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Lore of the Corps

Articles

TJAGLCS Features

Book Reviews

Lore of the Corps

"Electric Ladyland"[1] in the Army:

The Story of Private First Class Jimi Hendrix in the 101st Airborne Division

By Fred L. Borch
Regimental Historian & Archivist

Despite the many years that have passed since the untimely death of musician James "Jimi" Hendrix in 1970, he is not forgotten by lovers of American music generally and rock-and- roll in particular. "Purple Haze," "The Wind Cries Mary," and "All Along the Watchtower" continue to get airplay. *Rolling Stone* considers him to be the greatest guitar player of all time.[2] But many who admire Hendrix's skill with a guitar do not know that he served as a paratrooper in the 101st Airborne Division, and that he was able to cut short his three-year enlistment because of his knowledge of military law and regulation.

Jimi Hendrix

Born in Seattle, Washington the day after Thanksgiving in 1942, Jimi grew up poor and dropped out of high school. Some of his African-American male friends, who like Hendrix had few job opportunities, joined the armed forces.[3] Jimi also thought about enlisting—especially after he was arrested by the local police twice within four days for riding in a stolen car. Facing up to ten years in jail, Jimi learned that the Seattle prosecutors often accepted a stint in the service as part of a plea bargain.[4] As a result, Hendrix went to an Army recruiter in Seattle and asked if it was possible to join the 101st Airborne Division; he had read about the "Screaming Eagles" and wanted to be a paratrooper.[5]

Jimi's instincts were good. On May 16, 1961, a public defender representing Hendrix struck a plea bargain with the local district attorney: Jimi would receive a two-year suspended prison sentence on the condition that he enlist in the Army. The following day, Hendrix enlisted for three years as a supply clerk and shipped out to Fort Ord, California, for basic training.[6]

At first, Private Hendrix liked military life and, after two months at Fort Ord, he received orders to Fort Campbell, Kentucky. He arrived there on November 8, 1961, and immediately began airborne training. After earning his parachutist badge, now Private First Class Jimi Hendrix discovered that he liked the Army—and soldiering—less and less. This was because the military was interfering with his true love: rock-and-roll music. Hendrix had his guitar with him and he formed a band with his friends[7] and they "got weekend gigs in Nashville and at military bases as far away as North Carolina."[8]

Private Hendrix was a high school dropout, but he was no fool. He knew that he could not simply quit the Army, and if he went AWOL, he might be court-martialed and go to prison. In April 1962, having finished just ten months of his thirty-six-month enlistment, Jimi spoke to an Army psychiatrist at Fort Campbell. He told him that "he had developed homosexual tendencies and had begun fantasizing about his [male] bunkmates."[9] On a subsequent visit, Hendrix told the doctor that he was "in love" with a member of his squad.[10]

While these were fabricated claims about his sexuality, Jimi knew that under existing Army regulations, this was an exit strategy that could get him out of uniform. Under Army Regulation (AR) 635-89, *Personnel Separations—*

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[1] "Electric Ladyland" was the name of the critically acclaimed album released by Jimi Hendrix and his band, "The Jimi Hendrix Experience," in 1968. It showcased Hendrix' incredible talents with the guitar and contained the hit cover of Bob Dylan's "All Along the Watchtower." *See Jimi Hendrix: Electric Ladyland*, ROLLING STONE (Nov. 9, 1968), http://www.rollingstone.com/music/albumreviews/electric-ladyland-19681109.

[2] *100 Greatest Guitarists*, ROLLING STONE (Dec. 18, 2015), http://www.rollingstone.com/music/lists/100-greatest-guitarists-20111123. After Jimi, the list names the next five greatest guitarists of all time as: Slash from Guns 'N' Roses, B.B. King, Keith Richards, Jimmy Page, and Eric Clapton. *Id.*

[3] CHARLES L. CROSS, ROOM FULL OF MIRRORS: A BIOGRAPHY OF JIMI HENDRIX 78 (2005).

[4] *Id.* at 82.

[5] *Id.*

[6] *Id.* at 82-83.

[7] One such friend was Billy Cox, also assigned to Fort Campbell, who later played with Jimi on the "Band of Gypsies" album. *Id.* at 290.

[8] *Id.* at 92.

[9] *Id.* at 93.

[10] *Id.*

Homosexuals, a homosexual Soldier was subject to separation because his presence in the Army "impairs the morale and discipline of the Army."[11] According to the regulation, this unfitness to serve resulted from the fact that "homosexuality is a manifestation of a severe personality defect which appreciably limits the ability of such individuals to function effectively in society."[12]

Under AR 635-89, a Soldier who, demonstrated "by behavior a preference for sexual activity with persons of the same sex," could be discharged with a general or an undesirable discharge—although an honorable discharge might be given in exceptional cases.[13] Private Hendrix was sufficiently familiar with the regulation that he knew what he needed to say and, as a result the Army finally gave in. In May 1962, Captain (Dr.) John Halbert administered a comprehensive medical examination to Hendrix. Halbert concluded that Jimi suffered from "homosexuality" and recommended that he be discharged because of his "homosexual tendencies."[14]

Jimi Hendrix was discharged from the Army and began a red-hot career as a musician. He never admitted how he had used his knowledge of Army regulations to obtain an "early-out" and return to civilian life. On the contrary, he told his friends that he had broken his ankle on his twenty-sixth jump and had been discharged for this physical disability.[15] Private First Class Hendrix must have received at least a general discharge under honorable conditions, as his final paycheck included "a bonus for twenty-one days of unused leave."[16]

Had he lived longer, Jimi Hendrix likely would have been surprised at the changing attitudes about the lesbian, gay, bisexual, and transgender (LGBT) community in America, and in the Army in which he had soldiered. Unfortunately for Hendrix, his "reckless mixing of drugs and alcohol" at age twenty-seven resulted in his death on September 18, 1970.[17]

Jimi Hendrix is not the only musician—or celebrity—to have served in the armed forces. Johnny Cash served in the Air Force from 1950 to 1954 and Elvis Presley was in the Army from 1958 to 1960. But only Jimi Hendrix was a paratrooper, and it seems that his knowledge of the law and regulations got him back into civilian life earlier than might have been expected.[18]

More historical information can be found at

The Judge Advocate General's Corps
Regimental History Website
https://www.jagcnet.army.mil/8525736A005BE1BE

Dedicated to the brave men and women who have served our Corps with honor, dedication, and distinction.

[11] U.S. DEP'T OF ARMY, REG. 635-89, PERSONNEL SEPARATIONS—HOMOSEXUALS para. 2.*a*. (8 Sept. 1958).

[12] *Id.*

[13] *Id.* para. 3.*a*.

[14] Cross, *supra* note 3, at 94.

[15] The Jimi Hendrix website owned and operated by members of the Hendrix family perpetuates the false story of Hendrix being "discharged due to an injury he received in a parachute jump." *James Marshall Hendrix*, JIMI HENDRIX, http://www.jimihendrix.com/biography (last visited Aug. 1, 2016).

[16] Cross, *supra* note 3, at 94.

[17] *Id.* at 333.

[18] For more on celebrities in the armed forces, see Roger Di Silvestro, *Stars Who Served*, MILITARY HISTORY, Sept. 2016, at 40.

Understanding the U.S. Army's Religious Accommodation Policy and Procedures

Major David Lee Ford[*]

"While the members of the military are not excluded from the protection granted by the First Amendment…the fundamental necessity for obedience, the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside of it."[1]

I. Introduction

"You cannot miss training at the range to go to some church service, right?" It is 1600 on a Friday and you are the trial counsel for a brigade combat team. You look across your desk at a frustrated company commander and ask him to start from the beginning. Captain (CPT) Jones tells you that one of his Soldiers, Private (PVT) David Adelman, came to his office and requested two religious accommodations.[2] First, PVT Adelman, an Orthodox Jew, requested an exception to the Army grooming standards that prohibit him from growing out his hair and beard.[3] Second, PVT Adelman requested an excusal from all training exercises on Saturdays so that he can observe the Sabbath.[4] Captain Jones informs you that his company is going to the range next Saturday and he wants every Soldier to be there, including PVT Adelman. Captain Jones has never dealt with a religious accommodation before and is seeking your legal advice. You promptly tell CPT Jones you will research the Army's religious accommodation policy and have an answer for him as soon as possible.

Department of Defense Instruction (DoDI) 1300.17 provides the regulatory framework for religious accommodation in the military.[5] The Army implements DoDI 1300.17 through Army Regulation (AR) 600-20, chapter 5-6.[6] While the provisions of chapter 5-6 appear to be straightforward, in practice, commanders have had challenges complying with the regulation's procedural requirements, which vary depending upon the nature of a Soldier's religious accommodation request.[7]

In a 2015 Department of Defense Inspector General (DoDIG) report, the DoDIG highlighted two of the Army's challenges in implementing its religious accommodation policy.[8] First, the DoDIG found that in 2014 the Army completed only one in four religious accommodation requests within the thirty-day statutory time frame.[9] On average, it

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[*] Judge Advocate, United States Army. Presently assigned as Brigade Judge Advocate, 82d Combat Aviation Brigade, Fort Bragg, North Carolina. LL.M., 2016, The Judge Advocate General's School, United States Army, Charlottesville, Virginia; J.D., 2012, University of Houston Law Center; B.S., 2004, United States Military Academy. Previous assignments include Platoon Leader, 2d Brigade Combat Team, 4th Infantry Division, Fort Hood, 2004-2006; S3 and S4, 2d Brigade Combat Team, 4th Infantry Division, Iraq & Fort Hood 2006-2007; Executive Officer, 194th Armor Brigade, Fort Knox, 2007-2007; Aide De Camp, The Armor Center and School, Fort Knox, 2007-2009; Student, Maneuver Captains Career Course, Fort Knox, 2009; Aide De Camp, Recruiting Command, Fort Knox, 2009-2009; Trial Counsel, 1st Brigade Combat Team, 101st Airborne Division, Fort Campbell, 2013-2014; Chief of Client Services, 101st Airborne Division, Fort Campbell, 2014-2015. Member of the bars of Texas, the U.S. Supreme Court, The Court of Appeals for the Armed Forces, and The Army Court of Criminal Appeals. This article was submitted in partial completion of the Master of Laws requirements of the 64th Judge Advocate Officer Graduate Course.

[1] Parker v. Levy, 417 U.S. 733, 758 (1974).

[2] U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY (18 Mar. 2008) (RAR 22 Oct. 2014) [hereinafter AR 600-20].

[3] AR 600-20, *supra* note 2, para. 5-6.*h*.(5) (authorizing Soldiers to request an exception to the grooming standards of U.S. DEP'T OF ARMY, REG. 670-1, WEAR AND APPEARANCE OF ARMY UNIFORMS AND INSIGNIA (10 Apr. 2015) [hereinafter AR 670-1], for religious purposes).

[4] *Sabbath*, BBC, http://www.bbc.co.uk/religion/religions/judaism/holydays/sabbath.shtml (last visited Sept. 20, 2016). Sabbath is the Jewish holy day. *Id.* It "starts a few minutes before sunset on Friday and runs until an hour after sunset on Saturday." *Id.*; *see also* AR 600-20, *supra* note 2, para. 5-6.*h*.(1) (authorizing Soldiers to be excused from duty in order to attend worship services).

[5] U.S. DEP'T OF DEF., INSTR. 1300.17, ACCOMMODATION OF RELIGIOUS PRACTICES WITHIN THE MILITARY SERVICES para. 4.a. (10 Feb. 2009) (C1, 22 Jan. 2014) [hereinafter DoDI 1300.17].

[6] AR 600-20, *supra* note 2, para. 5-6.

[7] U.S. DEP'T OF ARMY PAM. 10-1, ORGANIZATION OF THE UNITED STATES ARMY appx. I (14 June 1994) [hereinafter DA PAM 10-1]. ("A company is the smallest element of the Army to be given a designation and an affiliation with higher headquarters at battalion and brigade level. . . . This designation of an alpha/numeric and a branch cause an 'element' to become a 'unit'.") A company is generally commanded by a Captain and consist of 62-190 Soldiers. *Id.* A battalion is generally commanded by a Lieutenant Colonel and consists of 300-1000 Soldiers. *Id.* A brigade is generally commanded by a Colonel and consists of 3,000-5000 Soldiers. *Id.* A Division is commanded by a Major General and consists of 10,000-15,000 Soldiers. *Id.*

[8] Inspector Gen., U.S. Dep't of Def., No. DoDIG-2015-148, Rights of Conscience Protections for Armed Forces Services 1 (22 July 2015) [hereinafter DoDIG-2015-148]. The National Defense Authorization Act for Fiscal Year 2014 required the Department of Defense Inspector General (DoDIG) to submit a report to the congressional defense committees that outlined the results of an investigation into the military department's compliance with religious accommodation policies and regulations. *Id.* at i. The DoDIG interviewed personnel in the Office of Diversity Management and Equal Opportunity, Defense Privacy and Civil Liberties Division, Armed Forces Chaplains Board, and Chaplain Schools of the military departments. *Id.* at 7. The DoDIG also conducted panel discussions on religious accommodations with commanders, chaplains, and noncommissioned officers assigned to units inside and outside of the continental United States. *Id.* Finally, the DoDIG received input from twenty-seven religious interest and advocacy groups. *Id.*

[9] *Id.* at 13; AR 600-20, *supra* note 2, para. 5-6.*i*.(11) ("Appeals to denials of accommodation will reach the DCS, G-1 within 30 days after the Soldier submits the appeal (60 days OCONUS)."). DoDI 1300.17, *supra* note 5, para. 5.b.(*2*) ("Final review will take place within 30 days for cases arising

took the Army sixty-nine days to process a religious accommodation request.[10]

Second, the DoDIG found that noncommissioned officers, without authority, issued decisions on religious accommodation requests, to include Soldiers' requests for adjustments to duty hours to attend religious services.[11] In accordance with Army Regulation 600-20, Chapter 5-6, unit commanders—not noncommissioned officers—have authority to approve or disapprove such requests for religious accommodations.[12] These issues suggest that commanders and their servicing judge advocates may not fully understand the Army's religious accommodation policy.

This article will provide an overview of the Army's religious accommodation policy, regulations, and procedures. Section II will discuss the case law and statutory developments that led to the Department of Defense's and the Army's current religious accommodation policies. Section III will examine the Army's religious accommodation policy and regulations as set forth in AR 600-20, Chapter 5, including the principal categories of religious accommodation requests, the approval authorities for such requests, and appeal procedures.[13] Finally, section IV will provide some practical tips for how commanders and judge advocates can ensure that they are implementing the Army's religious accommodation policy in a consistent, timely, and equitable manner. These practical tips will assist commanders and judge advocates in striking the appropriate balance between the Army's competing policy goals of promoting the free exercise of religion and maintaining military readiness, good order, and discipline.[14]

II. Recent Case Law and Statutory Developments in Religious Accommodation

The Army's policy on religious accommodation today is derived from changes in federal legislation and Supreme Court precedent. The Supreme Court's decisions and Congressional legislation are all driven by the Constitution.[15] Understanding the history of religious accommodation is essential to understand the Army's current policies and practices on religious accommodation.

A. The Constitutional Foundation of Religious Accommodation

The U.S. Constitution establishes the basis for religious accommodations. The First Amendment provides that Congress shall make no law "prohibiting the free exercise" of religion.[16] However, the Department of Defense is a unique federal agency where the free exercise of religion cannot be always guaranteed.[17] As one study of religious accommodation in the military found, in practice a conflict often arises "between the commander's responsibility to accomplish the mission and the Soldier's need for accommodation of religious practices."[18] The military's religious accommodation policy has evolved as Congress and the federal courts have likewise grappled over the competing values of state interests and individual freedom of religious expression.

B. The Compelling Interest Test of *Sherbert v. Verner*

In 1963, the Supreme Court decided *Sherbert v. Verner*, one of the first modern cases involving a citizen's challenge of a state law on the grounds that it violated the Free Exercise Clause of the First Amendment.[19] In *Verner*, the Court held that state unemployment benefits could not be denied to a Seventh-day Adventist who refused to work on Saturday because of her religious beliefs.[20] The Court established a two-part balancing test, the "*Sherbert* test," to determine if a state's interference with an individual's religious expression violates the First Amendment.[21] Under the *Sherbert* test, "governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest."[22] Applying the *Sherbert* test, the Court ruled that

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within the United States and within 60 days for all other cases, with strict limitations on exceptions for exigent circumstances.").

[10] DoDIG-2015-148, *supra* note 8, at 13.

[11] *Id.* at 21.

[12] AR 600-20, *supra* note 2, para. 5-6.*g*.

[13] *Id.* para. 5-6.

[14] *Id.* para. 5-6.a ("The Army will approve requests for accommodation of religious practices unless accommodation will have an adverse impact on unit readiness, individual readiness, unit cohesion, morale, good order, discipline, safety, and/or health.").

[15] U.S. CONST. amend. I.

[16] *Id.*

[17] Parker v. Levy, 417 U.S. 733, 758 (1974) ("While the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections."); *see also* Goldman v Weinberger, 475 U.S. 503, 507 (1986) ("Review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society.").

[18] Colonel Richard Goellen, Colonel Gaylord Gunhus, Colonel Gaylord Hatler, & Colonel Jerry Reynolds, *A Study of the Accommodation of Religious Practices in the United States Army*, U.S. ARMY WAR C. (Mar. 31, 1989), http://dtic.mil/dtic/tr/fulltext/u2/a208000.pdf. (providing the opinion of the authors based on their research conducted on religious accommodation practices in the Army).

[19] Sherbert v. Verner, 374 U.S. 398 (1963).

[20] *Sherbert*, 374 U.S. at 399-402.

[21] *Id.* at 403 (referring to the two-part balancing test as the Sherbert test); *see also* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 1492-93 (7th ed. 2004) [hereinafter ROTUNDA].

[22] Employment Div., Dep't of Human Res. of Oregon v. Smith, 494 U.S. 872, 883 (1990) (citing *Sherbert* 374 U.S. at 402-03).

the state lacked a compelling interest to deny the unemployment benefits to the Seventh-day Adventist.[23]

The Court applied the *Sherbert* test nine years later in *Wisconsin v. Yoder*.[24] In *Yoder*, a group of Amish parents did not want to send their children to school once they reached a certain age because of the parent's religious beliefs.[25] The Court, applying the *Sherbert* test, found the state's interest in compulsory education did not outweigh the religious rights and parental rights of the Amish parents.[26] The Court held that a state could not require members of the Amish church to send their children to public school after the eighth grade.[27] Despite this established precedent, in *Employment Division v. Smith*, the Supreme Court created another test for deciding free exercise cases that would serve as the catalyst for significant changes in free exercise jurisprudence and legislation.[28]

In *Smith*, the Court applied a different test for determining if a state's burden on an individual's religious expression violated the First Amendment.[29] In *Smith*, the Oregon Employment Division terminated two Native Americans from their jobs and denied them unemployment compensation because they used peyote as part of their religion.[30] The Court found in favor of the state holding, a valid and neutral law of general applicability did not violate the First Amendment's free exercise clause in this case.[31] In its decision, the Court stated, "[W]e have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."[32] In effect, the Court moved from applying the compelling interest test in a religious freedom case, to applying a rational-basis test.[33] Under the rational-basis test, "[L]legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest."[34] However, the lower standard of scrutiny used by the Court in *Smith* concerned some members of Congress that the Court was eroding religious freedom.[35]

C. The Religious Freedom Restoration Act of 1993 (RFRA)

Following *Smith*, Congress enacted the Religious Freedom Restoration Act of 1993 (RFRA)[36] "[I]n order to provide very broad protection for religious liberty."[37] The Religious Freedom Restoration Act "restore[d] the compelling interest test set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder"* and "guarantee[d] its application in all cases where free exercise of religion is substantially burdened."[38] Accordingly, the RFRA permits the government to substantially burden a person's exercise of religion only if it demonstrates that the burden furthers a compelling government interest and is the least restrictive means of furthering the government's interest.[39]

"The RFRA was amended in 2000 upon passage of the Religious Land Use and Institutionalized Persons Act (RLUIPA)[40] to change the understanding of the term exercise of religion."[41] Before RLUIPA, the RFRA defined the exercise of religion as "the exercise of religion under the First Amendment."[42] The RLUIPA defined exercise of religion as, "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."[43] Congress amended the RFRA to use the RLUIPA's broader definition of exercise of religion.[44] "Congress mandated that this concept be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution."[45] Congress also intended that the broad protections in the RFRA apply to the military.[46]

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[23] *Sherbert*, 374 U.S. at 403-08.

[24] Wisconsin v. Yoder, 406 U.S. 205 (1972).

[25] *Id.*

[26] *Id.* at 215-31.

[27] *Id.* at 234.

[28] Employment Div., Dep't of Human Res. Of Oregon v. Smith, 494 U.S. 872 (1990).

[29] *Id.*

[30] *Id.* at 872-73.

[31] *Id.* at 878-79.

[32] *Id.*

[33] *Id.* at 882-85.

[34] City of Cleburne Tex. v. Cleburne Living Center, 473 U.S. 432, 440 (1985); *see also* Vance v. Bradley, 440 U.S. 93 (1979); Schweiker v. Wilson, 450 U.S. 221 (1981).

[35] H.R. REP. NO.103-88, at 5 (1993). The House of Representatives Committee on the Judiciary found "the Smith decision created a climate in which free exercise of religion is continually in jeopardy." *Id.*

[36] Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103-141, 107 Stat. 1488 [hereinafter RFRA].

[37] Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2760 (2014).

[38] RFRA § 2, 107 Stat. at 1488.

[39] *Id.* § 3, 107 Stat. at1488-89.

[40] Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000 (2000).

[41] Jason Gubi, *The Religious Freedom Restoration Act and Protection of Native American Religious Practices*, MOD. AM., Fall 2008, at 78.

[42] *Hobby Lobby*, 134 S. Ct. at 2761-62.

[43] RLUIPA § 2000cc-5(7)(A).

[44] *See Hobby Lobby*, 134 S. Ct. at 2754.

[45] *Id.* at 2761-62.

[46] H.R. REP. NO. 103-88, at 8 (1993). Pursuant to the Religious Freedom Restoration Act (RFRA), "the courts must review the claims of prisoners and military personnel under the compelling governmental interest test."

III. The Department of Defense's and the Army's Religious Accommodation Policy

The Army's policies on religious accommodations incorporate the directives promulgated in DoDI 1300.17.[47] The Army policy outlines the different types of religious accommodations, who the approval authority is for each type of accommodation, and how a Soldier can appeal a denial of a religious accommodation.[48] Department of Defense Instruction 1300.17 is promulgated by the Department of Defense (DoD) and gives general instructions on religious accommodations to all of the services.[49] Department of Defense Instruction 1300.17 is periodically updated as legislation is changed.[50]

A. Department of Defense Instruction 1300.17: Accommodation of Religious Practices in the Military

In 2014, the DoD amended DoDI 1300.17 to, among other things, incorporate the RFRA's standard for determining when the military can burden a servicemember's religious expression.[51] Specifically, DoDI 1300.17 states that the military cannot deny a servicemember's request for a religious accommodation from a policy, practice, or duty that substantially burdens a servicemember's exercise of religion unless, the restriction "[f]urthers a compelling governmental interest" and "[i]s the least restrictive means of furthering that governmental interest."[52]

In applying this legal standard, DoDI 1300.17 withholds to Service Secretaries or their designees the authority to approve or deny requests for religious accommodation from grooming and uniform standards.[53] For all other requests for religious accommodations, DoDI 1300.17 grants approval authority to the immediate commander.[54]

When deciding whether to approve or deny a religious accommodation, the immediate commander must determine if the military duty substantially burdens[55] the servicemember's exercise of religion.[56] If the duty does not substantially burden the servicemember's exercise of religion, the commander must balance the needs of Soldier against the needs of mission accomplishment.[57] However, if the commander determines the duty is a substantial burden to the servicemember's exercise of religion, the commander can deny the accommodation only if the duty furthers a compelling government interest,[58] and the duty is the least restrictive means of furthering that compelling government interest.[59] A commander has ten working days to respond informally (verbally) or formally (in writing) to a request for a religious accommodation.[60]

Department of Defense Instruction 1300.17 also provides five factors military commanders should consider in determining whether to grant or deny an accommodation. Commanders should consider: (1) the importance of mission accomplishment, (2) the religious importance of the accommodation to the Soldier requesting the accommodation, (3) the impact of repeated accommodations of a similar nature, (4) any alternate means to meet the needs of the Soldier requesting the accommodation, and (5) treatment of similar requests made for non-religious reasons.[61] These five factors are not exclusive and commanders are encouraged to consider any other factors deemed appropriate to assist in their decision making process.[62] Finally, DoDI 1300.17 directs all of the services to promulgate regulations to implement DoD policy.[63]

Id.; S. REP. NO. 103-111, at 12 (1993). Under the "unitary standard set forth in the act, courts will review the free exercise claims of military personnel under the compelling governmental interest test." *Id.*; *see also* Rigdon v. Perry, 962 F.Supp. 150, 161 (D.D.C. 1997) (stating Soldiers are entitled to protection under the RFRA.); Singh v. McHugh, 109 F.Supp.3d 72 (D.D.C. 2015) (applying RFRA to the U.S. Army regarding a Reserve Officer Training Candidate's request for a religious accommodation for commissioning into active duty).

[47] AR 600-20, *supra* note 2, para. 5-6.

[48] *Id.*

[49] DoDI 1300.17, *supra* note 5, para. 1.

[50] *Id.* para. 4.

[51] *Id.*

[52] *Id.* para. 4.*e*.(1), (2) ("Requests for religious accommodation from a military policy, practice, or duty that does *not* substantially burden a Service member's exercise of religion should not be evaluated under the standard established in paragraph 4.e.(1) . . . . Under these circumstances, the needs of the requesting Service member are balanced against the needs of mission accomplishment.)

[53] *Id.* paras. 3.b., 4.*f*.(2) ("Religious apparel: articles of clothing worn as part of the doctrinal or traditional observance of the religious faith."); *Id.* para. 3.*c*. ("Grooming and appearance: grooming and appearance practices, including hair, required or observed by religious groups."); *Id.* para. 3.*d*. ("Religious body art: temporary or permanent tattoos, piercings through the skin or body part, or other modifications to the body that are of a religious nature.").

[54] *Id.* para. 4.*f*.(1).

[55] *Id.* para. 3.*e*. (defining substantially burden as significantly interfering with the exercise of religion as opposed to minimally interfering with the exercise of religion).

[56] *Id.* para. 4.*e*.(1).

[57] *Id.* para. 4.*e*.(2).

[58] *Id.* para. 3.*g*. (defining compelling government interest as a military requirement that is essential to accomplishment of the military mission).

[59] *Id.* para. 4.*e*.(1).

[60] AR 600-20, *supra* note 2, para. 5-6.*i*.(2).

[61] DoDI 1300.17, *supra* note 5, encl. 1.

[62] *Id.*

[63] *Id.* para. 5.b.

B. Army Regulation 600-20, Chapter 5: Accommodating Religious Practices in the Army

Incorporating DoDI 1300.17, Army Regulation (AR) 600-20, Chapter 5-6, sets forth the Army's religious accommodation policy and procedures for active duty and reserve component Army personnel.[64] The Army places a high value on servicemembers' rights to exercise their religious beliefs.[65] Accordingly, it is Army policy to "approve requests for accommodation of religious practices unless accommodation will have an adverse impact on unit readiness, individual readiness, unit cohesion, morale, good order, discipline, safety and/or health."[66]

The Army classifies requests for religious accommodation into five major areas: worship practices, dietary practices, medical practices, wear and appearance of uniform, and grooming practices.[67] A worship practice is typically a request to "attend worship services, to participate in faith-based events or relief from attendance at events conflicting with sincerely held beliefs."[68] A dietary practice is usually a request for separate rations or faith-based foods such as kosher or halal.[69]

In accordance with DoDI 1300.17, the Secretary of the Army delegated approval and denial authority to the Army G1 for religious accommodations that require a waiver to grooming and uniform standards.[70] Immediate commanders have approval and denial authority over worship practices, dietary practices, medical practices, and uniform/grooming practices that do not require a waiver of Army policy.[71] Examples of practices that require a waiver to the uniform and grooming standard include wearing a turban or growing a beard.[72] In contrast, wearing a yarmulke would not require a waiver.[73] It is incumbent on the immediate commander to know what to do with a religious accommodation request once he receives it.

C. Religious Accommodation Requests Approved by the Immediate Commander

Once the commander has received the religious accommodation request and determines he is the approval authority for the accommodation, he needs to determine if the military duty substantially burdens the Soldier's exercise of religion. If the military duty does cause a substantial burden on the Soldier exercising his religion, the commander can determine his next course of action depending on what area the accommodation falls under.

1. Worship Practices

Army regulation requires that worship accommodations be granted except when precluded by military necessity.[74] The Army regulation provides commanders with various options they can take to accommodate worship practices.[75] Commanders can grant the Soldier ordinary leave so the Soldier can attend worship service.[76] The commander can excuse the Soldier from duty provided the Soldier serves duty at an alternate time.[77] Another option the Commander has is to authorize the Soldier to attend the worship service without taking leave.[78]

2. Dietary Practices

If the accommodation request is for a dietary practice and the commander wants to approve the request, the commander has two options. The commander can ration separately for the Soldier.[79] Alternatively, the commander can allow the Soldier to bring his own rations to eat.[80]

3. Medical Practices

If the accommodation request is for a medical practice the commander needs to determine if the practice falls into one of three sub-categories: (1) emergency, (2) non-emergency, and (3) immunization.[81] In a medical emergency situation, "the military treatment facility (MTF) may order, or

[64] AR 600-20, *supra* note 2, at I (Army personnel for purposes of this regulation include Soldiers in the Active Army, Army National Guard, and U.S. Army Reserve).

[65] *Id.* para. 5-6.*a*.

[66] *Id.*

[67] *Id.* paras. 5-6.*h*.(1)(2)(3)(4) & (5).

[68] DoDIG-2015-148, *supra* note 8, at 4.

[69] *Id.*

[70] DoDI 1300.17, *supra* note 5, para. *i*.

[71] AR 600-20, *supra* note 2, para. 5-6.*g*; *see also* AR 670-1, *supra* note 3, para. 3.

[72] AR 670-1, *supra* note 3, para. 3-2.

[73] DoDI 1300.17, *supra* note 5, encl. 1.

[74] AR 600-20, *supra* note 2, para. 5-6.*h*.(1).

[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] *Id.*

[79] *Id.* para. 5-6.*h*.(2).

[80] *Id.*

[81] *Id.* para. 5-5.*h*.(3). In some situations, like an emergency, the commander will not be available to make the decision. In these cases, the appropriate authority present at the scene should make the decision on whether to deny or approve the accommodation.

the physician may take, immediate steps to save the Soldier's life, regardless of their religious practices or objections."[82]

In a non-emergency situation, a Soldier whose religious beliefs involve self-care can request accommodation for non-emergency illness or injury.[83] An example to self-care would be a Soldier that is diagnosed with cancer and believes praying to God will cure him, as opposed to receiving chemotherapy. In this case, medical treatment can be deferred until a decision is made on whether or not an accommodation will be granted.[84] If the Soldier refuses to submit to medical treatment that is recommended to him because of a religious objection, the Soldier's religious accommodation request will be referred to an ad hoc committee established by the medical commander.[85] All of the ad hoc committee members must be officers or full time employees of the Federal Government, the committee must include a chaplain, and the committee must be chaired by a medical corps officer.[86] Beside these mandates, the composition and procedures used by the committee are at the discretion of the medical commander.[87] After the ad hoc committee makes a decision and determines medical care is necessary,[88] the Soldier must be provided notice of the decision and given a chance to accept the prescribed care.[89] If the Soldier refuses to accept medical care, the medical commander will forward the committee recommendations to the Surgeon General.[90] The Surgeon General will either approve or disapprove the committee's recommendations.[91] The Surgeon General sends his decision back to the medical commander and sends a copy to the Army G1.[92] If the Surgeon General approves the committee recommendation, the Soldier is given another opportunity to comply with the recommendation.[93] If the Soldier still refuses treatment, the matter is referred to the Soldier's special court-martial convening authority who takes whatever action he deems appropriate.[94]

The final medical accommodation subcategory is immunization. Soldiers can request a religious accommodation from immunization requirements[95] by forwarding a request through the chain of command to the Surgeon General.[96] Each commander in the Soldier's chain of command recommends whether the accommodation should be granted or denied.[97] Prior to forwarding the request to the Surgeon General, the Soldier must be counseled by a chaplain, a physician, and his commander about the implications of not complying with immunization requirements.[98]

D. Appealing an Immediate Commander's Denial of a Religious Accommodation

If the immediate commander denies any religious accommodation he must inform the Soldier of the denial and give the Soldier an opportunity to appeal the decision.[99] The Soldier appeals the decision through a memorandum that is routed through each level of command, including commanders of Army Commands, Army service component commands, and direct reporting units, to the Army G1.[100] In addition to the memorandum from the Soldier, a memorandum from the chaplain and a legal review from a judge advocate must be forwarded to the G1.[101] The judge advocate should review the accommodation request for legal sufficiency and make a recommendation on whether it should be approved or denied.[102] The legal review will also state if the accommodation request packet is complete in accordance with AR 600-20, Chapter 5-6.[103] Army regulation mandates that the appeal be forwarded to the Army G1 within thirty days.[104] The Soldier should receive a reply from the Army G1 thirty days after G1 receives the appeal.[105]

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[82] *Id.* para. 5-6.*h.*(9).

[83] *Id.* para. 5-6.*h.*(3)(*b*).

[84] *Id.*

[85] *Id.* para. 5-6.*h.*(3)(*c*).

[86] *Id.*

[87] *Id.*

[88] *Id.* paras. 5-6.*h.*(3)(*d*)(1-4). The committee report includes: proposed treatment required, show a need for medical care, reasonableness of Soldier to refuse treatment, evidence the Soldier was given opportunity to appear before committee, submit written statement, and submit statements from members of his faith group. *Id.* If a Soldier cannot appear in person or refuses to, that will be noted in the report. *Id.*

[89] *Id.* para. 5-6.*h.*(3)(*d*)(6).

[90] *Id.*

[91] *Id.*

[92] *Id.* para. 5-6.*h.*(3)(*d*)(7).

[93] *Id.* para. 5-6.*h.*(3)(*d*)(8).

[94] *Id.*

[95] U.S. DEP'T OF ARMY, REG. 40-562, IMMUNIZATIONS AND CHEMOPROPHYLAXIS FOR THE PREVENTION OF INFECTIOUS DISEASES (7 Oct. 2013) [hereinafter AR 40-562].

[96] AR 600-20, *supra* note 2, para. 5-6.*h.*(3)(*e*).

[97] *Id.* para. 5-6.*h.*(3)(e)(4).

[98] *Id.* paras. 5-6*h*(3)(*e*)(2-4).

[99] *Id.* para. 5-6.*i.*(5).

[100] *Id.* The memorandum must include the name, rank, social, unit, and military occupational specialty of Soldier; the accommodation requested; the religious basis for the request; and commander endorsements. *Id.*

[101] *Id.*

[102] *Id.* para. 5-6.*i.*(7).

[103] *Id.*

[104] *Id.* para. 5-6.*i.*(11).

[105] *Id.*

E. Religious Accommodations that Require Service Secretary Approval

If the commander receives an accommodation request that requires a waiver to the uniform or grooming standard, he must forward the request to the Army G1.[106] Each commander in the Soldier's chain of command makes a recommendation as to whether the accommodation request should be approved or denied.[107] The chain of command recommendations, along with the Soldier's request, are forwarded to the Army G1.[108] Commanders should inform the Soldier that while the request is pending a decision by the Army G1, the Soldier must continue to comply with the uniform and grooming standards set forth in AR 670-1.[109]

If the Army G1 denies a Soldier's request for an accommodation, the Soldier can submit a second formal application to their commander.[110] The commander and Soldier should ensure the request: (1) is "not based on substantially the same grounds," (2) is "not substantially supported by the same evidence as the previously disapproved application," and (3) the application is sent to the Soldiers Special Court-Martial Convening Authority, who is required to obtain a legal review to determine if the application is substantially the same application that was previously denied.[111] If it is determined the application is the same, it will be returned to the Soldier without action.[112] If the application is substantially different it will be forwarded to G1.[113]

The Soldier can either comply with the uniform or grooming standard or he can request administrative separation from the Army under AR 635-200[114] or AR 600-8-24[115] if the second appeal is denied.[116] If the Soldier elects administrative separation, he can be subject to recoupment of Federal funds.[117]

IV. Practice Tips for Commanders and Judge Advocates

A. Reduce Approvals for Accommodation Requests to Writing

Army Regulation 600-20, Chapter 5-6, does not require commanders to approve religious accommodation requests in writing. However, commanders should always try to memorialize any religious accommodation decision in writing. Having the decision reduced to writing provides tangible proof that the commander made a decision and how the commander reached that decision.

Writing down all of the approvals is helpful if the Soldier changes units and the Soldier has to show there was previously an accommodation in place. Having the religious accommodation request, along with the commander's decision, in writing is also helpful if a higher echelon of command needs the number or type of religious accommodation requests a unit has. When a commander changes command, having the religious accommodation requests, along with the previous commander's decision, in writing makes it easier for the follow-on commander to see why an accommodation is in place, how it impacts unit readiness, and why he should continue to approve or deny it. One of the factors DoDI 1300.17 states a commander should consider when evaluating accommodation requests is the "previous treatment of similar request."[118] Keeping written records ensures commanders can comply with the DoDI.

The judge advocate should also maintain written records of religious accommodation requests processed. Doing so enables the judge advocate to track religious accommodation requests in the unit and advise commanders on issues the judge advocate could be identifying. Keeping written records also enables follow on judge advocates to review the unit's history on how it granted accommodation request and who it granted them to. In the event a Soldier ever takes his denial of a religious accommodation to federal court, it would be very beneficial for a judge advocate to have a written record they can provide to litigation division when they ask for assistance or more information. Finally, reducing decisions to writing can help if a unit elects to develop a standardized religious accommodation packet. Having a standardized packet is beneficial for a number of reasons.

A standardized packet provides the Soldier requesting an accommodation predictability on what is expected for him to submit and how his request is processed. Additionally, having a standardized packet can facilitate a more uniform application of accommodation regulations within the unit. Finally, a standardized packet can help a commander's case if his decision is being scrutinized by a higher echelon of

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[106] *Id.* para. 5-6.*i.*(1).

[107] *Id.*

[108] *Id.*

[109] *Id.*

[110] *Id.* para. 5-6.*i.*(12).

[111] *Id.* paras. 5-6.*i.*(12)(a-c).

[112] *Id.* para. 5-6.*i.*(12).

[113] *Id.*

[114] U.S. DEP'T OF ARMY, REG. 635-200, ACTIVE DUTY ENLISTED ADMINISTRATIVE SEPARATIONS (6 June 2005) (RAR 6 Sept. 2011) [hereinafter AR 635-200].

[115] U.S. DEP'T OF ARMY, REG. 600-8-24, OFFICER TRANSFERS AND DISCHARGES (12 Apr. 2006) (RAR 13 Sept. 2011) [hereinafter AR 600-8-24].

[116] AR 600-20, *supra* note 2, para. 5-6.*i.*(13).

[117] *Id.*

[118] DoDI 1300.17, *supra* note 5, encl. 1, para. 1.e.

command, the Army G1, or a federal court. The commander can use the packet to demonstrate that his decision was not made arbitrarily. It will also assist both commanders and Soldiers when it comes to appealing a denial of an accommodation request.

B. Inform Soldiers of their Right to Appeal in Writing

Army Regulation 600-20, Chapter 5-6, does not require the commander to inform the Soldier in writing of their right to appeal.[119] The regulation only requires that upon denial, the Soldier be given an opportunity to appeal the decision.[120] As a matter or practice, commanders should inform their Soldiers in writing of their right to appeal. Informing Soldiers of their right to appeal ensures the Soldier is actually put on notice of their right to appeal. Giving notice of a right to appeal in writing also facilitates maintain a complete record of the commander's decision about the accommodation. Having a complete record can prove to be beneficial if the Soldier were ever to take the denial of the accommodation to federal court.

C. Be Prepared for Litigation

If a commander at any level is going to deny a religious accommodation request, he should be prepared to have a compelling government interest for denying the request. In a recent case, *Singh v. McHugh*, a Sikh reserve officer training candidate (ROTC) brought a federal lawsuit against the Army after his religious accommodation request was denied.[121] The ROTC cadet's accommodation was denied because granting the accommodation would adversely impact unit cohesion, morale, good order, discipline, individual unit readiness, and safety.[122] The Court rejected this claim on two main grounds. First, the Court stated previous exemptions of a similar nature have been granted by the Army that did not adversely impact Army interests. Second, the Army did not carry its burden to show that "the compelling interest test is satisfied through its application of the challenged law to the person."[123]

In another case, *United States v. Sterling*, a former servicemember was discharged from service for failure to obey an order (and other offenses) after she refused to remove bible verses from her work area.[124] Ms. Sterling alleges that her religious rights under the RFRA were violated when she was punished for not removing the bible verses.[125] The Navy-Marine Corps Court of Criminal Appeals (NMCCA) upheld the conviction.[126] However, the Court of Appeals for the Armed Forces has granted review of that decision, calling into question the decision by the NMCCCA.[127]

What this means for commanders is denying an accommodation request based on general principles that an accommodation is detrimental to good order and discipline is not sufficient grounds to deny an accommodation. Commanders should determine how their Soldiers accommodation will impact the mission directly. When reviewing command decisions to deny religious accommodations its incumbent on the judge advocate to ensure a commander's actions are furthering a compelling government interest in the least restrictive means possible.

V. Conclusion

Navigating through the sea of religious accommodation regulations, policies, and procedures can be a challenging task for commanders and judge advocates alike. Commanders have a variety of considerations to take into account when making religious accommodation decisions. This article set out to provide commanders and judge advocates with the tools necessary to work through a religious accommodation case. Applying the policies and procedures presented in this article, the Commander from the introductory hypothetical could grant his Soldier excusal from duty on Saturday so he could observe Shabbat.[128] However, the Soldier will need to forward a religious accommodation request packet through the chain of command to the Army G1 to request a waiver to the grooming standards.[129] The commander will need to forward his recommendation to approve or deny the request to the Army G1.[130] With this firm understanding of the religious accommodation policy and process, the Commander along with the judge advocate, can ensure religious accommodation request are processed in a timely and equitable manner.

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[119] AR 600-20, *supra* note 2, para. 5-6.*i*.(5).

[120] *Id.*

[121] Singh v. McHugh, 109 F.Supp.3d 72 (2015).

[122] *Id.* at 82-84.

[123] *Id.* at 97.

[124] United States v. Sterling, No. 201400150, 2015, WL 832587 (N. M. Ct. Crim. App. Feb. 26, 2015)

[125] *Id.* at 1.

[126] *Id.* at 10.

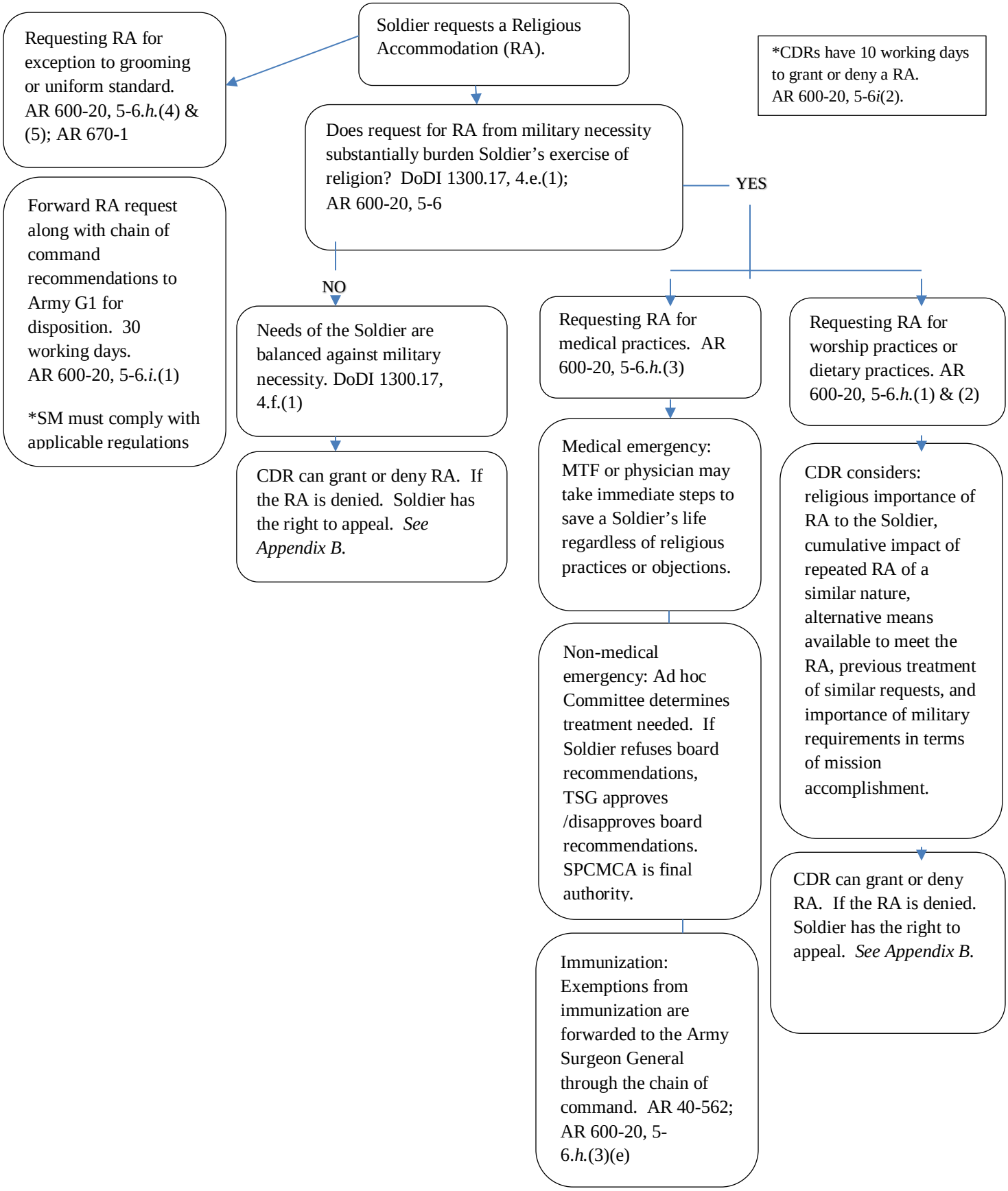
[127] Zachary D. Spillman, *CAAF Grants (on Specified Issues) in Sterling*, NIMJ BLOG-CAAFLOG (Oct. 28, 2015), http://www.caaflog.com/?s=US+v+STerling.

[128] AR 600-20, *supra* note 2, para. 5-6.*h*.(1).

[129] *Id.* para. 5-6.*i*.(1).

[130] *Id.*

Appendix A. Religious Accommodation Flow Chart



The (Too) Long Arm of Tort Law: Expanding the Federal Tort Claims Act's Combatant Activities Immunity Exception to Fit the New Reality of Contractors on the Battlefield

Major Jeffrey B. Garber[*]

Lieutenant Milo Minderbinder, a fictional war profiteer during World War II, expressed the following capitalist sentiment in Joseph Heller's novel Catch-22: "Frankly, I'd like to see the government get out of war altogether and leave the whole field to private individuals." While not to the extent advocated by Lieutenant Minderbinder, the role of government contractors in combat zones has grown to an unprecedented degree in recent years with the wars waged by the United States in Iraq and Afghanistan.[1]

I. Introduction

The Federal Tort Claims Act (FTCA) is an exception to the general rule that the government is sovereign and immune from suit.[2] However, the FTCA contains a combatant activities immunity exception (FTCA combatant exception) for "any claim arising out of the combatant activities of the military . . . during time of war."[3] Post-9/11 military operations in Iraq and Afghanistan were waged by a military that, in a partial adoption of the recommendation of Lt Minderbinder, outsourced to contractors many activities that historically were performed by military personnel.[4] In recent years, federal courts have begun to apply the FTCA combatant exception to contractors, albeit differently in each case and even then only after lengthy litigation. In 2015, the Supreme Court denied a petition for certiorari for a consolidated group of cases involving the contractor Kellogg, Brown & Root (KBR)[5] for activities in Iraq and Afghanistan encompassing barracks maintenance, the operation of a waste disposal burn pit, and water treatment in oil wells during the restoration of Iraqi oil operations[6] under the Logistics Civil Augmentation Program (LOGCAP).[7] This article will address the origin and historical application of the FTCA's combatant exception as well as the current circuit split and highly fact-dependent manner in which the exception is applied. It will then analyze how current judicial treatment of the combat exception is both impractical and counterproductive and places the judiciary in a role where it does not belong—second-guessing military planning and decision-making. Finally, the article will take the position that, in light of the Supreme Court's failure to grant certiorari in the KBR cases, Congress must take action to ensure the FTCA's combatant exception adapts to serve the national policy of utilizing a military force heavily dependent upon contractor support by allowing the President and the Department of Defense the flexibility to extend the exception to contractors engaged in, and acting in support of, combat activities..

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[*] Judge Advocate, U.S. Air Force. LL.M., 2016, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia; J.D., 2007, Ohio Northern University Pettit College of Law; B.A., 2004, Miami University. Previous assignments include: Chief of Legal Assistance and Preventive Law, Chief of Nonjudicial Punishment, and Chief of Military Justice, 81st Training Wing, Keesler Air Force Base, Mississippi, 2008-2010; Chief of Administrative Law and Claims, Chief of Operations Law, and Officer in Charge of Civil Law, 52d Fighter Wing, Spangdahlem Air Base, Germany, 2010-2012; Deputy Staff Judge Advocate, 332d Air Expeditionary Wing and 321st Air Expeditionary Wing/Iraqi Transition Assistance Mission, Joint Base Balad, Iraq and Ahmed al Jaber Air Base, Kuwait, 2011-2012; Area Defense Counsel, Spangdahlem Air Base, Germany, 2012-2013; Chief of Civil Law and Chief of Military Justice, 502d Air Base Wing, Joint Base San Antonio—Fort Sam Houston, Texas, 2013-2015; LL.M. student in the 64th Judge Advocate Officer Graduate Course, The U.S Army Judge Advocate General Legal Center and School, Charlottesville, Virginia, 2015-2016; and Program Counsel, 66th Air Base Group, Hanscom Air Force Base, Massachusetts, 2016-Present. Member of the bar of Ohio. Author of "To Charge or Not to Charge: *How to Successfully Navigate Virtual Child Pornography Cases*, THE REPORTER, 2011, Vol. 38, No. 2, at 12. This article was submitted in partial completion of the Master of Laws requirements of the 64th Judge Advocate Officer Graduate Course.

[1] In re: KBR, Inc., Burn Pit Litig., 736 F. Supp. 2d 954, 955-56 (D. Md. 2010), quoting JOSEPH HELLER, CATCH-22, 259 (1961).

[2] 28 U.S.C.A. § 2680 (2016).

[3] 28 U.S.C.A. § 2680(j).

[4] OFFICE OF THE SEC'Y OF DEF. FOR ACQUISITION, TECH., AND LOGISTICS, REPORT OF THE DEFENSE SCIENCE BOARD TASK FORCE ON IMPROVEMENTS TO SERVICES CONTRACTING 31 (2011), http://www.acq.osd.mil/dsb/reports/ADA550491.pdf.

[5] The conduct at issue in the cases discussed in this paper occurred when the firm was a Halliburton Co. subsidiary named Kellogg, Brown & Root Services, Inc. In 2007, the company was sold by Halliburton and became independent, renaming itself KBR, Inc. For simplification, throughout the text of this paper the acronym KBR will be used to refer both to Kellogg, Brown & Root Services, Inc. and KBR, Inc.

[6] In re KBR, Inc., Burn Pit Litig., 744 F.3d 326 (4th Cir. 2014) cert. denied sub nom. KBR, Inc. v. Metzgar, 135 S. Ct. 1153, 190 L. Ed. 2d 911 (2015); Harris v. Kellogg Brown & Root Services, Inc., 724 F.3d 458 (3rd Cir. 2013) *cert. denied*, 135 S. Ct. 1152, 190 L. Ed. 2d 910 (2015); McManaway v. KBR, Inc., 554 F. App'x 347 (5th Cir. 2014), *cert. denied*, 153 S. Ct. 1153, 190 L. Ed. 2d 911 (2015).

[7] The Logistics Civil Augmentation Program (LOGCAP) contract at issue in the suits discussed in this paper was a ten year multi-billion dollar contract awarded to KBR in 2001 for global support. In re KBR, Inc., 744 F.3d 326 (4th Cir. 2014). The contract was executed through task orders and statements of work that set out the work KBR was to perform in supporting military missions. *Id.* The current LOGCAP contract is held by KBR, DynCorp International, Inc., and Fluor International, Inc. and, as with the prior LOGCAP, covers a vast expanse of duties such as

> supply operations, such as the delivery of food, water, fuel, spare parts, and other items, field operations, such as dining and laundry facilities, housing, sanitation, waste management, postal services, and Morale, Welfare and Recreation activities, and other operations, including engineering and construction, support to communications networks, transportation and cargo services, and facilities management and repair.

U.S. Army Sustainment Command Public Affairs, *ASC Selects LOGCAP IV Contractors* (Jun. 28, 2007), http://www.army.mil/article/3836/ASC_selects_ logcap_iv_contractors/.

II. The History of the Federal Tort Claims Act's Combatant Exception

The FTCA is a statutory waiver of the federal government's sovereign immunity and allows individuals to file suit against the federal government, with certain exceptions.[8] One exception is the combatant activities exception, which applies to "any claim arising out of the combatant activities of the military . . . during time of war."[9] What "arising out of combatant activities" means is not defined in the statute and left to the judiciary. Recently, courts have very creatively interpreted the statute to extend it to contractors, a result that is in direct contravention of the statutory bar on the FTCA applying to contractors.[10] Despite this, the current application of the FTCA combatant exception remains inadequately tailored for the modern military due to many contractors that perform combat support tasks being denied the same immunity that has been afforded military members who have traditionally performed these tasks.

A. The Origins and Historical Application of the Federal Tort Claims Act's Combatant Exception

The issue of what constitutes a combatant activity was first addressed in a case involving allegations that military operations damaged a clam farm. In that case, the Ninth Circuit reversed a trial court's grant of a motion to dismiss for lack of jurisdiction on grounds that the damages alleged were not caused during a time of war or by an act arising out of a combat activity.[11] However, in doing so the court found that the FTCA term "combatant activities" was to be read broadly and was not limited strictly to acts of violence but encompassed all those activities that were "both necessary to and in direct connection with" hostilities.[12] The court stated that "the [FTCA] is couched in unambiguous language which leaves no doubt in our minds of the meaning the legislators intended to attach."[13] This reference to statutory unambiguous language would ironically later give way to ambiguity as courts began to struggle with the issue of whether the exception should apply to contractors, particularly when the military force structure changed to include contractors performing functions that historically had been performed by military personnel.[14]

While contractors are specifically excluded from the waiver provisions of the FTCA,[15] the Supreme Court opened the door to its application to contractors providing services to the military in a case involving a separate FTCA exception, the discretionary function exception.[16] However, the application of the FTCA's combatant exception remained limited to governmental actors until 1992 when it was extended by the Ninth Circuit to suits against contractors within the context of products liability claims.[17] In 2009 and 2011, in two cases involving contractors engaged in performing duties at Abu Ghraib prison in Iraq, the D.C. and Fourth Circuits, respectively, ruled that the FTCA's combatant exception was to be applied to private contractors if the actions of the contractor were within the control of military command authority.[18] In these two cases, the courts used a variation of the discretionary function exception's *Boyle*[19] test by looking to whether there were uniquely federal interests involved in applying the exception, whether there were significant conflicts between those unique federal interests and the application of state tort law, and by examining to what level the contractor activity was both integrated with military combat activity and under the command authority of the military.[20] This analysis had ample opportunity for further judicial application given the increased operational footprint of the U.S. military post-9/11 and the military's reliance on contract support in those operations.

B. Clear as Mud: The Current State of the Federal Tort Claims Act's Combatant Exception

With the newly expanded role that contractors play on the

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[8] 28 U.S.C.A. § 2680. Prior to 1948, the immunity waiver provisions were codified at 28 U.S.C.A. § 943(j) (1948).

[9] 28 U.S.C.A. § 2680(j).

[10] The statute "includes the executive departments, the judicial and legislative branches, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but *does not include any contractor* with the United States." 28 U.S.C.A. § 2671 (2016) (emphasis added). However, military contractors have long been afforded immunity under a separate exception, the discretionary function exception, better known as the government contractor defense. 28 U.S.C.A. § 2680(a), *see also* Boyle v. United Tech. Corp., 487 U.S. 500 (1988).

[11] Johnson v. U.S., 170 F.2d 767, 770 (9th Cir. 1948).

[12] *Id*.

[13] *Id*. at 769.

[14] In fact, as courts started to examine the Federal Tort Claims Act's (FTCA) combatant exception in light of the role that contractors began to play in wartime operations, one court even went so far as to say that the earlier lack of ambiguity was dead. "The FTCA does not explicitly state the purpose of the exception, nor does legislative history exist to shed light on it." Harris v. Kellogg, Brown & Root Services, Inc., 724 F.3d 458, 479 (3rd Cir. 2013).

[15] 28 U.S.C.A. § 2671.

[16] Boyle v. United Tech. Corp., 487 U.S. 500, 511-12 (1988).

[17] Koohi v. U.S., 976 F.2d 1328, 1334 (9th Cir. 1992).

[18] Saleh v. Titan Corp., 580 F.3d 1, 9 (D.C. Cir. 2009); Al Shimari v. CACI Int'l, Inc., 658 F.3d 413 (4th Cir. 2011), *vacated on rehearing en banc*, 679 F.3d 205 (4th Cir. 2012).

[19] *Boyle*, 487 U.S. at 503-13.

[20] *See Saleh*, 580 F.3d at 6-9; *Al Shimari*, 658 F.3d at 418-20. Although *Al Shimari* was later vacated and remanded due to the immunity issue not being subject to an interlocutory appeal, the reasoning utilized by the court in extending the FTCA's combatant exception in both cases was attuned to the growing need to adjust the law to address the historically unprecedented involvement of government contractors on the battlefield in the wars of Iraq and Afghanistan. *See Al Shimari*, 679 F.3d 205.

battlefield, "hundreds, perhaps thousands, of lawsuits have been filed in the wake of the wars in Iraq and Afghanistan and are wending a tortuous way through courts" and yet the current application of the FTCA's combatant exception is so muddled that it results in years of litigation and still produces inconsistent and counterproductive results.[21] There are, however, common grounds that can be used to map out the current state of the law. For instance, *Koohi* established that federal interests can conflict with and preempt tort suits against contractors in the field of products liability.[22] As mentioned previously, the D.C. Circuit adapted the *Boyle* test in *Saleh* and amended it to analyze contractor actions by adding considerations of whether those actions were integrated with combat activities.[23]

In using that test, *Saleh* held that the first prong, the identification of a uniquely federal interest, was the elimination of tort law from the battlefield.[24] However, courts have also developed a narrower federal interest for this prong as being only the prevention of a state from regulating military decisions and conduct.[25] On the second prong, courts have settled on the *Saleh* position as to the significance of the state-federal conflict by looking to whether the conflict touches on military decision-making, in which case the federal government occupies the entire field.[26] In analyzing the third prong, courts are divided on whether the exception applies only if the military was so integrated with the contractor as to overcome its authority or whether the imposition of tort liability constitutes state regulation of the military.[27] Therefore, it appears to be within the first and third prongs of the analysis that a circuit split has developed and resulted in courts creating an unworkable standard for applying the FTCA's combatant exception.[28]

While courts have extended the FTCA's combatant exception to the actions of contractors, the uneven application is best illustrated by examining three separate cases involving suits against KBR for damages alleged to have been caused by their performance under the LOGCAP in Iraq and Afghanistan. The three cases below were consolidated in a petition for certiorari to the Supreme Court that was denied in January 2015.[29]

1. Harris v. KBR: The Electrocution Case

In July 2012, the Western District of Pennsylvania granted a KBR motion to dismiss[30] in a suit by the administrators of a servicemember's estate for the electrocution death of the servicemember in Iraq.[31] The court made extensive findings of fact into the complex relationship between KBR and the military for the renovation of a housing complex where the member was electrocuted.[32] The only issue decided by the court in granting the motion was whether KBR's acts met the "direct connection with hostilities" threshold.[33] The court found there was sufficient evidence that KBR's acts were "integral to force protection" and that servicemembers used the facilities maintained by KBR to obtain power for their "war-time defensive instruments."[34] Finally, the court found that the acts constituted combatant activities because combat took place within the base where KBR performed their work.[35]

On appeal, the Third Circuit reversed and found the FTCA combatant exception did not apply and explained that, while the exception itself is quite simple, applying it is complicated by "a number of case-by-case factors."[36] The court quickly dispatched the first two *Boyle* prongs and on the third prong adopted the *Saleh* position that the application of the combatant activities exception turned on whether the contractor acts were integrated into the combatant activity for which the military retained authority.[37] The court held that

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[21] McManaway v. Kellogg, Brown & Root Services, Inc., 554 F. App'x 347, 353 (5th Cir. 2014) (dissent from denial of rehearing en banc).

[22] *See Koohi*, 976 F.2d at 1334.

[23] *See Saleh*, 580 F.3d at 9. However, one court has gone so far as to prohibit the application of the FTCA's combatant exception to cases not involving complex military equipment obtained in the procurement process or involving injuries sustained as part of the application of military force. Carmichael v. Kellogg, Brown & Root Services, Inc., 450 F. Supp. 2d 1373, 1377-78 (N.D. Ga. 2006). That case was later dismissed pursuant to the political question doctrine, a doctrine that is also at issue in the cases discussed in this paper but is outside the scope of this paper. Carmichael v. Kellogg, Brown & Root Services, Inc., 572 F3d 1271 (11th Cir. 2009).

[24] *Saleh*, 580 F.3d at 7.

[25] Harris v. Kellogg, Brown & Root Services, Inc., 724 F.3d 458, 480 (3rd Cir. 2013); In re KBR, Inc. Burn Pit Litig., 744 F.3d 326, 348 (4th Cir. 2014).

[26] *Saleh*, 580 F.3d at 7.

[27] *See In re: KBR, Inc.*, 744 F.3d at 350.

[28] The circuit split issue is covered further *infra* Part IV.A. of this paper.

[29] In re: KBR, Inc., Burn Pit Litig., 744 F.3d 326 (4th Cir. 2014) *cert. denied sub nom*. KBR, Inc. v. Metzgar, 135 S. Ct. 1153, 190 L. Ed. 2d 911 (2015); Harris v. Kellogg Brown & Root Services, Inc., 724 F.3d 458 (3rd Cir. 2013) cert. denied, 135 S. Ct. 1152, 190 L. Ed. 2d 910 (2015); McManaway v. KBR, Inc., 554 F. App'x 347 (5th Cir. 2014), *cert. denied*, 153 S. Ct. 1153, 190 L. Ed. 2d 911 (2015).

[30] The motions to dismiss in all of the KBR cases covered also include either the political question doctrine or derivative sovereign immunity under the FTCA's discretionary exception.

[31] Harris v. Kellogg, Brown & Root Services, Inc., 878 F. Supp. 2d 543, 548 (W.D. Pa. 2012). The court previously dismissed the motion and, after remand from the Third Circuit, conducted discovery prior to granting the renewed motion to dismiss. *Id*. at 547.

[32] *Id*. at 548-66. Specifically, the suit alleged that KBR failed to adequately install a water pump or respond to work orders that complained of "electrified water[.]" *Harris*, 724 F.3d at 463.

[33] *Harris*, 878 F. Supp. 2d at 595.

[34] *Id*.

[35] *Id*.

[36] *Harris*, 724 F.3d at 462.

[37] *See id*. at 480.

this analysis ensured "preemption occurs only when battlefield decisions are at issue" and the acts were "the result of the military's retention of command authority."[38] The court reversed the lower court's decision by finding that, while KBR's actions were integrated into the military's combat activities, the military's work orders to KBR "did not prescribe how KBR was to perform the work required of it."[39] Thus, because KBR had discretion in how to perform the work required by the military, the Fourth Circuit found that the FTCA combatant exception did not apply.

2. *In re: KBR: The Burn Pit Case*

In February 2013, the District of Maryland granted a KBR motion to dismiss in a consolidated case involving forty-four class action suits and thirteen individual plaintiffs filed by servicemembers alleging injuries sustained due to KBR's negligent operation of waste disposal burn pits and provisions of contaminated water.[40] In granting the motion, the court adopted the position of *Saleh* that the "focus should not be on the activity of the contractor, but rather that of the military and whether the claims asserted arise out of combatant activities of the military."[41] The court determined it was "the exigency of combat conditions that drove the decision of the military to use open burn pits in the first place."[42] On appeal, the Fourth Circuit acknowledged that the application of the FTCA's combatant exception to the modern military force structure was a "changing legal landscape,"[43] and reversed and remanded for further discovery on the issue.[44]

The Fourth Circuit rejected the broad *Saleh* "elimination of tort from the battlefield" goal of the FTCA's combatant exception as well as the limited holding from *Koohi* that there was "no duty of reasonable care" owed to those against whom force is directed[45] and instead adopted the *Harris* standard that the unique federal interest at issue was the prevention of state interference with military conduct and decisions[46] and that the federal government occupies the field as to military conduct and decision-making.[47] The Fourth Circuit also adopted the *Johnson* standard that combatant activities included those acts "necessary to and in direct connection with actual hostilities"[48] and that the operation of burn pits and water treatment in a combat area were combat activities.[49] In the end, however, the court found that there was insufficient evidence to determine whether KBR's combat activities were sufficiently integrated into the chain of command to trigger the application of the FTCA's combatant exception and the case was remanded for further discovery.[50]

3. *McManaway v. KBR: The Water Treatment Case*

In December 2012, the Southern District of Texas denied a KBR motion to dismiss in an action brought by servicemembers alleging injuries caused by KBR's operation of oil wells in Iraq.[51] The court used the *Johnson* standard for what constituted a combatant activity and found that there was no need to determine whether the FTCA combatant exception applied because KBR's restoration of oil production was not a combatant activity and did not occur during combat but instead occurred while the United States was "restoring the combat area of Iraq to productive use after hostilities ended."[52] The Fifth Circuit then denied a petition for an en banc rehearing but the denial contained a blistering dissent by four of the circuit judges based on the point that, "from the contractor's standpoint, its mission was fully intertwined with that of the military, as the facility's restoration depended on coordination and collaboration" between the Army and KBR.[53] The dissent noted that the current judicial status of the exception was unworkable and nonsensical by noting that "it makes no sense to render formulations of the exception that preserve contractor tort liability in ways that would be inconceivable had the same battlefield-related activities been conducted by the military itself."[54] The opinion accurately summed up the state of the judiciary's treatment of the FTCA's combatant activities exception by stating "[t]he panel's dismissal order stands federal procedure on its head by implying that this case must nearly be tried before we can assess federal court jurisdiction and competence to hear it."[55] The *McManaway* dissent serves as the judicial magnum opus of the logical and legal absurdity, not to mention impractical

[38] *Id*. at 481.

[39] *Id*.

[40] In re KBR, Inc., Burn Pit Litig., 925 F. Supp. 2d 752 (D. Md. 2013). The motion was originally denied pending development of a joint discovery plan and then the case was stayed pending the outcome of several FTCA combatant exception cases in the Fourth Circuit. *See id*. at 757-58.

[41] *Id*. at 770 (italics omitted).

[42] *Id*.

[43] In re: KBR, Inc., Burn Pit Litig., 744 F.3d 326, 331 (4th Cir. 2014).

[44] *See id*. at 351-52.

[45] Koohi v. U.S., 976 F.2d 1328, 1337 (9th Cir. 1992).

[46] *In re: KBR, Inc*., 744 F.3d at 347-48.

[47] *Id*. at 348-49.

[48] Johnson v. U.S., 170 F.2d 767, 770 (9th Cir. 1948).

[49] *See In re: KBR, Inc*., 744 F.3d at 351.

[50] *Id*.

[51] McManaway v. KBR, Inc., 906 F. Supp. 2d 654 (S.D. Tx. 2012).

[52] *Id*. at 666 (omitting internal citations). The restoration of the oil wells took place starting in 2003 shortly after the U.S invasion of Iraq. *Id*. at 658.

[53] McManaway v. KBR, Inc., 554 F. App'x 347, 355 (5th Cir. 2014) (dissent from denial of rehearing en banc).

[54] *Id*. at 353.

[55] *Id*. at 348. "To any reasonable observer, however, an incredible amount of private, military, and judicial resources will have been expended solely to determine if the suit can be heard in federal court." *Id*. at 349.

and counterproductive from a policy standpoint, that is the current status of the application of the FTCA's combatant exception.

III. The Need for True Combatant Contractor Immunity

Since 9/11, the United States has made the twin policy decisions to engage in wars while also utilizing a smaller active duty military that is dependent upon contractor support.[56] The modern military's reliance on contractors is now placed at some risk by the application of the FTCA's combatant exception because these tort actions, while seeking compensation for real and tragic losses, are "really indirect challenges to actions of the U.S. military."[57] The reality is that "contractors are part of the total military forces"[58] and the current judicial application of the FTCA's combatant exception does not adequately serve the needs of that force.

A. The Expanded Role of Contractors on the Battlefield

Contractors are now performing many combat support operations that were once performed by active duty military and routinely make up the majority of the total force in an area of combat operations.[59] Contractors perform a wide array of tasks that the average civilian would likely consider combat-related,[60] in addition to the combat support services at issue in the KBR cases.[61] National policy has created a "symbiotic relationship with in-theater service contractors to perform such essential combat support activities" in order to free up Soldiers for the "core functions of warfighting"[62] and it is necessary to ensure that the legal framework regarding the FTCA's combatant exception furthers that policy.

The move to a smaller military force dependent on contractors was made in large part to provide a more flexible military and save costs.[63] However, the Department of Defense has more than doubled their expenditure on contracting since 9/11, with total contracting obligations consisting of roughly ten percent of the entire federal budget.[64] For For instance, Iraq-related contract obligations of $25 billion in fiscal year 2008, reflecting costs during the U.S. troop surge, and Afghanistan-related contract obligations totaled $21 billion in fiscal year 2012 during the peak of the U.S. presence in Afghan operations.[65] Regardless of one's opinion of the wisdom of choosing the current force structure[66] or the effectiveness of KBR in the cases analyzed in this article, the Rubicon has been crossed. The military force has been cut and is now dependent on contract support and it is necessary that public policy, to include the application of the FTCA's combatant exception, work to serve national security needs with, to paraphrase former Secretary of Defense Donald Rumsfeld, the force we have rather than the force we once had.[67]

B. Impractical and Counterproductive: The March of the Judiciary

Courts and Congress have facilitated a legal absurdity by allowing military contractors engaged in combat operations to be subject to fifty different state tort schemes that creates operational uncertainty for both the government and contractors.[68] The new military force structure requires a

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[56] MOSHE SCHWARTZ & JENNIFER CHURCH, CONG. RESEARCH SERV., R43074, DEP'T OF DEF.'S USE OF CONTRACTORS TO SUPPORT MILITARY OPERATIONS: BACKGROUND, ANALYSIS AND ISSUES FOR CONG. 1 (2013) [hereinafter USE OF CONTRACTORS].

[57] Saleh v. Titan Corp., 580 F.3d 1, 7 (D.C. Cir. 2009). For instance, in *Harris*, a case in which formal discovery has not yet even taken place, there were seventeen military officials who were deposed by the time KBR sought a writ of certiorari from the U.S Supreme Court. Brief of the Chamber of Commerce of the United States of America, et al. at 24, Kellogg, Brown & Root Inc., Petitioner v. Harris, et al., Respondents, 135 S. Ct. 1152, 190 L. Ed. 2d 910 (2015) No. 13-817, 2014 WL 547051.

[58] Karen Parish, *Dempsey: Military Costs Must Shrink*, AM. FOREIGN PRESS SERVS. (Mar. 6, 2012), http://archive.defense.gov/news/newsarticle.aspx?id=67440.

[59] *See* DEP'T OF DEF. CONTRACTOR AND TROOP LEVELA IN IRAQ AND AFGHANISTAN: 2007-2014, R44116, 1 (Heidi Peters, et al. eds., 2015) [hereinafter CONTRACTOR AND TROOP LEVELS]..

[60] USE OF CONTRACTORS, *supra* note 56, at 3. Contractors perform "such critical tasks as providing armed security to convoys and installations, providing life support to forward deployed warfighters, conducting intelligence analysis, and training local security forces." *Id.*

[61] In addition to the KBR tasks of performing building maintenance in *Harris*, burning waste in pits in *In re KBR*, and treating water in *McManaway*, contractors also "wash clothes and serve meals, maintain equipment and translate local languages, erect buildings and dig wells, and support many other important activities." COMMISSION ON WARTIME CONTRACTING IN IRAQ & AFGHANISTAN SECOND INTERIM REPORT TO CONG., AT WHAT RISK? CORRECTING OVER-RELIANCE ON CONTRACTORS IN CONTINGENCY OPERATIONS 7 (2011).

[62] Brief for Petitioner at 3, Kellogg, Brown & Root Services, Inc., Petitioner v. Harris, et al., Respondents, 135 S. Ct. 1152, 190 L. Ed. 2d 910 (2015.); No. 13-817, 2014 WL 108365 (omitting internal citations).

[63] *See* USE OF CONTRACTORS, *supra* note 56, at 3-4.

[64] *See Id*. at 1-3, fig.1-2 (stating that in inflation-adjusted dollars the expenditures have increased from $170 billion in 1999 to $360 billion in 2012).

[65] *See* CONTRACTOR AND TROOP LEVELS, *supra* note 59, tbl.5.

[66] This article focuses primarily on the legal basis for ensuring the most effective operation of the national security policy choice of a military force structure heavily dependent on contractor support. Although outside the scope of this article, much has been written on the potential for contractor support, particularly in the field of private security contractors, to lessen the political risk for the use of force. *See* Robert Bejesky, *The Economics of the Will to Fight: Public Choice in the Use of Private Contractors in Iraq*, 45 Cumb. L. Rev. 1 (2014-2015).

[67] The actual quote of Secretary Rumsfeld was, "As you know, you go to war with the army you have, not the army you might want or wish to have at a later time." *Troops Put Rumsfeld in the Hot Seat*, CNN (Dec. 8, 2004), http://www.cnn.com/2004/US/12/08/rumsfeld.kuwait/index.html.

[68] *See* Katherine Florey, *State Courts, State Territory, State Power: Reflections on the Extraterritoriality Principle in Choice of Law and Legislation*, 84 NOTRE DAME L. REV. 1057, 1064 (2009). The inability to know which law will govern a contract "lead[s] to inconsistent standards

high level of trust and cooperation between commanders and contractors that is undermined by litigation that "will often as not devolve into an exercise in finger-pointing between the defendant contractor and the military, requiring extensive judicial probing of the government's wartime policies."[69] The seemingly obvious reason for the adoption of the FTCA's combatant exception was to free military activities from the hesitancy associated with the risk of tort liability. With the changed military force structure and the increasing dependence on battlefield support by contractors, that rationale logically now extends to contractors because tort suits "will surely hamper military flexibility and cost-effectiveness, as contractors may prove reluctant to expose their employees to litigation-prone combat situations."[70] Contractors are rational actors and will seek to minimize their losses. The imposition of tort liability in a combat environment raises the potential for liability so it is only natural that contractors will tailor their behavior to minimize their risk by more closely questioning military decision-making and the limits of what they are willing to do to perform their combat support functions.

Allowing contractor liability under an unpredictable legal framework will, to a large extent, have the same effect as it would if the suits are brought against the military because it will serve as a factor weighing on military decision-making on how to use contractors and for contractors in how to offer their expertise to support military missions. In addition, the current state of the law is counterproductive because contractors are unable to calculate the costs of performance prior to engaging in business with the military because they cannot factor in potential liability under the laws of all fifty states.[71] This inability to assess the costs of doing business with the military may very well lead to a degree of hesitancy or unwillingness to contract with the government[72] or higher costs of contracting.[73] In what truly seems to be a Twilight Zone twist, the standard contractual relationship between the government and battlefield contractor contains provisions that ensure "the costs of imposing tort liability on government contractors is passed through to the American taxpayer."[74] In fact, the LOGCAP contract under which KBR performed support services is a cost-reimbursement contract requiring reimbursement for all but those harms occurring as a result of willful misconduct.[75] In fact, in August 2015, in a task order under the LOGCAP that extended the passing through of liability to the government even further, the Armed Services Board of Contract Appeals addressed a case where the indemnification clause involved in a KBR Iraqi oil services restoration contract covered even willful misconduct and indemnified "third party claims . . . and related legal costs."[76] The eventual passing through of damage and litigation costs to the government under an unpredictable legal framework with no federal control negates in part the cost-savings benefit of using contractors to support a smaller military.

In addition, courts have simply shown themselves unable to make the military-specific determinations required to apply the FTCA's combatant exception. The judiciary has too often taken an ivory tower approach to analyzing the environments in which battlefield contractors operate. For instance, in *Harris*, the court downplayed the risk to KBR contractors and their activities when KBR was acting in an environment where attacks had occurred and affected life on the base.[77] Regardless of whether a contractor is actually engaged in combat, if they are in the theater of operations or within a base in which combat is occurring they must take the operational

being applied and uncertainty on the part of actors who wish to conform their conduct to the law." *Id.*

[69] Saleh v. Titan Corp., 580 F.3d 1, 8 (D.C. Cir. 2009).

[70] *Id.*

[71] For instance, in *Harris*, on December 26, 2015, after years of litigation and the denial of certiorari by the Supreme Court, the court finally determined that Pennsylvania's tort law would apply to the case. Harris v. Kellogg, Brown & Root Services, Inc., No. 08-563, 2015 WL 8990812 (W.D. Pa. 2015).

[72] In fact, one ironic twist of the current application of the FTCA's combatant exception is that large corporate conglomerates that are heavily invested in receiving wartime contracts, such as KBR, who were so criticized for their conduct during the wars in Iraq and Afghanistan and derided in the media as the modern day scourge of what President Eisenhower termed the Military-Industrial Complex, are likely the only type of firms that are able to take on such legal and financial uncertainty. The current legal framework acts to lock into place the major wartime contractors and acts to stifle competition.

[73] *See* Boyle v. United Tech. Corp., 487 U.S. 500, 517 (1988).

[74] *Saleh*, 580 F.3d at 8. "The financial burden of judgments against the contractors [will] ultimately be passed through, substantially if not totally, to the United States itself." *Boyle*, 487 U.S. at 511-12.

[75] 48 C.F.R § 52.228-7(c)(2), (e)(3) (2016).

> (c) The Contractor shall be reimbursed . . . (2) For certain liabilities (and expenses incidental to such liabilities) to third persons not compensated by insurance or otherwise without regard to and as an exception to the limitation of cost or the limitation of funds clause of this contract. These liabilities must arise out of the performance of this contract, *whether or not caused by the negligence of the Contractor or of the Contractor's agents, servants, or employees*, and must be represented by final judgments or settlements approved in writing by the Government. . . . (e) The Contractor shall not be reimbursed for liabilities (and expenses incidental to such liabilities) . . . (3) That result from willful misconduct or lack of good faith on the part of any of the Contractor's directors, officers, managers, superintendents, or other representatives who have supervision or direction[.]

Id. (emphasis added).

[76] *In re* Kellogg Brown & Root Services, Inc., ASBCA No. 59357, 2015 WL 5076058, at *7 (August 13, 2015). This case involved a consolidation of various claims against KBR, including those at issue in *McManaway*. *Id.* at *4-5.

[77] *See* Harris v. Kellogg, Brown & Root Services, Inc., 878 F. Supp. 2d 543, 595 (W.D. Pa. 2012) (minimizing the state of readiness required on the base). "[T]here was a risk of mortar and shelling at the base but limited reports of such activities affecting base life" and "soldiers generally felt that the RPC was a safer location to be housed than other areas of Iraq where intense fighting was more common." *Id.*

precautions as if they could be under attack at any time.[78] Practice has shown that courts are ill-equipped to make the determination of "how much combat is enough combat" .[79] In fact, in addition to *Saleh's* "elimination of tort from the battlefield"[80] and *Koohi's* "reasonable care"[81] theories, one commentator also found that courts have used a legal purist theory which refuses to extend the FTCA's combatant exception to contractors and a textualist theory that extends the exception only to those contractor activities that actually constitute combat operations.[82] This commentator wrote prior to the circuit court opinions in the KBR cases used in this article to illustrate the federal circuit split as to the application of the FTCA's combatant activities exception, and advocated an adoption of the *Koohi* standard, "which holds that a reasonable care standard for private military contractors is appropriate in some circumstances."[83] In addition, in articles also written prior to the denial of certiorari in the KBR cases used in this article, commentators have posited even more complicated judicial solutions to the issue of the FTCA's combatant activity exception's extension to contractors, such as a multi-pronged "particularized, contextual approach"[84] or an approach that analyzes whether an activity constitutes combat and then applying the rules of engagement.[85] However, in light of the differing analyses and inconsistent results that has only been made more confusing by the KBR cases, it remains evident that courts are simply unable to fashion a workable standard for extending the FTCA's combatant exception to contractors and that the answer to the problem is not for the judiciary to adopt an even more complicated and subjective test.

Finally, the federal circuit split on the issue of how to apply the FTCA's combatant exception has negative practical effects. The current state of the law requires years of litigation of motions to dismiss and, in effect, results in a threshold combatant immunity trial before the merits trial to determine if the exception is applicable.[86] For instance, although the Third Circuit in *Harris* purported to be following the D.C. Circuit's application of the FTCA's combatant activities exception in *Saleh*, the Third Circuit refused to dismiss due in part to the discretion retained by KBR in performing maintenance.[87] However, the court did not offert a clear delineation as to what measure of control is required by the military to overcome the threshold that would outweigh a contractor's discretion. In addition, even if a legal threshold could be determined, it would produce a counterproductive and "perverse incentive" for contractors to avoid exercising their expertise in furtherance of the military mission and seek complete oversight and direction from the military to avoid potential liability.[88]

Even if a contractor did not deliberately seek to have the military exercise a higher degree of control in order to avoid potential liability, under the framework set up in the KBR cases, the FTCA's combatant exception is more likely to be applied as the degree and control exercised by the military

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[78] As anyone who has served in the wars in Iraq and Afghanistan can attest, the security and operational posture of each of these support tasks requires a war footing and a constant readiness for combat. This is something that seems completely lost in the judicial analysis of the cases involving the FTCA's combatant exception.

[79] In fact, one court found that oil restoration activities in Iraq, while dangerous, were not related to combat activities but were instead related to a foreign policy goal that was more akin to providing "base maintenance services, or to conducting truck convoys through hostile territory with military escorts than to repairing a generator necessary for the performance of maintenance on the engines of war." Bixby, et al. v. KBR, Inc., et al., 748 F. Supp. 2d 1224, 1246 (D. Or. 2010).

[80] Saleh v Titan Corp., 580 F.3d 1, 7 (D.C. Cir. 2009).

[81] Koohi v U.S., 976 F.2d 1328, 1337 (9th Cir. 1992).

[82] Spencer R. Nelson, *Establishing a Practical Solution for Tort Claims Against Private Military Contractors: Analyzing the Federal Tort Claims Act's "Combatant Activities Exception" Via a Circuit Split*, 23 Geo. Mason U. Civ. Rts. L.J. 109, 119-27 (Fall 2012). This article is a great summary of the varying legal theories underpinning the differing application of the FTCA's combatant exception prior to the KBR cases addressed in this article.

[83] *Id*. at 127.

[84] S. Yasir Latifi, *Bathrooms, Burn Pits, and Battlefield Torts: The Need for a Particularized, Contextual Approach to the Combatant Activities Exception After Saleh and al Shimari*, 91 N.C. L. Rev. 1357 (May 2013). This comment calls for courts to examine the issue of how a contractor is used "in connection to combatant activities" and then analyze whether the claim arose "on the battlefield and its connection to combat activities." *Id*. at 1362-63. Further, if a contractor fails either of the issues above, they would then have the burden of demonstrating that "attacks on a base occurred at the very location involved in the claim with some frequency or intensity" or "that the base itself was so directly connected to hostilities that it would be unreasonable not to apply" the FTCA's combatant activity exception. *Id*. at 1363.

[85] Michael Kutner, *The Battle Over Combat: A Practical Application of the Combatant Activities Exception to the Federal Tort Claims Act*, 87 St. John's L. Rev. 701, 721-23 (Spring-Summer 2013). This article calls for looking to the plain meaning of the exception's language, and asks if the activity in question constitutes combat as it is commonly understood. *Id*. at 704-05. If the activity constitutes combat, this gives a rebuttable presumption for application of the FTCA's combatant activity exception that can be overcome if the plaintiff can show the activity violated the "rules of engagement for the area in which it occurred." *Id*. at 705. However, if the activity is not found to constitute combat, then a rebuttable presumption arises that the exception will not apply unless the government can show that the "activity is similar enough to combat that imposing liability for it would give rise to the same policy concerns as would imposing liability for combat." *Id.*

[86] Although there is not complete formal discovery on the merits in the KBR cases, there has been years of litigation, depositions, evidentiary submissions, and considerations of the threshold issues of the combatant immunity exception, the political question doctrine, and sovereign immunity and yet still courts find that they "lack the information necessary" to determine these claims and continually "need more evidence" to determine the relationship between the military and contractor. In re: KBR, Inc., Burn Pit Litig., 744 F.3d 326, 331, 339 (4th Cir. 2014).

[87] *See* Harris v. Kellogg, Brown & Root Services, Inc., 724 F.3d 458, 481 (3rd Cir. 2013).

[88] Saleh v. Titan Corp., 580 F.3d 1, 8-9 (D.C. Cir. 2009) (omitting internal citations). *Boyle* termed such a framework a perverse inventive for imposing liability as penalizing a contractor for exercising their discretion. Boyle v. United Tech. Corp., 487 U.S. 500, 513 (1988).

over the contractor increases. A contractor would actually be rewarded under such a structure for being so incompetent in performing battlefield support tasks that the military command structure would have to exercise additional oversight and control in order to ensure the needed tasks were performed adequately. Under the current military force structure, it is unsound policy to have a smaller active duty force dependent on contractors who also have an incentive to avoid exercising their expertise and instead push as much as possible to rely on government oversight and control to avoid liability. This unintended consequence of the legal status quo directly undermines the rationale for utilizing a small force dependent on contractor support, i.e. lower costs and freeing the military for combat and direct support of combat.

IV. Common Sense Expansion: Updating the Law to Fit Combat Reality

Combatant contractor performance is fundamentally different from peacetime performance and the role of contractors on the battlefield has fundamentally changed as they have become integrated into the military force structure. In addition to the uneven judicial application of the FTCA's combatant exception, the current application carries over the peacetime idea that the allocation of risk for performance-based contracts should rest with the contractor into the very different environment of battlefield contracting in which the idea of risk allocation requires a radically different approach. Although, in the wake of the experience gained in Iraq and Afghanistan, the trend is for increased military oversight of contractors, [89] the uneven application of the FTCA's combatant exception carries real risks and should allow the President and the Department of Defense to bring it into line with the operational needs of the military.

A. Missed Opportunity: The Supreme Court's Punt on the KBR Cases

The KBR cases presented the perfect opportunity for the Supreme Court to bring the FTCA's combatant exception into line with the reality of the modern military force and free contractors, and commanders, from the limiting risk of civil suit.[90] However, in January 2015, the Supreme Court denied certiorari[91] and the state of the law remains unpredictable and unevenly applied. Even if federal courts turn to *Saleh* and the D.C. Circuit to guide their analysis, the KBR cases illustrate that there is the real risk that most combat support contractors will find the exception inapplicable as performance-based contracts would likely fail the military oversight and control analysis of the third prong of the *Boyle* test [92] absent a contractual provision that shifts risk to the government.[93]

In addition to the practical economic and operational reasons already covered in this article, granting certiorari was necessary in the KBR cases because there is a circuit split as to what the test for application of the FTCA combatant exception is. The Fourth Circuit explicitly acknowledged the split in *In re KBR*.[94] In analyzing the first prong of the *Boyle* test, the "unique federal interest" at issue, the court compared the D.C. Circuit's elimination of tort from the battlefield standard in *Saleh* [95] and the Ninth Circuit's no duty of reasonable care owed against those to whom the combat activities are directed standard in *Koohi*, [96] before finally adopting the Third Circuit's *Harris* middle ground rationale of seeking only to foreclose state regulation of the military's battlefield decisions and conduct.[97] In addition, in analyzing the third prong of the *Boyle* test, balancing the conflict between state tort law and the federal interest for the FTCA's combatant exception, the Fourth Circuit also identified a split.[98] The Fourth Circuit compared the *Saleh* standard of whether the military retained command authority over the contractor to such an extent that the contractor is integrated

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[89] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-07-145, MILITARY OPERATIONS: HIGH-LEVEL DOD ACTION NEEDED TO ADDRESS LONG-STANDING PROBLEMS WITH MGMT. AND OVERSIGHT OF CONTRACTORS SUPPORTING DEPLOYED FORCES 1 (2006). The type of oversight recommended in the aftermath of the Iraq and Afghanistan operations is designed in large part to ensure that the United States receives adequate performance for the money expended, i.e. bang for the buck. The oversight does not involve the type of direct management by the military that would likely result in it being more likely that the FTCA's combatant exception would apply under the current legal framework. *See id.*

[90] *See Saleh*, 580 F.3d at 7 ("[A]ll of the traditional rationales for tort law—deterrence of risk taking behavior, compensation of victims, and punishment of tortfeasors—are singularly out of place in combat situations, where risk-taking is the rule."). This must be so in order to carry out the "elimination of tort from the battlefield, both to preempt state or foreign regulation of wartime conduct and to free military commanders from the doubts and uncertainty inherent in potential subjection to civil suit." *Id.*

[91] In re KBR, Inc., Burn Pit Litig., 744 F.3d, 326 (4th Cir. 2014) *cert. denied sub nom*. KBR, Inc. v. Metzgar, 135 S. Ct. 1153, 190 L. Ed. 2d 911 (2015); Harris v. Kellogg Brown & Root Services, Inc., 724 F.3d 458 (3rd Cir. 2013) *cert. denied*, 135 S. Ct. 1152, 190 L. Ed. 2d 910 (2015); McManaway v. KBR, Inc., 554 F. App'x 347 (5th Cir. 2014), *cert. denied*, 153 S. Ct. 1153, 190 L. Ed. 2d 911 (2015).

[92] "[T]he public policy rationale behind *Boyle* does not apply when a *performance-based statement of work* is used in a services contract, because the Government does not, in fact, exercise specific control over the actions and decisions of the contractor . . . ." *Saleh*, 580 F.3d at 9-10 (italics in original) (omitting internal citations).

[93] *See id.* (citing Contractor Personnel Authorized to Accompany U.S. Armed Forces, 73 Fed. Reg. 16,764 at 5 (Mar. 31, 2008)).

[94] *In re: KBR, Inc.*, 744 F.3d at 348.

[95] *See Saleh*, 580 F.3d at 7.

[96] *See* Koohi v. U.S., 976 F.2d 1328, 1337 (9th Cir. 1992). *See also* Lessin v. Kellogg, Brown & Root Services, Inc., 2006 WL 3940556, *4 (S.D. Tx. 2006) (drawing a distinction between the proposition that no duty of care is owed to enemies in a time of war by denying the FTCA's combatant exception due to a duty of care owed to U.S. servicemembers).

[97] *In re: KBR, Inc.*, 744 F.3d at 348.

[98] *Id*. at 349-51.

into the combat activity of the military[99] to the *Harris* standard of whether the application of state tort law constitutes a state regulation of military conduct and decision-making[100] before adopting *Saleh*.[101] The Fourth Circuit's opinion is even divided as to which portions of the test it is adopting for the first prong. The court rejected the D.C. Circuit's reasoning in *Saleh* in favor of the Third Circuit's in *Harris* before turning around and rejecting *Saleh* and adopting *Harris* on the third prong. These "refined disagreements among the circuits"[102] "stand federal procedure on its head" and should have served as a knock at the door of Supreme Court review.[103]

However, even if, as the plaintiffs in the KBR cases assert, there is no circuit split,[104] the United States as amicus curiae proposed a test that was designed to cover all claims arising out of combat activities of the military by proposing that the FTCA's combatant exception be applied if the United States would be immunized had the act been performed by the government and the contractor was acting within the scope of the contractual relationship.[105] To date, no court has adopted that test and the military has not acted to adopt contractual provisions shifting tort risk for combatant contractor activities onto the government. Because of this, it is time for Congress to amend the language of the FTCA to bring the purpose of the combatant activities exception, allowing for the U.S. military to effectively engage in combat when called upon without the risk of tort liability, to reflect the modern force structure. This purpose requires the FTCA combatant exception cover contractors who now perform vital combat support operations.

B. Modernizing the Federal Tort Claims Act's Combatant Exception: A Congressional Solution

The United States' amicus curiae briefs in *Harris* and *In re KBR* went so far as to admit that the current judicial treatment of the FTCA's combatant exception was "detrimental to military effectiveness."[106] This article has already shown how the failure of the judiciary to adapt the FTCA's combatant exception to fit the modern military force is counterproductive to national security needs given the modern military force's dependence on contractor support. However, depending on one's interpretation of the "arising out of"[107] language in the statute coupled with fact that the definition of "federal agency" does not include contractors,[108] it certainly is a defensible position for courts to be wary about extending the application of the FTCA's combatant exception, even if the current application does not serve the needs of the modern military force. The hesitancy of the court may well rest upon a sensible notion that Congress must amend the FTCA's combatant exception to include combatant contractors and that even the current limited application of the exception to contractors constitutes an inappropriate judicial re-writing of the FTCA. In fact, some have argued just this point by asserting that even the current limited, yet inconsistent, expansion of the FTCA's combatant activities exception to contractors is unjustified because "in the sixty years since the adoption of the FTCA, Congress has had ample opportunity to provide contractors with broad defenses to tort actions and has declined to do so"[109] and "[i]n the FTCA, Congress has only made its intent clear that it wanted to remove tort liability from the battlefield for the United States and its employees, it makes no mention of private military contractors."[110]

Although this article takes the position that the circuit split justified Supreme Court review to address the impracticality of the current application of the FTCA's combatant exception to the modern military force structure, it is also undeniable that a straight-forward reading of the statute weighs against the application of the exception to contractors. However, it is also undeniably true that the current limited expansion of the exception, circuit split, and modern military force structure that is heavily dependent on contractors is an unsustainable status quo that demands Congressional action.

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[99] *See Saleh*, 580 F.3d at 9.

[100] *See KBR Inc*., 744 F.3d at 350.

[101] Even in adopting *Saleh*, despite years of litigation on the issue, the Fourth Circuit still found that there was insufficient information in the record to determine whether the FTCA's combatant exception applied. *Id*. at 351-52.

[102] McManaway v. KBR, Inc., 554 F. App'x 347, 355 (5th Cir. 2014) (dissent from denial of rehearing en banc).

[103] *Id*. at 348.

[104] Brief for Respondent at 17, KBR, Inc., et al., Petitioners v. Metzgar, et al., Respondents, 135 S. Ct. 1153, 190 L. Ed. 2d 911 (2015) No. 13-1241, 2014 WL 1936174 (describing the circuit split as manufactured and illusory). "To the extent there have been different outcomes in these cases, it is a reflection of differences in the facts, not in the court's view of the law." *Id.*

[105] *See* Brief of the United States as Amicus Curiae at 15, Kellogg, Brown & Root Inc., Petitioner v. Harris, et al., Respondents, 135 S. Ct. 1152, 190 L. Ed. 2d 910 (2015) No. 13-817, 2014 WL 7185602; Brief of the United States as Amicus Curiae at 15, KBR, Inc., et al., Petitioners v. Metzgar, et al., Respondents, 135 S. Ct. 1153, 190 L. Ed. 2d 911 (2015) No. 13-1241, 2014 WL 7185601. The United States in both cases also took the position that there was not a circuit split.

[106] "A legal regime in which contractors that the U.S. military employs during hostilities are subject to the laws of fifty different States for actions taken within the scope of their contractual relationship supporting the military's combat operations would be detrimental to military effectiveness." Brief of the United States as Amicus Curiae in *Harris*, *supra* note 95, at 19; Brief of the United States as Amicus Curiae in *Metzgar*, *supra* note 95, at 21.

[107] 28 U.S.C.A. § 2680(j) (2016).

[108] 28 U.S.C.A. § 2671 (2016).

[109] Margaret Z. Johns, *Should Blackwater and Halliburton Pay for the People They've Killed? Or are Government Contractors Entitled to a Common-Law, Combatant Activities Defense?*, 80 Tenn. L. Rev. 347, 357 (Winter 2013).

[110] Nelson, *supra* note 81, at 133.

While it is unknown exactly why the Supreme Court failed to grant certiorari, the United States as amicus curiae argued against granting certiorari on the basis that the application of the FTCA's combatant exception was an interlocutory matter that was not yet ripe for decision.[111] However, there should be no need to wait years and engage in voluminous discovery to find an acceptable outcome within the judicial system. If courts refuse to act, perhaps sensible from a statutory interpretation standpoint, then Congress must bring the exception into line with the modern military force structure. To do so, Congress should: 1) expand the FTCA's combatant exception to cover the performance of those contracts taking place in a combat zone by providing flexibility to the Executive in determining when and where to apply the exception, and 2) establish a predictable forum for binding arbitration for all claims alleging harms suffered due to out-of-scope acts of the contractor occurring within the when and where scope covered by Executive discretion.

The model for expansion of the FTCA's combatant immunity exception is the combat zone tax exclusion (CZTE) that excludes gross income received by military members while serving in a combat zone.[112] The CZTE leaves the determination of what constitutes a combat zone to the Executive[113] and implementation of the exclusion is left to the Department of Defense.[114] The FTCA's combatant exception should be amended to include contractor acts arising out of combat activity that occur within a zone of combat zone when the harm is suffered due to acts within the scope of the contractual relationship while leaving the "when" and "where" of the expanded exception to the Executive. Executive flexibility[115] is necessary to ensure adequate tailoring of the exception to only those locations where combat occurs and those acts which constitute combat and the direct support of combat. For example, the exception need not be crafted as broadly from a geographic standpoint as the CZTE. For instance, the CZTE applies in countries such as Qatar and the United Arab Emirates where there is not a state of combat, but instead merely support combat areas such as Afghanistan.[116]

The proposal for amending the FTCA's combatant exception would allow for applying the exception to contractors in combat zones such as Afghanistan while refusing to extend it to support areas such as Qatar and the United Arab Emirates. The Executive could also make the exception available only for certain combat support tasks within a geographic area. For instance, the exception could be made to apply to convoy escorts but not to laundry services in a combat zone depending on whether the Executive believed those activities "arose out of combat." Large-scale contracts, such as those under the LOGCAP, could even be tailored according to each individual task order.[117]

While the FTCA's combatant exception must be expanded to reflect the change in military force structure, that does not mean that the very real injuries suffered by contractor employees should be without restitution. Contracts covered by the expanded exception should include provisions requiring all contractor employees to have minimum health and life insurance policies paid for by the contractor,[118] to serve the same function as the military insurance and disability programs available to active duty military members engaged in combat that are prohibited from filing suit against the government. The goal of the proposal is designed to, as closely as possible, provide modern day combatant contractors the same tort protections that have in the past been afforded the government when the same combat support tasks were performed by military members. Under this proposal, the only suits against contractors covered by the expanded FTCA combatant exception would be those for harms alleged to have been caused by acts outside the scope of the contract. Contractors would thus be encouraged to provide their expertise for what they were contracted for to the fullest extent possible and only be subject to tort liability when they venture outside that scope.

The limitation of liability may seem somewhat of a harsh solution, as even in-scope willful acts of a combatant contractor would fall within the expanded exception and be covered by insurance,[119] but the national policy choice has been made to rely on combat contractors and there is no longer a logical justification why the exception applied, and continues to apply, to combat support activities performed by

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[111] Brief of the United States as Amicus Curiae in *Harris*, *supra* note 92, at 20-1; Brief of the United States as Amicus Curiae in *Metzgar*, *supra* note 95, at 22-3.

[112] 26 U.S.C.A. § 112(a), (b) (2016).

[113] 26 U.S.C.A. § 112(c). The Executive Orders are found in U.S. DEP'T OF DEF., 7000.14-R, DOD FINANCIAL MANAGEMENT REGULATION, vol. 7A, ch. 44 (as amended) [hereinafter DoD FMR].

[114] U.S. DEP'T. OF DEF., INSTR. 1340.25, COMBAT ZONE TAX EXCLUSION (CZTE) (Sept. 28, 2010).

[115] The author intends the term "executive" to include those officials within the Department of Defense to whom the "when" and "where" determinations would likely be delegated.

[116] DOD FMR, *supra* note 101, vol. 7A, ch. 440103A.1.

[117] Allowing the FTCA combatant exception to apply within individual task orders would also allow further tailoring of the application of the exception within a geographic region on a task-specific basis. While this would create some unpredictability at the time of contract award as to which task orders would be covered by the exception, it is an improvement over the current system in that it would allow the contractor and government to determine in advance of performance whether the exception applies.

[118] While this would increase the costs of the contracts covered by the exception, the government could dictate in advance what protections would be required and the contractors would have an estimate of the costs so as to be able to make predictable accounting determinations at the time of competing for the contract award.

[119] Although, the author would assert that the proposed solution is still better than forcing contractors to engage in years of litigation and end up with the costs eventually being passed through to the government. *See In re* Kellogg Brown & Root Services, Inc., ASBCA No. 59357, 2015 WL 5076058 (Aug. 13, 2015).

servicemembers but is not applied to a contractor performing that same combat support activity today and in the future. Under the United States' proposed test from the KBR cases, a combatant contractor would remain unaware at the time of bidding or performance which of the fifty states laws would apply in a tort suit.[120]

This level of unpredictability is not acceptable, even in serving as a check to keep contractors within scope, when considered it within the context that combatant contractors are now an integral part of the national security apparatus. It is not unreasonable to assume that there could be occasions when a contractor would perform outside the scope at the behest of the military or in a good faith belief that doing so helps to further a military mission. Such a contractor should not be exposed to the unpredictability of playing a game of state-tort Russian roulette. Therefore, to bring uniformity to the process, contracts covered by the expanded exception should require a form of binding arbitration for those claims arising out of an allegation that the harms were suffered due to acts outside of the scope of the contractual relationship.[121] The arbitration system could be designed by the government and borrow many features of the existing military claims system. This would allow an action for harms alleged to have been caused by acts outside the scope of the contract but avoid the unpredictability of subjecting contractors to liability under fifty separate state tort systems by creating a forum designed and tailored primarily to suit national security interests.

V. Conclusion

The military force structure has not quite evolved to that advocated by Milo Minderbinder, but it has evolved to the point where combatant contractors are now deserving of protection from claims arising out of combatant activities. The FTCA's combatant exception has not been adapted by the judiciary and is currently illogical and counterproductive. Due to the Supreme Court's failure to grant certiorari in the KBR cases, it is time for Congress to bring the exception into line with the modern military force. War often involves the choice of one of several imperfect options and the proposed proposal is a vast improvement over the current status of the FTCA's combatant activity exception. The United States has chosen the policy of engaging in wars requiring large military forces while simultaneously downsizing the military so as to make the military dependent on contractor support in order to effectively fight those wars. This policy choice requires expanding the FTCA's combatant exception to cover combatant contractors with the same combatant tort protections that have historically been afforded to the military. Lieutenant Minderbinder would surely agree.

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[120] Brief of the United States as Amicus Curiae in *Harris*, *supra* note 92, at 15; Brief of the United States as Amicus Curiae in *Metzgar*, *supra* note 95, at 15.

[121] Arbitration would be necessary because there is not an avenue within the existing military claims system capable of handling such claims.

Untangling the Web of Resources Available for Victims of Sexual Assault

Major Stacey A. Guthartz Cohen[*]

You can succeed from this day forward in virtually every aspect of your military career, but if you fail at this, and that is leading on the issue of sexual assault, you've failed the Army.[1]

I. Introduction

Sergeant First Class (SFC) Jane Duffy is a senior leader in the Army. Last night, SFC Duffy was at a party with her peers. A fellow non-commissioned officer (NCO) gave SFC Duffy a plastic cup with some sort of alcohol-based fruit punch in it. SFC Duffy took a few sips and began to feel groggy. The fellow-NCO offered to take her home. Next thing SFC Duffy knows, she wakes up naked in her bed. She feels pain in her vagina and knows something bad happened the night before. SFC Duffy immediately calls her First Sergeant (1SG).

Mrs. Lindsay Smith is an Army wife. Her husband, Sergeant (SGT) Smith, has served in the Army for six years. SGT Smith uses violence to control Mrs. Smith. He hits her, kicks her and when things are really bad, SGT Smith strangles her. Two days ago, SGT Smith came home drunk and angry. When Mrs. Smith refused to have sex with SGT Smith, he raped her. Mrs. Smith has no idea what to do, so she calls SGT Smith's company commander.

Kayla Pearson is ten-years-old. Her step-father is a Soldier, and her mother is a nurse who works the night shift. The family lives on-post. Nearly every night, Private First Class (PFC) John Quincy, the step-father, comes into Kayla's bedroom and touches her breasts and vagina. Recently he has taken nude pictures of Kayla. Kayla has become withdrawn and sullen. One day, she tells her mother what PFC Quincy is doing to her. Mrs. Quincy calls the Military Police (MP).

Trisha Miller has been dating a Soldier, Major (MAJ) Paul Fisher for three-years. They have a child together. Major Fisher has not been the same since he came home from his last deployment. Three weeks ago, MAJ Fisher pushed Trisha down onto their bed, groped her breasts and tried to take her pants off. Trisha was terrified. She was able to throw MAJ Fisher off of her and run out of the house. Trisha has lived in fear ever since. Trisha rarely takes part in military activities. She is clueless about command structure, and she does not want to get MAJ Fisher in trouble. But she is scared and decides to tell her best friend what happened. The friend tells Trisha to call the legal assistance office for help.

Dana Kinsey has lived in a military town her whole life. She knows better than to get involved romantically with a Soldier. Yet, one night at the local bar she met a handsome, charming guy who spent most of the night buying Dana drinks. She agreed to go back to his barracks room with him, where the two continued doing shots. Dana remembers feeling really drunk and vomiting in the bathroom. Dana passed out on the Soldier's bed. She awoke to find the Soldier performing oral sex on her. She started crying, but was so incapacitated that she could not speak. She passed out again and woke in the morning to find the Soldier gone. Dana has no idea what happened to her and no idea what to do.

Sergeant Frist Class Duffy, Mrs. Lindsay Smith, Kayla Pearson, Trisha Miller, and Dana Kinsey do not know each other. But they have much in common. They are all scared. They are all confused. They are all lost as to what to do next. They turn to you, a newly appointed Special Victim Counsel (SVC), for answers.

The Department of Defense (DoD) is committed to supporting victims of sexual assault through a variety of programs. The Army support programs available to victims of sexual assault are delivered through a complicated web of agencies, care providers, first responders, military commanders, and judge advocates woven together to help care for victims. It is important for all involved to understand the capabilities and limitations of their colleagues and how they work together in order to help victims through what can be a complex and trying process. This guide will help untangle the web for the military justice practitioner.

The first part of this article examines the main programs available for victims of sexual assault and identifies overlaps among the agencies. Using the stories of SFC Duffy, Mrs. Smith, Kayla Pearson, Trisha Miller, and Dana Kinsey, this article identifies resources that are available to each of these victims, and also highlights gaps in the services available. The second part of this article explores some of the ways the available programs work together to serve the client. Special attention will be paid to the largest and most widely used programs: Sexual Harassment/Assault Response and Prevention (SHARP) resource centers, Sexual Assault Review Boards (SARB), and the Case Review Committee (CRC). Lastly, this article discusses how you as the SVC can leverage the services available to best serve your clients.

II. Understanding the Agencies Involved

In 2008, in response to sexual assault in the military, the DoD implemented the Sexual Assault Prevention and Response Strategic (SAPR) Plan.[2] This multipronged

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[*] Judge Advocate, United States Army. Presently assigned as Chief, Administrative Law, Fort Leavenworth, Kansas. LL.M., 2016, The Judge Advocate General's School, United States Army, Charlottesville, Virginia; J.D., 2004, University of Pace Law School; B.A., 1999, University of Michigan. Previous assignments include Chief of Client Services/Special Victim Counsel, Military District of Washington, Fort Myer, Virginia,

approach incorporates the strategic goals of prevention, investigation, accountability, advocacy, and assessment.[3] Utilizing that model, the Army's "[r]esponse [to sexual assault] is primarily a care, compliance, and coordination mission."[4] "In most instances, [Army] installations are expected to provide required services without referral to outside agencies."[5] However, figuring out which agency or support entity is available and knowing that agency's capabilities can be confusing. The best way to understand what resources are available and the capabilities of each is to examine a sexual assault case from the moment a victim seeks assistance.

In the case of SFC Duffy, it is seven o'clock in the morning on a Saturday when she first reports the assault to her chain of command, specifically 1SG Richardson.[6] Though 1SG Richardson is required to inform the chain of command of SFC Duffy's report, he first must ensure SFC Duffy is safe.[7] First Sergeant Richardson contacts his brigade Sexual Assault Response Coordinator (SARC) to assist SFC Duffy.[8]

A. Sexual Harassment Assault Response Prevention

Prior to 2008, sexual assault response and prevention was a separate and distinct program from the response and prevention of sexual harassment.[9] The two have since merged into the SHARP program.[10] "The Army SHARP program is designed to support two primary missions: (1) proactive prevention of sexual harassment and sexual assault and (2) effective response to allegations of sexual harassment or sexual assault."[11] It is through the response mission, rather than the prevention mission, that victim support services are created.[12] Army SHARP programs and procedures are available to

> [A]ctive duty Soldiers, including those who were victims of sexual assault prior to enlistment or commissioning, and Army National Guard (NG) and Army Reserve Component (RC) Soldiers who are sexually harassed or sexually assaulted when performing active service and inactive duty training. SHARP program policy also applies to military dependents eighteen years of age and older who are eligible for treatment in the military healthcare system, at installations in the continental United States (CONUS), and who were victims of sexual assault perpetrated by someone other than a spouse or intimate partner.[13]

1. Sexual Assault Response Coordinator

Sexual Harassment/Assault Response and Prevention is a commander's program, with the SARC as the key SHARP personnel coordinating and overseeing the program for the command.[14] The SARC position exists at both the installation and brigade levels.[15] The SARC receives extensive training[16] and ". . . reports directly to the senior commander for matters

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2013-2015; Special Assistant United States Attorney, Fort Bragg, North Carolina, 2011-2013 (Brigade Judge Advocate, 2009-2011; Trial Counsel, 2008; Administrative Law Attorney, 2007); Legal Assistance Attorney/Tax Attorney Camp Casey, 2d Infantry Division, South Korea, 2006-2007. This article was submitted in partial completion of the Master of Laws requirements of the 64th Judge Advocate Officer Graduate Course.

[1] U.S. DEP'T OF ARMY, SHARP GUIDEBOOK (Oct. 2013), https://www.us.army.mil/suite/doc/41688650 (citing John M. McHugh) [hereinafter SHARP GUIDEBOOK].

[2] U.S. DEP'T OF ARMY, ARMY SHARP PROGRAM CAMPAIGN PLAN (12 May 2014), https://www.us.army.mil/suite/ doc/43092898 [hereinafter ARMY SHARP PROGRAM CAMPAIGN PLAN].

[3] *Id.* at 1.

[4] *Id.* at 2.

[5] U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 17-2 (3 Oct. 2011) [hereinafter AR 27-10].

[6] SHARP GUIDEBOOK, *supra* note 1, at 35-37. Soldiers have two reporting options: restricted and unrestricted report of sexual assault. *Id.* Reporting options remain the same for Mrs. Smith, Trisha Miller, and Dana Kinsey, as they are for Sergeant First Class (SFC) Duffy. However, for Kayla and for all children, reports of child sexual abuse are never restricted reports. *See Need Assistance?—By Duty Status*, DEP'T OF DEF. SEXUAL ASSAULT PREVENTION AND RESPONSE, http://www.sapr.mil/index.php/need-assistance (last visited Sept. 9, 2016) [hereinafter *Need Assistance?—By Duty Status*].

[7] SHARP GUIDEBOOK, *supra* note 1, at 37.

[8] U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY para. F-2(h) (6 Nov. 2014) [hereinafter AR 600-20].

[9] *See generally* ARMY SHARP PROGRAM CAMPAIGN PLAN, *supra* note 2; SHARP GUIDEBOOK, *supra* note 1.

[10] *See* ARMY SHARP PROGRAM CAMPAIGN PLAN, *supra* note 2; SHARP GUIDEBOOK, *supra* note 1.

[11] ARMY SHARP PROGRAM CAMPAIGN PLAN, *supra* note 2.

[12] *Id.* at 2 ("Prevention is primarily a training and education mission. . . . Response is primarily a care, compliance, and coordination mission.").

[13] SHARP GUIDEBOOK, *supra* note 1, at 4.

[14] ARMY SHARP PROGRAM CAMPAIGN PLAN, *supra* note 2, at 5.

[15] AR 600-20, *supra* note 8, para. 8-5(p); *see also* Telephone Interview with Lieutenant Colonel (LTC) Stephanie Johnson, I Corps Program Manager, Sexual Harassment/Assault Prevention, Joint Base Lewis-McChord (JBLM) & Sergeant First Class (SFC) Jacqueline Kornelis, SARC, JBLM Ctr. (Dec. 8, 2015) [hereinafter Interview with LTC Johnson & SFC Kornelis] (stating that each brigade will have one full-time sexual assault response coordinator (SARC) assigned).

[16] *See* U.S. DEP'T OF DEF., INSTR. 6495.03, DEFENSE SEXUAL ASSAULT ADVOCATE CERTIFICATION PROGRAM (10 Sept. 2015) [herein after DODI 6495.03]; *Department of Defense Sexual Assault Advocate Certification Program*, U.S. DEP'T OF DEF. SEXUAL ASSAULT PREVENTION & RESPONSE, http://www.sapr.mil/index.php/d-saacp (last visited Sept. 9, 2016). All Sexual Assault Response Coordinator (SARC) and victim advocate (VA) positions are held by personnel who have undergone extensive background checks and are certified by the Defense Sexual Assault Advocate Certificate Program (D-SAACP) which is awarded by the National Organization for Victim Assistance (NOVA). *See* AR 600-20, *supra* note 8, paras. 8-7, H-3; Interview with LTC Johnson & SFC Kornelis, *supra* note 15.

concerning incidents of sexual assault."[17]

> The SARC is the single point of contact within an organization or installation who oversees sexual assault awareness, prevention, and response training; coordinates medical treatment, including emergency care, for victims of sexual assault; and tracks the services provided to a victim of sexual assault from the initial report though final disposition and resolution.[18]

The SARC is responsible for coordinating and implementing the victim advocacy (VA) program.[19] This is accomplished in part by "[a]ssign[ing] the VA to assist [the] victim immediately upon notification of an incident of . . . sexual assault."[20]

The SARC must be at a minimum a sergeant first class, chief warrant officer 3, major, or GS-11 Department of the Army Civilian.[21] Battalions will have a collateral duty, military member SARC from time to time.[22] Many times units will have alternates assigned.[23] The SARC is a required member at the Sexual Assault Review Board, discussed more fully in Section III of this article.[24]

In SFC Duffy's case, the SARC officially opens the case in his or her database, allowing the SARC to keep tabs on the case and ensuring SFC Duffy receives all the services she requires.[25] The SARC oversees the case from the strategic, or big-picture level, and is responsible for informing the Command about the status of the case.[26] However, the VA, who operates more in the day-to-day operations, is SFC Duffy's primary point of contact for assistance.[27] Since SARCs and VAs are available twenty-four hours a day, seven days a week, the brigade SARC comes to assist SFC Duffy after receiving an early-morning phone call from First Sergeant Richardson.[28] The SARC explains who she is to SFC Duffy and also explains how she can help SFC Duffy.

2. Victim Advocate

Victim Advocates exist at several layers in the command structure. The installation or brigade VA works for the installation or brigade SARC, and the battalion VA works for the battalion SARC.[29] Sergeant First Class Duffy's VA is the brigade VA. "The VA provides non-clinical crisis intervention, referral, and ongoing non-clinical support to victims."[30]

Typically, once a victim reports an assault, the SARC immediately contacts the VA, who is put in touch with the victim.[31] Like in SFC Duffy's case, the VA is often one of the first people in the support network with whom a victim comes into contact.[32] First, the VA will ensure SFC Duffy's safety.[33]

At SFC Duffy's request, the VA will accompany SFC Duffy to investigative interviews and medical appointments.[34] The VA will also bring SFC Duffy to the hospital if she requires medical treatment or needs to have a Sexual Assault Forensic Examination (SAFE) performed.[35] If a SAFE takes place at the hospital, the VA will let SFC Duffy know that it could take anywhere from three to seven hours to perform.[36] All services the VA provides for

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[17] AR 600-20, *supra* note 8, para. 8-5(p).

[18] SHARP GUIDEBOOK, *supra* note 1.

[19] AR 600-20, *supra* note 8, para 8-3(a)(1). If required, the SARC may perform the duties of the VA. Interview with LTC Johnson & SFC Kornelis, *supra* note 15.

[20] SHARP GUIDEBOOK, *supra* note 1.

[21] *See generally* AR 600-20, *supra* note 8, para. 8-5. Deployable units are also required to have a deployable SARC. *Id.* Deployable SARCs are Soldiers appointed on orders assigned to the command who are designated and trained to assume the duties of the civilian SARC. *Id.*

[22] AR 600-20, *supra* note 8, paras. 8-5(k), (p).

[23] E-mail from SFC Jacqueline Kornelis, SARC, JBLM Resource Center, to author (Dec. 8, 2015) (on file with the author) [hereinafter E-mail from SFC Kornelis].

[24] AR 600-20, *supra* note 8, para. E-3.

[25] *Id.* para. 8-5(p) (20)-(21).

[26] SHARP GUIDEBOOK, *supra* note 1, at 30.

[27] *See generally id.*

[28] *Id.* at 4.

[29] AR 600-20, *supra* note 8, para. 8-3; *see also* E-mail from SFC Kornelis, *supra* note 23.

[30] SHARP GUIDEBOOK, *supra* note 1, at 30. Because of the extensive amount of time spent with the victim and because of their training and certification, the VA is best situated to assess the victim's needs. In addition, since this is a full-time job, the VA is aware of all resources available and often has relationships developed with the various agencies the victim may need. This assertion is based on the author's recent professional experience as the Chief, Client Services/Special Victim Counsel for the Military District of Washington from Oct. 2013 to June 2015 [hereinafter Professional Experience].

[31] SHARP GUIDEBOOK, *supra* note 1, at 37; *see also Sexual Assault Prevention & Response*, MYDUTY, http://myduty.mil/ index.php/service-member-guidance/i-have-been-assaulted (last visited Sept. 9, 2016).

[32] *See* SHARP GUIDEBOOK, *supra* note 1, at 65. Safety of the victim is established first. *Id.* The assault is then reported to the SARC who assigns a VA, who makes contact with the victim. *Id.*

[33] *Id.*, *supra* note 1.

[34] AR 600-20, *supra* note 8, para. 8-5(r)(6).

[35] *See* SHARP GUIDEBOOK, *supra* note 1. Medical care could include a Sexual Assault Forensic Examination (SAFE); *see also* U.S. DEP'T OF ARMY MEDICAL COMMAND, REG. 40-36, MEDICAL FACILITY MANAGEMENT OF SEXUAL ASSAULT (23 Dec. 2004) [hereinafter MEDCOM REG. 40-36]; U.S. DEP'T OF ARMY MEDICAL COMMAND, SUPPLEMENT 1 TO REG. 40-36 (12 Nov. 2015) [hereinafter MEDCOM REG. 40-36, SUPP. 1].

[36] Telephone Interview with Kandace Ray, Nurse Administrator, Sexual Harassment/Assault Response and Prevention, U.S. Army Medical Command (Dec. 18, 2015) [hereinafter Interview with Kandace Ray].

SFC Duffy are non-clinical or non-medical and therapeutic in nature, but the VA is uniquely situated to refer SFC Duffy to clinical treatment providers (like mental health counselors or the chaplain).[37]

Returning to the hypotheticals of the other victims to whom we were introduced; Mrs. Lindsay Smith, as an adult military dependent is eligible for some of the SHARP resources.[38] However, SHARP resources are not available to ten-year old Kayla Pearson, or non-DoD dependents Trisha Miller or Dana Kinsey.[39]

We have already seen that "[t]he SARC serves as the installation's single point of contact for integrating and coordinating sexual assault victim care services. The [Family Advocacy Program] fulfills this role for sexual assault victims who are in a domestic, intimate partner relationship with the accused, and all cases involving a child victim."[40]

B. Family Advocacy Program

Army Community Services (ACS) is the Army agency responsible for the general management of the Family Advocacy Program (FAP).[41] The FAP is focused on spousal and child abuse, including sexual abuse.[42] The FAP is divided into two distinct parts: prevention and treatment for both victims and offenders.[43] Family Advocacy Program personnel play a role in two multidisciplinary committees: the Family Advocacy Committee (FAC)[44] and the Case Review Committee (CRC).[45] The CRC is discussed more fully in Section III of this article.

1. Family Advocacy Program Victim Advocate

One of the missions of the FAP is "to break the cycle of abuse by identifying abuse as early as possible and providing treatment for affected Family members."[46] In furtherance of this goal, the FAP maintains a victim advocacy program (FAP VA). This program "[p]rovides comprehensive assistance and support to victims of spouse abuse, including crisis intervention."[47] The FAP VA, similar to the VA with SFC Duffy, spends a large amount of time with Mrs. Smith, accompanying her to interviews and being a constant source of support and information for her. As a result, it is likely that Mrs. Smith feels most comfortable interacting with the FAP VA and thus the FAP VA becomes the primary coordinator of services for Mrs. Smith.[48]

In order for a victim to be eligible for the FAP resources, that victim must be the intimate partner or former intimate partner of the accused. In our hypothetical, Mrs. Smith, the wife a Soldier is eligible for FAP services.

Trisha Miller, a non-DoD identification card holder girlfriend of the accused, is only eligible for FAP services because she and MAJ Fisher, the offender, have a child in common.

Lastly, Kayla, the step-daughter of the Soldier offender, is eligible for FAP services. However, the FAP does not assign a FAP VA to children; rather, a FAP VA is assigned to assist the non-offending parent, in this case, Kayla's mother.[49]

2. Intervention

The FAP oversees community based education programs that focus on family violence, spouse abuse prevention programs that work to strengthen and stabilize intimate relationships, and family life classes and programs that focus on providing knowledge, social skills and support for the family life cycle.[50] "These programs inform the military community of the extent and nature of spouse and child abuse and focuses awareness of family violence, including how to report it and what services are available."[51] Most of the cases the FAP handles are domestic violence cases that end up transferred to the treatment side of the FAP.[52] Two classes

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[37] AR 600-20, *supra* note 8, para. 8-5(r).

[38] *Need Assistance?—By Duty Status*, *supra* note 3.

[39] *Id.*; *see also* SHARP GUIDEBOOK, *supra* note 1, at 4 ("SHARP program policy also applies to military dependents 18 years of age and older who are eligible for treatment in the military healthcare system . . . .").

[40] U.S. ARMY JUDGE ADVOCATE GEN.'S COPRS, HANDBOOK: SPECIAL VICTIMS' COUNSEL PROGRAM para. 3-3(a) (May 2015) [hereinafter SVC HANDBOOK].

[41] U.S. DEP'T OF ARMY, REG. 608-18, THE ARMY FAMILY ADVOCACY PROGRAM para. 2-1 (30 Oct. 2007) (RAR 13 Sept. 2011) [hereinafter AR 608-18].

[42] *Id.*

[43] AR 608-18, *supra* note 41, para. 1-6; *see also* Telephone Interview with Sara McCauley, VA Coordinator, Army Community Services, Joint Base Myer-Henderson Hall (Dec. 11, 2015) [hereinafter Interview with Sara McCauley]. The treatment portion of the Family Advocacy Program (FAP) falls under U.S. Army Medical Command (MEDCOM) and the Military Treatment Facility (MTF). The prevention mission falls under the Garrison Commander and Army Community Services (ACS). AR 608-18, *supra* note 41.

[44] *Id.* ch. 1.

[45] *Id.* para. 2-3(b). Case Review Committee (CRC) is a committee under the treatment-side of the FAP. *Id.* The Family Advocacy Committee (FAC) falls directly under the Garrison Commander and is neither treatment nor prevention. *See also* Interview with Sara McCauley, *supra* note 43.

[46] AR 608-18, *supra* note 41, para. 1-5.

[47] *Id.* para. 3-2.

[48] Professional Experience, *supra* note 30.

[49] Interview with Sara McCauley, *supra* note 43.

[50] AR 608-18, *supra* note 41, para. 3-2.

[51] *Id.*

[52] Interview with Sara McCauley, *supra* note 43. The treatment side of the FAP falls under the MTF and MEDCOM. The case would be transferred so the individuals involved could receive necessary treatment from social

offered by the FAP that may be relevant to a victim or offender of sexual assault are anger management and parenting.[53]

Regardless of whether the victim is SFC Duffy, Mrs. Smith, ten-year old Kayla, or Trisha Miller, the first responsible party (e.g. SARC; VA; FAP VA; etc.) to make contact with a victim "will inform eligible victims of their right to services of a [Special Victim Counsel]."[54]

C. Special Victim Counsel

"Special Victim Counsel are legal assistance attorneys[55] who have received special training and are designated by the The Judge Advocate General to serve as an SVC."[56] The SVC's role is to zealously represent the client's interests throughout the military justice process. [57] Special Victim Counsel are not affiliated with either the prosecution or defense. "Constrained only by ethical limits, the SVC represents the best interest of their clients as appropriate, even when their client's interests do not align with those of the government of the United States."[58] An SVC's primary duty is to his or her client and no other person, organization, or entity.[59]

The SVC advises "on issues implicating [Military Rule for Evidence (MRE)] 412 (rape shield), MRE 513 (psychiatrist-patient privilege), MRE 514 (victim advocate-victim privilege), and any other matter where the [victim's] interests or rights are at stake."[60] As a practical matter, once SFC Duffy, Mrs. Smith, or Kayla retain an SVC, the SVC is the primary point of contact for any attorney, including those on the prosecution and defense teams.[61]

Eligibility for SVC representation depends on military status and the timing of the assault.[62] Nearly all dependents of active duty Army members, who are eligible for legal assistance services at the time of the offense, including children, are eligible to receive SVC assistance.[63] Thus, SFC Duffy, Mrs. Smith and Kayla are all eligible to receive SVC services. However, Trisha Miller and Dana Kinsey are not eligible due to their status. An initial declination of SVC services by the victim does not permanently waive a victim's right to SVC services.[64] A victim can request SVC services at any time in the process.[65]

The VA contacts the Chief of Legal Assistance at the local office of the staff judge advocate (OSJA) asking that an SVC be assigned to SFC Duffy.[66] In the same way, the FAP VA contacts the chief of legal assistance asking that an SVC be assigned to Mrs. Smith and Kayla. Prior to assigning an SVC to SFC Duffy, the chief of legal assistance needs to run a conflict check on the case.[67] If no conflict exists, the chief of legal assistance will assign an SVC who will reach out to SFC Duffy.[68] Unlike the VA, the SVC is not on call twenty-

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workers and other medical related entities. AR 608-18, *supra* note 41, para. 3-23(c).

[53] Interview with Sara McCauley, *supra* note 43.

[54] SVC HANDBOOK, *supra* note 40, para. 2-1(a).

[55] U.S. DEP'T OF ARMY, REG. 27-3, THE ARMY LEGAL ASSISTANCE PROGRAM para. 2-1 (21 Feb. 1996) (RAR 13 Sept. 2011) [hereinafter AR 27-3] ("The mission of the legal assistance program is to assist those eligible for legal assistance with their personal legal affairs . . . ."). Legal assistance attorneys generally assist clients in the area of family law, estate planning, real property, personal property, economics, civilian administrative law, and military administrative law. Though legal assistance is a commander's program, legal assistance attorneys do not advise commanders. *Id.*

[56] *Special Victim Counsel Program*, JAGCNET, https://www.jagcnet2.army.mil/852573F600760E8C/0/D6D4BAE0D165B17B85257CD800480228?opendocument (last visited Sept. 9, 2016) [hereinafter *Special Victim Counsel Program*]. Other military attorneys within an Office of the Staff Judge Advocate (e.g. administrative law attorney) may serve as SVC as the mission requires. Professional Experience, *supra* note 30.

[57] *Id.*

[58] *Id.*

[59] *See generally* SVC HANDBOOK, *supra* note 40; *Special Victim Counsel Program*, *supra* note 56; Message from Lieutenant General Flora D. Darpino, TJAG Sends: Special Victim Advocate Program (Oct. 15, 2013), https://www.jagcnet2.army.mil/8525799500461E5B/0/4E84DDE69BFD758685257C05007ED042/%24FILE/TJAG%20Sends%20Vol%2039-02%20(Oct%2013%20-%20Special%20Victim%20Advocate%20Program).pdf.

[60] SVC HANDBOOK, *supra* note 40, para. 3-1(a). The Military Rules of Evidence are the collection of evidentiary rules for courts-martial codified in the Manual for Court-Martial. *Id.*

[61] *Id.* para. 4-2(b); Professional Experience, *supra* note 30.

[62] SVC HANDBOOK, supra note 40, ch. 1. Active duty Soldiers are not generally eligible for SVC representation when the sexual assault occurred prior to enlistment or commissioning. *Id.* Reserve component Soldiers are eligible if the circumstances of the alleged sex-related offense have a nexus to the military service of the victim based on the membership in the armed forces of either the victim or the member who allegedly committed such offense. *Id.*

[63] *Id.* para. 1-2. The report of sexual assault has to be made to the Army and the Army has to have jurisdiction over the investigation and prosecution of the offense. *Id.*

[64] *Id.* para. 2-1(b).

[65] *Id.* para. 2-1(a).

[66] SVC HANDBOOK, *supra* note 40, para. 2-2; *see also* AR 27-3, *supra* note 55, para. 1-1. The Chief of Legal Assistance is the supervisor or officer-in-charge of the legal assistance office. *Id.*

[67] AR 27-3, *supra* note 55, para. 4-9(c). "Army policy discourages attorneys from the same legal office from providing legal assistance to both parties involved in a domestic or other legal dispute." *Id.* Conflicts of interest should be avoided. Therefore, all client information and opposing party information should be entered into the Client Information System database. *Id.* The database is designed to identify when a conflict may arise between a potential and current client. *Id.*

[68] SVC HANDBOOK, *supra* note 40, para. 2-1(a)(2). The Chief of Legal Assistance should perform the conflict check and assign an SVC within twenty-four hours of the victim's request for an SVC. *Id.*

four hours a day, seven days a week.[69] Rather, the SVC endeavors to meet with SFC Duffy, and all new clients, at the first available opportunity.[70]

Alcohol was involved in SFC Duffy's assault. When the SVC learns of this, the SVC asks SFC Duffy her age. Sergeant First Class Duffy is thirty-two years old. Because underage drinking is a crime, if SFC Duffy were under twenty-one, the SVC would have referred SFC Duffy to a Trial Defense Service (TDS) attorney for advice.[71] The SVC is not allowed to advise SFC Duffy on any collateral misconduct that may have occurred during the assault.

Work place and social retaliation are increasingly pressing issues for SVCs and their clients.[72] Commanders are the ones tasked with addressing retaliation towards victims of sexual assault. "Army Directive 2014-20 prohibits taking, or threatening to take, adverse personnel action against crime victims or persons who report crimes." Army Directive 2014-20 also prohibits "ostracism and acts of cruelty or maltreatment against crime victims or person who report crime."[73] Though commanders have the tools to address or assist when retaliation takes these forms, social retaliation may be more prevalent and also more complex. However, other than promoting a culture of dignity and respect, there is little commanders can do to address peer-to-peer retaliation.[74] Sergeant First Class Duffy could reach out to her SVC, as the "SVC may be resolving victim concerns [or] perceptions of retaliation."[75]

In all the cases we have examined, victim safety is paramount.[76] Secondary to safety is ensuring evidence is preserved.[77] Preserving evidence often includes a SAFE, which can occur in the course of the victim seeking medical assistance.[78] But like the other resources we have discussed thus far, medical assistance provided by the Army is not provided to all categories of victims.

D. Medical

Sergeant First Class Duffy, Mrs. Smith, and Kayla are all military identification card holders or dependent identification card holders. They may go to the military treatment facility (MTF) on the installation where they live or work. The emergency room triages SFC Duffy when she arrives with her VA.[79] The emergency room does the same for Mrs. Smith when she arrives with her FAP VA. Following triage, an adult/adolescent sexual assault medical forensic examiner (SAMFE-A) comes and conducts a SAFE.[80] Every MTF with a twenty-four hour emergency room will have at least one sexual assault forensic examiner on staff.[81] The MTF can only provide SAFEs for military members and their dependents over the age of eighteen.[82] Thus, Kayla does not have a SAFE conducted at the MTF. Rather, she goes with her mom and the FAP VA to a local hospital. Whether or not a SAFE is done at the MTF depends on a number of factors.[83]

The sexual assault clinical provider (SACP) assists SFC Duffy and all DoD identification card holder victims of sexual assault with their medical needs. The SACP coordinates and collaborates with sexual assault care coordinator (SACC) who is responsible for "monitor[ing] and track[ing] the healthcare management of each identified victim of sexual assault who presents to the MTF."[84] The SACC explains advocacy and counseling services available and makes necessary follow-up

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[69] *Id.*

[70] *Id.* para. 2-2(a)(4).

[71] *Id.* ch.6.

> An investigation into the facts and circumstances surrounding a sexual assault may produce evidence that the victim engaged in misconduct. Collateral misconduct is misconduct that is committed by a victim of sexual assault that has a direct nexus to the sexual assault. Typical examples of collateral misconduct include underage drinking, adultery, fraternization, and violations of regulations or orders . . . [c]ollateral misconduct will not preclude SVC representation.

Id. para. 5-0; *see also* SVC HANDBOOK, *supra* note 40, para. R-1.

[72] Professional Experience, *supra* note 30.

[73] THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, COMMANDER'S LEGAL HANDBOOK para. 12(c) (2013).

[74] *See* Colonel Walter Hudson, Proposed Criminal Law/Military Justice Priorities: A Strategic Way Forward, at slide 26 (unpublished PowerPoint presentation) (on file with the author) [hereinafter Proposed Criminal Law/Military Justice Priorities: A Strategic Way Forward]; *see also* Major Shaun B. Lister, New Developments in Military Justice, at slide 23 (unpublished PowerPoint presentation) (on file with the author). In December 2015, the Military Justice Review Group proposed changes to the Uniform Code of Military Justice (UCMJ). *Id.* These changes included adding Article 32, a punitive article that would directly address retaliation. *Id.*

[75] Proposed Criminal Law/Military Justice Priorities: A Strategic Way Forward, *supra* note 74, slide 26.

[76] SHARP GUIDEBOOK, *supra* note 1, at 37.

[77] *Id.* at 38.

[78] *Id.*

[79] MEDCOM REG. 40-36 SUPP. 1, *supra* note 35, para. 6(n)(1); *see also* Interview with Kandace Ray, *supra* note 36.

[80] *See generally* MEDCOM REG. 40-36 SUPP. 1, *supra* note 35.

[81] *See generally* MEDCOM REG. 40-36 SUPP. 1, *supra* note 35. *See also* Interview of Kandace Ray, *supra* note 36.

[82] Interview with Kandace Ray, *supra* note 36. For dependents under the age of eighteen, a pediatric forensic exam is coordinated with a civilian children's advocacy center or similar center. Two MTFs provide their own pediatric forensic exams: Fort Bragg, North Carolina, and Fort Bliss, Texas. *Id.*

[83] MEDCOM REG. 40-36 SUPP. 1, *supra* note 35, app. B. Medical Command has a well-established SHARP program which it dictates to all MEDCOM facilities. Many MTFs have memorandum of agreement with civilian hospitals in the community to provide SAFE. *Id.*

[84] *Id.* para. 6(l)(1).

appointments and referrals. "Every patient of sexual assault is offered a referral to Behavior Health by the SARC, SACP, or SACC at the first encounter."[85] Sergeant First Class Duffy thinks she could benefit from speaking with a counselor or therapist, but she is afraid of the stigma of seeking mental health treatment at her local MTF. The VA will be able to assist SFC Duffy with locating behavioral health resources outside the military.[86]

Once SFC Duffy or Mrs. Smith has undergone a SAFE, the evidence must be collected by the local Criminal Investigation Division (CID).[87] The sexual assault medical director (SAMD) of the MTF collaborates closely with the local CID and local office of the staff judge advocate "to provide continuous case feedback to ensure timely ongoing quality assessment."[88]

What about Trisha Miller and Dana Kinsey? Where can they go for medical assistance? Because they do not hold a DoD identification card, they must utilize resources off the military installation. Trisha Miller has the benefit of the assistance of her FAP VA. Dana Kinsey, unfortunately, is on her own. If she reaches out to the military, they would assist her in locating local civilian resources.[89]

Collection of the forensic medical evidence is only one step in the CID investigation. At the conclusion of the investigation, CID gives the case file to the office of the staff judge advocate for action.[90] If a court-martial is appropriate, a special victim witness liaison (SVWL) contacts SFC Duffy, Mrs. Smith, Kayla, Trisha Miller and Dana Kinsey.[91]

E. Special Victim Witness Assistance Program

The Trial Counsel Assistance Program (TCAP) oversees the Special Victim Witness Assistance Program (SVWAP).[92] The Trial Counsel Assistance Program "provide[s] assistance, resources, and support for the prosecution function throughout the Army."[93] Part of TCAP's mission is to provide expertise in the area of sexual assault prosecution.[94] This is accomplished at the ground level by teams comprised of three individuals: a special victim prosecutor (SVP), a special victim paralegal/non-commissioned officer (SVNCO), and the newly created SVWL[95].

The SVWL is the primary coordinator of the sexual assault victim throughout the military justice process.[96] Assigned to TCAP, each SVWL works directly for, and reports directly to the special victim prosecutor at his installation.[97] If the SVWL is the first person the victim encounters, the SVWL ensures the SARC knows about the case.[98] One complication SVWLs run into is the lack of resources for those who do not hold a DoD identification card.[99] This is certainly the case of Dana Kinsey, who has not been eligible for any resource discussed thus far. The SWVL is the only military resource discussed above that is available to Dana.[100]

The SVWL works for the prosecution team. Accordingly, there is no confidentiality between the SVWL and the victim. In fact, many SVWLs do not take notes during or after interviews as they are potential witnesses at a court-martial.[101]

The SVWL will only assist Kayla with her mother

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[85] *Id.* para. 6(c)(8); *see also* Interview with Kandace Ray, *supra* note 36. Every MTF has a Sexual Assault Behavioral Health (SABH) care provider on orders to assist patients of sexual assault. *Id.*

[86] SHARP GUIDEBOOK, *supra* note 1, at 40; *see also* Interview with LTC Johnson & SFC Kornelis, *supra* note 15.

[87] MEDCOM REG. 40-36 SUPP. 1, *supra* note 35.

[88] *Id.* para. 6(q)(10).

[89] Professional Experience, *supra* note 30. Typically, when civilians contact the SARC or the SVC, they are directed to local resources available for victims of sexual assault. *Id.* These resources include hospitals and agencies equipped to address the victim's needs. *Id.*

[90] *Id.*

[91] AR 27-10, *supra* note 5, para. 17-9.

[92] Lieutenant Colonel Bret Batdorff, Introduction to the Trial Counsel Assistance Program, at slide 3 (unpublished PowerPoint presentation) (on file with author) [hereinafter Introduction to the Trial Counsel Assistance Program]. The Special Victim Witness Liaison (SVWL) program was created in 2015. *Id.*

[93] *Id.* slide 3.

[94] *Id.*

[95] Introduction to the Trial Counsel Assistance Program, *supra* note 92, at slides 9-10; *see also* Telephone Interview of Shirley Shafar, SVWL, Fort Carson, CO (Dec. 4, 2015) [hereinafter Interview of Shirley Shafar]. Victim witness liaisons are selected and hired by the staff judge advocate for whom they work, and typically work in the military justice area of the office of the staff judge advocate. *Id.* Special victim witness liaisons are all civilian employees who receive advocacy training from the Army. Some SVWLs have additional training and experience. *Id.*

[96] Army Position Description for Legal Administrative Specialist (Victim Witness Support) (July 17, 2014) (unpublished job announcement) (on file with author).

[97] *See generally* Introduction to the Trial Counsel Assistance Program, *supra* note 92; *see also* Interview with Shirley Shafar, *supra* note 95.

[98] *See generally* SHARP GUIDEBOOK, *supra* note 1; *see also* Interview with Shirley Shafar, *supra* note 95. The SVWL will also ensure the victim receives the immediate resources he or she needs (e.g. medical or mental health assistance; Criminal Investigation Division (CID); VA). *Id.*

[99] Interview with Shirley Shafar, *supra* note 95.

[100] *Need Assistance?—By Duty Status*, *supra* note 6. If Dana Kinsey worked for the Department of Defense (DoD), there would be additional services available to her. If the CID has jurisdiction over the unrestricted report of sexual assault, the SARC "can provide professional assistance with obtaining medical care, counseling services, legal and spiritual support, and obtaining off-base resources, if so desired." *Id.* Dana Kinsey would be eligible for "limited emergency medical services at a military treatment facility . . . ." *Id.*

[101] Interview with Shirley Shafar, *supra* note 95.

present. Many installations utilize non-military off-post services for interviewing children.[102] The SVWL is able to assist Trisha Miller and Dana Kinsey with obtaining additional resources off the military installation, such as medical or mental health services. The SVWL also serves as a person of support for the victim, particularly when the victim, like Dana Kinsey, only has the SVWL as a resource. The SVWL ensures that victims fill out all the necessary notification forms post-trial, and also assists with processing transitional compensation paperwork.[103] Transitional compensation is particularly important to Mrs. Smith, Kayla and her mother, and Trisha Miller.

Because of the multitude of resources available to victims, coordination between the agencies is key to ensuring all of the victim's needs are met.

III. Agencies at Work

No single resource discussed in Section II exists on an island unto itself. Similarly, no victim exists in a vacuum. It takes collaboration of all the resources and individuals working together to best serve the victim.

A. Sexual Harassment/Assault Response and Prevention Resource Centers Resource Centers

Created in 2014 in an effort to "synchronize and professionalize victim advocacy services," Sexual Harassment/Assault Response and Prevention Resource Centers consolidate services into a one-stop shop.[104] These services include lawyers, investigators, medical personnel, and advocates who work under the same roof and are better able to support each other and the victim.[105]

There are fourteen SHARP Resource Centers located throughout the Army.[106] If SFC Duffy's assault had occurred while she was stationed at Joint Base Lewis McChord (JBLM), or any of the other thirteen SHARP Resource Centers in the Army, she could have reported the assault there during any duty day.[107] Joint Base Lewis McChord's SHARP Resource Center's main entrance is what they call their restricted side. All the services provided to victims of assault that occur in a restricted capacity remain confidential.[108] Once the victim decides to make an unrestricted report, they may proceed to the unrestricted side of the office. This is where, among other agencies, the CID agent's office is located.[109]

The reason behind the success of the SHARP resource center is the improvement in information flow. Information flow within the SHARP resource center is much simpler and streamlined because all the agencies are co-located.[110]

Effective information flow is not unique to the SHARP resource centers. Monthly, the key agencies involved in sexual assault response and prevention come together to discuss cases at the SARB.

B. Sexual Assault Review Board

Chaired by the senior mission commander, the SARB provides "executive oversight, procedural guidance and feedback concerning the installation's [sexual assault prevention and response] program."[111] The SARB consists of the SARC, VA, CID, staff judge advocate (SJA), provost marshal (PMO), chaplain, SACP or SACC, chief of behavioral health, and others as applicable. Though the family advocacy program manager (FAPM) may attend the SARB, unless the FAPM has a case discussed at that month's SARB, the FAPM does not typically attend.[112] The goal is to review cases anonymously in order to improve processes and victim access to services.[113]

Every month, SFC Duffy's case is briefed at the SARB. The brief is anonymized, utilizing only a control number

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[102] AR 608-18, *supra* note 41, para. 3-15(c); *see also* Interview with Shirley Shafar, *supra* note 95.

[103] AR 27-10, *supra* note 5, paras. 17-16, 17-24, 17-26.

[104] Libby Howe, *Installations to open SHARP Resource Centers*, ARMY.MIL (July 2, 2014), http://www.army.mil/article/129352/Installations_to_open_SHARP_Resource_Centers/.

[105] U.S. DEP'T OF ARMY, SEXUAL HARASSMENT/ASSAULT RESPONSE AND PREVENTION (SHARP), RESOURCE CENTER (RC) GUIDEBOOK para. II(A) (2 Sept. 2014) [hereinafter SHARP RESOURCE CENTER GUIDEBOOK].

[106] Interview with LTC Johnson & SFC Kornelis, *supra* note 15. Each installation, though governed by the SHARP Resource Center Guidebook, has varying degrees of flexibility to make their resource center their own. *Id.*

[107] *Id.* Typically cases reported at the SHARP Resource Center do not remain clients of the Resource Center. *Id.* Coordination is made with the brigade SARC of the victim, who comes and assigns a VA. At JBLM, 14% of cases are reported through the Resource Center, 21% of cases are reported to the VA on-call, and 65% of cases are reported to the brigade SARC. *Id.*

[108] *See generally* SHARP RESOURCE CENTER GUIDEBOOK, *supra* note 105, para. IV(D)(3); *see also* Interview with LTC Johnson & SFC Kornelis, *supra* note 15.

[109] SHARP RESOURCE CENTER GUIDEBOOK, *supra* note 105, para. IV(D)(3-4); *see also* Interview with LTC Johnson & SFC Kornelis, *supra* note 15.

[110] SHARP RESOURCE CENTER GUIDEBOOK, *supra* note 105, para. II (A). In addition to working together, SHARP assets conduct a once-a-week meeting for the Sexual Assault Response Team (SART) that includes all VAs and the division-level program managers. *Id.* This allows for even greater information sharing and "lessons learned" to be identified and disseminated. *Id.*

[111] AR 600-20, *supra* note 8, para. E-2.

[112] Interview with Sara McCauley, *supra* note 43.

[113] AR 600-20, *supra* note 8, para. E-4.

rather than SFC Duffy's name to identify the case.[114] At the meeting, the senior commander chairing the SARB will learn the status of SFC Duffy's case and what resources (e.g. medical, mental health, SVC) SFC Duffy is utilizing.[115]

C. Case Review Committee

Supervised by the MTF commander, the CRC is a multidisciplinary team that falls under the treatment arm of the FAP. The CRC brings together medical, legal, law enforcement, social work, and commanders who establish a treatment plan for the victim and offender. Each case discussed at the CRC "receives a case determination of substantiated, unsubstantiated-unresolved, or unsubstantiated-did not occur."[116] Once that determination is made, recommendations for treatment for both the victim and the offender are set forth.[117] Mrs. Smith's, Kayla's, and Trisha Miller's cases are all discussed before the CRC.

The oversight of cases involving a spouse or child dependent of a Soldier is markedly different from the oversight of cases involving a Soldier victim. There are also significant differences in the services available for Mrs. Smith, Kayla, and Trisha Miller vice SFC Duffy, and certainly Dana Kinsey.

V. Conclusion: Leveraging your Resources

Victims of sexual assault are almost always confused, scared, unsure, and in great need of assistance. They often feel like they are trapped in a web of programs and a jumble of resources. Chances are you will meet clients like SFC Duffy, Mrs. Smith, Kayla, Trisha Miller and Dana Kinsey. When that happens you will need to help them with a number of different issues. These issues will include medical and mental health treatment options, social services and financial assistance, safety concerns, and a myriad of miscellaneous and administrative needs. While you as the SVC do not provide those services, you will likely be the person to whom the client will turn to help them understand what to do and where to go.

In order to assist SFC Duffy, Mrs. Smith, Kayla, Trisha Miller and Dana Kinsey with their needs, you must know what services are available for them. In order to do your job well you must be able to leverage partner agencies. Yet at the same time, you cannot allow yourself to fall victim to mission creep. That is, taking on the role of a partner agency and attempting to do their job for them. Each agency representative is the expert of their agency's programs. As the SVC, you are uniquely situated to talk to both the commander as well as the other support agencies to ensure your client is receiving adequate assistance and resources. If you are confident with the advice you provide to SFC Duffy, Mrs. Smith, Kayla, Trisha Miller and Dana Kinsey, you will be a great source of support to them and someone who will have made a difference in their lives when they need it most.

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[114] *See generally* AR 600-20 *id.* para. G-4.

[115] Professional Experience, *supra* note 30.

[116] AR 608-18, *supra* note 41, para. 2-4(r).

[117] *See generally* AR 608-18, supra note 41, para. 2-4; *see also* Interview with Sara McCauley, *supra* note 43. A case review committee is intended to create a treatment plan, not to punish a Soldier. Social work services create a treatment plan, then it is up to the command to enforce it. *Id.*

Appendix: Glossary

1SG	First Sergeant
ACS	Army Community Services
CID	Criminal Investigation Command
CRC	Case Review Committee
DoD	Department of Defense
D-SAACP	Department of Defense Sexual Assault Advocate Certificate Program
FAC	Family Advocacy Committee. The Family Advocacy Committee (FAC) is multidisciplinary team that is supervised by the Family Advocacy Program Manager (FAPM). This committee advises on the installation Family Advocacy Program (FAP) and procedures, training, program evaluation efforts, and also addresses administrative details. The FAC is comprised of the FAPM, Chief, Social Work Services/Case Review Committee (CRC) chairperson, medical doctor, community health nurse, dental activity commander, provost marshal, Criminal Investigation Command, Staff Judge Advocate, VWL, Army Substance Abuse Program, Child and Youth Services, chaplain, installation command sergeant major, public affairs officer, and other consultants as needed. Unlike the Sexual Assault Review Board, the FAC meets only quarterly to review trends and analyze programs in place.
FAP	Family Advocacy Program
FAPM	Family Advocacy Program Manager
LTC	Lieutenant Colonel
MAJ	Major
MEDCOM	U.S. Army Medical Command
Military OneSource	*See* http://www.military onesource.mil/confidential-help/non-medical-counseling?content_id=282873. Military OneSource is an online resource and 1-800 telephone number to contact for "[c]onfidential services, including non-medical counseling and specialty consultations, are available through Military OneSource. Eligible individuals may receive confidential services at no cost." Military OneSource is limited as to which issues it can address. Military OneSource will not address sexual assault as an issue in face-to-face counseling. The issues that can be addressed are: improving relationships at home and work; stress management; adjustment difficulties (like returning from a deployment); marital problems; parenting; grief or loss. For issues other than those enumerated, the counselor may receive authorization, or he or she can assist with finding other resources, including community services, installation services, or TRICARE.
MTF	Military Treatment Facility
MP	Military Police
NCO	Non-Commissioned Officer
NOVA	National Organization of Victim Assistance
PMO	Provost Marshal's Office
Restricted Report of Sexual Assault	*See SHARP Guidebook*, U.S. Army (Oct. 2013), https://www.us.army.mil/ suite/doc/41688650. A restricted report is where the victim can confidentially disclose a report of sexual assault to a SARC, VA, or health care provider. The victim can also confidentially communicate with a chaplain and a legal assistance attorney. The victim will have access to medical treatment,

	including emergency care, counseling, and assignment of a sexual assault response coordinator or victim advocate, without triggering an official investigation or prosecution of the alleged offender. If the victim chooses to file a restricted report, the installation commander will receive non-identifying information indicating an alleged sexual assault occurred. If the victim files a restricted report, he or she can change to an unrestricted report at any time.
SABH	Sexual Assault Behavioral Health
SACC	Sexual Assault Care Coordinator
SACP	Sexual Assault Clinical Provider
SAFE	Sexual Assault Forensic Exam. *See* U.S. Army *SHARP Guidebook*, https://www.us.army.mil/ suite/doc/41688650 (last visited Sept. 1, 2016). A SAFE kit, or Sexual Assault Forensic Examination, is "[t]he medical and forensic examination of the sexual assault victim under circumstances and controlled procedures to ensure the physical examination process and the collection handling, analysis, testing, and safekeeping of any bodily specimens and evidence meet the requirements necessary for use as evidence in criminal proceedings." *See also* MEDCOM REG. 40-36, SUPP. 1. MEDCOM SHARP protocol require that once a victim of sexual assault presents in an emergency room, the individual is triaged in accordance with emergency room protocols. If the assault occurred less than seven days prior to the victim presenting in the emergency room, a Sexual Assault Medical Forensic Examiner (SAMFE) is contacted to come perform a SAFE. If the assault occurred greater than seven days prior to the victim coming to the emergency room, evidence usually is not collected. In both cases, follow up appointments are made and medications are provided, as needed.
SAMD	Sexual Assault Medical Director
SAMFE	Sexual Assault Medical Forensic Examiner
SARB	Sexual Assault Review Board
SARC	Sexual Assault Response Coordinator
SARP	Sexual Assault Response and Prevention
SART	Sexual Assault Response Team
SFC	Sergeant First Class
SGT	Sergeant
SHARP	Sexual Harassment/Assault Response Prevention
SJA	Staff Judge Advocate
SVC	Special Victim Counsel
SVWAP	Special Victim Witness Assistance Program
SVWL	Special Victim Witness Liaison
Transitional Compensation	*See* AR 27-10, para. 17-24. "The Transitional Compensation Program provides financial support . . . for Family members of Soldiers who are discharged or sentenced to total forfeitures by court-martial or administrative separation proceedings for charges that include dependent abuse offenses."
Unrestricted Report of Sexual Assault	*See* U.S. Army *SHARP Guidebook*, (Oct. 2013) https://www.us.army.mil/ suite/doc/41688650. An unrestricted report is where the victim discloses, "without requesting confidentiality or restricted reporting, to a sexual assault response coordinator, victim advocate, health care provider, command authorities and others, that he or she is the victim of a sexual assault. If the

	victim chooses to file an unrestricted report, the sexual assault response coordinator (SARC), victim advocate (VA), health care provider, chain of command and law enforcement will be notified of the assault. All unrestricted reports must be forwarded to the Criminal Investigation Command (CID). Once the victim files and unrestricted report, he or she cannot change to a restricted report. There are numerous ways a victim can make an unrestricted report of a sexual assault. For example they could report directly to law enforcement, the chain of command, medical provider or chaplain. In addition, every installation maintains a hotline that is staffed twenty-four hours per day, seven days per week. This hotline is called the SHARP hotline.
VA	Victim Advocate. *See* AR 600-20, para 8-3. Each brigade typically has one full-time victim advocate. At a minimum this individual holds the rank of staff sergeant, chief warrant officer 2, first lieutenant, or Department of the Army civilian GS-9. In addition, each battalion will have a collateral duty VA assigned, which are military personnel. Like the SARC, the battalion and brigade VAs have to undergo extensive background checks. They also receive the same training and certification as the brigade and battalion SARC. In addition, some companies have what are called Company Advisors. These individuals are all military personnel who have gone to the 80-hour Sexual Harassment/Assault Response and Prevention (SHARP) course. The Company Advisor is allowed to train units and advise the command on SHARP procedures and policies, but are not allowed to intake a case or have contact with victims.
VWAP	Victim Witness Assistance Program. *See* AR 27-10, ch. 17. The VWAP is designed to mitigate the hardships suffered by victims and witnesses; to foster full cooperation of victims and witnesses; and to ensure victims and witnesses are advised of and provided the rights associated with being a victim of or witness to a crime. The VWAP program establishes Victim/Witness Liaisons.
VWL	Victim Witness Liaison. *See* AR 27-10. The VWL is a facilitator and a coordinator. Victim Witness Liaisons are the primary point of contact through which victims and witnesses may obtain information and assistance in securing available victim/witness services. They are able to link victims or witnesses up with other necessary resources both inside and outside the military. Unlike the SVWL, the VWL is not limited to assisting victims of sexual assault. The VWL's role remains the same for both victims of and witnesses to crimes, regardless of the nature of the crime. The VWL is also a coordinator. The VWL is responsible for the coordination of witness interviews with both the government and the defense. The VWL may also coordinate with a victim/witness employer; arrange for victim/witness travel; and will process transitional compensation requests.

Book Review

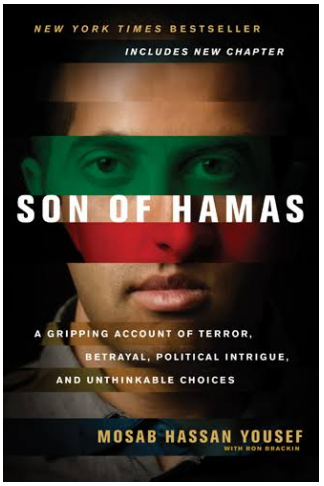
Son of Hamas[1]

Reviewed by *Major David L. Adamson*[*]

Islamic life is like a ladder, with prayer and praising Allah as the bottom rung. The higher rungs represent helping the poor and needy, establishing schools, and supporting charities. The highest rung is jihad.[2]

I. Introduction

Son of Hamas reveals the firsthand account of Mosab Hassan Yousef, a child of Islam, against the backdrop of the Arab-Israeli conflict and chronicles his journey from high ranking member of Hamas to Israeli informer as well as his gradual conversion to Christianity.[3] The author, Mosab Yousef, is an unusually reputable source because he is the son of Sheikh Hassan Yousef: one of the founding members of the Hamas organization.[4] The author's stated purpose is to expose secrets, correct some historical inaccuracies, and to leave the reader with hope that the impossible, —peace in the Middle East—can be accomplished.[5] A close examination of the author's conversion to Christianity as well as the evolution of his relationship with his father regarding strict adherence to the principles of Islam are the linchpins for understanding this work and evaluating the success of the author's purpose.



II. My Father was Islam to Me

Yousef's love for his father never waned, even as his belief in the faith his father represented slowly eroded.[6] Throughout the reading of this work, there is an expectation of a moment when the author's tone towards his father changes from one of respect and reverence to disgust. This change never took place. Instead Yousef slowly came to terms with a man who would not commit violence himself but condoned the killing of innocents in the name of Islam.[7] Although he held up his father "as an example of humility, love, and devotion,"[8] his father's casual manner of endangering children, even his own, shocked Mosab.[9]

Mosab struggles to reconcile his profound admiration of his father with Sheikh Hassan's ability to rationalize carnage and the death of innocents.[10] After the initial abuse and borderline torture,[11] Mosab learns to respect and admire his Shin Bet handlers and he concludes that his father never taught him to respect others because he did not know how to himself.[12] Mosab's admiration for his father also generates a blind spot in his analysis.

On the one hand Mosab holds up his father as his "everything" and "[his] example of what it meant to be a man,"[13] yet he never held him accountable for his role in resurrecting Hamas during the Second Intifada. He describes men like his father as "leaders who had led [their people] and their children like goats to a slaughter and then ducked out of range to watch the carnage from a comfortable distance."[14] Hamas leadership utilized popular sentiment to stir religious

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[*] Judge Advocate, U.S. Army.

[1] MOSAB HASSAN YOUSEF WITH RON BRACKIN, SON OF HAMAS: A GRIPPING ACCOUNT OF TERROR, BETRAYAL, POLITICAL INTRIGUE, AND UNTHINKABLE CHOICES (2010).

[2] YOUSEF, *supra* note 1, at 11–12. This quote, which innocuously appears early in the book, reveals the essence of Mosab's journey from Muslim to Christian.

[3] *Id.* at xiii.

[4] *Id.* at 5. Hamas was founded in 1986 and the author closes the chapter with the ominous words, "And my father climbed a few more rungs toward the top of the ladder of Islam." *Id.* at 19–20. Mosab is trusted at the highest levels of Palestinian leadership to include attending meetings with Yasser Arafat. *Id.* at 141.

[5] *Id.* at xv.

[6] *Id.* at 105. The author places his father on a pedestal as the ideal Muslim. He speaks of his father as a Muslim who represents the beauty of Islam and not the side that espouses jihad and conquest. *Id.*

[7] *Id.* The author believes his father is a moral man and the influence of Islam has allowed him to split hairs on issues of morality. *Id.*

[8] *Id.* at 78.

[9] *Id.* at 147. Mosab asked his father why he sent children to die and his father responded, "They want to go. Look at your brothers." *Id.* Mosab comes to learn that Islam demands warfare from its followers. *Id.*

[10] *Id.* at 59. A man who could not harm an insect had found a way to rationalize the "explo[sion] [of] people into scraps of meat, as long as he didn't personally bloody his hands." *Id.*

[11] *Id.* at 1–4. (describing Mosab's initial capture and the beating Israeli forces inflicted on him).

[12] *Id.* at 118–19. The exposure to this unknown virtue, tolerance, greatly affects Mosab. The fact that the Israelis, his enemy, showed him this lesson planted a seed that grows throughout the work. *Id.* at 118.

[13] *Id.* at 141. Mosab gushes about the pure motives of his father and his unfailing desire for peace. *Id.*

[14] *Id.* at 144. The love he has for his father blinds the author. While other leaders of Hamas receive his unrestrained scorn, Mosab's love for his father insulates the man from Mosab's criticism.

zealots into lethal action such as when a Hamas member undertook a suicide bombing mission in the city center of Netanya and wounded thirty Israelis.[15] Mosab grew increasingly critical of Hamas and the escalating violence but spared his father the criticism a leader in the Hamas organization objectively warrants. The insulating cocoon of love which shields Sheikh Hassan from criticism is finally pierced through Mosab's growing understanding of Christianity.

Although Sheikh Hassan lived up to all of the ideals Mosab attributed to Muslims, Mosab discovered that when viewed through the lens of the teachings of Jesus his father's actions were found wanting.[16] Their relationship is a significant constant throughout the book. Mosab's love for his father endures even as his faith changes. To understand Mosab one must understand his love for and complicated relationship with his father. Yet to truly understand the pendulum and character of Mosab's journey one must understand the evolution of his relationship with Allah and Jesus.

III. The Road to Conversion

Religion permeates the work. From the initial idyllic scene in the village of Al-Janiya,[17] to Mosab's religious basis for initially refusing to work with Shin Bet,[18] to his baptism,[19] to his recent blog entry where he states unequivocally that "ISIS is Islam, exposed in all its cruelty and ugliness, unchanged since Muhammad,"[20] religion is paramount. To understand his religious evolution is to know his thought process and better understand his work.

Mosab's conversion shows him that force of arms cannot win the Palestinian-Israeli conflict and that conflict is the nature of Islam.[21] Mosab eloquently juxtaposes the nature and goals of the Palestinian Liberation Organization (PLO) with the goals of Hamas.[22] An analysis of the failure of the Camp David summit, whereby Arafat rejected a deal that offered him 97% of the contested territories[23] supports Mosab's position that "For Arafat, there always seemed to be more to gain if Palestinians were bleeding."[24] Hamas's brand of Islam had come to replace old-style Arab nationalism and thus what was once secular in nature had morphed into a hybrid of the "extreme elements of nationalism and Islamic fundamentalism."[25] Mosab is further disillusioned when the supposedly ideologically pure members of Hamas become political.[26] From Muslims torturing Muslims,[27] to members of Hamas threatening to kill Mosab if he does not lie about his father running for office on the Hamas ticket,[28] the Islamic faith continues to disappoint Mosab. He eventually concludes that forgiveness is the only possible way to achieve peace.

IV. Love Your Enemies

When Mosab opens the Bible and reads "love your enemies" it changes his life and dramatically alters his view of how to solve the Israeli-Palestinian conflict.[29] It is enlightening to contrast Mosab's new found position with then Finance Minister Benjamin Netanyahu, who in 2004 championed the killing of Sheikh Ahmed Hassin, a spiritual

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[15] AHMED QURIE, PEACE NEGOTIATIONS IN PALESTINE: FROM THE SECOND INTIFADA TO THE ROADMAP 27 (2015).

[16] YOUSEF, *supra* note 1, at 157. Mosab's heartbroken with the understanding that a true follower of Jesus would not only not directly participate in violence but use his influence to stop it. *Id.* His father as a leader in Hamas possessed significant influence, however, never tried to stop the killing. *Id.*

[17] *Id.* at 5–8. Mosab describes his affection for his grandfather, the imam of his village, as well as the study of his father. *Id.* It is clear from an early age that the Muslim religion loomed enormously large in his life. *Id.*

[18] *Id.* at 82. The Shin Bet recruited Mosab at a young age. *Id.* While in there custody, angry and confused, Mosab found conviction in the inflexibility of Islam stating "Islam forbids me to work with you." *Id.*

[19] *Id.* at 228. Towards the end of the novel Mosab is compelled to embrace Christ and becomes baptized. *Id.*

[20] Mosab Hassan Yousef, *Behold the Face of Islam*, SON OF HAMAS: WORDPRESS (Feb. 18, 2015, 11:23 PM) https://sonofhamas.wordpress.com/2015/02/18/behold-the-face-of-islam/#comments. This most recent entry on Mosab's blog illustrates the completion of Mosab's religious conversion. No longer does Mosab see Islam as a religion of beauty and peace, but a religion of war, rape, and dominance as, so he exclaims, the prophet Muhammad intended. *Id.*

[21] YOUSEF, *supra* note 1, at 124. Mosab explores a hypothetical whereby the Palestinians got their wish and Israel ceased to exist and Jews fled the Holy Land. He concludes that nothing would change and that conflict is the nature of Islam. "We would still fight. Over nothing. Over a girl without a head scarf. Over who was the toughest and most important." *Id.*

[22] *Id.* at 58. "For Israel, the [Palestine Liberation Organization (PLO)] nationalists had been simply a *political* problem in need of a *political* solution. Hamas, on the other hand, Islamized the Palestinian problem, making it a *religious* problem. And this problem could be resolved only with a *religious* solution. . . ." *Id.* (emphasis added). Whereas politics is the art of compromise, by taking a political problem and making it a religious one Hamas effectively ensured that peace talks would fail because only total victory would satisfy their base and religious convictions.

[23] URI BEN-ELIEZER, OLD CONFLICT, NEW WAR: ISRAEL'S POLITICS TOWARD THE PALESTINIANS 77 (2012).

[24] YOUSEF, *supra* note 1, at 127.

[25] S. DANIEL ABRAHAM, PEACE IS POSSIBLE: CONVERSATIONS WITH ARAB AND ISRAELI LEADERS FROM 1988 TO THE PRESENT 68–69 (2006).

[26] YOUSEF, *supra* note 1, at 225. Mosab describes former leaders of Hamas who run for office as greedy and seeking "money, power, and glory." *Id.*

[27] *Id.* at 100. Hamas members tortured fellow Muslims by "shov[ing] needles under . . . [their] fingernails." *Id.*

[28] *Id.* at 235. Hamas leaders threatened to kill Mosab if he did not lie about his father's willingness to run for political office. *Id.* Islam forbids lying. *Id.* When Sheikh Hassan learned of the death threats against Mosab he relented and agreed to run for office out of love for his son where he swept into parliament carrying several other members of Hamas with him. *Id.*

[29] *Id.* at 122. The author describes being "thunderstruck" by the idea of loving his enemy and states that "this was the message I had been searching for all my life." *Id.*

leader of Hamas and paralyzed wheelchair dependent old man.[30] Mosab has come to realize through the doctrine of "love your enemies" that men are not the enemy.

Mosab knows that the "enemies are ideas," and ideas cannot be destroyed or occupied into submission.[31] Mosab was able to discard his lifetime affiliation with Islam after discovering the teachings of Father Zakaria Botros.[32] Al Qaeda declared Father Botros "one of the 'most wanted' infidels in the world" and declared a $60 million dollar bounty on his head.[33] With his conversion complete, he found hope in an unlikely source.

Mosab's key to peace in the Middle East may perhaps be found in his interaction with his Bible study friend Amnon.[34] Amnon was an Israeli citizen who grew up Jewish and after being exposed to Christianity turned his back on the Jewish faith, became baptized, and ignored the mandatory call to service with the Israeli Defense Forces (IDF).[35] Amnon maintained that he is "called to love [his] enemy" and that his faith would not allow him to take part in a futile and lethal call to service."[36]

Mosab found profound beauty in Amnon's refusal to serve the IDF. Mosab's musings in this chapter are the closest he comes to offering a Middle East solution: "I didn't believe that everybody in Israel and the occupied territories needed to become a Christian in order to end the bloodshed. But I thought that if we just had a thousand Amnons on one side and a thousand Mosabs on the other, it could make a big difference."[37]

The novel concludes with a powerful catharsis between Mosab and his father and a return to the author's initial purpose of instilling hope in a seemingly hopeless situation. Mosab calls his father from the United States while Sheikh Hassan is in prison and even though Mosab had betrayed his upbringing and converted to Christianity the hardline Sheikh tells Mosab "you are still my son."[38] His father's piety continues to shock Mosab who then reveals that he has worked for the Shin Bet for ten years and assumes the fatherly demeanor telling his father "I love you. You will always be my father."[39] In his closing thoughts the author holds himself up as an example of what's possible, if he, a man who grew up dedicated to the extinction of Israel, can love and forgive his enemies.[40] Religion may not be the answer, but religious virtues of truth and forgiveness are the solution to Middle East peace if bitter enemies are just "courageous enough to *embrace* it."[41]

V. Conclusion

Anyone looking for an insightful firsthand account of the Arab-Israeli conflict in the modern era should read this book. Military personnel would specifically benefit from the author's perspective regarding the intransigence on both sides as well as an understanding between political and religious objectives. An understanding of religious objectives, i.e. those that demand total victory, is of contemporary note regarding the conflict in Syria.[42]

The message of hope is consistent throughout and although subtle, the Yousef's true and evolved feelings on Islam are hinted at in the opening quotation of this review.[43] Mosab expounds on the metaphor of Islam as a ladder: "A moderate Muslim is actually more dangerous than a fundamentalist, however, because he appears to be harmless, and you can never tell when he has taken that next stop toward

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[30] RAMZY BAROUD, THE SECOND PALESTINIAN INTIFADA: A CHRONICLE OF A PEOPLE'S STRUGGLE 97 (2006). After killing Sheikh Yassin with a missile that left his wheelchair mangled, Mr. Netanyahu stated "Even if in the short term there will be a harsh response from Hamas, in the long term the effect will be to rein in Hamas and the rest of the terror organizations because their leaders will know that they will be destroyed." *Id.* These words are a harsh contrast from the author's words regarding the never-ending cycle of revenge killing "An eye for an eye—and there were no shortage of eyes." YOUSEF, *supra* note 1, at 175. Mosab now realizes that violence only begets more violence. *Id.*

[31] YOUSEF, *supra* note 1, at 236. At the time Mosab realizes that "our enemies are ideas" he realizes the futility of 'winning' in a conventional sense and his role in the conflict. He then tells the Shin Bet that he wants out. *Id.*

[32] *Id.* at 227. Zakaria Botros, through systematic analysis gave Mosab the ability to truly embrace Christ. Mosab goes so far as to say that Father Botros was able to expose "the entire [Qur'an] as cancerous." *Id.* Just like the first time Mosab read the Bible and was exposed to the doctrine of "love your enemies," his discovery of Father Botros cannot be understated. *Id.* In addition to embracing Christ, Father Botros's teachings doubtlessly paved the way for his more radical views as revealed in his blog post in February 2015. *See supra* note 21.

[33] Raymond Ibrahim, Al Qaeda Declares Coptic Priest Zakaria Botros "One of the Most Wanted Infidels in the World, JIHAD WATCH (Sept. 10, 2008, 2:00 PM), http://www.jihadwatch.org/2008/09/al-qaeda-declares-coptic-priest-zakaria-botros-one-of-the-most-wanted-infidels-in-the-world. Zakaria Botros challenges the assertions of Islam and believes all followers or Islam are spiritually lost. He reaches Muslims through a multi-media campaign including the Internet, phone, satellite radio, and television. *Id.*

[34] YOUSEF, *supra* note 1, at 206.

[35] *Id.*

[36] *Id.* at 207. Amnon's persistent refusal to do his tour of duty with the Israeli Defense Forces resulted in his imprisonment. *Id.* Amnon was jailed for trying to protect Palestinians while Mosab was trying to protect Jews. *Id.*

[37] *Id.* Mosab theory syncs well with the doctrine of "love thy enemy" and "turn the other cheek." *Id.* If there were more men like Amnon and Mosab perhaps then the never-ending conflict would abate. *Id.* Mosab ends his musing of a thousand Amnons and Mosabs on each side by leaving the reader with the poignant question: "And if we had more . . . who knows?" *Id.*

[38] *Id.* at 245.

[39] *Id.* at 245–46.

[40] *Id.* at 247–49.

[41] *Id.* at 250–51 (emphasis in original).

[42] BEN-ELIEZER, *supra* note 23, at 77.

[43] YOUSEF, *supra* note 1, at xiii.

the top. Most suicide bombers began as moderates."[44] To Mosab, jihad is a natural extension of being a Muslim. His chilling metaphor calls to mind the Boston Marathon bombings where two seemingly assimilated young Muslim men became terrorists. That incident validates Mosab's metaphor of Islam as a ladder. The evolution of his faith after publishing *Son of Hamas* is even more explicit.

The tempered language and metaphor of the ladder is cast aside for explicit denunciations of Islam in Mosab's blog.[45] Since publishing *Son of Hamas*, Mosab's views have continued to evolve to the point where he equates the Islamic State of Iraq and Syria (ISIS) with Islam stating that ISIS truly is following in the footsteps of the prophet Muhammed.[46] Gone is the confused soul in *Son of Hamas*. The book comes across more credible and less preachy as it covers Mosab's evolution. If he had portrayed himself as militantly anti-Islam and stated throughout that "Islam is not a religion of peace" it would have hurt the integrity of the work.

Overall the author's purpose is achieved through an interesting first-hand narrative and an important reminder that "an eye for an eye" revenge killing can continue perpetually unless somewhere the cycle is broken. Both sides have blood on their hands and the reader is left hoping that each side embraces forgiveness and has the courage to be the first to extend an open palm in friendship. Whether or not Mosab finds peace and fulfillment in his religious conversion, his contribution to the literature of the Arab-Israeli conflict and the unique perspective it offers along with his message of hope is an important addition and worthy of study and reflection.

[44] *Id.* at 12.

[45] Yousef, *supra* note 20.

[46] *Id.*

Book Review

Soldiers on the Home Front[1]

Reviewed by *Fred L. Borch III*[*]

This book is a useful survey of the role played by the American armed forces on U.S. soil. Its focus, however, is not on operations or personalities in history. Rather, *Soldiers on the Home Front* examines whether Americans in uniform on the "home front" have complied with the rule of law in saving lives, suppressing civil disturbances, and maintaining law and order from the colonial era to the present day. This legal history perspective makes sense, as authors William C. Banks and Stephen Dycus are law professors at Syracuse University and Vermont Law School, respectively.

Soldiers on the Home Front examines the following issues and themes: Responding to Civil Disturbances and Assisting Law Enforcement;" "Military Imprisonment of Civilians;" "Military Trials of Civilians;" "Military Intelligence Collection in the United States;" and "The Domestic Role of the Military After September 11 [2001]."[2] In discussing these topics, the book takes a chronological approach. It begins with the role of the militia in colonial America, its transformation into a Continental Army under the command of George Washington, and explains the Founding Father's reluctant acceptance of a standing Army when drafting the U.S. Constitution. As the authors explain, the current structure of the armed forces—active duty, Reserve and Guard—is rooted in the idea that a permanent Federal force was necessary to protect the new Republic from external enemies, while state militias consisting of citizen-soldiers would be chiefly responsible for maintaining internal security.[3] Initially, the idea was that this permanent force would be relatively small, but by the early 1950s, the threat posed by the Soviet Union and China, combined with America's emergence as a major player on the world stage, resulted in an Army, Navy, Air Force and Marine Corps consisting of more than a million men and women.

A chapter titled "Soldiers as Peacekeepers, Soldiers as Cops," traces the use of military troops to maintain law and order when civilian police authorities were either unable or unwilling to prevent civilian disorder.[4] Historical events detailed in this chapter include the use of Union troops to quell riots in Boston, New York City, and other locations that were sparked by the implementation of a draft during the Civil War;[5] and the use of soldiers to quell civil disturbances in the aftermath of the assassination of Dr. Martin Luther King in 1968.[6]

While *Soldiers on the Home Front* generally gets its history right in this chapter, it is inaccurate when discussing legal advice given by Army lawyers during the Los Angeles riots of 1992. The authors claim that "the general in charge refused to allow [active duty] troops to assist local police in law enforcement, mistakenly believing that the Posse Comitatus Act barred such use. He apparently failed to consult or to heed his staff judge advocate . . . ."[7] This is wrong. In fact, Army judge advocate Major Scott C. Black[8] advised Major General Mervin L. Covault, the Task Force Los Angeles commander that, because Soldiers were being used to quell a civil disturbance, the Posse Comitatus Act did not restrict the use of active duty personnel in any way. As a result, despite the authors' claims to the contrary, active duty troops were patrolling the streets of Los Angeles in direct support of the local police. Their mission was "to suppress violence and restore law and order in the City and County of Los Angeles."[9]

Other chapters in *Soldiers on the Home Front* discuss the use of the military troops in "jailing" Americans (the internments of more than 100,000 Japanese Americans in World War II)[10] and Soldiers as "investigators" on U.S. soil (the collection of personal information about anti-war protesters during the Vietnam War).[11] There is also a lengthy

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[*] Fred L. Borch is the Regimental Historian and Archivist for the U.S. Army Judge Advocate General's Corps. He graduated from Davidson College (A.B., 1976), from the Univ. of N.C. (J.D., 1979), and from the Univ. of Brussels, Belg. (LL.M, *magna cum laude*, International and Comparative Law, 1980). Mr. Borch also has advanced degrees in military law (LL.M, The Judge Advocate General's School, 1988), national security studies (M.A., *highest distinction*, Naval War College, 2001), and history (M.A., Univ. of Va., 2007). From 2012 to 2013, he was a Fulbright Scholar to the Netherlands and a Visiting Professor at the University of Leiden's Center for Terrorism and Counterterrorism. He also was a Visiting Researcher at the Netherlands Institute of Military History. Fred Borch is the author of a number of books and articles on legal and non-legal topics, including JUDGE ADVOCATES IN COMBAT: ARMY LAWYERS IN MILITARY OPERATIONS FROM VIETNAM TO HAITI (2001); JUDGE ADVOCATES IN VIETNAM: ARMY LAWYERS IN SOUTHEAST ASIA (2004); FOR MILITARY MERIT: RECIPIENTS OF THE PURPLE HEART (2010); and MEDALS FOR SOLDIERS AND AIRMEN (2013).

[1] WILLIAM C. BANKS & STEPHEN DYCUS, SOLDIERS ON THE HOME FRONT (2016).

[2] *Id*. at 7–10.

[3] *Id*. at 32–40.

[4] *Id*. at 47–112.

[5] *Id*. at 67–68.

[6] *Id*. at 90–91.

[7] *Id*. at 92.

[8] Scott C. Black served as The Judge Advocate General from 2005 to 2009. He retired as a lieutenant general.

[9] Lieutenant Commander Rolph, *Civil Disturbance Rules of Engagement: Joint Task Force Los Angeles*, ARMY LAW., Sept. 1992, at 32.

[10] BANKS, *supra* note 1, at 120–30.

[11] *Id*. at 175–78.

chapter titled "Soldiers as Judges," which takes an in-depth look at the use of military commissions during the Mexican-American War, Civil War and World War II.

The book finishes—not surprisingly—with a lengthy chapter on "Soldiers at Home in the Age of Terrorism." In an excellent discussion the major legal events that have occurred since September 11, 2001, the authors correctly conclude, in this reviewer's opinion, that the terrorist attacks on the World Trade Center and the Pentagon have forever changed the role of the American armed forces "on home ground."[12] According to *Soldiers on the Home Front*, "the growth in the military's domestic role since 9/11 demonstrates . . . that in times of crisis we have looked to the armed forces to keep us safe at home." However, it is not all clear that the law has kept pace with this changed landscape. Consequently, they argue that "our celebrated system of civilian control of the military needs fundamental reform."[13] Significantly, *Soldiers on the Home Front* does not argue that military forces themselves require additional restraints; the authors believe that military respect for civilian authority is firmly entrenched. Rather, the need is for "better controls" for "the military's civilian controllers."[14]

What they suggest is not particularly persuasive, especially since Professors Banks and Dycus believe that "better controls" will be achieved through the reconfiguration or realignment of military forces.[15] The authors propose a merger of the Army National Guard and Army Reserve. As they see it, Reserve personnel would be integrated into the guard of the reservists' residence states. However, the history of the Army National Guard and the Army Reserve indicate that this proposal would never make it through the U.S. Congress.

Even less practical is the proposal to create a Navy National Guard. This new military force would "focus on state maritime security . . . leaving the Coast Guard to focus on federal needs."[16] Nothing could be less practical. How would the new naval force be resourced? The active Army historically passes on resources to the Guard. How would the active Navy pass on items to the Navy National Guard? And what would it pass on? Why do we need a Navy National Guard if we have a Coast Guard? National defense is very much a zero-sum game these days. Consequently, if America were to resource a Navy National Guard, it would have to give up something else. Finally, one of the overarching themes of *Soldiers on the Home Front* is that American society must be on guard against the military undermining democratic civilian society. But since creating a new Navy National Guard would expand the military's domestic footprint, would this not add yet another potential threat to America's civilian government?

These criticisms aside, Professors Banks and Dycus rightly identify so-called "black swans"—"outlier events beyond the realm of regular planning" —as the major threat to American society.[17] They also accept that "military forces will have to lend a hand"[18] in an attack on America using a bioengineered virus or electromagnetic pulse (EMP) or similar unanticipated event. But the book falls short in proposing a way forward that is either politically unworkable or likely to succeed in practice.

Soldiers on the Home Front is well-written and the authors raise some interesting questions about the future of the U.S. armed forces in American life. Judge Advocates interested in the domestic role of the military in American history will find this a useful introduction to the topic.

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[12] *Id.* at 227.

[13] *Id*. at 267.

[14] *Id*. at 269.

[15] *Id*. at 267.

[16] *Id*. at 271.

[17] *Id*. at 266.

[18] *Id*. at 267.

The Judge Advocate General's Legal Center & School
U.S. Army
ATTN: JAGS-ADA-P
Charlottesville, VA 22903-1781