterparts engaged in building the rule of law overseas. The Dujail trial may have been the last chapter in the life of Saddam Hussein, but the ever-renewing struggle between justice and tyranny goes on.



John Warden and the Renaissance of American Air Power
John Andreas Olsen (Potomac Books, $32.95)

Review by Major Joe Dene, Instructor, Professional Outreach Division, The Judge Advocate General's School

Any Air Force professional who wants to have a better understanding of our history, particularly the 1991 Persian Gulf War, will be pleased to read John Andreas Olsen's biography of Colonel John Warden. Olsen is a Norwegian Air Force officer, but few American airmen can match the knowledge and understanding of the United States Air Force that he displays.

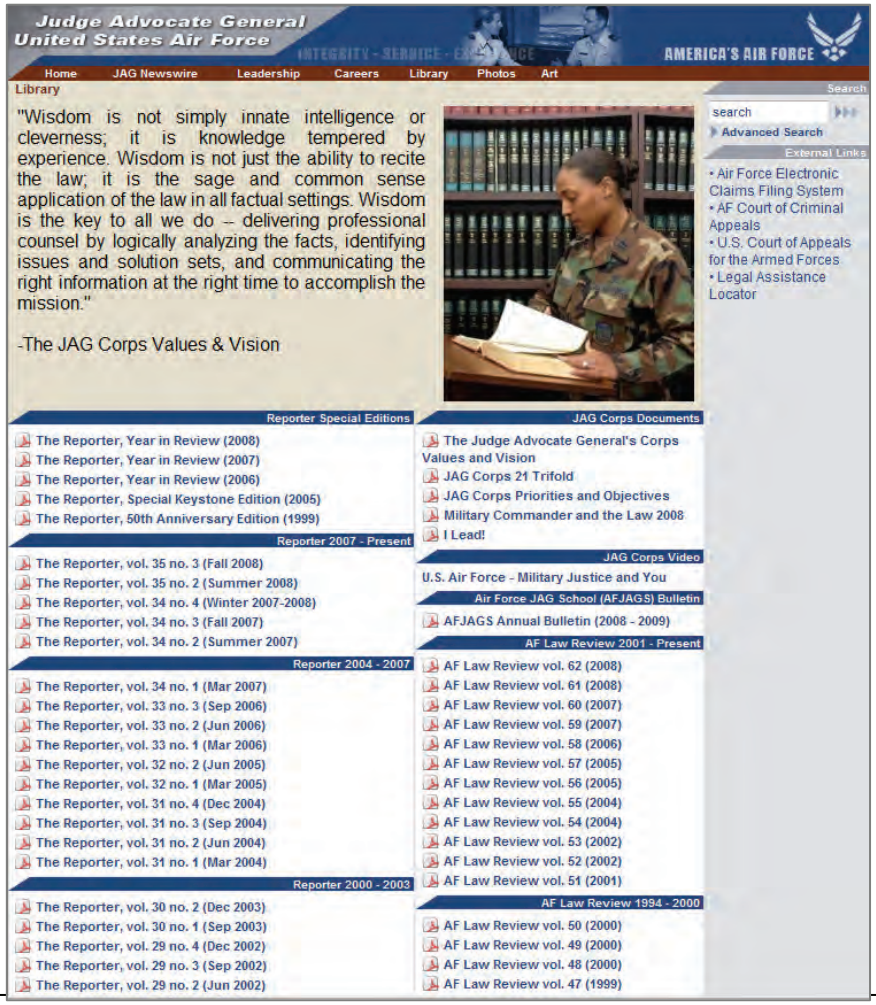
The book is valuable for two primary reasons. First, Olsen's work is successful as a biography. John Warden played a key, and well documented, role in planning what became, in large part, air power's 1991 victory. For this reason alone, he's a figure worthy of study and Olsen's account is detailed, well researched and ostensibly objective. Like many air power theorists of the distant past, Warden was a controversial and independent officer, and the book captures, seemingly in equal measures, both his successes and disappointments. With an active mind unrestrained by the limitations of conformity, Warden throughout his career questioned established practices and sought better ways of doing things. Known for challenging convention, Warden's career contains many leadership lessons for both those who seek to shake-up the status quo and those who work with like-minded individuals.

Secondly, Olsen tells Warden's story within the context of the larger Air Force. In fact, Olsen's essential premise is that after the Vietnam War, the Air Force suffered a substantial dearth of creative and strategic thinking about air power's potential. Largely driven by the organizational dichotomy between Strategic Air Command (SAC) and Tactical Air Command (TAC), the Service did not think, plan or organize for the use of kinetic air power other than for full nuclear war with the Soviets (in the case of SAC) or AirLand Battle doctrine's close support of the Army (in the case of TAC). Gone were the ideas of early air power advocates

like Billy Mitchell who envisioned war-winning operations which avoided horrendous battlefield casualties. Responsible for the Air Staff's "Checkmate" strategy division in the summer of 1990, Warden's mind was not limited to these two options. Rather, Warden saw the potential for air power focused not on tactical objectives, but decisive results in a limited, non-nuclear war. Undeterred by the tangential planning role his Air Staff position provided and ignoring the frosty reception his efforts met from the CENTAF commander, Warden continued to *relentlessly* plan an air campaign designed to eject Iraqi forces from Kuwait. In the end, CENTAF executed what was largely Warden's plan, despite leaving him in the Pentagon. Olsen argues that Warden forged a template for the application of air power at the operational level of war, which largely did not exist before 1990. That the template is still with us, now essentially enshrined in doctrine and reflected in our organization and culture, is testament to Warden's innovation and foresight.

If the book has a shortcoming, it has to be style. Readers accustomed to the work of professional writers like Tom Ricks or Mark Bowden will notice Olsen's less-elegant, more-academic technique. Still, the writing is competent and his research is manifestly meticulous and exhaustive. While it is clear he respects Warden's intellect, the book never comes off as unduly biased. Rather, the book leaves one with respect for Olsen's prowess as a researcher and writer, and with insight into John Warden and his place in history.

Have you read a book recently that is worthy of attention from others in the JAG Corps? Reviews and recommendations may be submitted to the editor, Captain Jodi Velasco, at jodi.velasco@maxwell.af.mil.



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DISCLOSING CLIENT CONFIDENCES: Even a Casual Conversation Can Create Ethics Problems

by Lieutenant Colonel Lee A. Gronikowski, USAFR*

You head to the club after a long day at work and meet some staff officers and pilots, all friends of yours. As you begin to complain about your golf game, someone inevitably asks, "How's work?" Without thinking, you, the chief of military justice, begin to describe the cases—and those who are accused—you are working on at the moment. The conversation seems harmless enough, but you may have violated several ethics rules by shooting the breeze with your friends. Consider this real-world example:

The Case of the Compromising Video

Captain X was assigned as assistant trial counsel for a court-martial in which there were allegations of sexual misconduct. Much of the evidence in the government's possession, such as photographs and videos, was sexually explicit.

Captain X was reviewing the case in his office one evening after hours. A friend of his, Capt Y, a staff officer in the same building, was leaving work when he saw Captain X's door still open. Some property had recently been stolen from Captain Y's vehicle, and he thought he would take the opportunity to ask his lawyer friend Captain X a few questions.

Captain Y was very upset over his loss. As he angrily described what happened, Captain X interjected and said, "Take a look at this. It'll take your mind off the car." With that, Captain X showed Captain Y a video that had been seized by OSI during a search of the accused's quarters. The video depicted the accused and several others in very clear, compromising sexual acts.

As Captains X and Y were viewing the tape, several other staff officers walked by the open office. Captain Y excitedly called them in to watch the tape. Captain X, without saying a word, allowed them in and let the video play until it was over, about fifteen minutes.

Word of what took place in Captain X's office reached the deputy SJA the next day through the office grapevine. The deputy called Captain X in to question him about it. Captain X told the deputy that he was viewing the evidence alone in his office when Captain Y and a couple of other officers came in unexpectedly. At that point, Captain X told the deputy, he stopped the video at once, put it away, and then merely engaged in small talk with the other officers.

The Ethics Rules Captain X Violated

What started as a casual conversation turned into a serious breach of professional ethics. Captain X's misconduct violated several of the Air Force Rules of Professional Conduct:

AFRPC 1.6(a): *A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are implicitly authorized in order to carry out the representation . . . .*

AFRPC 4.4: *In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.*

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*Lieutenant Colonel Lee A. Gronikowski (B.A., Rider University; J.D., Syracuse University) is a Category B IMA attached to The Office of Professional Responsibility, HQ USAF/JAA-PR, The Pentagon. He is also Deputy Ethics Counsel, Supreme Court of New Jersey, Office of Attorney Ethics, Trenton, New Jersey.

AFRPC 8.4 (c) and (d): *It is unprofessional conduct for a lawyer to: (c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation; or (d) engage in conduct that is prejudicial to the administration of justice.*

Analysis

As assistant trial counsel, Captain X represented the Air Force in the court-martial. Captain X owed the Air Force the same duties to maintain confidentiality he would have owed to an individual client under AFRPC 1.6(a).

The video was confidential information that related to the representation of the Air Force, which could only be revealed according to the AFRPCs or the Rules for Courts-Martial. Even though no one ordered Captain X directly to keep the video confidential, he was required to do so; his obligation arose from operation of the rule.

The lawyer's ethical obligation to maintain a client's confidences is much broader than the attorney-client privilege. Lt Col Norman K. Thompson and Capt Joshua E. Kastenberg, *The Attorney-Client Privilege: Practical Military Applications of a Professional Core Value*, 49 A.F. L. REV. 1, 32 (2000). The attorney-client privilege protects only communications between a lawyer and a client in which legal advice is given or solicited and is usually invoked only during litigation to prevent disclosure. On the other hand, AFRPC 1.6 protects ***all*** information that relates to the representation of a client from disclosure ***at all times***. To illustrate the broad application of RPC 1.6(a), disclosure of a legal assistance client's name to a third party, standing alone, could violate the rule. *See* Charles W. Wolfram, MODERN LEGAL ETHICS (1986) sec. 6.4.1. (construing RPC 1.6, the civilian analog of AFRPC 1.6).

Have a PR question?

Contact Lt Col Alan Liu, the Professional Responsibility Administrator (TPRA), or Lt Col Lee Gronikowski, Senior IMA to TPRA, at DSN 227-5523.

dignity and privacy of others. Captain X obtained the tape through his representation of the Air Force and disclosed it for clearly improper if not salacious reasons. Captain X created the potential that the accused and the video with a cell phone camera and then displayed it on the Internet?)

AFRPC 8.4(c) prohibits misconduct that involves dishonesty, fraud, deceit or misrepresentation. Captain X violated this rule by lying to his superior.

Finally, AFRPC 8.4(d) prohibits misconduct that is prejudicial to the administration of justice. Captain X created the risk that the pool of potential court members and the court-martial witnesses would be tainted or influenced by hearing about the contents of the tape.

Lesson Learned

Avoid discussing professional matters with those who do not have a legitimate need to know the information. The consequences can be serious. Violations may result in adverse action by TJAG and may be reported to the jurisdiction that issued your license to practice law for additional disciplinary action. *TJAGC Professional Responsibility Program, TJAGC Standards* – 5 (17 Aug 05), paragraph 11; *In re Hyderally*, 162 N.J. 95 (1999) (Navy TJAG referred judge advocate's ethics violation to licensing jurisdiction; reprimand imposed reciprocally by Supreme Court of New Jersey.)

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Our Heritage

1950s Version of the Article 6 Brief: *The Staff Judge Advocate, 4th Air Reserve District, San Francisco, CA, briefs Major General Reginald C. Harmon, The Judge Advocate General, during an Article 6 visit, circa 1952.*

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