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The Reporter

The Judge Advocate General's Corps

Challenging Ideas

for Challenging Times

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Major Shane Cohen, AFLOA/JACE-CR, makes his daily trip to work at the Central Criminal Court of Iraq Liaison Office during his deployment last year to Task Force 134, Baghdad, Iraq.

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

Message from the Commandant

Colonel David C. Wesley

This edition of The Reporter provides our readers with a variety of practical articles from the remarkable breadth of our practice of law in support of commanders and their Airmen. As with every issue, we've selected topics of current interest and they've been analyzed by members of our Corps who've made the time to share their experience and scholarship to enhance the quality of our practice.

Lieutenant Colonel Bruce Cox argues for simplification of damages computation in wrongful death actions brought in the federal system, providing an interesting historical assessment of the law in this area and a clear recommendation on the way forward. Colonel Steve Ehlenbeck reviews the existing rules concerning court member sentencing and asks readers to consider the ways in which judge-alone sentencing might provide more just (or perhaps, more consistent) results in courts-martial. Major Joe Kiefer makes some persuasive arguments for more effective use of technology in the courtroom. Mr. Dennis Matthews, Jr., challenges us to continue strengthening Victim-Witness Assistance Programs.

This edition also contains a very accessible introduction to the Sunni-Shi'ite struggle by Lieutenant Colonel Adam Oler, giving us key insights into this global flashpoint. Lieutenant Colonel Lee Gronikowski provides a handy overview of the Air Force Professional Responsibility Program, describing some of the more common ethics complaints issues dealt with in Air Force cases. And Captain Kenneth Artz shares leadership lessons he learned at Joint Task Force - Guantanamo Bay -- lessons we can all apply wherever we serve.

I'll close this, my last Commandant's Corner, with my heartfelt thanks to the amazing members of the faculty and staff of the JAG School. These officers, NCOs, and civilian members of the Corps have taken superb care of your JAG School while improving the quality and scope of JAG Corps instruction delivered around the clock and around the world. To have been in their company, to have witnessed their devotion to your education and training, and to have shared in the camaraderie that is daily life at the JAG School truly are humbling and inspirational to me. On behalf of my family, I thank every member of the faculty and staff, past and present, for service and fidelity to the highest standards of scholarship and the profession of arms. Their daily effort has written the very future of our Corps and, if I am any judge, it will be one in which we can all take great pride!

A Brief Introduction to the Sunni-Shi'ite Struggle: Six Key Points

by Lieutenant Colonel Adam Oler*

Generations of judge advocates and paralegals have deployed to protect freedom in the Mideast, including Desert Shield/Desert Storm, Operations OEF/OIF, and the decade of engaged legal support in between. Lieutenant Colonel Oler has devoted significant self-study to building expertise in the area, enhancing the experience gained on many deployments. An understanding of the history and strongly held beliefs of people in the region will similarly provide context for legal counsel and a more purposeful deployed experience.

Overview

In a New York Times OpEd published on 14 May 2008, Mideast and globalization expert Thomas L. Friedman asserted that the most-important security challenge facing our next President will pit America and its Sunni Arab allies against Shi'ite Iran and its surrogates.[1] At the operational level, American forces in Iraq are already caught in the midst of a seemingly endless Sunni-Shi'ite ground war.[2] At the strategic level, key Sunni leaders in the Mideast are convinced Iran is pursuing regional hegemony, and fear Teheran plans to destabilize their countries through incitement of Shi'ite minorities.[3] Meanwhile, fighting within Lebanon and between the Lebanese-based Hezbollah[4] and Israel, as well as the violence in and around Gaza, are all manifestations of Iran's increasing influence and power.[5]

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[1] Thomas L. Friedman, *The New Cold War*, N.Y. TIMES, May 14, 2008. In the OpEd, Friedman adds Israel to the U.S. and Sunni side and includes Syria and Iran's "non-state allies, Hamas and Hezbollah" as their New Cold War opponents. In 1989, Friedman wrote the classic book FROM BEIRUT TO JERUSALEM (1990), which won the National Book Award for nonfiction. He is now perhaps best known as the author of THE WORLD IS FLAT, A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY (2005), most recently re-issued in July 2007 as THE WORLD IS FLAT VERSION 3.0. The OpEd may be read at: http://www.nytimes.com/2008/05/14/opinion/14friedman.html?_r=1&ref=todayspaper&oref=slogin (last visited May 14, 2008). Once thought impossible, a U.S.-Sunni Arab-Israeli alliance against Shi'ite Iran is arguably now plausible. *See* Raja Kamal, *Emerging Sunni-Israeli Alliance Holds Hope for Mideast Peace,* Mar. 29 2007, http://belfercenter.ksg.harvard.edu/publication/1671/emerging_sunniisraeli_alliance_holds_hope_for_mIbideast_peace.html (last visited Jun. 1, 2008).

[2] Of all the Sunni-led attacks since OIF began, the February 2006 bombing of the Askariya Shrine in Samarra was arguably the most provoking. One of Iraq's two vice presidents exclaimed, "This is as 9/11 in the United States." Ellen Knickmeyer and K.I. Ibrahim, *Bombing Shatters Mosque in Iraq: Attack on Shiite Shrine Sets Off Protests, Violence*, WASH. POST, Feb. 23, 2006, available at http://www.washingtonpost.com/wp-dyn/content/article/2006/02/22/AR2006022200454.html (last visited May 30, 2008). The al-Qaeda bombing was designed to spark an all-out Shi'ite-Sunni war. *Ibid.* Subsequent blasts in June 2007 brought down the ninth century mosque's twin minarets. *See US Military Stays on Alert after Iraq Mosque Attack*, REUTERS, 13 June 2007, http://www.alertnet.org/thenews/newsdesk/L13537047.htm (last accessed May 19, 2008). Whether the present conflict is branded a civil war or not, the Askariya attack triggered a wave of ongoing sectarian violence that has killed tens of thousands of people. *Ibid.*

[3] Martin Walker, *The Revenge of the Shia*, THE WILSON QUARTERLY (Autumn 2006), http://www.wilsoncenter.org/index.cfm?fuseaction=wq.essay&essay_Ibid=202986.

[4] Hezbollah is a Shi'ite organization that emerged in the 1980s during Israel's occupation of South Lebanon. For a detailed study, *see* AUGUSTUS RICHARD NORTON, HEZBOLLAH, (2007).

[5] *See, e.g.,* Jocelyne Zablit, *Lebanon in Turmoil as Hezbollah takes West Beirut*, MIDDLE EAST TIMES, May 18, 2008, http://www.metimes.com/Politics/2008/05/09/lebanon_in_turmoil_as_hezbollah_takes_west_beirut/afp/ (last visited May 30, 2008). *See also*, Marie Colvin, *Hamas Wages Iran's Proxy War on Israel*, THE TIMES ON LINE, Mar. 9, 2008, http://www.timesonline.co.uk/tl

To help explain the roots of the intensifying Sunni-Shi'ite struggle, this article briefly describes six key turning points in the region's history. To be clear, it is a concise review and necessarily gives only brief mention to some very important events. Nonetheless, it will hopefully furnish a framework to help understand the operational and strategic challenges we face.

Key Point 1: The Sunni-Shi'ite struggle began as a dispute over whether Ali Ibn Talib, the Prophet Mohammad's cousin and son-in-law, should succeed him

The Prophet Mohammad was born around 570 in the Arabian town of Mecca.[6] Although fortuitously born into the ruling Quaraysh tribe,[7] Mohammad's father died before his birth and his mother died soon after.[8] Another member of the Quaraysh, an uncle named Abu Talib, raised Mohammad as well as Talib's own son, Ali.[9] Eventually Mohammad married a successful businesswoman named Khadija[10] and, although Mohammad had no surviving sons, he and Khadija had a daughter named Fatima.[11]

Mohammad's ministry started in 610 AD when, at the direction of the archangel Gabriel, he began to recite the verses that became the Holy Koran.[12] Mohammad's revelations were not immediately accepted[13] and for the next twenty years he struggled against the pagan Quaraysh. Ali, the Prophet's cousin and an early convert,[14] was instrumental in helping him escape to Medina in 622 after Mecca grew too dangerous.[15] Once in Medina, Ali married Fatima; they had two sons, Hassan and Husayn.[16]

Mohammad finally prevailed over the Meccans in 630,[17] but died just two years later.[18] Shortly before his death he famously said of Ali, "whoever has me as a master has him as a master."[19] A minority of the Prophet's followers concluded Ali was thus his intended heir and declared themselves "Shi'atu Ali" or "Shi'ites," meaning Ali's Party.[20] They gave Ali the title

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/news/world/Middle_east/article3512014.ece. Iran also trains other Shi'ite militias including the Badr Brigade and Mahdi Army in Iraq, the Army of Muhammad in Pakistan, and other forces. VALI NASR, THE SHIITE REVIVAL: HOW CONFLICTS WITHIN ISLAM WILL SHAPE THE FUTURE 223 (2006).

[6] BARNABY ROGERSON, THE PROPHET MOHAMMAD, A BIOGRAPHY 43 (2003). The exact year of Mohammad's birth is debated by historians. Albert Hourani says he was born around 570. ALBERT HOURANI, A HISTORY OF THE ARAB PEOPLES 15 (1991). Eminent historian Bernard Lewis gives the year as "probably 571." BERNARD LEWIS, THE MIDDLE EAST, A BRIEF HISTORY OF THE LAST 2,000 YEARS 52 (1995). Reza Aslan gives an interesting explanation why 522 is a likely date and in so doing gives a good introduction to why some facets of the Prophet's life are subject to debate. REZA ASLAN, NO GOD BUT GOD 18-19 (2005).

[7] ROGERSON, *supra* note 6, at 22. Rogerson writes, "To be born of the Quaraysh of Mecca was as good a start in life as was possible in central Arabia." Mohammad's immediate clan was the Banu Hashime. Jordan's King Abdullah is directly descended from Mohammad and the Banu Hashime; his country's official name is "The Hashemite Kingdom of Jordan." THE CONCISE ENCYCLOPEDIA OF ISLAM (Cyril Glasse ed., 1991), s.v. "Hashemite." *See also*, the Royal Jordanian Government's homepage, http://www.kinghussein.gov.jo/hashemites.html.

[8] ASLAN, *supra* note 6, at 19. Mohammad was six when his mother died. Ibid.

[9] ROGERSON, *supra* note 6, at 74. At one point, Mohammad took in his younger cousin Ali to assist Abu Talib.

[10] *Id.* at 71.

[11] *Id.* at 74. Mohammad had two sons die in childhood.

[12] KAREN ARMSTRONG, ISLAM, A SHORT HISTORY 3-4 (2002). ROGERSON, *supra* note 6, at 88-92. The word "Koran" means "recitation" in Arabic. *Id.* at 4.

[13] ROGERSON, *supra* note 6, at 96-103.

[14] NASR, *supra* note 5, at 37

[15] ASLAN, *supra* note 6, at 49. NASR, *supra* note 5, at 37, explains how Ali risked "death by sleeping in the Prophet's bed in order to fool assassins as Muhammad escape[d] from Mecca to Medina." The Emigration (*Hajj*) of 622 is critical for Sunnis and Shi'ites alike because it marks the beginning of the Islamic calendar. ARMSTRONG, *supra* note 12, at 12.

[16] ROGERSON, *supra* note 6, at 139.

[17] ARMSTRONG, *supra* note 12, at 20.

[18] *Id. at* 20.

[19] NASR, *supra* note 5, at 37-38. This statement was made at the Khumm Pool (*Ghadir Khumm*). Ibid.

[20] LEWIS, THE MIDDLE EAST, *supra* note 6, at 64. *See also*, NASR, *supra* note 5, at 38, spelling the term "Shiite Ali" and defining it as "Ali's partisans". By contrast, the majority of Muslims are known as Sunnis, based on their practice of following the Sunna--meaning tradition--of the Prophet.

"Imam," meaning "leader of the community"[21]; he has been known to Shi'ites as "Commander of the Faithful" ever since.[22]

The Sunni-Shi'ite struggle formally began when the Sunnis chose the Prophet's father-in-law, Abu Bakr, to be the first "caliph" instead of Ali.[23] The Sunnis also selected the next two caliphs, Umman and Uthman, neither of whom met with Shi'ite approval.[24] It was not until 656 that Ali finally assumed the caliphate. By then the Muslim community (the Umma) had split with Uthman's descendents, the Umayyads, who challenged Ali from their new base in Damascus.[25]

At this point open warfare commenced over control of the Umma.[26] In 661, Ali negotiated an agreement with the Umayyads[27] but this, in turn, angered a radical Islamic sect known as the Kharajites, one of whom murdered Ali in the newly built garrison city of Khufa.[28] Ali's followers buried him in nearby Najaf, establishing the first great Shi'ite shrine.[29]

Key Point 2: The defeat of Shi'ite forces at the Battle of Karbala in 680 is of paramount importance because of what it symbolizes for Shi'ites

Despite Ali's murder, the Shi'ites did not abandon their goal of leading the Umma.[30] In 680, Shi'ites living in Khufa persuaded Ali's son Husayn to lead them against the Umayyads.[31] With his family and a small force in tow, Husayn crossed the desert and confronted the much larger Umayyad army at Karbala.[32] None of the promised forces from Khufa materialized and Husayn, along with most of his family were slaughtered.[33] All Muslims consider Husayn's murder despicable,[34] but to Shi'ites it represents the epitome of martyrdom.[35] In their view, Husayn died in a noble effort to salvage Islam from its wayward practices.[36] Husayn's followers buried his body at Karbala, where another sacred Shi'ite shrine now stands.[37]

The Karbala massacre's impact on Shi'ism is extraordinary. For Shi'ites, the failure of Husayn's Khufa allies to assist him was an unforgivable sin to be passed from generation to generation.[38] Not long after the battle, Shi'ites began mourning their collective failure in what eventually evolved into the highly ritualized festival of Ashura.[39] This event is fundamental to Shi'ites and is often celebrated in parades and marches during which males beat themselves and draw their own blood to symbolize their

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ARMSTRONG, *supra* note 12, at 54-55. HOURANI, *supra* note 6, at 37.

[21] HEINZ HALM (*trans.* ALLISON BROWN), THE SHI'ITES, A SHORT HISTORY 3 (2007).

[22] HALM, *supra* note 21, at 7. According to Halm, today's Shi'ites usually refer to Ali by his full title, *amir al-Mu'minin*, vice his actual name. Ibid.

[23] HOURANI, *supra* note 6, at 22. Abu Bakr's daughter, A'isha' was the Prophet's favorite wife and was with him when he died. ARMSTRONG, *supra* note 12, at 38. The men who followed the Prophet as leaders of the Muslim community assumed the title caliph--from the Arabic word khalifa-- meaning deputy. HALM, *supra* note 21, at 3. Although the Shi'ites favored Ali, Ali himself purportedly agreed to Abu Bakr's selection. NASR, *supra* note 5, at 35.

[24] HALM, *supra* note 21, at 5. For Sunnis, the first four caliphs are central to Islam's cultural, political and jurisprudential development and are thus known as the "Rashidun"--the Rightly Guided Ones. ARMSTRONG, *supra* note 12, at 20-22. LEWIS, THE MIDDLE EAST, *supra* note 6, at 62. HOURANI, *supra* note 6, at 25. PETER MANSFIELD & NICOLAS PELHAM, A HISTORY OF THE MIDDLE EAST 14 (2d ed. 2004).

[25] LEWIS, THE MIDDLE EAST, *supra* note 6, at 64. HALM, *supra* note 21, at 6.

[26] ARMSTRONG, *supra* note 12, at 28-99. This conflict is known as the First Fitnah. Ibid.

[27] HOURANI, *supra* note 6, at 25.

[28] HUGH KENNEDY, THE GREAT ARAB CONQUESTS, HOW THE SPREAD OF ISLAM CHANGED THE WORLD WE LIVE IN 135 (2007).

[29] NASR, *supra* note 5, at 55.

[30] ARMSTRONG, *supra* note 12, at 30. Ali's eldest son Hassan demurred and spent the rest of his days in Medina. Ibid.

[31] HALM, *supra* note 21, at 9.

[32] *Id.* at 9-16.

[33] ARMSTRONG, *supra* note 12, at 37. HALM, *supra* note 21, at 15-66. LEWIS, THE MIDDLE EAST, *supra* note 6, at 67. JOHN L. ESPOSITO, ISLAM: THE STRAIGHT PATH 43 (1998).

[34] ARMSTRONG, *supra* note 12, at 37.

[35] NASR, *supra* note 5, at 57. Imam Husayn is "known as the Lord of the Martyrs." *Id.* ESPOSITO, *supra* note 33, at 43.

[36] NASR, *supra* note 5, at 59.

[37] *Id.* at 55.

[38] HALM, *supra* note 21, at 42. NASR, *supra* note 5, at 44, 48.

[39] HALM, *supra* note 21, at 42.

inherited guilt.[40] Fairly or not, the introduction of suicide bombing into the region--largely thought anathema to Islam--is sometimes cited as an extension of Shi'ism's cult of martyrdom.[41]

Key Point 3: Most Shi'ites revere the eight Imams who came after Ali and Husayn and they form a critical historic lineage in their faith

Shi'ites believe their third and fourth Imams (Husayn and his son, Ali) died at Karbala.[42] The next seven Imams, all descendents of Ali, lived under the control of the Sunni caliphs.[43] In 750 the Umayyad Dynasty fell and was replaced by the greatest of the Arab Empires, the Abbasids.[44] For the next 508 years, a Sunni Arab always remained caliph, either in Baghdad or nearby Samara.[45]

Despite their perpetual subjugation, the remaining Imams continued to advance Shi'ism's development as a unique faith.[46] Of particular importance was the sixth Imam, Ja'far Al-Sadiq (d. 765), who established the main Shi'ite school of law.[47] The Ja'fari school is similar to the four main Sunni schools,[48] but

[40] Halm provides a very detailed description of the evolution of Ashura (and western observations of it) over the past centuries. HALM, *supra* note 21, at 42-85. CNN chief international correspondent Christiane Amanpour's August 2007 documentary entitled *God's Warriors* shows parts of an Ashura festival in Iran and discusses the topic of Shi'ite martyrdom with a veteran of the 1981-88 Iran-Iraq war. It is available at: http://www.cnn.com/video/#/video/world/2007/08/15/gods.warriors.martyrdom.cnn (last viewed Jun. 1, 2008).

[41] The first suicide attack in the Middle East occurred in 1981 when a Shi'ite bombed the Iraqi Embassy in Beirut. Two years later another Shi'ite suicide bomber attacked the U.S. Embassy there. Thomas Joscelyn, *Death by Car Bomb in Damascus*, THE WEEKLY STANDARD, *Vol. 13, Issue 23 (*25 February 2008), *available at* http://www.weeklystandard.com/Content/Public/Articles/000/000/014/760sezag.asp?pg=1 (last visited May 30, 2008). *See also,* Mahan Abedin, *Britain, Iran Playing with Shi'ite Fire*, ASIA TIMES, Oct. 25, 2005, *available at* http://www.atimes.com/atimes/Middle_East/GJ01Ak04.html. According to journalist-author Robin Wright, over 3,400 Americans have been killed in suicide bombings since 1983. Robin Wright, *Since 2001, a Dramatic Increase in Suicide Bombings*, WASH POST, 18 April 2008, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2008/04/17/AR2008041703595_pf.html (last visited May 30, 2008). The suicide attack on the U.S. Marine barracks on 23 October 1983 killed 241 Marines, Navy corpsmen, and soldiers, the most US servicemembers killed on a single day since Iwo Jima. *Id.* Shi'ite concepts of martyrdom particularly unnerve anti-nuclear proliferation advocates who fear a nuclear-armed suicide bomber would be immune to deterrence. *See,* Noah Feldman, *Islam, Terror and the Second Nuclear Age*, N.Y. TIMES MAGAZINE, Oct. 29, 2006, *available on* the Council for Foreign Relations website at: http://www.cfr.org/publication/11838/islam_terror_and_the_second_nuclear_age.html?breadcrumb=%2Fbios%2F11780%2Fnoah_feldman%3Fgroupby%3D1%26hIbide%3D1%26Ibid%3D11780%26page%3D2. On the topic of martyrdom, Vali Nasr has written, "Shias believe that martyrdom is the highest testament to faith, following the example of the imams, a deed that will gain the martyr entry into paradise just as it will strengthen Shiism. Sunnis historically frowned on this belief, but now the most extremist Sunnis seem to have embraced an especially grim version of it in the form of suicide bombing." NASR, *supra* note 5, at 57.

[42] HALM, *supra* note 21, at 15. There were reports at the time Ali survived, but this does not seem to be the accepted position today. *Id*.

[43] *Id.* at 31.

[44] HUGH KENNEDY, WHEN BAGHDAD RULED THE WORLD 10 (2004). LEWIS, THE MIDDLE EAST, *supra* note 6, at 73-74.

[45] *Id.* at 145-49, 202. MONIKA GRONKE (TRANS. STEVE RENDALL), IRAN, A SHORT HISTORY FROM ISLAMIZATION TO THE PRESENT 54 (2008).

[46] HALM, *supra* note 21, at 33.

[47] *Id.* at 21-24. KNUT S. VIKOR, BETWEEN GOD AND THE SULTAN, A HISTORY OF ISLAMIC LAW 127 (2005).

[48] *Id.* at 129, 139. Some may argue the most-important difference is the continued Shi'ite practice of ijtihad, the independent interpretation of problems not addressed by the original sources of Islamic law. Unlike the Sunni Abbasids, who are often cited as having ruled the "gates of ijtihād closed," thereby limiting jurisprudential development, Shi'ite legal scholars continue its practice. LEWIS, THE MIDDLE EAST, *supra* note 6, at 226. ESPOSITO, *supra* note 33, at 85. HALM, *supra* note 21, at 126. At least one scholar has recently argued ijtihad's gates never really closed for the Sunnis. NOAH FELDMAN, THE FALL AND RISE OF THE ISLAMIC STATE 134 (2008).

Ja'fari law provided the unique foundation needed for Shi'ism's continued development.[49]

Most of today's Shi'ites pay great reverence to the 11 Imams who came after Ali.[50] Known as "Twelver Shi'ites," they consider the Twelfth Imam alive but hidden in an occult status pending his messianic reappearance as the Mahdi.[51] Some smaller Shi'ite sects recognize interim Imams and are generally known by which Imam they chose to follow.[52] All told, 120 million of the world's 1.4 billion Muslims are Shi'ites, of whom 80% are Twelvers.[53]

Key Point 4: The sixteenth century Safavid Empire was instrumental to Shi'ism's expansion and development into a regional power

In the 100 years following Mohammad's death, Arab armies emerged from the Arabian Peninsula to complete one of the greatest territorial conquests in history.[54] By the mid-eighth century they controlled vast swaths of territory from Spain to India.[55] To understand the geographic fault lines of the Sunni-Shi'ite struggle today, it is vital to appreciate that when the Arab forces conquered the former Byzantine territory in the Levant,[56] Egypt, and much of North Africa in the seventh century, they not only spread Islam, but brought Arab language and culture as well.[57] Egypt, which was largely Christian and administered in Greek when the Muslims first arrived,[58] is now a distinctly Arab nation.[59] In the east the invaders also succeeded in spreading Islam, but Arabic never successfully spread into Iran.[60] Instead, Persian language (Farsi), culture and administration survived.[61] An Iranian nationalism evolved soon

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[49] ESPOSITO, *supra* note 33, at 85. THE CONCISE ENCYCLOPEDIA OF ISLAM, *supra* note 7, s.v. "Ja'afar as-Sadiq."

[50] HALM, *supra* note 21, at 30. Of note, the tenth and eleventh Imams are buried in the Askariya Mosque. NASR, *supra* note 5, at 55. This is the mosque bombed by Al Qaeda in February 2006 and June 2007. *See* n.3, *supra*.

[51] HALM, *supra* note 21, at 34-37. Muqtada Al Sadr's Mahdi Army is named after the Twelfth Imam. NASR, *supra* note 5, at 130.

[52] For example, the ruling family of Syria, the Assads, are Alawites. WILLIAM L. CLEVELAND, A HISTORY OF THE MIDDLE EAST 386 (2000). HALM, *supra* note 21, at 174. Some do not consider them Shi'ite, although they emerged from the line of the fifth Imam. THE CONCISE ENCYCLOPEDIA OF ISLAM, *supra* note 7, s.v. "Alawi." More recently, they have been deemed "*bona fida* Shia Muslims" by Lebanese and Iranian Shia leaders. NASR, *supra* note 5, at 61. This may help explain Syria's surprisingly cozy relationship with Iran. Another branch of Shi'ism are the Ismailis who follow Ja'far's son, Ismail and are known as Seveners because some view Ismail as the seventh Imam. *Id.* at 75. The Druze are another Ismaili sub-group. they mostly reside in Lebanon and Israel. THE CONCISE ENCYCLOPEDIA OF ISLAM, *supra* note 7, s.v. "Druze."

[53] The percentage of Shi'ites in the world varies by source; the figure 80% is from Global Security.org. http://www.globalsecurity.org/military/intro/islam-ithna-ashari.htm. According to that site, "Twelvers are by far the largest group of Shiite Muslims, because the Iranians are Twelvers. Perhaps eighty percent of the Shiis are Twelvers. Twelvers constitute ninety percent of the modern population of Iran and fifty-five to sixty percent of the population of Iraq. Twelver Shiites are the majority in Iran, Iraq, Azerbaijan and also have substantial populations in Turkey, Pakistan, Lebanon, Syria, India, Afghanistan and Bahrain." Citing the COLUMBIA ELECTRONIC ENCYCLOPEDIA, NASR, *supra* note 5, at 34, n.2, states, "Shias number from 130 million to 195 million people, or 10 to 15 percent of the total [number of Muslims]." According to the CIA World Fact Book, Iran is 89% Shi'ite and 9% Sunni. https://www.cia.gov/library/publications/the-world-factbook/geos/ir.html (last visited May 30, 2008). Adherents.com states Iran's percentage of Shi'ites in 1999 was 93%. http://www.adherents.com/largecom/com_shiite.html (last visited May 30, 2008).

[54] KENNEDY, THE GREAT ARAB CONQUESTS, *supra* note 28, *at* 363.

[55] *Id.* at 363-66.

[56] The term "Levant" normally incorporates today's Israel, Syria, Lebanon, Jordan, and the Palestinian Territories--it can also include Egypt and southern Turnkey. *See, e.g.,* http://www.fsmitha.com/defini.html *and* http://highered.mcgraw-hill.com/sites/007299634x/student_view0/chapter6/key_terms.html (both last visited on May 30, 2008).

[57] This key point is explained well in Kennedy's *The Great Conquests.* In an earlier work, Mansfield describes the degrees of assimilation in terms of "Arabization" versus "Islamization." MANSFIELD, *supra* note 24, at 15-18.

[58] KENNEDY, THE GREAT ARAB CONQUESTS, *supra* note 28, *at* 139-42.

[59] *Id.* at 199.

[60] *Id.*

[61] *Id.*

after the conquests[62] and, although the area east of the Zagros mountains accepted Islam, it did not in any sense become Arab.[63]

In the early fifteenth century, the Safavid Dynasty from northern Iran and Azerbaijan[64] established a new, distinctly Persian state[65] roughly around today's Iranian borders.[66] In 1509 they made the critical decision to forcibly convert the majority Sunni population of Iran to Shi'ism.[67] The Sunni Ottoman Empire to their west felt threatened by the Safavids, resulting in growing hostility between the sects.[68] Early in their reign, the Safavids conquered the Shi'ite holy sites in Iraq and a "seesaw struggle" ensued with the Ottomans for control.[69] Finally, in 1638, the Ottomans prevailed and successfully held the territory until World War I.[70] The legacy of sectarian divisions created during the Ottoman-Safavid hostilities are central to the crises confronting Iraq today.[71]

Although they lost control of the Shi'ite holy sites in Iraq, by the time the Safavids collapsed in 1722, they had successfully spread their faith across Persia.[72] As a result, Iran today is approximately 90% Shi'ite[73] and the political and cultural center of world Shi'ism.[74] It also maintains extremely close ties with Shi'ite shrines and populations in Iraq.[75] In short, by adopting Shi'ism 500 years ago, the Safavids extended the Sunni-Shi'ite intra-religious struggle to a conflict with distinct nationalistic overtones that reverberate strongly in our own time.

Key Point 5: The Sunnis reject many Shi'ite practices and, in the view of many, continue to oppress Shi'ite populations in Sunni-led countries

For most Sunnis, worshiping at shrines, deifying Imams, and practicing Ashura rituals constitutes apostasy.[76] The key tenet of Islam for the Sunni majority is that "there is no god but God and Mohammad is the Prophet of God."[77] The practices unique to Shi'ism are seen as detracting from this one great truth--

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[62] For example, the great Persian national epic, *the Shahnamah* was written several hundred years after the Arab conquests. GRONKE, *supra* note 45*, at* 34-35.

[63] *Id.* at 30-35. KENNEDY, THE GREAT ARAB CONQUESTS, *supra* note 28*, at* 110, 199.

[64] THE CONCISE ENCYCLOPEDIA OF ISLAM*, supra* note 7, s.v. "Safavid." THE CAMBRIDGE HISTORY OF ISLAM 398 (M. Hold, Ann K.S. Lambton and Bernard Lewis, eds*,* vol. Ia*,* 1978) asserting "the rise of the modern state of Iran dates from the establishment of the Safavid state in 907/1501."

[65] ESPOSITO, *supra* note 33, at 63. GRONKE, *supra* note 45, at 77.

[66] MANSFIELD, *supra* note 24, at 136-37. THE CAMBRIDGE HISTORY OF ISLAM, *supra* note 64, at 398.

[67] The Safavids executed those who refused to accept Shi'ism. CLEVELAND, *supra* note 52, at 54. *See also*, BERNARD LEWIS, ISLAM IN HISTORY: IDEAS, PEOPLE, AND EVENTS IN THE MIDDLE EAST 277, 292 (1993). MANSFIELD, *supra* note 24, at 136.

[68] CLEVELAND, *supra* note 52, at 54-55, 57. *See also,* CHRISTOPHER CATHERWOOD, A BRIEF HISTORY OF THE MIDDLE EAST: FROM ABRAHAM TO ARAFAT 126-27 (2006).

[69] CLEVELAND, *supra* note 52, at 57.

[70] *Id.* at 57-58.

[71] *Id.* at 57. CATHERWOOD, *supra* note 68, at 128.

[72] GRONKE, *supra* note 45*, at* 78-94. HOURANI, *supra* note 6, at 86.

[73] *See* note 53, *supra*.

[74] NASR, *supra* note 5, at 213. Nasr argues, "No other country in the Muslim world is so rife with intellectual fervor and cultural experimentation at all levels of society, and in no place in the Muslim word is modernity and its various cultural, political and economic instruments examined as seriously and thorough as in Iran. The cultural dynamism of the country will also be a force that will define the Shia revival." *Id.*

[75] NASR, *supra* note 5, at 213. Nonetheless, the extent to which Iraqi (Arab) Shi'ites are loyal to Iran is widely debated. *See e.g.*, Nathanial Rabkin*, Who Speaks for Iraqi Shi'ites? Not Iran's ayatollahs*, THE WEEKLY STANDARD, Dec. 17, 2007, *available at* http://www.weeklystandard.com/Content/Public/Articles/000/000/014/460zxoej.asp (last visited Jun. 1, 2008). During the Iran-Iraq War both sides misjudged how Shi'ite Arabs would react to the conflict. *See, e.g.,* KENNETH M. POLLACK, ARABS AT WAR: MILITARY EFFECTIVENESS, 1948-1991 183 (2004).

[76] ASLAN, *supra* note 6, at 181. LEWIS, ISLAM IN HISTORY, *supra* note 67, at 290-92.

[77] This key verse, known as the *Shahadah*, is sometimes translated as "There is no got but God, and Muhammad is God's Messenger." ASLAN, *supra* note 6, at 43. Shi'ites have a different profession: "There is no god but God, and Muhammad is his Prophet, and Ali is the executor of God's will." NASR, *supra* note 5, at 38.

especially through the use of visual symbols--by ostensibly impeding one's proper focus on God.[78] For centuries Sunni Arab leaders have used such differences as justification for oppressing Shi'ites under their control.[79] Recent examples of this mistreatment include Sadam Hussein's massacre of Shi'ites in 1991 following the First Gulf War,[80] Saudi Arabia's subjugation of Shi'ites following the Iranian Revolution in 1979,[81] continued Saudi efforts to change Shi'ite demographics near Yemen,[82] and domination of the Shi'ite minority by the Sunni government of Bahrain.[83]

Key Point 6: OIF brought a seismic change to the Sunni-Shi'ite balance of power that had existed for centuries

In 1798 Napoleon invaded Egypt,[84] marking the beginning of western colonialism in the Mideast.[85] Soon, the major European powers were scrambling to assert control over the entire region. Britain established itself as the primary power in most Arab areas and competed with Russia for control over Shi'ite Iran--or at least its resources.[86] Following World War I, Britain played the preeminent role in setting up the region's new political geography.[87] Arguably, much of today's upheavals can be ascribed to Britain's post-WWI decision to place (or keep) large numbers of Shi'ites under Sunni control. In fairness, it is unclear what other options Britain had. However, in creating Iraq the British chose to place large numbers of Arab Shi'ites under a Sunni king.[88] Iran remained

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[78] NASR, *supra* note 5, at 44. For a detailed, though polemical discussion of the religious differences between Sunnis and Shi'ites, *see Sunnis vs. Shi'ites: An Outline of the Difference Between the Sunnis and The Shi'ite In Matters of Faith and Doctrine*, ISLAMIC WEB, *available at* http://www.islamicweb.com/beliefs/cults/shia_vs_sunni.htm (last visited May 29, 2008). The tone of the article is extremist and in no way reflects the views of this author.

[79] NASR, *supra* note 5, at 94-104. *See also*, ARMSTRONG, *supra* note 12, at 110, noting the Ottoman massacres of Shi'ites within Ottoman territory. It must be noted that some scholars argue most Sunnis do not consider Shi'ites infidels. *See, e.g.,* Lionel Beehner, *Backgrounder: Shia Muslims in the Mideast*, COUNCIL ON FOREIGN RELATIONS, Jun. 16, 2006, *available at* http://www.cfr.org/publication/10903/shiite_muslims_in_the_Middle_east.html (last visited May 30, 2008).

[80] MANSFIELD, *supra* note 24, at 345, HALM, *supra* note 21, at 172, LEWIS, THE MIDDLE EAST, *supra* note 6, at 270. NASR, *supra* note 5, at 188 estimates tens of thousands of Shia were killed by Sadam during this period.

[81] YAROSLAV TROFIMOV, THE SIEGE OF MECCA: THE FORGOTTEN UPRISING IN ISLAM'S HOLIEST SHRINE AND THE BIRTH OF AL QAEDA 179-87, 198-201 (2007).

[82] Andrew Hammond, *Saudi Shi'ites oppose plans to settle Sunnis*, REUTERS INDIA, Feb. 18, 2008, *available at* http://in.reuters.com/article/worldNews/idINIndia-32014420080218 (last visited 30 May 2008).

[83] Carnegie Endowment for International Peace, Arab Reform Bulletin (Michele Dunne, Editor, Trans. Dar Al Watan), Vol. 3, Issue 4 (May 2005), *available at* http://www.carnegieendowment.org/publications/index.cfm?fa=view&id=16907&proj=drl (last visited May 30, 2008). *See also,* Mark Mackinnon, *Tiny Bahrain firmly in Tehran's Orbit: Iran Possesses enormous influence among Bahrain's Shia majority*, THE GLOBE AND MAIL, Feb. 12, 2007, *available at* http://www.theglobeandmail.com/servlet/story/RTGAM.20070212.wxiranbahrain12/BNStory/International/home/ (last visited May 30, 2008). The article notes that while 70% of Bahrain is Shi'ite, Sunnis dominate the state politically.

[84] LEWIS, THE MIDDLE EAST, *supra* note 6, at 283. HOURANI, *supra* note 6, at 265. For a concise, if colorful introduction to Napoleon's three years in the Middle East, see TERRY CROWDY & CHRISTA HOOK, FRENCH SOLDIER IN EGYPT 1798-1802: THE ARMY OF THE ORIENT (2003).

[85] MANSFIELD, *supra* note 24, at 44. *See also*, DAVID FROMKIN, A PEACE TO END ALL PEACE: THE FALL OF THE OTTOMAN EMPIRE AND THE CREATION OF THE MODERN MIDDLE EAST 27 (1989).

[86] LEWIS, THE MIDDLE EAST, *supra* note 6, at 285.

[87] FROMKIN, *supra* note 85, at 493-529, 538-39, 558-63. Britain's role (as well as France's and Russia's) in the region during and after WWI is a focal point of Fromkin's work, which is a superlative treatise on how the present Middle East came to be.

[88] FROMKIN, *supra* note 85, at 450. The monarch, King Faisal, was (like Jordan's king) a Hashemite. *Id. at* 562. The Hashemites ruled Iraq until 1958 when deposed by a coup. MANSFIELD, *supra* note 24, at 262. Several governments (all Sunnis) ruled Iraq from that point forward, with Sadam coming to power in 1979. LEWIS, THE MIDDLE EAST, *supra* note 6, at 37. A third Hashemite line, King Hussein and his son Ali, ruled the *Hijaz* and Arabian Peninsula until 1924 when the present house of Saud took power -- hence the name Saudi Arabia. MANSFIELD, *supra* note 24, at 185. CATHERWOOD,

independent and a monarchy survived there until the Iranian Revolution of 1979.[89] Since then, the country has been ruled by a Twelver Shi'ite theocracy.[90]

Until 2003, the Sunni-Shi'ite line of power remained unchanged as it had for centuries.[91] Shi'ites controlled Iran, Sunnis dominated the Arab Middle East. In fact, the last time a Shi'ite government completely controlled a major Arab country was 1171.[92] In 2005, however, US-sponsored elections in Iraq produced a Shi'ite government in that Arab country.[93] In the simplest terms,[94] this seismic change is at the root of current Sunni rejectionism in Iraq[95] and the cause of great consternation among Sunni-Arab leaders throughout the region.[96] While Shi'ites view developments in Iraq as liberation from years of Sunni oppression and the source of new empowerment, [97] Sunnis fear an emboldened Iran will destabilize the region's long-established balance of power.[98]

Conclusion

The six points discussed in this article provide a suggested framework for studying the Sunni-Shi'ite struggle. Certainly, developments in the Middle East are extremely complex--as the area's history demonstrates. In a region where "diplomacy is merely war by other means,"[99] there is no reason to believe the divide will be mended peacefully. What is clear is that the United States is now a party to the Sunni-Shi'ite struggle, and our involvement will require a better understanding of events occurring over 1300 years ago. Those same events are still very much on the minds of the participants, and ought to be on ours, too.

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supra note 68, at 185-85. CLEVELAND, *supra* note 52, at 226-27.

[89] GRONKE, *supra* note 45*, at* 116-25. MANSFIELD, *supra* note 24, at 329-30.

[90] CLEVELAND, *supra* note 52, at 410-35. GRONKE, *supra* note 45*, at* 131-39. For a discussion on important distinctions between what exists in Iran today and what Twelver Shi'ism traditionally holds, see ASLAN, *supra* note 6, at 189-93.

[91] CLEVELAND, *supra* note 52, at 57-58. Walker, *supra* note 4.

[92] Following Imam Ali's death in 661, there have been only two periods when Shi'ites controlled significant Arab territories. The first were the Buyids (932-1062) who, although the strongest power in the Abitibi realm, allowed a Sunni Arab to remain caliph. HOURANI, *supra* note 6, at 38-39. THE CAMBRIDGE HISTORY OF ISLAM, *supra* note 64, at 143-49. THE CONCISE ENCYCLOPEDIA OF ISLAM*, supra* note 7, s.v. "Buyids." The more interesting Shi'ite political force was the Cairo-based Fatimid Dynasty (909-1171) which established a caliphate rivaling the Sunni Abbasids. LEWIS, THE MIDDLE EAST, *supra* note 6, at 83-5. The ongoing battles between the Fatimids and Abbasids in the eleventh century created the "power vacuum" that allowed the First Crusade to successfully seize Jerusalem in 1099. CATHERWOOD, *supra* note 68, at 93-94. It was the great Kurdish General Saladin who defeated the Fatimids and returned Egypt to the Sunni fold. (Ibid. at 103-04). *See also*, Geoffrey Hindley, *A Brief History of the Crusades Islam and Christianity in the Struggle for World Supremacy* (London: Constable and Robinson, 2004), 91-92.

[93] NASR, *supra* note 5, at 185-210. Nasr's seventh chapter is entitled, "Iraq, the First Arab Shia State." *Id*. at 185.

[94] This article's length does not permit a detailed discussion of Sunni insurgents' motives or a discussion of splits among Shi'ite elements. For an example of how the latter issue has become increasingly important, *see* Sudarsan Raghavan, "Between Iraqi Shiites, a Deepening Animosity: Basra Offensive Inflamed Long-Standing Rivalry, Redefining Nature of Conflict," *The Washington Post*, 7 April 2008, http://www.washingtonpost.com/wp-dyn/content/article/2008/04/06/AR2008040602430.htm.

[95] NASR, *supra* note 5, at 200. Of the changes in Iraq, "Iraqi Sunnis' attitudes were from the outset shaped by their belief that they would be able to get back on to" Ibid.

[96] *See* Walker, *supra* note 4.

[97] *See, e.g.,* Neil MacFarquhar, *Saudi Shiites Look to Iraq and Assert Rights*, N.Y. TIMES, Mar. 2, 2005, *available at* http://www.nytimes.com/2005/03/02/international/middleeast/02shiites.html?scp=1&sq=Saudi+Shiites+Look+to+Iraq+and+Assert+Rights&st=nyt (last visited May 30, 2008). *See also*, Sami Moubayed, *The waxing of the Shi'ite crescent*, ASIA TIMES*,* April 20, 2005, *available at* http://www.atimes.com/atimes/Middle_East/GD20Ak01.html (last visited May 30, 2008).

[98] Howard LaFranchi, *As Mideast Realigns, U.S. Leans Sunni*, THE CHRISTIAN SCIENCE MONITOR, Oct. 9, 2007, *available at* http://www.csmonitor.com/2007/1009/p01s01-usfhtml.

[99] Paraphrased from DAVID L. LEWIS, GOD'S CRUCIBLE: ISLAM AND THE MAKING OF EUROPE, 570-1215 18 (2008).

Legal Assistance Notes

The Legal Assistance Brainstorming Conference was held 26-27 February 2008 in Kettering, Ohio. The session focused primarily on prioritizing the spending of $4 million during FY08. There were 20 attendees from base-level providers of legal assistance through HQ USAF/JA. Attendees categorized the most urgent and desired tasks to assist base-level office in fulfilling their legal assistance mission. Among the items forwarded to TJAG for approval:

- New legal assistance courses focusing on Estate Planning and Family Law.
- Funding furniture and equipment at the Joint Service Pentagon Legal Office.
- Comprehensive, centrally-located All States Guide to assist in identifying state specific laws. Although most information is available through various sources, attendees desired the information in a central, readily available location.
- Standardized self-service Kiosk set-ups that allow clients to electronically input data (e.g., POAs or will worksheets) and centralized client survey links.
- Updates to FLITE hardware and search engines as well as purchase of selected legal assistance resource materials.

There will be more information as these ideas are put into action. Continue to cross-flow your great ideas!
(Thanks go out to Captain Pete Kezar, 314 AW/JA, for submitting this piece as a Conference Attendee!)

Falcon Loans

The Air Force Aid Society began its new Falcon Loan Program available to Air Force members (and spouses with POAs) beginning in March 2008. The Falcon Loan is a loan of $500 or less for up to ten months that can be used for emergency needs such as basic living expenses (rent, utilities, food), car repairs, emergency travel, or other approved needs. The streamlined application process for a Falcon Loan requires no budget information, backup documentation, or First Sergeant/Commander approval. Minimal information required to process an allotment or Paymatic transaction (automatic withdrawal from bank account) and your signature is all that is needed to complete the application. Airmen can obtain a Falcon Loan in three easy steps-

1. Download the application off the AFAS website
2. Get your ID card and current LES
3. Go to your Airman & Family Readiness Center

The Falcon Loan is a complement to the Society's standard emergency assistance loan/grant program. Receiving a Falcon Loan does not make you ineligible to receive a standard Air Force Aid Society loan/grant while you are repaying your Falcon Loan. For more information on the Falcon Loan, please visit your Airman & Family Readiness Center or the AFAS website at www.afas.org.

DL Wills Practice Alert

The Air Force drafts nearly 70,000 wills annually using the DL Wills Program. The latest version is 9.0 (May 2007). If you have version 8.0 or earlier, please upgrade to version 9.0. Offices are authorized to upgrade all licensed copies to the latest version. Go to the AFJAGS webpage (https://aflsa.jag.af.mil/AF/lynx/afjags/) and under "Fields of Practice," select "Legal Assistance," then "Will Drafting," then "Wills," and click on Wills Software icon. You must have administrator rights to install on your local hard drive.

If your office desires additional licenses, please follow the instructions in the Wills folder (Updating DL Wills in NETRAMS). A full inventory will be completed in early summer 2008, in time to purchase addition licenses if needed with end of year funds. Please note AFJAGS can only purchase licenses for ACTIVE DUTY units; Air Reserve and National Guard units will still have to purchase individual licenses.

Serviceman's Group Life Insurance and Minors

Please remember that for many Air Force clients, SGLI is the bulk of their estate. Many will want to leave these insurance proceeds to minor children in the event of their death. If an Airman names their minor child as a beneficiary, the child cannot inherit the SGLI proceeds until he turns 18. SGLI will not pay directly to a minor. While the Airman's spouse may still be alive, and by default, the guardian for the child, most state laws only extend that guardianship to the person of the child, not the property of the child. Naming a guardian of the property requires a court order, costing the family money in court and attorney fees.

Legal assistance attorneys can help prevent this situation. The key is to train your legal office and your local MPF personnel on how to properly direct the proceeds into a trust for the benefit of the child. There are two methods that, if done properly, avoid the necessity of having a court name a guardian of the property of the minor.

- Name a specific custodian under the Uniform Gifts to Minors Act or Uniform Transfers to Minors Act. (Example: "[Name of custodian], as custodian for each of my children, pursuant to the UGMA/UTMA of [name of state], with distribution to each minor when that minor reaches age [desired age, 18 or over].")
- Create a testamentary trust for the member. Then, list that trust on the SGLI form. (Example: "Trustee of the trust in my will for the benefit of my children. If no trust, to those children equally.")

(Captain Heather Rowlison, 375 AW/JA, submitted this valuable tip)

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Remember to check the School's site on FLITE for a variety of distance education programs on legal assistance topics. These tools include the Chief of Legal Assistance Course, advanced estate planning videos, and recordings of webcasts. *Consider using these materials in office training programs, too!*

DL Wills and AFI 34-242, *Mortuary Affairs Program*

The latest version of DL Wills gives the drafter the opportunity to prepare a document in which the client can name someone to direct the disposition of their remains. However, if the client names someone other than the next of kin, this can cause problems. AFI 34-242, *Mortuary Affairs Program* (2 April 2008), para 1.13 defines the Person Authorized to Direct Disposition of remains (PADD). This is the next of kin (NOK) with some minor refinements. It applies to anyone who is authorized to have their remains shipped back to CONUS at government expense, even if the government will not pay for the funeral services as they do for active duty military personnel. Persons eligible to have the remains shipped at Government expense include of course active military, APF civilians, and dependents of both stationed overseas.

AFJAGS recommends not using the DL Wills disposition of remains document where the person named differs from the PADD as designated in the AFI. Alternatively, if you are going to use the DL Wills disposition of remains document to name someone other that AFI PADD/NOK, explain to the client that the AF must follow its regulations. The AF risks severe criticism for dealing with the wrong party in disposing of the remains when it does not follow its own rules.

(Shared by Charles W. MacDonald, 52 FW/JA)

The Air Force's Professional Responsibility Program: An Overview with Advice on Avoiding Common Ethics Complaints

by Lieutenant Colonel Lee A. Gronikowski*

I. Introduction

Perhaps the most unsettling moment for any judge advocate is receiving word that he or she is the subject of an ethics complaint or allegation. An ethics allegation suggests an attorney has violated the Air Force Rules of Professional Conduct (AFRPCs).[1] The AFRPCs constitute a "moral code" and are intended to maintain the honesty and integrity of the legal profession, not to address substantive legal or procedural problems. The AFRPCs apply to all uniformed judge advocates, Air Force civilian lawyers, paralegals, non-lawyer assistants, such as volunteers, and civilian counsel who practice before Air Force tribunals.

In addition to the AFRPCs, Air Force attorneys are governed by the Air Force Standards for Civility and the Air Force Standards for Criminal Justice, two sets of rules that establish standards for practice and decorum. The Air National Guard and the Air Force Reserve also have their own professional responsibility rules, which complement the AFRPCs and which are designed primarily to prevent conflicts of interest between a reservist's military and civilian law practices.

In Air Force practice, the AFRPCs control and supersede the ethics rules of a judge advocate's licensing state:

> The [AFRPCs] have been specifically adapted to the unique needs and demands of Air Force legal practice. Although counsel are still obligated to their licensing bar authorities, *the [AFRPCs] govern Air Force practice*. They were adapted from the American Bar Association Model Rules of Professional Conduct in order to minimize inconsistent ethical requirements. However, *when there is a difference between state rules and the Air Force [AFRPCs], the Air Force provisions will control.*[2]

The basis for this policy is twofold: federal preemption and basic conflict of law rules.[3]

II. Conflicts Between the AFRPCs and State Ethics Rules

Consider a rare potential situation where an ethics complaint is made against a judge advocate.[4] TJAG determines the complaint is unfounded under the AFRPCs; however, the complainant, makes the same complaint to the officer's licensing authority, and the licensing authority determines that the underlying conduct violates the state's ethics rules. What is the result?[5] Guidance is scarce.

The Oregon Bar issued an informal opinion in 1988 regarding conflicts between military ethics rules and Oregon's ethics rules.[6] The opinion concluded that military attorneys who follow military ethics rules should not be subject to discipline in Oregon even if the conduct at issue violated Oregon's standards. The Oregon opinion relied in part on an ABA informal opinion that concluded that some flexibility is required in applying civilian ethics rules to military practice due to the differences between

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[1] The AFRPCs and the policies and practices of TJAG's professional responsibility program are found in The Air Force Standards for Civility in Professional Conduct are contained in Attachment 2 of TJAG Standards Policy Memorandum 2: Air Force Rules of Professional Conduct and Standards for Civility in Professional Conduct (17 Aug 05) [hereinafter TJS-02].

[2] TJS-02, para. 2(a) (*emphasis added*).

[3] *See* McCabe, *Who is the Government Lawyer's Client - and Which Rules Control that Lawyer's Conduct?,* 37 FED. B. NEWS & J. 172 (1990); *Professional Responsibility Note,* ARMY LAW., Jan. 1990, 42.

[4] Indeed, ethics complaints of all types are rare in The Judge Advocate General's Corps. Less than a dozen formal complaints are filed in an average year.

[5] As of this writing, AF/JAU is unaware of any cases where this has happened.

[6] Or. State Bar Ass'n, Informal Op. 88-19 (1988).

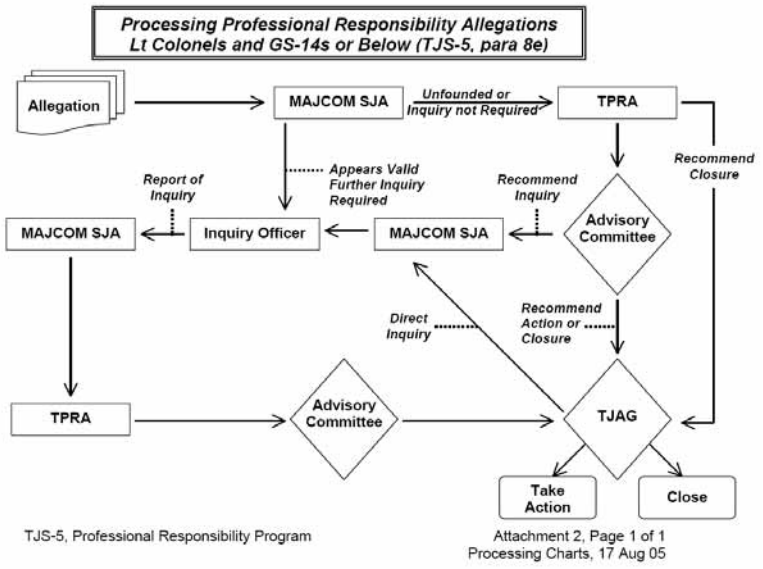
the two.[7] The Oregon opinion also suggested that the Supremacy Clause of the U.S. Constitution[8] may prohibit state officials from enforcing local ethics provisions that conflict with federal standards. Practically (and equitably?), a state disciplinary agency will likely decline to prosecute a judge advocate in such cases. Also, the Chief of the Air Force Office of Professional Responsibility will coordinate closely with licensing authorities to minimize conflicts.

In 1993, then-U.S. Attorney General Richard Thornburgh issued what came to be known as *The Thornburgh Memo*. The memo was issued in response to an adverse ruling in a federal criminal case that involved improper and unethical contact with a suspect by the government. In the memo, Mr. Thornburgh cited the Supremacy Clause to justify exempting Department of Justice attorneys from state ethics jurisdiction. In response, the *McDade Amendment* was passed in 1998.[9] This law was designed to return certain enumerated government attorneys to state ethics jurisdiction.

According to the *McDade Amendment*, "government attorneys . . . shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State." Judge advocates in Air Force practice are generally not subject to the *McDade Amendment* but take note: judge advocates who assume duties as special assistant U.S. attorneys are subject to the *McDade Amendment*. Training on the *McDade Amendment* and its application should be obtained from the local U.S. attorney for affected judge advocates.

III. Processing an Ethics Complaint

Ethics complaints may be filed by a wide variety of actors, including legal assistance clients, defense clients, commanders, a member of the public, a judge, or another attorney. No "standing" is required to file a complaint. This is a reflection of the fact attorneys owe varying but identifiable duties to everyone encountered during the course of any representation.



AF/JAU, TJAG's Office of Professional Responsibility, is primarily responsibility for overall management of TJAG's professional responsibility program and processing allegations of misconduct. In general, complaints are investigated by an inquiry officer appointed by the appropriate MAJCOM SJA. The results of the investigation are reviewed by AF/JAU and TJAG's Advisory Committee on Professional Responsibility and Standards, a three-member panel composed of senior judge advocates. AF/JAU and the Committee then make a recommendation to TJAG regarding final disposition of the complaint.

Violations of the AFRPCs, which are not punitive in and of themselves, may result in loss of designation as a judge advocate, loss of certification as trial and defense counsel under UCMJ Art. 27 (b), suspension from Air Force practice, verbal counseling, an LOC, an LOR, or any other disposition TJAG or the attorney's chain of command deems appropriate.

After investigation and review, TJAG may report proven violations of the AFRPCs to a judge advocate's licensing authority. Some

[7] ABA Informal Opinion No. 1474 (1982).
[8] U.S. CONST. art 6.
[9] 28 U.S.C. § 530B (2006).

states have disciplined judge advocates after receiving such referrals.[10]

IV. Common Sources of Ethics Complaints

Most ethics complaints are unfounded, yet responsible practitioners will seek to avoid them. Here are some of the more common ethics complaints. Thankfully, many of the problems common to the legal practice generally are much less common in government and military practice.

a. Lack of Communication – AFRPC 1.4

One of the most common ethics complaints is simply, "My lawyer never lets me know what's happening and doesn't return my phone calls." One of the best ways to avoid this complaint is to copy the client on everything you send to anyone in connection with the client's matter. Even if the client does not understand the intricacies of legal documents, she will appreciate seeing them. Try to send each client a status letter or make a follow-up telephone call every so often, even if nothing has happened in the interim. If you plan to go on leave, tell your clients. Moreover, never allow a telephone call to go unanswered for more than twenty-four hours. Clients hate to think that they are being ignored, and many will react to this perception harshly by filing a complaint.

b. Lack of Diligence and Gross Neglect – AFRPC 1.1; AFRPC 1.3

We have all had difficult cases. The adversary may be hard to deal with or the facts of the case may not be favorable. The client may have unreasonable expectations about the outcome of the case and may make frequent demands upon your time disproportionate to the complexity of the matter you are handling for that client. This type of case may generate an ethics complaint if the client perceives the case is being neglected. Perception is everything to a client. Be aware of these cases and give them the attention they require in a timely way.

The AFRPCs distinguish between instances of gross neglect, which is actionable, and an act of simple neglect, which does not support an ethics complaint. However, a pattern of simple neglect in several matters may be grounds for discipline.

c. Failure to Establish Scope of Representation – AFRPC 1.2

Clients must be told about all risks involved in their cases. Never guarantee a result or promise more than the law or you can deliver. If the client is not advised of the potential risks, then she is unable to make informed decisions about the handling of the case, and the lawyer could become the object of an ethics complaint after the "unknown" and unstated risks become realities.

The client decides what the objectives of a particular representation will be, and the lawyer must abide by those decisions, such as whether to accept a settlement in a civil case or to enter a guilty plea in a court-martial. The attorney has the responsibility, generally, for legal and technical issues, such as which witnesses to call, how to conduct examinations, and what motions to file. However, consult with the client on these issues and document any disagreements.

d. Failure to Maintain a Client's Confidences – AFRPC 1.6

AFRPC 1.6, a rule of ethics, is often confused with the attorney-client privilege, a rule of evidence. The former is a broad affirmative ethical obligation imposed on all Air Force attorneys to protect information obtained from a client generally; the latter is a narrower rule applied in the more limited context of litigation.

All of a client's information must be kept confidential under AFRPC 1.6. For example, even a client's identity and the fact of representation are confidential under AFRPC 1.6, unless disclosure of the information is

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[10] *See, e.g., In re Hyderally*, 162 N.J. 9 (1999) (*reciprocal reprimand imposed after the Navy Judge Advocate General revoked subject's Art 27(b) UCMJ certification*); *In re Walsh*, 702 A.2d 361 (Pa. 1997) (*reciprocal state suspension after the Navy Judge Advocate General suspended subject from Navy practice for one year*); *and In re Diekan*, *22 Mass. Lawyers' Weekly 21* (Feb. 7 1994) (*six-month state suspension after involuntary separation from the Army for conduct unbecoming an officer*). *See also United States v. Trimper*, 28 M.J. 460 (C.M.A. 1989) *and United States v. Berman,* 28 M.J. 615 (A.F.C.M.R. 1989).

implicitly authorized to carry out the representation or some other exception exists.[11]

An ABA informal opinion construing DR 4-101, the predecessor rule to RPC 1.6, states that a client's identity is protected confidential information.[12] The opinion says that a client's name, address, telephone and number are protected because disclosure could "embarrass" the client. And another ABA informal opinion states that it is impermissible to disclose the names of "judicare" (indigent) clients' names for a research study because it may be embarrassing.[13]

On the other hand, a client's name and identity are not generally protected under the attorney-client privilege, except in unusual circumstances.[14] One rationale for this is that in most instances such information is disclosed as a matter of course during normal litigation. Moreover, it is fair for a litigant to know the identity of her opponent.[15]

There are some exceptions to confidentiality. Confidences may be revealed to prevent a crime likely to cause imminent death or substantial bodily harm or to prevent substantial impairment of national security or the readiness or capability of a unit, craft, or weapons system. This is an example of adapting the ABA Model Rules to the realities of military practice. Confidences may also be revealed to defend oneself in an ethics case or to respond to an allegation in any proceeding concerning a lawyer's representation of a client.

V. Continuing to Learn through Research

There are ample resources available to guide legal professionals. The AFRPCs were adapted from the ABA Model Rules. Therefore, cases and other authorities that interpret the ABA's Model Rules are appropriate to use for analysis. The ABA/BNA Lawyer's Manual on Professional Conduct is a looseleaf treatise available by subscription. Its interpretation of the ABA Model Rules and their analogues in all 50 states. It also provides a nationwide weekly review of ethics cases.

All of TJAG's professional responsibility guidance, policies, opinions, lessons learned, and rules may be found on AF/JAU's website: https://aflsa.jag.af.mil/AF/lynx/jau/.

A library of state professional responsibility materials by jurisdiction may be found at either: http://www.sunethics.com/other_states.htm or http://www.law.cornell.edu/topics/professional_responsibility.html.

The National Organization of Bar Counsel, a nationwide association of disciplinary attorneys, maintains a site at: http://nobc.org/. The NOBC's site contains a complete list of all state disciplinary agencies and bar associations. http://nobc.org/links/bar.asp.

The American Bar Association's Center for Professional Responsibility maintains a site at: http://www.abanet.org/cpr/home.html . However, most information available here must be purchased from this site.

In some states, such as Montana (http://www.montanabar.org/), the unified state bar association will investigate and prosecute ethics complaints. In others, such as New Jersey (http://www.judiciary.state.nj.us/oae/index.htm), government agencies assume this function.

V. Conclusion: The Four "C's" – All of the Rules in a Nutshell

Avoiding most ethics complaints is easy if you follow the four C's: Candor, Courtesy, Competence, and Communication in your dealings with clients, third parties, adversaries, and courts. If you are honest, treat others with respect, handle only those matters which you are able to handle, and let your clients know how their cases are progressing (or even not progressing), the odds are that you will never need to respond to an ethics complaint.

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[11] CHARLES W. WOLFRAM, MODERN LEGAL ETHICS (1986) § 6.4.1. (*construing RPC 1.6 -- the civilian analog of AFRPC 1.6*) [*hereinafter* WOLFRAM]; Lieutenant Colonel Norman K. Thompson and Captain Joshua E. Kastenberg, *The Attorney-Client Privilege: Practical Military Applications of a Professional Core Value*, 49 A.F. L. REV. 1, 32 (2000).

[12] The American Bar Association's Informal Op. 1287 (1974).

[13] ABA Informal Opinion No. 1188 (1971).

[14] *See, e.g.*, *In re Grand Jury Proceeding*, 680 F.2d 1026, 1027 (5th Cir. 1982); Wolfram, *supra* note 9.

[15] 8 J. WIGMORE, EVIDENCE § 2313 (J. McNaughton rev. 1961).

Ask the Experts

If you have a question, the answer may help other readers! Send your questions to the editors of The Reporter.

I've just been appointed as the legal member on our Open House & Air Show team. Where can I begin learning about possible issues we may face -- and legal guidance on common issues?

Congratulations! You'll find this to be like many Air Force opportunities: challenging and quite rewarding!

You'll have a great behind-the-scenes role in showing your base and the Air Force to members of the community. Be prepared for major responsibilities in many areas:

- Planning: At the earliest meetings, decisions will be made on the basic structure for managing and funding the air show. It may be contracted out, or worked through a base private organization, or a nonfederal organization.

- Development: Issues will arise as the plans develop, including what support the Air Force may give private pilots, for example. Support can flow the other direction, raising questions of what the Air Force can accept from outside sources. You can take an active role in training and practicing with Public Affairs, Security Forces, and other team members -- exercising realistic scenarios, so that everyone is prepared for accidents, protestors, and other issues during the event.

- Implementation: You will want to plan continuous on-scene coverage, so that legal advice is immediately available throughout the open house. Your presence at the event ensures all of your planning and development flow smoothly.

Also, like so much of our practice, your initial guidance on the new role is likely to be in your own office -- speaking with your predecessor(s) and reviewing continuity files. Also branch out to colleagues at other bases. They may have fresh ideas, and can talk about their recent air shows. Tap the talent in your higher headquarters, too.

ACC/JA has created a great general source on legal issues surrounding open houses and air shows:

https://wwwmil.acc.af.mil/ja/Ops_Files/AVIATION/openhouse.mht

Their site presents excellent guidance based on decades of experience. ACC/JA also works closely with related staff agencies to develop the information. This results in guidance that recognizes the important issues and contributions of Contracting, Finance, Operations, Public Affairs, Services, and other key Open House and Air Show team members. Time spent on the site will provide many of the answers you'll see in your new role!

We expect to advise on several command directed investigations in the very near future. Any guidance on briefing commanders and investigating officers?

AF/JAA developed a CDI guide with the Secretary of the Air Force, Complaints Resolution Directorate (SAF/IGQ). The guide is written for CCs and IOs. It provides specific chapters for each, as well as general guidance on the CDI process. The guide also gives tools for both audiences. These include appointment letters, an interview script, sample witness statements, and other very relevant tools. Keep a copy handy to give to the next CC or IO you guide through the CDI process!

CDI Guide: https://aflsa.jag.af.mil/AF/GENERAL_LAW/LYNX/cdiguide.doc

Using Technology In the Courtroom:
A Subjective Evaluation of the Benefits of Visual Presentation of Evidence

by Major Joseph S. Kiefer*

"One hundred hearing not equal one seeing." -- Chinese philosopher Chow Ch'ung[1]

I. Introduction

Have you ever had someone suggest that you incorporate technology into your trial presentation? For several years now, but particularly over the past few years, the use of "technology" in court proceedings has increased dramatically. Many courts have gone to e-filing of pleadings and have "electronic" or "wireless" courtrooms. Most federal courtrooms and even many state courtrooms are outfitted with large screens, individual monitors, and various electronic presentation systems.[2] For those courtrooms without significant electronic equipment, many civil litigators bring in equipment for trial.

If this is the trend, is the Air Force following suit? Perhaps as compared to 10 or 15 years ago, Air Force litigators today use technology more often than their predecessors. In my experience as a civil litigator and an Air Force Reserve Military Judge, however, the civil cases I try seem to make much greater use of electronic presentation methods. Certainly the case types are different and that is a large determining factor in how and when to use technology in the courtroom. However, despite the differences, it seems that Air Force litigators could reap benefits from greater use of technology.

II. The Current State

So why don't Air Force courts-martial incorporate electronic presentations on a more routine basis? I offer three general reasons.

First, many Air Force courtrooms are still developing electronic capabilities, and often legal offices do not have large sections of technical support specialists available to acquire, set-up, and run these systems. While many Air Force courtrooms now have screens and counsel have access to projectors or other video presentation systems, this equipment is often not an integrated part of the courtroom.

Second, time pressures from a myriad of other duties make it difficult for counsel to become fully familiar with the technology available to them.

Third, counsel may have fear and apprehension -- fear of something going wrong, fear of making mistakes, fear of not knowing exactly how to handle electronic evidence or presentations in court. These apprehensions keep counsel from exploring new means of presenting the case and the benefits technology can yield.

In response to these obstacles, I offer the following advice. First, don't be afraid to take risks. Trial work is much like other events in life and all too often we are so worried about making mistakes or getting it wrong that we never really explore our true potential. The "I don't want to get it wrong" attitude keeps us from trying new things, and for many present-day Air Force trial practitioners that includes the use of technology. Please do not misunderstand my advice as a suggestion to simply fly-by-the-seat of your pants and disregard time-honored principles of preparation and organization. The risks that are most likely to turn out well are those that are calculated and planned.

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[1] This ancient variation on "A picture is worth a thousand words" was quoted by David L. Deehl in an American Bar Association primer on using visual aids in the courtroom, *Demonstrative Evidence in Federal Court*, available at http://www.abanet.org/tips/trial/Evidence.pdf (last visited May 25, 2008).

[2] For example, the United States District Court for the District of New Mexico describes the technology offered in each of its courtrooms, including video conference, document camera, flat panel displays, VGA connections, smart counsel tables, real-time transcription, color video printers, annotation monitors, and VCR/DVD players: http://www.nmcourt.fed.us/web/DCDOCS/files/court_technology.html (last visited May 24, 2008).

Sidebar 1: Elements & Evidence

This sample format is very basic. It simply lists the elements of a specification, then reminds the members of the key evidence supporting each element.

Consider using simple "builds" to bring in each element and each piece of evidence on command. This will focus the members' attention as the details are covered in the closing argument.

Remember: avoid putting too much on a slide!

Article 118, UCMJ: Murder

a) A certain named person is dead;
- Amn Smith is dead

b) The death resulted from the act of the accused;
- Confession, matching ballistics, eyewitness

c) The killing was unlawful; and
- No justification or excuse

d) The accused had a premeditated design to kill.
- Spoke w/SSgt Jones, "To Do" list, preparation

Preparation is still the key to success in the courtroom.

Additionally, while the matter of courtroom equipment and configuration are largely outside the control of individual trial attorneys, they have the ability to research the technology available to them and plan for how to maximize its use and effect. Success in this regard, however, still boils down to prior planning and budgeting time effectively. One of the greatest positives and negatives of Air Force legal practice is the number of different tasks attorneys, particularly at the base level, handle in a day, a week, or a month. The many responsibilities stemming from primary duties, court-martial cases, legal assistance, and base exercises and deployments create an environment rich in legal experiences. At the same time, however, budgeting time in such a diverse and demanding environment can be daunting to say the least. Nonetheless, for the motivated and organized counsel, technology offers a means to increase the persuasiveness of courtroom presentations.

III. What People Expect and How They Learn

How can technology help in the courtroom? People today are bombarded with electronic information from the moment they get up in the morning until they go to sleep at night. As recent as 10 or 15 years ago, few homes had personal computers. Today most Americans have a multitude of electronic gadgets designed to access information faster and with greater ease and convenience. From cell phones to PDAs to laptop computers and video players, people are becoming more and more accustomed to information in various electronic forms. The courtroom of the 21st century reflects these developments. Advances in network interoperability, video presentation software, and viewing platforms, combined with increased user and audience comfort levels with technology have created an expectation that trial practitioners will routinely use electronic information in presenting their case.

It is more than just the expectations of fact finders, however, that supports incorporating technology into court presentations. Studies cited by the U.S. Department of Labor (DoL) show that people learn better when information is presented in multiple formats. Research indicates that people are six times more likely to retain information presented to them with visual aids as opposed to the spoken word alone. Another study suggests that 83% of human learning occurs visually while the remaining 17% occurs through other senses. Finally, the DoL notes that three days after an event, people retain 10% of what they heard in a presentation as opposed to 35% retention from a visual presentation, and 65% from a visual and oral presentation.[3]

Similar results have been uncovered in the trial setting with regard to juror recall of information. Studies indicate that jurors retain perhaps as little as 20% of what they hear, but they retain as much as 60% percent of what they see and 80% of what they see and hear. In

[3] These figures are contained in the Department of Labor's *Presenting Effective Presentations with Visual Aids* available at http://www.osha.gov/doc/outreachtraining/htmlfiles/traintec.html (last visited May 23, 2008).

Sidebar 2: Time and Space

This map was useful in summing up all of the steps when the accused could have turned back: stealing a car, going AWOL, stealing another car when the first car broke down, etc. -- all the way to going home to help his parents run their illegal methamphetamine lab.

Each step built as trial counsel highlighted the events of that portion of the journey. This turned the case from a simple mistake to a series of concrete decisions.

response, many civilian courts and practitioners have moved in the direction of incorporating technology into courtroom presentations. PowerPoint, video clips, electronic transcripts, and other presentation methods have fueled the expectation of fact finders. The perception, however, seems to be that military practice does not lend itself or need technology in court. The use of technology is encouraged at courses such as the Judge Advocate Staff Officer's Course and other Air Force trial advocacy classes. However, when practitioners reach the field, the actual use of technology seems to be relatively sporadic. It is possible that military trial attorneys do not see the need for using technology in their trial presentations and are mistaken about the expectations of their audience.

Picture briefings you have seen across your career. From the Joint Chiefs of Staff down to the squadron commander level, most briefings today incorporate PowerPoint or some other presentation system with text slides, video clips, and other electronic visual aids. The court members that modern trial and defense counsel encounter have much greater experience with electronic information than panels of even just a decade ago. Individuals that ultimately serve as Air Force court members experience electronic information at home, in the office, and in their personal lives on a regular basis. In fact, based on the technological nature of many Air Force jobs, they likely interact with electronic information far more often than individuals serving on civilian juries.

Thus, given that people today have a greater expectation for and comfort level with electronic information and given that they appear to retain more with combinations of video and audio presentations, it seems to make sense to smartly incorporate technology into courtroom presentations.

IV. Use of Technology in the Military Urinalysis Trial

The following are my observations of two recent courts-martial in my capacity as military judge. I selected these "urinalysis" cases because they have certain parallels in terms of counsel, location, and issues. These types of cases are good candidates for comparison because they are very similar in terms of their witnesses and evidence. Typically, a urinalysis case includes the testimony of local chain of custody witnesses, documents from the local base collection site, an expert forensic toxicologist, and a drug testing report from the Air Force Drug Testing Laboratory.

My observations are focused primarily on the government's presentation of the drug testing report through their expert forensic toxicologist.

In the first case, the government used a very traditional method of presenting the expert's testimony – admitting a copy of the drug testing report, publishing separate copies of the report to each member, and marching through the report page by page. In this case, I watched the members closely as they received the testimony. I focused on their eye contact, posture, other body movements, and general attention. I had no way to know exactly what they were thinking at any given moment, but I made a few general observations.

1. Initially, upon receipt of the drug testing report, the members thumbed through

Sidebar 3: A Mountain of Evidence

Using photographs in a case? Why not guide the members through the key points of each photograph?

This series of photos spotlighted the immense collection of tools the accused had stolen from work. Red circle after circle built to include the shelves and extinguishers he had also stolen.

As the evidence mounted, the members were quick to dismiss any "just borrowed a tool now and then" defense!

several pages. This occurred while the witness was testifying about certain matters only in the first few pages of the report.

2. At a point, the members began following the expert's testimony, page by page, but after a time, they generally started to thumb through various pages again.
3. At a certain point, some of the members did not seem to be following along with the specific page the expert was discussing at all, and some did not appear to be referring to the report at all.

In the second urinalysis case, a smart board was used to present the expert's testimony concerning the drug testing report. Each page was loaded so that it could be individually displayed to the members as the expert discussed it. The expert was able to stand near the smart board and point to various information as he explained it. My observation of this testimony was that it was far more interactive than use of the hardcopy report. The expert read less and his posture, location, and presentation were much more like an instructor or professor explaining a concept than a witness sitting in a box at the front of the court. The members appeared to be more engaged, and at a minimum, they were not thumbing through disparate pages distracted from what the expert was addressing.

Certainly there may be a number of different reasons for these observed responses, and in the end they may provide little insight on true understanding, acceptance, and persuasiveness of the testimony for any individual member. Nonetheless, these observations reinforce some very basic trial principals. Part of persuasion is maintaining an audience's attention.

So, how technology can improve what appeared to be sporadic and inconsistent audience attention? At times, the members did not seem to be focused on what the witness was saying or what the party was intending to present. One of the problems in this regard was that the members simply had too much information. They were not necessarily overwhelmed, but had too much information from a focus standpoint. They had a large multi-page report to review, and often it seemed the report served as a distraction from what the witness was saying as opposed to an aid to the testimony. I am not suggesting that the drug testing report should or should not be used or whether every page should be discussed. This article merely presumes the use of similar types of reports and information and seeks to offer suggestions on how to maximize their effect.

In this instance, it would have improved the presentation if counsel had been able to present only those portions of the document being discussed by the witness at any given time. This is very difficult to execute with a hardcopy exhibit. Imagine having to separately publish each page of a voluminous document. Think about the time taken and the impact on the flow of the examination while continually stopping to hand out page after page. Undoubtedly, that is part of the reason common practice progressed to publishing the entire report at once. Consider, however, the alternative of electronically presenting each page as it is needed for the entire panel to see in an instant with the press of a button. This can be done with a smart board or

Sidebar 4: Overcoming Common Objections to PowerPoint in the Courtroom

Lacking foundation: *Use supporting witnesses and evidence*

Irrelevant: *Goes to the weight of the evidence -- not its admissibility*

Inaccurate: *Ensure appropriate characterization of underlying evidence*

Cumulative: *Note that slides are simply an efficient collective presentation*

Unfairly prejudicial: *Show how the presentation will aid the court members*

Argumentative: *Fine to argue in closing, but if using slides with a witness "stick to the facts"*

other type of presentation software. With this procedure, counsel is better able to control the information the members receive and consequently their focus. Additionally, depending on the location of the presentation screen and courtroom layout, you can better direct the members' attention to where you want it.

With the right presentation tools and some creativity, the benefits of technology do not end with simply flashing the document page on a screen. Highlighting, call-outs, and other means of emphasizing certain text or information are further means of focusing the members' attention on what is important. It is one thing for the expert to tell the members to look at the third entry on their copy of page 10 of the report. It is another to blow that section up on a screen that the expert can point to for all the members to see.[4]

V. Conclusion and a Challenge

These are just a few examples of the benefits technology can yield in courtroom presentations. Experienced litigators may remember the days when we used to show blown up photos of the GC/MS injector or Room 119, specimen processing, at the Air Force Drug Testing Lab? These visual aids were designed to do the same things that electronic presentations are offered for today -- to give the fact finder a better sense of what the testimony is describing and to maintain the attention of the audience. Imagine flashing those same images on a screen and being able to create additional electronic visual aids that can be accessed and easily organized for an effective presentation.[5]

Technology is not perfect. Systems go down unexpectedly. But these issues can be largely overcome or at least minimized with prior planning. It only takes some time, organization, and a little creativity to expand the envelope of trial practice to a new level of persuasion and professionalism!

The Military Justice Division of The Judge Advocate General's School is interested in your use of technology in the courtroom!

The division is incorporating PowerPoint, video-teleconferencing, and other tools into JASOC, along with the trial advocacy courses and conferences.

Please send your ideas, experiences, and sample presentations to Major Schuchs-Gopaul at Elizabeth.Schuchs-Gopaul@maxwell.af.mil so they may be shared across TJAGC!

[4] Microsoft offers examples of using Word, PowerPoint, and other pieces of its Office suite in the courtroom: http://office.microsoft.com/en-us/powerpoint/HA011232361033.aspx (last visited May 25, 2008).

[5] Continuing legal education providers are adding sessions on using technology persuasively. For example, the National Institute for Trial Advocacy offers a live training program, and also publishes POWERPOINT2002 FOR LITIGATORS (2002).

Simplifying the Calculation of Federal Wrongful Death Tort Damages

by Lieutenant Colonel Bruce D. Cox*

I. Introduction

Death is too much of a gamble.

Currently if someone is accidentally killed in the U.S. by the U.S. Government, the amount of money that the individual's family receives in compensation varies wildly: from a negligible figure to a settlement well into the millions of dollars.

This disparity is primarily due to the convoluted -- and hence expensive -- way in which damages for wrongful death are calculated. The method for calculation is generally based on the state law of damages where the death occurred. Because no state has an easily-set method for calculating wrongful death damages, the federal method of calculation is even less well-defined: it is a combination of at least 50 different convoluted methods of calculation.

The process of calculating damages in federal wrongful death cases can be easily simplified by establishing a set formula for evaluating monetary damages for all wrongful death cases. The improved system would substantially reduce the costs of litigation while providing much more equitable and timely compensation to the survivors of the deceased. These benefits would extend not just to the Air Force, but to the entire federal government.

II. Background

Prior to 1946, if a government employee accidentally killed someone,or damaged their property while carrying out government work, compensation from the Government was usually made by way of a "private bill" in Congress. In each case, the victim's congressman would have to submit a bill for passage by Congress.[1] Thousands of such bills were introduced in Congress each year prior to 1946.[2] To avoid the burden of the private bill method of compensation, Congress passed the Federal Tort Claims Act (FTCA) in 1946.[3] It provided access to the federal courts for torts, including those for "personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment."[4] Rather than craft a separate federal system, the FTCA purposefully "piggy-backed" its method of compensation on the tort system in each of the individual states. It accomplished this by including the language: "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."[5] Effectively this, along with a provision for an administrative remedy passed in 1966[6], moved the time and expense of compensating people for the consequences of Government acts from the legislative branch to both the judicial and executive branches.

However, whether cases are decided by judicial decision or administrative fiat, the law used to evaluate the case -- and hence to arrive at a monetary measure of damages -- is state law, and not especially uniform or decipherable state law at that.

III. State Law

State tort damages law usually is based on state case law. While there may be statutory caps and statutes that affect some types of damages, the actual amounts of money awarded are determined by juries based on the arguments of the various attorneys litigating the cases. Experts, such as economists, are called in by the

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[1] Dalehite v. United States, 346 U.S. 15, 24 (1953).

[2] *Id* at footnote 9..

[3] Ch. 753, tit. IV, 60 Stat. 812, 842-47 (1946) (codified as amended at 28 U.S.C. § 1346(b) and 28 U.S.C. § 2671–2680).

[4] 28 U.S.C. § 1346 (b)(1)

[5] *Id.*

[6] 1 JAYSON & LONGSTRETH, HANDLING FEDERAL TORT CLAIMS (Preface) (2007).

attorneys to give opinions on such things as lost wages and future earnings, etc. Such estimates are often quite speculative.

All states have a workers compensation system for compensating employees that are hurt or killed on the job. The federal government has a similar worker's compensation system for its civilian employees based on the Federal Employees Compensation Act (FECA). One of the fundamental principals of workers compensation is that a formula is used to arrive at the compensation amount and the court system and juries are not involved.

a. A State Law Example

One example is the California system. The California statute gives a specific dollar number for a death benefit based on when the death occurred and how many dependents the deceased had.[7] One paragraph states:

> In the case of three or more total dependents and regardless of the number of partial dependents, one hundred fifty thousand dollars ($150,000), for injuries occurring on or after July 1 1994, one hundred sixty thousand dollars ($160,000), for injuries occurring on or after July 1, 1996, and three hundred twenty thousand dollars ($320,000), for injuries occurring on or after January 1, 2006.

While there is an application and appeal process that is similar to a court system, most workers compensation schemes set the actual measure of damages for death on the job in largely uncontroversial terms.

Unlike the California lump sum method, the FECA method of compensation is based on a percentage of the employee's monthly pay and the number of dependants.[8]

As illustrated in the California example above, while the amount might be arbitrary and probably in many people's minds too little, the actual figure that may be recovered is not in doubt.

[7] CAL. LAB. CODE § 4702(a)(5) (2008).
[8] 5 U.S.C. § 8133 (2008).

IV. The Real Impact of the Current State

The focus on state law results in the federal government valuing some of its citizens more than others. This is a curious result for a government founded on the principle of equality. A New Jersey resident may have as much of a vote as a Colorado resident, but if he is killed by the federal government, a New Jersey resident may be worth substantially more money than a Colorado resident or vice versa. Additionally, most state tort damages base some of the wrongful death calculation on lost wages, which means a laborer's family is paid substantially less than a white collar worker's family is paid.

The existing tort system results in a substantial amount of uncertainty, which equates to potentially long and costly litigation.[9] FTCA cases in the federal courts can take years to reach trial. A recent case came about because of an aircraft crash in July of 2001. While the lawsuit was filed in early 2002, the case went to trial in October 2007, more than six years after the accident. One survivor, a daughter, was thirteen when her father died in the crash and is now college-age.

Effectively, the only issue in the case is the value of the wrongful death. At one time $3.5 million was offered to the plaintiffs, but the amount was refused. Had a schedule of benefits applied, the case would have settled in probably less than two years, with little in the way of litigation expenditure by the plaintiffs or the government.

One obvious argument against a set formula for compensation for wrongful death is that it is likely to badly under-compensate some families. After all, if a family breadwinner is making well over one hundred thousand dollars a year and that breadwinner is killed, the loss to the family is clearly going to be in the millions of dollars over the course of a few years even after the expenses of the breadwinner are deducted. With many families, this may easily mean that once they get (for example) the $320,000 they might

[9] This uncertainty extends beyond damage calculations. One author posited that federal judges have misinterpreted state tort law to allow otherwise-barred punitive damages. Jeff L. Lewin, *The Tail Wags the Dog: Judicial Misinterpretation of the Punitive Damages Ban in the Federal Tort Claims Act*, 27 WM AND MARY L. REV. 245 (1986).

be entitled to under the California statute, they might very well not be able to continue to live in the house they currently live in and the children might not be able to attend the colleges they anticipated being able to attend.

This result, however is foreseeable. The answer to this apparent injustice is life insurance. If a family believes that it needs more than what a set formula might give them, the breadwinner should have the life insurance to reflect that need. There may be a concern that insurance companies might specifically exclude coverage for deaths caused by government action. The legislation establishing a set formula for wrongful death could include a clause that deems such insurance clauses against public policy and hence illegal.

V. Conclusion & the Road Ahead

If the FTCA were changed to establish a set formula for damage calculations in wrongful death cases, it would reduce the litigation workload of both the federal court system and the executive agencies that adjudicate such claims, including the Air Force. At the same time such a change would allow for a more equitable, predictable, and rapid payment to be made to survivors.

Such a formula could parallel the FECA method for calculating death benefits, which is based on a percentage of wages. Alternatively, it could be modeled on the California statute with a set sum based on the number of dependents.

Once a specific formula is established, AF/JA should forward the proposal for a change in the law to SAF/GC. From there it will need to go to DOD/GC for coordination with other affected executive departments. This particular proposal is somewhat unusual since it significantly affects departments other than DOD. If other departments agree to the proposal, DOJ would probably be the appropriate department to submit it to the House Judiciary Committee for consideration. Alternatively, DOD could submit it directly to the House Judiciary Committee if other departments decline. Whatever the route, the destination is clear: swift, fair, and efficient compensation.

KEYSTONE Update

The KEYSTONE experience can now be shared in a new way: videos of the main plenary sessions. Twenty-six presentations from KEYSTONE '07 were placed on the KEYSTONE site on FLITE in the months after the event:

https://aflsa.jag.af.mil/AF/KEYSTONE

Each presentation is self-contained. Speakers' slides have been layered in, so each session flows smoothly. (Slides are also available separately on the site.)

Several creative SJAs have shown brief clips at wing staff meetings. A two-minute clip from Major General Welsh's talk *(shown here)* highlights the importance of legal professionals to the Air Force mission and its people. The clip not only educates wing leaders, it also highlights the central importance of KEYSTONE (and the need to fund attendance!)

Offices have also used the videos in regular training programs. Everyone will learn from hearing Lieutenant General Lorenz speak on leadership -- and be entertained at the same time! And all Corps members need to see the way ahead mapped out by Major General Rives, learn the impact of lawfare from Major General Dunlap, understand Chief Master Sergeant Dillard-Bullock speak on cultivating the next generation, and hear Senator Graham's perspective.

Military Justice Pointers

Sex Offender Notification and Registration

Conviction of a sex offense or a crime against a child triggers notification requirements for Air Force officials – specifically, the Staff Judge Advocate and Security Forces Corrections Officer – and registration requirements for state officials and the convicted member.

Major Jennifer Hays, Chief of the Policy and Precedent Branch of the Military Justice Division of the Air Force Legal Operations Agency (AFLOA/JAJM), and Major Andrew Turner, a Reservist assigned to AFLOA/JAJM, created this overview and guidance on applicable requirements.

Statutory Framework Congress passed the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act in 1994. The Act requires states to establish sex offender registries or lose federal funding.[1] In 1996, Megan's Law amended the Wetterling Act, requiring states to establish a community notification system.[2]

Congress again amended the Wetterling Act in 1998 via the Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act (CJSA).[3] CJSA requires states to register federal and military offenders, and requires the military to notify state and local officials of members convicted of sex offenses and crimes against children. For purposes of providing such notification, CJSA specifically directs the Secretary of Defense to "specify categories of conduct punishable under the Uniform Code of Military Justice" comparable to those subject to registration under the Wetterling Act.[4]

Most recently, Congress passed the Adam Walsh Child Protection and Safety Act of 2006, expanding the categories of crimes subject to registration. The Act created three tiers of increased periods of registration based on the seriousness of the offense and authorized a national registry to incorporate state registries.[5]

The federal-state framework established by the Wetterling Act, as amended, places the obligation to *notify* on the military service, and the obligation to *register* on the convicted member and the state.

DoD Implementation As directed by the CJSA amendments to the Wetterling Act, the Secretary of Defense issued an instruction identifying offenses under the Uniform Code of Military Justice (UCMJ) for which notification to state and local officials is required. DoD Instruction 1325.7, *Administration of Military Correctional Facilities and Clemency and Parole Authority*, Enclosure 27, lists the UCMJ offenses which "trigger requirements to notify State and local law enforcement agencies and to provide information to inmates concerning sex offender registration requirements."

Air Force Implementation Air Force responsibility to implement the Wetterling Act and DoDI 1325.7 rests with the base-level SJA and the designated Security Forces Corrections Officer, as set forth in AFI 51-201, *Administration of Military Justice*, section 13K. When an Air Force member is convicted of a notification-triggering offense (as set forth in Enclosure 27 to DoDI 1325.7), the SJA is required to mark the Report of Result of Trial (AF Form 1359) "SEX OFFENDER NOTIFICATION REQUIRED" in the

[1] Pub. L. 103-322; 42 U.S.C. § 14071.
[2] Pub. L. 104-145.
[3] Pub. L. 105-119, Title I, § 115.
[4] Pub. L. 105-119, Title I, § 115(a)(8).
[5] Pub. L. 109-248.

Sentence block.[6] The Security Forces Corrections Officer is required to inform the convicted member about state registration responsibilities, and to notify appropriate state and local law enforcement and sex offender registration officials.[7]

The registration requirements applicable to a convicted member vary by state, however, and may be triggered by offenses not listed in AFI 51-201 Figure 13.4.[8]

Article 120 Amendments The offenses triggering sex offender notification requirements include UCMJ articles "120A" (rape) and "120B1/2" (carnal knowledge).[9] Article 120 was amended by the National Defense Authorization Act for Fiscal Year 2006, for offenses occurring on and after 1 October 2007.[10] Article 120 is now titled "Rape, sexual assault, and other sexual misconduct," and comprises 36 offenses including offenses formerly covered under Article 120 as well as Article 134 (indecent assault, indecent acts or liberties with a child, indecent exposure, and indecent acts with another).

For notification purposes, offenses that required notification prior to the amendment should be treated as requiring notification now. For example, conviction of indecent acts with a child requires sex offender notification even though it now falls under Article 120 (rather than Article 134 as identified in Enclosure 27 of DoDI 1325.7 and Figure 13.4 of AFI 51-201). DoD is preparing specific interim guidance on application of sex offender notification requirements in connection with Article 120 offenses, which it expects to issue within the next few months.

Other Offenses AFI 51-201 notes that the list of offenses in Figure 13.4 is "not all inclusive based upon individual state requirements."[11] Offenses not listed in Figure 13.4 may, as indicated above, trigger registration under state law. With respect to notification, however, the Secretary of Defense has, as statutorily directed, specified in DoDI 1325.7 those offenses for which notification is required. DoDI 1325.7 does not indicate that other offenses may be deemed to require notification.

The SJA's obligation under AFI 51-201 is to, where "required", mark the top of a Report of Result of Trial "SEX OFFENDER NOTIFICATION REQUIRED."[12]

SJAs should not – absent specific guidance otherwise – mark a Report of Result of Trial "SEX OFFENDER NOTIFICATION REQUIRED" except where actually required under AFI 51-201.[13]

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[6] AFI 51-201 § 13.18. The list of notification-triggering offenses in Enclosure 27 to DODI 1325.7 is reproduced in AFI 51-201 at Figure 13.4. Note, however, that the list in Figure 13.4 inadvertently omits two entries from Enclosure 27 to DODI 1325.7: UCMJ Article 125B1/2, Sodomy of a Minor, and UCMJ Article 134-Y2, Assimilative Crime Conviction (of a sexually violent offense or a criminal offense of a sexual nature against a minor or kidnapping of a minor). These omissions will be corrected the next time AFI 51-201 is amended.

[7] AFI 51-201 § 13.17. Even where the Report of Result of Trial is not marked "SEX OFFENDER NOTIFICATION REQUIRED," the corrections officer is under an independent obligation to review all available records and provide notification to state and local officials if a prisoner to be released has been convicted of a covered sexually violent offense or criminal offense against a victim who is a minor. DODI 1325.7, section 6.18.6.1; see also AFI 51-201, section 13.17.

[8] *See*, *e.g.*, *Gunderson v. Hvass*, 339 F.3d 639 (8th Cir. 2003) (upholding sex offender registration requirement under Minnesota law for guilty plea to third degree assault which arose out of "same set of circumstances" as dismissed charge of first degree criminal sexual conduct). For further background on how each state defines, discloses, and maintains data on sex offenders, *see* http://www.nsopr.gov/ and http://www.usdoj.gov/criminal/ceos/statesexoffender.html.

[9] DODI 1325.7 Enclosure 27 and AFI 51-201 Figure 13.4.

[10] Pub. L. 109-163; 10 U.S.C. § 920.

[11] *See*, *supra*, note 7.

[12] AFI 51-201 § 13.18.

Summary Courts While it should be rare that an offense triggering sex offender notification would be disposed of by a summary court martial, questions have arisen concerning whether a guilty finding at a summary court martial is a "federal conviction" triggering notification requirements. In a 2002 evaluation of DoD correctional facility compliance with military sex offender notification requirements, the DoD Inspector General recommended that the Under Secretary of Defense for Personnel and Readiness address precisely that subject.[14] In response, the Under Secretary agreed to revise DoD policy to make clear that "covered sex offenses arise from general and special, not summary, courts-marital" and that "the next revision to DoDI 1325.7 will limit sex offender notification requirements to convictions at General or Special Courts-Martial."[15] Accordingly, a guilty finding at a summary court-martial does not trigger notification requirements.

Note that while the foregoing should be instructive in determining whether a guilty finding at a summary court martial requires a member to register within a state, registration *is ultimately determined by state law*.[16]

Defense Considerations The Court of Appeals for the Armed Forces has noted that trial defense counsel are not expected to be knowledgeable about the "plethora of sexual offender registration laws enacted in each state," but has concluded that defense counsel "should inform an accused prior to trial as to any charged offense listed on the DoD Instr. 1325.7 Enclosure 27" and "should also state on the record of the court-martial that counsel has complied with this advice requirement." *United States v. Miller*, 63 M.J. 452, 459 (2006). The Court has cautioned that, "[w]hile failure to so advise an accused is not *per se* ineffective assistance of counsel, it will be one circumstance this Court will carefully consider in evaluating allegations of ineffective assistance of counsel." *Id.*[17]

Conclusion Air Force practitioners should bear in mind the distinctions between Air Force *notification* and state *registration* requirements described above. DoD guidance with respect to UCMJ Article 120 is anticipated this summer, and revisions to DoDI 1325.7 are anticipated thereafter. AFLOA/JAJM plans to incorporate this guidance in the next revision to AFI 51-201.

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[13] The courts have scrutinized the classification of persons as "sex offenders" where a conviction is not on its face a sexual offense. *Compare Gunderson v. Hvass*, 339 F.3d 639 (8th Cir. 2003), *with Coleman v. Dretke*, 395 F.3d 216, 222 (5th Cir. 2004); *c.f. United States v. Moreno*, 63 M.J. 129, 140 (2006) (finding that excessive post trial delays, which led to appellant being required to register as a sex offender upon his release prior to his appeal being heard, "is distinguishable from the normal anxiety experienced by prisoners awaiting appeal" and constitutes "some degree of prejudice").

[14] Office of the Inspector General, DOD, Report no. CIPO2002S003 (June 26, 2002) (http://handle.dtic.mil/100.2/ADA407436). Footnote 18 to the Report observes:

> Pub. L. 105-119, Title I, §115(a)(8)(C)(ii), 111 Stat. 2466, requires a military member "sentenced by a court martial" for a covered offense to register as a sex offender. However, in *Middendorf v. Henry*, 425 U.S. 25 (1976), the Supreme Court held that a Summary Court-Martial was not an "adversary proceeding" nor was it a "criminal prosecution for the purpose of the Sixth Amendment." These conclusions raise concerns regarding the relationship between summary court-martial proceedings and the sex offender registration/notification requirements imposed by the statute.

[15] DOD IG Report no. CIPO2002S003 at iii, 19; *see generally The Art of Trial Advocacy, Summary Court-Martial: Using the Right Tool for the Job*, Army Lawyer, 52, 54 (July 2002)("finding of guilty at a summary court-martial is not a federal conviction"). DOD anticipates making this and other revisions to DODI 1325.7 within the next year.

[16] *See*, *supra*, note 9.

[17] *See also United States v. Jones*, 2006 CCA LEXIS 236 (A.F. Ct. Crim. App. 2006) (considering record in its entirety, failure to advise accused that he will be subject to sex offender registration requirements did not in itself amount to ineffective assistance of counsel).

The Victim/Witness Assistance Program and JAG Corps 21

by Mr. Dennis E. Matthews, Jr.*

I. Introduction

By now, everyone in the Air Force Judge Advocate General's Corps is aware of the far-reaching impact of JAG Corps 21 (JAGC21). Staff Judge Advocates and Law Office Superintendents are especially aware of the many challenges and opportunities presented by these new legal practice paradigms.

I believe the Victim/Witness Assistance Program (VWAP) is one area where SJAs can maximize the impact of JAGC21 and capitalize on manpower reassignments. In order to discuss this topic logically, it is helpful to first look at a brief history of the Victim/Witness Assistance Program. After we have seen how we arrived at where we are now, it is easier to see where we should go next.

II. Development of VWAP

The 1982 Task Force on Victims of Crime could be considered the genesis of the victims' rights movement. This committee resulted from an earlier study on violent crime. Based on a recommendation from then-Attorney General Edwin Meese, President Reagan issued Executive Order 12360. This formed the Task Force and directed it to review policies and make recommendations on how to assist and protect victims of crime. The study focused on "revictimization" during the criminal justice process and how to put victims on equal footing with defendants.[1]

After conducting six regional hearings and interviewing 187 witnesses, the board reviewed statistical data and analytical evidence from a variety of sources. The impact on the members was profound and their findings revealed serious procedural flaws throughout the criminal justice system. Accordingly, they made 68 recommendations in five areas, including proposing: 1) executive and legislative action; 2) federal action; 3) criminal justice system action; 4) other organization action; and, 5) a Constitutional amendment.[2]

As a result of these recommendations, the Office for Victims of Crime was established within the Department of Justice. Congress passed the Victim Witness Protection Act of 1982,[3] enhancing the role of the victim in the criminal justice process. Similarly, the Victims of Crime Act of 1984[4] funded victim services through fines levied against federal offenders and created compensation programs in all U.S. states, territories and the District of Columbia. Not surprisingly, the number of victim services offices tripled during the next two decades.[5]

The Victims' Rights and Restitution Act of 1990[6] was one of the most significant pieces of legislation to follow. This law created positions known as Victim/Witness Coordinators, responsible for identifying crime victims and informing victims of their rights. These rights are: to be treated with fairness and respect; to be reasonably protected from the accused; to be notified of court proceedings; to be present at all public court proceedings unless testimony could be affected; to confer with prosecutors; to receive available restitution; to have personal property returned in a timely manner; and to

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* Dennis E. Matthews, Jr. is the VWAP Liaison for the 11th Wing, Bolling AFB, DC. He is a retired Senior Master Sergeant with over 22 years military service as an Army Infantryman, Air Force Security Policeman and paralegal. Mr. Matthews has held a variety of positions at base and headquarters level legal offices including NCOIC, Military Justice; Law Office Manager of the Military Justice Division of then-Air Force Legal Services Agency; and Command Paralegal Manager for USCENTCOM. He was recently the VWAP Liaison in a capital murder trial and he is the AFDW nominee for the Attorney General's Crime Victims' Service Award.

[1] MELISSA HOOK AND ANNE SEYMOUR, OFFICE FOR VICTIMS OF CRIME, U.S. DEPARTMENT OF JUSTICE, ORAL HISTORY PROJECT: A RETROSPECTIVE OF THE 1982 PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, page 2, (Dec. 2004) *available at* http://www.ojp.usdoj.gov/ovc/ncvrw/2005/pg4d.html [hereinafter RETROSPECTIVE]

[2] *Id.* at 3.

[3] Pub. L. 97-291.

[4] 42 U.S.C. § 10601.

[5] RETROSPECTIVE, *supra* note 1, at 4.

[6] 42 U.S.C. § 10606.

receive information about conviction, sentencing, imprisonment, and release of offenders.

III. DoD & Air Force Implementation

Pursuant to the aforementioned Acts, the Department of Defense (DoD), and subsequently the United States Air Force (USAF), issued directives, regulations and instructions promulgating new VWAP requirements for military personnel. These publications have gone through several revisions to keep pace with current law. The most current DoD version was issued in 2004. The USAF re-issued its guidance in December 2007 and places primary responsibility for the program at the base level with the installation commander.[7] The commander can, and generally does, delegate this authority to the SJA. Hence, the SJA is in the best position to maximize VWAP efficiencies resulting from JAGC21 initiatives.

IV. Making a Good Program Better

While it is true, there have been great strides in victims' rights over the past two decades, there is always room for improvement. I believe JAGC21 presents a unique opportunity for SJAs and LOSs to maximize the impact of victim services offered at their installation. The first step should be to evaluate one's current program. As judge advocates and paralegals, we are trained to pursue justice for all; the victim, the accused and the USAF. This is a solid foundation. However, in order to evaluate VWAP effectiveness, one must do so through the eyes of a victim. Answering these questions is a good starting point:

- Does your office truly consult with victims prior to making recommendations about their case, or do you inform them after the fact or only when asked?
- Is the military justice system thoroughly explained to victims in terms they can understand?
- When advice is given to commanders, are victims' interests presented with equal weight as the interests of the Air Force and for the accused?
- Do you contact victims and witnesses early on, possibly during the investigation, or do you call them the week before trial?

Being aggressively proactive in all of these areas will ensure your VWAP is not only meeting the letter of the law, but the spirit and intent of it as well.

There is no substitute for an experienced VWAP professional who will truly champion a victim's cause in a base legal office. Rather than being just another cog in the prosecution machine, this individual should be able to independently and zealously represent victim's views to JAGs and commanders. Mature, responsible persons who are intimately familiar with the nuances of the military justice system and victim-centric laws and have the ability to communicate those details to civilians are ideal choices when filling these positions. Likewise, possessing the tact and diplomacy necessary to deal with senior officers, is also desired.

Typically, VWAP responsibilities in the Air Force are assigned to a paralegal NCO as an additional duty. Many installations do not have the workload to justify dedicating an entire position to VWAP. I believe the realities of JAGC21 initiatives may create a unique opportunity. There are currently some bases where VWAP responsibilities have been combined with other roles such as magistrate court, court reporter, or discharge clerk into a primary civilian position.[8] Conversion of a military claims examiner position into one of these positions is one possibility that could be explored. Where practical, I would highly recommend choosing this option, as it may provide greater focus, continuity, and autonomy.

[7] *See* U.S. DEP'T OF DEFENSE, DIR. 1030.1, VICTIM AND WITNESS ASSISTANCE (13 Apr. 2004); U.S. DEP'T OF DEFENSE, INSTR. 1030.2, VICTIM AND WITNESS ASSISTANCE PROCEDURES (4 JUN. 2004); and U.S. DEP'T OF AIR FORCE, INSTR. 51-201, ADMINISTRATION OF MILITARY JUSTICE (21 DEC. 2007), chapter 7.

[8] As of 24 Jan 08, the JAG roster listed VWAP positions at Buckley, Malmstrom, Peterson, Schriever, and Bolling Air Force bases.

Another way to work smarter, consistent with JAGC21 principles, is to increase training and education for personnel who perform VWAP duties. While the basic courses for Air Force attorneys and paralegals as well as some military justice courses touch on the application of VWAP, there is no formal training dedicated solely for that purpose at The Judge Advocate General's School. Until such a course is created, I highly recommend sending victim advocates to external training and conferences when available and funding permits. The National Organization for Victim Assistance (NOVA) annual conference is the pinnacle of these and comes highly recommended.[9]

[9] Information on the annual conference is available at: http://www.trynova.org/events/

V. Conclusion & Challenge

JAGC21 is about making things better. By following the above recommendations, we will strengthen the Crime Victims' Bill of Rights with definitive action and consistent with JAGC21 guiding principles. I believe it is necessary to "push the envelope" in order to make worthwhile progress in the victims' rights arena. I urge SJAs and LOSs to continue our collective journey towards victim justice by taking these next, logical steps. I also implore JAGs and paralegals at all levels to evaluate their own contributions to VWAP and, as they have always done, continue to improve on an already impressive record.

AFJAGS Outreach Webcasts

The Judge Advocate General's School has hosted monthly webcasts for nearly two years. Over 3,000 people across the Corps and DoD have participated in the webcasts -- and that number is poised to grow dramatically!

April's webcast inaugurated a new webcast system. The new system allows 400+ offices and individuals to connect at the same time -- a marked improvement over the initial system's limit of 50 live connections. The new system also allows Guard, Reserve, and other members to connect from civilian practices, home, and other computers not on the military network.

The webcasts also generally feature formal continuing legal education credit. The School's CLE Director, Mr. Steve Stevens, worked with every state with a CLE requirement. Now, every state but Tennessee now allows CLE credit for the School's substantive law webcasts.

"Preparing to Deploy" Webcast

The webcast series was created with a broad vision. Each of the School's divisions present sessions, providing a wide range of topics. Experts within the School, across the Corps, and from private practice have all shared their knowledge and real-world experiences.

The webcasts can also be a useful addition to regular office training programs.

Each session is recorded, so that everyone can access the material at convenient times. (The School cannot provide CLE credit for recordings, though attorneys may work individually with states for credit including "self-study" credit for watching a past session.)

Check the webcast schedule on the Distance Learning page of the School's site on FLITE and participate in the upcoming sessions!

Advice from the Field...

Leadership Lessons Learned at JTF-GTMO

by Captain Kenneth A. Artz, 90 SW/JA, F.E. Warren AFB

Captain Artz served as a legal advisor for six months in Joint Task Force - Guantanamo Bay Cuba (JTF-GTMO). He distilled many practical lessons in leadership from this experience -- lessons we can apply while deployed and elsewhere throughout the JAG Corps. -- The Editors

Joint Task Force - Guantanamo Bay, Cuba arguably operates under more media and public scrutiny than any other military mission in history. Everything that happens at GTMO, the most famous detention camp in the world, is done under the watchful eye of counsel for detainees, the media, Congress, and other non-governmental agencies.

In this intense pressure cooker of political and media scrutiny, legal professionals act on the front lines of history advising on the ever-evolving legal framework of detention operations. Although the GTMO legal office is small, consisting of a Navy 0-6 SJA, 5 JAGs (3 Army, 1 Navy, 1 AF, 1 civilian attorney (Navy OGC), and 10 enlisted personnel (5 Navy, 4 Army, and 1 AF), the SJA office helps protect the security of the United States.

I learned several leadership lessons from the Joint Task Force Guantanamo Staff Judge Advocate (JTF-GTMO SJA), a Navy CAPT, as well as from my other colleagues. I want to share them, since I think the lessons can be useful in any Air Force legal office.

1. Push the Legal Office into Every Aspect of the Mission. Because of the intense public scrutiny, almost every mistake that happens at GTMO winds up on the front page of the New York Times. Through months of hard work, the SJA trained the leaders of the operational mission to call the JAG first -- before making many important decisions. Through a mixture of competence and common sense, the SJA earned the trust of the decision makers and impressed upon them that letting the SJA in on important decisions keeps them out of hot water. Proactive legal involvement was a must at GTMO.

2. Know the Mission. JAGs cannot be the "sanity check" or give a common-sense read unless they know the mission inside and out. Talk to the operators, socialize with the operators, and let the operators teach you the mission. Visit the operators often so they know you actually care about them and the mission.

3. Be Competent. The only way to push your way into the mission and gain the trust of the decision makers is to provide quick, sound, practical and correct advice at all times. The leadership will stop turning to the SJA if we are not "spot-on" every time. An SJA who produces for leadership will continue to be "in the loop" -- which ultimately will help the mission.

4. Never Be Afraid of a Fight. This was one of the SJA's favorite phrases. The reason nobody likes lawyers is because we have the unenviable job of sometimes saying "no" to our bosses and fellow squadron leaders. The SJA's job is to keep our leaders out of trouble and out of jail. We would not be doing our job and not serving our county if we simply said yes to all ideas. If an idea doesn't feel right, then it probably isn't a good idea. Fight for what is right all the time, anytime, no matter who you are going to upset.

5. Provide Total Support and Top Cover to Members of the Legal Office. The SJA treated each person in the office as one of his own. He looked out for their well-being at every turn. He would often be found helping out his troops with promotions, fixing end-of-tour awards from prior assignments, relentlessly encouraging the younger enlisted troops to finish their degrees, and even offering advice on diverse topics such as relationships, future careers, and finances. He cared about everyone on his staff. In return, his people not only worked hard, they wanted to perform well for him. Office productivity was off the charts.

6. Utilize Every Member of the Office. The SJA also improved office productivity by forcing all members of the office to work at other jobs. This caused the entire office to learn the mission. It is rare in the military to have a full office, so when people take leave or are deployed, anyone in the office can step in and fill the void. The SJA pushed the youngest enlisted person into important duties, such as personally notifying detainees that they were being transferred from GTMO. Not only did this boost the confidence of all members, it diversified the skill set among all members of the SJA office. There were no wasted bodies in the GTMO SJA legal office.

7. Treat Big Things Big and Small Things Small. I learned that it is important for leaders to have a big-picture perspective. The SJA would focus his attention on the important issues that would have negative implications on the mission or the country. He intentionally would not blow up over smaller issues. This allowed the SJA members to work hard without worrying about making little mistakes which eventually increased productivity.

8. Get Off the Island/Take Leave. We worked hard and played hard. The SJA would often give people time off if there wasn't anything crucial happening. This allowed everybody to recharge their batteries before the inevitable busy times.

9. Have Fun Together. One reason the SJA office had great chemistry is because we spent time together outside of the office. We would work out together, eat together, snorkel together, and socialize together. We would attend karaoke every Wednesday and Saturday night, we organized and attended a base-wide pub crawl, and we attended many GTMO MWR events. We often read that the most successful sports teams are the closest off of the playing field. Our office was proof that this sports tenant is true.

10. Keep the Commander Informed of All Positive and Negative Developments. The SJA was always mindful of who we worked for. Bad news was always showing up in the newspaper. It took incredible effort to stay in front of these developments. The SJA had a knack of anticipating bad news and informing the JTF GTMO commander before he heard it from somewhere else. The commander always appreciated the advanced notice so he could be prepared.

Share your leadership lessons, deployment experiences, and other advice with our readers! Call or email the editors of The Reporter.

Court-Martial Sentencing with Members: A Shot in the Dark?

by Colonel Steven J. Ehlenbeck[**]

I. Virtues of the Military Justice System

The United States military justice system is highly regarded by those familiar with it. Experienced defense counsel are provided to all accused service members free of charge, with more serious cases often having two or more defense counsel. Because of a relatively light caseload – extremely light compared with civilian criminal justice systems – counsel for both sides are able to devote considerable time and resources to each case, and there is virtually no caseload-driven pressure on counsel for either side to deal cases that warrant litigating. Expert consultants and witnesses are readily available to both parties when warranted, with the deep pocket of the federal government providing whatever funding is necessary to ensure justice.

The motions and findings stages of the court-martial process are models to be emulated. Anyone who has observed a number of litigated courts-martial can't help but come away with the impression that the processes for litigating motions and determining guilt or innocence are thorough, fair and just.

II. A Flaw: Court Member Sentencing

Unfortunately the same cannot be said for the sentencing process. While the process allows introduction of extensive evidence to be considered in sentencing, and it is not skewed in favor of either party, there is nevertheless an inherent flaw. Court members (jurors) with little or no experience in determining an appropriate sentence are given a wide range of options (usually ranging from no punishment to the maximum authorized confinement) and told to go and decide what is just. If they ask about sentences for similar offenses in other cases, they are told such information is irrelevant. Thus sentencing takes place in a vacuum, resulting in a wide range of sentences for similar offenses and undermining both justice and the perception of justice.

A better approach would be to retain the option for court members to decide innocence or guilt, but mandate judge-alone sentencing in non-capital cases.[1]

III. Current Sentencing Options

Under the current system, the accused can choose either court members or the military judge sitting alone to determine guilt or innocence, if the case is litigated, and the sentence, if the accused is found guilty.[2] Court members are typically commissioned officers, but an enlisted accused is entitled to have enlisted representation on the panel if desired. There is no option to have court members determine the findings (guilty or not guilty) and the judge impose the sentence. Thus, the accused and their counsel consider how receptive they believe the court members and military judge would be to their arguments on both findings and sentencing in deciding which forum to select.[3] Conventional wisdom is that judges are generally more likely to convict and

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[1] This would also align the military justice system with the federal system and the criminal law procedures of 42 states. Major James Lovejoy, *Abolition of Court Member Sentencing in the Military*, 142 Mil. L. Rev. 1, 3 (1994).

[2] The accused's option is relatively new, beginning with the introduction of military judges in 1969. Sentencing was -- by statute -- by members only prior to that time. Colonel James A. Young III, *Revising the Court Member Selection Process*, 163 MIL. L. REV. 91, 112 (2000).

[3] "Forum shopping" was studied at length as one factor in the judge alone sentencing considerations of the Military Justice Act of 1983 Advisory Commission. The Commission found "the option is not being exercised on a mere 'gamble' but is, rather, being carefully exercised, normally based on sound legal advice given by a defense counsel in order to maximize the effectiveness of the selected trial strategy." ADVISORY COMMISSION TO THE MILITARY JUSTICE ACT OF 1983, ADVISORY COMMISSION REPORT, at 22 (14 Dec. 1984).

more predictable on sentencing. For certain types of serious offenses that tend to evoke emotional reactions – such as child sex abuse cases – accused and counsel often elect judge-alone sentencing in guilty plea cases, apparently expecting less confinement time than court members might adjudge.

Drug offenses, sex-related crimes and larceny are among the most commonly charged offenses in Air Force courts-martial. They carry maximum confinement periods ranging from 6 months (e.g. larceny of $500 or less) to 2 years (e.g. use of marijuana) to 5 years (e.g. use of harder drugs or larceny greater than $500 or indecent assault) to 7 years (e.g. indecent acts with a child) to 15 years (e.g. distribution of drugs) to 20 years (e.g. carnal knowledge with a victim at least 12 years old) to life without parole (e.g. rape or carnal knowledge with a victim under 12). Only a very small number of serious offenses have mandatory minimum sentences (e.g. death for spying and life with eligibility for parole for premeditated murder).

Other sentencing options generally include punitive discharges (dishonorable or bad conduct discharge for enlisted members; dismissal for officers), hard labor without confinement, restriction to limits, reduction in rank (enlisted only), forfeitures of pay, fines and a reprimand. In the great majority of cases, no punishment is also an option.

Thus the sentencing authority has a very wide range of options to consider. Moreover, there is nothing analogous to the sentencing guidelines of the federal criminal justice system that might assist the judge or court members in determining an appropriate sentence.[4]

Military judges are selected for their positions based on factors including military justice and litigation experience, judicial temperament and good judgment. They typically have extensive court-martial experience and are familiar with sentences imposed in a large number of cases covering a variety of offenses over a number of years. They also have a thorough understanding of the post-trial and appellate process.

Court members, on the other hand, usually have very limited experience with the military justice system. The typical court member has never sat on a panel before and is either unfamiliar with sentences imposed in other cases or has minimal knowledge of the details of those cases.

Court members thus generally have no frame of reference whatsoever for determining what would be a fair and just sentence in a given case. They are essentially told to go into the deliberation room, consider all the evidence and do what they think is right. If the accused has included information on the outcome of other cases in his unsworn statement (which case law seems to allow), the judge responds by telling the members that those other cases are irrelevant because the members don't know all the facts of those cases and the sentencing authority in those cases cannot be presumed to have any better judgment in sentencing than they do. Moreover, if the members ask intelligent questions in an effort to make a more informed judgment (e.g. if reduced in rank, when and how will the accused get the opportunity to earn it back?; or, what other discharge possibilities exist if the sentence does not include a punitive discharge?), they are told that such issues are collateral and they should just do what they think is right without regard to potential collateral consequences. The court members thus take a shot in the dark to come up with an appropriate sentence.

IV. A Systemic Impact

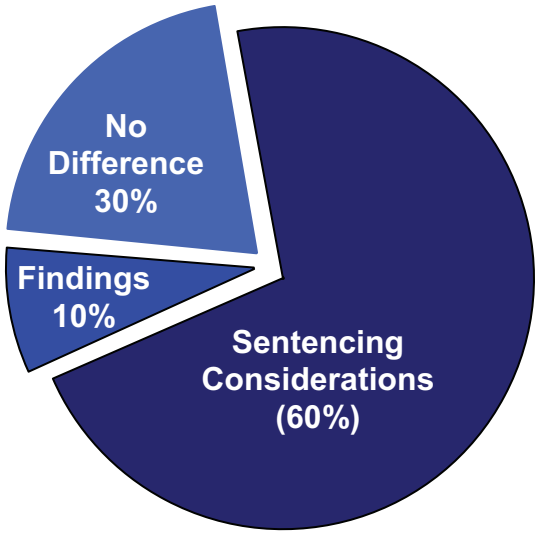
The current sentencing system provides an incentive for the government to take cases to the more serious general court-martial even when an appropriate sentence falls within the special court-martial maximum (limited to one year confinement and a punitive discharge no worse than a bad conduct discharge).

To illustrate, suppose there are charges alleging use of cocaine on multiple occasions and distribution on multiple occasions (by sharing it with other airmen), where an appropriate sentence considering all the

[4] In addition to the assistance of sentencing guidelines, most federal criminal cases require a presentencing investigation and report by a federal probation officer. FED. R. CRIM P. 32(c).

evidence might be confinement for 8 months and a bad conduct discharge. If the case goes to a special court-martial, the members are advised that the maximum sentence includes a bad conduct discharge and confinement for one year. The trial counsel (prosecutor) argues for a bad conduct discharge and 10 months confinement. The defense counsel then responds by pointing out that the distribution was technical only (sharing with friends rather than dealing) and arguing that the trial counsel's suggestion of a sentence close to the maximum is outrageous. The defense argument may resonate with inexperienced court members trying to be fair. However, if the same case is taken to a general court-martial, the members are advised that the maximum sentence includes a dishonorable discharge and confinement for 20 years. The trial counsel might then sound very reasonable asking for "only" a bad conduct discharge (versus the more serious dishonorable discharge) and 10 months confinement (versus the 20 years authorized).

Defense Counsel's View of Forum Selection



Source: LOVEJOY, *supra* note 1, at 4 n.10.

The accused's option of electing court members for sentencing thus steers cases to general courts-martial. When cases that might otherwise be taken to special courts are instead taken to general courts, extensive additional time and resources are expended, as an Article 32 investigation (essentially a mini-trial) must be conducted before charges may be referred to a general court-martial.

V. Extreme Outcomes

Court members are honorable service members who take their duty seriously and put forth their best effort to determine a fair and just sentence. In most cases, they get it right, adjudging a sentence within a reasonable range given the offenses and other relevant considerations.

However, there are a substantial number of cases where court members come up with extreme sentences, usually on the lenient end of the spectrum.[5] Whether because of inexperience, discomfort in judging another individual or excessive sympathy for the plight of the accused, court members too often adjudge sentences which are highly inconsistent with the range of sentences imposed on similar offenders for similar offenses. Such extreme sentences can undermine confidence in the fairness of the military justice system. While it is true that each case is different and must be decided on its own merits, there are nevertheless too many cases where the sentence just does not seem to fit the crime, taking into account all the evidence.[6]

a. A Common Example

One example of an extreme sentence came in a general court-martial case in spring 2007. The accused, a senior airman (E-4), had gotten into an

[5] This can shift with local attitudes. One study in a state allowing jury sentencing found juries more likely to acquit -- but also likely to give sentences *five times more severe* that judges in drug cases and twice as severe in violent felony cases. LOVEJOY, *supra* note 1, 26 n.160 (citing *Few are Willing to Gamble on Jury*, THE DAILY PROGRESS (Charlottesville, Va.), Nov. 17, 1992, at 1.)

[6] This disparity occurs even in cases decided on the same base, removing the "local military community" support for member sentencing favored by the Advisory Commission to the Military Justice Act of 1983. ADVISORY COMMISSION REPORT, *supra* note 3, at 5.

argument with his girlfriend and threw her clothing in the dumpster at his apartment complex. She confronted him late at night in the courtyard of the apartment complex. He threw her shoes at her and ran after her. Her uncle, who was waiting in the car, stepped between the two and a fistfight resulted, with the uncle getting the better of the accused. As the girlfriend and uncle drove off, the accused grabbed a pistol and fired a shot in their direction. The round went through the window of an apartment across the courtyard (occupant was home but in another room). The accused then drove to the uncle's home and fired four rounds into the front of the house (aunt and children were in front room of the house). He crashed his car following a police chase and fled on foot, throwing the gun on top of a building. He was found guilty of two specifications of willful discharge of a firearm (under circumstances that endangered human life), obstruction of justice and disorderly conduct. A panel of officer and enlisted members sentenced him to 3 months confinement, 3 months forfeitures of pay and reduction to E-1 (no punitive discharge).

b. Another Example

Another extreme sentence came in a special court-martial case in summer 2007. The accused (E-4) stole credit cards from two co-workers at the base hospital and used them for various transactions. In one transaction, while in uniform, he bought expensive rims for his Escalade, telling the merchant that the credit card belonged to his Air Force boss (which would explain the female name on the card) and the vehicle was going to be used for recruiting at local high schools. Upon learning he was under investigation, the accused submitted a package to the wing commander professing his innocence. In a separate incident, he presented reasonably authentic-looking copies of $20 bills as payment for a massage. He was found guilty of counterfeiting, larceny, obtaining services by false pretenses and making a false official statement. A panel of officers sentenced him to a bad conduct discharge (no confinement or reduction in rank). The special court-martial maximum sentence, discussed in Section IV above, may have been a factor in the sentence in this case. Regardless, it is apparent that such sentences can undermine confidence in the military justice system.[7]

VI. Benefits of Judge Alone Sentencing

Judge alone sentencing would substantially improve the military justice system. The accused would still retain the option to have court members decide innocence or guilt, but the court members would then be excused after findings were announced. The wide range of sentencing options would remain, with the sentence decided by an experienced military judge rather than court members with no frame of reference.

The very existence of the military justice system is based on the premises that discipline is critical to an effective fighting force and a commander-centric system is the best way to impose that discipline. Judge alone sentencing would arguably reduce commander involvement in the system, as the convening authority would no longer select court members for sentencing purposes and commanders sitting as court members would no longer be involved in deciding the punitive consequences of offenses serious enough to warrant court-martial.[8] Nevertheless, such a modification would not undermine any key aspects of commander control of the military justice system. Commanders would still prefer charges, recommend disposition of charges, direct Article 32 investigations, refer cases to the appropriate type of court-martial, select court members for findings purposes, and take action on the findings and sentences adjudged.

The primary benefit of judge alone sentencing would be more consistent sentences, which would enhance the actual fairness and perception of fairness of the military justice system. Moreover, judges are in a better

[7] Experienced litigators are familiar with outcomes at the other extreme, including cases in which the members return a sentence of confinement *longer* than recommended by *trial counsel*.

[8] Indeed, this separation has been noted as a positive feature in isolating sentences from possible undue command influence. ADVISORY COMMISSION REPORT, *supra* note 3, at 14.

position to objectively evaluate each sentencing case and are less susceptible to get caught up in emotions that might lead to an unreasonably harsh or lenient sentence.[9] Thus, sentences would not only be more consistent; they would also be more appropriate across the board. There would also be a substantial savings of resources associated with Article 32 investigations, as all cases where the special court-martial maximum sentence was within the reasonable range given the offenses would presumably be taken to special courts.[10] There would be no need to take cases to general courts simply to prevent members from imposing unreasonably light sentences solely because of their perception of the maximum sentence allowed.

It may seem arrogant and presumptuous for a military judge, or any judge advocate, to proclaim the virtues of having judges rather than other military members decide the sentences for court-martial offenses. After all, our jury system is based on the idea that it is more fair and objective for innocence or guilt to be determined by a group of our peers rather than an individual sitting on high. Who is to say that a judge is any better qualified to determine a just sentence than is a group of military members with different backgrounds and perspectives? And it may be likely that some judges will tend to impose harsher or more lenient sentences than other judges, either for particular offenses or across the board. While these are legitimate considerations and arguments, judge alone sentencing works effectively in many civilian jurisdictions and there are checks in the military justice system that serve to reinforce the desirability of judge alone sentencing.

The initial check in the system is the process by which military judges are appointed. The Judge Advocate General (TJAG), with input from those familiar with the nominee's background, personally appoints military judges, based on considerations such as experience, competence, judicial temperament and judgment. Thus, individuals who have a firm prosecution or defense oriented view of the world, even though they may be great litigators and otherwise qualified, are not likely to be appointed as judges. The Judge Advocate General also decides when to reassign a judge to a non-judicial position. Although TJAG is no doubt careful to respect judicial independence, and recognizes that there is often a wide range of reasonable sentences for any given case, a pattern of bizarre sentences could be one factor in concluding that a particular judge is not well suited for the position.

A pretrial agreement provides another check in the system. An accused can agree to plead guilty in exchange for a commitment from the convening authority not to approve a sentence in excess of a certain cap. If the judge imposes a sentence in excess of the cap, the convening authority must reduce it. Even without a pretrial agreement, the accused always has the option to submit clemency matters. These matters may include the argument that the sentence was unreasonably harsh and should be reduced. The convening authority has broad discretion to reduce the sentence imposed by the military judge.

VII. Conclusion

In summary, judge alone sentencing in court-martial cases would enhance objectivity, consistency and fairness in sentencing; promote efficiency by eliminating unnecessary Article 32 investigations; and increase confidence in the military justice system. Absent such a change, court members will continue to take a shot in the dark to come up with an appropriate sentence.

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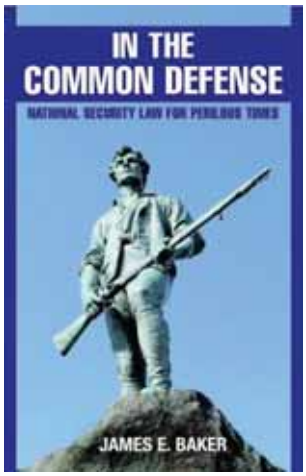
[9] Insulation from emotion may be offset by the judge's knowledge of inadmissible evidence -- a strong concern of the Advisory Commission to the Military Justice Act of 1983. One commentator countered this concern by noting "[m]ilitary and civilian judges are routinely tasked with hearing facts for limited purposes, which they later disregard if consideration would be improper." YOUNG, *supra* note 2, at 114 n.125 (quoting United States v. Howard, 50 M.J. 469, 471 (1999)).

[10] This can be seen as a logical extension of the administrative cost savings that helped drive the introduction of judge alone trials in 1969. LOVEJOY, *supra* note 1, at 30. This includes the substantial time of court members in the sentencing phase of trial. ADVISORY COMMISSION REPORT, *supra* note 3, at 14.

BOOKS IN BRIEF



In the Common Defense: National Security Law for Perilous Times
James E. Baker, $30.00, Cambridge University Press.

Military legal professionals wanting to learn more about their role in national security now have a very accessible resource. James E. Baker delves far beyond the acts and cases of national security law, thoroughly describing the processes and players involved. Readers will be inspired to live up to their heavy burden in protecting the nation.

The author is well-known to many readers of The Reporter. Judge Baker sits on the United States Court of Appeals and is also a frequent lecturer at The Judge Advocate General's School. He writes with a wealth of experience, having served as a special assistant to the President and legal advisor to the National Security Council. He also served as counsel to the President's Foreign Intelligence Advisory Board. He was also an infantry officer in the United States Marine Corps.

Four security threats form a very useful structure, as actors and actions are viewed throughout the book against:

- Terrorist attacks -- particularly with nuclear weapons and other WMDs, but also from suicide bombings and other methods. The extreme consequences and terrorists' emphasis on such attacks create a critical vantage point from which to examine national security law.
- Attacks on the rule of law, coming as responses to terrorist threats. Government action may go unchecked by any effective system of independent evaluation. "Law is itself a national security tool," notes Judge Baker, discussing its strength to "dissuade the fence sitter, buttress the modernist, and isolate the jihadist."
- Trade-offs between security and law, diminishing one by compromise -- rather than gaining a consensus that advances both. As Judge Baker states, "the rule of law provides for the common defense of liberty *and* security." *(emphasis added)*
- Other threats -- not as focused as terrorist attacks, but with potentially grave effects on national security. These additional threats include pandemic disease and conflict in the Middle East.

These diverse and realistic threats allow great discussion of the competing interests in national security law. Judge Baker makes a noteworthy effort throughout the book to present all sides to each issue. This balanced view rewards the reader with a full picture -- a significant feat in a subject that finds many authors resting on their "war stories" or leading with their opinions. This work equips readers to develop their own thoughts.

The final chapter of the book is a challenging exploration of the roles of a national security lawyer. The roles come alive in an "edge of the seat" hypothetical proposing a pre-emptive strike on a suspected terrorist target:

- ***Advocacy***: the attorney defends the President's decision using the law that supports it.
- ***Advisory:*** the attorney educates the President on the legal standard, then defers to the decision.
- ***Judicial***: the attorney inquires as to collateral effects, seek to resolve any ambiguity in collected intelligence, then advises the President that he could -- or could not -- approve the target as "lawful".

Judge Baker logically advises using all three roles, with thoughtful counsel for all government attorneys:

> The hypothetical also illustrates the potential range of duties, functions, and choices the attorney might (and in my view should) address in a given scenario. The national security lawyer has a duty to guide decisionmakers toward legally available options. In performing this function in a timely and meaningful manner, the lawyer provides for our physical security. In doing it faithfully, based on honest belief in the application of law, he provides for the security of our way of life, which is to say, a process of decision founded on respect for the law and subject to law.

Heritage to Horizon

One hundred years ago, the Chief Signal Officer of the Army contracted with the Wright Brothers for one "heavier-than-air flying machine" -- effectively the birth of the world's greatest Air Force!

WAR DEPARTMENT,
OFFICE OF THE CHIEF SIGNAL OFFICER.

Washington, February 10, 1908.

Wright Brothers,
Dayton, Ohio.

Gentlemen:-

Under proposal No. 203, opened in this office on February 1, 1908, (41) I am directed by the Chief Signal Officer of the Army to place order with you for the article listed below, subject to the instructions on the back hereof.

Goods must be securely packed for shipment and delivered within 200 days from receipt of order to Fort Myer, Va., being forwarded.

If transportation charges are to be borne by the United States, Government bill of lading must be received by you before shipment is made. If you ship without Government bill of lading, you will be held for transportation charges. Advise if there is delay in furnishing bill of lading.

Inspection will be made at Fort Myer, Va.

Mark Package: Order 3619.

Address and ship: Signal Officer,
Fort Myer, Virginia.

Item:

One(1) heavier-than-air flying machine, in accordance with Signal Corps Specification No. 486, dated December 23, 1907, at $25,000.00.

$25,000.00

Note:

Bond is required in the sum of ten per cent. of the consideration, and upon receipt of same your certified check for $2,500.00 will be returned to you.

Very respectfully,
Chas. L. Wallace,
Captain, Signal Corps, U.S.A.,
Disbursing Officer.

Even at that early stage of flight, though, it is impressive to see the importance -- and maturity -- of contract law! The order, contract, and incorporated solicitation and specifications show many modern aspects of government procurement, including:

- **Procurement Ethics (Art. X: "No member … of Congress, nor any person belonging to, or employed in, the military service … shall be admitted to any share or part of the contract.")**
- **Performance Incentives (Gen'l Requirement 4 set out a payment scheme based on the average speed attained. The Wright Flyer flew at 42 mph, earning the Wrights 120% -- a $5,000 bonus.)**
- **Intellectual Property Rights (Gen'l Requirement 11 conveys a nonexclusive right of use in any patented aspects of "the flying machine" and ensures the Wrights had the rights to convey.)**
- **The right of inspection, reprocurement costs on default, non-assignability of claims**

The order on this page, the solicitation that follows, and many other interesting Wright Brothers documents are available from the Library of Congress at: http://memory.loc.gov/ammem/wrighthtml/

To the Public:

Sealed proposals, in duplicate, will be received at this office until 12 o'clock noon on February 1, 1908, on behalf of the Board of Ordnance and Fortification for furnishing the Signal Corps with a heavier-than-air flying machine. All proposals received will be turned over to the Board of Ordnance and Fortification at its first meeting after February 1 for its official action.

Persons wishing to submit proposals under this specification can obtain the necessary forms and envelopes by application to the Chief Signal Officer, United States Army, War Department, Washington, D.C. The United States reserves the right to reject any and all proposals.

Unless the bidders are also the manufacturers of the flying machine they must state the name and place of the maker.

Preliminary.— This specification covers the construction of a flying machine supported entirely by the dynamic reaction of the atmosphere and having no gas bag.

GENERAL REQUIREMENTS.

Acceptance.— The flying machine will be accepted only after a successful trial flight, during which it will comply with all requirements of this specification. No payments on account will be made until after the trial flight and acceptance.

Inspection.— The Government reserves the right to inspect any and all processes of manufacture.

The general dimensions of the flying machine will be determined by the manufacturer, subject to the following conditions:

1. Bidders must submit with their proposals the following:

(a) Drawings to scale showing the general dimensions and shape of the flying machine which they propose to build under this specification.

(b) Statement of the speed for which it is designed.

(c) Statement of the total surface area of the supporting planes.

(d) Statement of the total weight.

(e) Description of the engine which will be used for motive power.

(f) The materials of which the frame, planes, and propellers will be constructed. Plans received will not be shown to other bidders.

2. It is desirable that the flying machine should be designed so that it may be quickly and easily assembled and taken apart and packed for transportation in army wagons. It should be capable of being assembled and put in operating condition in about one hour.

3. The flying machine must be designed to carry two persons having a combined weight of about 350 pounds, also sufficient fuel for a flight of 125 miles.

4. The flying machine should be designed to have a speed of at least forty miles per hour in still air, but bidders must submit quotations in their proposals for cost depending upon the speed attained during the trial flight, according to the following scale:

40 miles per hour, 100 per cent.
39 miles per hour, 90 per cent.
38 miles per hour, 80 per cent.
37 miles per hour, 70 per cent.
36 miles per hour, 60 per cent.
less than 36 miles per hour rejected.
41 miles per hour, 110 per cent.
42 miles per hour, 120 per cent.
43 miles per hour, 130 per cent.
44 miles per hour, 140 per cent.

5. The speed accomplished during the trial flight will be determined by taking an average of the time over a measured course of more than five miles, against and with the wind. The time will be taken by a flying start, passing the starting point at full speed at both ends of the course. This test subject to such additional details as the Chief Signal Officer of the Army may prescribe at the time.

6. Before acceptance a trial endurance flight will be required of at least one hour during which time the flying machine must remain continuously in the air without landing. It shall return to the starting point and land without any damage that would prevent it immediately starting upon another flight. During this trial flight of one hour it must be steered in all directions without difficulty and at all times under perfect control and equilibrium.

7. Three trial flights will be allowed for speed as provided for in paragraphs 4 and 5. Three trials for endurance as provided for in paragraph 6, and both tests must be completed within a period of thirty days from the date of delivery. The expense of the tests to be borne by the manufacturer. The place of delivery to the Government and trial flights will be at Fort Myer, Virginia.

8. It should be so designed as to ascend in any country which my be encountered in field service. The starting device must be simple and transportable. It should also land in a field without requiring a specially prepared spot and without damaging its structure.

9. It should be provided with some device to permit of a safe descent in case of an accident to the propelling machinery.

10. It should be sufficiently simple in its construction and operation to permit an intelligent man to become proficient in its use within a reasonable length of time.

11. Bidders must furnish evidence that the Government of the United States has the lawful right to use all patented devices or appurtenances which may be a part of the flying machine, and that the manufacturers of the flying machine are authorized to convey the same to the Government. This refers to the unrestricted right to use the flying machine sold to the Government, but does not contemplate the exclusive purchase of patent rights for duplicating the flying machine.

12. Bidders will be required to furnish with their proposal a certified check amounting to ten per cent. of the price stated for the 40 mile speed. Upon making the award for this flying machine these certified checks will be returned to the bidders, and the successful bidder will be required to furnish a bond, according to Army Regulations, of the amount equal to the price stated for the 40-mile speed.

13. The price quoted in proposals must be understood to include the instruction of two men in the handling and operation of this flying machine. No extra charge for this service will be allowed.

14. Bidders must state the time which will be required for delivery after receipt of order.

(signed) JAMES ALLEN,

Brigadier General, Chief Signal Officer
of the Army.

Signal Office,
Washington, D.C., December 23, 1907.

Catching Up with . . .

Colonel Gary Halbert
USAF (ret.)

The National Transportation Safety Board is responsible for investigating every civil aviation accident in the United States, plus significant accidents involving railroad, pipeline, highway, and marine transportation. As a result of its accident investigations, the Safety Board has made over 12,000 safety recommendations during the past four-decades. These recommendations brought about improvements in transportation regulatory oversight, manufacturing processes, and industry practices. So it is reassuring to know that an Air Force-veteran, Colonel Gary Halbert, USAF (ret), is serving the NTSB using the sound legal principles learned over almost two decades as an Air Force JAG.

Mr. Halbert became the NTSB's General Counsel in February 2006.

"My role with the NTSB feels like a perfect fit, combining experiences as an officer, supervisor, manager, JAG and pilot. Even more important for me in deciding to join this remarkable group of people is the agency's public service role—improving transportation safety by investigating accidents to determine what went wrong."

Mr. Halbert began his career as a Distinguished Graduate of the Air Force Academy. He was assigned as an instructor pilot after graduation from pilot training. Approximately five years later, he entered law school through the Funded Legal Education Program, graduating from the University of Texas School of Law with honors. As a JAG, he served as a Claims Officer, Chief of Military Justice, and Deputy SJA at Elmendorf AFB. He also served as the SJA of Moody AFB, Barksdale AFB, and Third Air Force. He attended Squadron Officer School and Air Command and Staff College in residence, graduating as the year's top graduate from both, and the National War College where he was a Distinguished Graduate. Tours as a Branch Chief in JAG (now JAA), leading JAX, as the Executive Officer to TJAG, and then directing the Air Force Executive Issues Team gave him a broad understanding of the Air Force and the challenges facing large organizations. Those experiences continue to pay dividends.

"The Air Force gave me an excellent education and remarkable experience. I'm proud to have served with the outstanding attorneys, paralegals, and staff, as well as commanders and so many other Air Force professionals who mentored me. I was most fortunate to have the opportunity to work with world-class people counseling Air Force leaders on the top issues of the day."

A Continuing Legacy

The JAG Corps continues to benefit from Colonel Halbert's service. Offices around the Corps have adapted his office policies. The core set of polices are available on the I Lead! website: https://aflsa.jag.af.mil/ILead/jcld_materials.htm

The policies form the foundation of a continuity book. Indeed, one policy addresses continuity books, highlighting structure and use -- and the crucial importance of the continuity materials:

> *"We are not simply doing work for today, we are also establishing values, traditions, and an enduring knowledge base to be passed on to future members of the Air Force and of this office so that the institution may extend its tradition of service, excellence, and success."*