# WE ARE CHILDREN: THE PROSECUTION OF THE AFGHAN WAR'S MOST NOTORIOUS CRIMINAL

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*The following is an excerpt from "We Are Children: The Prosecution of the Afghan War's Most Notorious Criminal," a pending book by Jay Morse, the lead prosecutor in United States v. Robert Bales*.

I sat at a high-top inside Fadó Irish Pub in Washington, D.C.'s Chinatown. It was 10:00 a.m. eastern time on Sunday, March 11, 2012, and I had a half-full Guinness in hand. Sunday morning drinking was not my regular routine, but Fadó was one of the few bars in the city airing the Six Nations Rugby tournament. It was 4:00 p.m. in Paris, and the France versus England game had just started. I and a few friends watched the televisions hanging from the wall, the ubiquitous and much-maligned Blackberry on the table in front of me. It was the U.S. government's version of an ankle monitor, and for the previous eight and a half months, it had rarely been more than an arm's reach away.

At 11:00 a.m., just a few minutes into the second half of the game, I received an email from Sandy Tullius. I was not surprised. Sandy was a "highly qualified expert" at the Army's Trial Counsel Assistance Program, the organization I had been leading for about eight months. Commonly referred to as TCAP, I and about thirty other attorneys provided training and assistance for all the Army's prosecutors. Sandy had more than twenty years of experience, and though she was an exceptional attorney, she was in her element as a trainer and consultant for the Army's young prosecutors. She loved helping the junior attorneys, and they lapped up her mentorship. Sandy emailed from Afghanistan, where she was on a training mission. She

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practically lived on the road, so getting an email from her was normal. Her brief message, however, was cryptic: "I'm here in Kandahar if you need anything."

It was around 8:30 p.m. where Sandy was staying at Kandahar Airfield. More than nineteen hours had passed since the American soldier Robert Bales murdered four Afghan civilians in the small village of Alikozai. More than sixteen hours had passed since he had murdered twelve other men, women, and children in the neighboring village of Najabien, and just over fifteen hours had passed since he had returned to his American base for the second and last time. But it was still midmorning in D.C., and though *Reuters* and the *New York Times* were both already reporting the story, the full impact of the news had not yet reached me. I typed a short response to Sandy: "I'm all set here!"

Sandy quickly responded with a second email, writing that an American soldier left his base near Kandahar and murdered several people. I walked outside the pub with my Blackberry and called Sandy, slowly pacing up and down 7th Street Northwest while we talked. Bales was in custody, she told me, and had been ordered into pretrial confinement at Kandahar Airfield. He would wait there for a few days until the Army escorted him to Camp Arifjan in Kuwait, where he would arrive just after midnight on March 15th. The following day, March 16th, the Army would fly Bales to Fort Leavenworth, Kansas, where he would be put into pretrial confinement at the Joint Regional Confinement Facility.

Sandy had few details. She understood that Bales had left the base at night alone and had returned to the base covered in blood. The base, Village Stability Platform (VSP) Belambai, was currently on lockdown. Not only were no American soldiers allowed to leave the base, but local Afghan National Army and National Police leaders were at Belambai trying to calm the growing crowd—there were reports that hundreds, if not thousands, of local citizens were protesting outside VSP Belambai's gate.

Sandy was not alone in Kandahar. Major Cara Hamaguchi, a former Army communications officer and now a judge advocate, sat with Sandy as we talked through the situation over speaker phone. Cara was the Brigade Judge Advocate (BJA) and senior attorney for Bales's unit. Though I would soon be named as the lead prosecutor in the criminal case against Bales, Cara was, in many ways, the first attorney assigned to the case. Sandy's presence in Afghanistan when the crimes occurred was opportune and would later prove to be the prosecution team's second stroke of good luck. The first was that Major Hamaguchi was the BJA when the murders occurred.

Each U.S. Army brigade typically has at least two assigned attorneys. The junior attorney is a "Trial Counsel" who focuses on advising the commander on soldier misconduct and discipline. She also acts as a prosecutor during criminal trials. The BJA—Major Hamaguchi's position—

is essentially a general counsel, serving as the legal advisor to the commander and supervising the legal office. Two attorneys and a handful of paralegals are sufficient while units are at their home base, but units deploying to Afghanistan were taking as many as four attorneys to handle the significant number of legal issues that occur in a combat zone. Though a judge advocate's primary responsibility is simply to provide legal advice, good ones understand the complexities not just of the law, but how decisions impact the unit's ability to accomplish the mission. Great attorneys, like Major Hamaguchi, quickly earned the trust of their commanders and found themselves providing advice and guidance on a range of non-legal issues as well as legal advice.

Though Cara was a major, she had been promoted from captain just three days earlier. In addition to being newly promoted, she was also a new attorney. She served nine years in the Army before she became a judge advocate, but by the time Cara found herself providing advice on a sixteen-count homicide in a combat zone, she had been an attorney for just two years. Whatever legal experience she may have lacked, she more than made up for in humility, selflessness, and determination. Major Hamaguchi lived a mantra of "get shit done" and would demonstrate many times over her value to the successful prosecution of Robert Bales.

Sandy, Cara, and I talked through our initial concerns. Among them, we wanted to make sure any evidence was preserved and that anyone involved with the initial investigation and Bales's confinement was following procedures correctly. Ideally, commanders contact judge advocates immediately upon learning of allegations of criminal conduct; judge advocates then immediately coordinate with local criminal investigators. Involving these professionals early helps to ensure evidence is handled correctly in that a "chain of custody" is established for any evidence and that it is not otherwise tainted; that a soldier's rights are not violated; or that witnesses are not speaking to one another in a way that might call into question the veracity of their statements, distort their memory, or otherwise put their credibility at issue. We also had concerns as to whether the local commander, a special forces captain, was getting good legal advice. Any mistake in the initial investigative process, no matter how innocuous or unintentional, had potential ramifications for the case down the road. A trial judge might rule, for example, that improperly gathered evidence was inadmissible at court. My immediate concern was to ensure that Bales's chain of command was following correct procedures in placing Bales into pretrial confinement. Fortunately, they were.

Military commanders have broad regulatory powers over the soldiers and units they command and rightly so. That power comes from the Uniform Code of Military Justice (UCMJ), a congressionally enacted body of laws that proscribes soldier conduct and grants commanders power to discipline

soldiers who do not follow the rules. Soldiers are subject to the UCMJ twenty-four hours a day, seven days a week, no matter where they are or what they are doing. Bales, though far from the United States and any domestic criminal jurisdiction, was subject to the UCMJ. Likewise, Bales's commanders possessed authority over him granted by the UCMJ. Though judge advocates are assiduously involved in ensuring the fairness of the military justice system, it is ultimately the commanders who hold the authority to enforce the law. One of the many powers a commander has—perhaps second only to the authority to order a soldier into combat—is the ability to order soldiers into confinement.

At 8:09 p.m. on March 11th, Bales was ordered into pretrial confinement. At 9:20 p.m., a doctor examined Bales to determine whether confinement would "produce serious injury to the inmate's health." The doctor found that confinement would not produce such injury. He also noted that Bales had a three-centimeter bruise to his left posterior shoulder, a two-centimeter bruise to his left forearm, and two abrasions to his left knee. At 9:32 p.m., the Deputy Provost Marshal at Kandahar Airfield—an Army captain and military police officer—signed the initial confinement order, and at 9:35 p.m., the Deputy Provost Marshal officially took Bales into custody, literally issuing a receipt for him. The Department of Defense Form 2708 is a simple document consisting of just sixteen blocks covering less than half a page. Outside of the personal information of both the detained and the detaining, there are just three sections. One asked for "Remarks," left blank on Bales's form. The second asked for any "Personal Property." This too was empty. The last section, "Offense," was the only with any text, and its entry was just one word: "Murder."

I had wanted to be an attorney for as long as I can remember. Though saved homework from my *what do you want to be when you grow up* era reflects the standard 1970s little boy imagination—firefighter, cowboy, American Indian—early childhood memories about my future profession, either soldier or lawyer, are non-existent. I could eventually articulate the person I wanted to be; I just did not know then what it was called. This is unsurprising. There were a few attorneys in my small northern Nevada community, but I did not really know them, and I certainly did not know what they did. It was my sophomore year biology teacher who put a name to it.

Mr. Gunther kept me after class one day. He had started to yell at a classmate—unfairly, I thought. Though the boy was a notorious troublemaker, he was not the genesis of this particular outburst. I let Mr. Gunther know his scolding was misplaced, even as he was issuing it. Though the conversation was surely longer than I remember it, and probably far less generous—deservedly so—my recollection is of Mr. Gunther sharing two things: "Stop interfering with my class; I'm in charge of discipline. And you should be an attorney."

The foundation of Mr. Gunther's observations of me in 1986 were still around in 2012. I had a strong sense of justice and antipathy for unfairness. I often favored the underdog. Though I loved being an Army defense attorney, I felt that prosecution was a better fit. My obligation as a defense attorney was to get the best possible result for my client. As a prosecutor, the government was my client, but I viewed my responsibilities as much more comprehensive: I represented the system itself. I had an affirmative and primary obligation not to secure a conviction, but to make sure justice was served and to do so with integrity. A fair trial for the accused was paramount over everything else. I had a strong sense of duty, of right and wrong, and deeply felt the responsibility of leadership. I also relished challenges, and there were none bigger than Bales.

I thought that most people took account of their careers at their conclusions, but I recognized the importance of this case from the moment Sandy called me from Kandahar. So much of what lawyers do hinges on the misfortune of others, either preventing it or helping to mitigate misfortune when it occurs. Seeking justice for innocent men, women, and children, and prosecuting a soldier who was essentially a war criminal was the height of what criminal attorneys are supposed to do. This was an opportunity to validate many of the moral tenets I held most dear.

My first outward-facing act was to organize a team conference call. I had been able to choose my team: John Riesenberg worked across the hall from me at TCAP. He was intense, no-nonsense, obviously brilliant, and had an unparalleled work ethic. Though he was not particularly social—sometimes a detriment to a successful career in the Army—John did not need to be. His peers frequently came to see him. Rob Stelle was a Special Victim Prosecutor at Joint Base Lewis McChord in Washington and was one of the most experienced prosecutors in the Army when it came to high-profile cases. I had been able to persuade JAG Corps leadership that Cara was pivotal to our success, and she had been transferred to the team from her job as the BJA.

The three of us—John at his home in Washington, D.C., Rob at Joint Base Lewis McChord, and me at my desk at Fort Belvoir—joined Sandy and Cara, who were still at Kandahar Airfield, on a conference call. There was so much to do and so many issues. There is an old Army saying that "amateurs talk strategy, professionals talk logistics." Though the sentiment is important, I think professionals do both. Strategy and logistics go hand-in-hand, and either one without the other is an exercise in academics. A well-thought-out strategy provides a map for what you need, and all your logistical planning is for naught without a sound strategy. We were not yet thinking about our long-term strategy, but were already thinking about logistics. We needed investigators to process a crime scene in a war zone. We needed an investigating officer for the article 32, a preliminary hearing required for any

case sent to a general court-martial. We also needed to consider what Bales would be charged with.

I took the charging decision seriously. This sounds obvious—it is a serious event—but there are two philosophies in determining what to charge. Some prosecutors use the "kitchen sink" method: Charge every possible offense. This practice almost guarantees a conviction, but I took a dim view of winning at all costs. Securing a conviction for "failure to repair" (being late for work), for example, when the main offense was aggravated assault seemed cheap to me. I preferred the "gravamen" method, where the prosecutor identifies the main, or most serious, offense. Anything else I charged was in support of that main offense, or necessary to get information relevant to the main offense in front of the judge or panel. For Bales, murder was the gravamen offense. Drinking on duty or violating a lawful order to not drink while in Afghanistan—other allegations of Bales's conduct—seemed an innocuous crime compared to murder. But if we needed to show that Bales had been drinking prior to leaving the base to validate our theory of the case, then that charge became relevant.

To our knowledge, no American personnel had yet visited the crime scene or interviewed any of the victims or witnesses. It was crucial that American criminal investigators visit the four homes as soon as possible, as every passing day made any evidence we did gather more problematic. Without knowing who was going in and out of the homes or what they were doing, we risked losing evidence or having available evidence tainted. We knew Afghan investigators had been to at least one of the homes, where they came under gunfire from Taliban members, but we did not yet know what evidence they had gathered, if any. And if they did find any evidence, we would have to be able to show a clear chain of custody to admit the evidence at trial. This "chain of custody" meant we needed to identify every set of hands that touched the evidence from the time it was found until we presented it to the court. Evidence gathered by American criminal investigators (CID) would be much easier to track—plus they were better trained in our system. Army CID agents could get accurate measurements, take photos and videos, search for (and hopefully find) rounds from Bales's firearms, attempt to retrace Bales's steps through interviews with other American soldiers, and gather blood and other DNA, among other things.

Rob, John, Cara, Sandy, and I discussed other people we might need for our investigation. The first experts we thought of would be pivotal: Craig Ackley, a retired profiler from the Federal Bureau of Investigation, and Garland Slate, a fantastically named and commensurately competent private investigator. We had used both these experts before in other high-profile cases, and they were worth more than what we paid them. Craig was a master organizer of case files and could provide invaluable input during strategy sessions. Garland was as persistent as he was unflappable. I also wanted a

dedicated warrant officer—someone who could lead the effort of what would be significant logistical demands—as well as a senior paralegal who could take charge of the paperwork and other details. All that would be for later. John, Rob, and I had the more pressing requirement of getting ourselves to Kandahar Airfield, where we would join Sandy and Cara.

The next twenty-four hours I was largely in my own head. Of my ten years as a JAG, I had spent more than a year as a prosecutor, fifteen months as a defense attorney, and another eight as a Senior Defense Counsel. I focused on criminal law in my year at the Army's Judge Advocate Graduate Course. I had spent a year supervising the military justice process first as a Deputy Staff Judge Advocate, and then another year as a Staff Judge Advocate. When the JAG Corps appointed me as lead prosecutor for the Bales case, I was going into my ninth month as the Chief of TCAP. I loved criminal law and felt like the courtroom was where I was at my best. But the truth was that I was not a great attorney. I was relentless when chasing down facts, good at critical thinking, and able to relate well to juries. But the *law*—doing research, finding and interpreting caselaw, making substantive arguments to a judge, or even identifying potentially problematic legal nuances before trial? Not my strength. I recognized and was comfortable acknowledging this shortcoming. Identifying my own weaknesses, even subconsciously, was surely what caused me to select John and Rob, both of whom would ably make up for my own deficiencies. I also knew the JAG Corps leadership did not select me as lead prosecutor because it thought I was a good attorney, but rather because it was confident I could lead the team.

For the next twenty-four hours, I thought about what that meant. "Lead prosecutor" was ambiguous. I was the senior person and would be responsible for success or failure. But what did *lead prosecutor* look like? Being a good leader was more important to me than being a good attorney, and this, I thought, was what was needed—a good lead prosecutor who was a better leader.

Leadership was something I thought about. A lot. I viewed "good leader" as something wholly different than just charismatic or confident, or someone who was always willing to take charge. The best leaders I knew were steady and level-headed. They were consistent—you knew what you were going to get. They rarely, if ever, yelled or became visibly angry with subordinates. They asked for help when needed and acknowledged when they did not have applicable expertise. They delegated. They praised publicly and scolded privately. They were both the sword and shield for their team, pushing them forward when they were great and protecting them when they weren't. They provided guidance and then instilled confidence in subordinates to take the initiative to follow that guidance in making their own decisions.

I wanted those characteristics I believed in as a leader to positively influence the case and thought about how I would do that practically. I thought about our priorities and long-term strategy. I thought about how I would interact with the long list of commanders and senior leaders I was going to have to deal with as we investigated the case. Commanders can have egos and can be territorial. They are unlikely to be pleased to see someone from outside their command prowling around, potentially identifying flaws or shortcomings in their units, or even in their own leadership practices, that may have contributed to the murder of sixteen civilians.

I mostly thought about how our team would interact with the Afghan victims and witnesses. I assumed they would not be enthused to cooperate with us, and that any enthusiasm would deteriorate as time went on—the American justice system can be a slow-moving train for attorneys, let alone for victims. I thought about how I might feel if the person professing to seek justice for me or my family was wearing the same uniform as my family's murderer. I thought about cultural, language, religious, and economic differences; power dynamics; and the simple yet unignorable fact that my country had invaded theirs. I thought about how the American public or media might perceive this crime, and whether they would see Bales as some sort of victim himself. Worse, I wondered if some people might consider him a hero. I thought about how America might view the Afghan families, and whether they would see them as fully human, deserving of their empathy and horror.

I thought about how *I* was going to view them.

I thought about justice, and what that even meant when a child—your child—had been shot in the head at point-blank range.

A complex case like Bales could last years. Sometimes prosecutors are switched out, usually to take other assignments and usually at other bases. I wanted to mitigate this risk by having guiding principles for the team, whether we were still on the case or someone else had taken over. Rob, John, and Cara were exceptional attorneys and officers, and I trusted them eminently. I would do my best to exhibit all those leadership skills I valued, but I also wanted to turn the three of them loose to take full advantage of their expertise and professionalism, and ensure they did not feel inhibited in their ability to make decisions.

After taking a day to think about what was important to me, and what I wanted the case to look like when it concluded, I identified three guiding principles. Every decision we made would go towards one of three goals:

1. A conviction, within the confines of the law.
2. The victims were satisfied, or at least understanding of our process.
3. No insurmountable mistakes.

Convictions are important to any well-run justice system, but only those won fairly. I wanted our team to focus on proving our case, but always under the guiding principle of doing the right thing, legally, ethically, and morally. My first principle meant we would prioritize integrity over a conviction in pursuing justice.

"No insurmountable mistakes" did not mean "no mistakes"—I expected we would make them. Rather, I did not want us to make a decision that risked a mistrial or created appealable error. In the military, every case resulting in a conviction and a sentence of either a punitive discharge (Dishonorable or Bad Conduct Discharge) or confinement of more than six months is automatically appealed. The Appeals Court considers factual or legal sufficiency from the findings of the trial court and can order a remedy to any error.

One example of appealable error might be denying the defense access to expert assistance. Under the UCMJ, the government provides not only a defense attorney for an accused but provides *all* resources. When I was a defense attorney, if I wanted expert assistance, either my client—the soldier—had to pay for it himself, or we requested the expert from the government. This created some obvious issues. I did not necessarily want the government to know what areas I was exploring as a possible defense. I certainly did not want to justify, in detail, why I thought a certain expert was "relevant and necessary"—the standard I was required to meet before the government would pay for any expert. Most Staff Judge Advocates recognize when specialized assistance makes sense for the defense and immediately recommend that the government pay for the witness. But some aggressive prosecutors and Staff Judge Advocates deny the request if they think it is unnecessary. The defense can then ask the military judge to compel the government to pay for the expert assistance, but this adds time and creates extra work for everyone. As both a prosecutor and a Staff Judge Advocate, I rarely pushed back against a defense request. But in Bales, I wanted no issues that could be grounds for appeal down the road. I told both the team as well as the Staff Judge Advocate at Joint Base Lewis-McChord that I was making a blanket recommendation to give the defense every expert they asked for, no matter how specious or relevant. This third principle of "no insurmountable mistakes" meant that I wanted the case to be watertight. I wanted us to think through the possible ramifications of our decisions. We might make mistakes, but they would be neither intentional nor anywhere close to fatal.

Where the first and third guiding principles were mandatory—and catastrophic to our case if we violated them—the second was more amorphous. It was also personal. I later realized the hubris in thinking the families could be "satisfied" with any result. No family anywhere in the world would be "satisfied" after having gone through what the Afghan

families had experienced. And why would any victim care, or care to understand, some foreign justice system when they had suffered such loss?

On the seventeenth of March, just a week after Bales murdered sixteen people, I was not thinking about that. Instead, I was thinking about how I was going to build a bridge between the Afghan families and me—between their pain and the potential for justice.

I wanted the families to see that we recognized their humanness, we valued them, and we recognized that they had been violated.

I wanted them to see that Robert Bales, though we wore the same uniform, did not hold my same values.

I wanted them to testify in person, at the trial, to have a voice.

I wanted the families to see that we gave a shit about them.