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The Reporter

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Education and Outreach for The Judge Advocate General's Corps

2015
this edition:

Protecting Children

"You have heard the victim's account, you have seen the bruising.... Is this a crime? Is it child abuse? If so, how do you prove it?"

The Reporter

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About Us

THE REPORTER is published by The Judge Advocate General's School for the Office of The Judge Advocate General, United States Air Force. Contributions from all readers are invited. Items are welcomed on any area of the law, legal practice, or procedure that would be of interest to members of The Judge Advocate General's Corps.

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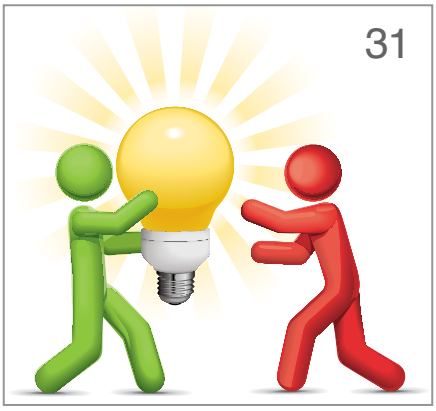
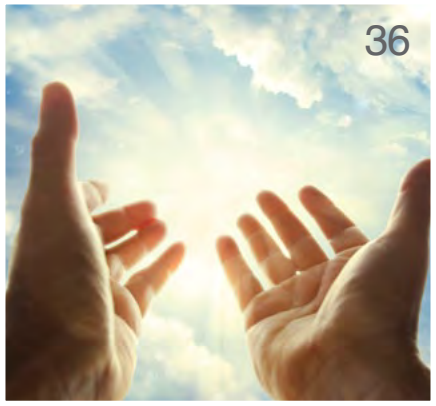




Message from The Commandant

Prosecuting cases involving child victims can be challenging yet tremendously rewarding. This issue of *The Reporter* features two military justice articles focused on the prosecution of child physical abuse and child pornography. Major Brian Mason leverages his experience as a Senior Trial Counsel, Appellate Government Counsel and liaison to the Defense Computer Forensics Laboratory to present a comprehensive primer on prosecuting child pornography cases. In addition, Captain Sarah Dingivan and Captain Anna Scott provide guidance on how to overcome the parental discipline defense in child abuse prosecutions. Writing on another complicated topic, Lieutenant Colonel David Frakt delves into a judge advocate's role of advising a Convening Authority on whether to refer a capital case. All three of these articles are excellent resources for prosecutors working complex cases.

Cultivating effective leadership for the JAG Corps is a top priority at the Judge Advocate General's School. In this issue we are excited to share an article by Lieutenant Colonel Vincent White, who articulates how the Air Force Core Values helped shape his military and civilian careers. In addition, Captain Thomas Burks provides practical leadership lessons for new judge advocates.

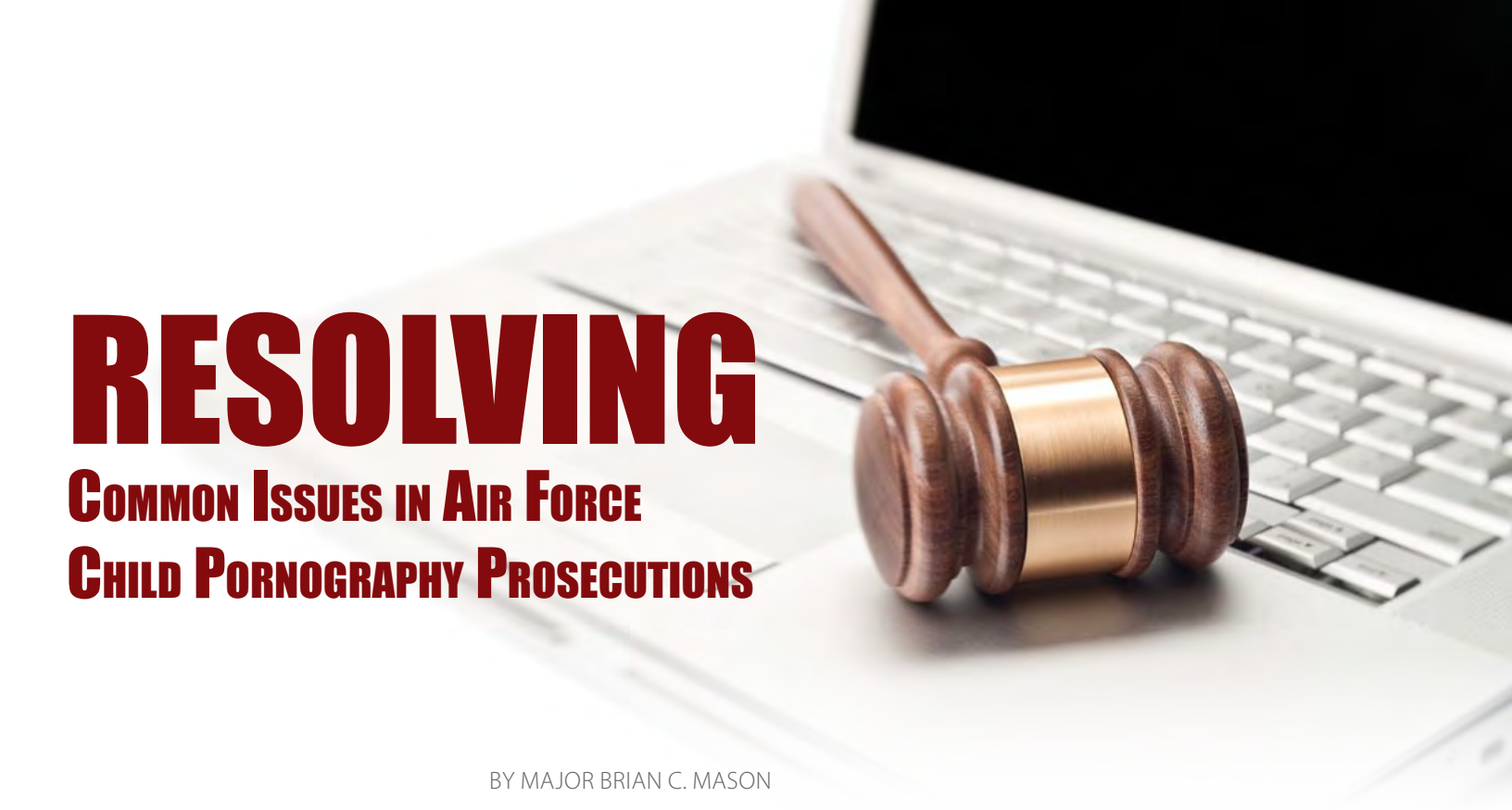
Under the training heading you will find a short but insightful list of legal writing tips. In developing this list, Lieutenant Colonel Chris Bazeley draws not only from his experience as a Judge Advocate but as a former law clerk and current magistrate judge.

Legal assistance practitioners will benefit from Senior Airman Diego Bermudez and Captain Rodney Glassman's article describing their recently developed "Legal Assistance Prescription Pad," a concept currently being tested at Davis-Monthan Air Force Base, Luke Air Force Base, and Joint Base San Antonio-Lackland.

The fields of practice section contains an article by Mr. Robert Hunt and Captain James Woodward, commenting on the tension between the free exercise and establishment clauses of the First Amendment in the context of military service along with two timely field notes regarding recently passed provisions of the 2015 National Defense Authorization Act. The first field note, written by Major Jennifer Aaron, discusses DoD's misapplication of the term "cooperative agreements" to describe agreements authorized under the Sikes Act for the maintenance and improvement of natural resources. In the second note, Major Janet Eberle explains changes to the construction funding thresholds and commercial item test program.

Finally, Major David Schichtle pens a thoughtful review of author Tanya Biank's book *Undaunted*, which tells the story of the challenges women in the military face as they balance demanding careers with their family and personal lives.

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



RESOLVING

Common Issues in Air Force Child Pornography Prosecutions

BY MAJOR BRIAN C. MASON

This primer provides one perspective on how to resolve issues that can be obstacles to prosecuting these heinous crimes and achieving justice for the child victims of these crimes.

INTRODUCTION[1]

The sexual molestation of a child is arguably the most heinous crime that a human being can commit. Recording and publication of these crimes can give new and indefinite life to these crimes in shocking ways. For mainstream society, the viewing of recordings of these crimes for sexual pleasure is incomprehensible. Yet, individuals comprising a small segment of society devote significant portions of their existence to obtaining, viewing, possessing and distributing these recordings for that very reason. All of these activities are clearly prohibited by federal, state and military law. Enforcing these laws is a seemingly never-ending task. To protect the privacy of the child victims of the recorded sexual assaults, vigilant prosecution is required. This primer provides one perspective on how to resolve issues that can be obstacles to prosecuting these heinous crimes and achieving justice for the child victims of these crimes. For the purpose of this primer I will refer to the crime by its criminal designation, child pornography "CP", which is how it is most commonly referred to, but understand that there is a movement to describe these crimes in other ways, such as "child sexual abuse images."

UNDERSTANDING THE INVESTIGATION STAGE

The first stage in the prosecution of any case is, the investigation where the crime is discovered and evidence is gathered. A full understanding of how to prosecute CP cases requires familiarity with how these criminals are typically caught.

[1] The concepts and recommendations discussed should not be construed as legal advice but rather as general guiding principles that may or may not be applicable to any particular case or circumstance.

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When illicit activity is discovered, law enforcement's first step is generally to obtain the Internet Protocol address ("I.P. address") from which the criminal is connecting to the Internet. Every device that connects to the Internet must have an I.P. address, and these addresses can be tracked.

Law enforcement agencies utilize a variety of tools that "sweep" Internet programs where exchanging of files is common (i.e., peer-to-peer networks like Limewire, Frostwire, etc.) and also routinely impersonate minors online to catch predators. When illicit activity is discovered, law enforcement's first step is generally to obtain the Internet Protocol address ("I.P. address") from which the criminal is connecting to the Internet. Every device that connects to the Internet must have an I.P. address, and these addresses can be tracked. I.P. addresses are purchased by Internet Service Providers (i.e., Comcast, Verizon Fios, etc.) and leased to individuals/businesses for their use. Law enforcement will search online to find which Internet Service Provider owns the I.P. address from which the criminal activity was detected. When the Internet Service Provider is identified, law enforcement will send an investigative subpoena requesting the billing information for that I.P. address for the time period when the criminal activity was detected.[2] The billing records will be sent by the Internet Service Provider and law enforcement will obtain search authorization or a warrant (depending on where the criminal resides) and seize the computer media and peripheral devices.

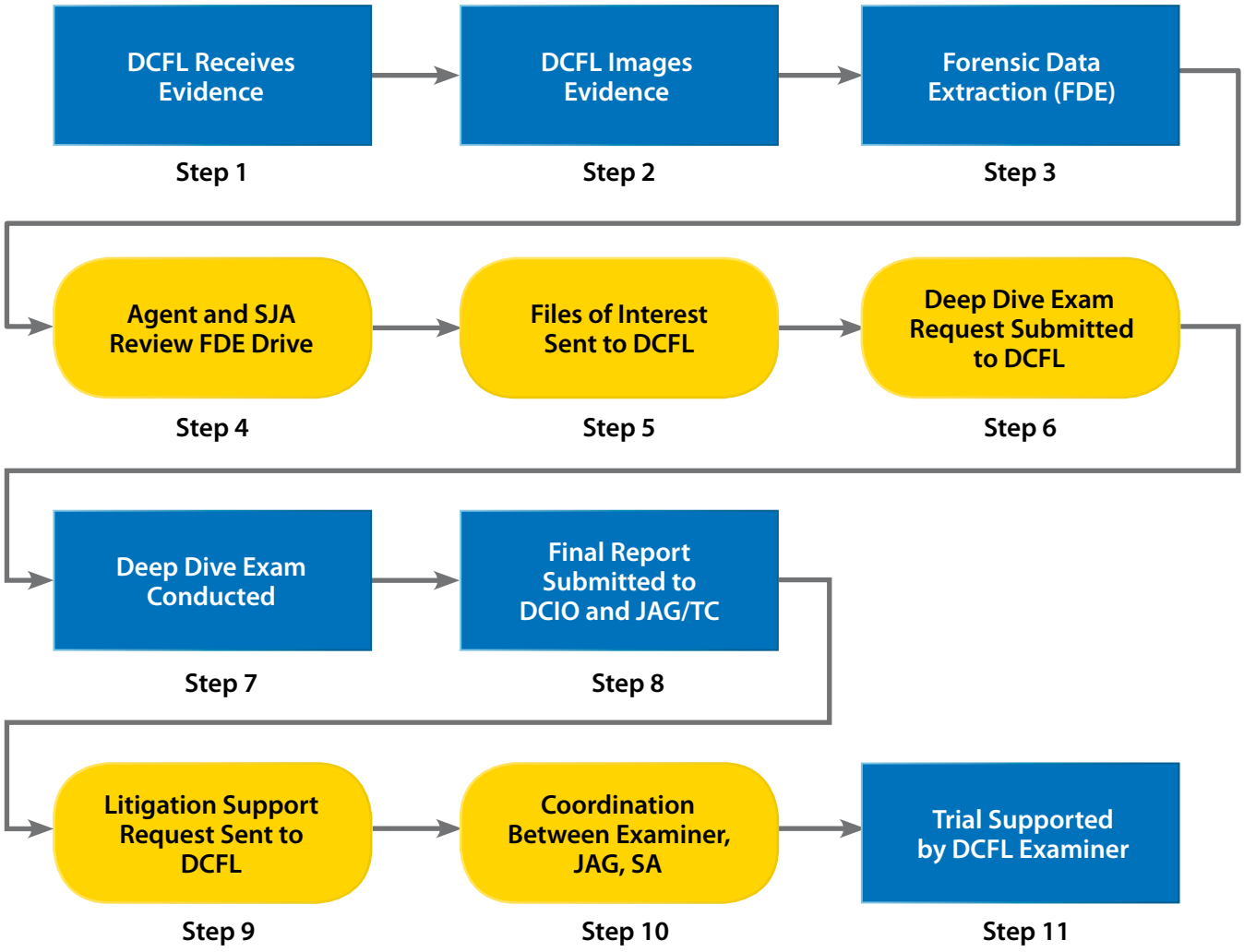
After the seizure is completed (and occasionally during), some agencies will "preview" the computer media. They will connect a write-blocker to prevent modification of any of the evidence and browse through files and folders looking for evidence of CP. Following this "preview," law enforcement will forward the computer media to a forensic lab for analysis. In Air Force cases where the Office of Special Investigations ("OSI") is the lead agency, the computer media is sent to the Department of Defense Computer Forensic Laboratory ("DCFL") for analysis.

DCFL Services

DCFL is a division of the Defense Cyber Crime Center commonly referred to DC3 and is located in Hanover, Maryland. DCFL provides a multitude of services. One of those services is the processing and analysis of evidence. A chart depicting how these services are provided is on the next page. The blue rectangles depict functions that occur at DCFL. The yellow ovals depict functions that occur at the local base.

Essentially, DCFL provides services at three different stages, two pretrial and one at trial. In the pretrial stage, DCFL will image the evidence submitted and from the forensic image perform a data extraction. This data extraction will separate and gather all images, logos, icons and other visual depictions and place them on to a hard drive to be sent back to the local base for review. An examiner is not manually reviewing these images. Rather, this is an automated process that simply recognizes picture files and puts all of those on a separate media. The purpose of this step is to quickly and easily provide the local base with all the images so that they may review them to determine whether CP resides on the computer. If the local base or case agent determines that CP images are among those in the data extraction, a request for a "deep dive analysis" or further examination may be submitted to DCFL including up to 25

[2] It is very important that they ask for the I.P. address for the applicable time period. Some Internet Service Providers assign I.P. addresses statically, meaning that they do not change. They are provided to a customer and that is their address to use for the life of the account. Other Internet Service Providers assign I.P. addresses dynamically, meaning that they do change. In the circumstance of dynamic assignment of I.P. addresses, if the wrong dates are requested, the billing record could reflect the wrong account as someone else could have been assigned the I.P. address at the applicable time.



Flow Chart of the Department of Defense Computer Forensic Laboratory's ("DCFL") Services

files/images.[3] DCFL will then conduct the analysis on these files and provide a report of their findings.

File Selection—Agent Selects

The importance of the selection of the files for analysis cannot be overstated. It is from these 25 images that a case will be built, evaluated and judged. Images recovered through the data extraction are known to be on the seized media. However, little will be known about where the images resided, how long they resided there, how they were placed there, etc. Conversely, the images selected as the 25 "agent selects" will likely have more "metadata" or history, which may include location, creation and modified dates, origin, etc. once further analysis is completed.

Because we must prove beyond a reasonable doubt *knowing* possession, viewing, receipt, distribution, or manufacturing, this metadata becomes critical evidence. Considering this factor as well as several discussed below, selection of these files for deep dive analysis is the pivotal point in the investigation and is often determinative of the ultimate outcome of the prosecution.

In most CP cases, the criminal has a variety of images on the media. To the extent possible, the images the agent selects should include images that clearly demonstrate the minor(s) depicted are in fact minors. In other words, you do not want the fact-finder to have any trouble determining that the persons depicted are under the age of 18. Therefore, agent selects should be the images depicting the youngest

[3] The limit of files for analysis is usually 25. This limit is set to ensure a timely processing of the evidence. Special exceptions may be requested.

minors. Moreover, it is better if the fact-finder does not have to spend any significant time determining whether the images depict sexually explicit activity. Sexually explicit activity basically consists of two distinct categories, sexual acts and "lascivious exhibition of the genitals."[4] Whether an image constitutes a lascivious exhibition of the genitals is a highly subjective determination. Leaving highly subjective determinations to fact-finders is generally not a good strategy. In most CP cases, it is also unnecessary. Most cases involve images that depict sexual acts. Those images should generally be selected vice images depicting a lascivious exhibition of the genitals.

To ensure a stronger case presentation, images recovered from a variety of media should be chosen. "In other words, if CP images are found on a seized laptop, external hard drive and DVD, it is usually easier to meet the knowledge element than if they were located on just one piece of media.

When the examination of the agent selected files is completed, DCFL will provide their report. In the event that the case does proceed to trial, DCFL works to make the examiner available for trial upon request. In order to receive that trial support, however, the local base/trial counsel MUST coordinate with Litigation Support and obtain examiner availability *prior* to docketing the case.

Gathering Evidence

While DCFL is completing their review, OSI and trial counsel should be working together to gather evidence of the identity of who downloaded, possessed, viewed, etc. the CP. As mentioned above, the criminal activity online can be tracked to the customer to whom the I.P. address was leased from the Internet Service Provider. In many cases though, multiple people will live in the residence where the Internet service is provided. Therefore, investigation and identification of the criminal *does not end* with the identification of the customer on the I.P. address billing records. Solid identification evidence is often easily obtained, but frequently overlooked due to ignorance or unjust hopes of finding conclusive digital evidence of identification on the seized media. A best practice is not to *presume* the media seized will prove identification but rather to gather evidence to determine: (1) if the suspected criminal is the only one living in the residence; and/or (2) if others may have had access to the media seized.

CHARGING

When a trial counsel/legal office contemplates charging a CP case, there are a few recurring questions. They are addressed below.

I have a CP case, how do I charge it? Should I follow the model spec?

Maybe. Like any other case, how you charge it depends on the evidence that you have. In many cases, following the model specification is a good bet. However, there are several considerations. First, one of the terminal elements MUST be alleged in the language of your preferred/referred specification. In CP cases, the best bet is almost always to charge the conduct as being of a nature to bring discredit upon the armed forces. Possession, viewing, receiving, distribution, etc. of CP by an Airman easily qualifies as service discrediting conduct. In some cases, you may have evidence involving other Airmen being exposed (purposely or inadvertently) to these files. In those or other similar cases, there may be enough evidence to prove prejudice to good order and discipline in the armed forces, which would justify charging this clause as well. If both terminal elements are alleged, they should be done conjunctively, not disjunctively (use "and" not "or") to eliminate any possibility of confusion on appeal of exactly what the verdict was.[5]

The model spec includes the language "what appears to be." If I include that language, how does that affect the maximum punishment?

The maximum punishment for an offense depends on the language alleged in the specification. For CP cases charged under the listed Article 134 offense in the Manual for Courts-Martial, the maximum punishments are those listed in the Manual. For example, for a case charged as possession of CP, meaning "a minor or what appears to be a minor," in accordance with the listed Article 134 offense model specification, includes 10 years confinement and a dishonorable discharge. However, you must ensure that to use the listed Article 134 offense language or its corresponding punishments, the charged conduct must have occurred (charged timeframe must *start*) ON or AFTER 12 January 2012, the effective date of the listed Article 134 CP offense.

For conduct occurring (or beginning) before 12 January 2012, charging decisions are more complicated.

[4] For a full analysis of what constitutes "lascivious exhibition of the genitals," *see United States v. Dost*, 636 F. Supp. 828 (S.D. Cal. 1986) adopted by the Court of Appeals for the Armed Forces in *United States v. Roderick*, 62 M.J. 425 (C.A.A.F. 2006).

[5] *See* the unpublished draft opinion of the Air Force Court of Criminal Appeals, *United States v. Dietz*, ACM 38117 (2014), for a recent explanation of this rule by the court. The case is available at http://afcca.law.af.mil/content/afcca_opinions/cp/dietz-38117_rem.u.pdf.

Prior to the effective date of the listed Article 134 CP offense, CP cases in the military were charged as General Article 134 offenses. Legally sufficient specifications for General Article 134 offenses generally allege an act and one of the terminal elements. For example, an allegation of CP possession "which conduct was of a nature to bring discredit upon the armed forces" is legally sufficient. An allegation of possession of "what appear to be minors engaged in sexually explicit conduct" plus the terminal element is likewise a legally sufficient specification. Problems arise when determining the maximum punishment.

Maximum punishments are determined using the process listed in RCM 1003(c). For CP cases pre-12 January 2012 involving "minors" (real kids), maximum punishments are derived from 18 U.S.C. § 2252 or 18 U.S.C. § 2252A. For CP cases pre-12 January 2012 where we include the language "what appear to be minors" (meaning virtual kids), the maximum punishment is equal to a simple disorder.[6] Therefore, you should only use "what appears to be" language in pre-12 January 2012 CP cases where the evidence is of only virtual images. Where you have evidence of minors, to avoid unnecessarily reducing the maximum punishment, allege minors, not what appear to be minors.

Should I list specifics of the files or what media they were found on in the specification?

In 2012, the Court of Appeals for the Armed Forces ("CAAF") decided the case of *U.S. v. Barberi*[7]. In *Barberi*, the Court overturned a conviction and dismissed the specification with prejudice in a case where the accused was convicted based on some images that were deemed constitutionally protected speech. Essentially, the Court found that multiple images were not CP by law because they did not depict the genitals. The Court could not determine which images the conviction was based upon and therefore reversed the conviction. In order to avoid this appellate problem, some have advocated that we should charge specific details associated with images of alleged CP in the specification. In a very recent case, however, CAAF rejected their reasoning in *Barberi*, holding, "[w]e erred."[8] Considering this new case law rejecting and expressly superseding the rationale underpinning *Barberi*, it is now not necessary to include specific details of the images or videos or what media they were found in the specifications.

> A common issue those prosecuting their first CP case deal with is how the CP evidence should be presented to the fact finder.

Because of CAAF's holding in *Barberi*, there have been and may still be several cases that include specific details of the files or what media they were found on. Having this information in the specification does not undermine the legal sufficiency of the specification. It must be recognized though that in these cases, as with every case, the government must prove what is expressly charged in the specification. Thus, where specific images are expressly charged, the government must prove knowing possession, distribution, manufacturing (whichever is charged) of those particular images.

PREPARING AND PRESENTING THE EVIDENCE

A common issue those prosecuting their first CP case deal with is how the CP evidence should be presented to the fact finder. Because CP is contraband and has special handling requirements under the Adam Walsh Act, 14 U.S.C. § 16911, this can be an intimidating issue. With some pretrial planning, however, the issue is fairly easily managed. As with all exhibits, you should think about how you want to present the evidence at trial. Do you want to present the evidence in court or just have the fact finder review it as part of their deliberations? Do you want to use the evidence while you are presenting testimony? If so, how do you want the fact finder to see the evidence in court? In CP cases, you often can do this by positioning a screen in a way that does not allow the gallery to see it.

Experienced attorneys in this area have different preferred methods. One method that is commonly used is to have a CD of the files for use either in court or for review in deliberations. Meanwhile sanitized copies of reports are used for review of the forensic laboratory's findings with the expert witness. This method can be successfully used, but relies heavily on some way for the fact finder to reference the files on the CD with the sanitized reports. For example, if the case involves a DCFL analysis of "Report Items," then the files on the CD should either be named or

[6] For the reasoning, *see United States v. Beaty*, 70 M.J. 39 (C.A.A.F. 2011).

[7] 71 M.J. 127 (C.A.A.F. 2012).

[8] *See U.S. v. Piolunek*, no. 14-0283/AF, (C.A.A.F. 26 March 2015) (slip op. at 4).

> The preparation involved in a CP case can be emotionally exhausting. The evidence typically consists of depictions of shocking, graphic and disturbing content no "normal" individual would choose to view.

labeled with the corresponding "Report Item" number to ensure the fact finder can look at those two pieces of evidence together at some point to link them. This should be addressed in the direct examination of the expert as well as in closing argument to ensure understanding of the evidence.

Another common method in cases involving images only (no videos), is to have one binder containing each of the images at issue in the case. The members can review that binder as needed. Regardless of the format the evidence is presented, the trial counsel must ensure that the military judge orders the contraband sealed. Moreover, prior to admission into evidence, the trial counsel's best practice is to have OSI maintain accountable control over the contraband. Once it is offered into evidence, that control is shifted to the court reporter.

HANDLING DEFENSES

There are generally three defenses commonly presented by defense counsel in CP cases.

"The depictions are not CP."

This defense is most easily overcome of the three. Proper evaluation of the evidence prior to making a charging decision is crucial to ensuring this defense is not viable. As discussed above, if the proper images are chosen to be offered into evidence at trial, this defense should not be available in the vast majority of cases. To the extent that it is, the government should seriously consider whether the case should be going to trial at all.

"The depictions may be CP, but I did not download/possess/receive/view them."

This defense is more commonly asserted at trial and is based on evidence that another person accessed the computer media in question either by physically being in the same room where the computer media was stored and altering the media directly, or by using a virus/malware or other software to connect to the computer media via the Internet and alter the media through that channel. In each circumstance, the defense is essentially challenging the identity of the wrongdoer. To combat this defense, it is critical that trial counsel and OSI work together to gather evidence of who had physical access to the computer media where the CP was found. Possible wrongdoers should be eliminated from consideration based on the evidence (or even their direct testimony denying committing the offense) until only the accused remains as the possible wrongdoer in the case. Additionally, in most cases, evidence from the computer examiner should be sought to determine whether any viruses or malware were present on the computer that could have allowed other individuals to place the CP files on the computer media. Very few cases present legitimate evidence that a virus was on the accused's computer that could have resulted in the downloading of these files. However, as trial counsel has the burden of proof, he/she should appropriately present evidence eliminating this possibility.

"The depictions may be CP, I may have downloaded them, but I did not do it on purpose/knowingly."

This is the most commonly presented defense as it is more readily available based on the evidence than the other two defenses. The Military Judge will instruct the court members that they may infer the knowledge element based on all the facts and circumstances in the case.[9] Understanding that, trial counsel should become intimately familiar with what other activity can be proven to have occurred on the computer media before, during and after the CP files were downloaded, viewed, received, possessed, etc. Detailed conversations between the computer examiner and trial counsel and having a full understanding about what was (or was not) found as part of the examination is a necessary prerequisite to a successful CP prosecution. In cases involving an analysis conducted by DCFL, a report CD or hard drive is sent to OSI that contains not only the examiner's report, but a plethora of additional data from the analysis. All too often, trial counsel review only the examiner's report and incorrectly believe that report contains all of the evidence available and resultant

[9] *See* U.S. Dep't of Army, Pam. 27-9, Military Judges' Benchbook para. 3-68-1.d and 7-3, note 3 (10 Sept. 2014).

from the examination. Consequently, trial counsel fail to present evidence that could easily make the difference between a conviction and an acquittal. For example, Internet history is often not listed in detail in an examiner's report, but rather it is in the additional data. This type of evidence is routinely helpful in identifying search terms as well as names, dates, and times related to the CP files. There are numerous other examples of ways trial counsel could utilize helpful evidence obtained through the computer examination, which are too numerous to discuss in this paper. The key is to have the examiner explain what evidence was found and then what those findings tell us about whether the user of the computer media knowingly committed the alleged offense(s).

Being aware of the defenses available in a CP case will help in preparing a stronger presentation of the government's case. Overcoming defenses in a CP case is achieved utilizing the same techniques as would be used in any other case: proper preparation and understanding of the evidence; presentation of the evidence in a clear manner; and articulating in closing argument why the defense(s) do not apply.

RESILIENCY

The preparation involved in a CP case can be emotionally exhausting. The evidence typically consists of depictions of shocking, graphic and disturbing content no "normal" individual would choose to view. All counsel involved in a CP case are necessarily required to spend significant time viewing and contemplating these depictions. There are varying levels of severity of these types of images, but all can have a real impact on a person. Understanding your personal resiliency is of central importance. Nightmares, crying, or other responses to being exposed to (as one trial counsel appropriately articulated) "daily doses of this mind-warping material" are not uncommon. If you experience emotional or mental health issues during or after working one of these cases, you MUST take care of yourself. Taking care of yourself can mean something different to each individual, but doing nothing is unacceptable. There is no shame or weakness in talking to others or taking other resiliency-building steps.

Just as counsel will likely experience a response to having been exposed to this material, so will the court members. In a multi-day trial, it is expected that the morning after the court members have reviewed the CP images in evidence, the members will appear exhausted. Invariably, they will not have slept well that evening. Sensitivity to this will aid in the trial and in their resiliency.

CLOSING THOUGHTS

Prosecution of these offenders can help achieve justice for those who suffered terrible abuse. Though it is unlikely we will see the end of child pornography in our lifetimes, failing to pursue justice in this area would demonstrate a failing of our society. Though it should go without saying, in these cases like ALL other cases, the rights of an accused are paramount. Trial counsel should safeguard those rights and make sure that all involved in the process respect the fact that an accused is presumed innocent until proven guilty. In other words, trial counsel should seek truth through the justice process and work to ensure appropriate punishment for those who have been convicted. R

Resources

Defense Computer Forensics Laboratory (DCFL)
http://www.dc3.mil/digital-forensics/about-dcfl

Defense Cyber Crime Center (DC3)
http://www.dc3.mil

Electronic Military Judges' Benchbook
https://www.jagcnet.army.mil/Portals/USArmyTJ.nsf/(JAGCNetDocID)/Electronic+Benchbook?OpenDocument

Office of Special Investigations (OSI)
http://www.osi.af.mil

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PARENTAL DISCIPLINE DEFENSE

Prosecuting Child Abuse Cases Involving the Affirmative Defense of Parental Discipline

BY CAPTAIN SARAH M. DINGIVAN AND CAPTAIN ANNA B. SCOTT

You have heard the victim's account, you have seen the bruising, and you know the injuries could have been much worse. Is this a crime? Is it child abuse? If so, how do you prove it?

Your office is notified that the daughter of a military member on your installation has been taken by ambulance to the hospital or that the state Child Protective Services has been called by a teacher at the child's school to report suspicious bruising. You get pictures taken of the injuries and something just does not seem right. The bruises are everywhere; they are in the distinct shape of a belt, her knees are scraped, her arms are black and blue and pictures taken the next day show bruising around both of her eyes. You talk to the young girl and she says she deserved it, and it is all her fault. After all, she did misbehave, and this is not the first time she has stepped out of line. The medical records reveal there were no broken bones or internal bleeding, no permanent injury or disfigurement. However, you have heard the victim's account, you have seen the bruising, and you know the injuries could have been much worse. Is this a crime? Is it child abuse? If so, how do you prove it?

At a court-martial, prosecutors faced with this similar fact pattern should be prepared for a parental discipline defense. When a child misbehaves, a parent has the right to discipline the child. But how far is too far? Breaking bones would most likely be considered outside of the acceptable norms of parental discipline. But is pushing a

Photo illustration ©iStock.com/Squaredpixels

child into an object that could potentially break a bone enough? Regardless of the injuries or the reason for the "punishment," one thing you can count on is that a child abuse court-martial involving the affirmative defense of parental discipline will be emotionally charged and unpredictable. By their very nature, cases involving parental discipline create or enhance previously existing family drama, discord and even violence. Preparation by trial counsel can strengthen these cases and allow the fact finder to focus on applying the facts of the specific case to the parental discipline instruction instead of forcing them to settle a family feud or participate in a referendum on corporal punishment. Two areas that have a tremendous impact on the successful prosecution of the case are the strategic use of medical evidence as corroboration and tailoring an appropriate and useful parental discipline instruction reflecting the specific facts of the case.

MEDICAL EVIDENCE AS CORROBORATION

In many cases involving injuries at the hand of a parent or parental figure, the allegations come to light because the victim received medical treatment for his or her injuries. In cases where medical personnel (e.g. paramedics, nurses, doctors, etc.) have treated the victim, their fact witness testimony can provide crucial corroboration of the victim's account of the abuse that caused the injury. This testimony is increasingly important in a case with a minor victim who is too young to recount the events or an uncooperative victim who is reluctant to testify against his or her abuser.

In order for statements made by your victim to medical providers to be admissible as an exception to the general prohibition against hearsay, you must offer evidence that the victim believed the statements were made for the purpose of receiving medical treatment.[1] Testimony from your medical provider witnesses about what the providers were wearing and how the providers identified themselves when they spoke to the patient/victim are critical, especially when the victim is a young child. The Court of Military Appeals has recognized that the drafters of Military Rule of Evidence (MRE) 803(4) intended the exception to cover statements to hospital attendants and ambulance drivers, and is not limited to statements to a physician.[2] In cases where the victim was transported to the hospital by ambulance, you may be able to capitalize on the opportunity to get important corroborating evidence from all of the individuals who treated the victim, rather than limiting your evidence to the treating physician.

Motions practice may also be useful to shape your case, particularly if the accused elects to be tried by members. Ask the military judge in advance of trial to rule on what hearsay statements are admissible under the medical hearsay exception. This will allow you to plan your case according to the evidence you know will be admitted. You will also be able to prepare your witnesses based on what you know they will be allowed to testify about. Additionally, if there are medical records you are attempting to admit, consider using motions practice to get an advance ruling on any redactions to those records. Then, when you admit these records, you will have them redacted, copied and ready to publish to the members at the point in the trial when your witness will be laying the foundation and you will be admitting them into evidence, creating a seamless presentation for the members.

If your victim is unable or unwilling to testify, you must be prepared to argue that the statements you are seeking to admit under MRE 803(4) are non-testimonial in nature, and therefore are not objectionable under the Confrontation Clause. The Supreme Court has recognized statements to medical providers as non-testimonial.[3] The line of questioning to establish the statements as exceptions to MRE 803(4) should elicit the facts needed to eliminate any *Crawford*[4] *issues.*

In addition to obtaining fact witness testimony about the actual injuries that the medical professional observed and treated, you may want to qualify your fact witness as a medical expert or obtain expert assistance from another medical professional who is qualified to testify about traumatic injuries. Part of the parental discipline findings instruction, discussed in more detail below, defines unreasonable or excessive force as that force which causes "substantial risk of serious bodily injury."[5] Providing the fact finder with expert testimony regarding the risk of injury associated with the mechanism of force used in your case may strengthen your excessive force argument since the burden of establishing substantial risk of serious bodily injury "can be met without physical manifestation of actual harm."[6] Even if your expert did not treat the

[1] Manual for Courts-Martial, United States, Mil. R. Evid. 803(4) (2013) [hereinafter MCM].

[2] *United States v. Welch*, 25 M.J. 23, 25 (C.M.A. 1987).

[3] *See Giles v. California*, 554 U.S. 353, 376 (2008). When addressing potential confrontation issues with statements to medical providers, the court found that "[s]tatements to friends and neighbors about abuse and intimidation and statements to physicians in the course of receiving treatment are excludable, if at all, only by hearsay rules…."

[4] *Crawford v. Washington*, 51 U.S. 36 (2004). Testimonial evidence is inadmissible under the Confrontation Clause unless the witness is unavailable and there has been a prior opportunity for cross-examination.

[5] The model instruction defines unreasonable or excessive force as force "designed to cause or known to create a substantial risk of causing death, serious bodily injury, disfigurement, extreme pain, extreme mental distress, or gross degradation." Although this article focuses on serious bodily injury, medical testimony could be used to prove some of the other risks identified in the definition. U.S. Dep't of Army, Pam. 27-9 Military Judges' Benchbook para. 5-16 (10 Sept. 2014)[hereinafter Benchbook].

[6] *United States v. Rivera*, 54 M.J. 489, 492 (C.A.A.F. 2001).

patient, using your expert to discuss medical concerns stemming from the mechanism of force and to identify injuries that could arise from the type of force used in your case can reassure the fact finder that serious injuries could have resulted from the actions of the accused, especially in cases that do not involve apparent serious bodily injury. Your expert should also analyze any existing photographic evidence of the injuries from the days following the abuse. If you are involved with the case from its inception, make sure pictures are taken on multiple occasions following the assault to document the evolution of the injuries. Subsequent pictures could reveal latent injuries that may not have been noticeable the day the abuse occurred that could be relevant in your expert's risk analysis. Many injuries do not appear until days later or can be overlooked by a physician if there are other more apparent injuries or obvious sources of pain during the initial treatment.

Expert medical testimony can also be great rebuttal evidence in the event that the defense alleges an alternate theory for the injuries during their case-in-chief. Even if your expert cannot affirmatively link a certain bruising pattern to an isolated incident or mechanism of injury, they may be able to rule out the defense's version of events as a possible cause of the documented injuries. Discrediting the defense's theory of the case while simultaneously reaffirming the victim's account in rebuttal can provide critical corroboration and give you the last word before argument.

TAILORED FINDINGS INSTRUCTION

When the affirmative defense of parental discipline is raised, trial counsel's focus must shift from the basic elements of the assault charge to providing sufficient evidence to disprove the affirmative defense of parental discipline beyond a reasonable doubt. The Military Judges' Benchbook provides a model findings instruction for cases where the affirmative defense of parental discipline is raised by defense counsel.

The parental discipline instruction in its current form reads:

> "The evidence has raised an issue of whether the accused was imposing corporal punishment as a permissible parental disciplinary measure at the time of the alleged act(s) on (his) (her) child in relation to the offense(s) of (state the offense(s)).
>
> In determining this issue you must consider all the relevant facts and circumstances (including, but not limited to (the amount of force used) (the instrument used) (where upon the body the (force)(instrument) was applied) (the number of times and manner (force) (the instrument) was used) (the age and size of the child) (the size of the accused) (here the military judge may specify other significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides)).
>
> A parent does not ordinarily commit a criminal offense by inflicting corporal punishment upon a child subject to (his) (her) parental authority because such parental authority includes the right to discipline a child. The corporal punishment must be for the purpose of safeguarding or promoting the welfare of the child, including the prevention or punishment of the child's misconduct, and the force may not be unreasonable or excessive.
>
> Unreasonable or excessive force is that designed to cause or known to create a substantial risk of causing death, serious bodily injury, disfigurement, extreme pain, extreme mental distress, or gross degradation.
>
> If the act(s) of the accused in (striking) (___) (his) (her) child (was) (were) for the purpose of disciplining the child, and the force used was not unreasonable or excessive as I have defined those terms, the accused is considered to have legal justification for (his) (her) acts and (he) (she) must be acquitted. However, if you are satisfied beyond a reasonable doubt that at the time of the accused's act(s), the accused was motivated by other than a parental desire to safeguard or promote the welfare of the child, including the prevention of punishment of misconduct, or, that the force used was unreasonable or excessive, then the act(s) may not be excused as permissible, parental disciplinary measures.
>
> The prosecution's burden of proof to establish the guilt of the accused not only applies to the elements of the offense(s) of (state the alleged offense(s)), but also to the issue of parental discipline. In order to the find the accused guilty of the offense(s) of (state the alleged offense(s)), you must be convinced beyond a reasonable doubt that the accused's act(s) (was) (were) not within the authority of parental discipline as I have defined the term, or that the force used was unreasonable or excessive."[7]

[7] Benchbook, *supra* note 5 at Ch. 5-16.

While military judges are encouraged not to significantly deviate from the standard Military Judges' Benchbook instruction, the parental discipline instruction is designed to be tailored to the particular facts and issues of each case and can be altered to conform to current case law.[8] It is recommended that you draft an instruction before your case begins that highlights the facts you expect to come out during the government case-in-chief and reexamine it after all evidence is before the court. One way to proactively address this crucial issue is by submitting the proposed instruction for consideration as part of your motions practice, hopefully garnering any objections from opposing counsel prior to the beginning of trial. This also provides the Military Judge an opportunity to review the instruction before the members arrive.

The parental discipline instruction can be broken down into two elements: (1) whether the parent figure was motivated by other than a parental purpose; **or** (2) whether the force used was unreasonable or excessive. When proposing changes to the model instruction, it is important to provide guidance that will enhance the fact finder's understanding of these two distinct concepts. An easy way to adapt the instruction is by highlighting the relevant facts and circumstances from your case in the second paragraph of the instruction. The model instruction has a laundry list of factors for the fact finder to consider, including the amount of force used, the instrument used, and where on the body the force was applied, among others. Some of these factors may be relevant to your case, but be creative and propose additional factors as appropriate. For example, other factors you may want the fact finder to consider during deliberations include the duration of the alleged discipline, the amount of pain the accused's actions caused the victim, or evidence of improper motive. Recent parental discipline case law provides good examples of facts and circumstances that the courts have determined are relevant to the reasonableness and purpose assessment. It may be helpful to brainstorm ideas for your case by seeing what has been convincing to prior fact finders. For example, in *U.S. v. Rivera*, when making a determination about whether the parent's behavior was criminal, the members properly considered the age of the child, the object used to hit the child, where on the body the child was hit, and the child's reaction to the strike.[9] Additionally, in *U.S. v. Brown*, the court permitted members to consider the motive or purpose behind a parent's administration of punishment in their reasonableness analysis.[10]

It may be helpful to brainstorm ideas for your case by seeing what has been convincing to prior fact finders.

If the accused has elected to be tried by members, consider changing language in the model instruction for clarification. For example, the model instruction states that the force used must not be unreasonable or excessive to qualify as parental discipline; however, the converse of these two terms is never mentioned or defined in the model instruction. Explaining that the force used must be moderate and reasonable to qualify as parental discipline may help your fact finder more clearly conceptualize what parental discipline should or should not "look like."

In addition, consider inserting into the instruction firmly established conclusions from case law in order to provide a more structured backdrop for deliberations. For instance, you could better explain what makes an action unreasonable or excessive by explicitly stating in the instruction that "the burden of establishing substantial risk

[8] *United States v. Staton*, 68 M.J. 569, 572-573 (A.F.C.C.A. 2009)

[9] *Rivera*, *supra* note 6 at 492 (C.A.A.F. 2001).

[10] *U.S. v. Brown*, 26 M.J. 148, 150-151 (C.M.A. 1988).

Child abuse victims may also be afraid to stand up to their parental figure by testifying against them.... As a prosecutor, it is your job to give these victims a voice and demand justice on their behalf.

[of serious bodily injury] can be met without physical manifestation of actual [injury]."[11] By including this language, you will ensure the fact finder does not inadvertently require evidence of actual injury even though this is not explicitly stated as a requirement in the model instruction. However, be forewarned that attempting to include specific examples from case law of actions deemed reasonable or unreasonable may be met with judicial resistance. It may also prompt the defense to propose inclusion of examples from case law that are favorable to their position.[12] If defense counsel seeks to include specific examples from case law, ensure that you review their proposed additions for completeness and locate additional cases that will provide your fact finder with a more comprehensive overview that is favorable to your position.[13]

[11] *Rivera*, *supra* note 6 at 492.

[12] *See, e.g., United States v. Scofield*, 33 M.J. 857, 862 (A.C.M.R. 1991). "[U]nder some circumstances, a parent who acts with a bona fide parental purpose may lawfully punish [the] child by striking him or her on the buttocks and back of his or her legs with a belt with sufficient force that welts and bruising are the unintended result." *Id.*

[13] *See United States v. Robertson*, 36 M.J. 190, 192 (C.M.A 1992). Unreasonable force could be found when "the doctor expressed sufficient concern for the child's condition to take x-rays to determine the extent of the injuries" and "photographs show that bruises remained on the girl's buttocks more than 24 hours after the punishment was administered." *Id. See also Brown*, *supra* note 11 at 150-151. Evidence that the accused "disliked [his] stepson and vented his hostility on occasion" and "was angry on the day of the assault" was sufficient for the fact finder to infer an improper motive. Additionally, fact finder was justified in finding that punishment was unreasonable when it produced "welts and bad bruising on a 7 year old child" and "numerous blows (3-4) were administered to the child and each one produced a physical reaction." *Id. See also Rivera*, *supra* note 6 at 492. Members could reasonably conclude that the 13 year-old victim "was struck [with a closed fist] with sufficient force so as to fall down and thus with sufficient force so as to cause substantial risk of serious bodily injury" despite no evidence of bruising or mental distress. *Id.*

CONCLUSION

Child abuse victims in cases involving the affirmative defense of parental discipline may be overwhelmed with self-blame. This self-blame may grow as you near trial, particularly if other adults who exert influence over them have told them that the abuse was justified. Child abuse victims may also be afraid to stand up to their parental figure by testifying against them. By definition, the victims of this type of crime are dependent on adults for everything in their life; they may be afraid to testify because of concerns about the future impacts of a conviction on their life and the lives of other family members. As a prosecutor, it is your job to give these victims a voice and demand justice on their behalf.

Effectively prosecuting any military case requires preparation, but prosecuting child abuse cases involving the parental discipline defense requires additional pre-trial preparation in order to prove the elements of the offense and overcome the affirmative defense. Prepositioning yourself with appropriate medical testimony and creating a tailored instruction that clarifies and guides the decision-making process for the fact finder will set you up for effective prosecution of these difficult cases where it is more important than ever that the victim's voice, a child's voice, be heard. R

Decision to Seek Death

A Field Guide to Advising Convening Authorities on The Capital Referral Decision

BY LIEUTENANT COLONEL DAVID J. R. FRAKT

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We are fortunate in the Air Force that murders, particularly premeditated murders and felony murders, are extremely rare. If one does occur on your watch, whether as Staff Judge Advocate, Chief of Military Justice, or trial counsel, one of the most significant issues you will face is whether to recommend a capital or non-capital referral. In this article, I will provide some factors to consider as you advise the Convening Authority on this most critical decision.

Let me start by saying that I am personally opposed to the death penalty. Even among those who are not morally or philosophically opposed, the extreme inefficiency of America's capital punishment system, coupled with concerns about wrongful convictions,[1] arbitrariness,[2] and racial bias,[3] among other factors, has contributed to growing opposition to the death penalty nationally.[4] While I believe it is perfectly appropriate to share such concerns with the Convening Authority, if your views on the death penalty are so strong that you feel you cannot provide unbiased advice you should recuse yourself from the matter. However, in most cases, your general opposition to capital punishment should not prevent you from providing sound, well-reasoned advice to the decision-maker regarding the lawful option of a capital referral. The guidance in this article should assist you in structuring your advice.

The only statutory requirement for a capital referral is that death must be an authorized sentence for one or more of the offenses to be tried.

CAPITAL REFERRAL

The only statutory requirement for a capital referral is that death must be an authorized sentence for one or more of the offenses to be tried. Although death is an authorized punishment for a range of military specific offenses,[5] it is most likely to come up in the context of Article 118, Murder.[6] Death is an authorized punishment for both Article 118(1) premeditated murder, and Article 118(4) felony murder.[7] In addition, it has become customary for a General Court-Martial Convening Authority to consider whether there is evidence of one or more aggravating factors enumerated in Rule for Court Martial (RCM) 1004(c)[8] before refer-

[1] One hundred fifty death row inmates have been exonerated in the U.S. since 1973, including seven in 2014. *See* Death Penalty Information Center, http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row?scid=6&did=110 (last visited Jan. 21, 2015).

[2] Only about 2% of convicted murderers are sentenced to death. *See generally* Death Penalty Information Center, http://www.deathpenaltyinfo.org/arbitrariness (last visited Jan. 21, 2015)

[3] A recent study published in the *Journal of Criminal Law and Criminology* about the U.S. Military death penalty system found that racial disparities among those sentenced to death are worse in the military than in other criminal courts. The study, conducted by Catherine Grosso of Michigan State's College of Law, the late David Baldus of the University of Iowa College of Law, and others, reviewed all potentially death-eligible military prosecutions from 1984 to 2005 and identified 105 death-eligible murder cases. The study found that defendants of color in the military are twice as likely as white defendants to be sentenced to death. The researchers said the disparities against defendants of color "sharply distinguishes the military system from the typical civilian system" at a "magnitude that is rarely seen in court systems." C. Grosso et al., *Racial Discrimination In The Administration Of The Death Penalty: The Experience Of The United States Armed Forces (1984–2005)*, 101 J. Crim. L. & Criminology 1227 (2012).

[4] Thirty-six states have either abolished the death penalty, have executions on hold, or have not carried out an execution in at least five years. Recently, three states, Arizona, Ohio, and Oklahoma, temporarily halted executions as reviews are conducted of botched executions. In six states, Arkansas, California, Kentucky, Louisiana, Montana, and North Carolina, a de facto moratorium on executions is in place because of lethal-injection challenges; most of those states have not had an execution since 2008. Colorado, Oregon, and Washington have formal moratoriums on executions imposed by their governors. Eighteen states and the District of Columbia have abolished the death penalty. In six additional states, while no formal hold is in place, no execution has been conducted in at least five years.

[5] Desertion (Article 85), assaulting or willfully disobeying a superior commission officer in time of war (Article 90), mutiny & sedition (Article 94), misbehavior before the enemy (Article 99), subordinate compelling surrender (Article 100), improper use of countersign (Article 101), forcing safeguard (Article 102), aiding the enemy (Article 104), spying (Article 106), espionage (Article 106a), improper hazarding of vessel (Article 110), misbehavior of sentinel or lookout in time of war (Article 113). *See* Manual for Courts-Martial [hereinafter MCM], United States, Maximum Punishment Chart at A12-1 (2012).

[6] Uniform Code of Military Justice, art. 118 (2012).

[7] The UCMJ and the MCM do not use the term felony murder. What I am referring to as felony murder is described in Article 118(4) as murder During Certain Offenses, namely: burglary, aggravated arson, robbery, sodomy, rape, rape of a child, and other aggravated sex crimes. The common law felony murder offense of kidnapping is not included.

[8] These factors include: endangering the lives of others (R.C.M.

ring charges to a capital court-martial. This is a logical consideration because a court-martial is required to find the existence of one or more before death can be adjudged.[9] It would make no sense to refer charges to a capital court-martial if there were not reasonable grounds to believe one or more aggravating factors could be proven beyond a reasonable doubt. For this reason, notice of the aggravating factors that the government intends to prove should be given to the defense prior to the Article 32 pretrial investigation, and should be addressed in the Article 32 Report of Investigation, even though RCM 1004(b)(1)(B)[10] requires only that such notice be given prior to arraignment. However, it is important to note, the mere fact that one or more aggravating factors appear to be present should not automatically result in a capital referral. The presence of aggravating factors simply means the Convening Authority *could* refer capital, not that she *should*. It is solely up to the Convening Authority's discretion whether to refer a potentially capital-eligible case as capital or non-capital.

Given that this is purely a matter of discretion, what guidance can we as JAGs offer to help guide the Convening Authority through this extraordinarily difficult decision? There are a number of factors to consider, including the views of the surviving victims (if any) and victims' family members, the severity of the offenses, factors personal to the accused, and efficiency issues.

VIEWS OF VICTIMS

It is essential for the legal office, whether through the Victim and Witness Assistance Program representatives, trial counsel, or SJA personally, to solicit inputs from surviving victims (such as attempted murder victims) and family members. In doing so, it is important to promise only that their preference regarding capital or non-capital referral will be considered by the Convening Authority, not that it will be determinative. Family members should also be advised of the extremely lengthy trial and appellate process in capital cases,[11] as this may influence their preference.

SEVERITY OF OFFENSES

Obviously, all premeditated and felony murders are extremely serious crimes, especially those where one or more aggravating factors appear to be present. But even among capital-eligible premeditated murder cases, only a small percentage are referred capital. How is a Convening Authority to determine which of these cases warrant the extreme option of a capital-referral? In addition to analyzing the statutory aggravating factors, one helpful method is to compare the facts of the case under review with other military capital cases in order to properly place your case on the spectrum of capital-eligible cases and determine if a capital verdict is a reasonable prospect.

There are currently six persons on death row at the Disciplinary Barracks at Fort Leavenworth. (The U.S. Armed Forces have not carried out an execution since 13 April 1961.) Of the six military members on death row, three have had their death verdicts affirmed on appeal at least once, but the cases are still in the appellate process. The other three cases have not completed their initial appeal. In addition, there have been a handful of other cases in which the death penalty was adjudged, but was later overturned on appeal or reduced on clemency by the Convening Authority. A review of the proven facts of these cases demonstrates that these cases have a number of factors in common.

CURRENT DEATH ROW CASES

Gray

Former Army Specialist Ronald Gray has been on military death row the longest. In 1988, Gray was convicted of two premeditated murders, and an additional attempted premeditated murder. He was also found guilty of three specifications of rape, two of robbery, and two of forcible sodomy with respect to the victims, as well as burglary and larceny of property of another person. Two of the victims (one of the murder victims and the attempted murder victim) were Army soldiers. One victim was severely beaten before being shot to death. Another was bound, gagged, stabbed repeatedly and beaten. The victim who survived was also stabbed several times in the neck and side and suffered a punctured lung. Gray has exhausted his military appeals and is pursuing a federal *habeas corpus* action.[12]

Loving

The following year, in 1989, former Army Private First Class Dwight Loving was sentenced to death by a General Court-Martial at Fort Hood, Texas. According to the appellate opinion in his case, on the night of 11 December 1988, Loving robbed two convenience stores at gunpoint.[13] He then robbed three cab drivers at gunpoint and killed two of the drivers after receiving money and other items.

1004(c)(4)), committing premeditated murder while engaging in another serious listed felony (including those under Article 118(4) plus kidnapping, and certain drug and military-specific offenses) (R.C.M. 1004(c)(7)(B)), committing premeditated murder for financial gain (R.C.M. 1004(c)(7)(C)), and multiple murders in the same case (R.C.M. 1004(c)(7)(J)).

[9] MCM, *supra* note 5, R.C.M. 1004(b)(4)(A).

[10] *Id.* at R.C.M. 1004(b)(1)(B).

[11] Since the inception of the current military capital punishment system in 1984, there have been no executions. Two military members sentenced to death in 1988 and 1989 are still on death row. *See* discussion of current and former capital cases, *infra*.

[12] *See*, United States v. Gray, 51 M.J. 1 (C.A.A.F. 1999).

[13] United States v. Loving, 41 M.J. 213 (C.A.A.F. 1994).

One of the taxi drivers was an active duty Army soldier stationed at Fort Hood. The other victim was a retired Army sergeant. Loving attempted to kill the third cab driver, but the victim struggled the gun away from Loving and fled the scene. Loving was convicted of two counts of premeditated murder, attempted murder, two counts of robbery and other felonies. Loving has exhausted his military appeals and his conviction was affirmed by the U.S. Supreme Court.[14] However, the President has not confirmed the death sentence.

Hasan Akbar

More recently, in 2005, former Army Sergeant Hasan Akbar, was convicted of two counts of premeditated murder and three counts of attempted premeditated murder and sentenced to death. The commander of the 18th Airborne Corps affirmed the death sentence, as did the Army Court of Criminal Appeals.[15] Akbar was assigned to a brigade of the 101st Airborne Division during a deployment to Iraq. On 22 March 2003, the brigade was preparing to cross the line of departure from Kuwait into Iraq. While assigned to guard the brigade's supply of grenades, Akbar removed four M–67 fragmentation grenades and three M–14 incendiary grenades. Akbar then approached the area of the camp where the brigade headquarters was located. He turned off the stand-alone generator, extinguishing the exterior lights and then tossed an incendiary grenade into a tent occupied by the brigade Commander, brigade Command Sergeant Major, and the brigade executive officer. After the explosion, the brigade executive officer, a major, exited the tent and was shot by Akbar. He next moved to another tent, which was occupied by several staff officers. He pulled the pin from a fragmentation grenade, yelled into the tent, "We're under attack," and then tossed the grenade into the tent. Akbar then went to a third tent, which was occupied by several captains on the brigade staff, and threw a fragmentation grenade inside. As a captain exited the tent, Akbar shot him in the back, killing him. An Air Force major was also killed in the attack and fourteen other soldiers were injured, some of them permanently. The case is currently on appeal to the U.S. Court of Appeals for the Armed Forces.[16]

Witt

The only Airman on death row is former Senior Airman Andrew Witt. On 3 July 2004, Andrew Witt made a sexual advance toward the wife of another senior airman at Warner Robins Air Force Base (AFB), Georgia. Senior Airman Andy Schliepsiek, the husband, and another service member, Staff Sergeant Jason King, called Witt and allegedly threatened to tell Witt's commander about an affair Witt had with a lieutenant colonel's wife. Witt donned his camouflage uniform, grabbed a combat knife and drove to the Schliepsieks' home, where he stabbed the couple and King 13 times each. King survived; Witt was convicted on 13 October 2005, of two counts of premeditated murder and one count of attempted murder. The death sentence was recently affirmed by the Air Force Court of Criminal Appeals.[17]

Hennis

Army Master Sergeant Timothy Hennis in 1985, raped and murdered the wife of a deployed Airman, and stabbed to death and slashed the throats of two of her daughters, ages 3 and 5. His responsibility for these crimes could not be proven at the time. After advances in DNA evidence years later proved that the semen in the victim was his, Hennis was recalled to active duty and tried by court-martial. The court-martial convicted Hennis of three counts of premeditated murder and sentenced him to death on 15 April 2010. His initial appeal to the Army Court of Criminal Appeals is pending.[18]

Nidal Hasan

The most recent court-martial to result in a capital verdict was the case of Major Nidal Hasan, an Army psychiatrist stationed at Fort Hood, Texas. He was charged with 13 counts of premeditated murder and 32 counts of attempted murder for the jihadist-inspired massacre of his fellow soldiers at Fort Hood on 5 November 2009. He was found guilty on all counts, and sentenced to death on 28 August 2013. The Convening Authority has not yet acted on the case.[19]

OTHER RECENT MILITARY CASES IN WHICH CAPITAL PUNISHMENT WAS ADJUDGED BUT LATER REDUCED

Parker

Marine Lance Corporal Kenneth Parker and his co-conspirator Lance Corporal Wade Walker were convicted of two counts of premeditated murder of two other Marine Corporals, at Camp

[14] *See Loving v. United States*, 517 U.S. 748 (1996).

[15] *See United States v. Akbar,* 2012 CCA LEXIS 247 (A. Ct. Crim. App. 2012).

[16] Oral argument was held on 18 November 2014. Audio of the oral argument is available at: http://www.caaflog.com/2014/11/19/caaf-argument-audio-akbar/.

[17] *See United States v. Witt*, 73 M.J. 738 (A.F. Ct. Crim. App. 2014). The case is now under mandatory review at C.A.A.F. No. 15-0260/AF, U.S. v. Andrew P. Witt, CCA 36785.

[18] *See*, *Hennis v. Ledwith*, 2014 C.A.A.F. Lexis 198 (2014).

[19] Chris McGuinness, *2009 Fort Hood Shooting Case Still Winding Through Legal Process*, Killeen Daily Herald, Nov. 5, 2014, available at: http://kdhnews.com/military/hasan_trial/fort-hood-shooting-case-still-winding-through-legal-process/article_92896d96-64b3-11e4-bac7-001a4bcf6878.html ("On Tuesday, Fort Hood officials confirmed the formal review of Hasan's court-martial proceedings are ongoing, and it may be several months before the convening authority in the case, Lt. Gen. Sean MacFarland, III Corps and Fort Hood commander, signs off on the case and moves it forward.")

Lejeune, North Carolina, plus armed robbery and kidnapping.[20]

Murphy

Army Sergeant James Murphy, was convicted of three counts of premeditated murder for killing his wife by smashing her in the head with a hammer and then drowning her and killing his two children by drowning them.[21]

Kreutzer

Army Sergeant William Kreutzer was convicted of one specification of premeditated murder of an Army major and 18 specifications of attempted murder for opening fire on a formation of soldiers at Fort Bragg, North Carolina.[22]

Quintanilla

Marine Corporal Jessie Quintanilla was convicted of the premeditated murder of a Marine lieutenant colonel and two attempted murders of a Marine officer and NCO, plus other felonies.[23]

COMMON FACTORS

There are three factors common to all of these cases. These factors may correlate to, but are not co-extensive with, the aggravating factors listed in RCM 1004(c).[24]

1 First, all involve *multiple acts of homicidal violence directed at multiple individuals*. In each of these cases, the accused was convicted of at least two premeditated murders, or one or more premeditated murders plus one or more attempted murders. Most involve killing sprees in which there were three or more victims of violence.[25]

2 Second, each case has a *direct military nexus*. In every one of these cases, the victims of murder or attempted murder were military members[26] or dependent family members, and several occurred on military installations. Thus, the crimes had a direct and palpable impact on the mission and good order and discipline and/or affected the broader military community.

3 Third, each of these cases involved *either extreme brutality or significant suffering of the victims*, or both.[27] In the Gray and Hennis cases, for example, the victims were forced to undergo extreme and violent sexual violations before being murdered. In the Gray, Witt, and Hennis cases, some or all of the victims were stabbed to death. Murphy beat his wife brutally with a hammer and then drowned her and his two children. In Akbar, Hasan, Witt, and Quintanilla, some of the victims experienced extreme suffering from their injuries, and/or were permanently disabled. In all of the cases, at least some of the victims consciously experienced the horror that someone was trying to kill them.

COMMON FACTORS:

FIRST: *Multiple acts of homicidal violence directed at multiple individuals.*

SECOND: *Direct military nexus.*

THIRD: *Either extreme brutality or significant suffering of the victims.*

[20] *United States v. Parker*, 71 M.J. 594 (N-M. Ct. Crim. App. 2012); *U.S. v. Walker*, 71 M.J. 523 (N-M. Ct. Crim. App. 2012).

[21] *United States v. Murphy*, 36 M.J. 1137 (ACMR 1993); 50 M.J. 4 (C.A.A.F. 1998).

[22] *United States v. Kreutzer*, 59 M.J. 773 (A. Ct. Crim. App 2004); 61 M.J. 293 (C.A.A.F. 2005).

[23] *United States v. Quintanilla*, 60 M.J. 852 (N-M. Ct. Crim. App. 2005); 63 M.J. 29 (C.A.A.F. 2006).

[24] MCM, *supra* note 5, at R.C.M. 1004(C).

[25] Multiple victims may correlate to the aggravating factor found in R.C.M. 1004(c)(7)(J). "The accused has been found guilty in the same case of another violation of Article 118."

[26] In some cases where the victims were military members, this may correlate to the aggravating factor found in R.C.M. 1004(c)(7)G): "The accused then knew that the victim was any of the following persons in the execution of office: a commissioned, warrant, noncommissioned, or petty officer of the armed services of the United States; a member of any law enforcement or security activity or agency, military or civilian, including correctional custody personnel; or any firefighter."

[27] In some cases, this may correlate to aggravating factor R.C.M. 1004(c)(7): "The murder was preceded by the intentional infliction of substantial physical harm or prolonged, substantial mental or physical pain and suffering to the victim."

If your case involves all three of these factors, it may be a strong candidate for a capital referral. If one or more of these factors are lacking, that may argue in favor of a non-capital referral.

FACTORS PERSONAL TO THE ACCUSED/MITIGATION

It is often remarked that the punishment must fit both the crime and the person. Even if the offenses are sufficiently severe that capital referral may be warranted, there may be factors personal to the accused that merit non-capital referral. Ultimately, if the case is referred capital, the court-martial members will be required to determine, unanimously, that any aggravating factors they determine exist **substantially** outweigh any extenuating or mitigating circumstances.[28] Thus, it will be useful to provide the Convening Authority a preview of the mitigating evidence you expect to be presented during sentencing. In some cases, such as where the accused has an outstanding service record or a lengthy history of mental health issues, some mitigation information may be readily available to the government. But in most cases, the government will need to rely on the defense to provide mitigation information about the accused. For this reason, in any case in which a capital referral is seriously contemplated, it is advisable to ensure that the defense has the appropriate resources to conduct at least a preliminary mitigation investigation prior to the referral decision. In order to conduct this mitigation investigation, the defense is likely to require the services of a mitigation specialist and a forensic psychiatrist or psychologist, and the defense may also need their own investigator.[29] SJAs should encourage the Convening Authority to approve defense requests for these specialists prior to referral and to defer the referral decision for a reasonable time to provide the defense the opportunity to conduct a mitigation investigation and present their findings to the Convening Authority. This not only will ensure that the Convening Authority has the information she needs to make the best decision, but will also avoid potential appellate issues if the case is ultimately referred capital.

EFFICIENCY/SPEED AND COSTS

Each Convening Authority will give different weight to the factors of speed and costs. Some Convening Authorities may be believe that if a capital referral is warranted for the offenses and the person, then it doesn't matter how long it might take or how much it might cost. Others may consider it important to have relatively swift resolution of the case and may not consider it prudent to expend extraordinary sums in pursuit of a highly uncertain outcome. Whatever your Convening Authority's views, it is important to provide a realistic assessment of the likely costs and length of time it will take for a capital vs. a non-capital referral. Your advice should also include an explanation of the lengthy appellate process in capital cases.

IN CLOSING

The decision to refer murder charges to a capital or non-capital court-martial will never be an easy one for a Convening Authority. But if you follow the guidance outlined above, you will ensure that the Convening Authority has the information she needs to make a just, and justifiable, decision. R

[28] MCM, *supra* note 5, at R.C.M. 1104(b)(4)(C).

[29] The military lacks any specific standards for defense counsel in capital cases, but the generally accepted professional standards are the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*. According to Guideline 4.1(A): "The defense team should consist of no fewer than two attorneys. . . an investigator, and a mitigation specialist." Further, "[t]he defense team should contain at least one member qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments."

Resources

ABA Guidelines: Death Penalty
http://www.americanbar.org/groups/committees/death_penalty_representation/resources/aba_guidelines.html

Death Penalty Information Center
http://www.deathpenaltyinfo.org/description-cases-those-sentenced-death-us-military-0

The Air Force Core Values and You

How a Reservist Can Use These Values to Augment Both Their Military and Civilian Careers

BY LIEUTENANT COLONEL VINCENT R. WHITE

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> As a reservist, a citizen-Airman, serving two different careers can be very challenging.

Lieutenant Colonel Vincent R. White, USAFR

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When you hear of the Air Force core values; Integrity First, Service Before Self, and Excellence in All We Do, I am sure that you, like I do, as a reservist get a sense of pride in being part of an organization that places a high demand upon individuals to reflect these beliefs. However, as a person who lives a dual career as a civilian and a military member, you sometimes feel it is difficult to overlay these beliefs into your duties as a "citizen-airman" on a daily basis. It is my opinion that it is it not difficult to exercise these values on a daily basis and, in fact, if you consistently do so your career in both the civilian and military worlds will benefit from it.

INTEGRITY FIRST

President Dwight D. Eisenhower said, "The supreme quality for leadership is unquestionably integrity. Without it, no real success is possible, no matter whether it is on a section gang, a football field, in an army, or in an office." Integrity covers several different traits, the first of which is courage. As a reserve Judge Advocate, you must have the courage to be able to interpret and analyze the law and come to strong and sound legal conclusions. Those conclusions might not be the same as those of your Staff Judge Advocate, Wing Commander, or your civilian supervisor, but you must have the courage to present to them the best analysis that you can regardless of any "blowback" you might receive. You also must be strong in your conviction if you truly believe in what you are advocating for and not bow or tilt to any pressure or external forces. This can understandably be difficult at times however, your ultimate duty is to show integrity to the organization, whether it be your military or civilian organization, and to remain strong in your convictions as an attorney.

Honesty

The next trait is honesty, Oprah Winfrey stated that, "Real Integrity is doing the right thing, knowing that nobody's going to know whether you did it or not." Being honest sometimes requires courage. But you can rest assured that commanders and your Staff Judge Advocate will value your honest and measured evaluations of legal issues. From determining the strengths and weaknesses of a military justice case to how much the Air Force should pay out on a civil claim and everything in between. Our civilian employer will also value your honesty as you advise and counsel clients no matter what area of law that you practice in.

> Responsibility and accountability play a significant role in many professional and personal forums.

Responsibility & Accountability

In addition, responsibility and accountability play a significant role in many professional and personal forums. As a reservist, you need to be accountable first and foremost to your unit of assignment. When you go to serve, you need to ask: "Are you just there or are you a 'value-added' resource the unit looks forward to having there because you augment their mission?" When you leave, do people know that you were even there and are they asking when are you coming back? When you are accountable for the projects given to you and you do a good job on them, the active duty unit picks up on this and they look forward to your presence.

Make a determination to be a value added to the unit and don't let the unit just sit you in a corner and forget about you. If you do not know members of the unit, go up and introduce yourself. Be prepared and willing to step outside your civilian field of expertise. If there are no projects assigned when you first arrive for duty, go around to each member and ask if they have anything they want you to do, and don't stop until you have a number of projects in your cart. The motto should be; "the more projects the better." I have found that by doing this I have received a number of very interesting projects where I initially knew nothing about the subject matter, but at the end of the day learned a great deal and became a more well-rounded attorney.

When I had completed the project and submitted my work product, I would always ask the member who assigned me the project to let me know if there were any corrections or revisions to be done, even if I would not get the corrections until after my tour was over. I felt that if a project was assigned to me, I wanted to be the one to complete it to the satisfaction of whoever assigned it to me. This also creates a level of trust, confidence, and respect from the active member, because they know when they assign you a project you will see it through.

In your civilian job, be accountable to your boss and subordinates by making efforts to ensure that your office will not be crippled while you are away performing your military duties. Let them know of your reserve schedule and try to complete as many of your civilian job duties and take care of scheduling priorities prior to your departure. There are many times I have worked a reserve day and then come home and spent a significant amount of time doing my civilian job at night just so no one else at my civilian employment would have to do it for me. Let people in your job know what you do in the reserves and that you appreciate their support. This helps them understand that you are not on "vacation" but are actually doing something special and worthwhile to your community and country. Use what you have learned in the military reserves to help you better communicate with your civilian co-workers and supervisors.

Sense of Justice

A very important aspect of integrity, especially for Judge Advocates, is a sense of justice. A sense of justice should carry through both your military and civilian careers. In my civilian profession, I find that when a party or counsel uses the word "justice" that typically means "do whatever is best for me or my client" in the terms of either a more harsh or more lenient sentence. Justice is not just punitive. Justice should mean whatever is fair to all parties in the case to include the community as a whole. Justice is not always the most popular or easy decision, but a decision that takes into account all of the factors of a case, whether criminal or civil, the applicable law, and a reasonable conclusion based upon the facts and the law. It takes into account the past decision in similar cases, and the parties disposition in the present case, and it always takes into account fairness. In criminal cases it also takes into account rehabilitation. In every case, whether it is a military justice case or a claim, a Judge Advocate must advocate for a just decision and not a decision that curries favor from an outside interest groups, superiors, or themselves.

Respect

Finally, in order to practice "Integrity First" you must respect yourself and others and be humble at all times. Respect for yourself is recognition that as both a reserve Judge Advocate and a civilian attorney you represent more than just yourself. You carry your name as well as the name of the Air Force JAG Corps with you in the civilian community. Your colleagues see you in a different light than typical people in their profession. The community and your peers know that you have this dual profession and everything you do will reflect upon you and the Air Force. If you are constantly late in filing documents with or making appearances before the court, the community will associate that kind of conduct with all Judge Advocates. If you practice unethically or with disrespect towards your fellow attorneys or the legal system, the impression you make will be imputed to all Judge Advocates. To respect your self means to respect the ethics, policies, and procedures of your community, your organization, and the courts in which you practice.

In order to respect others, you need to be humble. To paraphrase the Bible; "He who exalts himself shall be humbled and he who humbles himself shall be exalted." Always remember that for all the outstanding things you may have accomplished, you had the help and assistance of friends, family, superiors or subordinates. In your military and civilian life, always remember that your subordinates and peers have goals, dreams, and desires just like you do. Help them accomplish their goals because they are most likely helping you accomplish yours. Be loving and respectful to family member and recognize that they have to make great sacrifices while you perform your duty as a reservist.

One example where I had to stand by my integrity, despite some potentially very serious consequences, occurred when I was the Deputy Attorney General for the Employment Unit of the State of Colorado Office of the Attorney General, I was the supervisory attorney for approximately 45 attorneys and support staff which provided legal advice and counsel to over 63,000 employees. We had a labor case from one of the departments and we decided we would defend the department against the plaintiff employee. After years of pretrial work and extensive discovery, the case finally went to trial before a jury. At the close of trial the jury returned a verdict against the department and in favor of the employee for an amount in the millions. The attorneys that I had working the case on our behalf wanted to appeal the verdict and while the appeal was pending enter into settlement negotiations with the Plaintiff in an effort to reduce the award.

During the pending appeal of the case I took a closer look at the case and decided that, based upon some facts that came out during the trial, the department's action and the decision to go to trial was a mistake. Admitting that mistake would potentially make my client and the taxpayers of the state liable for millions of dollars in damages. Personally, it had the potential to put my career at risk. However, I knew what the right thing to do was, and in order to maintain my integrity I knew I had to do the right thing. At the mediation session, I admitted the mistake and apologized to the Plaintiff and her attorney for what the Department and we as an office put her through. She immediately started to cry and said to me "thank you". She explained that for all of these years that was all that she had been looking for and that I was the first person who had ever said that to her. In appreciation for my gesture, she immediately offered to settle for an amount significantly lower than the jury award. Despite how bad you think an outcome might be you must choose to do the right thing. Acting with integrity in everything you do is critical and will lead to some unexpected positive results.

SERVICE BEFORE SELF

When you joined the United States Air Force and the JAG Corps you made a choice to serve in a way that most people will never experience. As a reservist, a citizen-Airman, serving two different careers can be very challenging. The core value of "Service Before Self" means your profession, community, and family duties take precedence over your own needs and wants. A simple way I learned this core value was as a Reserve Officer Training Corps student back in college. My instructors always told the cadets that as leaders we must make sure that our troops were fed prior to feeding ourselves. To me this meant that the needs of the organization and those subordinate to me outweighed my needs. The lesson I learned over time is that if this core value is followed, and you take care of your people and your family first, they take care of you and you personally benefit greatly.

To put the idea of service before self into practice, you must always know and understand the rules of the organization and of your practice. For lawyers in litigation, our practice is dictated by the rules of procedure and rules of evidence whether state or federal. For Air Force criminal matters you will also have the Manual for Courts-Martial. These provide lawyers with clear guidelines for how to practice in their jurisdiction. If you clearly follow the rules and procedures, and do not cross the lines for the benefit of your civilian or military practice, you will establish a reputation of fairness and respect for both you and your organization in the legal community in which you work.

Discipline

You also must exercise discipline and control in all aspects of your life. The path of least resistance may be the easiest path to follow but it may not be the correct path. To exercise true service before self you need to recognize that as service members and especially reservists, who are "dual-hatted" attorneys, you represent not only your image but also a proud and outstanding organization's image to the civilian community. This means that even if you are not aware, people are looking at your dress and eating habits, how you handle your family and how you handle all aspects of your public life. You are viewed as a leader because you have answered a call from your country by joining the JAG Corps and people will want to see what you are about. Recognize the opportunity you have to inspire a desire to serve in others by sharing your experiences with family, friends, and colleagues outside of the military.

Military Service

I recognize that service in the military has benefitted me greatly in my civilian life. I have had the privilege of working for a number of outstanding organizations throughout my civilian career. As I gained more job experience each opportunity presented greater challenges with significantly more opportunities. Each job interview for these positions was extremely competitive with a number of highly qualified applicants with whom I was competing against. In nearly every one of the interviews I had for these positions

the one issue that most of the hiring authorities wanted to talk about was my experience as an Air Force Reserve Judge Advocate. In the civilian world they recognized the commitment to something greater than oneself and it was a trait that they wanted on their team. That experience on my resume stood out like no other experience. After a majority of those interviews I was the fortunate person they chose to hire, and I believe my success was a by-product of my willingness to serve.

> "Excellence in all we do" requires excellence in what we do for the service, for our community and for ourselves.

EXCELLENCE IN ALL WE DO

"Excellence in all we do" requires excellence in what we do for the service, for our community and for ourselves. The "in all we do" portion of this core value means that not only must you strive for excellence in the duties and responsibilities that you love and care about but in any job you are tasked with. Every person can shine when they are doing something they love and are committed to. The real commitment to the organization and to yourself is to show the same enthusiasm and motivation when you are tasked with a job or assignment you are unfamiliar with or do not care about. This is when a true leader steps forward and applies the same care and commitment as they would to a task in which they love. Understand that the assignment you receive might not be important to you, but it is important to the overall mission of the Air Force and that's why it must be done to the best of your ability. Keep this perspective and practicing excellence in all you do will come easier.

As lawyers and military members it is important that we become part of the communities in which we live in. There are always people and community groups which would love to have a guest speaker discuss the legal topics of the day or law in general. There are plenty of elementary, middle, and high schools that have career days and would love to have a lawyer and an Air Force member talk about his or her profession. Many local bar associations have teen court and mock trials in which they need volunteers to participate. On a one-on-one level, reservists often have plenty of individual lawyers who inquire about how they can come join the military whether on active duty, the guard, or reserve. In non-legal forums, coaching local children's park and recreational leagues is an option. Be open to these and other opportunities that come along and although they will take time out of your busy schedule, you will be rewarded by the experience and the appreciation you will receive from your community.

Finally, you should also strive for excellence personally, which as a reservist means that you keep up with your commitments both as an Airman and as a civilian. Make sure that you are physically and mentally fit. Make sure that you have all of your appropriate bar credentials up to date. Have your military and civilian schedules coordinated so that they don't unnecessarily interfere with each other. Make sure that all of your medical and dental records are up to date.

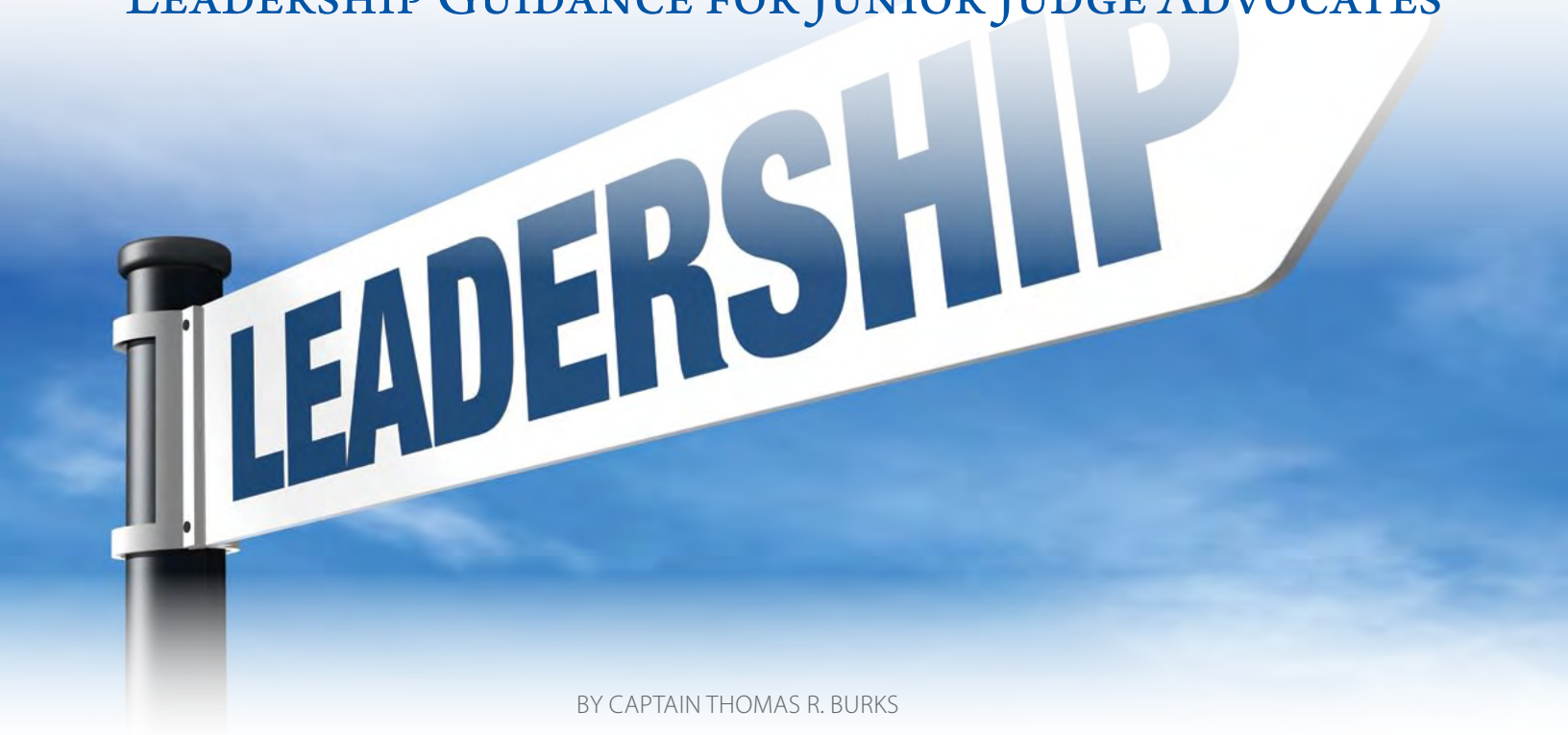
If you are excellent in all you do for the service you will be "paid back" in many ways. I experienced this myself as I was progressing in my career and interviewing for different positions. Once I left active duty, I immediately received a position performing criminal defense work. After about a year, a position opened up with another agency that I really wanted but they were seeking an attorney with civil law experience. On the "civilian" side of my resume I had nothing but criminal law experience. However, based upon the fact that I had been assigned civil law responsibilities while I was on active duty and in the reserves I was able to use that experience to get my foot in the door and get hired. I had a similar experience again when I applied for my first judicial officer position as a Combined Courts Magistrate. I was competing against a number of outstanding candidates but my reserve experience being assigned as an Article 32 Investigating Officer performing some of the same duties as the Magistrate position set me apart. Without the experience and the recommendations I received from each of the Staff Judge Advocates I worked for as a reservist, I am confident that I would not have been the person each of these organization chose to hire at the time.

CONCLUSION

I am a living, breathing example of what can happen if you strive to internalize these core values–Integrity First, Service Before Self, and Excellence in All You Do. I am retiring from the Air Force Reserves after a long and satisfying career and I have experienced immense success in my civilian profession and my personal life. I know that if you strive to internalize these values, you will achieve success in whatever goals you want to attain in both in your military and civilian careers. R

New Kid on the Block:

Leadership Guidance for Junior Judge Advocates



BY CAPTAIN THOMAS R. BURKS

I arrived at Commissioned Officer Training in January 2011 as a newly minted officer and attorney, only a few months removed from the Bar exam. I was older than most new JAGs, having worked for several years in the private sector after college, but just as inexperienced in my profession as anyone right out of college and law school. Four years later, I am the so-called "senior" captain in my second assignment. Much of what I have learned during the past four years centered on the practice of law, which is an appropriate focus for a junior attorney. However, it is not enough to be a competent attorney; JAGs are also expected to be effective military leaders. The problem is, like many JAGs in my position, I had little concept of what leadership looked like when I walked into the legal office on my first day.

I understood that I needed to become a leader and I went in search of answers. Although there are many great resources on leadership theory, much of it is difficult to apply in the JAG context. Unlike some military career fields where a captain might be in command of a few hundred people, an Air Force JAG does not have the same level of direct responsibility over other people. So, what does it look like to be a leader when a JAG is in charge of only herself, or, at most, a handful of other people?

As I continued to learn how to become an effective leader, I repeatedly ran across two characteristics of good leadership: leaders **"lead from the front"** and leaders **"take care of their people."**

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to understand what these concepts look like in practice. The following is my version of what it means to "lead from the front" and "take care of people" in the first four years as a JAG.

LEAD FROM THE FRONT

Be a Competent Attorney

A leader sets the standard for others to follow. Being good at one's job is the critical first step to inspiring others to be the best at theirs. Moreover, if one requires excellence from herself, subordinates will know the same is expected from them. There are many facets to being a good lawyer. JAGs in particular must learn how to advise commanders on how something will affect the amorphous concept of good order and discipline, not just whether it meets a minimum threshold of legality. Once the commander has determined what is in the best interest of good order and discipline, the ball is back in the JAG's court. The JAG must strive to prepare for every contingency when executing the commander's intent, whether that involves briefing, writing a legal review, or prosecuting a court-martial.

Integrity and Honesty are Key

In addition to professional competence, leaders also set the standard for ethical behavior. When I was deployed, my Deputy Staff Judge Advocate met with me to clarify his expectations during the deployment. As we talked, he also shared his personal moral code: "Be good at your job, take care of your family, and don't lie." Just before he shared this philosophy, we discussed the recent discovery that a unit in Afghanistan had obligated federal funds for an improper purpose, which caused an Anti-Deficiency Act violation. Rather than admit the mistake, the unit initially tried to cover it up. Given the context of our conversation, it is clear that the phrase "don't lie" encompasses more than literally telling a lie. It includes cover-ups, massaging the truth, and generally being dodgy. Leaders set the standard for ethical behavior. JAGs should be above board in all that they do.

Look and Act Like a Military Officer

Again, leaders set the standard for others to follow. The military has specific standards for dress and appearance, physical fitness, and customs and courtesies. Every junior JAG must take the time to learn and strive to exceed these standards. Everyone, from paralegals to legal assistance clients to court-martial panel members, knows what these standards are and expects JAGs to meet them. A paralegal once told me he appreciated that my "blues" always looked right and that my shoes were always shined. Conversely, I once overheard several noncommissioned officers commenting that a female officer had highlights in her hair that were against regulations. People will notice whether one looks and acts the part. It should not be a close call. Start by being exceptional in the easy stuff.

Study the Profession of Arms

A JAG is both an attorney and a military officer, which requires a JAG to know as much about the military as she does the law. Consequently, a JAG has a responsibility to understand military culture, which includes learning Air Force history, principles of airpower, and the mission local to one's base. Books, articles, and defense and policy blogs are all great resources for this knowledge. The annual Air Force Chief of Staff reading list is also a good place to start. However, while reading is an important tool, one must not overlook the value of getting out of the office and talking to people. Learning the mission of the base is tremendously important to knowing one's client and understanding how the Air Force works outside of the legal office. It also provides the opportunity to study the habits of officers and enlisted personnel who are considered to be good leaders. The more a JAG knows about the Profession of Arms and those who espouse its principles, the better officer and leader that JAG will be.

Learn from Subordinates

Most paralegals I have worked with cross-trained from another career field when they were already a noncommissioned officer. They may be new to the paralegal field, but often have a wealth of knowledge about how the Air Force works. Their perspective can be extraordinarily valuable when an attorney is advising a commander on a course of action. When I was running an adverse actions program, on more than one occasion a course of discipline that appeared perfectly reasonable to me seemed ridiculous to my paralegals. I was always careful to listen to their perspective and reasons supporting that position. Even if I ultimately did not agree, getting insight into how Airmen in the unit might view their commander's action from a paralegal's perspective was valuable input when formulating my recommendation. A leader's behavior sets the example for others to follow. Recognize that one may be "the leader" of a section, but there is much that leader can learn from her subordinates. If a JAG wants those around her to seek and heed the counsel of others, she must be humble enough to do the same.

Be Receptive to Guidance and Correction

It is natural to become defensive when corrected by someone else. However, it is important to put pride aside and thoughtfully consider what the other person has to say because he or she may very well be right. When I was a brand new JAG, every legal review I drafted went to one of the senior captains in

the office for review prior to being submitted to the SJA. One legal review in particular stands out because the edits went further than noting typographical errors or stylistic differences between attorneys, and questioned my analysis of the law and ultimate legal opinion. Although I did not want to, I swallowed my pride and took a more critical look at what I had written. I discovered that the captain was right. My analysis was sloppy and I made an inferential leap that was not sufficiently supported by the evidence. I re-examined the evidence and corrected my faulty reasoning, resulting in a much stronger end product. This time, the legal review passed muster. Realizing that I need corrective guidance from others is one of the most important lessons I have learned as a JAG, and a principle I have tried to apply to every facet of my career. We make each other better, and it is critical to listen to the guidance and criticism of others in order to continue developing as an attorney and leader.

Never Be above the Work Required of Others

I have worked with attorneys who considered themselves too good for so-called "grunt work," which included anything from shoveling snow to scanning a signed legal review. We attorneys spend a lot of time learning a very specialized skill set. Consequently, our time is valuable and is often better spent doing actual lawyer work. However, our paralegals and civilians also have a lot to do, and knowing that an attorney is willing to pitch in and help when they are swamped will make them appreciate and respect that attorney. Handing paralegals a task at the end of the day that must be completed immediately, and then walking out the door to go home will more likely earn their ire than their respect. A leader should not consider herself too good for the work required of subordinates, and should be willing to lend a helping hand when needed. And, a true leader never leaves first without first ensuring his or her people are taken care of.

Do Not Be Buddies with Subordinates

This is a tough one because most of us are social creatures by nature. However, unlike most civilian career fields, the Profession of Arms requires separation between the officer and enlisted ranks. Remaining professional should not, however, be interpreted as being unfriendly. It simply means figuring out where the professional line is and making sure it is not crossed. An officer I knew told me the story of how she almost went over that line. Several years ago, when she was relatively new to the military, she began exercising every day at lunch with an enlisted subordinate. It made perfect sense to the two of them. They had both recently had a child and wanted to lose some extra baby weight. They also worked closely together and knew each other fairly well. After a few weeks, others in the office began to notice how much time they spent together. A fellow officer pulled her aside and let her know that there was a growing perception in the unit that she and her subordinate were spending too much time together. The officer realized the error of her ways and remedied the problem. Even with such an example, it can be difficult for young JAGs to recognize where the line is between professional and unprofessional relationships. Here are some the obvious rules to stick to: do not date a subordinate; do not allow a subordinate to call an officer by his or her first name; do not hang out with a subordinate to the exclusion of others; do not foster a relationship that makes it appear one has "favorites" among the enlisted ranks.

TAKE CARE OF PEOPLE

Praise is a Free Force Multiplier

Recognition does not have to be in the form of an award or some sort of grand gesture. Telling people they did well on a project is a simple, yet effective way to let them know their effort is appreciated. Additionally, recognizing someone at an office staff meeting is a phenomenal way to ensure his or her co-workers are aware of how well that person is doing. Another effective way to recognize others is through email communication. As attorneys, we communicate a lot through email, even rendering informal legal opinions through that medium. If one worked closely with someone on an issue, copying them to the email and mentioning his or her efforts in the text is an easy way to recognize them. I learned this lesson from a more senior JAG with whom I worked. I researched an issue for him, and in his response to the commander he adopted my analysis and mentioned to the commander that I did the leg work. It felt pretty good to know that he recognized my efforts and trusted my judgment. I immediately adopted the practice and began doing the same for the people who work with me. The point is that everyone likes to be told they are doing a good job. A good leader inspires a person to achieve more by recognizing that person for what they are doing well now.

Correction Must Be Fair, Personally Tailored, and Delivered in a Way that Does Not Result in Shaming

Leaders must be willing to have a candid discussion with a person who is not meeting the standards expected of her. Much of a JAG's time is spent focused on her own development as an attorney. There will be a time, however, when a JAG has paralegals, civilians, and even fellow JAGs working under her daily supervision. Inevitably, one of those people will fail to meet the

standard set for work product, dress and appearance, or fitness, among many other standards. I typically give a person the benefit of the doubt the first time he or she fails to meet expectations. However, if it becomes a repeat problem, it is clear that this is not an exceptional issue; it has morphed into the norm. I have had to correct subordinates a handful of times, and on every occasion, they thanked me for letting them know there was a problem. They also fixed it. Leaders owe it to their subordinates to give corrective guidance when it is warranted, and to give that correction in the right way. If leaders fail to do so, they are setting their subordinates up for failure, tacitly approving the behavior.

Feedback and Training are of Paramount Importance

Few new JAGs understand the military enlisted structure, specifically the difference between 3, 5, and 7-level paralegals or what they must do to achieve each new level. To reach 5-level status, paralegals must learn and be signed off on a shocking number of tasks. JAGs owe it to the paralegals in the office to ask how they are progressing in upgrade training, whether they work in one's section or not, and what help they need to get signed off on their tasks. Additionally, providing paralegals with feedback on their day to day performance is critically important. If a paralegal is doing a particular job well, the Airman needs to know that he or she is cleared to "fire for effect" with regard to that task. By the same token, feedback also provides course corrections to paralegals who fail to complete a task in the manner envisioned by the JAG. Without feedback, paralegals are left to hope they are doing things correctly, something they should not have to do. JAGs also often work closely with and sometimes supervise civilian employees. It is important to understand the civilian evaluation system, and to know when a civilian needs a mid-term appraisal and an annual appraisal. We do them a disservice when we do not understand the requirements of their appraisal system and provide them with the feedback they need to be truly exemplary employees.

Clarify Expectations

Every JAG has some idea of how work product should be formatted, suspenses routed, and work prioritized, along with a host of other preferences. However, while the JAG may have a great idea, the people she works with are not mind readers. Without clarification and subsequent feedback, those a JAG works with are left to figure it out on their own, and it should come as no surprise when the result differs from what the JAG envisioned. Communication is the key. This is simple stuff, but we sometimes forget to do it.

Share Knowledge with Others

The idea for this article came to me as I reflected on how the base legal office operates on a day to day basis. The military as an institution values resolving problems at the lowest level possible. So what does a new JAG do when she has a novel (to her) issue? The JAG will likely do some research, look for old legal reviews, and try to get an idea of the right answer. But ultimately, she will probably go to another, more senior captain and get his or her take on the problem. Such captain-to-captain guidance was invaluable to me when I was a brand new JAG and still is today. Over time, as I gained experience, I became the captain that advised others. As I discussed various issues with my more junior peers, I realized that my guidance was being sought out on a surprisingly regular basis, and that the source of my advice was typically my own experience tackling the same or similar issue. Eventually, every JAG becomes the "senior" captain. JAGs owe it to those around them to pass on what they have learned so that others may develop into better leaders and more competent attorneys.

CONCLUSION

Leadership can be overwhelming and difficult for a junior JAG to implement without some guidance as to what it looks like in practice. The foregoing is not an all-encompassing list of leadership characteristics, but rather a starting point from which junior leaders can develop their own leadership style. It has been my experience that the application of theory becomes clearer if someone has the forethought to tell me "do this, and then go from there." As with the practice of law, leadership development is a continual process of refinement. I hope that the examples above will provide some insight which junior leaders in the JAG Corps can draw on to become truly effective military leaders. R

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Legal Writing for JAGs

"The Dirty Dozen"

BY LIEUTENANT COLONEL CHRISTOPHER BAZELEY

"Legal Writing." For many of us that phrase brings back ugly memories from law school. Unfortunately, it is a very important part of our practice as Judge Advocates and Paralegals. As a sitting magistrate judge and former judicial clerk in my civilian capacity, I can tell you that judges really do pay attention to what is written in our legal documents. While "cutting and pasting" from old documents and using templates are common practices in the JAG Corps and can be very helpful, it is the author's duty to make sure that what they have written is clear, accurate, and persuasive. Based on my experience reviewing other legal professionals' work, I've developed my own list of 12 tips legal professionals can apply in order to improve their writing skills.

1. **Say what you mean.** Many writers fail to make clear assertions because they are afraid that the reader will disagree with them, or they are trying to be just vague enough to "cover all of the bases." A reader can sense when an author is uncertain and it may cause them to lose confidence in the writer's argument.

2. **Use English, not Legalese.** What is the difference between "The government failed to file its motion within the time limitations prescribed in…" and "The government's motion was untimely?" Not much. Legalese cannot always be avoided but it will help keep the reader's attention if you write in plain English.

3. **Condense what you have written.** No one likes to grind through a twenty-page legal brief. Figure out what facts and arguments are essential and focus on them. Everything else can be condensed and summarized as background information.

4. **Focus your arguments.** Writers often use the "shotgun effect" by making every argument they can think of while expecting the reader to lock onto the important points. Do not make your reader pick the important issues out of a group. A good rule of thumb is to limit your focus to no more than three arguments whenever possible.

Lieutenant Colonel Christopher Bazeley, USAFR

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5. **Cite any point of law.** Just making a statement of law such as "courts have not found specific intent to be an element of this crime" leaves the reader wondering, "who are you and why should I listen to you?" Make sure you cite to a case, AFI, statute, etc. to back up statements of law.

6. **Check your citations!** Your argument may catch the reader's attention, and they may want to look up the case or statute you have cited to learn more about its holding. However, if the cite is wrong, odds are that they do not have the time to search for the authority on their own. Instead, they will simply discount what you have said and move on.

7. **Do not leave citations in a document when they are not relevant to your argument.** Templates are designed to cover as many situations as possible. As a result, they often contain citations that have no relevance to your specific issue. Do not confuse the reader by leaving unnecessary references in your document simply because they were there in the template. Delete what you do not need.

8. **Do not forget about the "burden of proof."** One side has the burden to show that they are entitled to the relief they are seeking. Tell the reader who has the burden. If it is you, tell them why you have satisfied that burden. If not, tell the reader how the other side has not satisfied their burden.

9. **Summarize any uncontested issues.** Your reader is going to have to wade through a lot of facts that they are not familiar with. Make their job easier by identifying any facts or law that are not in dispute.

10. **Concede when you have to.** Rarely is any legal issue so cut-and-dry that only one side has anything valid to say. Ignoring a valid argument that opposes yours just gives credibility to the other side. If your opponent has a valid point, acknowledge it and then soften its blow by arguing why that point is irrelevant, unsupported, or why your position is stronger.

11. **Never tell the reader what to do.** A judge or commander will make their own decision and will, at best, ignore anything that comes across as "you must…." Always respectfully recommend a course of action or ask for the relief you are seeking.

12. **Tailor your language to your reader.** Keep in mind who will be reading the document and what their level of expertise is in the area. For example, you would explain intestacy laws differently in a letter to a high school student than to a judge.

BONUS—I have added one more tip to help make your legal writing even more effective!

13. **Sleep on it.** Have you ever picked up something you wrote months earlier and thought to yourself "yech…did I really submit that?" The more time we spend writing a legal document the better it sounds in our head. Whenever possible, don't submit your document the same day you draft it. Take a look at it with fresh eyes the next morning and you may find mistakes you glazed over the previous day.

Exporting Best Practices to Your Next Base

The Legal Assistance Prescription Pad

BY CAPTAIN RODNEY B. GLASSMAN AND SENIOR AIRMAN DIEGO BERMUDEZ

My 72 year old client, Mrs. Smith, trembled as she sat in the chair across from my desk for her walk-in legal assistance appointment at the 56 FW/JA at Luke, Air Force Base. With a look of confusion, she handed me the envelope she had recently received by certified mail, filled with divorce paperwork, from her husband of 52 years, retired Air Force Master Sergeant Smith. She appeared sad, frustrated, and tired as she shared her bewilderment and said "Captain Glassman, I am here because I do not know what to do."

Within the span of her 30 minute appointment, I educated Mrs. Smith about the mental health and family advocacy services available on base, and walked her through the process of utilizing the local county court's self-service website to download a guide for the divorce process and how to access the necessary forms. Upon learning that she would like to hire an attorney, I provided Mrs. Smith with information about the local bar association's referral service where, for just forty-dollars, she would be connected with a local family law attorney who would provide a thirty-minute consultation and a quote for handling her divorce. Throughout her visit, I was able to circle phone numbers, highlight websites, and even assist Mrs. Smith in taking notes with the use of our office's new Legal Assistance Prescription Pad.

BEST PRACTICES

The standard two to three year PCS cycle for active duty attorneys and a recommended three to five year re-attachment cycle for reservists has the JAG Corps positioned to enjoy the benefits of cross-pollination through the spread of "Best Practices" developed at installations and higher headquarters across the Air Force. Entrepreneurial leadership committed to seeking out, understanding, and applying the tools and resources created by fellow JAG Corps members, enables us to continue evolving and developing new processes to improve services for our clients from wing commanders to retirees.

Air Force Instruction 51-109 defines the Article 6 Inspection Process pursuant to Article 6 of the Uniform Code of Military Justice. Paragraph 2.9.4 discusses Best Practices stating,

> "an important piece of the Article 6 Inspection process is to highlight those programs that enhance the quality and efficiency of legal services and enhance the advice provided by an office, recognize judge advocates, paralegals, and our civilian professionals making a difference, and cross feed useful information across AFJAGC."

The AFI defines Best Practices as "innovative programs or practices that significantly contribute to improving a process or greatly enhance the quality of legal services provided by an office," and further states, "Best practices should have utility outside the inspected office

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or be of such quality that it clearly stands out as having a major impact in a given area at the inspected installation."

One recent example of a Best Practice identified during an Article 6 Inspection at Davis-Monthan Air Force Base (AFB) is the "Legal Assistance Prescription Pad". This Best Practice has now been cross-pollinated from ACC to AETC and can help support and enhance your office legal assistance mission.

Today, every attorney at Davis-Monthan AFB, JBSA-Lackland, and Luke AFB has a Legal Assistance Prescription Pad on their desk. This tool provides an enhanced level of service and resources to each client. Additionally, the Legal Assistance Prescription Pad builds confidence with both the attorney and client. Finally, this tool is replicable, customizable, and provides additional value to every client that visits the legal office for legal assistance. Below is the Legal Assistance Prescription Pad's story.

LEGAL ASSISTANCE PRESCRIPTION PAD

In the fall of 2012, then Lieutenant Colonel Elizabeth Schuchs-Gopaul, the former Staff Judge Advocate, 355 FW/JA, was interested in bringing to fruition an idea she had envisioned for quite some time; a Legal Assistance Prescription Pad. Years earlier, TJAG had mandated that Legal Assistance clients who were in distress should be given a list of non-legal resources during legal assistance appointments so that they could seek assistance from other resources that they may not know about. This mandate was in response to a spike in military suicide. Legal issues can be extremely stressful and could contribute to a situation where a member contemplates suicide. That member who is seeking help from the legal office but is not aware of non-legal mental health and support resources available to them, could benefit from being made aware of such services as much as they may benefit from the legal advice he or she receives. Lt Col Schuchs-Gopaul's vision for the Prescription Pad was a document that had all of those resources on it so that she could be confident that every client leaving her office was provided with a list of helping agencies. It is "wingman" concept imbedded in legal assistance.

As a JAG Corps leader, Lt Col Schuchs-Gopaul had found that attorneys were often writing down plans and resources on paper for their clients during legal assistance and thought a professionally produced resource guide, versus a simple half-slip of paper or post-it note would make more sense and provide even more value to the client.

Lt Col Schuchs-Gopaul's concept was to create a one-page resource attorneys could utilize during all of their legal assistance appointments to:

(1) Provide attorneys with a consistent, pre-approved list of resources that could easily be circled or highlighted—increasing client visit efficiency.

(2) Provide attorneys with the ability to provide their clients a professional tool containing the resources discussed during appointments—enhancing effectiveness of the client's take-away knowledge;

(3) Provide the client with paper to write down important information and a roadmap from their office visit—improving client confidence in his or her ability to complete the necessary post consultation steps.

As with many long-term projects, the Legal Assistance Prescription Pad had made its way to the bottom of the "to-do" lists for the cadre of busy active duty attorneys at the 355 FW/JA. However, Lt Col Schuchs-Gopaul was determined to see this project completed so she tasked me, the office individual mobilization augmentee (IMA) Captain JAG, to develop a Legal Assistance Prescription Pad prototype by the end of my annual tour.

The goal was to develop a single 8 ½ x 11 sheet containing essential frequently utilized resources for clients to receive during their legal assistance appointments. The first step for developing the tool was to send an email to the entire legal office requesting phone numbers, websites, and on-base resources most often provided to clients during legal assistance appointments. From that information, a draft was developed which included sections for (1) Stress and Anxiety; (2) Useful Websites; (3) HOT Numbers; and (4) Client Notes. Both the AF legal assistance website and the base legal office website were prominently displayed on the form for clients who would be returning for will, advanced medical directive, or power of attorney appointments. By providing a range of valuable resources including base programs, online links, and telephone numbers, the prescription pad would be the type of tool that could be used for the entire spectrum of legal assistance clients.

Once the draft prescription pad was complete, copies were distributed to all of the attorneys who provided legal assistance in the office to beta test the product. A final draft was ultimately created and a civil law paralegal produced the actual "pads" for each attorney (see the end of the article for instructions to produce a prescription pad—developed by Senior Airman Diego Bermudez). Lieutenant Colonel Schuchs-Gopaul directed all of the attorneys of the 355 FW/JA to utilize their new resource for all legal assistance appointments.

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Senior Airman Diego Bermudez, USAF: is a General Law Paralegal for the 355th Fighter Wing, Davis-Monthan Air Force Base, Arizona.

Positive feedback from both clients, who were thrilled to receive something tangible at the end of their visits, and from the attorneys, who felt empowered to deliver additional value and direction to their clients, was immediate.

The Davis-Monthan AFB "Legal Assistance Prescription Pad" was recognized by JAI during the base's most recent Article 6 inspection and continues to provide additional value to legal assistance appointments while reducing the need for follow-up visits. Clients, who would have otherwise been less sure of the next steps they needed to take to deal with the legal issue they faced, felt more confident, informed, and educated because they were provided clear and organized information which more effectively leveraged their attorney office visits.

REPURPOSED

In the fall of 2014, I was reassigned to Luke AFB as an IMA at the 56 FW/JA and began reporting to a new Staff Judge Advocate, Lieutenant Colonel Joel England. During our initial feedback, he asked me if there were any best practices or processes that I had utilized during my time at Davis-Monthan AFB that I thought would benefit the Luke AFB office and our clients. The first idea I shared was the "Legal Assistance Prescription Pad." Lt Col England immediately saw the value in this resource. During my next Inactive Duty Training day, he tasked me with consulting our Chief of Legal Assistance on developing a similar form for Luke AFB. The Chief of Legal Assistance also thought the prescription pad was a good idea so we began developing a Luke AFB version.

We collaborated with the office attorneys and paralegals to identify those phone numbers, websites, and base resources most often provided to clients to during legal assistance office visits. Once the Luke AFB specific resource guide was complete, we reached out to Senior Airman Diego Bermudez, the paralegal at Davis-Monthan AFB who was initially charged with mass-producing the Legal Assistance Prescription Pad. SrA Bermudez quickly developed an easy, "how-to" guide for putting together the Legal Assistance Prescription Pad and shared the process with the paralegal responsible for managing the front desk for legal assistance at Luke AFB.

After the appropriate supplies for binding the pads were purchased (one large bottle of pad/book compound and a soft tooth-brush) the Legal Assistance Prescription Pad at Luke AFB was put into production and utilization. (See end of article for a sample prescription pad layout.)

BOTTOM LINE

The Legal Assistance Pad and its voyage from Davis-Monthan AFB to Luke AFB, is a great example of a JAG Corps member coming up with an idea and the leveraging total force resources to bring the idea to life. Lt Col Schuchs-Gopaul provided me the opportunity to work a project that will provide long-lasting impact for legal assistance clients at Davis-Monthan AFB and beyond. As the new SJA for Joint Base San Antonio-Lackland, now Colonel Schuchs-Gopaul has expanded the use of this tool to a third base legal office and a large population of legal assistance clients. The Legal Assistance Prescription Pad is just one of many best practices currently being utilized across the Judge Advocate General's Corps that can be easily transferred, modified, and repurposed to provide greater support and more robust resources to the clients we serve. R

How To Make a Prescription Pad

BY SENIOR AIRMAN DIEGO BERMUDEZ

STEP 1

Gather Supplies

Start off by going to a crafts store and purchasing binding glue. "Pad/Book Compound" is a good adhesive for binding pads and books. You will also need a soft toothbrush to apply the glue and something heavy to weigh down the pages as they dry.

STEP 2

Make Copies

Make 50 copies of the quick resource sheet (sample layout provided on the next page) and stack them on top of a Record for Trial (ROT) hard back.

STEP 3

Assemble Copies

Align all the edges and press the top area of the stack with something heavy, i.e., a couple of heavy books stacked on top of each other. After placing the heavy objects on top of the stack, realign all the edges.

STEP 4

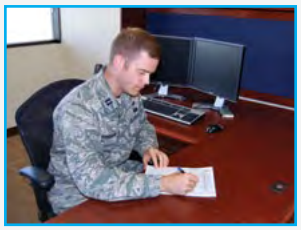
Bind Copies

With a soft toothbrush apply the glue on the entire top edge of the stack and let it dry completely until the glue turns clear. After it dries, re-apply the glue. Place one more book on top of the stack to compress the paper further. Let it dry until the glue turns clear.

STEP 5

Distribute Product

After it dries the prescription pad should be ready to use. Make as many as you need and handout to your attorneys.



56 FW/JA Quick Resource Sheet

LUKE AFB Legal Assistance

INTEGRITY - SERVICE - EXCELLENCE WISDOM - JUSTICE - VALOR

www.luke.af.mil/library/lukestaffjudgeadvocate.asp

STRESS & ANXIETY

Luke Air Force Base SARC—623-856-4878
Base Family Advocacy—623-856-3417
Base Chaplains/Clergy—623-856-6211
Base Mental Health—623-856-7579
Military One-Source—*(online face-to-face)*
800-342-9647 or militaryonesource.com
National Suicide Prevention—800-273-8255

USEFUL WEBSITES

Maricopa County Self-Service:
www.superiorcourt.maricopa.gov/index.asp
Small Claims: http://justicecourts.maricopa.gov/
Attorney Search: www.azbar.org/findalawyer.com
Bankruptcy: uscourts.gov/federalcourts/bankruptcy
Attorney General: azag.gov/publications.html
State of Arizona: azleg.gov & azhousing.gov
Child Support Enforcement: www.azdes.gov/dese
Consumer: www.bbb.org/phoenix & ftc.gov
Servicemembers Civil Relief Act:
Justice.gov/crt/spec topics/military/scrascra.php

HOT NUMBERS

Lawyer Referral Service—602-257-4434
Legal Aid—602-254-1655
Maricopa County Bar Association—602-257-4200
Veteran's Affairs—800-827-1000
Maricopa County Superior Court—602-506-3204

Complete an online legal worksheet for a will, advance medical directive, or power of attorney prior to visiting the legal office by visiting aflaglegalassistance.law.af.mil!

CLIENT NOTES

Attorney Follow-up _____

☐ Schedule Appt ☐ Referral

***** https://aflegalassistance.law.af.mil/lass/lass.html *****

56 FW/JA **7383 N. Litchfield Rd.** **Luke AFB, AZ 85309** **ph: 623-856-6901**

God & Man in the Military

Military Commanders and the First Amendment

BY LIEUTENANT COMMANDER ROBERT J. HUNT AND CAPTAIN JAMES J. WOODRUFF II

Military commanders are faced with the issues of balancing between church and state as they deal with religious practices and the needs of the mission.

Traditions and practices within various faith groups underlie the resiliency of many service members. All branches of the military recognize this need for spiritual counsel and the accommodation, to the extent possible, of religious practices to support this uniquely human quality. To accommodate these need, military commanders are faced with the issues of balancing between church and state as they deal with religious practices and the needs of the mission. Religious liberty issues present a commander with a complicated, ever-changing, and for many, foreign legal battlefield. A review of the headlines these last few years is replete with examples such as quibbling over the words used in the Oath of Enlistment;[1] placement of Bibles on tables dedicated to missing and fallen service members;[2] Christmas and Nativity displays set up in or on government buildings and land;[3] bumper stickers;[4] and of course, traditional speech.[5]

In an attempt to provide clarity in the stormy seas presented at the intersection of church and state we have followed a three-step process to resolve religious liberty issues. A military commander may experience bewilderment when confronted with questions such as when is public prayer allowed or when can a religious artwork be displayed on a

[1] Stephen Losey, *Group: Airman Denied Reenlistment for Refusing to Say "So Help Me God"*, Air Force Times (Sept. 4, 2014), http://www.airforcetimes.com/article/20140904/NEWS05/309040066/Group-Airman-denied-reenlistment-refusing-say-help-me-God-.

[2] R. Norman Moody, *Bible Sparks "Missing Man" Table Controversy*, Florida Today (Mar. 28, 2014), http://www.floridatoday.com/story/news/local/2014/03/28/bible-sparks-missing-man-table-controversy/7042197/ .

[3] Cheryl K. Chumley, *Outrage as Air Force Base in South Carolina boots Nativity scene*, Washington Times (Dec. 11, 2013), http://www.washingtontimes.com/news/2013/dec/11/outrage-sc-air-force-base-boots-christmas-nativity/.

[4] Jeff Schogol, *Judge: Lejeune Can't Ban Car Decals Linking Islam, Terrorism*, Stars and Stripes (Apr. 2, 2010), http://www.stripes.com/news/judge-lejeune-can-t-ban-car-decals-linking-islam-terrorism-1.100567.

[5] James Weirick, *Censorship at the Highest Ranks of the U.S. Military and the Growing Divide between the Military and Civilians*, Foreign Policy (Jan. 22, 2015), http://foreignpolicy.com/2015/01/22/censorship-at-the-highest-ranks-of-the-u-s-military-and-the-growing-divide-between-the-military-and-civilians/.

Photo ©iStock.com/STILLFX

military installation. This article will review the three-step process to utilize in answering most religious-based First Amendment issues that arise during military operations. It will also provide a new manner of thinking regarding the separation of church and state.

THE THREE-STEP PROCESS

When a military commander encounters the shoreline where church and state meet, things may get rather confusing. In an attempt to simplify navigating these treacherous shores we suggest a three-step process. The process begins with the Freedom of Speech Clause then proceeds to the Free Exercise Clause and ends with a review of the Establishment Clause. While this process will not work for every religious based First Amendment scenario, it does provide a framework to cover the situations most commonly encountered.

Free Speech Clause

We begin our analysis by reviewing the conduct under the broadest expression protection in the Constitution: the Freedom of Speech Clause. As is widely understood, the Constitution prohibits "abridging the freedom of speech, or of the press."[6] However, what is commonly forgotten is that the prohibition against abridgment does have its limits.

The Supreme Court has provided guidance to military commanders when confronted with Freedom of Speech Clause issues. In *Parker v. Levy*, the Court held Congress and military commanders might restrict speech if the speech "undermine[s] the effectiveness of response to command."[7] The Court of Appeals of the Armed Forces (C.A.A.F.) provided further guidance regarding a commander's ability to restrict speech in *United States v. Brown*.[8] In *Brown*, the C.A.A.F. held that "The test in the military is whether the speech interferes with or prevents the orderly accomplishment of the mission or presents a clear danger to loyalty, discipline, mission, or morale of the troops."[9] These expression restrictions are allowed because "the military is, by necessity, a specialized society separate from civilian society."[10]

Professor David E. Fitzkee, in his work *Religious Speech in the Military: Freedoms and Limitations*, has examined the use of evangelizing speech and prayer in the military.[11] He suggested that a service member proselytizing and praying in the service member's office may be allowable.[12] It is only when a service member engages in proselytizing or prayer in the office with subordinates that such speech may appear to be a government endorsement of a specific religion.[13] It should always be remembered that on military installations speech restrictions must be content neutral in order to pass constitutional muster, restricting religious speech alone would run afoul of a military member's constitutional rights.[14]

While free speech inside the office often comes to mind, military commanders may also encounter speech issues in the parking lot. Issues have arisen over the last several years at Nellis Air Force Base regarding the display of ichthys on the cars of Airmen. The ichthys is a fish shaped symbol that is commonly referred to as the "Christian or Jesus fish." The first issue involved a Christian fish being mounted in a sexual nature by another fish with legs and the word "truth" inside. This display was deemed offensive and the Airman was ordered to remove the obscene symbol as it affected good order and discipline. This was followed a short time later by a complaint over a fish symbol on another Airman's car. This fish had horns and a tail with the word "Satan" inside. The original Hebrew term Satan is from a verb meaning primarily "to obstruct, oppose," as it is found in Numbers 22:22, 1 Samuel 29:4, Psalms 109:6.[15] Satan is traditionally translated as "the accuser" or "the adversary."[16] The Airman's use of the emblem may have been meant as a joke or the Airman may have been a Satan worshipper. Either way, it was protected speech as it was not obscene. In both circumstances the commander had to decide whether to do nothing or make a determination that the speech affects the mission or good order and discipline.

Free Exercise Clause

Once it has been determined that the speech at issue is not subject to the military's speech restrictions, the Free Exercise Clause may be examined. This may very well be the second most expansive protection of individual rights in the Constitution. The Free Exercise Clause forbids Congress from making a law that prohibits the free exercise of religion.[17]

In 1993, Congress passed the Religious Freedom Restoration Act establishing the compelling interest standard as the necessary standard when reviewing laws that may infringe on religious liberty.[18] The compelling interest stan-

[6] U.S. Const. amend. I.

[7] *Parker v. Levy*, 417 U.S. 733, 758-59 (1974).

[8] *United States v. Brown*, 45 M.J. 389 (C.A.A.F. 1996).

[9] *Id.* at 395 (citing *United States v. Hartwig*, 39 M.J. 125, 128 (C.M.A. 1994) and *United States v. Priest*, 21 C.M.A. 564, 570, 45 C.M.R. 338, 344 (1972)).

[10] *Levy*, 417 U.S. at 743.

[11] David E. Fitzkee, *Religious Speech in the Military: Freedoms and Limitations*, Parameters, Autumn 2011, at 66-67 (2011).

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] James L. Crenshaw, Harper Collins Study Bible (NRSV) (1989).

[16] *Id.*

[17] U.S. Const. amend. I.

[18] 42 U.S.C. § 2000bb (1993).

dard requires that the law burdening religious liberty (1) "is in furtherance of a compelling government interest and (2) the law or regulation is the least restrictive means of furthering that compelling government interest."[19]

In order to ensure the Free Exercise Clause is properly understood within the military, the Department of Defense created Department of Defense Instruction 1300.17. Under the instruction the military is to accommodate service members' religious beliefs and lays out the procedure to provide such accommodation on a case-by-case basis.[20]

The Air Force has also created two Air Force Instructions (AFI) that help understand the current policy of the Air Force. AFI 1-1, paragraph 2.12, encourages Airmen to practice their religious beliefs and to respect the religious beliefs of others. Additionally, AFI 36-2706 forbids the discrimination against military and civilian employees on the basis of religion.

Many religions have, as part of their religious belief, a calling to evangelize. Some religions also have certain clothing and grooming commandments as part of their practice of faith. And some religions have specific prayer schedules followers are to adhere to throughout the day. In accordance with the DoD Instruction and AFI 1-1, care should be taken to ensure service members can abide by their religious tenants to the extent possible.

[19] 42 U.S.C. § 2000bb-1(b) (1993).

[20] Dep't of Defense, Instr. 1300.17, Accommodation of Religious Practices within the Military Services, 4(e)-(j) 10 Feb. 2009.

Establishment Clause

The Air Force's official policy is that it "will remain officially neutral regarding religious beliefs, neither officially endorsing nor disapproving any faith belief or absence of belief."[21] This is in line with the Establishment Clause's restriction on Congress' ability to establish a national religion. Prior to 1947, the Establishment Clause only applied to federal government action leaving the states with the option of having an established state religion.[22] With the expansion of the Establishment Clause to state governments through the Fourteenth Amendment, an opportunity for more litigation arose providing more fertile ground to define the Establishment Clause's boundaries.

In 1971, the Supreme Court issued its opinion in *Lemon v. Kurtzman* and thereby created a three-part Establishment Clause test.[23] The Court stated, "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion."[24] While the court focused on statutes, the same analysis can be used when reviewing regulatory provisions if those provisions are religious based and funded by congressional direction.[25]

Additionally, the Establishment Clause does not prohibit the display of religious items by service members. Religious items may be displayed in a service member's office or on a service member's vehicle without fear of appearing as a government endorsement of religion.[26] In fact, requiring the removal of religious messaging on a service member's personal vehicle in the form of a Christian fish would violate both the Free Speech and Free Exercise Clauses as described earlier.

And what about the placement of religious art, Christmas trees, menorah, other religious items, or the celebration of religious holidays on a military installation? The *Lemon* test allows for the placement of all these items on a military installation.[27] While such displays may lead to a limited number of complaints and threats of lawsuits their presence on a military installation does not violate the tenants of the Establishment Clause. Even though these displays are legal, the traditional Nativity display is disappearing out of concern that only one holiday is being supported over others. In an attempt to be fair, Chanukah candles are sometimes included, or a Star of David or other symbol of Judaism. However, should considerations also include the non-religious holiday of Kwanzaa alongside Christmas and Chanukah displays? In order to avoid all conflicts some military commanders have chosen to limit these displays to secular symbols such as snowflakes and snowmen or other generic devices to avoid offending anyone except those who dislike snow.

This leads us to a recent example. In September 2014 a young sergeant stationed at Creech Air Force Base was, for a time, unable to reenlist in the Air Force due to the omission of

[21] Revised Interim Guidelines Concerning Free Exercise of Religion in the Air Force (February 2006).

[22] *Everson v. Board of Education*, 330 U.S. 1 (1947).

[23] *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

[24] *Id.* at 612.

[25] *Hein v. Freedom from Religion Foundation*, 551 U.S. 587 (2007) (holding taxpayers do not have standing when discretionary dollars are used by the executive branch to fund religious institutions or purposes absent specific legislative authorization.).

[26] *See* Fitzkee, *supra* note 11.

[27] *See, e.g.*, Religious Displays on Military Installations, Op. JAG, Air Force, 2013-8 (9 April 2013).

the words "so help me God" in the enlistment oath.[28] The sergeant had struck the phrase "so help me God" from the oath of enlistment and was subsequently denied reenlistment by his commander. Although the phrase was optional in previous Air Force Instructions, the latest iteration had struck out the option.[29] The sergeant's plight appeared on national news and resulted in negative attention for the Air Force. Upon evaluating the situation, the Air Force was quick to change the rules allowing the optional language again.

Another example that may be encountered is found in military dining facilities. Inside the dining facilities it is common for a table to be set in honor of missing comrades. The table contains many symbols of significance. A single rose, spilled salt, an upside down glass, all are symbols used to remind military members of missing and fallen brethren. A Bible is placed on the corner of the table in many of these displays. The military commander will likely be confronted with the issue of whether the Bible should be on the table. In this case, such a display should survive constitutional muster under the *Lemon* test. If anything, the military commander might order the display of other religious texts, such as the Koran or Talmud, to create a more inclusive display.

Military Chaplains

The curious position of military chaplains does not seem to square with the Supreme Court's Establishment Clause test. Such a position provides a ready example of the conflict brought about under the current interpretation of the free exercise and establishment clauses.[30] To resolve this issue, an analogy may be made to the employment of chaplains by legislative bodies. In 1983, the Supreme Court determined that based on the long history and tradition of chaplains being employed by legislatures that their employment did not offend the Establishment Clause.[31] Military chaplains share a similar history and tradition in the military. The employment of chaplains by the military first occurred in 1776 when the Continental Congress provided for the appointment of chaplains to the military with a $20 monthly base salary.[32] To this day Chaplains continue to honorably serve in the armed forces at what may be, thankfully, a slightly higher salary.

A NEW METAPHOR

When it comes to achieving military mission success, people are the most important factor. The people who come together under a command bring with them a diverse range of beliefs regarding both church and state. This diversity brings with it the challenge of negotiating the line between church and state. Some individuals practice a religious belief that guides everything they do in their lives while others have a less demanding faith. Added to the mix are others that may have no religious belief system at all. Given such a diverse group, where does the metaphorical line separating church and state really occur? The answer is that no such clear separation actually exists.

The people who come together under a command bring with them a diverse range of beliefs regarding both church and state. This diversity brings with it the challenge of negotiating the line between church and state.

[28] *See* Losey, *supra* note 1.

[29] U.S. Dep't of Air Force, Air Force Instr. 36-2606, Reenlistment in the U.S. Air Force para. 5.6 (9 May 2011).

[30] *See Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 309 (1963) (Stewart, J., dissenting).

[31] *Marsh v. Chambers*, 463 U.S. 783 (1983). *See also, McCreary County v. ACLU*, 545 U.S. 844, 875 (2005)

[32] Journals of Congress: Containing Proceedings from Sept. 5 1774 to Jan. 1 1776 (Vol. 1).

Avoiding the use of cliché phrases such as "separation of church and state" will alleviate confusion when providing advice. Such over simplifications may be more apt to lead to decisions that violate the Free Speech and Free Exercise Clauses while attempting to comply with the Establishment Clause. It is best remembered that while the Air Force, as a component of the federal government, cannot endorse a religion it does not mean that religion is to be driven from the public fora.

In order to achieve the right balance it is more appropriate to think of the line separating church and state in terms of a shoreline rather than an unmovable wall between the two. A visit to a shoreline greets the observer with a constantly changing boundary between the sea and land. Following such an analogy, waves of religious revival occur individually and culturally at different times and those waves may temporarily wash over the shores of the state. At other times, like an expansion of the shoreline by volcanic eruption, an eruption of state power can displace the seas of the church. As new ideas are developed and cultural norms and beliefs continue to develop, the shoreline between church and state will change over time much like shorelines are constantly changing in nature.

Furthermore, the water near the shoreline will have a higher concentration of sand mixed within it than the water found farther out to sea. A similar situation occurs on land. The sand comprising the land at the shoreline will hold a higher saturation of water than the land further inland. This intermingling of sand and sea is similar to what is encountered in the intersection of church and state. While the state is prohibited from establishing a religion, certain elements of traditional religion do influence and become part of the state. This occurs because the state is a man-made creation and will reflect the society that created it. As such, the state will be influenced by the religious beliefs of those people of conscious who run and serve the state, influencing both domestic and foreign policy. Likewise, certain aspects of the state do, over time, appear as part of the church. The state's influence on the church can be found in the manner in which the church is structured and how the church engages in its various callings.

CONCLUSION

Given the changing nature of the shoreline of church and state, it is best to team with the Chaplains Corps when advising the military commander. While history has shown that to some extent there is always an intermingling of church and state, the extent of the intermingling ebbs and flows with the facts and time. In order to ensure that the best advice can be delivered regarding appropriate intermingling at the time the advice is given, it is best to meet with the chaplain before presenting a military commander with a list of options. The phrase "separation of church and state," which has become a sophist cliché, can only lead to confusion and potentially a violation of the Free Speech and Free Exercise Clauses. To ensure mission focused guidance that meets the requirements of the Establishment Clause and protects service member's rights, the use of the shoreline metaphor presented in this article will provide an easily understood and more accurate image of this complex area of law. R

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Through the Cooperative Agreement Looking Glass

BY MAJOR JENNIFER S. AARON[1]

> "When I use a word," Humpty Dumpty said in rather a scornful tone, "it means just what I choose it to mean—neither more nor less."[2]

The Sikes Act, 16 U.S.C. § 670a-670o, authorizes the Department of Defense (DoD) to enter into "cooperative agreements" with states, local governments, Indian tribes, and non-governmental organizations and individuals for the maintenance and improvement of natural resources located on or off military installations (e.g. wetlands protection and management, protection of coastal and marine resources, fish and wildlife management, threatened and endangered species management, forest management, and the like).[3] However, there are no regulations governing 16 U.S.C. § 670c-1(c) cooperative agreements. Without such guidance, the DoD has resorted to applying 31 U.S.C. § 6305 Federal Grant and Cooperative Agreement Act (FGCA) requirements to them.[4] This policy is misguided because the DoD is blurring the once clear definition of assistance instruments under the FGCA. More importantly, it makes it incredibly difficult for DoD organizations to execute Sikes Act agreements. To make matters worse, Congress codified the DoD's wrong-step in the 2015 National Defense Authorization Act (FY15 NDAA).[5] While both 16 U.S.C. § 670c-1(c) and 31 U.S.C. § 6305 use the same "cooperative agreement" terminology, they are not talking about the same kind of instrument. Nobody has said it better than Mr. Gregory L. Fronimos, an attorney at the former Air Force Center for Engineering and the Environment, when he wrote, "The use of the term 'cooperative agreement' in the Sikes Act was an unfortunate and unintentional use of a contracting term of art."[6]

[1] Thanks to Mr. Gary Stuebben for his inspiration and expertise.

[2] Carroll, L., & Gardner, M., The Annotated Alice: Alice's Adventures in Wonderland & through the Looking Glass (1960).

[3] 16 U.S.C. § 670c-1(a).

[4] *See* Dep't of Def. Man. 4715.03, Integrated Natural Resources Management Plan (INRMP) Implementation Manual Encl. 7, para. 1C (25 Nov. 2013) [hereinafter DoDM 4715.03].

[5] Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, H.R. 3979 sec. 312(c)(2), 113th Cong. (2014) [hereinafter NDAA]. The misstep is discussed in detail later in this article.

[6] Memoranda of Agreement under the Auspices of the Sikes Act, HQ AFCEE/JA, February 2000. (AFCEE is now the Air Force Civil Engineer Center or AFCEC.)

FEDERAL GRANT AND COOPERATIVE AGREEMENT ACT (FGCA)

The FGCA was enacted to distinguish Federal assistance relationships from Federal procurement relationships.[7] Cooperative agreements under the FGCA are specific legal instruments used to provide assistance to states, local governments, and other recipients and articulate the relationship between the Federal Government and those other entities.[8] Under 31 U.S.C. § 6305, an agency uses

> "a cooperative agreement as the legal instrument reflecting a relationship between the United States Government, and a State, a local government, or other recipient when (1) the principal purpose of the relationship is to transfer a thing of value to the State, local government or other recipient to carry out a public purpose of support or stimulation authorized by a law of the United States **instead of** acquiring (by purchase, lease, or barter) property or services for the direct benefit or use of the United States Government and (2) substantial involvement is expected between the executive agency and the State, local government or other recipient when carrying out the activity contemplated in the agreement" (emphasis mine).

The DoD's implementing regulations for the FGCA are at part 21 of Title 32, Code of Federal Regulations (DoD Grants and Cooperative Agreement regulations (DoDGARs) 32 C.F.R. § 21.640 defines cooperative agreement as a legal instrument that is consistent with 31 U.S.C. § 6305.

[7] S. Rep. 97-413, 97th Cong., 1982.

[8] *Id.*

SIKES ACT

In contrast, under the Sikes Act, the term "cooperative agreement" is understood to mean documents in which Federal and State agencies mutually agree in principle on wildlife programs.[9] It is an instrument used to acquire goods and natural resources management services for the direct benefit or use of the government.[10] However, the nature of what a Sikes Act "cooperative agreement" is remains unknown. It is not a conventional procurement instrument; that would be a Federal Acquisition Regulation (FAR) contract. It is also not an assistance instrument because the principal purpose of the instrument is to acquire property or services for the direct benefit or use of the government. 31 U.S.C. § 6303 requires the use of a conventional procurement contract for that purpose.[11]

TERMINOLOGY CONFUSION

Using the same terminology created great confusion. Congress tried to clarify its intent as to the use of the term "cooperative agreement" via amendment. The legislative history of the 1982 Sikes Act amendments, indicates that a "cooperative agreement" under the Sikes Act is a different agreement than a "cooperative agreement" under 31 U.S.C. § 6305. Specifically the 1982 bill amended section 101 of the Sikes Act to "clarify that any cooperative plans agreed to for military reservations will not be, nor treated as, cooperative agreements to which the Federal Grant and Cooperative Agreement Act of 1977 applies."[12] Consequently, 16 U.S.C. § 670c-1(c) used to state: "Cooperative agreements and interagency agreements entered into under this section shall be subject to the availability of funds and shall not be considered, nor be treated as, cooperative agreements to which chapter 63 of Title 31 applies."[13] Unfortunately, the bill explained what a Sikes Act Cooperative Agreement is not, and failed to state what a Sikes Act cooperative agreement is.

[9] *Id.*

[10] 16 U.S.C. § 670c-1(a) and (b) (2014).

[11] *See also* 32 C.F.R. § 22.205(a).

[12] S. Rep. 97-413, 97th Cong., (1982).

DoDI 4715.03, March 18, 2011, Enclosure 1, paragraph 1(k) added some clarity with the following statement: "Conventional procurement methods, as well as cooperative agreements pursuant to section 670c-1 of the Sikes Act, may be used to accomplish work identified in installation [Integrated Natural Resources Management Plans] INRMPs."[14] Unfortunately, it also failed to state what the nature of a Sikes Act cooperative agreement is.

The DoD tried to clear up this confusion with Department of Defense Manual (DoDM) 4715.03. It states, "These [Sikes Act] cooperative agreements or IAGs are not considered, nor treated as, cooperative agreements to which chapter 63 of Title 31, U.S.C.…applies."[15] It then immediately contradicts itself in the very next sentence: "The DoD Grants and Cooperative Agreement regulations in part 21 of Title 32, Code of Federal Regulations…do apply to Sikes Act cooperative agreements."[16] It is antithetical to state that the underlying law does not apply, but that law's implementing regulations do apply.

The DoD may have looked to 32 C.F.R. § 21.110(a) for justification. 32

[13] NDAA, *supra* note 5.

[14] U.S. Dep't of Def. Instr. 4715.03, Natural Resource Conservation Program Encl. 1, para. 1(k) (18 Mar. 2011).

[15] DoDM 4715.03, *supra* note 4.

[16] *Id.* This is also the case with 10 U.S.C. § 2684a(c). Prior to the FY12 NDAA modification, it read, "Chapter 63 of title 31 shall not apply to any agreement entered into under this section." The FY12 NDAA modified it to read, "Notwithstanding chapter 63 of title 31, an agreement under this section that is a cooperative agreement or a grant may be used to acquire property or services for the direct benefit or use of the United States Government." In other words, this modification contradicts 31 U.S.C. § 6303 by stating that under this section, agreements that are not cooperative agreements by definition under the Federal Grant and Cooperative Agreement Act and the DoDGARs (because they are for the direct benefit of the United States Government) may nonetheless be governed by the DoDGARs.

C.F.R. § 21.110(a) states, "The DoD Grant and Agreement Regulations (DoDGARs) apply to all DoD grants and cooperative agreements." However, 32 C.F.R. 21.130(b) defines cooperative agreement exactly the same as 32 C.F.R. § 21.640 (as a legal instrument that is consistent with 31 U.S.C. § 6305). Therefore, this rationale is flawed because as discussed above, a Sikes Act cooperative agreement is not a cooperative agreement to which chapter 63 of Title 31 should apply.

CONCLUSION

Ultimately, the DoDM has confused Sikes Act instruments with assistance instruments, and the ramifications go far beyond a philosophical legal matter. It makes it so the Award and Administration requirements of 32 C.F.R. Part 22 apply to 16 U.S.C. § 670c-1 procurements, including use of a Grants Officer (32 C.F.R. § 22.605). This makes it very difficult for many DoD organizations to use their 16 U.S.C. § 670c-1 authority. Few DoD organizations have grant officers so the organizations may have the authority to enter into Sikes Act cooperative agreements, but have no means to do so. They are forced to use another agency, such as the Army Corps of Engineers which requires a large administrative charge. In addition, the requiring organization faces the possibility that the agencies that do have grants officers will not be willing to take on the additional work.

Ultimately, the DoDM has confused Sikes Act instruments with assistance instruments, and the ramifications go far beyond a philosophical legal matter.

The DoDM effectively turned Sikes Act cooperative agreements into 31 U.S.C. § 6305 cooperative agreements when there was explicit language in 16 U.S.C. § 670c-1(c) stating the contrary. The DoDGARs should only apply to 31 U.S.C. § 6305 cooperative agreements (and other non-procurement based arrangements listed in 32 C.F.R. § 21.110(b)). The DoD is essentially jamming a round peg into a square hole by applying it to Sikes Act cooperative agreements. In this case, doing so has broken the peg. Sikes Act cooperative agreements are not usable tools for most DoD organizations.

Rather than clear up the confusion by defining what the nature of a Sikes Act cooperative agreement is, section 312(c)(2) of the FY15 NDAA, takes the opposite approach and reverses the 1982 Sikes Act Amendment discussed earlier. In fact, it takes the same approach as the FY12 NDAA did with 10 U.S.C. § 2684a (see footnote 16). It modified 16 U.S.C. § 670c-1(c) to read, "Notwithstanding chapter 63 of title 31, United States Code, a cooperative agreement under this section may be used to acquire property or services for the direct benefit or use of the United States Government." This bill causes 16 U.S.C § 670c-1(c) and 31 U.S.C. § 6305 to be antithetical. The Sikes Act now allows cooperative agreements to be used to acquire property or services for the direct benefit of the United States while 31 U.S.C. § 6303 states they cannot be used for that purpose. It will confuse grants officers by telling them they can now use 31 U.S.C. § 6305 cooperative agreements when the direct benefit is for the United States Government, despite the clear prohibition of this in 32 C.F.R. § 22.205(a).

Instead of expanding the sphere of confusion and making Sikes Act cooperative agreements very difficult for DoD organizations to execute, the DoD and Congress should have kept Sikes Act cooperative agreements and 31 U.S.C § 6305 cooperative agreements separate and distinct. To keep the instruments and definitions consistent, Congress should have defined the nature of Sikes Act cooperative agreements and should not have passed section 312(c)(2) of the FY15 NDAA. In spite of the FY15 NDAA being passed; the DoD should amend the DoDM to clarify that Sikes Act cooperative agreements are outside the scope of chapter 63 of Title 31.

NDAA Updates for Contract and Fiscal Law

BY MAJOR JANET C. EBERLE

The Fiscal Year 2015 NDAA contains two significant updates in the area of contract and fiscal law.

Each year the National Defense Authorization Act (NDAA) impacts how we operate by mandating new procedures, providing new authority, or even prohibiting actions by the Department of Defense. The Fiscal Year 2015 NDAA contains two significant updates in the area of contract and fiscal law. It increases funding thresholds for military construction and provides permanent authority for the Commercial Items Test Program (CITP).[1]

MILITARY CONSTRUCTION PROJECTS

A military construction project includes "all military construction work… necessary to produce a complete and useable facility or a complete and useable improvement to an existing facility…."[2] Military construction projects fall into three categories based on their total funded cost.[3] First there are projects specifically authorized by Congress in the Military Construction Appropriation (MILCON). The Service Secretaries include these proposed projects in their budget submission to the President.[4] Second the Air Force Facility Management Division (AF/A7CF) manages unspecified Minor Military Construction (UMMC) projects. Annually, they request a prioritized list of proposed UMMC projects and determine which will be funded for the year.[5] Finally, 10 U.S.C. § 2805 authorizes the Secretary of the Air Force to

[1] Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, H.R. 3979, 113th Cong. (2014).

[2] 10 U.S.C. § 2801(b) (2008).

[3] *See* 10 U.S.C. §§ 2802, 2805 (2013). For a discussion of funded vs. unfunded costs, *see* U.S. Dep't of Air Force, Instr. 32-1021, Planning and Programming Military Construction (MILCON) Projects Attch. 1, (31 Oct. 2014) [hereinafter AFI 32-1021] and Chapt. 8, Cont. & Fiscal L. Dep't, The Judge Advoc. Gen.'s Legal Center & Sch., U.S. Army, Fiscal Law Deskbook (2014).

[4] 10 U.S.C. § 2802 (2014).

[5] AFI 32-1021, *supra* note 3, para. 4.4.

carry out Operations and Maintenance (O&M) funded military construction projects.[6] Authority to approve O&M funded military construction projects can be delegated to the installation level.[7]

Prior to the Fiscal Year 2015 NDAA, minor military construction projects costing up to $750,000 were funded with O&M funds. Projects up to $2,000,000 were funded with UMMC funds. If the project was solely intended to correct a life, health, or safety deficiency, projects up to $3,000,000 could be funded with UMMC. Projects over $2,000,000; or $3,000,000 when correcting a life, health, or safety deficiency; were funded with MILCON.[8] Section 2802 of the Fiscal Year 2015 NDAA increased the funding thresholds for O&M and UMMC funded projects. Now, O&M funded military construction projects can have a total funded cost up to $1,000,000. The threshold to fund UMMC projects increased to $3,000,000, and up to $4,000,000 for UMMC projects to correct a life, health, or safety deficiency.[9]

The increase in the total funded cost of a military construction project for O&M or UMMC funded projects allows more projects to be approved at a lower level. Projects that previously had to compete for UMMC funding may now be funded at the installation level. Additionally, fewer projects will require specific Congressional approval and can be managed at the Headquarters Air Force Level. However, until Guidance Memoranda are issued for the governing instructions reflecting the change in the thresholds, approval authorities remain at previous levels.[10]

SIMPLIFIED ACQUISITION PROCEDURES AND THE COMMERCIAL ITEMS TEST PROGRAM

The Federal Acquisition Regulation (FAR) allows for contracting by sealed bid, competitive negotiations, or simplified acquisition procedures.[11] The Competition in Contracting Act (CICA) authorizes the use of simplified acquisition procedures for purchases below the simplified acquisition threshold (currently $150,000) because CICA's drafters recognized the cost of conducting full competitions for low priced procurements often exceeds the savings competition can produce.

In 1996, the Clinger-Cohen Act provided temporary authority for the use of simplified acquisition procedures for commercial item purchases up to $6.5 million and $12 million when the commercial item purchase is for a contingency operation or to defend against or recover from a nuclear, biological, chemical, or radiological attack.[12] The FAR refers to this authority as the Commercial Items Test Program (CITP).[13] It was routinely renewed[14] until 2012 when it lapsed, but it was revived by the Fiscal Year 2013 NDAA. The CITP was set to expire on January 1, 2015.[15]

The Fiscal Year 2015 NDAA eliminated the expiration date for the CITP, making the authority permanent.[16] While the FAR still indicates the CITP authority expired on January 1, 2015, the Department of Defense issued a class deviation striking FAR 13.500(d), the paragraph reflecting the expiration date.[17] By making the CITP permanent, units will be able to continue to utilize the more efficient simplified acquisition process for most commercial items a typical wing might require.

IMPACT

The changes to military construction funding authority and commercial item contracting in the Fiscal Year 2015 NDAA increase flexibility in accomplishing the mission. By increasing the cost of military construction projects that can be funded by O&M or UMMC funds, more projects can be funded and approved at lower levels, making the process faster. By making the CITP a permanent authority, it eliminated uncertainty and the potential for the program to not be renewed. R

[6] 10 U.S.C. § 2805(c) (2014).

[7] U.S. Dep't of Air Force, Instr. 32-1032, Planning and Programming Appropriated Fund Maintenance, Repair, and Construction Projects para. 1.6.1, (17 Oct. 2014) [hereinafter AFI 32-1032].

[8] 10 U.S.C. § 2805 (2014).

[9] Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, H.R. 3979, 113th Cong. (2014).

[10] AFI 32-1032, *supra* note 7, Table 1.1.

[11] FAR pts. 13-15 (2014).

[12] Kate Manuel, Cong. Research Serv., R40516, Competition in Federal Contracting: An Overview of the Legal Requirements 15 (2011).

[13] FAR 13.500 (2014).

[14] Manuel, *supra* note 12.

[15] National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, § 822 (2012).

[16] Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, H.R. 3979, 113th Cong. (2014).

[17] Memorandum from The Director of Defense Procurement and Acquisition Policy, U.S. Dep't. of Def., to Service Deputy Assistant Secretaries of Acquisition and Procurement, et al., subject: Class Deviation—Permanent Authority for Use of Simplified Acquisition Procedures for Certain Commercial Items (24 Dec. 2014).

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UNDAUNTED

The Real Story of America's Servicewomen in Today's Military

BY MAJOR DAVID R. SCHICHTLE JR.

Undaunted peers into the personal and professional lives of four women at different stages of their military careers.

Candice was determined to stick it out, even though the comment from a mentor echoed in her head: A happy military marriage, a successful career, and well-adjusted kids—you can only have two of the three.

Tanya Biank's *Undaunted*[1] peers into the personal and professional lives of four women at different stages of their military careers. Each Marine and Soldier faces personal and professional challenges that are intrinsically unique to women in uniform, yet universal to all women in fast paced and highly stressful careers. Brigadier General Angela Salinas is a single Hispanic Marine with over 30 years of military service. Brigadier General Salinas entered the Corps at a time when women were trained on the proper application of lipstick during basic training. Through the years, Brigadier General Salinas defied the odds and filled a number of highly visible positions before becoming the first female to command the exclusively male recruiting depot in San Diego. Army Lieutenant Bergan Flannigan completed four years of Reserve Officer Training Corps (ROTC) while attending our nation's oldest private military college, Norwich University, before commissioning to the Army Reserve

[1] Tanya Biank, Undaunted: The Real Story of America's Servicewomen in Today's Military (2013).

Students practice basic marksmanship techniques (U.S. Marine Corps photo by Sgt. Tyler L. Main/Released)

and deploying to Afghanistan where she was struck by a roadside bomb and nearly lost her life. Then there is Marine Sergeant Amy Stokley, who chooses to forego any personal life whatsoever to become a drill instructor. Finally, Army Major Candice O'Brien is a high speed mother of two in a dual military marriage…on the brink of divorce.

Tanya Biank is both an author and journalist whose previous works served as the basis for the popular Lifetime Television Network show, "Army Wives." As a military daughter, an Army wife, and an embedded writer with deployed military troops, Biank understands current military familial concerns. In *Undaunted*, Biank follows the aforementioned women over the course of five years while documenting their personal and professional successes and failures.

Biank eloquently illustrates each woman's personal run-ins with both the actual and perceived "good old boys club." She further delves into their resolve to never appear weak to their male counterparts while simultaneously maintaining some degree of femininity. Finally, Biank follows these women from their place of duty to their homes and documents the impact their professional choices make on their personal lives. All of this is to accurately present these day-to-day challenges as "the issues most servicewomen deal with daily and out of the public view." The *Undaunted* women make difficult choices and directly confront "the issues facing so many U.S. *servicewomen* today, from *marriage* and *motherhood* to career trajectories and life goals." Although Biank may have set out to pen a book addressing the issues that military *women* face, she created a product for anyone with leadership aspirations that transcend gender boundaries.

STRONG WOMEN, DIFFICULT DECISIONS, AND INEVITABLE CONSEQUENCES

Biank's purpose is clear in highlighting the struggles these women have in balancing their personal lives with the desire to succeed in a world dominated by masculinity. She accurately portrays the very real truth that while success in the workplace is an attainable goal, it will likely come at a price at home.

General Salinas's career in the Marine Corps serves as a centerpiece to Biank's argument as Salinas encounters resistance, both subtle and overt, to the Commandant's decision to select her as the first woman to command the all-male Marine Corps Recruit Depot (MCRD) in San Diego. Given the military's stance on sexual discrimination, her male military peers instead pointed out that she had no combat or deployment experience. While it was true that General Salinas had never served in a deployed location, her peers failed to see that for most of Salinas's 32 years of service, women had been barred from combat situations. It wasn't until the Iraq War, that the face of war changed to include female service members. However, by that point, General Salinas was a colonel charged with running the Marine Corps manpower and recruiting program and unable to deploy. In fact, it was General Salinas' prior work with the manpower and recruiting program that led to her selection to command the MCRD. Conversely, it was the ban on women in combat that led to the aforementioned discrimination and resistance General Salinas was tasked with overcoming upon taking command of the MCRD.

Upon taking command of the MCRD, General Salinas immediately set up an appointment to visit with retired Marine Corps Lieutenant General Victor Krulak at his home. General "Brute" Krulak was a living legend in the Marine Corps for his service in WWII, the Korean War, and contributions to Vietnam. General Krulak was also a prior commander of the MCRD before retiring in San Diego. It was a well-known fact that without General Krulak's approval, no commanding officer of the MCRD would succeed. In fact, prior commanders failed to gain the support of the local community due solely to perceived levels of disrespect to General Krulak. Adding to the stress of any officer meeting General Krulak for the first time was General Salinas' knowledge that General Krulak had once written that "there were some not ready to fight, and this raises the troublesome, albeit delicate, question of women in uniform." One of Salinas's prior commanders tacitly agreed with this assessment when he ensured that Salinas reviewed Krulak's editorial on the issue of women in uniform.[2] Over the course of the following two years Krulak witnessed Salinas' dedication to the Corps and leadership as a commanding officer and at his 95th birthday conceded that she was the perfect general for the position.

While publicly General Salinas exuded honor, courage, and commitment, personally, she suffered a number of injuries related to years of road marches and runs. Prior to command-

[2] *Id*. Biank does not provide an extensive account of Krulak's personal views on military women. In Brian Mitchell's Women in the Military: Flirting with Disaster, at xi (1998), the assistant secretary of the Army for manpower criticized the Marine Corps as being less connected to society than the Army on women's issues. Krulak replied that the assistant secretary "summarily dismiss[ed] 222 years of sacrifice and dedication…dishonor[ing] the hundreds of thousands of Marines whose blood has been shed in the name of freedom" (internal citation omitted).

ing the MCRD General Salinas nearly separated from the Corps due to injuries for the simple fear of appearing weak by having much needed back surgery. Additionally, as one of only three female Marine generals in the Corps, Salinas had little opportunity to build friendships with similarly-situated colleagues. General Salinas explained one reason fellow high ranking female officers often avoided each other was a fear of appearing homosexual to their fellow officers. In sum, Salinas's particular hardships cannot logically be reversed and then be applied to military men; as such, Salinas's story serves as a compelling example furthering Biank's purpose.

In addition to fighting the "good-old-boy system," Biank also addresses the difficulties in maintaining a sense of femininity in today's military, yet another uniquely woman-centered issue. Both Lieutenant Flannigan and Sergeant Stokley balance incredibly unusual leadership challenges—whether it be guiding male troops through IED-laden streets or training the next enlisted women of the Marine Corps—while also maintaining traditional notions of womanhood.

These struggles are illustrated throughout the book by a variety of symbols and objects. For young Lt Flannigan, height assists to illustrate her interactions with a world dominated by men. During her ROTC scholarship, Lt Flannigan begins at the back of her ROTC flight due to her height. From there, Flannigan sees the rest of her flight as a block of faceless people. However, Lt Flannigan's leadership abilities set her apart, and she ultimately took her place as company commander in front of a row of six-foot males.

Additionally, Biank points out the struggle to be feminine in the face of dual or ambiguous military standards between the sexes. For example, various ROTC detachments allow female cadets to wear civilian dresses at military functions, but require their male counterparts to be in uniform. While West Point forbids this practice, Army regulations are ambiguous on the issue and defer to commander discretion. The differing standards here are not matters of life-or-death, but illustrate one instance of women being treated differently. On the other hand, men can escape unfair appraisals of their authority based on their outward appearance.

Lastly, Biank uses Lt Flannigan's stuffed animals as recurring objects throughout her journey from Norwich University to the streets of Afghanistan. These objects allude to the softer side of a woman determined to make a name for herself as an officer in the United States Army and reappear during significant events in Lt Flannigan's life. Both items were kept on her bed when she was a cadet, poised next to her M4 rifle on her bunk as she led her all-male platoon as a military police (MP) commander in Afghanistan, and sat by her hospital bed after she lost her leg in an IED explosion.

Sgt Stokley serves as the second example of a woman making choices to ensure good military discipline while maintaining her sense of femininity. Through Sgt Stokley, Biank illustrates a persistent issue: women not only face uneven-handed treatment from men, but they also face almost unattainable expectations from female peers. While training to become a Marine Corps Drill Instructor (DI), Sgt Stokely learns that when male and female Marines are evaluating each other, men generally feel uncomfortable correcting women for fear of sexual harassment. As an instructor in the training environment, Sgt Stokley is criticized by fellow female DI's for the length of her nails. While the male DI's are oblivious to the regulation on female nails, her female peers chided her for being too feminine. Rather than shy away from such criticism, Sgt Stokley owned her femininity while proving her strength and abilities by ensuring her company was rated as "Outstanding." Further, Sgt Stokely impressed upon her trainees, "We are Marines and we are women—not men."

Doctor Author Melissa S. Herbert's extensive studies of women in military service reinforce Stokely's experience: women are compelled to strike a balance between the masculine and feminine demands of their assigned work roles.[3] Nevertheless, accomplishments are often overshadowed by a notion that distinction was bestowed because of *being* a woman, not because of *demonstrated merit*. Through the aforementioned women, Biank successfully highlights challenges that apply to women service members, and indeed furthers her stated objectives. However, Biank uses other examples that, upon careful inspection, sometimes diverge from her overall objective.

UNDAUNTED'S PURPOSE: CONNECTED AT TIMES, SOMETIMES FALLING SHORT

While strict adherence to a thesis is by no means required, Biank tends to label various experiences as problems only applying to women service members, when they could apply to both sexes to a great extent. This is quite prevalent in her exploration of MAJ O'Brien and her failing marriage. Without a doubt,

[3] Melissa S. Herbert, Camouflage isn't Only for Combat: Gender, Sexuality, and Women in the Military 77 (1998).

MAJ O'Brien is an accomplished intelligence officer, but Biank belabors the point on how difficult O'Brien's life is without her deployed husband. This, coupled with the pressures she puts on herself to be the best and her abilities to multi-task are the recurring themes. Entire passages are devoted to O'Brien carting her sick children to daycare while having to negotiate a physical fitness test in the morning, and how her health takes a toll. However, Biank does little to demonstrate how this is uniquely a servicewoman issue. The trials that O'Brien faces many times equally apply to men, women, military, and civilians alike.

In fairness, Biank does discuss an issue unique to military families—MAJ O'Brien's husband is diagnosed with post-traumatic stress disorder (PTSD). But Biank presents the issue in a way that diminishes *Undaunted*'s otherwise serious literary potential by portraying O'Brien's husband as a monster and then by injecting political bias. To illustrate, O'Brien eagerly watches President Obama's "monumental" inauguration with promises of wars ending, an end to death, and reunification of families everywhere. But her husband then ruins the occasion by entering the room with "clenched fists" and a "rigid jaw," while ranting his own "extremist views." Biank describes how O'Brien's "blue eyes widened, as if she were witnessing an accident," and she is left to watch the inauguration alone with her vision blurred from her tears. Fortunately, passages reading like this, where Biank lets her work devolve into a scene fit for an episode of *Army Wives* is the exception.[4] Critic Sandi E. Cooper reviews Biank's work in *Army Wives* and describes the drum-pounding point that seeps into *Undaunted*: troubled military marriages are the norm and not the exception, and they remain "private, secret areas of personal suffering" for women.[5] PTSD in military service is a serious topic, but Biank treads on presenting it in a trite and melodramatic way.

It is difficult and politically unsavory to provide any viewpoints which might contradict Biank's subject matter—that of positive female role models in the military. In fact, critical reviews of *Undaunted* are almost nonexistent; amazon.com,[6] NBC's "The Cycle,"[7] and Hispanic.com's informal reviews shower Biank with accolades and restate the book's factual basis.[8] Only Cooper criticizes Biank's choices in organizational structure and describes it as "border[ing] on the chaotic," containing paragraphs that "ricochet back and forth from one life story to another."[9] Those words accurately describe *Undaunted*'s absolute lack of transitions between chapters as the reader is jarringly dropped into random times in these four women's lives. If *Undaunted* was reorganized to ease these sudden organizational shifts, and Biank would simply acknowledge that some of the challenges she describes are not exclusive to women, these criticisms would be moot. By doing so, Biank would not only widen her thesis, but she would likely appeal to a male readership who would greatly benefit from *Undaunted*'s military leadership insights.

CONCLUSION

At first glance, *Undaunted* may seem to target a select audience of female military members, but that is simply not the case. Shown through a prism of four military women, Biank eloquently presents decades of struggles they have endured proving themselves in service to the United States. The *Undaunted* women display their courage in the face of issues that historically have befallen only their gender. But as the barriers among the sexes have come down throughout the years, the benefits *and* burdens of military service are being shared as well. *Undaunted* reaches out to all—military and civilian, men and women alike—and provides lessons on challenges, professional and personal choices, and decision-making that are critical to military leadership. R

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[4] *See generally Army Wives* (Lifetime Television Network June 3, 2007, *et seq*).

[5] Sandi E. Cooper, The Fires at Home, *in* 24 Women's Review of Books, at 31 (2007) (reviewing Tanya Biank, Under the Sabers: The Unwritten Code of Army Wives (2006)).

[6] *See generally* Editorial Reviews of Tanya Biank, Undaunted: The Real Story of America's Servicewomen in Today's Military, http://www.amazon.com/Undaunted-Americas-Servicewomen-Todays-Military/dp/0451239229 (last visited Sept. 11, 2013), for recent columnist and layperson reviews.

[7] *See generally* The Cycle Staff, *Today on The Cycle: Undaunted*, http://www.nbcnews.com/id/50706273/t/today-cycle-undaunted/#.UjEX5j8Qr3l (last visited Sept. 11, 2013).

[8] *See* Interview of Author Tanya Biank, http://hispanic.com/press-releases/itemlist/tag/major%20general%20angela%20salinas (last visited Sept. 11, 2013), for an in-depth assessment of selecting Brigadier General Salinas as a Hispanic role model in *Undaunted*.

[9] Cooper, *supra* note 4, at 31.

Ethics Corner

Editor's Note: This is the first in what will be a reoccurring series in *The Reporter*. Our ethics corner will include a list of the substantiated professional conduct violations approved by TJAG during the previous quarter. In this issue, the cases listed below are all of the substantiated professional conduct violations from 2014. Each of these cases was thoroughly investigated and the findings were approved and forwarded by TJAG to the appropriate authority for action. The purpose of publishing the results of these cases is to ensure we as a professional community understand the rules we practice under and how those rules are being applied.

CASE 1

Following a court-martial, a case paralegal prepared an AF Form 1359, *Report of Result of Trial*, and DD Form 2707, *Confinement Order*. The AF Form 1359 incorrectly named the detailing authority. The trial counsel did not read anything more than the summary of the charge, plea, findings, and sentence before he signed AF Form 1359, and failed to notice the name of the detailing authority was wrong. Also, the trial counsel did not read the DD Form 2707 thoroughly enough to have noticed that Block 4 misstated the "Offenses/Charges of UCMJ Articles Violated." AFRPC 1.1, *Competence*, requires a lawyer have "the legal knowledge, thoroughness, and preparation reasonably necessary for representation." AFRPC 1.3, *Diligence*, requires a lawyer "act with reasonable diligence and promptness in representing a client." Diligence requires and adequate level of preparation so that the lawyer may competently represent the client. In this case, the trial counsel did not employ even a basic method or procedure that met the standard of a competent or diligent Air Force lawyer; namely trial counsel failed to reasonably review the official documents for completeness and errors prior to signing them. As a result, the trial counsel violated AFRPC 1.1, *Competence,* and AFRPC 1.3, *Diligence*. These findings were forwarded to the supervisor for action. An additional lawyer violated AFRPC 1.3, *Diligence*, and AFRPC 5.3, *Responsibilities Regarding Nonlawyer Assistants*, when the trial counsel failed to correct AF Form 1359, *Report of Result of Trial*, despite being aware of an error. The findings were forwarded to the MAJCOM SJA for action.

The trial counsel's supervisory lawyer violated AFRPC 5.1, *Responsibilities of Supervisory Lawyer*, and AFRPC 5.3, *Responsibilities Regarding Nonlawyer Assistants*, when the supervisory lawyer failed to reasonably ensure the trial

Photo ©iStock.com/_ba_

counsel and case paralegal complied with the rules and standards during post-trial processing. The applicable part of Rule 5.1 reads as follows: "…(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure the other lawyer conforms to the rules." The applicable part of Rule 5.3 reads as follows: "With respect to a paralegal or other nonlawyer employed or retained by, associated with, or supervised by a lawyer: (c) a lawyer shall be responsible for conduct of such a person that would be a violation of these rules if engaged by a lawyer if: (2) the lawyer has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated, but fails to take remedial action." The findings were forwarded to the MAJCOM SJA for action.

CASE 2

Prior to a court-martial, a Special Victims' Counsel (SVC) advised a client that the SVC would not be attending the trial in person due to a personal conflict, but that if the client needed anything to let the SVC know. The SVC did not notify supervision and did not make arrangements for another SVC to attend the trial in their absence. The court-martial started with several motions that involved the client. Following the motions hearing, the client contacted the SVC and requested that the SVC attend the remainder of the court-martial. The SVC attended the remainder of the court-martial proceedings.

AFRPC 1.3, *Diligence*, requires a lawyer "act with reasonable diligence and promptness in representing a client." In this case, the SVC should have attended the motions hearing and court-martial proceedings to protect the rights of the client. The SVC should have acted

with commitment and dedication to the interests of the client over personal interests, and zealously advocated on behalf of the client. The SVC violated AFRPC 1.3, *Diligence*, when the SVC failed to act with reasonable diligence and promptness in ensuring proper representation of the client during the trial t when the SVC determined they could not attend the trial because of a conflict.

The SVC also violated AFRPC 8.4 (b) and (c) *Misconduct*, when the SVC provided false information to a supervisor regarding the absence at the court-martial. A criminal act that reflects adversely on the lawyer's honesty is a violation of AFRPC 8.4 (b). If the lawyer's conduct involves dishonesty, but is not a crime, it is a violation of AFRPC 8.4 (c).

CASE 3

A Staff Judge Advocate violated AFRPC 5.1, *Responsibilities of Supervisory Lawyer*, when the SJA incorrectly advised a subordinate lawyer that an Article 64(a) review did not need to discuss the accused's assignment of errors.

CASE 4

A Staff Judge Advocate violated Air Force Rules of Professional Conduct (AFRPC) 8.3, *Reporting Professional Misconduct*, when the SJA failed to report AFRPC violations by a subordinate lawyer. The findings were forwarded to the MAJCOM SJA for action.

CASE 5

A Deputy Staff Judge Advocate violated AFRPC 1.1, *Competence*, and AFRPC 1.3, *Diligence*, because the DSJA assisted trial counsel and assistant trial counsel during the court-martial when the DSJA was prohibited from any involvement in the court-martial. The findings were forwarded to the MAJCOM SJA for action.

CASE 6

A lawyer violated AFRPC 8.4(b) and (c), *Misconduct*, when the lawyer made several false official statements to law enforcement personnel. The findings were reported to the state licensing authority.

CASE 7

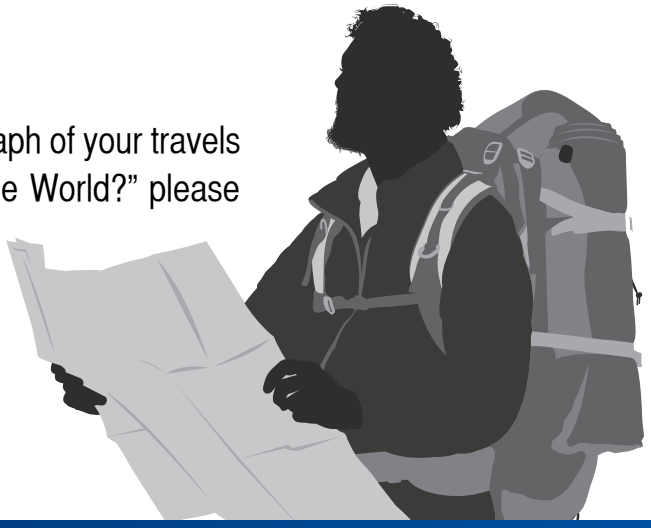
A lawyer violated AFRPC 8.4(b) and (c), *Misconduct*, when the lawyer wrongfully used their Government Travel Card (GTC) and filed a fraudulent travel voucher. The findings were reported to the state licensing authority.

Lady Justice statue at the Air Force Judge Advocate General's School (U.S. Air Force photo/Ms. Thomasa Paul)

WHERE IN THE WORLD?

Photo courtesy of Major Matthew E. Dunham

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



Answer: Castle Neuschwanstein in Bavaria, built in the late 1880s by King Ludwig II (inspired Walt Disney's model for Cinderella's castle).

Honor Guard (U.S. Air Force photo/Airman First Class Ryan Conroy)