



The Reporter

2020 Archive

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Civil Law: Civil law disciplines are interwoven with the acquisition, operation, protection, and preservation of the force and its people, funds, weapon systems, materiel, and installations.

EQUAL PROTECTION UNDER ENVIRONMENTAL LAW

Posted: 6 October 2020

By Major Mark Coon,
Edited by Major Katelyn M. Bries

Excerpt: Military environmental law attorneys should be aware that all waivers of the federal government's sovereign immunity from paying state-levied environmental fines need to be construed very narrowly.

PROTECT AGAINST MAYHEM

Posted: 22 July 2020

By Colonel John Kiel, Jr.

Excerpt: The irony is, that by singling out GAP insurance, the DoD has created a situation where service members are forced to buy lesser GAP coverage through insurance companies or third party companies.

HURRICANE MICHAEL RESPONSE

Posted: 21 May 2020

By Major Vincent DeFabo

Excerpt: This article will address what medical law practitioners and other legal professionals should do before, during, and after a natural disaster, based on the lessons learned from Hurricane Michael.

GONE FISHIN'

Posted: 18 February 2020

By Captain James Woodruff II

Excerpt: Opposing counsel routinely ask for personnel documents... In this article, we'll walk through what we do at the LLFSC, how we typically interact with the office that receives a request and help to alleviate cumbersome "fishin' expeditions"....

"MORE THAN A DEPENDENT"

Posted: 10 January 2020

By Lieutenant Colonel Charlton Meginley

Excerpt: Professional military spouses are more than dependents. Many have more education, higher earning potential, and job satisfaction than their military spouse. Yet, most are often forced to quit their job and start over in the new PCS location.



Military Justice and Discipline – The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby strengthen national security.

ADMITTING HEARSAY

Posted: 14 September 2020

By Captain Ryan Crnkovich and Captain Adam Merzel
Edited by Major Heather A. Smilde

Excerpt: This article summarizes the Air Force’s current guidance with respect to the admission of hearsay at administrative discharge proceedings.

THE PROCEDURAL GUIDE

Posted: 5 June 2020

By Lieutenant Colonel Bryon Gleisner

Excerpt: The procedural guide is an important step in the triggering of legal ramifications for both the accused and the government. Incorrect completion and reading of the procedural guide could have drastic consequences and result in needless litigation.



Operations and International Law – Operations and International law capabilities enhance command situational awareness, maximize decision space, and promote optimal conditions for the projection of ready forces to defend the Nation and our allies.

THE KILLING OF QASSEM SOLEIMANI

Posted: 29 October 2020

By Lieutenant Colonel Scott A. Hodges
Edited by Major Danielle Crowder

Excerpt: Did President Trump violate international law when he directed the strike on Soleimani? This article will examine three different theories for justifying the strike, and conclude that Soleimani was a lawful target.

W. HAYS PARKS AND THE LAW OF WAR

Posted: 26 March 2020

By Major R. Scott Adams

Excerpt: W. Hays Parks' work deserves serious study by judge advocates today. His work provides insight, both as a challenge to modern-day thinking, and as a plethora of practical guides to important areas of international humanitarian law.

THE JAG IN THE ARENA

Posted: 6 February 2020

By Lieutenant Colonel Bryon Gleisner

Excerpt: Many military lawyers might believe they are only in the arena when they are in the courtroom. Nothing can be further from the truth—especially for the operational lawyer.



Book Reviews

FOREWARNED IS FOREARMED

Posted: 27 August 2020

Book Review by Lieutenant Colonel Jeremy McKissack
Edited by Major Mark E. Coon

Excerpt: Junior and experienced military defense counsel alike will benefit from the book's (*The United States v. You*) concise explanations about the military justice process and trial preparation.

PERILOUS TIMES: FREE SPEECH IN WARTIME

Posted: 22 January 2020

Book Review by Captain Matthew Blyth

Excerpt: During times of war, both government and citizens take actions that exceed necessity and threaten individual liberties. Stone's offers timeless lessons for legal professionals about the intersection of free expression and national security.

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MORE THAN A DEPENDENT

Legal Professionals Advocating For Legislative Changes For Professional Military Spouses Employment

BY LIEUTENANT COLONEL CHARLTON J. MEGINLEY

Military spouses are more likely than other workers to be caught up in this country's patchwork of occupational licensing laws, both because they are more likely to move across State lines and because they are disproportionately employed in occupations that require a license.

PCS "PENALTY" FOR MILITARY SPOUSES

"I have to get another license." For many military spouses who hold professional licenses, these six dreaded words are often uttered when notice of a permanent change of station (PCS) arrives, and rarely are these six words said with excitement or joy. The reality many military spouses with professional licenses face, having to secure a new license in another state, makes military moves even harder. For those spouses, having to quit their job, take another licensure test, wait for the results, and then search again for employment, makes the military lifestyle too much to handle. In turn, military families face a dilemma: is the military member's career worth the stress, the loss of income, and aggravation of having to address spousal employment every two to three

years? For many, the answer is no. In turn, is the Department of Defense (DoD) positioning itself to lose valued service members if it does not take a strong interest in this dilemma? Arguably, the answer is yes. While some states have made proactive statutory changes to make PCS transitions easier on military spouses, there is still significant progress that needs to be made. While there are ethical bounds that must be respected, DoD officials and particularly judge advocates need to have stronger engagement with state and local officials to bring to light spousal employment and the impact spousal employment could have on national security. Short-term solutions include enacting favorable laws on temporary licensure and reciprocity; long-term solutions include interstate compacts. Furthermore, DoD officials

must also address internal solutions, such as longer tours for families and meaningful spousal preference in government positions, to assist spouses. These issues will be addressed in this article.

Short-term solutions include enacting favorable laws on temporary licensure and reciprocity; long-term solutions include interstate compacts.

TRULY A DEPENDENT – THE FACTS BEHIND MILITARY SPOUSAL EMPLOYMENT

Military spousal employment—and unemployment—has been gaining significant attention amongst military and civic leaders. Recently, the United States Chamber of Commerce conducted a study on military spouses in the workplace.[1] The findings were disheartening. The study found:

- Unemployment rates for military spouses range from 20% to 25%.[2] 67% of spouses have had to quit a job because of their spouse's military service; 65% of spouses said it took four or more months to find a job; another 29% said it took 4-6 months.[3]
- Military spouses are 92% female.[4] Approximately 1/2 of military spouses are over 30 years old. 41% of military spouses have children. 15% of military spouses have a postgraduate degree; 34% have a college degree.[5] Spouses with greater education attainment appear to struggle more than spouses with a high school degree or some college.[6] Further, 41% of spouses stated the greatest challenge was employers not wanting to hire them because they may move in the future; 28% stated they had difficulty explaining time gaps on their resume.[7]
- Moves between duty stations play havoc on careers. "Not only do most spouses have to quit jobs because of a military move, they face long periods of unemployment" after the move.[8] On average, military

spouses are unemployed for some amount of time after a military move.[9] Not surprisingly, "the lack of equal economic opportunity for military spouses creates financial challenges and influences a family's decision to stay in or leave the military.[10] "The issue of military spouse employment profoundly impacts military readiness and our nation's ability to recruit and retain an all-volunteer force." [11]

The data presented by the U.S. Chamber of Commerce presents a bleak picture for spouses,[12] and yet, for those military spouses who face employment issues every two to three years, none of this comes as a surprise. The Chamber of Commerce study is not an anomaly. In May 2018, The Council of Economic Advisers issued a report entitled, "Military Spouses in the Labor Market,"[13] with many of its findings tracking the U.S. Chamber of Commerce findings. Additionally, on the issue of military spouses who require a license to work, The Council of Economic Advisers states:

Occupational licensing regimes in each State impose additional barriers to labor market participation, and a new resident must clear these hurdles before commencing work. Military spouses are more likely than other workers to be caught up in this country's patchwork of occupational licensing laws, both because they are more likely to move across State lines and because they are disproportionately employed in occupations that require a license. The Bureau of Labor Statistics estimates that 22 percent of all workers required a government license to do their job in 2016, while 35 percent of military spouses in the labor force worked in occupations requiring a license or certification (U.S. Department of Treasury and U.S. Department of Defense 2012). Moreover, military families move much more frequently than civilian families, including across State lines, where military spouses face the potential for relicensing at every interstate move. The 2016 ACS survey indicates working age military spouses were seven times as likely to move across State lines in the United States as the civilian noninstitutionalized working age population in general.[14]

The Council’s findings essentially exposed a “military spouse penalty”—even when employed military spouses can be expected to lose as much as \$190,000 over a 20-year military career (approx. \$12,300 a year).[15] Further, even in states with favorable spousal policies, rules on licensing reciprocity, expedited licenses, and portability increased the confusion for spouses where only 40% of states publicized “information about military spouse licensure on their websites and a majority of customer service representatives [were] unaware of the relevant legislation.”[16]

CONGRESSIONAL INVOLVEMENT

Congress has also identified military spousal licensure as an issue of concern and taken certain steps. As part of the 2018 National Defense Authorization Act (NDAA) for Fiscal Year 2018, Congressional leaders directed the Secretaries of Defense (DoD) and Homeland Security (DHS) to work with States to “identify barriers to the portability between States of a license, certification, or other grant of permission held by the spouse of a member of the Armed Forces to engage in a particular activity in a State” and to develop recommendations to expedite the portability of licenses, certifications, and other grants of permission for military spouses.[17] Further, Congress requested recommendations as to the feasibility of reciprocity, temporary licensure, and expedited review processes for military spouses. Finally, Congress passed legislation that allows military spouses to claim up to \$500 of licensure expenses on a PCS voucher in the 2018 NDAA.[18]

In March 2018, at the above direction of Congress, the DoD and DHS released their “Report on the Barriers to Portability of Occupational Licenses Between States.” For those who have lived with the issue of military spousal licensure, the findings of this report were no surprise. The report found,

The career experiences of Service members draw them to stay in the military, and to a similar degree, the spouses’ careers can be a source of mitigation for the hardships they endure. Additionally, careers provide for present and future financial stability for the military family. Sustaining these careers is difficult

and the lack of portability of professional licenses exacerbates this difficulty.[19]

The report specifically found that,

Barriers to the transfer and acceptance of certifications and licenses that occur when state rules differ can have a dramatic and negative effect on the financial well-being of military families. Military spouses routinely lose 6 to 9 months of income during a military move as they try to reinstate their careers.... Differences in licensure requirements across states limit advancement or deter re-entry into the work force at a new location. Removing these barriers, creating reciprocity in licensing requirements, and facilitating placement opportunities can help a military family’s financial stability, speed the assimilation of the family into its new location, and create a desirable new employee pool for a state (especially in education and health care).[20]

The report also included testimony from spouses across all professional fields identifying the hassles, difficulties, additional requirements, and expense of obtaining a new license every time the military family moved. The report listed a series of recommendations, which includes “implementing the laws and policies already approved and approving licensure compacts presented to the legislature by occupations.”[21]

A year later, the DoD presented a review on the obstacles to spousal licensure across the states. The review provided additional analysis, including: outlining the prevalence of military spouses in each state; the impact of employment of military spouses on each state’s economy; the economic impact of establishing licensing compacts or licensing boards to reduce licensing burdens; the benefits to each state by increasing occupational licensing reciprocity for military spouses; and the views of local businesses and industry on “facilitation or greater credentialing” for military spouses.[22] This comprehensive review noted the “delays resulting from State-specific requirements and occupational board review of

the substantial equivalency of the applicant’s current license as potential obstacles.”[23]

RECENT STATE LEGISLATIVE ACTION

In reality, Congress recognized it could only do so much to give relief to military spouses, as licensure matters are largely a state issue. In February 2018, the Secretaries of the Army, Air Force, and Navy collectively signed a memorandum addressed to the National Governors Association, asking states to eliminate or mitigate the barriers that come with a military relocation[24] and those efforts appear to be having some effect.[25] More states are granting licensure by endorsement, granting reciprocity, issuing temporary licenses, and enacting expedited licensure procedures.

Arizona just passed the most sweeping legislation on occupational licenses, enacting “universal” licensure, making Arizona the first state to recognize occupational licenses from other states without having to obtain an Arizona-specific license.[26] The legislation was a “top priority” for Governor Doug Doocy, as 100,000 people move to Arizona every year, and with many of those people trained and certified in their careers, the Governor deemed it was foolish for them to face “daunting and unnecessary hurdles imposed by state government to start a job.”[27] The primary requirements under the Arizona House Bill 2569 is that the person moving into Arizona be in good standing with the state they are moving from and have been licensed in that state for at least a year.[28]

Prior to Arizona’s legislation, **Utah** passed what may be the most dramatic legislation on military spousal licensure to date, exempting all licensure requirements for military spouses as long as the spouse’s military member is stationed in Utah and the spouse holds a valid license in another state and is in good standing with that state.[29] Utah’s law essentially places the burden on the spouse’s potential employer to verify the spouse’s professional licensure is in good standing. Admittedly, a concern with such expansive legislation is that consumers of various services don’t have the checks and balances that normally come with licensure, specifically verification of educational and professional qualifications, as well as a standard background check. Nonetheless, for

military spouses, Utah’s legislation makes the stress of finding a job significantly less.

For now, Arizona and Utah are outliers in the arena of military spousal licensure. However, many states have enacted reciprocity-like legislation, establishing favorable criterion designed to alleviate some of the issues spouses face. For example, **South Dakota** recently removed most barriers for military spousal licensure and certification, as well as application fees for both active duty members and their spouses who seek a professional licensure, so long as the licensee is stationed in South Dakota.[30] **Idaho** passed “licensure by endorsement” if the spouse possesses current, valid, and unrestricted licensure in another state.[31] In 2017, **Florida**, which already had a six-month temporary licensure law,[32] enacted into law a policy that requires boards to issue a license to a military spouse based on having a current license in good standing and a background check.[33]

While not as advantageous for military spouses, forty-two states have passed legislation that grant temporary licenses and 31 states have policies that expedite the licensure process to spouses.[34] **Colorado**, which was one of the first states to address spousal licensure, grants military spouses a year to seek licensure.[35] A current proposal in **North Dakota** would grant a two-year temporary licensure.[36] Like several other states, **Louisiana** has ceded temporary licensure issuance to professional licensure boards to make the decisions.[37] Yet, while a temporary period is better than no period, there are significant flaws to the perceived benefit of a temporary license. First, reviewing the University of Minnesota data, not every career field has a temporary licensure opportunity (the data fails to address many medical professionals and teachers). Second, temporary licensure generally falls short of providing actual relief to spouses. States that grant shorter temporary periods (such as four to six months) fail to recognize the issues that come with a PCS: moving from one house to another, settling into the new location, applying for a license, taking the test, and waiting for the results. Third, most temporary licensure is limited and not renewable[38]; anything less than six months is often not adequate. Additionally, many states, such as **Washington**, utilize an “expedited” process by prioritizing

spousal applications “so that they may begin employment as soon as possible after they submit their completed application.”[39] Yet, “expedited” is a misleading benefit, as a spouse may still have to go through the process of applying for, and passing a licensure exam. In its report on this issue, Congress found the “expedited” process for licensure to have limited benefit when viewed together with temporary licensure.[40] Congress concluded a temporary licensure and expedited processing “did not resolve the underlying concerns expressed by military spouses.”[41] Again, while better than nothing, temporary licensure and expedited processing are not long-term solutions.

INTERSTATE COMPACTS

DoD officials have also advocated for the implementation of Interstate Compacts. Interstate Compacts are “immutable contracts between states which, when codified in state law, can create an agreed upon set of standards and rules for multi-state initiatives,”[42] and allow states to maintain some control of a profession, while allowing for members of that profession to have mobility supported.[43] The key benefit of interstate compacts is *portability*: compacts support mobility while ensuring “public safety” through licensure requirements.[44] Interstate compacts are not military specific; but military spouses often reap the benefits of these contracts.

Arguably, one of the biggest interstate compact success stories is the Enhanced Nursing Licensure Compact (eNLC), which provides a cost effective way of allowing nurses the ability to quickly move across states’ borders, as well as facilitate telehealth services to patients. Thirty-three states have agreed to the eNLC with pending legislation in an additional nine states.[45] Currently, two million nurses live in eNLC states.[46] There are also compacts for those working in psychology, physical therapy, and emergency medical services.[47]

While there is a push for interstate compacts, some state occupational boards have resisted compacts, as they feel they will lose control over the licensure process. However, this is not necessarily true, as licensure boards still retain oversight over their respective professionals, regardless of where that licensee works.[48] As such, even though a state

may enter into a compact, the state still retains oversight of their professional licensing requirements, and in turn, the activities of the professionals working in their state. Mr. Marcus Beauregard, Chief of the DoD-State Liaison Office, further mentions, “If there is an infraction against their practice act, they can prohibit the professional from working in the state, and also have a responsibility to relay the information to the licensing state to take further administrative action.”[49]

Ultimately, Mr. Beauregard opined that compacts are very favorable to the military spouses, stating,

One of the underlying concepts (and benefits) of the compact approach is that military spouses are seen as professionals in the same standing as their peers. Individual state initiatives which provide the closest version of reciprocity essentially eliminate segments of the review process for military spouses and as a result apply different standards for military spouses. This may impact spouses in the long term, consequently, we see these kinds of licensing accommodations as improvements to the status quo but not as the final solution.[50]

As states recognize the changing mobility of American society, interstate compacts could become more commonplace and of benefit to military spouses. There is still much work to be done and while DoD officials can advocate for interstate compacts, states legislatures must be willing to see other states as equals in the licensure process for the betterment of professionals across state lines.

RECOMMENDATIONS FOR DOD AND STATES MOVING FORWARD

While many states have done their part to alleviate some of the obstacles that professional military spouses face in a PCS, the DoD should play a bigger role. In addition to spousal preference for government jobs, the DoD should consider reducing the number of PCSs for members. Many officers PCS every 2-3 years. At this pace, in a 20-year career, without reciprocity or a “compact,” a spouse would need to gain licensure in 7-10 states. Also, the DoD, subject to

mission-essential duties/requirements, should allow service members to provide input on spousal employment to their assignments branches, with the possibility of turning down or receiving alternate assignments without harm or repercussion to a member's career. Further, the DoD should consider a talent management plan that takes professional spouses into consideration, much like the plan for dual military spouses. Finally, when making future decisions on Base Closure and Realignment (BRAC), DoD authorities should consider what legislation/programs states have enacted for military spouses.

As for the states themselves, interstate compacts appear to be far more beneficial to military spouses than individual states licensure boards. The DoD should take a more active role with states in advocating the benefits of interstate compacts legislation that could provide greater protections and opportunities for DoD dependent spouses that move across state lines due to military orders. In the alternative, if a state is not receptive to a compact,[51] reciprocal legislation should be enacted. Alternatively, if a state chooses not to grant reciprocity, states should consider other options from requiring military spouses to take a licensure or jurisprudence exam, such as a continuing education or online training. For instance, the requirement to take a jurisprudence exam is perhaps the single most important barrier to a pharmacist-spouse from expeditiously obtaining a license upon a PCS, as that spouse has to apply to take the National Association of Boards of Pharmacy. Simultaneously applying with the state they are moving to, and waiting for the results of the exam, is a process which could take months.

States should consider making it illegal for companies to discriminate against the hiring and employing military spouses, similar to the protections afforded to military members under the Uniformed Services Employment and Reemployment Act.[52] Another consideration is to expand the "qualifying exigencies" for military families under the Family & Medical Leave Act (FMLA) to include PCS moves, preferably without forcing the employee to use paid time off (PTO) with the option to take unpaid time. For those spouses who need to have a required number of "supervised hours" (i.e., social workers, counselors), states should ensure

that hours earned in one state will be accepted for licensure in another state. Another option, recently broached in Illinois, is for licensure reciprocity within two years of a military retirement and final PCS, which would allow military spouses of just retired members to make their final PCS and have the ability to have a temporary license in their final "forever home." For many military families the roles often reverse upon military retirement, and the military spouse is the one that requires the stability. Affording them this ability to obtain a temporary license sets their families up for success.[53]

States should enact limitations on how long it takes for the adjudication of a license, allow for an affidavit approach to licensure application attesting to the accuracy of the application (sparing licensees from having to provide school transcripts, letters of good standing from other states, etc), and eliminate or reduce application and licensure fees. Specifically to fees, as mentioned earlier, the 2018 NDAA authorized a reimbursement of up to \$500 for expenses related to a spouse having to obtain new licensure. However, when factoring transfer reciprocity fees, national board exams, continuing education classes, study materials, and the actual cost to take an exam, obtaining a new license can cost well beyond \$500. States should consider waiving reciprocity and application fees related to a PCS. Finally, states should have a provision to allow military spouses to hold "inactive" statuses for when they no longer live in a state where they are licensed due to a PCS, which would preclude the spouse from having to pay additional fees. It's not uncommon for a spouse to leave one state, only to return to that state later in their military spouse's career.

JUDGE ADVOCATE INVOLVEMENT AND FUNDAMENTALS OF ENGAGEMENT

Judge advocates are in a unique position to have a direct impact on military spousal issues. We have the ability to phrase issues, analyze data, and help write narratives as to why this is such a significant DoD issue. DoD officials, installation commanders, and local Staff Judge Advocate offices must be more involved. The obvious questions become what should be our level of involvement, and in what capacity. Fortunately, DoD leadership provides us direction:

in April 2018, Under Secretary of Defense for Personnel and Readiness, Ms. Stephanie Barna, issued guidance to military commanders on the issue of “communicating factual information or background information, or discussing the views” of state-level legislation to legislators, opining that such communication by DoD employees or military members is “generally legally permissible, provided it is done through official channels.”[54] So long as commanders and military officials keep this guidance in mind, there should be no issue under **DoD Directive 1344.10**, *Political Activities by Members of the Armed Forces*. Discussing with state and local officials the issue of military spousal employment would probably not be considered “partisan political activity,”[55] nor should there be an issue under **Air Force Instruction (AFI) 51-508**, *Political Activities, Free Speech, and Freedom of Assembly of Air Force Personnel*, as long as the member avoids any activity that may be “reasonably viewed as directly or indirectly associating the AF or DoD with a partisan activity or is otherwise contrary to the spirit and intention of the Instruction.”[56]

Active engagement is key. When engaging with state officials on this issue, **AFI 35-105**, *Community Relations*, states Air Force leaders should have “open, timely and honest dialogue” with community and opinion leaders and that “community outreach enables community leaders to understand Air Force missions and priorities through direct personal contact and dialogue with Air Force personnel, and to convey community leaders’ understanding to broader community audiences and opinion leaders.”[57] As for the wear of uniform at any engagement, since having open, timely, and honest dialogue with community and opinion leaders is “official business” for Air Force leaders, it makes sense that Air Force leaders could wear their uniform at an event or meeting. Admittedly, there is concern about furthering political activities when it comes to engaging with political officials. **AFI 36-2903**, *Dress and Personal Appearance of Air Force Personnel*, para. 1.4.6, states that Air Force members may not wear the uniform “[w]hile furthering political activities, private employment or commercial interest.”[58] AFI 36-2903 also states that Air Force members may not wear the uniform “[w]hen it

would discredit the Armed Forces.”[59] Nonetheless, if a commander or military member wore their uniform at this event, it is unlikely it would discredit the Armed Forces when: wearing the uniform to bring attention to spousal issues is appropriate and in good taste; commanders volunteer to go; there is no additional cost to the government; there is no interference with military duties; and community engagement is served. Ultimately, as long as DoD officials avoid lobbying or advocating for certain provisions or positions, engagement with local officials concerning military spousal licensure should not violate ethical or other rules of engagement.

CONCLUSION

Professional military spouses are more than dependents. Many have more education, higher earning potential, and job satisfaction than their military spouse. Yet, most are often forced to quit their job and start over in the new PCS location. Rarely does a military spouse find employment immediately upon arrival to their new duty station, and when many spouses finally interview, the gaps in employment make it difficult to explain to potential employers. Further, many companies are reluctant to hire military spouses because the cost of investment may not be worth it to the company when the military spouse may have to leave two or three years after arriving at the new duty location. As more attention focuses on the issue of military spousal employment, most states are taking proactive approaches. However, whether it be temporary licensure, licensure by endorsement, or forcing employers to undertake the burden, there are still limits and obstacles to accommodating military spouses, such as time delays, unnecessary fees, and cutting out bureaucracy. Most of the significant laws related to this issue still require spouses to jump through hoops to get a permanent license, falling short of reasonable requirements needed to help military spouses. The realities for many military families is that military spouses are frequently out of work due to preparing for or recovering from a military PCS. Legislation that allows spouses to have minimal gaps in employment would allow the military to retain more families through a career full of moves and transitions

ABOUT THE AUTHOR



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The author thanks Mr. Marcus Beauregard for his valued contributions to this article. Mr. Beauregard is the Chief of the DoD-State Liaison Office (DSLO) within the Office of the Deputy Assistant Secretary of Defense for Military Community and Family Policy. Together with a Senior Liaison and 8 Regional Liaisons, he works with state governments on a slate of key issues important to service members and their families. **Additionally, the author thanks Ms. Tammy Perreault**, Defense-State Liaison Office, who also provided resources on this issue, **Maj Meghan Smorol (USAFR)**, who has worked tirelessly with Illinois officials on this issue, and contributed to this article, and **Capt Allison Johnson** who provided ethics research.

EXPAND YOUR KNOWLEDGE:

[EXTERNAL LINKS TO ADDITIONAL RESOURCES](#)

- **Veterans:** Military Spouse Interstate License Recognition Options
- **Military One Source:** Managing Your Career as a Military Spouse During a PCS
- **Federal News Network:** The secret lives of military/federal spouses
- **Military Times:** Helping military spouses with professional licensing costs after PCS moves
- **Military Families Learning Network:** Unemployment Benefits for Military Spouses after a Permanent Change of Station
- **MOAA:** What Military Spouses Need to Know About Recent Changes to Federal Hiring
- **USA Jobs:** Hiring Path

ENDNOTES

- [1] U.S. Chamber of Commerce Foundation, *Military Spouses in the Workplace – Understanding the Impacts of Spouse Unemployment on Military Recruitment, Retention, and Readiness* (June 2017), <https://www.uschamberfoundation.org/sites/default/files/Military%20Spouses%20in%20the%20Workplace.pdf> (last visited Aug. 23, 2019). See also The Council of Economic Advisers, *Military Spouses in the Labor Market* (May 2018), <https://www.whitehouse.gov/wp-content/uploads/2018/05/Military-Spouses-in-the-Labor-Market.pdf> (Accessed Aug. 23, 2019).
- [2] *Id.* at 2. This number varies. According to Blue Star Families, it is around 18%. See, *Blue Star Families: Challenges Facing Our Military Spouses*, https://bluestarfam.org/wp-content/uploads/2018/09/BSF_final_Milspouse_Unemployment_infographic.pdf (Accessed Aug. 23, 2019).
- [3] *Id.* at 9.
- [4] *Id.* at 5.
- [5] *Id.*
- [6] *Id.* at 8.
- [7] *Id.* at 10.
- [8] *Id.* at 8.
- [9] *Id.* at 8.
- [10] *Id.* at 2.
- [11] *Id.*
- [12] Additional findings noted that military moves often come with little or no notice. 49% of military spouses reported that they had less than 3 months to prepare for a move; 11% reported they had less than a month. Location of bases in rural areas may cause additional career challenges specific to rural or remote locations (*Id.* at 6). 81% of military families have discussed leaving military service due to career opportunities for both spouses (*Id.* at 13). Finally, 61% of spouses said that deployments create the greatest stress on the family, 47% stated finding work/managing their career was the greatest stress (*Id.* at 14)
- [13] The Council of Economic Advisers, *Military Spouses in the Labor Market* (May 2018), <https://www.whitehouse.gov/wp-content/uploads/2018/05/Military-Spouses-in-the-Labor-Market.pdf> (Accessed Aug. 23, 2019).
- [14] *Id.* at 4.
- [15] *Id.* at 3.
- [16] *Id.* at 5, citing REACH, *Military Spouse Licensure Portability Examination State Report*, University of Minnesota (Nov. 2017), at 1.
- [17] NDAA of FY 2018 (PL 115-91, Section 556(b)). This report was completed in March 2018.
- [18] NDAA of FY 2018 (PL 115-91, Section 556(a))
- [19] Department of Defense and Department of Homeland Security, *Report on the Barriers to Portability of Occupational Licenses Between States*, (Mar. 2018), p. 1. [hereinafter “Report on Barriers to Portability”] (The report itself is only 20 pages long. However, the appendices provide a wealth of information on military spouse demographics, current spousal licensure laws, and the physical therapy licensure compact.)
- [20] *Id.*
- [21] Report on Barriers to Portability, *supra* note 19, p. 19.
- [22] Department of Defense, *Review of Existing Obstacles to Greater Military Spouse Licensure and Credentialing Portability Across the States*, (Mar. 2019), p.2.
- [23] *Id.* at 2-3.
- [24] *Memorandum for the National Governor’s Association*, Feb. 23, 2018, <https://media.defense.gov/2018/Feb/23/2001881660/-1/-1/1/Military-Family-School-Consideration-and-Professional-Licensure-Reciprocity.pdf>
- [25] Two sources to find how a state has addressed this issue are Military OneSource’s Military State Policy Source found at <https://statepolicy.militaryonesource.mil> and the US Department of Labor’s Military spouse License Recognition Options, found at https://www.veterans.gov/milspouses/military_spouse_txt.htm.
- [26] Office of the Governor, Doug Ducey, *Arizona Becomes First State to Establish Universal Recognition of Occupational Licenses*, Apr. 10, 2019, <https://azgovernor.gov/governor/news/2019/04/arizona-becomes-first-state-establish-universal-recognition-occupational> (Accessed Aug. 23, 2019).
- [27] *Id.*

- [28] AZ RS: 55 § 34-4302. Out-of-state applicants: residents: military spouses: licensure: certification: exceptions (also known as Arizona House Bill HB 2569, 2019). Reviewing the new legislation with the prior statute, there was little change for military spouses, with the exception that military spouses with more than one year of experience can be licensed under this provision without being supervised by a licensed provider (it had been five years).
- [29] Utah Code Ann. § 4-1-111 1953 (S.B. 227, 2018 General Session). The change in the law also exempted military spouses from having to pay licensure fees in the event the spouse seeks a license. Of note, the law does not include non-state regulated actors, specifically the Utah Bar Association. Spouses still need to identify themselves to the prospective employer as a military spouse, provide military orders, license, and job application.
- [30] S.D. Codified Laws § 36-1B-1 (2019); see also S.D. House Bill 1111. HB 1111 requires boards to issue a license within 30 days of receiving a *completed application*. The previous law required boards to issue a temporary license if the permanent license could not be provided in 30 days. HB 1111 eliminates South Dakota's former temporary license provision. Nonetheless, under the current law, it could still take a spouse two to three months to secure a license as part of the application process.
- [31] Idaho Code Ann Code, 93 § 67-9306 (House Bill No. 248). Of note: there is no definition on what boards are required to do to provide this endorsement, potentially making this "licensure by endorsement" an empty vessel.
- [32] FL Stat. § 23: 456.024, Health Professions and Occupations: General Provisions
- [33] FL Stat. § 23: 455.02, Licensure of members of the Armed Forces in good standing and their spouses or surviving spouses with administrative boards or programs. The Florida Department of Business and Professional Regulation has confirmed that they actually issue licenses with this minimal level of scrutiny. The only other document they request is a copy of the practice act from the state issuing the license (Information courtesy of Mr. Marcus Beauregard). Note: this law does not apply to every profession, see § 20: 20.165, Department of Business and Professional Regulation.
- [34] Report on Barriers to Portability, *supra* note 19, p. 10.
- [35] Co. Rev. Stat. § 12-71-101 (Definitions), 12-71-102 (Authority to practice – reciprocity)
- [36] Bill currently in progress. See, First Engrossment, Engrossed Senate Bill No. 2306, Sixty-six Legislative Assembly of North Dakota, North Dakota Century Code, § 43-51-11.1. This bill also requires that the spouse have two years working in the profession out of the past four in order to qualify, which could impede the benefit of the law for military spouses who may not have had an opportunity to work at the last duty station. Additionally, two years seems odd for a temporary license.
- [37] La. Rev. Stat. Ann. § 37:3651. For instance, the Louisiana Board of Pharmacy issues only four month temporary licenses. Also, the provisions of this section do not apply to any applicant receiving a dishonorable discharge or a military spouse whose spouse received a dishonorable discharge.
- [38] Report on Barriers to Portability, *supra* note 19, p. 11.
- [39] REACH, *Military Spouse Licensure Portability Examination State Report*, University of Minnesota (Nov. 2017), at 2.
- [40] Report on Barriers to Portability, *supra* note 19, p. 11.
- [41] *Id.*, at 12.
- [42] *Id.*, at 14.
- [43] Department of Defense. "Interstate Compacts to Support License Portability." (undated)
- [44] Report on Barriers to Portability, *supra* note 19, p. 17.
- [45] Nursecompact.com. (2019). [online] Available at: https://nursecompact.com/Updated_onepaged_NLC.pdf [Accessed 7 Oct. 2019]. See also, Nurse.org (2019). *Updated Map: Enhanced Nursing Licensure Compact (eNLC) July 2019* [online]. Available at: <https://nurse.org/articles/enhanced-compact-multi-state-license-eNLC/> (Accessed 3 Jul. 2019).
- [46] Ncsbn.org. (2019). [online] Available at: www.ncsbn.org/NLC_Fast_Facts.pdf. (Accessed 31 Mar. 2019)
- [47] Statepolicy.militaryonesource.mil. (2019). *Military State Policy Source*. [online] Available at: <https://statepolicy.militaryonesource.mil/key-issue/interstate-compact-to-support-license-portability> [Accessed 7 Oct. 2019]. While not specifically a compact, as for military spouse attorneys, according to Military Spouse J.D. Network, 37 jurisdictions have military spouse licensing accommodations. "Licensing accommodations" include bar membership without having to take another state's bar and reduction of barriers to employment for military spouses. See Military Spouse J.D. Network, www.msjdn.org. (Apr 1, 2019)
- [48] Interview with Mr. Marcus Beauregard, Chief of the DoD-State Liaison Office (DSLO) (Apr. 10, 2019).
- [49] *Id.*
- [50] *Id.*
- [51] Shawna Sowersby, *Washington misses chance to streamline moves for out-of-state nurses, some say*, The News Tribune, Mar. 5, 2019, <https://www.thenewstribune.com/news/local/article227087114.html> (Accessed July 8, 2019).
- [52] See WA House Bill 1812, Sixty-six Legislature, 2019 Regular Session, <http://lawfilesexet.leg.wa.gov/biennium/2019-20/Pdf/Bills/House%20Bills/1812.pdf>. This bill did not pass.

- [53] Smorol, M. (2019). RE: FW: Mil Spouse Licensure (UNCLASSIFIED). [email].
- [54] Stephanie Barna, Office of the Under Secretary of Defense. *DoD Key Issues Supporting Service Members and Families for 2019*, Apr. 23, 2018.
- [55] U.S. Dep't of Def., Dir. 1344.10, Political Activities by Members of the Armed Forces, Encl 2 (19 February 2008). Partisan political activity is considered "Activity supporting or relating to candidates representing, or issues specifically identified with, national or state political parties and associated or ancillary organizations or clubs."
- [56] U.S. Dep't of Air Force, Instr. 51-508, Political Activities, Free Speech, and Freedom of Assembly of Air Force Personnel, para 2.4.3 (12 October 2018).
- [57] U.S. Dep't of Air Force Instr. 35-105, Community Relations, para 10.2 (23 June 2017).
- [58] U.S. Dep't of Air Force Instr. 36-2903, Dress and Personal Appearance of Air Force Personnel, para 1.4.6 (15 April 2019).
- [59] *Id.* at, para 1.4.4

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Book Review

Perilous Times: Free Speech in Wartime

BOOK BY GEOFFREY R. STONE

REVIEWED BY CAPTAIN MATTHEW BLYTH, USAF

The difficult balance between liberty and security...when do unwanted or unpopular ideas actually pose a danger?

Free expression is the “indispensable condition” for our other basic freedoms.[1] But what happens in wartime when this cherished right collides violently with national security? Do our constitutional rights ebb and flow with each conflict, or do they remain static and stoic in the face of seemingly existential crises? In *Perilous Times: Free Speech in Wartime*, Geoffrey Stone surveys United States history during six periods of actual or imminent war, from the Alien and Sedition Acts of 1798 to Vietnam, to draw instructive lessons on our reactions, and overreactions, to wartime speech.[2] His thesis: During times of war as passions rise and threats loom, both government and citizens take actions that, with the benefit of hindsight, exceed necessity and threaten individual liberties. Stone’s compelling argument offers timeless lessons for legal professionals about the intersection of free expression and national security. This problem does not belong to history; indeed, the Global War on Terrorism (GWOT) presents the latest installment.

THE ALIEN AND SEDITION ACTS OF 1798

The two primary parties in the early Republic, the Federalists and the Republicans, viewed the French Revolution through their ideological lenses: **Republicans** (who valued liberty over security) lauded a principled stand against an unjust government, while **Federalists** (taking the opposite approach) saw merely chaos.[3] As tensions rose with France (America’s then-recent ally) over repeated slights, the Federalists raised the threat of “internal subversion”—a theme seen time and again—and conflated Republican dissent with disloyalty.

Congress responded with legislative measures known as the Alien and Sedition Acts.[4] **The Alien Enemies Act** allowed wartime deportation or confinement of an enemy nation’s citizens.[5] **The Alien Friends Acts** allowed detention and deportation of any noncitizens deemed dangerous.[6] Finally, the **Sedition Act** prohibited “false, scandalous, and malicious” statements against the government made with intent

to defame, bring into contempt, or excite hatred.[7] Once passed, applying the Acts raised a thorny question: When do unwanted or unpopular ideas *actually* pose a danger? In this fevered atmosphere, the federal bench became an ally against sedition (read: Republicanism).[8]

War fervor can lead to overreaction. Not only can Congress craft disproportionate solutions to legitimate problems, but parties may use national security threats for partisan ends.

This period showed how war fervor leads to overreaction. Not only can Congress craft disproportionate solutions to legitimate problems, but parties may use national security threats for partisan ends. In such moments of high anxiety, judges and juries may not protect civil liberties. Finally, the Acts reveal the elusive line between legitimate and malicious dissent. When this line is unclear, the mere threat of prosecution chills the willingness to criticize. Though the author underplays the procedural uncertainty and substantive threat facing the young nation, he convincingly lays out the key themes that resonate through these six periods and beyond.

During the American Civil War, free speech ideals collided with reality.

THE CIVIL WAR

During the American Civil War, free speech ideals collided with reality. Fought from 1861 to 1865, the Civil War presented an existential threat to the nation. Facing riots in Baltimore and threats to key rail links with the North, President Abraham Lincoln suspended the writ of habeas corpus in areas of Maryland blocking access to Washington, D.C. The Constitution states that, “The privilege of the writ of habeas corpus shall not be suspended, unless when in

cases of rebellion or invasion the public safety may require it.”[9] The “great writ” offered a “fundamental instrument for safeguarding individual freedom against arbitrary and lawless” government action; its suspension removed the ability of citizens to challenge their detention in court.[10]

In *Ex parte Merryman*, Chief Justice Roger Taney ruled that the President could not suspend the writ, a power delegated solely to Congress.[11] Lincoln ignored the ruling, arguing that the “war power” and his role as Commander in Chief imbued him with authority to defend the nation against imminent destruction. To forbid him this power would allow “all the laws, *but one*, to go unexecuted, and the government itself go to pieces, lest that one be violated.”[12] Without the writ, military authorities were central to law and order. They arrested between 13,000 and 38,000 civilians during the war,[13] and commanders exercised their authority in widely divergent ways. As former Chief Justice Rehnquist wrote, “statements critical of the government...were punished by fine and imprisonment.... Martial Law was the voice of whichever general was in command.”[14]

The Civil War raised questions of persistent relevance. Do the ordinary guarantees of free speech bend in the face of threats to the government?

The Civil War raised questions of persistent relevance. Do the ordinary guarantees of free speech bend in the face of threats to the government? Are judges even capable of making this determination, or should it remain an executive prerogative? Ultimately, the author concludes that Lincoln, faced with an unprecedented and existential crisis, took prudent and limited action to curtail free speech, though he failed to control excesses wrought by military commanders. Even recognizing the grave nature of the danger, the author downplays the precedential danger of the executive ignoring a mandate from the judiciary.

WORLD WAR I

The United States resisted entering World War I (WWI) for three years until 1917, when German targeting of neutral shipping led to war. President Woodrow Wilson, raising the specter of active foreign subversion—just as Federalists had over a century earlier—established a committee that effectively conscripted public opinion for war.[15] A tip line yielded thousands of daily accusations of “disloyalty.” In this environment, Congress passed the infamous Espionage Act of 1917 and Sedition Act of 1918.

The Espionage Act broadly criminalized speech: it banned false statements that interfered with military success, prevented persons from causing *or attempting* to cause insubordination, and forbade obstruction of recruiting and enlistment activities. **The Sedition Act** barred disloyal or abusive language about the government.

Swept up in the wartime mood, courts loosened standards and held that speech need only have a “bad tendency” to cause insubordination.... “War fever turned dissent into disloyalty, and disloyalty into crime.”

Swept up in the wartime mood, courts loosened standards and held that speech need only have a “bad tendency” to cause insubordination.[16] Stunning results followed. For instance, a Russian immigrant stated that “I am for the people and the government is for the profiteers” during an antiwar rally. There were no soldiers (and, in fact, no men) present, but she nonetheless received a ten-year sentence.[17] In essence, opposition to the war equated to obstructing the war: “War fever turned dissent into disloyalty, and disloyalty into crime.”[18]

Beginning with President Wilson, the government enthusiastically bent to public demands and wielded the sword of

justice without discretion. The author faults the executive branch officials enforcing the Acts, but reserves special ire for the federal judiciary, including the Supreme Court, for its rash interpretation and application of the law, as well as the approval of unconscionably long sentences.[19] Following the war, Congress repealed the Sedition Act. Most prisoners had their sentences reduced and were freed. While the excesses were quickly recognized, this dark chapter nonetheless remains a cautionary tale. The author not only captures these excesses well, but returns to them to pose the question we still cannot answer: Why don’t these lessons last longer?

Fascism and communism spurred popular fear in the years before World War II (WWII).

WORLD WAR II

Fascism and communism spurred popular fear in the years before World War II (WWII). Unlike WWI, the forced entry following the attack on Pearl Harbor galvanized the nation. This led to very different results. Though Congress passed the **Smith Act**, which required alien registration and restricted advocacy against the government, only two wartime prosecutions resulted.[20] Meanwhile, the Supreme Court continued, and even accelerated, a speech-protective shift. Of note, in *West Virginia State Board of Education v. Barnette*, the Court held schools cannot require children to salute and pledge allegiance.[21] Justice Jackson, with rhetorical flourish, wrote that “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion....”[22]

Yet the period was not free of wartime overreactions. In 1942, **President Roosevelt issued Executive Order (EO) 9066**, authorizing the Army to exclude people from designated “military areas.” In *Korematsu v. United States*, the Court upheld an exclusion order that interned anyone of Japanese ancestry, regardless of citizenship.[23] The majority cast the measure in light of wartime necessity, rather than race. In

dissent, Justice Frank Murphy questioned the rationale for differential treatment of the Japanese.[24] He wrote, “I dissent, therefore, from this legalization of racism.”[25] Time vindicated the dissent and exposed the exclusion’s folly. A 1983 commission reviewed the evidence supporting the policy. It found fabricated assertions, concluded that the most dangerous individuals were already in custody, and revealed that senior military figures assessed the risk of Japanese attack on the West Coast as virtually zero.

World War II saw less repressive government action with regard to speech. Prosecutions for disloyalty were rare and DOJ officials applied the laws with discretion. The Supreme Court increased its protections on speech and association. However, the Court, and the nation, cannot erase the racist treatment of Japanese citizens. This dark hour where, with the military’s complicity, ancestry became a sole reason for detention, will remain a chilling reminder of excess. The author sets up the stark contrast with World War I. Yet in this section, and throughout the work, his attempts to explain systematic causes for period-to-period differences in wartime speech are unsatisfying and forced. Perhaps the reasons are too complex for reductive explanations.

President Harry Truman’s EO 9835 established a loyalty program: a “reasonable belief” that a person would be disloyal meant termination or denial of federal employment.

COLD WAR

Though 1945 brought victory in WWII, the United States quickly entered a new “Cold War” with its erstwhile ally, the Soviet Union. “**Loyalty**” became the defining issue in politics. Fear burrowed relentlessly into the American psyche. Politicians and government officials vigorously pursued communists or “fellow travelers” for either present or past beliefs.[26]

President Harry Truman’s EO 9835 established a loyalty program: a “reasonable belief” that a person would be disloyal meant termination or denial of federal employment. Little due process existed. The results: 4.7 million Americans were investigated, 350 were discharged, and exactly zero cases of espionage or subversive malfeasance were found.[27] Even if cleared, those investigated faced personal and professional repercussions.

Congress was not immune. The **McCarran Internal Security Act** required registration of all communist organizations and allowed detention, without judicial review, of any person who *might* participate in “acts of espionage or sabotage.”[28] Meanwhile, the **House Un-American Activities Committee (HUAC)** tarred respondents with “guilt by association.” But the emblematic figure of the era was **Senator Joseph McCarthy** of Wisconsin. He fueled the hysteria by producing fabricated “lists” of avowed communists in and out of government. In time his excesses became evident, yet the author reminds us that, for several years, he rode a tidal wave of popularity that met with little resistance. Leaders might shake their heads, but few stood up to this juggernaut.

The Supreme Court had a mixed record. In a 1951 decision that encouraged “red hunters” nationwide, the Court upheld convictions for *conspiring* to advocate the overthrow of the government (rather than so advocating).[29] Yet by 1957 the Court evolved and held that advocacy of forcible overthrow alone is not enough—without *some* effort to bring about that end the advocacy was “[t]oo remote from concrete action.”[30] More speech protective decisions followed: the Court invalidated a statute requiring state employees to swear they did not belong to an organization advocating violent government overthrow;[31] granted an as-applied challenge to a statute requiring out-of-state associations to disclose membership lists;[32] and reversed a labor leader’s conviction for refusing to answer HUAC’s questions on the political activities of former Communist members.[33]

The author laments a stunning decline in support for civil liberties, even among those tasked with their preservation—the press, politicians, lawyers, courts, and educators. The

failure was pervasive. Voices for suppression enjoyed broad support in combatting what, in retrospect, was as a minor threat to the government. The true threat came from this erosion of core rights: instead of focusing on espionage from a law enforcement perspective, the country instead stifled open debate and fostered “a climate of fear and timidity.”[34]

A key concern the Vietnam Era raised:
How can the public, or, indeed,
Congress, act as a check against
excessive monitoring when the
scale and scope of monitoring are
unknown to them?

THE VIETNAM WAR

The Vietnam War (1955-1975) grew in controversy as it gradually escalated. By the late 1960s, widespread demonstrations, bombings, and building takeovers dominated the news. The government raised the specter of subversion by linking protests to possible communist influence. This translated to extensive domestic surveillance and active steps against the anti-war movement. For instance, the FBI, CIA, NSA, Army Intelligence, and even the IRS were harnessed to monitor and thwart the anti-war movement.[35]

Yet the Supreme Court protected dissent vigorously during this period. The Court upheld students’ right to wear black armbands to protest the Vietnam War.[36] It rejected the Georgia House of Representatives action to prevent a duly elected representative from taking a seat because he endorsed statements criticizing the draft.[37] And it struck down a ban on wearing military uniforms in a theatrical production that tended to discredit the armed forces.[38] Looking back through history, the Court would have upheld these cases. Yet the Court had come to understand the necessity of protecting speech at the margin.[39] The Vietnam era demonstrates that courts, when focused on applying First Amendment protections in spite of popular mood, can serve as a bulwark against excess. The author deserves praise for presciently identifying a

key concern the Vietnam Era raised: How can the public, or, indeed, Congress, act as a check against excessive monitoring when the scale and scope of monitoring are unknown to them? This resonates profoundly today.

The author suggests that each
generation’s notion of “dangerous”
speech, seemingly justified at the
time, rarely survives retrospective
scrutiny.

PERILOUS TIMES: REDUX

The author suggests that each generation’s notion of “dangerous” speech, seemingly justified at the time, rarely survives retrospective scrutiny. And when government panders to baser instincts for political gain, liberty comes under threat. As Judge Learned Hand wrote, “Liberty lies in the hearts of men and women. No law can save what dies there.”[40] The broader public must acknowledge liberty’s value or it dissipates during wartime. Congress, though it sometimes acted with restraint, often failed to check public hysteria.

These issues continue to resonate. This 2004 book only briefly addresses the challenges of the Global War on Terrorism (GWOT). The **attacks of September 11, 2001**, forced a reckoning on the balance between liberty and security. In October 2001, the **USA PATRIOT Act** altered this balance.[41] This 300-page Act included provisions authorizing indefinite detention of immigrants; allowed law enforcement to conduct “sneak and peek” warrants with delayed notification; expanded the use of **National Security Letters**, which allowed the FBI to search phone, email, and financial records without a court order; and expanded access to business records.

The following years, more familiar to today’s readers, saw legal and political challenges to the breadth of the Act. The Supreme Court struck down indefinite detention of immigrants, requiring the government to provide the opportunity to challenge enemy combatant status.[42] This may have

seemed like an abstraction to most citizens, but **Edward Snowden’s 2013 revelations** regarding, among other things, the depth of National Security Agency (NSA) surveillance programs, including bulk telephone record collection, made the problem concrete.[43] In 2015, the **USA Freedom Act** ended this practice without court authorization.[44]

Every generation facing tension
between liberty and security has said,
“This time is different.”

How have we fared over the past 18 years? Certainly, terrorism presents a different challenge than the large-scale wartime conflicts described above; perpetrators, sometimes tied to terrorist groups and sometimes inspired by such groups, are difficult to detect, identify, and counteract. But as legal professionals who will help shape the future of national security law, we must ask ourselves if this challenge is so different that old lessons do not apply. Every generation facing tension between liberty and security has said, “This time is different.” Congress, on behalf of a justifiably angry, wounded, and fearful nation, passed sweeping legislation 70 days after the attacks of September 11. In the moment, assessing risk and crafting moderate solutions are hard. The hope is that politicians, and indeed the public, can recognize excess and adjust the balance accordingly. Yet this only works

with transparency: when secrecy in the name of security obscures public view, can we assess the balance of liberty and security without knowing the full picture?

When secrecy in the name of security
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CONCLUSION

The author’s presentation is highly readable and well argued, but also extensively sourced for anyone that wants to dive into the weeds. While his conclusions are debatable, they provide excellent food for thought on a challenge that will recur. His key messages are worth internalizing. History is unkind to the wartime curtailment of liberty in the interest of security. Congress and the Executive, motivated by an urge to protect, may threaten the liberties that animate our great nation. We also see that courts were not immune to wartime pressures. Results-oriented approaches yielded convictions unsupported by law or evidence. As legal professionals, we may find ourselves in a position to influence this debate, whether in or out of the military. Let us keep these lessons in mind when striking the difficult balance between liberty and security.

ABOUT THE REVIEWER



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EXPAND YOUR KNOWLEDGE:

EXTERNAL LINKS TO ADDITIONAL RESOURCES

- **PBS:** Prelude to the Red Scare: The Espionage and Sedition Acts
- **National Constitution Center:** Lincoln and Taney's great writ showdown
- **National Archives:** Defining a Spy: The Espionage Act
- **NPR:** Once Reserved For Spies, Espionage Act Now Used Against Suspected Leakers
- **National Archives:** Executive Order 9066: Resulting in the Relocation of Japanese
- **Truman Library:** Executive Order 9835: Truman's Loyalty Program
- **Dept of Justice Archive:** USA PATRIOT Act
- **Washington Post:** USA Freedom Act: What's in, what's out

ENDNOTES

- [1] *Palko v. Connecticut*, 302 U.S. 319, 326–27 (1937).
- [2] GEOFFREY STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME* (Norton 2004).
- [3] *Id.* at 25.
- [4] Congress fought bitterly over the Acts. The recently-ratified Constitution's meaning was unclear on critical matters, including the First Amendment's breadth, or whether it even protects noncitizens. (It does.)
- [5] This remains law. *See* 50 U.S.C. § 21–24
- [6] An Act respecting Alien Enemies, 5th Cong, 2d Sess, ch 66 (1798).
- [7] An Act for the Punishment of Certain Crimes against the United States, 5th Cong, 2d Sess, ch 74 (1798).
- [8] STONE, *supra* note 2, at 44.
- [9] U.S. CONST art.1, §9, cl. 2. Note that Article I enumerates the powers of Congress, not the executive. Until the Civil War, the writ was suspended only twice—both in brief and localized circumstances. STONE, *supra* note 2, at 120.
- [10] *Harris v. Nelson*, 394 U.S. 286, 290–91 (1969).
- [11] 17 F. Cas. 144 (D. Md. 1861) (No. 9,487).
- [12] STONE, *supra* note 2, at 122 (emphasis added).
- [13] *Id.*
- [14] WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* 73–74 (Knopf 1998).
- [15] Caryn E. Neumann, *Committee on Public Information*, <https://www.mtsu.edu/first-amendment/article/1179/committee-on-public-information> (last visited July 1, 2019).
- [16] STONE, *supra* note 2, at 170–71.
- [17] *Id.* at 171–72.
- [18] *Id.*
- [19] *Id.* at 228. By contrast, the Sedition Act of 1798 provided for only two years maximum imprisonment.
- [20] Pub L No 670, 54 Stat 670, 671 (1940).

- [21] 319 U.S. 624 (1943).
- [22] *Id.* at 642.
- [23] 323 U.S. 214 (1944).
- [24] No similar measures occurred with Italians or Germans, the other enemies in the War.
- [25] *Korematsu v. United States*, *supra* note 23, at 244–46, 248 (Jackson, J., dissenting).
- [26] STONE, *supra* note 2 at 319. By 1950 there were approximately 10,000 active Communist Party members, but 250,000 former members.
- [27] *Id.* at 348.
- [28] The Internal Security Act of 1950, Title II, § 103, Pub. L. 31-831, 4 Stat. 987 (1950).
- [29] *Dennis v. United States*, 321 U.S. 494 (1951).
- [30] *Yates v. United States*, 354 U.S. 298, 321–22 (1957).
- [31] *Elfbrandt v. Russel*, 384 U.S. 11, 13, 17, 19 (1966).
- [32] *NAACP v. Alabama*, 357 U.S. 449, 462–63 (1958).
- [33] *Watkins v. United States*, 354 U.S. 178, 197–200 (1957).
- [34] STONE, *supra* note 2, at 374.
- [35] *Id.* at 488–497.
- [36] *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 508, 510–11 (1970).
- [37] *Bond v. Floyd*, 385 U.S. 116, 120, 133–34 (1966).
- [38] *Schacht v. United States*, 398 U.S. 58, 63 (1970).
- [39] STONE, *supra* note 2, at 521.
- [40] *Id.* at 536 (quoting Learned Hand, *The Spirit of Liberty*, in Irving Dillard, ed., *The Spirit of Liberty: Papers and Addresses of Learned Hand* 189–90 (Knopf 1974)).
- [41] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act, Pub. L. 107-561, 115 Stat. 272 (2001).
- [42] *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).
- [43] Snowden Revelations, LAWFARE BLOG, <https://www.lawfareblog.com/snowden-revelations> (last visited June 5, 2019). Snowden was ultimately charged with violating the Espionage Act of 1917.
- [44] Uniting and Strengthening America by Fulfilling Rights and Ensuring Effective Discipline Over Monitoring Act, Pub. L. 114-23, 129 Stat. 268 (2015).

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THE JAG IN THE ARENA

The Ethical Challenges of the Operational Lawyer

BY LIEUTENANT COLONEL JASON S. DESON

Many military lawyers might believe they are only in the arena when they are in the courtroom. Nothing can be further from the truth—especially for the operational lawyer.

It is not the critic who counts; not the man who points out how the strong man stumbles, or where the doer of deeds could have done them better. The credit belongs to the man who is actually in the arena, whose face is marred by dust and sweat and blood; who strives valiantly; who errs, who comes short again and again, because there is no effort without error and shortcoming; but who does actually strive to do the deeds; who knows great enthusiasms, the great devotions; who spends himself in a worthy cause; who at the best knows in the end the triumph of high achievement, and who at the worst, if he fails, at least fails while daring greatly, so that his place shall never be with those cold and timid souls who neither know victory nor defeat.[1]

Many military lawyers might believe they are only in the arena when they are in the courtroom. Nothing can be further from the truth—especially for the operational lawyer. While lawyers have found themselves increasingly vital to the planning and execution of military operations, most of those operations occur without the actual presence of lawyers. There was no lawyer on the **gunship** that mistakenly opened fire on a *Médecins Sans Frontières* medical facility in Kunduz, Afghanistan in October 2015, yet one of the aircrew still expressed reservations about whether they were engaging a valid military objective under the law of war.[2] In the special operations forces (SOF) context, there are no lawyers on the teams conducting missions, but we know from those more notorious cases where missions went wrong like *Operation Red Wings*, that decisions were made with law of war ramifications.[3] While some may be inclined to ask whether a lawyer could

have done more to prevent this and similar incidents, the better question is whether the *process* failed for the lawyer to get the *right* advice to the *right* people at the *right* time to make the *right* decision.

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With all of the challenges of the current strategic environment, the ethical duty of the operational law practitioner to uphold *good process*—which includes not only making sure that the ***right things are done the right way***, but also that the practitioner is in the ***right place at the right time***—takes on increased significance. This ethical duty is not limited to lawyers working in the halls of the White House or the corridors of the Pentagon. It applies to all military lawyers. It may sound simple enough, but it is a duty that never ceases and underlies all the ethical duties espoused by the rules of professional conduct. A good lawyer may be competent and diligent, but what good is that competence and diligence if the lawyer is not present at the key moment of operational decision?

A good lawyer may be competent and diligent, but what good is that competence and diligence if the lawyer is not present at the key moment of operational decision?

In the national security context, ethical rules like competence and diligence take on new meanings and obligations. The good news is that it is relatively simple to identify these ethical baselines. The bad news is that it takes a great deal of dust and sweat and blood to achieve them. To uphold *good process*, the JAG must be *in the arena*. The emergence of operations law as a separate and distinct field of practice

was due in large part to JAGs who embodied the concept of being in the arena—they had to fight for their place on the team.[4] We bear the same burden today.

THE RULES OF THE GAME: THE NATIONAL SECURITY PROCESS AND THE ETHICS RULES

[T]he majority of legal advice within the national security process is not directed, but is the product of practice, custom, and personal interchange between lawyer and client. That means that good process requires personal persuasion, presence, and value added, or the lawyer will find that he or she is only contributing to decisions where legal review is mandated and then only as a last stop on the bus route.[5]

The writings of **Judge James E. Baker**, the current chair of the American Bar Association (ABA)'s Standing Committee on Law and National Security, provide a good source for the “rules of the game.”[6] Judge Baker once described the plain truth that “good government is difficult work.”[7] What is true in the broader national security context is equally true at the operational and tactical levels. What makes it so difficult is not just knowledge of the rules themselves, but also an added commitment to *the process* that applies and enforces those rules—especially when our clients are at their tensest and focused on *the outcome* over the process.

NATIONAL SECURITY PROCESS FOR THE JAG

In his book, *In the Common Defense*, Judge Baker writes that the law “depends on the morality and courage of those who apply it” and “on the moral courage of lawyers who raise tough questions, who dare to argue both sides of every issue, who insist upon being heard at the highest levels of decision-making, and who ultimately call the legal questions as they believe the Constitution dictates and not necessarily as policymakers [or commanders] may want at a moment in time.”[8] In a 2002 address to senior JAGs, Judge Baker noted, “It is axiomatic that the national security lawyer’s duty is to guide decision-makers toward legally available options. In performing this function in a timely and meaningful manner, the lawyer provides for our physical security. In doing it faithfully, based on the application of law, they provide

for the security of our way of life, which is founded on the rule of law.”[9] The key to success is what Judge Baker refers to as *good* process—good process, in the national security context, leads to better results because it puts players in the right place at the right time with the right tools to make the right call.[10]

Process can be viewed as a nuisance in the operational world, but good process starts with the old adage—work smarter, not harder.

Process can be viewed as a nuisance in the operational world, but good process starts with the old adage—work smarter, not harder. For this reason, Judge Baker suggests that the *process* of national security law is arguably more important than its *substance*. [11] In reality, *process* underlies the *substance* of not only national security law, but also an attorney’s ethical obligations. The key to understanding this is to look at these rules through the lens of *process*.

THREE ETHICAL RULES

Using the *Air Force Rules of Professional Conduct* in Air Force Instruction 51-110 as a guide, three ethical rules guide the lawyer to make sure she is *there when needed* (i.e., **diligence**), that her advice is *meaningful* (i.e., **competence**), and that it is *accessible* (i.e., **advisor**). [12] Diligence requires an attorney to act with “promptness in representing a client.” [13] Competence requires “the legal knowledge, skill, thoroughness, and preparation necessary for representation.” [14] Finally, being an advisor mandates that “a lawyer shall exercise independent professional judgment and render candid advice” and in doing so “may refer not only to law, but other considerations such as moral, economic, social, and political factors that may be relevant to the client’s situation.” [15] Each of these rules, in their own way contribute to the preservation of *good* process because they urge the attorney to take *individual initiative* to be in the right place at the right time to make sure things are done the right way. The rise of operations law itself as a separate discipline within the JAG Corps is a prime example.

Good JAGs know the law, great JAGs know the mission.

HOW JUDGE ADVOCATES JOINED THE GAME: THE RISE OF OPERATIONS LAW

The old adage found on plaques and bookmarks, “good lawyers know the law, great lawyers know the judge,” can be modified for our purposes to read, “good JAGs know the law, great JAGs know the mission.” You, of course, must know both and be prepared to apply that law to the mission to assist commanders across the entire spectrum of Air Force operations. The mission’s success depends on it, and the Airmen we serve depend on us to deliver the professional, candid, independent, and quality legal counsel that overcomes the threats and secures victory. [16]

Last year marked the 50th anniversary of the **My Lai massacre**, which occurred in March 1968. [17] That incident planted the seeds for what would eventually become a new discipline within the Judge Advocate General’s corps of the armed services—operations law. [18] While defined slightly different by each service, the general definition encompasses the “domestic, foreign, and international law associated with the planning and execution of military operations in peacetime or hostilities.” [19] Operations law has been called a “parallel discipline” to national security law. [20] Indeed, the Army and Navy recently renamed the discipline as such. [21] For the Air Force, the rise of operations law as a separate and distinct discipline within military legal practice began in Vietnam. [22]

While Air Force JAGs had been on the ground in Vietnam since 1962, many did not have the security clearance to be in the operations room. [23] *The First 50 Years: U.S. Air Force Judge Advocate General’s Department* documents the events that led to the creation of the operations law discipline. The My Lai massacre and the creation of the DoD Law of War Program was the most critical of these events. [24] Yet, the DoD Law of War Program was only the first step

in the process. It took initiative from Judge Advocates in all services to build the discipline into what it is today.

In the 2001 International and Operations Law Edition of *Air Force Law Review*, then-Colonel Charles J. Dunlap, Jr.,^[25] credited then-Colonel Bill Moorman, the 12th Air Force Staff Judge Advocate during Operation Just Cause, with arranging “to get JAGs into the operation center as well as the planning cells, all with good effect.”^[26] This was the “first instance of Air Force lawyers participating to this extent in operations planning.”^[27] It was a far cry from the “general mistrust among commanders concerning any restrictions placed upon their freedom of action, specifically the application of LOAC and Rules of Engagement (ROE).”^[28] Indeed, Judge Advocates proved to be true mission enablers by establishing that “they could contribute more to the planning effort than purely legal advice.”^[29] This eventually paved the way for the 4 August 1988 memorandum from the Joint Chiefs of Staff requiring combatant commanders to have legal advisors immediately available to provide advice on ROE, LOAC, and related matters during planning and execution of joint operations and exercises.^[30]

We cannot afford to wait for war to bring judge advocates into the operations and planning environment.

The success of Air Force JAGs in Operation JUST CAUSE spilled over into the support provided to Operations DESERT SHIELD and DESERT STORM in 1991. Shortly thereafter, the Air Force formally established operations law as a new legal discipline through a joint letter signed by the Air Force Deputy Chief of Staff for Plans and Operations, Lieutenant General Michael A. Nelson, and the Judge Advocate General of the Air Force, Major General David C. Morehouse on 11 December 1991, which stated that, “we cannot afford to wait for war to bring judge advocates into the operations and planning environment.”^[31] This statement holds true today, but it took the *diligent* efforts

of *competent* Judge Advocates advising on *legal and related matters* across multiple conflicts to get the Air Force to formally recognize this concept of legal support.

JAG Heritage

Excerpt from: *JAG Corps Values & Vision: Air Force Legal Support for the 21st Century*

- **1989:** Operation JUST CAUSE: A theater-level legal staff was fully integrated in crisis action planning
 - **1990-1992:** Operations DESERT STORM and RESTORE HOPE: Full-spectrum legal services realized—from mission planning to multifaceted legal support at deployed locations and home bases
 - **2000:** The first Joint Air Operations Center Legal Advisor Course was held at Hurlburt Field, Florida, to provide the specialized skills needed by legal advisors to Joint Forces Air Component Commanders and their staffs
 - **2001:** Operations NOBLE EAGLE and ENDURING FREEDOM began; Operation IRAQI FREEDOM commenced in 2003: Legal professionals provided unprecedented levels of support in areas such as target planning and lawfare
-

PLAYING THE GAME: STAYING IN THE “MIDFIELD”^[32]

In doing your work in the great world, it is a safe plan to follow a rule I once heard on the football field; don't flinch, don't fall, hit the line hard.^[33]

Today's strategic environment depicted by the current National Security Strategy and National Defense Strategy highlight several challenges for the modern operations law practitioner. Many of these challenges will call for rapid-fire decisions. Judge Baker writes that, “Not every attorney is suited to a process of decision-making that can be rapid and is conducted under stress and often involves the application of law to uncertain or emerging facts.”^[34] Likewise, “[i]t may be difficult for lawyers who prefer practice areas oriented toward black-letter law and absolute answers.”^[35] This is often the case in the operations law discipline. Nonetheless, Air Force lawyers must be prepared to advise in this area. Using the three ethical rules mentioned earlier as guideposts, this section demonstrates how these ethical rules can be leveraged to keep our team in the midfield.

DILIGENCE—Appreciate the Grind

The leading rule for the lawyer, as for the man of every other calling, is diligence.^[36]

Diligence in the national security arena is often associated with the need to quickly make decisions during a crisis (e.g., in a dynamic targeting situation where an attorney must quickly advise on whether a target is valid to be attacked);^[37] however, it also means taking individual initiative to *reasonably* prepare oneself to be ready to advise on those quick decisions before they happen. In the non-legal military context, this is *readiness*. As JAGs, the ethical duty of diligence requires a certain level of readiness in the operations law context.

It is very easy to act with diligence when one is directed to do so. It is not so easy to take the individual initiative when there is no explicit requirement to do so. For example, JAGs often hear of the importance of “being in the room.” Lawyers

have to be in the room when a trial is taking place, but in the field of national security law, it is not always so easy to be in the room to render advice. It's easier in established locations like an Air Operations Center (AOC), but in other commands, it may require additional effort. Diligence in this context means not just waiting to see where JAGs can start to have influence in this new environment, or to act quickly when advice is sought, but to *proactively* seek out where they can enable the mission within their own commands and steer it in the right direction. As Judge Baker writes, “National security process is never designed to convenience the lawyer. Sometimes it is specifically designed to avoid the lawyer.”^[38] To combat this, the JAG must act with diligence to not just be in the right place to give those answers, but be ready to give those answers as well, and that also requires competence.

JAGs often hear of the importance of “being in the room.”

COMPETENCE—Play the Way You Practice

In short, national security practice requires a capacity to close on issues and make decisions, identifying nuance and caveats, if necessary.^[39]

In his paper, *Ethics Issues of the Practice of National Security Law*, General Dunlap writes that competence in the national security context requires the practitioner to “have a deep enough level of understanding of the means and methods of national security activities to be able to offer lawful alternatives when possible.”^[40] When this is done right, the practitioner’s “‘client’ commanders have greater faith in them, and will more readily incorporate them into the decision-making process.”^[41] This is the true value of competence. It requires “a comprehensive and in-depth knowledge of not just the law, but also the ‘client’ and his or her unique ‘business.’”^[42] Thus, while competence *primarily* requires a degree of individual initiative in knowing the law applicable to the mission, it also requires acquiring knowledge of the mission itself to avoid the pitfalls of ethical failure. This is particularly true in the

operational environment. A practitioner may never know when they will be called to render an opinion in a dynamic tactical situation.[43] There is no better way to hone this competence than through practice—whether it is through self-study, exercises, simulations, or real on the job training sought out during a deployment.[44]

ADVISOR—Surrender the Me for the We[45]

Judge Advocates cannot maximize their understanding of the military arts and the national security process by simply taking up shop behind a desk.[46]

General Stanley A. McChrystal writes that “today, every aspect of military operations requires competent, ethical, and timely advice.”[47] He views this as an “inevitable consequence of the complexity of the twenty-first century military environment.”[48] The trick is to ensure clear delineation between legal and policy advice.[49] Colonel Lisa Turner, in her article on the Detainee Interrogation Debate, notes that there is an equal concern with ensuring the lawyer does not go too far down the path of policy-advocate rather than *advisor*.^[50] This is the danger of taking this duty too far.

Knowing the danger of the extremes, JAGs must be willing to step out from their role as the “legal advisor” to become “visible in the organization” or “part of the organization.”^[51] Doing so also helps build credibility with the commander and the rest of the organization.^[52] It may be as simple as visiting the flying squadrons to actually learn their mission. Learning (or taking part in) the mission not only helps build competence and credibility with those we seek to advise, it may also help shape the legal advice rendered.^[53] It also helps to establish that *good* process where effective, timely, and meaningful advice can be rendered at a critical juncture where time is of the essence. Serving as an *advisor*, a JAG can embed into the decision-making process by adding value beyond simply rendering legal advice when required to do so.

THE END GAME: ACHIEVING “COMPETITIVE GREATNESS”

Competitive Greatness is having a real love for the hard battle knowing it offers the opportunity to be at your best when your best is required.^[54]

Being in the arena is not easy. It requires courage, both moral and physical, and it requires *endurance*. Operations law is not a spectator sport and the game shows no signs of slowing down in the near future. JAGs need to be ready to meet the legal and ethical challenges that lie ahead. Fortunately, this does not require any change to how the game is played, but rather a renewed commitment to the rules that already govern the conduct of JAGs of every military service. This requires an ethical commitment to *dare greatly* by not only mastering the *substance* of operations law, but also mastering the *process* of operations law.

In doing this, the JAG is best situated to achieve *competitive greatness*—that is to relish the opportunity to give the best possible advice at the right time. Adherence to our ethical code brought JAGs into the national security arena through the development of operations law as a separate discipline. Now, renewed adherence to that code will ensure that JAGs will continue to contribute meaningfully to the substance and process of operations law as the military faces new strategic challenges in the coming years. It will not be easy, but in striving to meet these ethical challenges, JAGs will *never be with those cold and timid souls who neither know victory nor defeat*.

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EXPAND YOUR KNOWLEDGE:

EXTERNAL LINKS TO ADDITIONAL RESOURCES

Médecins Sans Frontières medical facility in Kunduz, Afghanistan

- **NBC News:** Pentagon Punishes 16 for Afghan Hospital Airstrike
- **NYTimes:** How a Cascade of Errors Led to the U.S. Airstrike on an Afghan Hospital

Operation Red Wings

- **The History Reader:** June 28, 2005: One of the worst Days in U.S. Special Operations History

My Lai massacre

- **Army History:** What Really Happened on 16 March 1968? What Lessons Have Been Learned? A Look at the My Lai Incident Fifty Years Later
- **History:** My Lai Massacre

ENDNOTES

- [1] Theodore Roosevelt, Address to the Sorbonne, Paris: Citizenship in a Republic (23 April 1910), <http://www.theodore-roosevelt.com/trsorbonnespeech.html>.
- [2] See Major General William Hickman, Army Regulation 15-6 Investigation Report of the Airstrike on the Medecins Sans Frontieres/Doctors Without Borders Trauma Center in Kunduz, Afghanistan on 3 October 2015, xii. The investigator found that at one point during the mission the TV Sensor Operator on board the aircraft “expressed concern regarding communications...stating, ‘He is being very vague, and I’m not sure if that’s going to be people with weapons or just anybody, so we will stay neutral as far as that goes.’”
- [3] See generally, MARCUS LUTTRELL, LONE SURVIVOR (2005). As related by the author, the SEAL team engaged in a debate over whether to execute Afghan goatherds that came across their possession during a reconnaissance mission. The decision was made to let them go despite the belief by some on the team that they might inform the enemy of their location. Shortly thereafter, the team came under fire from enemy forces that were likely alerted to their location by the released goatherds, killing all of the team except Luttrell.
- [4] See *infra* Section III. The Air Force JAG Corps recognized operations law as a separate discipline in 1991, in a memorandum issued jointly by The Judge Advocate General and the Deputy Chief of Staff, Operations and Planning.
- [5] James E. Baker, *The National Security Process and a Lawyer’s Duty: Remarks to the Senior Judge Advocate Symposium*, 173 MIL L. REV. 124, 124-125 (2002). [hereinafter, “Baker Remarks”]
- [6] Prior to his current position at the ABA, Judge Baker was the Chief Judge of the U.S. Court of Appeals for the Armed Forces and also a former legal advisor to the National Security Council. In addition, he served as a United States Marine infantryman.
- [7] Baker Remarks, *supra* note 5, at 124.
- [8] JAMES E. BAKER, IN THE COMMON DEFENSE 325 (2007).
- [9] Baker Remarks, *supra* note 5, at 130.

- [10] BAKER, *supra* note 8, at 24. Antithetically, Baker posits that “Bad process is bad. It may impede decision, dilute decision, and be used to bypass critical actors as well as the law.” *Id.*
- [11] See Generally, James E. Baker, *Process, Practice, and Principle: Teaching National Security Law and the Knowledge that Matters Most*, 27 GEO. J. LEGAL ETHICS 163-189 (2014).
- [12] See U.S. DEP’T AIR FORCE, INSTR. 51-110, PROFESSIONAL RESPONSIBILITY PROGRAM attachment 2, Rule 1.1, Rule 1.3, and Rule 2.1 (11 Dec. 2018) [Hereinafter, AIR FORCE RULES].
- [13] *Id.* at Rule 1.3.
- [14] *Id.* at Rule 1.1.
- [15] *Id.* at Rule 2.1.
- [16] Lieutenant General Christopher F. Burne, Judge Advocate General of the United States Air Force, from Foreword to AIR FORCE JUDGE ADVOCATE GEN.’S SCHOOL, AIR FORCE OPERATIONS AND THE LAW iii (2014).
- [17] Nancy Montgomery, *What Led to My Lai?*, STARS AND STRIPES, U.S. Ed., Vol. 10, No. 15, 2-4 (23 March 2018).
- [18] See generally, Colonel Robert L. Bridge, *Operations Law: An Overview*, 37 A. F. L. REV. 1 (1994).
- [19] DEP’T OF AIR FORCE, INSTR. 51-101, THE AIR FORCE JUDGE ADVOCATE GENERAL’S CORPS (AFJAGC) OPERATIONS, ACCESSIONS, AND PROFESSIONAL DEVELOPMENT (29 November 2018). The full definition reads: “The domestic, foreign, and international law associated with the planning and execution of military operations in peacetime or hostilities. It includes, but is not limited to, the Law of Armed Conflict, the law relating to security assistance, training, mobilization, pre-deployment preparation, deployment, overseas procurement, the conduct of military combat operations, counter-terrorist activities, status of forces agreements, operations against hostile forces, and rule of law operations. Operations law is the application of law to a specific mission of the supported Air Force unit.”
- [20] NATIONAL SECURITY LAW & POLICY xiii (John Norton Moore, Guy B. Roberts & Robert F. Turner eds., 3d ed. 2015).
- [21] The Air Force JAG Corps Flight Plan identifies National Security Law as comprising all three major legal domains of the JAG Corps (military justice and discipline, operations and international law, and civil law) and bridges JAG Corps practice to the strategic national security strategy and associated documents. See JAG CORPS FLIGHT PLAN, 28 December 2018.
- [22] See Generally, FREDRIC L. BORCH, JUDGE ADVOCATES IN COMBAT: ARMY LAWYERS IN MILITARY OPERATIONS FROM VIETNAM TO HAITI (2001); see also PATRICIA A. KERNS, THE FIRST 50 YEARS: THE AIR FORCE JUDGE ADVOCATE GENERAL’S DEPARTMENT (2001).
- [23] KERNS, *supra* note 21, at 61.
- [24] *Id.* at 137.
- [25] Later Major General (ret.) and served as The Deputy Judge Advocate General of the Air Force.
- [26] Colonel Charlie J. Dunlap, Jr., *Revolution in Military Legal Affairs*, 51 A. F. L. REV. 293, 295 (2001).
- [27] KERNS, *supra* note 21, at 138.
- [28] Major Leonard L. Broseker, *Sword in the Sand: Operations Desert Shield and Desert Storm*, THE REPORTER, SPECIAL HIST. ED., Vol. 26, at 138, 141 (citing Steven Keeva, *Lawyers in the War Room*, A.B.A. J., December 1991, at 52: “Relations were often marked by suspicion and a belief—on the commander’s part—that lawyers, together with politicians, were an obstacle to winning the war.”).
- [29] Lieutenant Colonel Terrie M. Gent, *The Role of Judge Advocates in a Joint Air Operations Center*, AIRPOWER J. 40-55 (September 1999), <http://www.dtic.mil/dtic/tr/fulltext/u2/a529835.pdf>.
- [30] *Id.* at 45.
- [31] *Id.* at 47.
- [32] See Memorandum from Sec’y of Def. to All Dep’t. of Def. Employees, subject: Ethical Standards for All Hands (4 Aug. 2018). [hereinafter, “Ethical Standards Memo”]
- [33] Theodore Roosevelt, http://www.azquotes.com/author/12606-Theodore_Roosevelt/tag/football (last visited 2 August 2019).
- [34] BAKER, *supra* note 8, at 313.
- [35] *Id.*
- [36] Abraham Lincoln, *Notes for a Law Lecture* (1 July 1850), <http://www.abrahamlincolnonline.org/lincoln/speeches/lawlect.htm> (last visited 4 February 2018).
- [37] See Charlie J. Dunlap, Jr., *Ethical Issues of the Practice of National Security Law: Some Observations*, 38 OHIO N. U. L. REV. 1057, 1076 (2012).
- [38] BAKER, *supra* note 8, at 314.

- [39] *Id.* at 313.
- [40] Dunlap, *supra* note 38, at 1072.
- [41] *Id.*
- [42] *Id.*
- [43] The same can be said in the deliberate targeting process as well. The ATO is doctrinally on a 72-hour cycle, but less than 24 is actually devoted to planning and getting those approvals, which leaves even less legal preparation time.
- [44] Operations law experience can be gained and maintained in a number of ways, but it really begins and ends with hitting the books. Attorneys new to the practice area have a number of good resources like the DoD Law of War Manual to aid them in getting better insight into the complex issues that can arise in the discipline.
- [45] The full quote here is, “Good teams become great ones when the members trust each other enough to surrender the ‘me’ for the ‘we.’” Phil Jackson, <https://athleteassessments.com/coaching-quotes-best-sports-coaches/>.
- [46] Renn Gade, *The U.S. Judge Advocate in Contemporary Military Operations: Counsel, Conscience, Advocate, Consigliere, or All of the Above?*, in U.S. MILITARY OPERATIONS: LAW, POLICY, AND PRACTICE 28 (Geoffrey S. Corn, Rachel E. VanLandingham, & Shane R. Reeves eds., 2016) [hereinafter, U.S. MILITARY OPERATIONS].
- [47] General Stanley McChrystal, Foreword, in U.S. MILITARY OPERATIONS, *id.*, at xi.
- [48] *Id.*
- [49] Dunlap, *supra* note 37, at 1084.
- [50] Turner, *supra* note 132, at 45. Colonel Turner also cites Jeh Johnson, former DoD General Counsel, who said, “You must live by one simple rule: you wear the uniform of a JAG to help policymakers and commanders shape the policy to fit the law, not to shape the law to fit the policy.” *Id.* at 42.
- [51] Colonel (Ret.) Renn Gade, quoted in U.S. MILITARY OPERATIONS, *supra* note 46, at 29.
- [52] *Id.*
- [53] *Id.*
- [54] John Wooden Official Website, *Pyramid of Success: Competitive Greatness*, <http://www.coachwooden.com/pyramid-of-success#Pyramid/1> (last visited on 2 August 2019) (excerpted from JOHN WOODEN, WOODEN ON LEADERSHIP (2005)).

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Gone Fishin'

Discovery and Personnel Records

BY CAPTAIN JAMES J. WOODRUFF II

There is little to fear when counsel has gone fishin' for personnel records as long as you follow the advice in this article.

People often desire what they cannot have and information to which they are not entitled. Such is the nature of the discovery process in civil litigation.

The Labor Law Field Support Center defends the Air Force in federal litigation against discrimination complaints and appeals over disciplinary actions brought by civilian employees. In our line of work, opposing counsel routinely ask for personnel documents such as disciplinary records, performance appraisals, and other official personnel records regarding not only their client, but the client's coworkers as well. Opposing counsel makes the request in order to establish whether their client was singled out for being a member of a protected class. The Department of the Air Force, referred to generically as "agency" in federal administrative litigation, is represented by a lawyer referred to as an agency representative. The agency representative's initial reaction upon receiving such a request is usually a well-worded objection to the requestor. The objection makes it obvious that such information is protected by the Privacy Act and therefore not discoverable, right?

Opposing counsel routinely ask for personnel documents such as disciplinary records, performance appraisals, and other official personnel records regarding not only their client, but the client's coworkers as well.

As with many legal inquiries, the proverbial answer is, it depends. A judge may find the requested information relevant and if such information is not turned over an order may be issued resulting in monetary sanctions against the Air Force. In this article, we'll walk through what we do at the Labor Law Field Support Center, how we typically interact with the office that receives a request (e.g. base legal office), and help to alleviate cumbersome "fishin' expeditions" through the process.

THE LABOR LAW FIELD SUPPORT CENTER

In 2007, the Labor Law Field Support Center (LLFSC) was established to centralize expertise in the specialized areas of employment and labor law. The mission is “to provide the full spectrum of labor and employment law litigation expertise, advice and training to ensure maximum flexibility for commanders in effective use of the civilian workforce.”^[1] Litigation attorneys at the LLFSC defend the Air Force before employment and labor related administrative bodies and courts worldwide.

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The LLFSC is broken into five components. There are two Administrative Litigation Branches, a Federal Litigation Branch, a Labor Relations Law Branch, and four regional offices. The Administrative Litigation Branches have differing jurisdictions. The Center’s primary office is at **Joint Base Andrews** in Maryland. The four regional offices are located in California, Florida, Illinois, and Texas. The Air National Guard, the Air Force Reserve, Tinker AFB, Hill AFB, and Wright-Patterson AFB each maintain their own labor and employment resources and do not fall under the purview of the Center.

When a case arises in federal court or before a federal administrative agency, such as the **Merit Systems Protection Board** (MSPB), **Equal Employment Opportunity Commission** (EEOC) or **Federal Labor Relations Authority**, the Center’s lawyers litigate the case. The MSPB handles the appeal of federal employee disciplinary actions where the employee was suspended for more than 14 days or removed from federal service. The MSPB will also hear cases involving the **Whistleblower Protection Act**. The EEOC hears discrimination and retaliation cases brought by federal employees. Cases before the federal administrative agencies are litigated by Judge Advocates and federal civilian attorneys working at

the Center. Cases brought before federal courts are primarily litigated by Department of Justice attorneys with support provided by Judge Advocates and federal civilian attorneys at the Center.

In assisting with the collection of information, the legal office may get inquiries regarding the production of information protected by the Privacy Act.

During the litigation process, the LLFSC’s litigation attorney will reach out to the appropriate base legal office for assistance in retrieving documents and information for discovery and to schedule the final hearing in the related case. Additionally, a base legal office attorney may serve as co-chair in the matter being litigated. In assisting with the collection of information, the legal office may get inquiries regarding the production of information protected by the Privacy Act. If the legal office knows how the Privacy Act applies to the information sought and when such information is excluded from the Act’s protection, it can make the discovery process less complicated for all involved.

THE LABOR LAW FIELD SUPPORT CENTER AND THE BASE LEGAL OFFICE

The base legal office will most commonly become involved with the LLFSC in matters involving civilian employees. The issue may be one of labor relations (e.g. Union disputes), the disciplining of a civilian employee, or a discrimination case brought by a civilian employee through the EEOC.

Sample Case

For example, Mr. John Smith is a federal civilian employee, GS-07, working in the contracting squadron at an Air Force installation.^[2] While employed there he responds to a job announcement on USAJobs.gov for a GS-08 position at the same contracting squadron. He is selected for an interview along with eight other candidates. The selecting official hires Ms. Jane Doe for the position. Ms. Doe is of Asian descent and is not a member of the military reserve. Mr. Smith is a

white 40-year-old, military reservist. After learning about his non-selection, Mr. Smith goes to the Equal Employment Opportunity (EEO) office on the Air Force installation for counseling regarding his rights. Ten days later—*unrelated to his non-selection*—management provides Mr. Smith a five-day suspension for failure to follow the Air Force Instruction and Federal Acquisition Regulations when handling a procurement. Mr. Smith files a formal complaint with the EEOC through the base EEO office alleging discrimination based on race, age, gender, veteran’s status, and reprisal for prior EEO activity. Following the investigation, an investigative file is compiled and provided to Mr. Smith. Upon receipt, he files a request for hearing before the EEOC.

...the base legal office will need to know what information may and may not be released. This will often lead to an analysis of the Privacy Act and any exceptions.

A few years after the filing of the complaint and the request for hearing, an administrative judge with the EEOC files an Acknowledgment Order in the case.[3] That Order provides both parties thirty days to initiate civil discovery. Mr. Smith takes advantage of his discovery rights and files a request for interrogatories and production of documents. A number of those requests seek information regarding the other employees within the contracting squadron. The request seeks each employee’s race, age, gender, veteran’s status, and prior EEO activity. It also seeks the disciplinary history of all employees within the contracting career field Air Force-wide. At this point, the base legal office may get a question from either the attorney at the Center, from the base EEO office, or the base Civilian Personnel Office regarding Mr. Smith’s requests. When presented with these questions, the base legal office will need to know what information may and may not be released. This will often lead to an analysis of the Privacy Act and any exceptions.

THE PRIVACY ACT AND ROUTINE USES

Federal agencies commonly maintain collections of records that include information about individuals, including their employees. The collected records may include official personnel records, military records, criminal investigations, and other similar records collected in the process of regulatory investigation and compliance. The collection is called a “system of records.”[4] In order to qualify as a system of records, the information in the record must be retrievable by an individual’s name, number, symbol, or any other unique identifier that has been assigned to the individual.[5] A system of records may be anything from a collection of civilian personnel records to criminal records. When a system of records is established, a federal agency must publish a **system of records notice** (SORN) in order to comply with the Privacy Act. The federal agencies are required to publish their SORNs in the Federal Register. The Department of Defense’s Defense Privacy, Civil Liberties, and Transparency Division provides a searchable SORN database.[6]

Penalties for violating the Privacy Act are civil and criminal in nature.

The **Privacy Act** was established because Congress determined that “the privacy of an individual is directly affected by the collection, maintenance, use, and dissemination of personal information by Federal agencies.”[7] Federal agencies are concerned about the Privacy Act because it prohibits the nonconsensual disclosure of information found in a system of records.[8] It also provides the public the right to access and amend records within a system of records regarding the inquiring individual.[9] Penalties for violating the Privacy Act are civil and criminal in nature. The civil penalties focus on the agency and include a minimum of \$1,000 in actual damages, reasonable attorney’s fees, and other costs.[10] The criminal penalties focus on the individual agency employee and include a misdemeanor charge with a fine up to \$5,000.[11]

Even with the significant protections of an individual's privacy, the Privacy Act actually allows for the disclosure of a non-party employee's personnel information. There are several exceptions even though the Privacy Act states that records subject to the Act are not to be disclosed by "any means of communication to any person or to another agency."^[12]

Even with the significant protections of an individual's privacy, the Privacy Act actually allows for the disclosure of a non-party employee's personnel information.

The key exception that many of the discovery requests will fall under is the "**routine uses**" exception.^[13] In order to qualify, the routine use has to have been specifically described in the Federal Register.^[14] Federal civilian employee records are managed by the **Office of Personnel Management** (OPM).^[15] While each federal agency creates and maintains each employee's records, the regulatory authority for the use of such records as well as the management of the federal civilian workforce is with the OPM.^[16] Therefore, the OPM is the agency responsible for the proper handling of personnel records and has published routine uses of those records in the Federal Register.^[17]

Under the OPM's established routine uses of records there are three exceptions to the Privacy Act relevant to our discussion. **First**, Privacy Act information may be disclosed to another Federal agency, party, or court in a Federal administrative proceeding or court proceeding where the government is a party.^[18] **Second**, disclosure is allowed in response to discovery requests as long as the information sought "is relevant to the subject matter involved in a pending judicial or administrative proceeding."^[19] **Third**, disclosure is allowed to the Office of Special Counsel or MSPB in connection with appeals, investigations, and other functions authorized by law.^[20]

Returning to the hypothetical case of Mr. Smith, the LLFSC attorney would provide the base legal office with a copy of the discovery requests. After receiving the requests, the base legal office would begin collecting the requested documents from the various base level organizations such as the civilian personnel office, equal opportunity office, those who have been named as allegedly engaging in discriminating conduct, and the employee's squadron. Once this information is collected it would be provided to the LLFSC attorney for review and, if appropriate, disclosure to the opposing party. If information is not determined to be relevant an objection will be made to the discovery request and the irrelevant information will not be turned over.

If the opposition has met the initial burdens necessary to acquire the information sought, it may still not be a good idea to hand it over. The Agency should seek a protective order in an effort to not only protect the coworker's information but the Agency as well.

REDACTIONS, PROTECTIVE ORDERS AND SEALING RECORDS

Even though the records may be turned over as a routine use, this does not mean a coworker's information should be made freely available. The Privacy Act provides important protections for information regarding individuals collected and maintained by the government. Redaction of information identifying the individual should be made as necessary prior to releasing the information to another federal agency or litigant. Such redactions ensure the goals of the Privacy Act are met by the federal government. Additionally, a protective order and order sealing the records may be necessary depending on the type of records being produced.

The MSPB and the EEOC both have procedures for seeking **protective orders**.^[21] A protective order is an order prohibiting a party from, among other things, sharing information.^[22] The motion should demonstrate the privacy interest of the coworker whose information is being disclosed and that disclosure of the information would result in annoyance, embarrassment, or oppression.^[23] It should also limit the opposing party's use of such information. Any

motion for protective order should likely include a request that the judge require the complainant or appellant to notify those impacted by the disclosure of the information. Often, opposing counsel is agreeable to the entry of a protective order in cases and will consent to the entry of such an order.

Redaction of information identifying the individual should be made as necessary prior to releasing the information to another federal agency or litigant.

An order sealing the records placed into the administrative agency's file may also be sought as those files may be subject to a **Freedom of Information Act** (FOIA) request. The request seeking to seal the records should be narrowly tailored to demonstrate the need for additional protection. Beware, however, if the case is high-profile or has garnered media interest, there may be third-parties who will fight the sealing of such records under the First Amendment.

These steps should be taken as the administrative agencies are subject to FOIA requests. Once the protected Privacy Act information is provided to the MSPB or EEOC, those agencies have a responsibility to protect the information and limit its disclosure.

The ultimate issue with protective orders becomes enforceability.

The ultimate issue with protective orders becomes enforceability. While federal courts have various enforcement means at their disposal, this is not true for federal administrative bodies. Other than sanctioning the offending party for its misconduct there is little an administrative body can do.^[24] Any additional penalty is criminal in nature and would require the interest of a prosecutor's office. This ultimately leaves the offending party and representatives with access to

information that they may wrongfully use without any real threat of punishment.

CONCLUSION

There is little to fear when counsel has gone fishin' for personnel records as long as you follow the advice in this article. When coworker information is sought in discovery, the first thing that should be assessed is whether that information is relevant. Once such information is found to be relevant, the coworker information is discoverable and must be turned over. Mr. Smith, from the example provided earlier in the article, may be able to receive information regarding his co-worker's race, age, gender, veteran's status, and prior EEO activity. The information provided may be in table form with the co-worker's names redacted. He may also be able to acquire the disciplinary history of current and prior employees within the unit limited to some reasonable time frame.

By understanding the complaints being raised, the legal office can provide better advice to the Wing on what is relevant.

The base legal office should ask for the initial complaint underlying the action currently subject to discovery requests. By understanding the complaints being raised, the legal office can provide better advice to the Wing on what is relevant. Once that is known, the base legal office can also advise the Wing on the proper redaction of documents and information to be turned over in the litigated manner. After all, success in fishing is often a matter of finding the right pond and the right rig for the desired fish. If the plaintiff's attorney's is interested in largemouth bass then she should not be seeking or receiving information on catfish. Knowing the type of information sought is akin to knowing the sought after fish and knowing the relevancy of the information sought is the equivalent of the right lure. Using the right lure for the right fish is essential to avoiding Privacy Act issues and ensuring the proper catch.

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ENDNOTES

- [1] Labor Law Field Support Action Officer Handbook 3 (January 8, 2018).
- [2] This is a completely fictional case and used purely for purposes of illustrating how a base legal office may become involved in such a case. No identification with actual persons (living or deceased) or places is intended or should be inferred.
- [3] The time it takes for a complaint to move from the formal complaint stage, through the post-formal complaint 180-day investigation period, and to move through the crowded EEOC docket can result in cases routinely taking *more than three years* to process from start to finish.
- [4] 5 U.S.C. § 552a(a)(5).
- [5] 5 U.S.C. § 552a; 43 C.F.R. § 2.221; and 45 C.F.R. § 5b.1.
- [6] Department of Defense, *System of Records Notices (SORNS)*, <https://dpcl.dod.mil/Privacy/SORNs.aspx> (last visited Mar 8, 2019).
- [7] Pub. L. 93-579, § 2, Dec. 31, 1974, 88 Stat. 1896.
- [8] 5 U.S.C. § 552a(b)
- [9] *Id.*
- [10] 5 U.S.C. § 552a(g).
- [11] 5 U.S.C. § 552a(i).
- [12] 5 U.S.C. § 552a(b).
- [13] 5 U.S.C. § 552a(b)(3); 32 C.F.R. § 505.7.
- [14] 5 U.S.C. § 552a(b)(3).
- [15] 5 C.F.R. §§ 293.301-303.
- [16] 5 C.F.R. § 250.101-103 & 5 U.S.C. § 1104.
- [17] 77 Federal Register 73,696-73,697.
- [18] 77 Fed. Reg. 73696.
- [19] 77 Fed. Reg. 73697.
- [20] *Id.*
- [21] 5 U.S.C. § 1204(e)(1)(B); 5 C.F.R. § 1201.55(d); MD-110, Ch. 7, III.D.6., II.D.12, & IV.B.4.
- [22] *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984).
- [23] *Id.*, at 28.
- [24] 5 C.F.R. § 1201.43 and 29 C.F.R. § 1614.109.

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W. Hays Parks and the Law of War

BY MAJOR R. SCOTT ADAMS

W. Hays Parks's work deserves serious study by judge advocates today. His work provides insight, both as a challenge to modern-day thinking, and as a plethora of practical guides to important areas of international humanitarian law.

The study of the law needs to be integrated with the study of history: if not, it is inadequate.

—Sir Adams Roberts^[1]

INTRODUCTION

Perhaps more than in any other area of law, scholars of international humanitarian law (IHL) hold persuasive power over practitioners.^[2] This may be partially explained by the inherent ambiguity of international law, and partly because the **International Court of Justice** (ICJ) statute expressly accepts “teachings of the most highly qualified publicists” as an authoritative source.^[3]

Among those highly qualified publicists, perhaps no one has had more influence on the United States' understanding of IHL than **W. Hays Parks**, who is often described as “the preeminent authority in the United States on the

Law of War.”^[4] Parks served as a Marine infantry officer in Vietnam^[5] and as a Judge Advocate prosecuting court-martial.^[6] He taught international law before serving over 30 years as a DoD civilian lawyer.^[7] He served as Chairman of the DoD Law of War Working Group for many years, where, among other things, he directed a 16-year effort to produce the **DoD Law of War Manual**.^[8] From 1978 until 2001, he served on the U.S. delegation to a series of United Nations conferences on prohibiting Certain Conventional Weapons (CCW). During that time he became the preeminent U.S. authority on weapons law and was a principal drafter of CCW Protocol III on incendiary weapons.^[9]

Parks often notes in his published work that lawyers make the mistake of seeing the law through the lens of the conflict at hand^[10] rather than broader historical experience across the conflict spectrum.^[11] As a result, Parks, whose vast experience did cross the conflict spectrum, often presents ideas and arguments in his published works that offer a startling

challenge to the thinking of IHL practitioners today[12] and deserves serious study by current judge advocates. This article seeks to summarize Parks' work to draw lessons from his experience.

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ACADEMIC PUBLICATIONS

The academic work of Parks generally falls into four categories: (1) historical lessons; (2) means and methods of warfare; (3) IHL pedagogy; and (4) criticism of efforts to change IHL.

Historical Lessons

Because IHL has significant impact on the lives of people, it is important to place it in the frame of real experience, not abstract hypotheticals. Parks emphasizes life experiences, and though his are too numerous to adequately summarize here, he has written on his participation in various operations, including the Vietnam War, the 1986 Libya airstrike,[13] the Gulf War,[14] Afghanistan,[15] and many others.

Means and Methods of Warfare

Parks is best known for his expertise on weapons law, an issue that gained attention during the conflict in Vietnam.[16] The United States received significant international criticism for its use of certain weapons, including napalm, cluster munitions, flechettes, blast munitions, and even the small-caliber M-16 rifle.[17] This criticism led to the promulgation of a DoD directive mandating the legal review of new weapons to ensure compliance with U.S. treaty obligations.[18] This 1974 directive pre-dates the treaty obligation of Article 36 to the First Additional Protocol to the Geneva Conventions (Protocol I) by nearly four years.[19] Today Article 36 obligates 174 States to follow substantially the same requirement

as the 1974 directive.[20] Yet very few States are in fact conducting Article 36 reviews.[21]

Some of Parks' weapon reviews have been released to the public,[22] while others have been the catalysts for academic publications:[23]

- **1997:** Parks wrote that use of the shotgun is permitted in war.[24]
- **2003:** Parks addressed controversy over special operators' wearing of non-standard uniforms.[25] On this subject he came to a nuanced conclusion, stating that in unusual circumstances combatants may wear non-standard uniforms or no uniform when justified by military necessity, so long as it is not perfidious.[26]
- **2006:** Parks demonstrated from States' use of the explosive 12.7mm .50-caliber round that the **1868 St. Petersburg Declaration** prohibition of exploding projectiles is obsolete.[27]
- **2010:** Later, Parks used the **2010 Kampala amendments** to the Rome Statute as an opportunity to clarify the law regarding expanding bullets,[28] an issue of significant confusion for decades.

Expanding Bullets

The **1899 Hague Declaration Concerning Expanding Bullets** prohibits the use of "bullets which expand or flatten easily in the human body." [29] The treaty is expressly limited to armed conflict wherein all parties to the conflict are also parties to the treaty.[30] But since that time, States have only rarely used expanding bullets.[31] In 2010, signatory parties to the Rome Statute attempted to make use of expanding bullets a war crime in all conflicts.[32] Parks pointed out that the elements to the offense require the prosecutor to establish the user intended or knew the bullet would "uselessly aggravate suffering or the wounding effect." [33] This element leads into Parks' nuanced understanding. Expanding bullets are not prohibited as a class of weapons. Rather, individual bullets must be analyzed on a case-by-case basis,

to consider whether the projectile may cause unnecessary suffering.[34] Parks acknowledges here that, due to the nature of expanding bullets, they “would be limited to exceptional circumstances which justify pre-planned specific *modi operandi*.”[35] However, he is not afraid to say that there is such a thing as necessary suffering to combatants.[36] A trade-off may exist between the protection of civilians and unnecessary suffering to combatants. Where expanding bullets offer increased accuracy, increased stopping power, and reduced risk of over-penetration or ricochet, they may be permitted.[37]

Legal Review of Weapons

In discussing weapons law more generally, Parks explains that legal reviews of weapons usually consider first whether a specific treaty prohibits use of that weapon, and second whether the weapon is prohibited by general considerations, specifically unnecessary suffering or indiscriminate effects. This analysis follows the ICJ’s Nuclear Weapons Advisory Opinion.[38]

But understanding of what constitutes unnecessary suffering remains illusory and contentious.

But understanding of what constitutes unnecessary suffering remains illusory and contentious. In the late 1970s, many States and non-governmental organizations (NGOs) began a series of attempts to clarify the rule and attach “some flesh to the heretofore bare-bone prohibition.”[39] These attempts each failed for various reasons[40] and left States with ambiguity over what constitutes unnecessary suffering.

In 1997, Parks noted “neither superfluous injury nor unnecessary suffering has been defined.”[41] The same year the ICJ had only just defined unnecessary suffering[42] as “a harm greater than that unavoidable to achieve legitimate military objectives.”[43] But this definition has not proven sufficiently clear for application.[44] Instead Parks proposes a test that asks if “the suffering caused is out of proportion to the military advantage to be gained.”[45] Parks’ test holds

that a weapon is not prohibited unless it causes suffering “clearly disproportionate to the intended objective.”[46] This position, embraced by the DoD Manual, provides a workable definition.[47]

Certain Conventional Weapons (CCW)

Parks’ work with weapons law allowed him to participate in the drafting of the **CCW** and its protocols over many years. The CCW ultimately led to prohibitions or restrictions on non-detectable fragments,[48] land mines and booby traps,[49] incendiary weapons,[50] blinding lasers,[51] and explosive remnants of war.[52]

Parks describes the prohibition of incendiary weapons as the *raison d’être* for the CCW, and the third protocol is perhaps the only modern law of war treaty he praises in published work.[53] This is partly because it seeks to protect civilians rather than combatants.[54] **CCW Protocol III** is sometimes misunderstood as a general prohibition on incendiary weapons.[55] In fact, it merely places reasonable restrictions on use, consistent with State practice.[56]

Throughout the CCW and other treaty-making processes, Parks sought to maintain balance between military and humanitarian goals.

Throughout the CCW and other treaty-making processes, Parks sought to maintain balance between military and humanitarian goals. Forming treaties, he argues, is not like litigation.[57] Success is “a matter of finding the balance between legitimate military necessity and...providing protection” for civilians.[58] These ideas remain relevant to modern treaty-making efforts, where some parties aggressively seek to prohibit lethal autonomous weapon systems,[59] the use of explosive weapons in populated areas (EWIPA),[60] the targeting or military use of schools,[61] all uses of nuclear weapons,[62] weapons in space,[63] and others. Parks might respond to these proposed agreements by arguing that if modern-day efforts to alleviate the sufferings of war are to succeed, they should perhaps emphasize compliance with

existing law, rather than creating new rules that present low probability of long-term success.[64]

Advising and Teaching IHL

Far from the UN or even the Pentagon, Parks sees a critical role for lawyers to advise commanders on tactical operations.[65] Lawyers have not always been welcomed to advise on military operations. But the tragedy of **My Lai** was a watershed moment wherein the U.S. identified a need for judge advocates to assist commanders in developing programs that were preventive in nature.[66] As commanders began to use judge advocates more, they often found them to be enablers rather than obstacles to military operations.[67]

Lawyers have not always been welcomed to advise on military operations.

Since the Vietnam conflict, judge advocates have also increasingly trained tactical forces. Such training is not just calculated to ensure an accurate understanding of the law; it is also to convince forces they *should* follow the law.[68] This is implicitly understood by most IHL instructors, who often begin by attempting to ground IHL in ideas consistent with morality, chivalry, or religion.[69] Parks has no patience for such lofty ideas, all of which he describes as inaccurate, irrelevant, or both.[70]

These ideas received attention in a 2004 International Committee of the Red Cross (ICRC) study of IHL compliance in a publication titled *The Roots of Behaviour in War*.^[71] The report concluded that IHL compliance was based primarily on group conformity and obedience to authority.^[72] Consequently, the report recommended teaching IHL as a purely legal issue: that is, you must obey the law because it's the law.^[73] But the issue was revisited in 2018 through an updated report, *The Roots of Restraint in War*.^[74] The updated publication is more nuanced, but it may be seen broadly as a reversal of the 2004 position,^[75] emphasizing “a strong moral compass” and correlation between IHL and religious principles.^[76]

Though Parks would avoid that approach, he does not embrace a purely legalistic approach, nor does he place humanitarian concerns above military necessity. He too argues, “no program can survive simply because ‘it’s the law.’”^[77] But in his view, “one must accept and acknowledge that war is not nice. It is a very bloody business.”^[78]

We follow IHL because (1) we are a nation that believes in the rule of law, (2) adherence to the rule of law is what our country expects of us, and (3) following the law is consistent with military efficiency and professionalism.^[79]

Criticisms

Another substantial portion of Parks’ academic writings may be described as criticisms of new treaties or proposals, particularly the work of the ICRC. For example, in 2010, Parks published a review of the ICRC’s Direct Participation in Hostilities Study (DPH Study), subtly titled: “No Mandate, No Expertise, and Legally Incorrect.”^[80] He was also very critical of the ICRC’s Customary International Law (CIL) study, which he described as “a brief for past and future ICRC agenda items.”^[81]

The Manual states that many situations require “case-by-case analysis of the specific facts.”

On the DPH Study, Parks was one of several experts invited to participate, only to later withdraw and request to have his name removed from the publication.^[82] The U.S. position on the ICRC DPH Study is partially clarified by the DoD Manual, which rejects many of the ICRC’s concepts.^[83] But the Manual states that many situations require “case-by-case analysis of the specific facts.”^[84] This approach of “I know it when I see it,” is common of the DoD Manual, which seeks operational flexibility. Many young judge advocates quickly refer to the Manual on a broad range of issues, perhaps without understanding the history behind it. Parks began working on the DoD Manual in 1996.^[85] He retired in 2010, at which time the Manual was on the proverbial “one-yard line.”^[86] A series of changes followed his departure,

and consequently, Parks has directed his criticism even to the Manual we have today. His criticism is not so substantial as to question its accuracy. But it causes the reader to infer that Parks may point to today's judge advocates and say we lack a broad understanding of the law of war; that our limited experience may be an obstacle in a future "total war."^[87]

For Air Force judge advocates today, Parks' *magnum opus* is his 1990 article from the *Air Force Law Review*: "Air Wars and the Laws of War" (hereinafter *Air Wars*). The article provides a 225-page historical analysis of the law before and during World War II ^[88] and flows into what can only be described as harsh criticism of the First Additional Protocol to the Geneva Conventions (Protocol I).^[89] *Air Wars* is extremely well-researched^[90] and clever.^[91] His narrative shows that the law of war before World War II was primitive, particularly regarding air warfare.^[92] In the wake of World War II, a series of treaties created clear restrictions that were pragmatic and balanced, largely because, according to Parks, the drafters were experienced in war.^[93] Such balance stands in stark contrast to Protocol I.

In the wake of World War II, a series of treaties created clear restrictions that were pragmatic and balanced, largely because, according to Parks, the drafters were experienced in war.

The U.S. signed Protocol I in December, 1977, then delayed submitting the treaty to the Senate for ratification. ^[94] Parks was then working as the Head of the Law of War Branch for The Judge Advocate General of the Navy.^[95] He became the Special Assistant to The Judge Advocate General of the Army for Law of War Matters in July, 1979,^[96] and thereafter played a significant role in the internal review of Protocol I, including a comprehensive review that led to a formal Joint Chiefs of Staff recommendation in 1985 not to ratify.^[97] The following year the White House decided it would not present Protocol I to the Senate.^[98]

Parks' criticisms of Protocol I are too numerous and too detailed to provide an adequate review here. Striking right at the foundation, Parks argues that the primary motive of States in creating Protocol I was a desire of inferior military powers, supported by misguided NGOs, to use the law as a "vehicle for the conventional disarmament of the superpowers."^[99] Parks tells of a draft rule proposed by Togo at the first Protocol I Diplomatic Conference, wherein a nation with an air force would not be permitted to use it in an armed conflict with a nation without an air force.^[100] At the time, Togo's air force was obsolete to the point of non-existence.^[101] Similarly, he quotes Jean Pictet of the ICRC, who reportedly became frustrated with the U.S. delegation and shouted, "if we cannot outlaw war, we will make it too complex for the commander to fight!"^[102] Among Parks' many substantive objections to Protocol I, two are worth noting here: (1) Article 51 and direct participation in hostilities, and (2) proportionality.

Direct Participation in Hostilities

Article 51(2) states that civilians shall not be the object of attack "unless and for such time as they take a direct part in hostilities."^[103] Parks' objection to this "revolving door"^[104] has echoed through the decades. He argues that Article 51 is a departure from customary international law,^[105] is absurd in application, and results in more risk to civilians.^[106] Parks gives a hypothetical to demonstrate his points:

A civilian is driving a military truck filled with ammunition towards his front lines. If the civilian dies incidental to the attack of the truck, there is no crime; but if the driver is attacked directly, the soldier who has fired at him has committed a violation of Article 51(3) and 85(3)(a) and must be brought to trial for a war crime.^[107]

From a historical perspective, the hypothetical is fascinating because the ICRC used precisely the same one in its DPH study almost 20 years later.^[108] The 2009 DPH Study provided a distinction between temporary loss of protection and continuous or status-based loss,^[109] something

Parks had not considered in 1990.[110] Further, the ICRC provided three elements to qualify as a direct participant in hostilities:[111] (1) threshold of harm, (2) direct causation, and (3) belligerent nexus.[112] Analyzing the hypothetical under these elements, the ICRC concluded the driver “would almost certainly have to be regarded . . . as direct participation in hostilities.”[113] The example reveals something of the evolution of IHL. Parks’ criticism is justified, and it clearly influenced the U.S. approach, but experience has adjusted our understanding of express law.

Parks argues that protection of civilians should be a shared obligation.

Proportionality

Articles 51 and 57 of Protocol I prohibit attacks which may be expected to cause incidental harm which would be excessive in relation to the concrete and direct military advantage anticipated.[114] In *Air Wars*, Parks criticizes this rule no less than 12 times, calling it ambiguous, impractical, and a reversal of responsibility for civilian casualties. [115] Historically, “collateral civilian casualties resulting from the attack of a legitimate target were not regarded as the responsibility of an attacker,” but rather the defender or civilians themselves.[116] Parks argues that protection of civilians should be a shared obligation.[117] Protocol I shifts responsibility “exclusively onto an attacker,”[118] which results in weaker forces exploiting the law for tactical advantage. Parks argues shifting responsibility to the attacker results in more risk to civilians.[119]

Whether proportionality is easy to apply is another question, but today it is not controversial.[120] The DoD Manual repeats the rule multiple times in various contexts.[121] Targeting doctrine also repeats the rule,[122] and most IHL practitioners today are surprised at Parks’ criticism.[123] Parks’ concerns about ambiguity and technological limitations have been, if not resolved, at least substantially mitigated to allow application.[124]

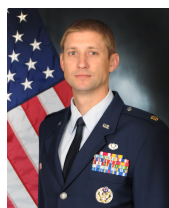
On respective responsibility, experience has proven that weak enemies do respond to incentives by endangering civilians.[125] Parks would almost certainly argue that Articles 51 and 57 have created that environment, making tragic events inevitable.[126] Yet if an attacking force becomes inured to the deaths of civilians habitually used as “human shields” by the defending force, arguing that the defending force had greater responsibility seems extremely unlikely to advance the primary goal of protecting civilians. It also seems obtuse to place responsibility on civilians to protect themselves from aerial bombardment. Parks’ feelings on this subject in 1990 were largely colored by his experience in Vietnam and Operation ROLLING THUNDER, where the enemy often used civilians as human shields.[127] In December, 2019, his opinion had not changed, but had been tempered, and when asked today he simply says that all parties are responsible for civilian casualties.[128]

CONCLUSION

In 1986 and 1987, Australia and the United States conducted joint war games, which concluded a military commander “adhering to the requirements of Protocol I would be defeated by an opponent not following them.”[129] Parks cites this as a major reason Australia postponed ratification shortly before *Air Wars* was published.[130] Australia did ratify in 1991[131] with no reservations.[132] Moreover, the U.S. and Australia have since participated together in multiple combat operations with only minor issues of interoperability, implying Parks’ prediction has not come to fruition. But to be fair, his ominous prophecy applied only to “mid-to high-intensity conflict,”[133] and as they relate to a proverbial “total war,” Parks’ arguments remain untested.

Parks lost his proportionality argument in the long run. Reading his work 30 years later reveals that he got some things wrong. It also shows that IHL in general, and particularly our understanding of it, tends to shift over time. Nonetheless, Parks’ work deserves serious study by judge advocates today. His work provides insight, both as a challenge to modern-day thinking, and as a plethora of practical guides to important areas of IHL. As Parks might say, “the law does not exist in a vacuum,” and his work allows us to peek outside our ephemeral bubble of experience.

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EXPAND YOUR KNOWLEDGE:

EXTERNAL LINKS TO ADDITIONAL RESOURCES

- **U.S. Naval Institute:** W. Hays Parks
- **Lawfare Blog:** Hays Parks on the Demise of the DoD Law of War Manual

ENDNOTES

- [1] Sir Adam Roberts, *Land Warfare: From Hague to Nuremburg*, in *THE LAWS OF WAR: CONSTRAINTS ON WARFARE IN THE WESTERN WORLD* 117 (Sir Michael Howard, George J. Andreopoulos & Mark Shulman eds., 1994)
- [2] Professor Carrie McDougall, Address at the Asia-Pacific Centre for Military Law (August 2018).
- [3] Statute of the International Court of Justice, United Nations Charter Annex art. 38, 26 June 1945.
- [4] *W. Hays Parks*, U. VA. CTR. FOR NAT'L SEC. L., <https://cnsl.virginia.edu/w-hays-parks> (last visited 3 January 2020) [since being cited, this link appears to no longer be available]. Very recent expert commentary illustrates Parks' powerful influence over IHL. Earlier this year controversy erupted over journalistic descriptions of the killing of Major General Qassem Soleimani as an assassination. See Shane Reeves & Winston Williams, *Was the Soleimani Killing an Assassination?*, *LAWFARE*, 17 January 2020, <https://www.lawfareblog.com/was-soleimani-killing-assassination>. The authoritative voice on the subject was a 1989 memorandum written by Parks, which provided a clear definition and helpful explanation of the prohibition of assassination in international law. See *id.*
- [5] Telephone Interview with W. Hays Parks (18 December 2019). Parks was commissioned in the Marine Corps immediately after law school. After significant training, he volunteered to serve in Vietnam, and was immediately sent on a 14-month deployment where he served as a prosecutor and infantry commander. *Id.* Parks was present and responsible for base defense during the Tet offensive and experienced significant combat events. *Id.*
- [6] W. Hays Parks, *The Law of War Adviser*, 31 *JUDGE ADVOCATE GENERAL J.* 1 (1980).
- [7] *W. Hays Parks*, *supra* note 4.
- [8] W. Hays Parks, National Security Law in Practice: The Department of Defense Law of War Manual, Address to the American Bar Association (8 November 2010). The manual was ultimately published four-and-a-half years after his address. U.S. DEP'T OF DEF., *DEPARTMENT OF DEFENSE LAW OF WAR MANUAL* (June 2015, updated December 2016) [hereinafter *DoD LAW OF WAR MANUAL*]. In describing his 16-year effort, Parks said he attempted to balance the competing ideas expressed in the adages of "the best is the enemy of the good" while "speed is great, but accuracy is better." *Id.*
- [9] See W. Hays Parks, *The Protocol on Incendiary Weapons*, 279 *INT'L REV. RED CROSS* 548 (1990).
- [10] *Id.*
- [11] Parks, *supra* note 8.
- [12] See, e.g., W. Hays Parks, *Air Wars and the Law of War*, 1 *A.F. L. REV.* 1 (1990).
- [13] W. Hays Parks, *Lessons from the 1986 Libya Airstrike*, 36 *N.E. L. REV.* 4 (2002). Among other legal principles articulated by Parks in 1986 was the idea that "the obligation to reduce collateral civilian casualties...is the responsibility of all parties.... Civilians who choose to remain near a target do so at an assumed risk." *Id.* at 761.
- [14] W. Hays Parks, *War Crimes in the Gulf War*, 66 *ST. JOHN'S L. REV.* 73 (1992); W. Hays Parks, *The Gulf War: A Practitioner's View*, 10 *DICK. J. INT'L L.* 3 (1992). Parks also provides valuable insight in describing his experience in dealing with nearly 70,000 prisoners of war. See *id.*

- [15] W. Hays Parks, *Combatants*, 85 INT'L STUD. SER. U.S. NAVAL WAR COL. 247 (2009). Parks provides a nuanced discussion of President Bush's order that members of the Taliban are not entitled to Prisoner of War status under the Third Geneva Convention. *Id.*
- [16] W. Hays Parks, *Means and Methods of Warfare*, 38 GEO. WASH. INT'L L. REV. 512 (2006).
- [17] *Id.* Parks argues most of this criticism was incidental to stronger disagreement to the war in general, ostensibly motivated by humanitarianism. *Id.* at 513.
- [18] *Id.* at 516; U.S. DEP'T OF DEF., DIR. 5500.15, REVIEW OF LEGALITY OF WEAPONS UNDER INTERNATIONAL LAW (16 October 1974). The directive has since been superseded by updated directives and individual service instructions. *See* U.S. DEP'T OF DEF., DIR. 5000.01, THE DEFENSE ACQUISITION SYSTEM, para. E1.1.15 (12 May 2003, certified current 20 November 2007); U.S. DEP'T OF ARMY, REG. 27-53, REVIEW OF LEGALITY OF WEAPONS UNDER INTERNATIONAL LAW (1 January 1979); U.S. DEP'T OF NAVY, SEC'Y OF NAVY INSTR. 5000.2E, DEPARTMENT OF THE NAVY IMPLEMENTATION AND OPERATION OF THE DEFENSE ACQUISITION SYSTEM AND THE JOINT CAPABILITIES INTEGRATION AND DEVELOPMENT SYSTEM (1 September 2011); U.S. DEP'T OF AIR FORCE, INSTR. 51-401, THE LAW OF WAR (3 August 2018).
- [19] *See* Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflict, *opened for signature* December 12, 1977, 1125 U.N.T.S. 3 (entered into force on 12 July 1978) [hereinafter Protocol I].
- [20] *See id.* art. 36, *cf. Treaties, States Parties and Commentaries*, ICRC, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/470> (last visited 3 January 2020).
- [21] 88 INT'L COMM. OF THE RED CROSS, PUBL'N No. 864, A GUIDE TO THE LEGAL REVIEW OF NEW WEAPONS, MEANS AND METHODS OF WARFARE: MEASURES TO IMPLEMENT ARTICLE 36 OF ADDITIONAL PROTOCOL I OF 1977, at 934 (2006).
- [22] *See e.g.*, W. Hays Parks, *Joint Service Combat Shotgun Program*, ARMY LAW. 16 (October 1997).
- [23] *See, e.g.*, Parks, *supra* note 16.
- [24] Parks, *supra* note 22, at 24.
- [25] W. Hays Parks, *Special Forces' Wear of Non-Standard Uniforms*, 4 CHI. J. INT'L L. 493 (2003).
- [26] *Id.* at 513.
- [27] *Id.* This position contrasts with the International Committee of the Red Cross (ICRC)'s Customary International Law (CIL) Study. INT'L COMM. OF THE RED CROSS, 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, Rule 272 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) (hereinafter ICRC CIL Study). Rule 78 of the study states that "the anti-personnel use of bullets which explode within the human body is prohibited" under customary international law. *Id.* The U.S. position today is that "exploding bullets" are not prohibited by the law, but are subject to the prohibition of superfluous injury. DoD LAW OF WAR MANUAL, *supra* note 8, para. 6.5.4.3 (December 2016). It is worth noting that the U.S. is not a party to the 1868 St. Petersburg Declaration on Exploding Bullets. *Id.* But the paragraph nonetheless show Parks's influence on the DoD Manual, and U.S. understanding of IHL.
- [28] *See* Alfons Vanheusden, W. Hays Parks & William H. Boothby, *The Use of Expanding Bullets in Military Operations: Examining the Kampala Consensus*, 50 MIL. L. & L. WAR REV. 535 (2011).
- [29] Hague Declaration Concerning Expanding Bullets, 29 July 1899.
- [30] *Id.*
- [31] Vanheusden et al., *supra* note 28, at 537. The ICRC argues that expanding bullets are prohibited in armed conflict as a matter of customary international law. ICRC CIL Study, *supra* note 24, at Rule 77.
- [32] Rome Statute of the International Criminal Court art. 8, para. 2(e)(xv), 17 July 1998, amended 29 November 2010, 2187 U.N.T.S. 3. The Rome Statute originally made use of expanding bullets a war crime only in international armed conflicts. *See id.* art. 8, para. 2(b)(xiv). The 2010 amendments proposed to make the same crime applicable to non-international armed conflict. *See id.* art. 8, para. 2(e)(xv). The U.S. has not ratified the Rome Statute.
- [33] *See* Vanheusden et al., *supra* note 28; INT'L CRIM. CT., ELEMENTS OF CRIMES 42, <https://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf>.
- [34] *See* Vanheusden et al., *supra* note 28, at 547.
- [35] *Id.* at 546.
- [36] *Id.* at 545, quoting Sir Christopher Greenwood, Keynote speech delivered on the occasion of the Third International Workshop on Wound Ballistics at Thun, Switzerland (28-29 March 2001).
- [37] *Id.*
- [38] *See generally* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (8 July).
- [39] Parks, *supra* note 16, at 519-20.

- [40] Some proposed a weapon analysis program called CUSHIE for “causes unnecessary suffering or has indiscriminate effects.” *Id.* at 519. When this attempt failed the ICRC initiated its effects-based SIrUS Project for “superfluous injury or unnecessary suffering.” *Id.* at 527. The ICRC adopted an effects-based analysis that looked not at the intended normal effect, but solely at the potential wounding effect of various weapons. *Id.*
- [41] Parks, *supra* note 22, at 18.
- [42] It is worth noting here that although “unnecessary suffering” and “superfluous injury” are often used synonymously, including in the ICJ Advisory Opinion, Parks argues that “superfluous injury” is the more appropriate term to use, as it more closely resembles the French term, which was the original language of the 1907 Hague Convention. *Id.* at 18.
- [43] Legality of the Threat or Use of Nuclear Weapons, *supra* note 38.
- [44] This assertion is supported by the author’s experience in reading hundreds and writing dozens of legal reviews of new weapons for the Australian Defence Force between 2017-19.
- [45] Parks, *supra* note 22 at 18.
- [46] *Id.*
- [47] DoD LAW OF WAR MANUAL, *supra* note 8, para. 6.6.1.
- [48] United Nations Conference on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (CCW) Protocol on Non-Detectable Fragments (Protocol I), 10 October 1980, 1342 U.N.T.S. 137.
- [49] CCW Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II), 10 October 1980, 2048 U.N.T.S. 93.
- [50] CCW Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III), 10 October 1980, 1342 U.N.T.S. 171.
- [51] CCW Protocol on Blinding Laser Weapons, (Protocol IV) 13 October 1995, 1380 U.N.T.S. 370. Parks’s involvement in Protocol IV is a fascinating history in itself. He was a lead negotiator for the U.S. at the UN Conferences and in 1995, regrettably found his name on national headlines after he wrote an inflammatory memo that leaked to the media. See Bradley Graham, *Accusatory Memo has the Pentagon in Full Retreat*, WASH. POST, 1 October 1995, <https://www.washingtonpost.com/archive/politics/1995/10/01/accusatory-memo-has-the-pentagon-in-full-retreat/2ae058c2-3cd9-4567-86e3-a098710ca13d/>. Parks has also written that Protocol III was futile in that it prohibited a non-existent weapon. See Parks, *supra* note 16. However, the restriction in Protocol III has limited use of lasers on the battlefield today.
- [52] CCW Protocol on Explosive Remnants of War (Protocol V), 28 November 2003, 2399 U.N.T.S. 100. Several failed attempts were made to prohibit other weapons, such as cluster munitions, blast weapons, small-caliber projectiles, directed-energy weapons and others. See Parks, *supra* note 16, at 523.
- [53] W. Hays Parks, *The Protocol on Incendiary Weapons*, 279 INT’L REV. RED CROSS 548 (1990). This may be partly owing to the fact that he was a principal author. See *id.*
- [54] Parks, *supra* note 16, at 518. The others are CCW Protocol II, prohibiting landmines and booby-traps. *Id.*, and CCW Protocol V, *supra* note 52.
- [55] See, e.g., ICRC CIL Study, *supra* note 24, at Rule 85.
- [56] See CCW Protocol III, *supra* note 50.
- [57] Parks, *supra* note 16, at 535.
- [58] *Id.*
- [59] Since 2013, the CCW States Parties have been discussing lethal autonomous weapon systems (LAWS). United Nations, *Background on Lethal Autonomous Weapons Systems in the CCW* (2017), [https://www.unog.ch/80256EE600585943/\(httpPages\)/8FA3C2562A60FF81C1257CE600393DF6?OpenDocument](https://www.unog.ch/80256EE600585943/(httpPages)/8FA3C2562A60FF81C1257CE600393DF6?OpenDocument). These discussions led to a series of Informal Meetings of Experts in Geneva to discuss a possible ban. *Id.* In 2016 at the Fifth CCW Review Conference, a Group of Government Experts (GGE) was created to discuss challenges and issues related to LAWS, including a possible ban. The UN GGE on LAWS has met four times. United Nations, *2019 Group of Governmental Experts on Lethal Autonomous Weapons Systems (LAWS)* (2019), [https://www.unog.ch/80256EE600585943/\(httpPages\)/5535B644C2AE8F28C1258433002BBF14?OpenDocument](https://www.unog.ch/80256EE600585943/(httpPages)/5535B644C2AE8F28C1258433002BBF14?OpenDocument). The UN GGE meetings include a range of opinions, from the Human Rights Watch Campaign to Stop Killer Robots to the resistant attitudes of Russia. Thus far no broad agreement has been reached.
- [60] For many years the ICRC and some States, including Germany, have sought to limit or prohibit the use of explosive weapons in urban settings. Judith Kiconco, Address to the ICRC’s Open Session of the Peace and Security Council on the Protection of Civilians Against Use of Explosive Weapons in Populated Areas (17 July 2019), <https://www.icrc.org/en/document/ewipa-icrc-statement-use-explosive-weapons-populated-areas>. Multi-lateral discussions have taken place, for example, as a side-event to the UN General Assembly’s First Committee. Ruben Nicolin, *Strengthening the Protection of Civilians from the Use of Explosive Weapons in Populated Areas* (29 October 29 2018), <https://www.un.org/disarmament/update/strengthening-the-protection-of-civilians-from-the-use-of-explosive-weapons-in-populated-areas/>. However, broad consensus on the subject remains elusive.

- [61] The Global Coalition to Protect Education from Attack, an NGO, has, since 2015, sought to obtain State signatures on a non-binding Declaration that claims to prevent the use or targeting of schools in armed conflict. Global Coalition to Protect Education from Attack, *Safe Schools Declaration and Guidelines* (2019), <http://www.protectingeducation.org/safeschoolsdeclaration>. To date 89 States have signed. *Id.*
- [62] As of 2019, 48 states had signed The Treaty on the Prohibition of Nuclear Weapons, though it has not yet entered into force, as 50 signatures are required. Treaty on the Prohibition of Nuclear Weapons, 7 July 2017. The treaty is the result of the ICRC's "humanitarian initiative" to prohibit completely the possession or use of nuclear weapons for all States. Of the 48 States that have signed, none are nuclear power States.
- [63] Since 2008, and amended in 2014, China and Russia have sponsored a draft Treaty on the Prevention of the Placement of Weapons in Outer Space, the Threat or Use of Force against Outer Space Objects (PPWT). The U.S. and others have consistently resisted these efforts for several reasons, including suspicion over the motives, and perhaps hypocrisy of the drafters. Ambassador Robert Wood, Address to the United Nations General Assembly (20 October 2017), *available at* <https://usun.usmission.gov/explanation-of-vote-in-the-first-committee-on-resolution-l-54-further-practical-measures-for-the-prevention-of-an-arms-race-in-outer-space/>
- [64] Parks has often argued that for a law of war treaty to succeed it should follow the following rules: (1) Treaties that stringently regulate the use of weapons are less effective than arms control agreements, but effective weapons are unlikely to be banned. W. Hays Parks, *Making Law of War Treaties: Lessons from Submarine Warfare Regulation* 75 INT'L L. STUD. 339, 365 (2000). (2) Beware those who claim humanitarian motives. *Id.* Treaties with emotional appeal are likely to offer short-term political gain, but have less chance of long-term respect. *Id.* (3) The law of war cannot be used to cancel another nation's strengths or mitigate against a nation's weakness. *Id.* at 366. Finally, difficult issues seldom become easier to solve with the passage of time. *Id.* at 367.
- [65] W. Hays Parks, *The Law of War Adviser*, 31 JUDGE ADVOCATE GENERAL J. 1, 6 (1980).
- [66] *Id.* at 19.
- [67] See W. Hays Parks, *The Gulf War: A Practitioner's View*, 10 DICK. J. INT'L L. 3, 399 (1992). Parks warns that "attention to law of war implementation and training is directly proportionate to the individual staff judge advocate's or commander's interest in the law of war." Parks, *supra* note 65, at 23-24.
- [68] W. Hays Parks, *Teaching the Law of War: A Reprise*, 3 IDF L. REV. 2007-2008.
- [69] *Id.* at 11-13. Related to this point, John Bellinger very recently emphasized the need to ensure IHL is not viewed as "politically correct or Lilliputian infringements on U.S. sovereignty." John Bellinger, *Attacking Iran's Cultural Sites Would Violate the Hague Cultural Property Convention*, LAWFARE, 5 January 2020, <https://www.lawfareblog.com/attacking-irans-cultural-sites-would-violate-hague-cultural-property-convention>.
- [70] *Id.* As a young Captain, the present author delivered dozens, perhaps more than 100, IHL briefings to tactical forces in Afghanistan. Some of these briefings included discussion of IHL's correlation with morality and honor, with mixed results. Generally, the author found a reverse correlation between combat experience and the level of interest in such discussions. Parks, with his own combat experience, would not be surprised.
- [71] DANIEL MUÑOZ-ROJAS & JEAN-JACQUES FRÉSARD, ICRC REF NO. 0853, THE ROOTS OF BEHAVIOUR IN WAR: UNDERSTANDING AND PREVENTING IHL VIOLATIONS (2004).
- [72] *Id.*
- [73] *Id.*
- [74] FIONA TERRY & BRIAN MCQUINN, ICRC REF NO. 4352, THE ROOTS OF RESTRAINT IN WAR (2018).
- [75] *Id.* at 32.
- [76] *Id.* at 32, 34; *see also* Dr. Helen Durham, Address to Asia Pacific Centre for Military Law (October 2018).
- [77] Parks, *supra* note 68, at Annex.
- [78] *Id.* at 11.
- [79] *Id.* at 14-15.
- [80] W. Hays Parks, *Part IX of the ICRC 'Direct Participation in Hostilities' Study: No Mandate, No Expertise, and Legally Incorrect*, 42 NYU J. INT'L L. & POL. 769 (2010).
- [81] W. Hays Parks, *The ICRC Customary Law Study: A Preliminary Assessment*, Address to the American Society of International Law (2005).
- [82] Parks, *supra* note 80, at 784. Professor Michael Schmitt was similarly situated, and he likewise published harsh criticism of the ICRC's DPH Study. See Michael Schmitt, *Perspectives on the ICRC Interpretive Guidance: Deconstructing Direct Participation in Hostilities: The Constitutive Elements*, 42 N.Y.U. J. INT'L L. & POL. 697 (2010). Yet, because the study ostensibly provides a specific test to resolve an ambiguous rule, it is nevertheless used often by allies.
- [83] See DoD LAW OF WAR MANUAL, *supra* note 8, para. 5.8.4.
- [84] *Id.*

- [85] W. Hays Parks, *Update on the DoD Law of War Manual*, Address to the American Bar Association 22nd Annual Review of the Field of National Security Law 2 (2012).
- [86] *Id.* at 3.
- [87] “Total War” is a phrase Parks uses often in his article *Air Wars and the Law of War*, 32 A.F. L. REV. 1, 51 (1990). He does not define the term, but uses it to describe a major conflict where the survival of the state is at stake.
- [88] *See generally id.*
- [89] *See id.* at 2-3.
- [90] *See e.g., id.* at n.1, wherein Parks attempts to summarize the total number of civilian deaths during World War II as a result of aerial bombardment. *See also, id.* at 39, wherein Parks references a 1936 German military manual to show Germany’s historical position on targeting war-sustaining objects.
- [91] *See e.g., id.* at 74-75. Parks provides here an analogy from Winston Churchill, wherein Churchill mockingly speculates on what an arms control treaty would look like in the animal kingdom. Parks also uses sports analogies to describe the difficulty of IHL compliance. *See id.* at 51. Parks also finds clever quotes to deliver his arguments. He quotes Vice Admiral Sir John A. Fisher in saying: “If I’m in command when war breaks out I shall issue my orders: The essence of war is violence. Moderation in war is imbecility. Hit first, hit hard, and hit anywhere.” *Id.* at 13.
- [92] As one of many examples, Parks quotes the Lieber Code in saying: “the more vigorously wars are pursued the better it is for humanity.” *Id.* at 8; quoting U.S. Dep’t of War, General Order No. 100, Instructions for the Government of the Armies of the United States in the Field by Order of the Secretary of War, para. 29 (1863). The present author has learned that few things will turn a room of IHL academics against you more quickly than articulating the Lieber Code principle that “sharp wars are brief.”
- [93] *Id.* at 59.
- [94] Tracey Begley, ICRC, *Is It Time to Ratify Additional Protocol I?* (2015), <http://intercrossblog.icrc.org/blog/d9r104eqyjqgma49vlapmk6a9l67i>. It is worth noting that following the signing of Protocol I, the U.S. was widely expected to ratify. Indeed, the U.S. Air Force published a law of war pamphlet in 1976 incorporating Protocol I. *See U.S. DEP’T OF AIR FORCE, PAM. 110-31, International Law - The Conduct of Armed Conflict and Air Operations* (1976).
- [95] *W. Hays Parks, supra* note 4.
- [96] *Id.*
- [97] Parks, *supra* note 12, at 90-91; Appendix to John W. Vessey Jr., Chairman of the Joint Chiefs of Staff, Review of the 1977 First Additional Protocol to the Geneva Conventions of 1949, 3 May 1985. Parks insists he had little to do with Protocol I’s rejection. Telephone Interview with W. Hays Parks, *supra* note 5. He says the primary force at the Pentagon was Douglas Feith, a policy political appointee. *Id.* However, Parks participated in the review. *Id.*
- [98] *See Parks, supra* note 12, at 90-91
- [99] *Id.* at 81.
- [100] *Id.* at 218.
- [101] *Id.* at n.644. In this case, the proposed rule died in committee, but similar efforts were frequent. In Parks’s view, these efforts were often supported by altruistic, but misguided NGOs. *See id.*
- [102] *Id.* at 75. Here Parks references a conversation with Waldemar A. Solf, *id.* at n.255. Solf was a member of the U.S. delegation to the Diplomatic Conference and subsequently co-authored a now well-known book on the conferences. MICHAEL BOTHE, KARL JOSEF PARTSCH & WALDEMAR A. SOLF, *NEW RULES FOR VICTIMS OF ARMED CONFLICTS* xv (2d ed. 2013). Parks also criticized the delegates for lack of experience, stating that because none had “dropped a bomb in anger” they lacked sufficient understanding to create a law of war treaty. Parks, *supra* note 12, at 78. He quotes the English author, John Glasworthy: “idealism increases in direct proportion to one’s distance from the problem.” *Id.* at 219.
- [103] Protocol I, *supra* note 19, art. 51(3). ICRC commentary held that “it is only during such participation that a civilian loses his immunity and becomes a legitimate target. Once he ceases to participate, the civilian regains his right to the protection.” ICRC, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, para. 1944 (1987).
- [104] Parks, *supra* note 12 at 118.
- [105] *Id.* Specifically, Parks argues that customary international law held that once a civilian carried out combat activities, he was then a legitimate target and could not revert to civilian status. *Id.*
- [106] *See Parks, supra* note 12, at 118-20.
- [107] *Id.* at 134.
- [108] *Id.* At 56.
- [109] NILS MELZER, *INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW* 44, 45 (2009).

- [110] To be fair, the ICRC has argued that we have only a slightly better understanding of the law today than we did in 1990, and the ICRC’s analysis is an attempt add more meat to the bones of Article 51. *See id.*
- [111] *Id.* at 46.
- [112] *Id.*
- [113] *Id.* It is worth noting that while Parks was wrong in this case, one need only change one element to the hypothetical to make him correct. If the driver were instead taking ammunition from a factory to a port, instead of the front line, he would remain a civilian while his cargo would be a military objective. *See id.*
- [114] Protocol I, *supra* note 19, arts. 51, 57.
- [115] *See, e.g.* Parks, *supra* note 12, at 181.
- [116] *Id.* at 21. This was true for both ground and aerial attacks. *See id.*
- [117] *Id.* at 29.
- [118] *Id.* at 112.
- [119] *Id.* at 163.
- [120] *See* R. Scott Adams, *Power and Proportionality: The Role of Empathy and Ethics on Valuing Excessive Harm*, 80 A.F. L. Rev. 149, 160 (2019); *see* ICRC CIL Study, *supra* note 24, at Rule 14.
- [121] COL THEODORE T. RICHARD, UNOFFICIAL UNITED STATES GUIDE TO THE FIRST ADDITIONAL PROTOCOL TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 120-22 (2019).
- [122] U.S. JOINT CHIEFS OF STAFF, JOINT PUBL’N 3-60, JOINT TARGETING A-5 (28 September 2018).
- [123] Even in the immediate aftermath of Parks’s *Air Wars* article, at least one Australian scholar responded that Parks’s argument was patently false and that it revealed the U.S. always sees itself as the attacker. *See* JUDITH GAIL GARDAM, NON-COMBATANT IMMUNITY AS A NORM OF INTERNATIONAL HUMANITARIAN LAW 122 (1993).
- [124] Since Protocol I was drafted, international case law has established the “reasonable military commander” standard, allowing commanders operational flexibility, but nonetheless requires their decisions to be objectively reasonable. *See generally*, Ian Henderson & Kate Reece, *Proportionality under International Humanitarian Law: The Reasonable Military Commander Standard and Reverberating Effects*, 51 VAND. J. TRANSNAT’L L. 835 (2018). The “reasonable person” standard is ubiquitous in the law, and its application here undermines Parks’s argument that if proportionality were a U.S. statute it would be “constitutionally void for vagueness.” Parks, *supra* note 87, at 173. Further, the U.S. has created an imperfect, but nonetheless practical method for calculating estimated civilian casualties. *See, e.g.*, CHAIRMAN, JOINT CHIEFS OF STAFF, INSTR. 3160.01, NO-STRIKE AND THE COLLATERAL DAMAGE ESTIMATION METHODOLOGY (13 February 2009).
- [125] *See e.g.*, Michael R. Gordon, *Pentagon Inquiry Blames ISIS for Civilian Deaths in Mosul Strike*, N.Y. TIMES, 25 May 2017, <https://www.nytimes.com/2017/05/25/us/politics/mosul-us-airstrike-civilian-deaths-isis-pentagon.html>.
- [126] Parks predicted that a great danger from Protocol I was that it “provides an enemy captor with an authentic basis for his misallegations in future conflicts, no matter how discriminate air operations may in fact be.” Parks, *supra* note 12, at 180.
- [127] Telephone Interview with W. Hays Parks, *supra* note 5.
- [128] *Id.*
- [129] *Id.*
- [130] *Id.*
- [131] Protocol I, *supra* note 19, signed 7 December 1978, [1991] ATS 29.
- [132] *See id.* Australia did submit some declarations. For example, Australia submitted a declaration to Articles 51-58 inclusive, stating that military commanders must reach their decisions based on an assessment of all relevant information available at the time. *See id.* at n.7.
- [133] *See* Parks, *supra* note 12, at 222.

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Hurricane Michael Response: Medical Legal Considerations Before, During, and After a Natural Disaster

BY MAJOR VINCENT L. DEFABO

This article will address what medical law practitioners and other legal professionals should do before, during, and after a natural disaster, based on the lessons learned from Hurricane Michael.

On **8 October 2018**, Hurricane Michael strengthened to Category 1[1] and was projected to intensify as it moved through the Gulf of Mexico. Members of the 96th Medical Group at Eglin Air Force Base (AFB), Florida met to develop a plan for assisting with recovery to the local and base community and to discuss the “ride out” options. As a precautionary measure, the decision was made to close the hospital for the next two days.

On 9 October 2018, Hurricane Michael strengthened to Category 2 and it became evident there would be a direct impact on the Florida panhandle. Closure signs went up at Eglin’s hospital. A little over 90 miles to the east, the situation looked more precarious for Tyndall AFB and a mandatory evacuation was ordered for all personnel.

On 10 October 2018, as Hurricane Michael was about to make landfall, it had developed into a high-end Category 4

(measured wind speeds were only two miles per hour shy of criteria for Category 5 storm—the highest category).[2]

On the evening of **11 October 2018**, Hurricane Michael quickly passed through the Florida panhandle, sparing Eglin but devastating Tyndall. While normal operations resumed on Eglin, almost all of Tyndall’s structures were damaged.[3]

Several legal issues arose in the following days and weeks: what would be the Rules of Engagement (ROEs) for medical personnel responding on Tyndall; what would be the status of squadrons that had to move temporarily; and, who would assume responsibility for hospital operations ranging from unread lab tests to clinical adverse actions? This article will address what medical law practitioners and other legal professionals should do before, during, and after a natural disaster, based on the lessons learned from Hurricane Michael.

BEFORE THE DISASTER

Mutual Aid Agreements

Planning a medical response for a disaster should begin well before a hurricane, wildfire, earthquake, or other disaster materializes. Mutual Aid Agreements (MAAs) should be developed with civilian entities to provide a coordinated medical response.[4]

An MAA is an agreement between agencies or jurisdictions that provides a mechanism to quickly obtain emergency assistance in the form of personnel, equipment, materials, and associated services.

An MAA is an agreement between agencies or jurisdictions that provides a mechanism to quickly obtain emergency assistance in the form of personnel, equipment, materials, and associated services.[5] An MAA should define the type of assistance requested and/or available to support others (e.g., ambulance transport) and also include the procedures required for civil authorities to request assistance. Verbal requests must be followed by a written request to the installation commander with an offer to reimburse the DoD.[6] In the immediate aftermath of a disaster, the installation commander may authorize requests for immediate relief when there is not enough time for higher headquarters approval.[7] Therefore, the MAA should be signed by the installation commander, as opposed to a group commander, since the installation commander has been given the authority to provide assistance in the immediate aftermath of a disaster.

An MAA should also outline the specific timelines for enacting a request. Commanders may authorize a request for assistance as described above, which should be received from civilian agencies within 24 hours of the agency's damage assessments.[8] Any enactment of the MAA beyond 72 hours requires the installation commander to conduct an assessment to determine if the emergency still exists.[9]

A military commander may employ resources under his or her control to save lives, prevent human suffering, or mitigate property damage under imminently serious conditions.[10] It is not clear from DoD and Air Force guidance if group and squadron commanders may authorize assistance under the immediate response authority since they are military commanders with resources under their control, or if this responsibility rests solely with the installation commander. Therefore, an MAA should clearly delineate the installation commander's role in disaster response and if he or she is authorizing a group commander or a medical wing to act on requests to use medical group assets in a medical emergency. As such, the group commander can rely not only on immediate response authority, but also on the installation commander's direction under the MAA.

Tyndall did not have an MAA in place and ambulance responses had to be coordinated on an ad hoc basis.

During Hurricane Michael, Eglin did not have an MAA in place. This created the potential for confusion if Hurricane Michael directly hit Eglin. Tyndall did not have an MAA in place and ambulance responses had to be coordinated on an ad hoc basis. This included Eglin ambulance crews driving over 90 miles to assist Tyndall and then waiting for further clarification on response capabilities after arriving. After the hurricane, Eglin worked with local governmental authorities to develop an MAA to avoid confusion in the event of a future disaster.

Hospital Closure Planning

Alongside establishing MAAs before a major disaster, closure planning is key. The concept of closing a hospital or clinic may seem unlikely or improbable, until a disaster is imminent. Simply having a discussion about closing the hospital or clinic is a necessary step for pre-disaster planning. The factors to consider in determining whether to close a Military Treatment Facility (MTF) are: (1) whether the Standard of Care (SOC) can be maintained if the facility remains

open; (2) notification procedures to patients and potential patients; and (3) procedures for handling unresolved patient encounters (i.e. open medical encounters)[11] in which further action is needed. Examples of follow up care for open medical encounters includes: unread radiology or lab results, referrals, and follow up treatment recommendations.

The concept of closing a hospital or clinic may seem unlikely or improbable, until a disaster is imminent.

While a facility remains open, the SOC does not necessarily change for hospital operations.[12] A hospital that remains open must be prepared for normal emergency response and transfer of patients to appropriate facilities despite hazardous conditions, meaning it is not an option to keep only the emergency room open. Courts have held hospitals liable for an individual physician's negligence under the theory of corporate negligence if the negligence was the result of deficiencies in staffing, which may apply to natural disasters.[13]

MTFs should discuss what services they can provide in the event of a disaster, taking into consideration supplies, backup power, and their ability to maintain proper staffing.

Manning positions with personnel whose qualifications do not meet the minimum SOC is also not an option. Hospitals can be liable for the negligence of individual health professionals when the resulting injuries could have been prevented through adequate supervision.[14] MTFs should discuss what services they can provide in the event of a disaster, taking into consideration supplies, backup power, and their ability to maintain proper staffing. At Eglin, the need to maintain the same SOC was central to the decision to close the hospital for 48 hours. The concern was that patients

would show up to receive emergency medical care and the hospital would not be able to provide proper services.

Proper notification of patients in the event of a closure is also part of closure planning. Clear signage should be posted to ensure patients have reasonable notice that the facility will be closing, or is closed, and to ensure that patients are aware of the anticipated duration of the closure. Notifications by phone should also occur to ensure patients are aware that their appointments and surgeries are canceled. Automated closure messages and local media can also be utilized in order to disseminate the message.

The final factor to consider in closure planning is to determine who will handle open medical encounters. Specifically, who will take care of unread radiology and lab results and relay those results to patients. Certain medical encounters require follow up care and providers should have plans for transferring or following up with patients. Under the **Health Information Technology for Economic and Clinical Health (HITECH) Act**, the federal government seeks to achieve interoperability by building a “nationwide health information technology infrastructure that permits the electronic exchange and use of health information.”[15] This act may also create a requirement to ensure transmission of care and notification of results if a hospital is closed.[16]

Who will handle open medical encounters? Specifically, who will take care of unread radiology and lab results and relay those results to patients.

A similar, related consideration is that evacuees need to be able to obtain new medications and resume medical care. “With interoperability, authorized clinicians will have direct access to the results of all prior diagnostic tests and procedures, no matter where they were conducted.”[17] In short, MTFs should have contingency plans to ensure continuity of medical care and these plans should be finalized and in place before a disaster strikes.

Planning for Continuing Operations

Part of the closure decision making process is determining the capabilities for continued medical operations during a disaster. Facilities that remain open may become part of the disaster response, which may call for ambulances to transport disaster victims to appropriate medical facilities.[18] Even clinics that are not normally engaged in emergency response may be called upon to assist disaster victims.

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In instances of continuing operations in which military medical personnel are called upon to assist civilians in a disaster, it is important to know that there are several legal protections shielding health care providers from liability. Under 10 U.S.C. § 1094, military personnel acting within their scope of care, as directed and authorized by the Department of Defense (DoD), may provide medical support outside of an installation, even if they do not have a medical license in the state.[19] Additionally, Good Samaritan laws in most states protect medical personnel, including those in the military, who are responding to emergency situations.[20] However, Good Samaritan law protections generally extend only to stabilization treatment and do not include patient transfers or sustained medical care.[21] To conduct a patient transfer or provide medical care beyond stabilization, providers should be relying on agreements—such as MAAs—or authorizations from commanders to treat civilians, especially off base. Working under an MAA or some other directive (such as a Presidential declaration of emergency or major disaster) provides proper authority and liability protections for responses beyond stabilizing patients.[22] In sum, stabilizing disaster victims may always occur to save life, limb, or eyesight; but, any sustained medical care or medical transport requires additional authorization.

DoD medical personnel may also rely on the **Federal Torts Claims Act (FTCA)** for liability protection.[23] For individual medical personnel employed by the DoD, protections extend to those who are acting within the scope of medical practice and job duties.[24] Having a clear directive of the medical support that will be provided to civilians ensures that FTCA protections extend to medical personnel providing such care. The FTCA not only protects individuals, but the entire MTF. NDAA FY 2020 does not alter the coverage that individual medical personnel employed by DoD (including military, civilian, and personal service contractors) have in terms of liability protection.[25]

Knowing the liability protections also helps to develop ROEs for medical response teams.

Knowing the liability protections also helps to develop ROEs for medical response teams. Preferably the development of ROEs occurs before a disaster to facilitate a speedy response. ROEs should clarify three items. First, what medical care can be provided to different statuses of patients (e.g. DoD beneficiaries and non-DoD beneficiaries) in emergency medical situations? Second, what medical care can be provided to these same categories of individuals in non-emergent situations? Third, what care is best provided off of a military installation and which options are available?

With regard to the first item, the law generally limits care for civilian non-beneficiaries to only emergency care to save life, limb, or eyesight. As to the second item, non-emergent care to non-active duty beneficiary patients may also be limited based on resources, in which case, patients should be directed to the nearest civilian medical facility. Finally, ROEs should be written at the time of the disaster and sent to all treating providers to delineate what care can be provided off a military installation (i.e. outside of exclusive/concurrent jurisdiction). Draft ROEs should be readily available based on the existing MAA and then modified based on the nature of the disaster. Without an MAA or some other authoriza-

tion of a declared disaster, off-base medical care by military medical personnel is limited to stabilizing patients.

Draft ROEs should be readily available based on the existing MAA and then modified based on the nature of the disaster.

During Hurricane Michael, ROEs were developed at Tyndall with input from the medical law consultant, the Air Force advisor to the Surgeon General, and the Air Combat Command (ACC) Staff Judge Advocate. This ensured both local level support and knowledge, but also higher level considerations and institutional lessons learned from previous disasters.

AFTER THE DISASTER – FACILITY CLOSED

Relocation of Patients and Personnel

If the MTF closure will last an extended period of time, then patients will need to be seen at other facilities. In the case of Hurricane Michael, TriCare authorized most evacuees to receive medical care from a TriCare authorized provider without a referral.[26] This authorization lasted in some counties for one week and in more impacted counties for over three months.[27] In addition, MTFs in evacuation zones received an influx of patients from both active duty and dependent patient populations. MTFs in evacuation zones may have to carefully consider staff schedules and look for ways to manage resources and appointments, to meet the needs of new patients. For example, some providers may have to work extra hours in the short term and some patients may have longer wait times.

An extended closure of an MTF also means that military personnel and missions may be temporarily or permanently moved to new installations. Installation Support Agreements, Memoranda of Understanding (MOU), and Memoranda of Agreement (MOA) will have to be established between the host installation(s) and units leaving their closed installation.[28] These agreements can take time to negotiate while personnel wait to perform assigned duties. Thus, drafts and

reviews of MOAs and MOUs should begin as soon as it is anticipated a squadron or unit will be moving temporarily or permanently to a new installation.

Clinical Adverse Actions

Another consideration is the management of clinical adverse actions under **Air Force Instruction 44-119**, *Medical Quality Operations*. A clinical adverse action is one that is invoked against a healthcare provider (privileged or non-privileged) where there is a threat, or potential threat, to patient safety, the safe delivery of healthcare or to the integrity of the Air Force Medical Service.[29]

If the MTF is closed permanently, then the Air Force Medical Operations Agency (AFMOA) assumes responsibility for all pending clinical adverse actions.

As the privileging authority, the MTF commander is ultimately responsible for initiating and directing the majority of actions.[30] However, if the MTF is closed permanently, then the Air Force Medical Operations Agency (AFMOA) assumes responsibility for all pending clinical adverse actions.[31] For those MTFs on extended closure (e.g. more than 30 days), the MTF commander should consult with AFMOA to handle clinical adverse actions accordingly. During Hurricane Michael, the MTF commander and AFMOA discussed adverse actions as soon as the commander could divert focus away from recovery efforts. While clinical adverse actions are important, the actions can wait a few days or even weeks if a commander needs to focus on recovery efforts.

AFTER THE DISASTER – FACILITY REOPENS

Medical Response Liability Considerations

Once a disaster has occurred, the medical response begins almost immediately. It is of primary importance to save lives. Saving life, limb, and eyesight for disaster victims is both the proper ethical and legal response.[32] If an MTF fails to respond to a disaster victim's medical emergency on

the installation, there is potential for a medical malpractice claim, especially if the patient presents at the MTF.

The Emergency Medical Treatment and Active Labor Act (EMTALA) requires a medical screening and stabilization for all emergency medical conditions.[33] EMTALA does not expressly waive the sovereign immunity of the DoD, or creates a mechanism outside the Federal Tort Claims Act (FTCA) to pursue tort claims for injury or loss caused by MTF providers in the course of their duties. Regardless, the Air Force and DoD have historically abided by EMTALA, due in part to EMTALA's 30-plus years of implementation at civilian hospitals making the Act's response protocols the SOC. This means that an MTF failing to abide by EMTALA standards risks falling below the SOC even though there is arguably no statutory requirement to follow it.[34] Since the DoD follows EMTALA for SOC considerations during normal operations, EMTALA standards should be followed during disasters.

During some situations a medical facility may be held to the same standard as if there were no disaster.

Significant EMTALA standards were set since the enactment of the law for normal medical conditions, but there still remain open questions about hospitals' liability in mass casualties or disasters.[35] During some situations a medical facility may be held to the same standard as if there were no disaster. For example, SOC remains the same for hospitals during power outages.[36] Hospitals are expected to anticipate power outages in order to provide the same level of patient care. There must be backup plans for some disaster situations, such as having hand pumping equipment if the power goes out completely.[37] During disasters normal operations must be maintained to some degree if the MTF remains open.

On the other side of the equation, there are some liability protections if the disaster is so widespread that the system is overwhelmed. For example, certain patient transfer rules are

changed if patient transfers are not possible or are severely limited based on road conditions and facility availability.[38]

The **Bioterrorism Preparedness Act** expressly authorizes federal authorities in an emergency area to waive or modify, for sixty days, certain health care laws and requirements on health care providers regarding patient transfers during an emergency period.[39] The Bioterrorism Preparedness Act is implemented when the President declares an "emergency period" under the **Federal Robert T. Stafford Disaster Relief and Emergency Assistance** authority, or the Secretary of HHS (**Health and Human Services**) declares it under the **Federal Public Health Service Act**. [40] Medical screening and stabilization requirements may also be relaxed, but this is not readily apparent in the Stafford Act.[41] Thus, the major application of the Bioterrorism Preparedness Act for MTFs, as it relates to liability, is primarily in limiting the requirements of patient transfers.[42]

However, there are some indications the liability requirements for patient transfers remain the same. According to Sara Rosenbaum and Brian Kamoie, "The law does not change the underlying duty itself, nor does it extinguish the private right of action on the part of injured individuals. Furthermore, the law does not affect hospitals' screening obligations." [43] Thus, to the extent possible, MTFs should provide the same level of care during all forms of disaster.

Related to the level of care is the liability arrangements for civilian beneficiaries and active duty personnel. Civilian beneficiaries have always been able to file medical claims under the FTCA.[44] Additionally, they have access to judicial remedy if their claim is denied. In contrast, active duty service members have historically been barred from filing claims under *Feres*. [45] However, under NDAA 2020, Section 731, active duty service members can now file a claim; but unlike civilian beneficiaries, active duty personnel still do not have a judicial remedy if their claim is denied.[46] For both civilian beneficiaries and active duty personnel, the initial claims should be filed in writing, typically on Standard Form 95.[47] Base level JAGs should contact their local Medical Law Consultant (MLC) or the Medical Law

Branch after receiving claims under the FY20 NDAA, as the law will evolve for the foreseeable future.

Commanders may authorize assistance to civilian non-beneficiaries for “imminently serious conditions” in disaster situations.

Care to Non-Beneficiaries and National Guard Members

As previously discussed, commanders may authorize assistance to civilian non-beneficiaries for “imminently serious conditions” in disaster situations.[48] This authorization includes support to off installation civilian non-beneficiaries. Every 72 hours a re-evaluation needs to occur to determine if there is still an “imminently serious condition.”[49] Installation commanders may authorize support to save lives and prevent human suffering; but are prohibited from authorizing support that is systematic in nature or to provide widespread medical care.

For medical care that will last more than 72 hours or beyond “imminently serious conditions,” the President of the United States may authorize medical care on public and private lands for the preservation of life.[50] Air Force medical response units may provide immediate medical care for imminently serious conditions if it is anticipated that the President will declare a disaster or emergency.[51] However, the anticipation of a Presidential declaration is limited to Air Force MTFs and is not to exceed 10 days, absent Presidential declaration or other authority. While Air Force regulations do not delineate who may make this call, MTF commanders could authorize the immediate response in order to preserve life and then immediately notify the installation commander. The installation commander is the best authority to authorize a response beyond the first few hours of an imminently serious condition and then make required notification up the chain of command properly. Of note, the authority is limited to providing non-beneficiaries with emergency medical treatment only and to allow for the restoration of medical capabilities.

Sustained medical care is permissible under the Stafford Act if a state Governor makes a request for assistance and the President declares an *emergency* in order to save lives, protect property, and public health and safety, or to lessen the threat of or otherwise avert a catastrophe in any part of the country. [52] Emergency medical care may be provided to civilian non-beneficiaries under a declared emergency.[53] If the President declares a *major disaster*, then military treatment medical units may be called on to perform more sustained functions.[54] Assistance may include distributing medicine or food, providing medical care beyond triage and stabilization (i.e. normal medical care), and taking part in medical rescues. The wording of the authorization is critical as responding medical units need to know whether an *emergency* or a *major disaster* has occurred to understand the parameters of authorized medical care for civilian non-beneficiaries. The range of assistance available for state and local governments, private individuals, and families is broader under a *major disaster* compared to an *emergency*. [55] Consequently, the amount of resources and time that will need to be dedicated to a *major disaster* will generally be more than an *emergency*.

There may be other disaster response situations where MTFs may be called on to provide medical care or incidental medical assistance to civilian non-beneficiaries.

There may be other disaster response situations where MTFs may be called on to provide medical care or incidental medical assistance to civilian non-beneficiaries. This situation can occur under a different set of authorizations that allow for treatment of civilian non-beneficiaries on a federal military installation. In past natural disasters, such as during Hurricane Harvey, the Under Secretary of Defense (Personnel and Readiness), in coordination with the **Federal Emergency Management Agency** (FEMA), authorized certain bases to provide only emergency treatment and follow-on hospital care, if necessary.[56] As part of these past authorizations, civilian FEMA personnel, including

Red Cross workers, and civilian personnel who were affected by the disaster were provided medical care at MTFs. FEMA reimbursed the MTFs for the cost of the treatment. In this situation, patients received more sustained care than the type of care authorized under emergency response situations (i.e. more than just triage care).

According to the Congressional Research Service, governors routinely utilize their state National Guard to assist with disaster response and recovery.[57] Federal authorities may also order the National Guard to active duty.[58] Concerning military health care, if the National Guard members are on **Title 10** status, they are entitled to the same medical care as active duty members. Members of the National Guard on **Title 32** orders for more than 30 consecutive days are eligible for TriCare and can receive medical care at MTFs.[59] Absent another source of entitlement to military health care (for example, marriage to an active duty service member) a National Guardsman not on Title 10 status or on orders for more than 30 consecutive days is treated like a civilian non-beneficiary.

HIPAA Rules in Disasters

The DoD and the Air Force follow the rules of the **Health Insurance Portability and Accountability Act (HIPAA)**, which protects the privacy of protected health information (PHI).[60] HIPAA contains special disclosure rules are specifically related to disasters. In disasters, PHI may be disclosed in order to “assist in disaster relief efforts” for the purpose of coordinating with entities engaged in disaster relief.[61] Of note, if this HIPAA rule is utilized, this does not mean HIPAA is suspended. The Secretary of HHS has the ability to temporarily waive certain HIPAA rules under the **Bioshield Act**.[62] For example, the Secretary of HHS may waive the requirement to give the patient the opportunity to object to disclosure of his location to family members that is usually required under the registry information rule.[63]

Disasters will strike, and there is never one perfect response to them. However, responses can be improved through proper disaster planning.

CONCLUSION

It is naive to believe a disaster will never strike. Disasters will strike, and there is never one perfect response to them. However, responses can be improved through proper disaster planning. Such planning begins before a hurricane, flood, wildfire or other major disaster occurs. Assisting in the response to Hurricane Michael helped me to learn plans should be considered for both closing and keeping the MTFs open in the aftermath of a disaster. Plans addressing both short-term and long-term closures should be formulated and reduced to writing well ahead of a disaster. The personnel in medical readiness, the medical squadron and group leaders at Eglin and Tyndall, and the Tyndall AFB JAGs did an exceptional job of adjusting course and having some preliminary plans in place. They are the reason the disaster was not worse. However, there are always things that could have been done better, such as having an MAA in place or not having to develop ROEs several days after Hurricane Michael struck. Concrete agreements must be in place before a storm hits and it is the good community relationships and dedicated efforts of many individuals that allowed the lack of an MAA to not be a stumbling block. Finally, the Air Force medics and JAGs who responded to Hurricane Michael were truly dedicated to limiting the tragedy and are the reason the Florida panhandle is on the path to recovery.

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ENDNOTES

- [1] Hurricanes are categorized from 1 to 5 on the Saffir-Simpson Hurricane Wind Scale, which is based on a hurricane's sustained wind speed. A category 1 has "very dangerous winds," sustained at 74-95 miles per hour (mph) and will produce "some damage." A category 2 has "extremely dangerous winds," sustained at 96-110 mph, and will cause "extensive damage." Categories 3, 4, and 5 are considered major hurricanes. Category 3 has sustained winds 111-129 mph and produces devastating damage. Category 4 has sustained winds 130-156 mph and Category 5 has sustained winds 157 mph or higher. Both cause "catastrophic damage." <https://www.nhc.noaa.gov/aboutsshws.php>.
- [2] *Summary of Tropical Cyclone Michael*, National Weather Service, available at https://www.weather.gov/akq/Oct_11_Michael_Summary. January 15, 2019.
- [3] Joel Achenbach, Kevin Beoges, Dan Lamothe; *Hurricane Michael: Tyndall Air Force Base Was in the Eye of the Storm, and Almost Every Structure Was Damaged*; https://www.washingtonpost.com/national/hurricane-michael-tyndall-air-force-base-was-in-the-eye-of-the-storm-and-almost-every-structure-was-damaged/2018/10/23/26cca0b0-d6cb-11e8-aeb7-ddcad4a0a54e_story.html last accessed January 15, 2019.
- [4] U.S. DEP'T OF AIR FORCE, INSTR. 10-2501, AIR FORCE EMERGENCY MANAGEMENT PROGRAM, para. 4.11.1 (26 Sep. 2018) (hereinafter AFI 10-2501).
- [5] U.S. DEP'T OF DEFENSE INSTR. 6055.17, DoD EMERGENCY MANAGEMENT (EM) PROGRAM, G.2. Definitions "MAA" (13 Feb. 2017) [hereinafter DoDI 6055.17]; *see also* AFI 10-2501, *supra* note 4, Attachment 1.
- [6] U.S. DEP'T OF DEFENSE DIR. 3025.18, DEFENSE SUPPORT OF CIVIL AUTHORITIES (DSCA) para. 4.d (29 Dec. 2010, Incorporating Change 2, 19 Mar. 2018) [hereinafter DoDD 3025.18] (citing the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), 42 U.S.C. § 5121 et seq., and the Economy Act (31 U.S.C. § 1535)).
- [7] DoDD 3025.18, *supra* note 6, G.2 Definitions "emergency authority"; *see also* U.S. DEP'T OF AIR FORCE, INSTR. 10-801, DEFENSE SUPPORT OF CIVIL AUTHORITIES, para 3.1.2.1 (23 Dec. 2015) (hereinafter AFI 10-801).
- [8] *Id.*
- [9] AFI 10-801, para. 3.2.4.
- [10] DoDD 3025.18, para. 4g.
- [11] An "open encounter" is a term used in the medical community denotes an interaction with a patient that means "All unsigned and incomplete encounters (outpatient encounters, telephone consults, ambulatory procedure visits, and inpatient records), both in paper and electronic formats. Open encounters may include system errors (e.g., write-back errors), test appointments, appointments created in error, duplicate encounters, or draft documentation a provider has not yet completed." U.S. DEFENSE HEALTH AGENCY INTERIM PROCEDURE MEMORANDUM 18-021, Definitions "MAA" (18 Nov. 2018).
- [12] James G. Hodge, Jr., Stephanie H. Calves, et. al. *Risk Management in the Wake of Hurricanes and Other Disasters: Hospital Civil Liability Arising from the Use of Volunteer Health Professionals During Emergencies*, 10 MICH. ST. J. MED. & LAW 57, 61 (2006).
- [13] *Id.*
- [14] *Id.* at 73.
- [15] Sharona Hoffman and Andy Podgurski, *E-Health Hazards: Provider Liability and Electronic Health Record Systems*, 24 BERKELEY TECH. L.J. 1523, 1531 (2009).
- [16] The area of law of transmission of care is still developing and there is not currently a statutory requirement to transfer the notifications in the event of a disaster.
- [17] *Id.*
- [18] Elizabeth Weeks, *After the Catastrophe: Disaster Relief for Hospitals*, 85 N.C.L. REV. 223, 244 (2006); Sara Rosenbaum & Brian Kamoie, *Finding a Way Through the Hospital Door: The Role of EMTALA in Public Health Emergencies*, 31 J.L. MED. & ETHICS 590, 591 (2003).

- [19] 10 U.S.C. § 1094. 10 U.S.C. § 1094 allows “health care professionals” to practice medicine in any state or the District of Columbia if the individual a) has a current license to practice medicine, osteopathic medicine, dentistry, or another health profession b) is performing authorized duties for the Department of Defense. While there is a patchwork of regulations and memorandums that further clarify this authority, it is best when working with civilian authorities to directly cited to the US Code because that holds more sway than DoD Regulations or Instructions. “Health care professional” includes active duty and civilians, as well as doctors, nurses, physician assistants, and others who have a license. Additional rules and regulations vary if the healthcare professional is part of the National Guard or if the healthcare worker does not have a license, such as an unlicensed technician.
- [20] Vincent C. Thomas, *Good Samaritan Law: Impact on Physician Rescuers*, 17 WYO. L. REV 149, 154-155 (2017) (Good Samaritan law protections vary from state to state. Some states cover providers at hospitals, some do not. Other states, like California, avoid liability if a ‘medical disaster’ is declared).
- [21] *Id.*; see e.g. Florida Statute (F.S.) 768.13, *Florida’s Good Samaritan Law* (allows protection for healthcare providers responding to an emergency medical situation up to the point of stabilizing a patient).
- [22] DoDD 3025.18, para. 4.d.
- [23] 28 U.S.C. §§ 1346(b), 2671-2680 (2018).
- [24] *Id.*
- [25] See Maj Leslie Newton, *Administrative Relief from Feres Bar*, 35 AF. Med. Law Quarterly Vol. 1, 3-4 (Winter 2020) (citing 28 U.S.C. §§ 2679(b)(1) (only relief someone has when injured by a governmental employee when the employee is acting within the scope of their duty is to bring a claim in accordance with the FTCA).
- [26] *Emergency Procedures Due to Hurricane Michael*, <https://tricare.mil/michael>. Last accessed January 15, 2019.
- [27] *Id.*
- [28] See generally U.S. DEP’T OF DEFENSE INSTR. 4000.19 (31 Aug. 2018); see also U.S. DEP’T OF AIR FORCE, INSTR. 25-201, INTRA-SERVICE, INTRA-AGENCY, AND INTER-AGENCY SUPPORT AGREEMENTS (10 Aug. 2013).
- [29] U.S. DEP’T OF AIR FORCE, INSTR. 44-119, MEDICAL QUALITY OPERATIONS, para. 9.1 (16 Aug. 2011) [hereinafter AFI 44-119].
- [30] AFI 44-119, para. 9.7.3.
- [31] AFI 44-119, para. 9.73.
- [32] Rosenbaum & Kamoie, *supra* note 16, at 591.
- [33] Pub. L. No. 99-272, § 9121, 100 Stat. 164-67 (1986) codified at 42 U.S.C. § 1395dd (2003). An “emergency medical condition” is defined in regulation as “a medical condition manifesting itself by acute symptoms of sufficient severity such that the absence of immediate medical attention could reasonably be expected to result in: (i) placing the health of the individual (or, with respect to a pregnant woman, the health of the woman or her unborn child) in serious jeopardy; (ii) serious impairment to bodily functions; or (iii) serious dysfunction of any bodily organ or part.” A pregnant woman who is having contractions is considered to have an emergency medical condition when “there is inadequate time to effect a safe transfer to another hospital before delivery, or “that transfer may pose a threat to the health or safety of the woman or the unborn child.” 42 C.F.R. § 489.24(b))
- [34] Rosenbaum & Kamoie, *supra* note 16, at 591 (private litigation has become part EMTALA component of enforcement).
- [35] *Id.* at 594 (private litigation has become part EMTALA component of enforcement).
- [36] See Hodge, Calves, et. al, *supra* note 6, at 70.
- [37] *Id.*
- [38] Emergency Preparedness, Response & Recovery Checklist: Beyond the Emergency Management Plan, Vol. 37, No. 4, HOSPLW Pg. 503, Belmont, Elizabeth
- [39] See The Public Health Security and Bioterrorism Preparedness and Response Act of 2002, Pub. L. No 107-188, 116 Stat. 594 [hereinafter Bioterrorism Preparedness and Response Act]; 42 U.S.C. § 1320b-5; see also Sara Rosenbaum & Brian Kamoie, *Finding a Way Through the Hospital Door* at 591.
- [40] See Bioterrorism Preparedness and Response Act; see also Robert T. Stafford Disaster Relief and Emergency Assistance Act of 1988 (Stafford Act) Pub. L. No. 93-288, as amended; 42 U.S.C. §§ 5121–5207; Elizabeth Weeks, *supra* note 16, at 249.
- [41] *Id.*
- [42] Rosenbaum & Kamoie, *supra* note 16, at 596.
- [43] *Id.*
- [44] See 28 U.S.C. §§ 1346(b), 2671-2680.
- [45] See Newton, *supra* note 25 at 1-3. The Supreme Court had previously ruled under *Feres v. United States* that active duty personnel could not recover medical malpractice claims filed against the DoD under the FTCA for injuries “incident to service.” *Feres v. United States*, 340 U.S. 135, 137 (1950).

- [46] Some items like discovery, will not occur for active duty personnel who file claims since they have no judicial remedy. *Id.* at 3.
- [47] *Id.*
- [48] DoDD 3025.18, para. 4d(3).
- [49] *Id.*
- [50] 42 U.S.C. § 5170b(c)(1).
- [51] *Id.*; AFI 10-801, para. 3.1.2.3; AFI 10-2501, para. 4.12.1.
- [52] 42 U.S.C. § 5191, 42 U.S.C. §5122(1).
- [53] *Id.*
- [54] *Id.*
- [55] Congressional Research Service, Jared T. Brown and Bruce R. Lindsay *Congressional Primer on Responding to Major Disasters and Emergencies*, September 13, 2018.
- [56] U.S. Dep't of Defense, Under Secretary of Defense (Personal and Readiness), Memorandum for Medical Treatment for Hurricane Harvey Victims (August 31, 2017).
- [57] *Id.*
- [58] 10 U.S.C. § 12301 (d) (A member of the National Guard may be ordered to active duty voluntarily with the consent of the Governor); 10 U.S.C. § 12302 (In time of national emergency, the President may order a unit to federal status); 10 U.S.C. § 1204 (The President may call up the National Guard to augment the active duty force).
- [59] *Id.*
- [60] Public Law 104-191, *Health Insurance Portability and Accountability Act of 1996*, August 21, 1996 (also known as "HIPAA"), as amended; 45 CFR Parts 160 to 164; U.S. Dep't of Defense Manual, DoDM 6025.18, Implementation of the Health Insurance and Portability Act (HIPAA) Privacy Rule in DOD Health Care Programs, March 13, 2019 (hereinafter DoDM 6025.18); *see also* U.S. Dep't of Air Force, Instr. AFI 41-200, Health Insurance and Accountability Act (HIPAA), July 25, 2017 (hereinafter AFI 41-200).
- [61] DoDM 6025.18, para. 4.3b.4.
- [62] Project Bioshield Act of 2004 (PL 108-276) and section 1135(b) of the Social Security Act; *see also* 42 USC § 1320b-7.
- [63] DoDM 6025.18-R, para. 4.3b.4.

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The Procedural Guide: The First Path to Truth^[1]

BY LIEUTENANT COLONEL BRYON T. GLEISNER

Courts-martial aren't scripted, as experienced trial practitioners know, but the procedural guide navigates trial counsel and the accused through legally significant gateways and milestones that must be traversed during every court-martial proceeding.

“Adversity is the first path to truth.”

–Lord Byron^[2]

New assistant trial counsel may relate to this Lord Byron quote as a military judge interrupts his or her reading of the procedural guide to correct what counsel may perceive as ‘minor’ errors. A wrong date here, an incorrect name there. Some trial counsel may think, “What’s the big deal...it’s just a meaningless ‘scripted’ portion of the trial, right? In fact, didn’t we used to call this thing the ‘script’?” Putting aside that trial counsel has just made a poor first impression with the military judge by demonstrating a lack of understanding and attention to detail, the procedural guide’s structure is rooted in the Uniform Code of Military Justice (U.C.M.J.) and the Rules for Courts-Martial (R.C.M.). In fact, the procedural guide mirrors the requirements set forth in R.C.M. 901. While it was previously called “the script,” that name was retired for several reasons, chief among them was that it inaccurately described what was actually occurring during these early

portions of the trial. Courts-martial aren't scripted, as experienced trial practitioners know, but the procedural guide navigates trial counsel and the accused through legally significant gateways and milestones that must be traversed during every court-martial proceeding.

“THE PROCEDURAL GUIDE IS THE FIRST PATH TO TRUTH.”–JUDGE BRYON

The adversarial process of courts-martial, with its many rules, is designed to seek the truth. By understanding the procedural guide and being conscientious in both completing and reading it, new assistant trial counsel can ensure this truth finding process begins smoothly. This journey begins by properly stating the convening order number, headquarters and date, as well as any amending convening orders. Be sure to note any minor corrections to the convening order(s). This information publicly announces the R.C.M. 201(b) requisites of court-martial jurisdiction: (1) that is convened by an official empowered to convene it and (2) that the court is composed of the proper number of personnel.

Judge Bryon Says: The detailed military judge will receive the initial convening order counsel send to the central docketing office; however, if later amendments occur, be sure to send those amended convening orders to the detailed military judge and upload them to the e-filing site. Also, include hard copies of all convening orders in the judge's folder.

GOT 30A'S?

Next, if there were any requests for investigative subpoenas, warrants or orders under Article 30a, counsel may announce the dates on which those proceedings were held. A proceeding occurs whether or not there was a hearing and includes all the email communications and documents considered or issued by the detailed judge in acting upon the Article 30a request. Consistent with R.C.M. 309(e) all this documentation must be included in the record of trial as an allied paper.[3]

YOU'VE BEEN SERVED!

A common error by new assistant trial counsel is that he or she will often state the incorrect date of service of the charges. In these instances, it is usually because counsel has confused preferral, where the accused is informed of the charges, with formal service of referred charges. Counsel can find the date the accused was served the referred charges by going to page two, block 15 of the charge sheet (DD Form 458). Article 35 and R.C.M 602(a) require physical service upon the accused, substitute service upon the defense counsel is insufficient. The date of service of the charges carries legal significance because an accused cannot be brought to trial over objection until after expiration of the three day, for special courts-martial, and five day, for general courts-martial, statutory waiting period. When computing the days, the day of service of the referred charges and the day of trial are not counted. Sundays and Holidays are included. If the statutory waiting period has not expired, make sure the judge conducts the appropriate inquiry with the accused before continuing on with the procedural guide.

Judge Bryon Says: The judge will appreciate the attention to detail if counsel properly drop the (s) on charge(s) when there is only one charge. Be sure to drop the (s) even if the charge has multiple specifications.

WHO'S PRESENT, WHO'S ABSENT, & WHO'S ON TELEVISION?

Trial counsel will announce the rank and full name of the accused and properly identify whether they are ready to proceed only with arraignment or with the entire trial by including or excluding the "(with the arraignment)" parenthetical as necessary. Next, properly stating who is present and who is absent is important because the U.C.M.J. and R.C.M. require the presence of certain trial participants. Article 39(b) and R.C.M. 804 require the presence of the accused at trial proceedings. R.C.M. 805 requires the presence of the military judge, at least one qualified counsel from each party, and the members; with the exception that members are not required for Article 39(a) sessions, during individual voir dire, or after excusal.[4] The presence requirements of R.C.M. 804 and 805 also apply to post-trial 39(a) proceedings held in accordance with R.C.M. 1104.

Presence of the parties should be interpreted to mean physical presence unless otherwise authorized by service regulation[5] and the R.C.M. R.C.M. 804(b) specifically states that defense counsel must either be physically present at the accused's location or "when the accused consents to presence by remote means with the opportunity for confidential consultation with defense counsel during the proceeding." [6] Where the Manual for Courts-Martial authorizes a party's presence by "remote means" the Manual always does so in terms of "audiovisual technology, such as video conferencing technology" (VTC).[7] For example, R.C.M. 804(b) specifically states, "Such technology may include two or more remote sites as long as all parties can see and hear each other." [8] Similar language appears in R.C.M. 805. This means that the Article 39(a) session should not continue if there are technical difficulties which prevent all parties from both hearing and seeing the proceedings.

The Manual does not specifically allow, and case law prohibits, any of the parties from appearing via telephone. In *U.S. v. Reynolds*,^[9] the Court doubted that by presiding over an arraignment via the telephone that the military judge could properly supervise the proceedings, ensure appropriate decorum, participate in a full and meaningful way, and perform his duties under Article 26. Specifically, the judge was unable to observe the most elemental aspects of the court-martial process, including the accused's presence in court, the accused's capability, by reason of intelligence and sobriety, to participate in the proceedings, the accused's body language, and whether the responses the accused gave were his own. The court highlighted the importance of an accused's "body language," which could indicate to the military judge whether the accused really understands his or her rights or requires additional instruction.

Judge Bryon Says: When any party appears via VTC, it is best practice to specifically state who is physically present and who is appearing via VTC along with their location. Counsel should also state that all parties can both hear and see the proceedings. For example,

The accused and the following persons detailed to this court are physically present at the Moody Air Force Base courtroom: Capt Sally Newbee, assistant trial counsel, and Capt Lance Longbow, defense counsel. The military judge, Lt Col Bryon Gleisner is present and appearing, connected via video conferencing technology from Joint Base Langley-Eustis, Virginia. Capt Tommy Twoguns, circuit trial counsel, is present and appearing, connected via video conferencing technology from Cannon Air Force Base, New Mexico. Prior to coming onto the record, all parties have confirmed they are receiving both the audio feed and the video feed of this proceeding.

IT'S ALL IN THE DETAILING...AND CERTIFICATION.

As is likely evident by now, the old saying, "the devil is in the details" is certainly true when it comes to the procedural guide. But the devil also lurks in the detailing and qualifications of counsel. R.C.M. 503(c) requires all counsel to be detailed by their detailing authority as established by AFI

51-201, para 10.3. To properly announce this, counsel should understand and appropriately state who detailed each of the counsel appearing in the court-martial, to include who detailed circuit trial counsel (hint: local counsel and circuit counsel are not detailed by the same person).^[10]

Next, counsel must accurately state whether all members of the prosecution are qualified and certified. Even if counsel are not certified it is proper to say all counsel are qualified, assuming all counsel are designated judge advocates.^[11] Counsel are not qualified if they lack this designation or have served in any of the disqualifying roles listed in Article 27(a)(2). If any counsel is disqualified, the judge is required to conduct an inquiry and "take appropriate action."^[12] At a minimum, the detailing authority should be informed of the disqualification of detailed counsel. If the disqualification is one the accused may waive, the military judge will inform the accused so he or she can decide whether to waive it. Failing to have the requisite number of qualified counsel can bring the case to a screeching halt.

For example, a fellow judge was conducting an arraignment at a general court-martial and the new assistant trial counsel, standing alone at the prosecution table, stated confidently on the record that he was qualified but not certified or sworn. Much to the new counsel's surprise, the judge immediately stopped the arraignment and refused to proceed until certified counsel was detailed to sit with the uncertified counsel. What this legal office failed to appreciate was that Article 27(b) and R.C.M. 805 require the presence of a certified trial counsel for all stages of a general court-martial.

One may be thinking, "What's the big deal? It's just an arraignment." Of course, to say it's "just" an arraignment is folly because every arraignment has significant legal consequences for both the government and the accused. For example, it stops the R.C.M. 707 speedy trial clock, prevents additional charges from being referred to the court-martial without waiver by the accused,^[13] and marks the point in time after which the trial may proceed even if the accused voluntarily absences himself or herself. If done improperly, these important legal consequences of an arraignment may be imperiled. Had this new trial counsel been sitting

alone at a special court-martial that would have been fine because Article 27(c)(2) does not require certification, but only requires trial counsel at a special court-martial to be designated as a judge advocate.[14] In contrast, Article 27 requires defense counsel and assistant defense counsel at both general and special courts-martial to be certified. These certification rules apply to reservists with equal force; therefore, if a Staff Judge Advocate (SJA) has an experienced, but not yet certified reservist on a general court-martial, the reservist must be detailed as assistant trial counsel even if detailed trial counsel is a certified but less experienced litigator.

Judge Bryon Says: During the initial 802 with the judge on the first day of trial, uncertified counsel should inform the judge of his or her status, advise the judge whether the counsel prefers to swear or affirm,[15] and let the judge know if the SJA is likely to ask the military judge for a memorandum in support of certification at the conclusion of the trial. Providing this information in advance allows the judge to pay particular attention to the uncertified counsel's trial performance, in addition to the trial itself. Furthermore, the judge may ask the uncertified counsel and the SJA about cases to which the counsel has been previously detailed. It is also not unusual for the judge to request the certification package the SJA will be submitting prior to writing an indorsement memorandum because it provides the judge with a good history of the counsel's overall experience. If the judge declines to provide a certification memorandum he or she will normally provide the SJA with areas where counsel's performance fell below that of minimal competence. In the event this occurs, counsel should talk to the SJA about these areas, engage in self-study, and request additional training to elevate his or her litigation skills.

VICTIMS, DEFENSE COUNSEL, AND PERSONS OF LIMITED STANDING, OH MY!

Prior to arraignment, trial counsel has certain obligations to inform Article 6b victims of the time and date of any court-martial proceeding and the victim's right to attend.[16] If the victim is not represented, this communication is made directly to the victim. If a Special Victim's Counsel (SVC) is detailed then trial counsel is responsible for ensuring the SVC is aware of the date and time of the proceeding. Counsel

must ensure that, at a minimum, someone on the trial team has informed the victim directly or through counsel of his or her rights, so counsel can affirmatively state that the victim has received timely notice of the proceeding and has been made aware of his or her right to attend. Next, the military judge may prompt any SVCs to place their qualifications on the record. SVCs are not parties to the litigation, but are considered "persons of limited standing." [17]

R.C.M. 506 provides that an accused has the right to be represented by detailed military counsel, civilian counsel, or military counsel of the accused's own choosing, if reasonably available. R.C.M. 901(d)(4) requires the military judge to inform the accused of his or her rights to counsel, ascertain whether the accused understands those rights, and have the accused affirmatively select representation. The judge must swear any civilian defense counsel.[18]

Judge Bryon Says: While counsel may not have a speaking role when the military judge informs an accused of his or her rights to counsel, counsel can still assist the court in ensuring the record is complete by bringing to the judge's attention, during an 802, the following: (1) Will the accused be waiving the presence of one or more defense counsel for arraignment? (2) Was the accused previously represented by another defense counsel on the charges before the court? By alerting the judge to these issues ahead of time, the judge will be properly prepared and will be less likely to inadvertently fail to inquire with the accused on these matters. If the accused has released a defense counsel or if a defense counsel has requested and was granted permission to withdraw by the court,[19] these documents should be printed and counsel should be prepared to mark them as appellate exhibits for the record.

OFF THE RECORD DISCUSSIONS, FORUM CHOICE, AND THE GENERAL NATURE OF THE CHARGES.

After the judge states his or her detailing and qualifications, he or she may wish to summarize or have assistant trial counsel summarize any prior 802 conferences for the record. If the judge summarizes the 802 conferences, but misses something significant, counsel should not be hesitant about adding to the judge's summary. Additionally, if a previous judge held 802 conferences, counsel will need to summarize

those. The primary purpose of summarizing the 802 conferences is to ensure a complete record, but an interaction with the judge at an 802 could also provide grounds to question or challenge the military judge.

If neither party wishes to question or challenge the military judge, the judge will inform the accused of his or her forum rights as set forth in R.C.M. 903. Oftentimes, during arraignment only proceedings, the defense may request to defer forum choice.^[20] However, if there are straddling offenses, meaning some offenses occurred prior to 1 January 2019 and some occurred on or after 1 January 2019, the military judge must inform the accused of the different sentencing rules and the accused must select either the pre- or post-1 January 2019 sentencing rules.^[21] The accused must make this election before arraignment and the election is irrevocable absent good cause. Counsel should be aware of the ramifications of this choice not only upon the accused but also upon the convening authority's ability to take certain actions regarding plea deals.^[22]

Sometimes when assistant trial counsel is prompted to announce "the general nature of the charge(s)," judges get quizzical looks and sense apprehension. Occasionally new counsel will incorrectly state "charges" even though there is just one charge. Moreover, newer counsel sometimes misstate the general nature of the charge or charges. The general nature is simply the article number and title of the specification. So, for example, if the accused was charged with two specifications of sexual assault and two specifications of abusive sexual contact, counsel would state, "The general nature of the charge in this case is two specifications of sexual assault and two specifications of abusive sexual contact in violation of Article 120, Uniform Code of Military Justice." Counsel must also state who preferred the charges, and forwarded them with recommendations as to disposition, as indicated in block III of the charge sheet. For general courts-martial, the special court-martial convening authority will also be involved in forwarding the charges to the general court-martial convening authority with recommendations as to disposition. For general courts-martial, the date of the Article 32 preliminary hearing or waiver of the preliminary hearing must also be stated.

Judge Bryon Says: Ask the judge at an 802 conference if he or she requires trial counsel to mark the scheduling order as an appellate exhibit. Some judges have it marked as a matter of course and others only mark it when there was a violation of the order that may impact the proceedings. An 802 conference is also a good time to inform the judge if the accused waived the Article 32 preliminary hearing so that the judge can be prepared to enter into a colloquy with the accused regarding that decision.

ARRAIGN ON MY PARADE.

Arraignment is the reading of the charges and specifications to the accused and calling on the accused to plead.^[23] The entry of the pleas is not part of the arraignment and, therefore, the accused can ask to defer entry of pleas. Arraignment is complete when the military judge utters the words, "how do you plead?" If a judge does not call for the entry of pleas, an arraignment has not occurred. As stated earlier in this article, an arraignment has certain legal consequences, but a legally insufficient arraignment may not trigger these consequences. In addition to stopping the R.C.M. 707 speedy trial clock, prohibiting additional charges from being referred to the court-martial without waiver by the accused, and allowing the court to proceed in the absence of the accused, the arraignment also prevents the government from making minor changes to the specifications without first making a motion to the military judge.^[24] If arraignment and trial are bifurcated, defense counsel will often request to defer motions because failure to defer or make certain motions prior to arraignment will result in waiver.^[25]

R.C.M. 910 lists the legally permissible pleas that may be entered by the accused. A military judge cannot accept an irregular plea (*e.g.*, guilty without criminality or guilty to a charge but not guilty to all specifications). In addition to ensuring the accused's plea is legally permissible, counsel should also ensure that it is in proper form. This can sometimes trip up counsel, particularly when an accused is pleading by exceptions and substitutions.

Judge Bryon Says: To find the proper form for announcing pleas and findings, look at Appendix 10 in the 2016 Manual for Courts-Martial. Counsel should take note that for some inexplicable reason, this handy reference was taken out of the 2019 Manual. Also, particularly when arraignment and trial are bifurcated, trial counsel may want to request that the judge inform the accused of the consequences of an arraignment if the judge does not do so *sua sponte*.

ASSEMBLY AND IMPANELMENT REQUIRED.

Article 29 and R.C.M. 911 require the military judge to announce assembly of the court-martial, and as vanguard of the procedural guide, counsel should make sure the judge says these words at the correct time.[26] Assembly of the court is significant because it “marks the point after which: substitution of the members and military judge may no longer take place without good cause; the accused may no longer, as a matter of right, request trial by military judge alone or withdraw such a request previously approved; and the accused may no longer request, even with the permission of the military judge, or withdraw from a request for members.”[27]

R.C.M. 505(c) states that prior to assembly the convening authority or the SJA, if delegated the authority, may excuse members without showing cause; although the SJA may dismiss no more than one-third of the members detailed by the convening authority.[28] Prior to assembly the military judge has no authority to excuse members. After assembly the SJA no longer has authority to excuse members. The convening authority and the military judge have the power to excuse members after assembly, but only if good cause is shown.[29] The military judge may also dismiss members as a result of challenges or when the number of members is in excess of the number required for impanelment.[30] Finally, after assembly, new members may be detailed only when the venire falls below quorum or, in the case of an enlisted accused who has requested enlisted members, the number of enlisted members is reduced below one-third of the total membership.[31]

Article 29 and R.C.M. 912A(f) also require, in members trials, for the judge to impanel the court-martial after the exercise of challenges and announce that “The members are impaneled.” A special court-martial requires four members for impanelment and a general court-martial requires eight members; additionally, if requested by an enlisted accused, at least one-third of the members must be enlisted.[32] Counsel should be familiar with the rules for randomizing and impaneling members that are found in R.C.M. 912A to ensure a proper impaneling of members has occurred.

Judge Bryon Says: The procedural guide is an important step in the triggering of legal ramifications for both the accused and the government. Incorrect completion and reading of the procedural guide could have drastic consequences and result in needless litigation. Consequently, in addition to reading through the procedural guide and becoming familiar with it, this judge encourages counsel to also read the corresponding U.C.M.J. Articles and R.C.M. referenced in this article to gain a better understanding of what counsel are saying, why counsel are saying it, and why it matters in the long run. Additionally, take the time to practice the oath for members and witnesses.[33] Completing the procedural guide correctly and reading it in a confident and controlled manner, rather than a rushed and uncertain way, will not only build confidence, but it will ensure a legally sufficient arraignment, and minimize the need for the military judge to intervene. After all, despite the wisdom of Lord Byron, adversity does not have to be the first path to truth, but as so eloquently professed by Judge Bryon, such path to the truth begins with a correctly completed procedural guide.

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ENDNOTES

- [1] An update of the 2009 article “The Trial Script: Everything You Didn’t Know You Didn’t Know” written by Lt Col Le T. Zimmerman, USAF.
- [2] Lord Gordon Byron, simply known as Lord Byron...was an English poet – who became a revolutionary. <https://www.britannica.com/biography/Lord-Byron-poet>.
- [3] *See also*, Uniform Rules of Practice Before Air Force Courts-Martial, rule 2.3.
- [4] R.C.M. 901(e) states, “The procedures described in R.C.M. 901 through 910 shall be conducted without members present in accordance with the procedures set forth in R.C.M. 803.”
- [5] U.S. DEP’T OF AIR FORCE, INSTR. 51-201, ADMINISTRATION OF MILITARY JUSTICE, section 12H (18 July 2019) [hereinafter AFI 51-201]: “[t]he use of audiovisual and teleconferencing technology is authorized by Secretary of the Air Force to the extent and under the conditions allowed for in R.C.M. 804(b), 805(a), 805(c), 914A, and 914B.” The Uniform Rules of Practice Before Air Force Courts-Martial, rule 3.8 authorizes VTC for all preliminary matters.
- [6] R.C.M. 804(b).
- [7] *See e.g.*, Article 39(b), R.C.M. 804(b), 805(a), and 805(c).
- [8] R.C.M. 804(b).
- [9] 44 M.J. 726 (A.C.C.A. 1996), *affirmed*, 49 M.J. 260 (1998).
- [10] In addition to announcing orders detailing counsel orally, the written detaining is included in the record of trial. R.C.M. 503(c) and AFI 51-201, para 10.3.
- [11] *See* 10 U.S.C. § 8067(g) and U.S. DEP’T OF AIR FORCE, INSTR. 51-101, AIR FORCE JUDGE ADVOCATE GENERAL’S CORPS (AFJAGC) OPERATIONS, ACCESSIONS, AND PROFESSIONAL DEVELOPMENT, [hereinafter AFI 51-101].
- [12] R.C.M. 901(d)(3).
- [13] *See* R.C.M. 904.
- [14] *See* 10 U.S.C. § 8067(g) and AFI 51-101, Ch. 6.
- [15] *See* Article 42(a), R.C.M. 901(d)(5), and AFI 51-201, para 10.5.2 regarding oath requirements for uncertified counsel and defense counsel.
- [16] *See* R.C.M. 806(b)(3).
- [17] *See* Uniform Rules of Practice Before Air Force Courts-Martial.
- [18] *See* R.C.M. 901(d)(5).
- [19] *See* Uniform Rules of Practice Before Air Force Courts-Martial, para 2.5(C).
- [20] Although if an accused makes a forum choice, he or she can withdraw it any time before assembly. R.C.M. 903(d)(1).
- [21] R.C.M. 902A.
- [22] AFI 51-201, para 3.3.3.
- [23] R.C.M. 904.
- [24] R.C.M. 603(e).
- [25] *See* R.C.M. 905 for a list of motions that must be raised before a plea is entered to avoid waiver. Motions to dismiss for lack of jurisdiction and failure to allege an offense are not waived.
- [26] In trial by members, the court is assembled after the court members are sworn by trial counsel. In military judge alone cases, the court is assembled after the military judge approves the accused’s request for trial before military judge alone.
- [27] R.C.M. 911, discussion.
- [28] R.C.M. 505(c)(1)(B)(ii).
- [29] R.C.M. 505(c)(2).
- [30] *Id.*
- [31] R.C.M. 505(c)(2)(B).
- [32] R.C.M. 912A(a)-(b).
- [33] *See* R.C.M. 807; Uniform Rules of Practice Before Air Force Courts-Martial, rule 4.4(f).

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The Military Lending Act May Not Let Service Members Protect Against Mayhem

BY COLONEL JOHN LORAN KIEL, JR.

If you haven't purchased a new vehicle since 2017, there are some things you definitely need to know about the Military Lending Act (MLA) that will save you a lot of heartache and financial distress.

GUARANTEED ASSET PROTECTION (GAP) WAIVER

I recently purchased a new "Special Ops Edition" Chevy Silverado pickup truck from my brother who owns a Chevy dealership in Florida and was stunned to learn that every potential lender I contacted claimed that they were legally forbidden from offering me a guaranteed asset protection (GAP) waiver to forgive the balance of my loan in the event my truck got totaled in an accident. If you haven't purchased a new vehicle since 2017, there are some things you definitely need to know about the Military Lending Act (MLA) that will save you a lot of heartache and financial distress later on in the event mayhem decides to pay you a visit.^[1]

This article will examine the purpose of the MLA and some of its key provisions, explain why lenders feel that they are forbidden from financing GAP waivers pursuant to the Department of Defense's (DoD) interpretation of the MLA, discuss why a GAP waiver can be extremely valuable to service members, and explain why purchasing a GAP waiver through a lender is the optimal way to secure such valuable protection for your vehicle.

The good news is, there are three easy ways to fix the DoD's interpretation of the MLA so that it no longer harms service members and their dependents.

THREE FIXES

The good news is, there are three easy ways to fix the DoD's interpretation of the MLA so that it no longer harms service members and their dependents. First, the Department could redact its interpretation in the 2017 interpretive guidance that created the harm in the first place. Second, the President could issue an executive order or direct the Secretary of Defense to withdraw the DoD's interpretation of the statute. Third, Congress could step in and amend the MLA to expressly permit dealerships and lenders to once again finance GAP waivers for service members, as they had done prior to 2017.

The DoD estimates that it can continue to expect to separate 7,580 service members a year where financial distress is a contributing factor.

PURPOSE OF THE MLA

The Department of Defense implemented the Military Lending Act in 2006 in 32 CFR part 232.[2] The MLA generally protects service members and their dependents against certain types of lending practices. Congress and the DoD were concerned that predatory lenders like pay day loan and title loan companies posed a significant threat to military readiness and service member retention.[3] Every year, thousands of well-trained service members are booted out of the military after losing security clearances due to financial mismanagement.[4] From 2004 to 2013, the DoD estimates that an average of 54,293 Soldiers, Sailors, Airmen, and Marines were involuntarily separated from the service due to legal or standard-of-conduct related issues.[5] Approximately half of those (an average of 18,961 per year), were attributable to loss of a security clearance and of those, 80 percent were due to some sort of financial distress.[6] Based on this data and other underlying assumptions, the DoD estimates that it can continue to expect to separate 7,580 service members a year where financial distress is a contributing factor.[7] The average cost of each separation is approximately \$58,250 and climbing.[8] The 10-year cost to the DoD of involuntary separations due to financial distress is estimated to be between \$1.646 billion and \$3.769 billion.[9] It is understandable why Congress and the DoD wanted to curb certain lending practices that directly contribute to these eye-popping costs and the national security risks they pose. What is not so clear is the problem with GAP waivers the Department was specifically trying to address. In a moment, I will explain the irony of the DoD's decision to prohibit lenders from financing GAP waivers and how it actually contributes to the increasing number of service men and women separated from the military for financial mismanagement.

WHO THE MLA PROTECTS

The MLA and the DoD's regulation implementing the MLA found in 32 CFR § 232, define a covered borrower as "a consumer who, at the time the consumer becomes obligated on a consumer credit transaction or establishes an account for consumer credit, is a covered member of the armed forces or a dependent of a covered member." [10]

Covered members of the armed forces include members of the Army, Navy, Marine Corps, Air Force, or Coast Guard on active duty under a call or order that does not specify a period of 30 days or less or who are on active Guard and Reserve Duty.[11]

The term dependent includes a covered member's spouse, children under the age of 21, children under the age of 23 if they are enrolled in college full-time, and any dependent for whom the member provides more than half of their support.[12] There are other relationships that may qualify under this definition for which practitioners need to be on the lookout, but for the sake of brevity, they are not discussed here.

WHAT THE MLA PROTECTS AGAINST

The MLA provision of which service members are probably the most aware is the one prohibiting lenders from charging a military annual percentage rate (MAPR) greater than 36 percent interest with respect to consumer credit extended to a covered member or their dependents.[13] In addition to open and close-ended interest rate caps, the MLA also makes it unlawful for creditors to do any of the following:

- (1) Require the borrower to waive their right to legal recourse under any otherwise applicable provision of State or Federal law, including any provision of the Service Members' Civil Relief Act;
- (2) Require the borrower to submit to arbitration or imposing onerous legal notice provisions in the case of a dispute;
- (3) Demand unreasonable notice from a borrower as a condition for legal action;

- (4) Use a check or other method of access to a deposit, savings, or other financial account maintained by the borrower, or the title of a vehicle as security for the obligation;
- (5) Require as a condition for the extension of credit that the borrower establish an allotment to repay an obligation;
- (6) Prohibit the borrower from prepaying the loan or charging a penalty or fee for prepaying all or part of the loan; or
- (7) Rolling over, renewing, repaying, refinancing, or consolidating any consumer credit extended to the borrower by the same creditor with the proceeds of other credit extended to the same covered member or a dependent.^[14]

Another valuable provision of the MLA requires creditors to provide information orally and in writing to the member or member's dependent stating the MAPR applicable to the extension of credit; any disclosures required under the Truth in Lending Act (TILA); and a clear description of the payment obligations the member or their dependent have incurred.^[15]

PENALTIES FOR VIOLATING THE MLA

Creditors are held criminally and civilly liable for violating one or more of the provisions discussed above. A creditor who knowingly violates the MLA is either fined as provided in title 18 of the U.S. Code, imprisoned for not more than one year, or both.^[16] A creditor will be civilly liable to a covered member or their dependent for:

- (1) Any actual damage sustained as a result of a violation of the MLA, but not less than \$500 for each violation;
- (2) Appropriate punitive damages;
- (3) Appropriate equitable or declaratory relief; and
- (4) Any other relief provided by law.^[17]

The MLA also provides for recovery of attorney's fees and costs in the event of a successful action to enforce civil liability. It is also worth mentioning that, by operation of law, any credit agreement, promissory note, or other contract prohibited under the MLA is contractually void from its inception.^[18]

Any credit agreement, promissory note, or other contract prohibited under the MLA is contractually void from its inception.

DOD'S REVISIONS TO THE MLA

In July 2015, the DoD published a final rule revision to 32 CFR § 232 that expanded application of the MLA to additional types of credit such as credit cards, deposit advance products, overdraft lines of credit, and certain types of installment loans.^[19] This revision—among other things—updated the MAPR to include certain additional fees and charges, modified the required creditor disclosures, and modified the prohibition on rolling over, renewing, or refinancing consumer credit.^[20]

INTERPRETATIVE GUIDANCE

On December 14th 2017, the DoD issued “interpretative guidance” that included a section containing questions and answers about certain interpretations of the 2015 final rule revision. Section II of that guidance makes clear that “these questions and answers represent the official interpretations of the Department on issues related to 32 CFR § 232.”^[21] The second question asked whether credit extended by a creditor to purchase a motor vehicle falls within the exception to consumer credit under 32 CFR § 232.2.^[22] In response, the Department concluded that “a credit transaction that finances the object itself, as well as any costs expressly related to that object, is covered by the exceptions [to consumer credit] in § 232.3(f)(2)(ii) and (iii), provided it does not also finance any credit-related product or service.”^[23]

The Department provided two concrete examples of additional costs “expressly related” to the vehicle that would fit

within the two exceptions of the regulation, like financing the purchase of optional leather seats or an extended warranty for service.[24] Additionally, the Department concluded that it would be permissible for a covered member to trade in a vehicle that has negative equity and then include in the purchase of the second vehicle financing to repay the credit on the trade-in.[25]

The DoD then declared that a credit transaction that finances a “credit-related product or service” (like GAP insurance coverage) rather than a product or service “expressly related” to the motor vehicle, does not fall within either of the exceptions in 32 CFR part 232(f)(2)(ii) or (iii).[26] Just like that, without notice, warning, or opportunity to comment, the automobile finance industry was left wondering whether it could continue to offer service members financing that complied with the MLA.[27] Needless-to-say, this decision continues to cause a lot of consternation within the auto finance industry and, more importantly, it continues to harm service members and their dependents.

GAP, really has one purpose—to protect the investment you made in your vehicle if it is lost or destroyed through theft, accident, or natural disaster.

The DoD’s interpretations of the MLA are binding on creditors nationwide because Congress specifically granted the DoD various authorities to prescribe regulations, to carry out the law, and to determine the scope, terms, and conditions of the regulations.[28] Out of an abundance of precaution, lenders and dealers then are left with no alternative but to avoid selling GAP waivers to service members and their dependents in order to comply with the MLA, or rather, the DoD’s current interpretation of it.

GAP CAN PROTECT AGAINST MAYHEM

Guaranteed Asset Protection or GAP, really has one purpose—to protect the investment you made in your vehicle

if it is lost or destroyed through theft, accident, or natural disaster.[29] GAP is not an insurance policy. It is actually an addendum to your auto loan contract that essentially waives or cancels the remainder of the loan balance with your creditor.[30] Normally, GAP will cover the difference between what you owe on the loan and what your insurance company pays out for your collision or comprehensive coverage.[31] Some GAP products will even cover your insurance deductible.[32]

Within the first year of ownership, most vehicles will depreciate on average 20 to 30 percent depending on make and model.

Here is an example an automobile warranty company executive shared with my brother and me that took place recently in Colorado. An Airman went into one of the Nissan dealerships that this executive’s company owns in Colorado Springs. He purchased a brand new Nissan Frontier pickup truck for \$25,000. After factoring in the tax, tag, and title, some negative equity in his trade-in and an extended service warranty, his total financed amount on the loan was nearly \$35,000. Two days later, outside the gate of Peterson Air Force Base, an unmarked police car, speeding without its lights on, crashed into the truck and totaled it. Because the dealership was forbidden from financing a GAP waiver and because this Airman hadn’t purchased GAP coverage from his insurance company, he was on the hook for at least \$10,000. This number is approximate because insurance companies typically offer actual cash value for the vehicle which is almost always less than the original price paid for the truck. Here, if they’d offered him \$22,000 after depreciating its value, he would have been financially responsible for nearly \$14,000 to his lender. It is important to note, that most automobiles lose at least ten percent of their value the moment their new owner drives them off the lot.[33] Within the first year of ownership, most vehicles will depreciate on average 20 to 30 percent depending on make and model.[34]

WHEN TO PURCHASE

So when does it make sense to purchase GAP coverage? A number of experts would recommend it if you:

- (1) Made a small down payment on a new car, or none at all;
- (2) Agreed to a loan term longer than 48 months (you will pay down the principal slower);
- (3) Drive a lot, which reduces the car's value more quickly;
- (4) Lease your car;
- (5) Bought a car that depreciates faster than average.^[35]

A GAP WAIVER IS THE WAY TO GO

There are essentially three ways to purchase GAP coverage: (1) through the dealership or lender as a one-time fee calculated into your monthly loan payment; (2) from your automobile insurer, as part of your regular insurance premium; or (3) or from a company that only sells GAP products.^[36] Because of the DoD's current interpretation of the MLA, service members may only exercise the latter two options. However, these options have their pitfalls. First, insurance companies do not waive or cancel the remainder of your loan after they pay for the actual cash value of your car. For example, if I total my new Silverado, my insurance company, USAA, is only going to send me a check for the actual cash value of the truck plus 20%. That would probably cover a good deal of what I owe on my loan—but not all of it. I would likely pay a few thousand dollars out-of-pocket because of the extended service plan I also purchased and rolled into the loan cost. The typical cost of GAP coverage from an insurance company is around \$120 plus the cost of comprehensive and collision coverage.^[37] Not only is GAP coverage from an insurance company not as valuable as a full GAP waiver/cancellation addendum from the lender or dealer, but purchasers may not remember to add it to their insurance coverage after they leave the dealership. This also inaccurately assumes most purchasers know that insurance companies offer GAP protection.^[38] This is exactly what

happened to the Airman who totaled his truck in Colorado. When he learned that the dealer could not sell him a GAP waiver, he became upset and eventually left the dealership, not knowing about his other options. Nevertheless, he bought the truck. Two days later, mayhem struck, and he wasn't protected.

Not only is GAP coverage from an insurance company not as valuable as a full GAP waiver/cancellation addendum from the lender or dealer, but purchasers may not remember to add it to their insurance coverage after they leave the dealership.

Consumers can also purchase GAP coverage through a third-party company selling GAP products. The typical cost of buying such standalone coverage is somewhere around \$200 to \$300.^[39] Again this is problematic for service members who don't know that such companies are out there or who don't remember to look for one after they leave the dealership and their vehicle is at risk on the road. The other issue is dealing with a third-party company trying to convince the purchaser to pay the balance of a loan that they did not write. These circumstances prove to be uncomfortable and contentious for both parties; arguments ensue, curse words fly, and the consumer is usually left with the short end of the stick.

Purchasing a GAP waiver from the dealer or lender may cost on average \$500 to \$700, but the convenience and the peace of mind it provides for a few dollars more is worth the price.^[40] When my brother's finance manager handed my wife and I a disclosure and said "you have to sign this form because you are a service member and a service member's dependent" it made me feel like they were discriminating against us by telling us we could not buy a valuable product that every nonmilitary customer is free to buy. It wasn't the fault of anyone at the dealership though, they were all following a rule that appears to be nothing more than an

afterthought by the DoD, a rule that needlessly penalizes service members and their dependents. The irony is, that by singling out GAP insurance, the DoD has created a situation where service members are forced to buy lesser GAP coverage through insurance companies or third party companies. Not only does the DoD policy discriminate against service members and their dependents, it discriminates against automobile dealerships and lenders all over the country. Why should only insurance companies and small companies who provide GAP products exclusively benefit from the DoD's harmful interpretation of the MLA? The glaring answer is, they shouldn't.

As a legal assistance attorney who managed multiple legal assistance offices throughout my time in the Army JAG Corps, I know there are many Soldiers out on the road in brand new expensive cars and trucks that they cannot afford. The Army already separates Soldiers who cannot afford to pay their auto loans once they lose their security clearance due to financial mismanagement. The DoD policy has made the problem worse. Now, even if they manage to pay their loans on time, if a Soldier loses his or her vehicle due to accident, theft, or natural disaster, and they don't have a GAP waiver, they become one of the very statistics the Department has been desperately trying to prevent. Industry experts have aptly noted that service members are more likely to not obtain GAP coverage when there is no option to finance it into their monthly payments, thereby making them more susceptible to financial distress in the event their vehicle is lost or destroyed.[41] These experts are also concerned that the DoD's interpretation raises potential fair lending concerns in states that specifically prohibit discrimination against service members in commercial and other credit transactions.[42]

HOW TO RIGHT THE WRONG

There are three ways to rectify the DoD's interpretation of the MLA. First, the President could force the DoD to rescind its interpretative guidance either through issuing an executive order or by directing the Secretary of Defense to clarify or rescind it.[43] Second, the DoD should, on its own volition, rescind this portion (question two) of its interpretive guidance for the reasons previously discussed. Finally, if all else fails, Congress should step in and amend the MLA by specifically authorizing covered members and their dependents to finance GAP waivers into their automobile loans as they previously had been able to do prior to December 2017. Fixing this problem would be a great opportunity for the DoD, the President, or Congress to prioritize helping our service members who sacrifice so much defending our freedoms every day.

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ENDNOTES

- [1] Mr. Mayhem is currently an advertisement campaign run by Allstate insurance company. Allstate began running its mayhem commercials in April 2010. See Steve Johnson, *Behind the Scenes with Allstate's Mayhem Man*, CHICAGO TRIBUNE, June 1, 2011, <http://www.chicagotribune.com/news/ct-xpm-2011-06-01-ct-live-0602-allstate-mayhem-ads-20110601-story.html>.
- [2] 10 U.S.C. § 987 (2006).
- [3] FDIC Compl. Examination Man., Part V, sec. 13.1 (2016).
- [4] Limitations on Terms of Consumer Credit Extended to Service Members and Dependents, 80 Fed. Reg. 43560, p. 73 (Jul. 22, 2015).
- [5] *Id.*
- [6] *Id.*
- [7] *Id.* at 74.
- [8] *Id.*
- [9] *Id.*
- [10] FDIC Compl. Examination Man., Part V, sec. 13.2 (2016); 32 C.F.R. § 232 (2018).
- [11] 10 U.S.C. § 987 (2006).
- [12] FDIC Compl. Examination Man., Part V, sec. 13.2 (2016).
- [13] 10 U.S.C. § 987 (2006).
- [14] *Id.*
- [15] *Id.*
- [16] *Id.*
- [17] *Id.*
- [18] *Id.*
- [19] This did not include installment loans expressly intended to finance the purchase of a vehicle or personal property when the credit is secured by the vehicle or personal property being purchased. See FDIC Comp. Examination Man., Part V, sec. 13.3 (2016)
- [20] *Id.*
- [21] *Military Lending Act Limitations on Terms of Consumer Credit Extended to Service Members and Dependents*, FEDERALREGISTER.GOV (Dec. 14, 2017), <https://www.federalregister.gov/documents/2017/12/14/2017-26974/military-lending-act-limitations-on-terms-of-consumer-credit-extended-to-service-members-and>.
- [22] *Id.*
- [23] *Id.*
- [24] *Id.* The Department really meant to say here, “extended service contract”, as there is legally no extension of the original service warranty.
- [25] *Id.*
- [26] *Id.* The Department’s repeated use of the term “GAP insurance” also indicates that is not fully aware of what these products are that they indiscriminately banned. A GAP waiver or cancellation provision is part of the addendum to the original finance contract and is not an insurance policy.
- [27] Rachel R. Mentz, *Trump Administration Plans to End Military Lending Act Prohibition on Offering GAP Insurance to Service Members in Auto Loan Transactions*, Consumer Fin. Monitor (Aug. 21, 2018), <https://www.consumerfinance.com/2018/08/21/trump-administration-plans-to-end-military-lending-act-prohibition-on-offering-gap-insurance-to-service-members/>.
- [28] 80 Fed. Reg. 43560 (Jul. 22, 2015).
- [29] *Mind the GAP: When to Consider Guaranteed Asset Protection for Your Loan*, Securian Financial, <https://www.securian.com/insights-tools/articles/mind-the-gap.html> (last visited Jan. 11, 2019).
- [30] *Id.*
- [31] *Id.*
- [32] *Id.*
- [33] *Id.*
- [34] *Gap Insurance: What is it and Who Needs it*, Nerdwallet, <https://www.nerdwallet.com/blog/insurance/car-insurance-basics/is-gap-insurance-worth-it/> (last visited Jan. 11, 2019).
- [35] *Id.*
- [36] *Id.*

[37] *Id.*

[38] *The 4 Best Gap Auto Insurance Providers*, Cars Direct, <https://www.carsdirect.com/car-insurance/the-4-best-gap-auto-insurance-providers> (last visited Sep. 10, 2019).

[39] *Id.*

[40] *Id.*

[41] Rachel R. Mentz, *supra* note 27.

[42] *Id.*

[43] *Id.*

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Forewarned is Forearmed:

*A Review of *The United States v. You: A Practical Guide to the Court-Martial Process for Military Members and Their Families**

BY LIEUTENANT COLONEL JEREMY K. MCKISSACK

EDITED BY MAJOR MARK E. COON

A Review of *The United States v. You: A Practical Guide to the Court-Martial Process for Military Members and Their Families*

I spent my first several hours as a military defense counsel in pre-trial confinement, meeting with my new client. The government had alleged that the young, misunderstood, and impressionable Airman I now represented had committed grave offenses that on paper appeared concerning, but in reality proved overblown. At least, that is how I like to remember the case.

I got assigned to defend the client upon my arrival at the area defense counsel's office. Before I could unpack my moving boxes, the client's former attorney handed me the file. I had little time to review the case, and then I was on my way to the local confinement facility. Boxes could wait; justice could not.

As I met with the client, I tried to act like the case was neither my first rodeo nor my first tussle with the government. A first-enlistment Airman, the client had many questions about the military justice system and about her future. I had uncertain answers. I may or may not have inspired confidence. I stammered through that first interview with legalese seasoned with stock phrases, such as "it depends"

and "I'll see what I can do" and "hmm, let me check with my paralegal." I probably left the client with a few handouts about trial preparation before scurrying back to my office to unpack.

This slender book serves as a resource for military members who have been accused of criminal offenses.

THE UNITED STATES V. YOU

The Airman and I could have used a book like *The United States v. You: A Practical Guide to the Court-Martial Process for Military Members and Their Families*, written by civilian defense attorney and Air Force Reserve judge advocate R. Davis Younts.[1] He was a well-respected trial counsel and military defense counsel during his active duty career. As a Reservist, Mr. Younts has been an instructor with the TRIALS team (Training by Reservists in Advocacy and Litigation Skills).

Mr. Younts brings his litigation experience and his defense chops to bear in *The United States v. You*. This slender book serves as a resource for military members who have been accused of criminal offenses. After nearly two decades of military practice, Mr. Younts knows “how intimidating it can be for a military member to prepare their case and learn what they need to know so they can protect their career, their future, and their freedom.”^[2] Even though the book’s target audience is accused service members, junior and experienced military defense counsel alike will benefit from its concise explanations about the military justice process and trial preparation. The book may especially benefit new defense counsel and give them more confidence as they go into their first several meetings with clients.

The United States v. You is a quick, yet comprehensive read. The title of the book conveys the gravity of being under charges in the military. While in the throes of the military justice system, accused service members may feel like the Wicked Witch of the East did in *The Wizard of Oz*, after Dorothy’s house lands on her early in the movie. This is not to say that the military justice system literally crushes people to death, but the book jacket gets it right when it says that “an accused military member facing court-martial is fighting to defend their freedom and their future against the government of the United States.” *The United States v. You* was written, then, to give accused service members the information they will need to alleviate the weight of the government’s allegations.

Mr. Younts patterns the book’s chapters after a frequently asked questions section on a website.

Mr. Younts patterns the book’s chapters after a frequently asked questions section on a website. Each chapter addresses the questions and issues nearly all clients ask while facing court-martial. The book walks readers through military investigations, preliminary hearings, jury selection, sentencing, confinement, and appeals without getting bogged down in details or too much legal jargon.

TWO FUNDAMENTAL RIGHTS

In one chapter, Mr. Younts covers two fundamental rights under the Uniform Code of Military Justice (UCMJ): the right to remain silent and the right to an attorney. First, Mr. Younts describes how Article 31 of the UCMJ requires rights advisement to all service members “suspected of an offense,” whether they are in custody or out.^[3] He also distinguishes the Article 31 right to remain silent from the *Miranda* warnings required in civilian jurisdictions.^[4] As past and present defense counsel well know, however, accused service members often fail to appreciate the finer differences between Article 31 and *Miranda*, or custodial and non-custodial interrogations, until after they have poured their hearts out to investigators.

Second, Mr. Younts explains the right to counsel in the military justice system. Under the UCMJ, all accused service members have the right to military counsel at no cost to them.^[5] They may also pay out of pocket to hire a civilian attorney.^[6] Military members who have never been involved in any legal process may not know what to expect of their defense attorney. Junior enlisted members may stifle questions they have about their counsel’s qualifications out of deference to their attorney’s rank and position.

The United States v. You teaches accused service members how to carefully and deliberately exercise their right to counsel in the military justice system. The book encourages them to ask their assigned military counsel questions about their training and their experience with similar cases, just as medical patients might ask the same of their surgeon before going under the scalpel.^[7] This same section also includes a bulleted list of suggested questions members should discuss with any prospective civilian counsel.^[8]

The heart of the book, though, is about process. Mr. Younts explains UCMJ jurisdiction because service members often wonder why the Service charged them for something that occurred off-base.^[9] He further devotes an entire chapter to military investigations—how they are conducted and what agencies are involved.

WHAT YOU NEED TO KNOW BEFORE BEING QUESTIONED

Law enforcement interrogation, or interview, techniques receive particular attention here. Mr. Younts describes ways in which law enforcement officials get suspected service members to open up both before and after Article 31 rights advisement.^[10] But unless accused service members read *The United States v. You* before questioning, they may not learn about these particular law enforcement techniques until it is too late. Even still, this part of the book should get accused service members thinking about their interactions and conversations with law enforcement officials and military superiors about the case that were not captured on camera.

“WHAT CAN I DO NOW TO PREPARE FOR TRIAL?”

The book’s final chapter tackles the question “What Can I Do Now to Prepare for Trial?” Readers will find that the chapter’s headings can serve as the start of a trial preparation checklist.^[11] Mr. Younts encourages military members to prepare a list of potential fact and character witnesses for their attorney.^[12] He further suggests that clients write a life history that touches on their background, their childhood, their family life, and their military career.^[13] Although the government should obtain and disclose military records in pre-trial discovery, Mr. Younts correctly nudges accused service members to gather their own records for their defense team to review.^[14]

The book gives a stark and needed reminder that, in the digital age, talking about a case includes posting on social media.

LOOSE LIPS CAN SINK SHIPS

Furthermore, Mr. Younts gives accused service members reasons to think twice before talking about their case with others.^[15] Loose lips can sink ships as well as court-martial defenses. The book gives a stark and needed reminder that, in the digital age, talking about a case includes posting on

social media. Mr. Younts also notes that the government can access military emails. It may seem unlikely that anyone would share lurid details about alleged criminal activity on a government network, but sometimes people make poor choices. The book, therefore, makes a straightforward argument for discretion being the better part of valor.

SECOND EDITION NEEDED

A second edition of *The United States v. You* would increase its benefit with additional information on a couple key topics. First, members under charges often have questions about the effects of a court-martial sentence on their dependents. For example, they may wonder whether their dependents will continue to receive pay and allowances. If members live on a military installation with their family, they may want to know about moving requirements and permanent change of station entitlements. Health care coverage is another common concern. Although these are not strictly legal questions, they often fall to defense counsel and defense paralegals to answer.

It teaches accused service members how to get involved in their defense early and remain invested throughout the process.

Second, accused service members may struggle with mental health issues as they await trial. Worse yet, they may feel loath to speak about their thoughts, feelings, and emotions to military mental health professionals for fear that their disclosures could get used against them. They may have similar concerns about chaplains or even civilian mental health providers. Consequently, and sometimes tragically, accused service members could end up suffering in silence. An overview of mental health services available to accused service members in all military branches, along with a general discussion about the boundaries of confidentiality, would add even more wisdom and compassion to *The United States v. You*.

CONCLUSION

Still, the book hits all the need-to-know points for service members undergoing investigation and facing court-martial. It translates Byzantine legal processes into terms laypeople can understand. It teaches accused service members how to get involved in their defense early and remain invested throughout the process. And it serves as a companion for military members looking for credible information about the UCMJ system. For all of these reasons, *The United States v. You* is a thoughtful book that advances the fair administration of military justice.

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ENDNOTES

- [1] R. DAVIS YOUNTS, ESQ., *THE UNITED STATES V. YOU: A PRACTICAL GUIDE TO THE COURT-MARTIAL PROCESS FOR MILITARY MEMBERS AND THEIR FAMILIES* (2020).
- [2] *Id.* 3
- [3] *Id.* at 8-9.
- [4] *Id.* at 8.
- [5] Uniform Code of Military Justice art. 38 (2017); 10 U.S.C. § 838 (2017).
- [6] *Id.*
- [7] YOUNTS, *supra* note 1, at 12.
- [8] *Id.* at 13-14.
- [9] *Id.* at 17.
- [10] *Id.* at 27-31.
- [11] *Id.* at 98.
- [12] *Id.* at 99.
- [13] *Id.* at 100.
- [14] *Id.* at 101.
- [15] *Id.* at 98.



Admitting Hearsay

Why the Air Force's Current Guidance on Admitting Hearsay at Sexual Assault Discharge Boards Violates the Fifth Amendment

BY CAPTAIN RYAN S. CRNKOVICH AND CAPTAIN ADAM M. MERZEL

EDITED BY MAJOR HEATHER A. SMILDE

This article summarizes the Air Force's current guidance with respect to the admission of hearsay at administrative discharge proceedings.

When we first entered the Air Force, the prevailing view across the JAG Corps seemed to be “almost anything goes in a discharge board.” We were told that there were limited rules, nearly everything is admissible, and hearsay is an afterthought. Think about it...how many times have you heard counsel argue for the admission of evidence because “we’re at a board, not a court?”

Since then, however, a series of federal and state appellate decisions has undermined the Air Force's current guidance with respect to the admissibility of hearsay at administrative discharge boards. In particular, courts across the country have drawn a line in the sand regarding an individual's right to confront an accuser in an administrative proceeding concerning sexual assault. While the majority of these cases have involved college students facing expulsion proceedings at public universities, the reasoning employed by these courts makes it clear that their holdings should apply equally to administrative discharge boards and boards of inquiry conducted by the military.

The admission of **hearsay** at discharge boards for sexual assault presents a unique set of problems.

In this article, we summarize the Air Force's current guidance with respect to the admission of hearsay at administrative discharge proceedings. We then examine recent case law germane to this issue that has emerged from the First, Sixth and Seventh Circuit Courts of Appeals within the past three years. These decisions, along with the federal district and state courts that have relied upon them to reach similar conclusions, underscore two important things: current Air Force guidance is premised upon the wrong case law, and, if the military continues to follow current Air Force guidance, it will systematically and repeatedly violate military members' right to due process under the Fifth Amendment to the United States Constitution.

The ultimate goal of this article is to demonstrate that federal law entitles a Respondent to **cross-examine an accuser** in an Air Force administrative discharge board involving an accusation of sexual assault where credibility is at issue.

The ultimate goal of this article is to demonstrate that federal law entitles a Respondent to cross-examine an accuser in an Air Force administrative discharge board involving an accusation of sexual assault where credibility is at issue. We also seek to end the misconception that “anything goes” during Air Force discharge boards, especially when the outcome can permanently affect the trajectory of a Respondent’s life. These proceedings are not immune from Constitutional requirements like procedural due process, and our clients—a subset of the 1% of Americans who volunteer to serve in the military—deserve to enjoy the freedoms which they fight to protect.

OVERVIEW OF CURRENT AIR FORCE GUIDANCE

The Air Force’s three primary sources of guidance relating to the admission of hearsay at administrative discharge proceedings are:

- (1) **OpJAGAF 2015-4**
Hearsay Evidence in Administrative Proceedings, Opinion JAG, Air Force, No. 2015-4 (24 April 2015),
- (2) **OpJAGAF 2018-23**
Acceptance of Hearsay Evidence in Board of Inquiries, Opinion JAG, Air Force, No. 2018-23 (7 August 2018); and
- (3) **AFMAN 51-507**
U.S. Dep’t of Air Force, Manual 51-507, *Enlisted Discharge Boards and Boards of Officers* (15 July 2020)[1]

OpJAG 2015-4

The first of these authorities, OpJAG 2015-4, cited various federal court decisions and statutory authorities as precedent. Specifically, the opinion indicated that, consistent with § 556(d) of the Administrative Protection Act, cross-examination “may be required for a full and fair disclosure of the facts.”[2]

OpJAG 2015-4 continued to explain that, to the extent an individual opposes hearsay evidence, the “opponent to hearsay bears the burden to demonstrate there are serious issues with respect to its reliability such that cross-examination is crucial to the truth-finding function.”[3] In making this determination, the authors directed litigants and legal advisors to the eight factors identified in both *Richardson v. Perales*, 402 U.S. 389 (1971) and *Calhoun v. Bailer*, 626 F.2d 145 (9th Cir. 1980), and described *Calhoun* as “a case frequently cited as synthesizing the approach to the admission of hearsay in administrative proceedings.”[4]

However, OpJAG 2015-4 went on to note that, although the *Calhoun* decision is instructive, the court in that case “conflated admissibility, procedural due process, and judicial review standards.”[5] OpJAG 2015-4 advocated a three-part analysis to assess the admission or exclusion of hearsay at an administrative hearing:

- (1) Is the hearsay **relevant**?
- (2) Does its admission comport with **due process**? and
- (3) Does it constitute **substantial evidence** such that it can adequately support the conclusions of the proceeding?

With respect to the first prong, OpJAG 2015-4 states that, so long as the hearsay is relevant, it is admissible. With respect to the second and third prongs, the authors suggested a default to the *Calhoun* factors.[6]

The authors of OpJAG 2015-4 did not conclude that a Respondent never has a right to cross-examine adverse witnesses at an administrative hearing, nor did it apply the law to a particular factual scenario.

OpJAG 2018-23

About three and a half years later, the Air Force's Administrative Law Directorate (JAA) released OpJAG 2018-23, which more squarely addressed whether a Board of Inquiry could accept hearsay evidence from alleged sexual assault victims who refused to participate in administrative discharge proceedings. Similar to OpJAG 2015-4, the opinion cited *Calhoun*, and concluded that hearsay evidence was admissible if, applying the Ninth Circuit's eight-factor test, there were adequate "indicia of reliability."^[7]

AFMAN 51-507 distinguishes between two different categories of hearsay evidence.

AFMAN 51-507

These eight *Calhoun* factors are virtually identical to the factors found in paragraph 5.3.1.2 of AFMAN 51-507, which suggests that the drafters of AFMAN 51-507 relied heavily on the OpJAG opinions when crafting the regulation. However, it is important to note that paragraph 5.3.1 of AFMAN 51-507 distinguishes between two different categories of hearsay evidence:

- (1) hearsay evidence which would be **admissible** in a judicial proceeding, and
- (2) hearsay evidence which would be **inadmissible** in a judicial proceeding.^[8]

This first category seems to represent the type of hearsay that conforms to an exception pursuant to Mil R. Evid. 803 (e.g., statements made for medical diagnosis or treatment, business records, etc.). Per paragraph 5.3.1.1, "hearsay evidence admissible in a judicial proceeding is generally admissible in all administrative proceedings." While there is some room for interpretation and argument on this point, particularly on the question "what constitutes a judicial proceeding?" the primary problem involves the admission of hearsay at discharge boards that falls within the second category of hearsay.

This second category covers hearsay that a finder of fact would not see at a court-martial (i.e., out of court statements offered for the truth of the matter asserted that do not conform to an exception under MREs 803 or 804). While Category One statements can also create Constitutional problems if admitted erroneously, the systemic problem begins at the admission of Category Two statements in administrative proceedings. Per AFMAN 51-507, paragraph 5.3.1.2, just because a hearsay statement is inadmissible in a judicial proceeding does not make it *per se* inadmissible at an administrative proceeding. As noted above, in order to determine whether or not this category of hearsay is admissible, AFMAN 51-507 instructs the legal advisor to apply the *Calhoun* factors in ascertaining whether the hearsay evidence bears adequate "indicia of reliability."

Just because a hearsay statement is inadmissible in a judicial proceeding does not make it *per se* inadmissible at an administrative proceeding.

It is important to note that the next paragraph in AFMAN 51-507 (para. 5.3.1.2.3) goes on to address hearsay evidence specifically from non-testifying victims. It states "[w]hen a Victim is unavailable for the hearing due to his or her decision not to testify, the decision not to testify does not automatically result in any prior written or oral statements being ruled admissible. Rather, the Legal Advisor should use analysis from paragraph 5.3.1.2.2 to evaluate the hearsay evidence." In other words: apply the *Calhoun* factors. But, does that actually scratch the itch?

CONDUCTING THE WRONG ANALYSIS

The fact that hearsay evidence is reliable under *Calhoun* does not obviate the need for cross-examination when procedural due process requires it.

Consider the following increasingly-common scenario: an individual tells law enforcement "Airman Smith sexually assaulted me," submits to a video-recorded interview, but

elects not to participate in a potential court-martial of Airman Smith. Airman Smith's squadron commander is advised that the Government cannot win the case at trial without the alleged victim's testimony, so in lieu of prosecution, the squadron commander issues Airman Smith a Letter of Reprimand for sexual assault, triggering administrative discharge action. The commander recommends an Under Other Than Honorable Conditions service characterization and the convening authority directs a discharge board. The Government Counsel for the discharge board cannot compel the alleged victim to testify, and instead seeks to admit the video-recorded interview or statement that the alleged victim gave to law enforcement.

The *Calhoun* factors' assurance of "reliability" does not equate to "you can safely believe the substance of the statement."

In this situation, relying on the *Calhoun* factors as the only gatekeeper to hearsay evidence rubber stamps the admission of hearsay testimony in the place of live testimony as long as basic tenets of authentication and foundation are met. There may be exceptions where, even under *Calhoun*, such evidence would not be sufficiently reliable, but those cases are, at least anecdotally, very rare. And in the context of Air Force administrative discharge boards for sexual assault, that is problematic.

The *Calhoun* factors' assurance of "reliability" does not equate to "you can safely believe the substance of the statement." In the *Calhoun* context, reliability is much closer to "it was said under conditions such that we can accept that the person was actually trying to say what was in the statement." Applying the *Calhoun* factors involves asking external, neutral questions, such as, "Is the statement sworn? Is it corroborated? Is the declarant biased?" This superficial analysis does little to assess the veracity of the statement. Consider the fact that in almost every single court-martial, defense counsel impeach witnesses with prior inconsistent statements. Even when under oath, accidentally or purposefully, people say

things that are not true. The law recognizes the impact of prior inconsistent statements, even authorizing judges in both civil and criminal cases to give an instruction to the factfinder about how to analyze that evidence.^[9] Yet, current procedure in administrative discharge boards dictates almost automatic admission of hearsay statements, followed by an instruction from the legal advisor to the board that he or she has "determined there are adequate safeguards for the truth."

Given the Air Force's sole reliance upon *Calhoun*, one would think the trial concerned an allegation of sexual assault (or other serious misconduct) where the complainant did not testify. That is not the case. *Calhoun* dealt with a situation where a postal service employee was dismissed for making false statements. Several witnesses submitted written affidavits, and during the hearing, one of those witnesses changed his version of events while testifying under oath. Ultimately, at the conclusion of the hearing, the finder of fact deemed the affidavits more reliable than the live testimony. On appeal, the Ninth Circuit analyzed whether or not the board relied upon sufficient evidence to support its decision given the fact that the affidavits were contradicted by live testimony.

Somehow, "hearsay may be substituted for live testimony because the proceeding is administrative" is where the Air Force has landed.

It is important to note that the Ninth Circuit went to great lengths to highlight that the Respondent in *Calhoun* never objected to the admission of the hearsay. The affiants in *Calhoun* were subject to live questioning, and based upon the manner in which the affiants testified, the hearing officer made a determination regarding their credibility. At no point did the *Calhoun* court suggest that hearsay evidence, if deemed reliable, could be permissibly substituted for live testimony.

Yet, somehow, "hearsay may be substituted for live testimony because the proceeding is administrative" is where

the Air Force has landed. *Calhoun* was never meant to be a barometer for due process in a sexual assault case in which the complainant's credibility is at issue and the complainant declines to testify. The factual and procedural scenarios in *Calhoun* are entirely different from the situation described above, where the factfinders hear no live testimony and are forced to rely on law enforcement's Report of Investigation to make a credibility assessment of a person whom they have never met. This should have raised red flags for drafters of AFMAN 51-507 with respect to the applicability of *Calhoun* to administrative discharge boards, but it apparently did not.

We do not assert that *Calhoun* should be dismissed entirely. To the contrary, it remains instructive in assessing whether hearsay evidence bears sufficient indicia of reliability such that it ought to be admitted. However, this is a discrete analysis, and one that does not help resolve the question of whether cross-examination is required to satisfy due process in a particular case. In other words, adequate "indicia of reliability" under *Calhoun* does not stand for the proposition that due process is automatically satisfied.

Admitting hearsay in lieu of live testimony, instead of in conjunction with it, often deprives a Respondent of due process under the Fifth Amendment.

Ultimately, this is where the Air Force's guidance goes astray; it makes a *Calhoun* analysis the end of the analytical road. As noted above, AFMAN 51-507, paragraph 5.3.1.2.3 instructs legal advisors to apply the *Calhoun* factors in determining whether a complainant's hearsay statements should be allowed in when the complainant decides not to testify. This is problematic, and distorts *Calhoun* by extending its application to a scenario that it was never meant to address. As one can see from the cases below, admitting hearsay in lieu of live testimony, instead of in conjunction with it, often deprives a Respondent of due process under the Fifth Amendment.

FEDERAL COURT JURISPRUDENCE

While the U.S. Supreme Court has not directly addressed this issue, the Court has recognized the importance of procedural due process during administrative proceedings that can impart a stigma on a Respondent. The Court has held "where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential."^[10] In a case where the Court held that an administrative termination or exclusion did not violate the due process clause, it was careful to note that the government action in that case did not "bestow a badge of disloyalty or infamy, with an attendant foreclosure from other employment opportunity."^[11] It has likewise instructed that "[i]n almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses."^[12]

This principle is not strictly limited to the criminal context.^[13] In *Green v. McElroy*, the Supreme Court explained that "where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show it is untrue."^[14] The Court further noted that while this requirement applies to documentary evidence, "it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice or jealousy."^[15] Formal protections for such concerns are expressed in the Sixth Amendment; however, the Supreme Court has found occasion to zealously protect these rights from erosion by speaking out "not only in criminal cases...but also in all types of cases where administrative and regulatory actions were under scrutiny."^[16]

Similarly, federal courts have long held that "[l]iberty interests are implicated where summary governmental action is taken which (1) seriously damages one's associations and reputation in their community or (2) imposes a stigma which hinders one's ability to secure other employment in their chosen field."^[17] As applied to administrative discharge boards, the

convening of the board is the governmental action, and the potential finding that sexual assault occurred coupled with the imposition of a less-than-Honorable service characterization represents the reputational damage or stigma.

What process is due to a student who is accused of committing a sexual or physical assault upon another student before a finder of fact makes a decision on expulsion?

In applying these principles over the past three years, federal appellate courts across the country have considered an analogous situation: administrative expulsion proceedings conducted by a public university. What process is due to a student who is accused of committing a sexual or physical assault upon another student before a finder of fact makes a decision on expulsion? Thus far, three different federal appellate courts have provided opinions which inform how such cases should be handled. The following federal circuit court decisions should be given substantial weight because they are the closest thing to binding authority within this field. Moreover, several of these opinions postdated the publication of OpJAGAF 2018-23 and the original version of AFMAN 51-507, so the Air Force did not have the benefit of considering all of these decisions as it was initially crafting this guidance.

THE SIXTH CIRCUIT'S ANALYSIS

In administrative hearings adjudicating claims of sexual assault, when the decision turns on credibility, due process requires that the respondent be entitled to cross-examine his accuser through counsel.

The Sixth Circuit Court of Appeals has been unequivocal: in a sexual assault case with competing narratives adjudicated at an administrative hearing, there must be some manner of cross-examination afforded to the Respondent as a fundamental matter of due process, and this right of

cross-examination includes the right of an accused to have his agent conduct the questioning.

In 2017, the Sixth Circuit issued its opinion in *Doe v. Univ. of Cincinnati*, the first of two major opinions by this court related to whether a public university student has the right to confront his or her accuser in an administrative expulsion proceeding on the basis of sexual assault.^[18] In that case, the Court considered a situation in which the Respondent claimed that he had been denied his due process rights under the United States Constitution after he was found to have committed a sexual assault without being allowed to confront his accuser at the proceeding.

Prior to reaching the Sixth Circuit Court of Appeals, the Federal District Court for the Southern District of Ohio agreed with the Respondent that the University “could not constitutionally find him responsible for sexually assault... without any opportunity to confront and question [the complainant].”^[19]

On appeal, the Sixth Circuit held that “suspension clearly implicates a protected property interest, and allegations of sexual assault may impugn [a student’s] reputation and integrity, thus implicating a protected liberty interest.”^[20] Once the Sixth Circuit determined that the Due Process Clause applied, it turned to the question of what process was due. In resolving this question, the Court first noted that the interest at stake was significant—“[a] finding of responsibility for a sexual offense can have a lasting impact on a student’s personal life in addition to his educational and employment opportunities, especially when the disciplinary action involves a long-term suspension.”^[21] Because the Respondent’s interest was compelling, the Court then considered “the risk of erroneous deprivation of this interest under the University’s current procedures and the value of any additional procedural safeguards [the Respondent] requests.”^[22] The Court explained “where the deprivation is based on disciplinary misconduct, rather than academic performance, we conduct a more searching inquiry.... Accused students must have the right to cross-examine witnesses in the most serious cases.”^[23]

The Sixth Circuit ultimately concluded that an opportunity for cross-examination was required based on the facts of the case. The fact that the Respondent was provided with his accuser's statements and was able to highlight potential inconsistencies was not enough. The Court concluded the following:

Given the parties' competing claims, and the lack of corroborative evidence to support or refute [the complainant's] allegations, the present case left the... panel with a choice between believing an accuser and an accused. Yet, the panel resolved this problem of credibility without assessing [the complainant's] credibility. In fact, it decided the [Respondent's] fate without seeing or hearing from [the complainant] at all. That is disturbing, and in this case, a denial of due process.^[24]

While protection of victims of sexual assault from unnecessary harassment is a laudable goal, the elimination of such a basic protection for the rights of the accused raises profound concerns.

The Court was "equally mindful" of the complainant's interests and her right to be free from fear of sexual assault and harassment. It even conceded that "[a]llowing an alleged perpetrator to question an alleged victim directly may be traumatic or intimidating."^[25] However, the Court reasoned that "while protection of victims of sexual assault from unnecessary harassment is a laudable goal, the elimination of such a basic protection for the rights of the accused raises profound concerns."^[26] Therefore, allowing the Respondent "to confront and question [his accuser] through the panel would have undoubtedly aided the truth-seeking process and reduced the likelihood of an erroneous deprivation."^[27]

Less than one year later, the Sixth Circuit heard *Doe v. Baum*,^[28] which presented a very similar facts as *Cincinnati*.

In *Baum*, the Sixth Circuit agreed with the Respondent's position that, because he never received an opportunity to cross-examine his accuser or her supporting witnesses, there was "a significant risk that the university erroneously deprived [the Respondent] of his protected interests."^[29] Although the Court did not clearly delineate whether it was speaking to a protected property or liberty interest, it made clear that "[b]eing labeled a sex offender by a university has both an immediate and lasting impact on a student's life."^[30]

This time, the Court went even further, holding that the accused had a right to cross-examine the complainant through his agent. The Court held that "if a public university has to choose between competing narratives to resolve a case, the university must give the accused student or his agent an opportunity to cross-examine the accuser and adverse witnesses in the presence of a neutral factfinder."^[31] Relying upon its decision in *Univ. of Cincinnati*, the Court concluded that some form of cross-examination was required "in order to satisfy due process."^[32]

THE FIRST CIRCUIT'S APPROACH

Real time cross-examination is required, but it may be satisfied by submitting questions to the panel conducting the hearing for them to ask the accuser.

In August 2019, the First Circuit Court of Appeals considered the case of *Haidak v. Univ. of Massachusetts-Amherst*,^[33] which involved a similar scenario as the *Cincinnati* and *Baum* cases. In this case, the Respondent was suspended and later expelled from the state-run University of Massachusetts-Amherst after a female student accused him of committing physical assaults upon her.^[34] Both the Respondent and his accuser were students at the University and had previously been engaged in a romantic relationship with one another.^[35] In the wake of these allegations, the University ultimately put together a "Hearing Board" comprised of four students and one staff chair.^[36] Under the procedures of this board, the Respondent was not permitted to question other students directly, "but instead could submit proposed questions for the Board to consider posing to the witness."^[37] The Respondent submitted thirty-six questions he wanted the board to ask

his accuser, but the Assistant Dean of Students “pared this list down to sixteen.”^[38] Ultimately, the board concluded that the Respondent was guilty of assault and failing to comply with no-contact orders, but not for endangerment or harassment. After the board concluded, the Associate Dean of Students decided to expel the Respondent, and the Respondent subsequently brought suit in federal court on the basis of both a failure to comport with due process and a claim under Title IX.^[39]

After his case was dismissed in district court, the Respondent appealed to the First Circuit Court of Appeals. The court began its analysis by noting that the respondent was entitled to due process because of the potential deprivation of his property interest.^[40] The court then looked to what process he was entitled to under the circumstances.

The Court held that “due process in the university disciplinary setting requires some opportunity for real-time cross-examination, even if only through a hearing panel.”

In answering this question, the court acknowledged that although notice and an opportunity to be heard have consistently been held to be the “essential requisites of procedural due process” the question was whether the hearing in this case was adequate under the circumstances.^[41] One of the Respondent’s primary arguments was that his hearing failed to comport with due process because “he was not allowed to cross-examine” his accuser directly. In assessing this argument, the Court noted that “the university employed a non-adversarial model of truth seeking” which could fairly be described as “inquisitorial.”^[42] The Court noted that as a general rule it disagreed with the Respondent’s position that a student has the right to confront his accuser himself in a school disciplinary proceeding. However, the Court expressly caveated that this was “not to say that a university can fairly adjudicate a serious disciplinary charge without any mechanism for confronting the complaining witness and probing his or her account.”^[43] In so finding, the Court

held that “due process in the university disciplinary setting requires some opportunity for real-time cross-examination, even if only through a hearing panel.”^[44]

The First Circuit expressly recognized that its approach differed from the Sixth Circuit’s in *Baum*, which it described as a case with “a holding that we could easily join” except for the fact that it announced a categorical rule “that the state school had to provide for cross-examination by the accused or his representative in all cases turning on credibility determinations.”^[45] Although the Court expressed concern with certain aspects of the hearing, it ultimately concluded that “the Board managed to conduct a hearing reasonably calculated to get to the truth...by examining [the Respondent’s accuser] in a manner reasonably calculated to expose any relevant flaws in her claims.”^[46] For this reason, the Court disagreed with the Respondent’s claim that his expulsion proceeding did not provide due process.

THE SEVENTH CIRCUIT’S VIEW – THE INTEREST AT STAKE IS A LIBERTY INTEREST

Despite plainly holding that some form of cross-examination must be afforded to a respondent facing expulsion from a public university on the basis of an assault in which credibility is at issue, the cases cited above do not contain a military nexus. The Sixth Circuit’s decisions in *Cincinnati* and *Baum* focus their analysis on what process is due, not necessarily the interest at stake that triggers due process rights. The First Circuit’s decision in *Haidak* addresses that question, but explains that the Respondent in that case had a protected property interest.

That is what makes the Seventh Circuit Court of Appeals’ June 2019 decision, *Doe v. Purdue Univ.*, perhaps the most important case within this field of the law for military practitioners.^[47] Unlike other cases, *Purdue* has a military nexus.

In *Purdue*, the Respondent sued the University after he was found guilty of committing sexual violence against his accuser and suspended for an academic year. As a result of his suspension, the Respondent was expelled from the Navy ROTC program, which terminated both his ROTC scholarship and his ability to pursue a career in the Navy. The

Respondent's suit, similar to the claims in both *Cincinnati* and *Baum*, alleged violations of his constitutional right to due process based upon the procedures used by the University to determine his guilt, as well as violations of Title IX.

After expressly finding that the respondent held no protected property interest, the Seventh Circuit unanimously reversed the magistrate judge's decision to dismiss the Respondent's suit, holding that the respondent maintained a protected liberty interest in his freedom to pursue service in the Navy, which was his occupation of choice.^[48] The Seventh Circuit explained that in order for the Respondent to succeed on his claim that the government had deprived him this protected liberty interest, he must establish that he had been wronged using the "stigma plus" test. Under this test, he was required "to show that the state inflicted reputational damage accompanied by an alteration in legal status that deprived him of a right he previously held."^[49] The Respondent argued that he satisfied the first prong of the test (i.e., the stigmatization), because "Purdue inflicted reputational harm by wrongfully branding him as a sex offender."^[50] He likewise argued that he satisfied the second prong of the test (the change in legal status) because Purdue suspended him, subjected him to readmission requirements, and caused the loss of his Navy ROTC scholarship. As the Respondent alleged, "these actions impaired his right to occupational liberty by making it virtually impossible for him to seek employment in his field of choice, the Navy."^[51] The Seventh Circuit concluded that this was sufficient to satisfy the "stigma plus" test, thereby triggering the protections of the Due Process clause.^[52]

Given that the Respondent had a protected liberty interest, the Court turned to whether the University's procedures were fundamentally unfair in determining the Respondent's guilt. Although the Seventh Circuit expressly avoided the question of whether cross-examination was required under these circumstances, it observed that "in a case that boiled down to a 'he said/she said,' it is particularly concerning that...the committee concluded that [the complainant] was the more credible witness—in fact, that she was credible at all—without ever speaking to her in person" and that it was "unclear, to say the least, how...the committee could have evaluated [the complainant's] credibility."^[53]

TAKEAWAYS FOR MILITARY ADMINISTRATIVE DISCHARGE BOARDS

These cases do not present identical holdings and rationales, but juxtaposing them demonstrates the following: In an administrative discharge proceeding concerning a serious offense (e.g., sexual assault) in which a military member's career is at stake and the underlying facts are contested, due process entitles a Respondent to some manner of real-time cross-examination of his accuser. So while these cases do not present a unified solution, they do indicate that the Air Force's current guidance fails to guarantee due process in these types of cases.

In an administrative discharge proceeding concerning a serious offense in which a military member's career is at stake and the underlying facts are contested, due process entitles a Respondent to some manner of real-time cross-examination of his accuser.

The Sixth Circuit's decisions in *Cincinnati* and *Baum* provide a lifeline for respondents facing discharge proceedings where the complaining witness declines to participate. However, even though these Sixth Circuit opinions unequivocally set forth a right to cross-examination, they do not clearly articulate what the protected interest actually is under the Due Process Clause.

Under the court's rationale in *Purdue*, there can be little doubt that if a candidate for military service (i.e., a student enrolled in Naval R.O.T.C.) maintains a protected liberty interest in the pursuit of his profession, then an active duty member of the armed forces possesses the same liberty interest. Furthermore, the Seventh Circuit found that branding a person a sex offender after an administrative hearing would easily meet the "stigma-plus" test necessary to trigger the protections of the Due Process clause. Alternatively, being involuntarily separated from active duty with an Under

Honorable Conditions (General) or Under Other Than Honorable Conditions discharge constitutes a “change in legal status” and a “stigma,” which would trigger the same protections. Accordingly, the main question in the context of administrative discharge boards for sexual assault in the military becomes “what process is due in such a situation?”

For this, we can look to both the Sixth Circuit’s decisions in *Cincinnati* and *Baum* as well as the First Circuit’s decision in *Haidak*. Although these decisions represent somewhat of a circuit split, both courts have recognized that, at a minimum, real-time cross examination is necessary in a case where there are competing narratives. Even under the more conservative approach taken by the First Circuit, the Air Force’s current guidance runs afoul of the Constitution. Consistent with these federal court decisions, legal advisors should exclude hearsay statements from witnesses whose credibility is at issue unless the respondent is first afforded an opportunity for real-time cross examination.

Being discharged for sexual assault has a much more significant gravitas than “minor disciplinary infractions” or “a pattern of misconduct.”

The most obvious application of this principle is to sexual assault cases where consent or mistake of fact as to consent are at issue. While expulsion proceedings and discharge boards have their differences, the deprivation of the liberty interest is virtually identical. Getting kicked out of a government-run organization affixed with the label “sex offender” without due process is the crux of the problem. And this lasting impact on a person’s life, this scarlet letter, is not confined to university students—it applies to every active duty member in the United States Air Force facing involuntary termination by the United States government for rape or sexual assault. Legal advisors and practitioners should be aware of these recent developments in federal case law and be prepared to address them when they inevitably arise at discharge boards and boards of inquiry.

NOTIFICATION DISCHARGES FOR SEX ASSAULT: ALSO UNCONSTITUTIONAL

As a general matter, the Air Force must be able to shape the force. If the Government were compelled to offer a hearing to every Airman who faced involuntary discharge, it would be unduly cumbersome and time-consuming. Fortunately, the federal case law discussed above does not require a discharge board or a hearing in every case. While the *Purdue* case provides some support for this idea, being discharged for sexual assault has a much more significant gravitas than “minor disciplinary infractions” or “a pattern of misconduct.”

While we will not speculate for which offenses discharge constitutes a stigma, we are comfortable with the conclusion that an involuntary notification discharge for sexual assault satisfies the “stigma plus test” and is *per se* unconstitutional. Since a member’s command usually seeks an Under Other Than Honorable Conditions service characterization in a discharge board for sexual assault, a notification discharge for sexual assault is a relatively rare occurrence. However, due to lack of evidence or for expediency, commanders and legal offices sometimes pursue notification discharges for sexual assaults. Based upon the above analysis of the law, notification discharges for sexual assault are also unconstitutional.

CONCLUSION

The admission of hearsay at discharge boards for sexual assault presents a unique set of problems. There is no judge, the legal advisor has limited power, and the Air Force’s guidance does not reflect the recent developments in federal case law. Especially in light of recent jurisprudence, the Air Force should rework its current guidance to ensure that it is not creating a forum that deprives its service members of rights to which they are Constitutionally entitled. Until then, legal advisors should possess a firm understanding of these cases and exclude an alleged victim’s hearsay statements unless the respondent is first afforded some manner of real-time cross-examination.

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ENDNOTES

- [1] Hearsay Evidence in Administrative Proceedings, Op. JAG, Air Force, No. 2015-4 (24 April 2015) [hereinafter OpJAGAF 2015-4]; Acceptance of Hearsay Evidence in Board of Inquiries, Op. JAG, Air Force, No. 2018-23 (7 August 2018) [hereinafter OpJAGAF 2018-23]; U.S. Dep't of Air Force, Manual 51-507, *Enlisted Discharge Boards and Boards of Officers* (15 July 2020) [hereinafter AFMAN 51-507].
- [2] OpJAGAF 2015-4 at 2.
- [3] *Id.*
- [4] *Id.* at 3; *Richardson v. Perales*, 402 U.S. 389 (1971); *Calhoun v. Bailar*, 626 F.2d 145 (9th Cir. 1980). These eight factors, which are listed in paragraph 5.3.1.2.2 of AFMAN 51-507, are: (1) the independence or bias of the declarant; (2) the type of hearsay submitted; (3) whether the statements are signed or sworn as opposed to anonymous, oral, or unsworn; (4) whether the statement is contradicted by direct testimony; (5) whether or not the declarant is available to testify and, if so, whether or not the party objecting to the hearsay statements subpoenaed the declarant; (6) whether the declarant is unavailable and no other evidence is available; (7) the credibility of the declarant if a witness, or of the witness testifying to the hearsay; (8) whether the hearsay is corroborated.
- [5] OpJAGAF 2015-4 at 3.
- [6] *Id.* at 4.
- [7] OpJAGAF 2018-23 at 1.
- [8] AFMAN 51-507, para. 5.3.1.
- [9] *See generally Fed. R. Evid.* 613; *see also Mil. R. Evid.* 613.
- [10] *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971).
- [11] *Cafeteria Workers v. McElroy*, 367 U.S. 886 (1961).
- [12] *Goldberg v. Kelly*, 397 U.S. 254, 269–70 (1970) (citing *ICC v. Louisville & N.R. Co.*, 227 U.S. 88, 93-94 (1913) and *Willner v. Committee on Character & Fitness*, 373 U.S. 96, 103-104 (1963)).
- [13] *See Greene v. McElroy*, 360 U.S. 474, 496-97 (1959).
- [14] *Id.* at 496.
- [15] *Id.*
- [16] *Id.* at 497.
- [17] *See, e.g., Rew v. Ward*, 402 F. Supp. 331, 339 (1975).
- [18] *Doe v. Univ. of Cincinnati*, 872 F.3d 393 (6th Cir. 2017). The Sixth Circuit decided this case on 25 September 2017—11 months before OpJAGAF 2018-23 was issued and 16 months before the initial version of AFMAN 51-507 went into effect.
- [19] *Id.* at 398.
- [20] *Id.*
- [21] *Id.* at 400 [internal quotes omitted].
- [22] *Id.*
- [23] *Id.*
- [24] *Id.* at 402.

- [25] *Id.* at 403.
- [26] *Id.* at 404.
- [27] *Id.*
- [28] *Doe v. Baum*, 903 F.3d 575 (6th Cir. 2018). The Sixth Circuit decided this case on 7 September 2018—one month after OpJAGAF 2018-23 was issued, but four months before the initial version of AFMAN 51-507 went into effect.
- [29] *Id.* at 582.
- [30] *Id.*
- [31] *Id.* at 578.
- [32] *Id.* at 581.
- [33] *Haidak v. Univ. of Massachusetts-Amherst*, 933 F.3d 56 (1st Cir. 2019). Former associate Supreme Court Justice David H. Souter participated in the three-judge panel which decided this case and joined the opinion in full.
- [34] *Id.* at 60.
- [35] *Id.* at 61.
- [36] *Id.* at 64.
- [37] *Id.*
- [38] *Id.*
- [39] *Id.* at 65.
- [40] Although the Court focused upon a property interest in this case, this case is still important because it conducts an analysis of “what process is due” once a respondent’s protected interests are triggered.
- [41] *Id.*
- [42] *Id.* at 68.
- [43] *Id.* at 69.
- [44] *Id.*
- [45] *Id.*
- [46] *Id.* at 71.
- [47] *Doe v. Purdue Univ.*, 928 F.3d 652 (7th Cir. 2019).
- [48] *Id.* at 656.
- [49] *Id.* at 661.
- [50] *Id.*
- [51] *Id.*
- [52] *Id.* at 663.
- [53] *Id.* at 18.

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Equal Protection Under Environmental Law?

DEFENDING FEDERAL INSTALLATIONS FROM DISCRIMINATORY STATE FINES

BY MAJOR MARK E. COON

EDITED BY MAJOR KATELYN M. BRIES

The waivers of sovereign immunity are strictly conditioned on the federal government being afforded equal protection under the law.

The sovereign immunity defense has long been the primary “shield” employed by military attorneys tasked with defending federal installations from state-levied environmental fines.^[1] Rooted in the Supremacy Clause of the U.S. Constitution,^[2] the doctrine of sovereign immunity provides that the federal government is wholly immune from state regulation, including the payment of punitive fines, unless Congress has specifically consented to such regulation.^[3] In the military environmental law context, this means that federal military installations are prohibited from paying environmental fines to the states^[4] unless Congress has clearly and unambiguously authorized the payment of such fines through a waiver of sovereign immunity for the law allegedly violated.^[5]

As part of its efforts to be a leader in the field of environmental regulation, and in recognition of the fact that the federal government is itself a major operator of facilities that contribute to pollution,^[6] Congress has attempted to “put its money where its mouth is.” In so doing, Congress

has—for *some* environmental statutes—waived the federal government’s sovereign immunity from state environmental fines and granted consent for federal instrumentalities to pay them. Naturally then, the initial inquiry when evaluating a state environmental fine issued against a federal military installation is, “has sovereign immunity been waived to pay fines under this statute?”^[7] The legal literature addressing this question is voluminous^[8] but, in short, federal sovereign immunity from environmental fines has been waived only for the Resource Conservation and Recovery Act (RCRA),^[9] the Safe Drinking Water Act (SDWA),^[10] and the lead-based paint provisions of the Toxic Substances Control Act (ToSCA).^[11]

Importantly though, this does *not* mean that every single fine levied under these laws must automatically be paid. The inquiry is more intensive. This is because the waivers of sovereign immunity in these statutes are both limited and conditional. Specifically, sovereign immunity is not waived to pay *all* fines, just *nondiscriminatory* ones.^[12] In other words,

the waivers of sovereign immunity are strictly conditioned on the federal government being afforded equal protection under the law and military attorneys need to be ready to cite this requirement when negotiating and settling state environmental enforcement actions that include punitive fines. This article details the background of limited waivers of sovereign immunity, explains the scope of the equal protection requirement, and offers guidance on how attorneys citing this requirement can counter state environmental fines issued against federal military installations.

In order to understand whether or not a federal military installation can pay a state-levied environmental fine, one must first understand how to interpret Congressional waivers of sovereign immunity.

LIMITED WAIVERS OF SOVEREIGN IMMUNITY

In order to understand whether or not a federal military installation can pay a state-levied environmental fine, one must first understand how to interpret Congressional waivers of sovereign immunity. The standard for interpreting these waivers can be found in the U.S. Supreme Court case of *Hancock v. Train*.^[13] In that case, the Court struck down a state effort to require federal facilities to obtain state environmental permits on the grounds that sovereign immunity had not been waived, despite statutory language that led some to believe it had.

The Court held that “because of the fundamental importance of the principles shielding federal installations and activities from regulation by the States,” a waiver of sovereign immunity and consent to state regulation will be found only where the statutory language evinces “specific congressional action” that is both “clear and unambiguous.”^[14] Simply put, waiver is not to be taken lightly, nor found easily. In addition to being strictly construed in favor of the sovereign,^[15] it must be “unequivocally expressed,” and “may not be implied or inferred.”^[16]

In light of these strict requirements, waivers of sovereign immunity must be carefully analyzed across multiple variables, only one of which is whether or not payment of fines has been authorized.^[17] Put differently, just because a statute waives the federal government’s sovereign immunity from compliance with substantive state regulation does not automatically mean that the federal government’s immunity from paying fines for failing to meet those substantive requirements has also been waived.^[18] This, too, must be unequivocally expressed and language waiving sovereign immunity from paying fines “must not be read for more than what the language strictly allows”^[19] or otherwise be “enlarged...beyond what the language requires.”^[20] In fact, the Court has found that the need to construe waivers of sovereign immunity strictly is particularly acute when the waiver is associated with matters that will result in the expenditure of federal funds.^[21]

The bottom line is waivers of sovereign immunity are extremely limited and, when evaluating whether or not a state-issued environmental fine can be paid, military environmental law attorneys “have no choice but to construe waivers very narrowly.”^[22] It is with this in mind that we look at the waivers of sovereign immunity to pay fines under RCRA, SDWA and ToSCA.

EQUAL PROTECTION AS A CONDITION ON WAIVERS OF SOVEREIGN IMMUNITY

Looking to the federal waivers of sovereign immunity in these statutes, one should note that the language of all three waivers provides that the federal government shall be subject to state requirements “*in the same manner, and to the same extent*” as any other person or nongovernmental entity.^[23] In initially reading this, the natural takeaway is obvious: the federal government must comply with environmental regulations just like everyone else. Upon closer inspection though, one can see that there are two sides to that coin. In addition to having to follow the law like everyone else, the federal government must also be treated like everyone else.^[24] Looking at it this way, and keeping in mind how narrowly waivers must be construed, it is clear that Congress’ waivers of sovereign immunity for these statutes are strictly

conditioned on the federal government being afforded equal protection under the law when state fines are levied.[25]

While one generally thinks of equal protection as an individual right, and not one afforded to the government,[26] Congress has required federal agencies to be treated in “the same manner and to the same extent” as nongovernmental entities to protect the federal government—the ultimate “deep-pocketed client”—from bearing a disproportionate share of the cost of state environmental compliance.[27] Put differently, the states may not treat the federal government differently than other regulated entities for the purpose of reaching into its deep pockets and taking additional money for themselves.[28]

States may not treat the federal government differently than other regulated entities for the purpose of reaching into its deep pockets and taking additional money for themselves.

The principle against states reaching into the pocket of the federal government stems from a long line of case law extending all the way back to the foundational 1819 case of *McCulloch v. Maryland*.^[29] There, the U.S. Supreme Court struck down a state levy that taxed federally chartered banks but not state-chartered banks.^[30] This state levy was struck down not only because the state was impermissibly reaching into the pocket of the federal government without its consent, but also because it was doing so in blatantly discriminatory fashion. As such, even reading *McCulloch* narrowly, the primary is that state actions which discriminatorily “retard, impede, burden, or...control” federal operations—and especially their expenditures—are constitutionally impermissible.^[31]

This concept is enshrined in two centuries of case law and is even seen in modern cases such as *Massachusetts v. U.S.*^[32] The U.S. Supreme Court reaffirmed that monetary charges

against the government are unconstitutionally discriminatory when nongovernmental entities are treated differently and when such charges “control, unduly interfere with,” or otherwise “destroy [the government’s] ability to perform essential services.”^[33] In fact, in the wake of this opinion, the U.S. Comptroller General’s office expressly opined that federal agencies are only liable for state-levied fines insofar as, *inter alia*, federally-owned facilities are treated in the same manner as non-federally owned facilities.”^[34]

Ultimately then, the key takeaway for the military environmental law attorney is that waivers need to be read not as waiving sovereign immunity from paying fines *per se*, but only as waiving sovereign immunity from paying fines that are *nondiscriminatory*. In other words, the federal government is still wholly immune from paying fines that are in any way discriminatory. As such, when evaluating a state environmental enforcement action that levies a fine, any evidence that a state has treated a military installation differently than similarly-situated nongovernmental entities should provide grounds to refuse payment (at least until the fine is reduced to a point that it is fair and proportionate with the fines assessed to those entities).^[35]

THE EQUAL PROTECTION DEFENSE IN PRACTICE

In determining whether or not a federal military installation has been afforded equal protection in the state assessment of an environmental fine, one should first ask the regulator for the state’s civil penalty policy as well as the “penalty matrix” used to calculate the specific penalty in the case at hand. ^[36] Designed to protect the states from claims that their penalties are arbitrary, capricious, or otherwise made up out of thin air, both the penalty policy and the penalty matrix will give you an idea of how the state arrived at the amount of the fine it has levied.^[37]

Next, one should seek records of enforcement actions that the state has taken in other cases involving the same or similar allegations against nongovernmental entities. Some states will have an online database through which you can search all proposed and previously executed enforcement actions in that state by violation type and year.^[38] In other states, there is no online database and one must request that

the regulators produce such records.^[39] Either way, one must analyze these past cases to see how nongovernmental entities have been fined and to get a sense of what the fair, “going rate” is for a particular violation. This is the best way to ensure that the federal government has been afforded equal protection under the law.

Designed to protect the states from claims that their penalties are arbitrary, capricious, or otherwise made up out of thin air, both the **penalty policy** and the **penalty matrix** will give you an idea of how the state arrived at the amount of the fine it has levied.

Using this information, if one determines that the state fine levied upon the federal government is in any way disparate from those assessed against nongovernmental entities in factually similar cases, one must assert that the fine is discriminatory and cannot be paid because sovereign immunity has not been waived. Then, looking to the “going rate” in those similar cases, one can—using analogy and distinction—argue for a reduced, fair, and more appropriate fine. The following case example is instructive:

The U.S. Environmental Protection Agency has delegated State X the authority to enforce RCRA through State X’s hazardous waste management regulations.^[40] As part of its daily military operations, Base Y generates and stores hazardous waste. After conducting a RCRA compliance inspection, State X issues a notice of violation against Base Y. In addition to alleging a single count of failure to conduct and document weekly inspections of a hazardous waste accumulation area for two months, the enforcement action assesses a \$7,500 fine.^[41]

After looking at State X’s civil penalty policy and penalty matrix, and upon seeking and obtaining records of enforcement actions that State X has taken against nongovernmental

entities in other recent cases involving allegations of failure to conduct and document weekly inspections of hazardous waste accumulation areas, Base Y’s environmental law attorney discovers the following pertinent facts:

- Company A failed to conduct inspections for four months and was fined \$5,000.
- Company B failed to conduct inspections for three months and was fined \$3,750.
- Company C, in addition to improperly disposing of hazardous waste, failed to conduct inspections for two months and was fined \$8,000.
- Company D failed to conduct inspections for two months and was fined \$2,500.
- Company E failed to conduct inspections for eight months and was fined \$10,000.
- Company F failed to conduct inspections for five months and was fined \$6,250.

In further examining these other cases, Base Y’s environmental law attorney should note that although the fines levied against Company C and Company E are in relative proximity to the \$7,500 assessed in the instant case, those cases are clearly distinguishable from the case of Base Y. First, whereas Base Y has not been alleged to have committed *any* other violations, Company C’s case entailed another, more significant violation. Second, whereas Base Y is only alleged to have failed to conduct and document its inspections for a period of 2 months, Company E failed to conduct its inspections for 8 months. Moreover, looking even more closely at the other cases, Base Y’s environmental law attorney should also notice that the cases of Companies A, B, and F are distinguishable as well. Specifically, they all received *lower* fines despite failing to conduct and document their inspections for *longer* periods of time than Base Y did. Indeed, the case of Company D is perfectly analogous to that of Base Y, but its fine is only one-third of what Base Y was fined.

In light of these facts, it should be clear to Base Y's environmental law attorney that State X has denied Base Y equal protection under the law. This is not only because the fine assessed is close to the ones levied against much more egregious nongovernmental violators (namely Company C, but also Companies A, E and F), but also because the fine is significantly different from those assessed against similarly-situated private entities that committed essentially the same conduct (Companies B & D). Put more simply, the "going rate" for failing to conduct and document inspections at hazardous waste accumulation areas is clearly about \$1,250 a month and Base Y has been denied equal protection under the law by being assessed a fine that is well above that "going rate."

The federal government is still wholly immune from paying fines that are in any way discriminatory and military environmental law attorneys need to be ready to cite this restriction when negotiating and settling state environmental enforcement actions that include punitive fines.

Consequently, the attorney should contact the attorneys and regulators at State X and inform them that Base Y is legally precluded from paying fines for violations of state environmental regulations when those fines are in any way discriminatory.^[42] Further, the attorney should aver that based on the evidence here, the proposed penalty of \$7,500 is clearly, impermissibly discriminatory. Rather than just refusing to pay though, and putting the burden of calculating a new fine back on State X, efficiency demands that the attorney counter-offer with a proposal to settle the case for \$2,500.^[43] Not only is this perfectly in line with the fair, equitable "going rate" (and the fine levied in the analogous case of Company D), but it enables quick resolution of the case while also allowing Base Y to accept responsibility for its violation without stepping afoul of the Constitution or federal law.

CONCLUSION

Military environmental law attorneys should be aware that all waivers of the federal government's sovereign immunity from paying state-levied environmental fines need to be construed very narrowly. Such narrow construction of the waivers found in RCRA, SDWA, and the lead-based paint provisions of ToSCA reveals that those waivers are strictly conditioned on the federal government being afforded equal protection under the law inasmuch as it is required to be treated "in the same manner, and to the same extent" as nongovernmental regulatees. Simply put, under these statutes, the federal government is still wholly immune from paying fines that are in any way discriminatory and military environmental law attorneys need to be ready to cite this restriction when negotiating and settling state environmental enforcement actions that include punitive fines.^[44] As always, base-level attorneys are invited and encouraged to contact the Regional Environmental Counsel's office for assistance with these cases.^[45]

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ENDNOTES

- [1] See Lt Col Harry M. Hughes & Major Mitzi O. Weems, *Federal Sovereign Immunity Versus State Environmental Fines*, 58 A.F. L. REV. 207, 210 (2006). “The availability of sovereign immunity as a defense against punitive fines only acts as a shield to the payment of the fine, not as a sword against complying with the underlying statute.”
- [2] U.S. CONST. ART. VI, CL. 2 states “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof. . . shall be the supreme Law of the Land . . .”
- [3] Sovereign immunity is not specifically mentioned in the Constitution, but the U.S. Supreme Court has found it to be implicit in the Supremacy Clause. See *McCulloch v. Maryland*, 17 U.S. 316 (1819).
- [4] While the federal government drafts and enacts environmental laws, the states implement and enforce them through an arrangement called “Cooperative Federalism.” Hughes & Weems, *supra* n. 1 at 207. For a more expansive discussion of Cooperative Federalism see also Barry Breen, *Federal Supremacy and Sovereign Immunity Waivers in Federal Environmental Law*, 15 E.L.R 10326 (1985) “The federal government is the nation’s most important drafter of environmental laws, but state and local governments are the most important enforcers.”
- [5] See Hughes & Weems, *supra* n. 1 at 211-12. “federal agencies have no authority to use appropriated funds to pay fines or penalties resulting from their activities. Only when an express statutory waiver of sovereign immunity exists may a federal agency do so.”
- [6] See William A. Wilcox, Jr., *Special Issues in Environmental Law Involving Federal Agencies*, 14 VILL. ENVTL. L. J. 39 – 40 (2003). See also Breen, *supra* n. 4 at 10326. “The federal government is charged with providing leadership in environmental protection, and the public scrutinizes the government’s stewardship of the federal environment.”
- [7] See Major F. Scott Risley, *The Receipt, Negotiation, and Resolution of Environmental Enforcement Actions*, 54 A.F. L. REV. 89, 95 (2004). “As to the substantive response to an Enforcement Action response, the analysis begins with a determination as to whether or not the government as waived sovereign immunity.”
- [8] See Hughes & Weems, *supra* n. 1; Wilcox, *supra* n. 6; Breen, *supra* n. 4; Capt William A. Wilcox, Jr., *The Changing Face of Sovereign Immunity in Environmental Enforcement Actions*, 1993 Army Law. 3 (1993); Kenneth M. Murchison, *Waivers of Immunity in Federal Environmental Statutes in the Twenty-First Century: Correcting a Confusing Mess*, 32 WM. & MARY ENVTL. L. & POL’Y REV. 359 (2008); For the most succinctly comprehensive compendium see Lt Col Barbara B. Altera, *Payment of Fines and Fees to the Environmental Protection Agency and the States*, The Reporter, Vol. 44, Number 3 (2006).
- [9] This includes RCRA’s Solid and Hazardous Waste Management provisions at 42 U.S.C. § 6961 as well as its Underground Storage Tank provisions at 42 U.S.C. § 6991f
- [10] 42 U.S.C. § 300j-6.
- [11] 15 U.S.C. § 2688.
- [12] See *infra* at discussion on “Equal Protection as a Condition on Waivers of Sovereign Immunity.”
- [13] 426 U.S. 167 (1976).
- [14] *Id.* at 179.
- [15] *U.S. Dep’t of Energy v. Ohio*, 503 U.S. 607, 615 (1992) quoting *McMahon v. United States*, 342 U.S. 25, 27 (1951) and *Eastern Transportation Co. v. United States*, 272 U.S. 675, 686 (1927).
- [16] Hughes & Weems, *supra* n. 1 at 214.
- [17] See Breen, *supra* n. 4 at 10328
- [18] See generally Breen, *supra* n. 4.
- [19] Hughes & Weems, *supra* n. 1 at 214.
- [20] *U.S. Dep’t of Energy v. Ohio*, 503 U.S. 607, 615 (1992) quoting *McMahon v. United States*, 342 U.S. 25, 27 (1951) and *Eastern Transportation Co. v. United States*, 272 U.S. 675, 686 (1927).
- [21] *Lane v. Pena*, 518 U.S. 187, 192 (1996).
- [22] Hughes & Weems, *supra* n. 1 at 215.
- [23] See *supra* fn 9-11.
- [24] Lt Col Michael Van Zandt, *Defense of Environmental Issues in the Administrative Forum*, 31 A.F. L. REV. 183,194 (1989) (“The state may not impose greater requirements upon the federal entity than those imposed upon the private sector or other public agencies.” To that end, “if the state enforces the standard more stringently against the federal agency then it does against the private parties, that is a discriminatory act and is not allowed under the waiver [of sovereign immunity].”)
- [25] Further supporting the conclusion that these waivers of sovereign immunity are strictly conditioned on equal protection under the law is the fact that each of these waivers also expressly require that “reasonable service charges” be “nondiscriminatory.” See *supra* fn 9-11. In fairness, “reasonable service charges” are separate and distinct from punitive fines but, nevertheless, the U.S. Supreme Court has held that statutory words must be read in their context. *Graham County Soil and Water Conservation District v. U.S. ex. rel. Wilson*, 130 S. Ct. 1396, 1412 (2010). Reading the word “nondiscriminatory” in the context of the requirement that the federal government be regulated “in the same manner, and to the same extent” as nongovernmental entities, one cannot reasonably conclude that Congress actually intended to preclude the payment of discriminatory service charges while permitting the payment of discriminatory fines. The most sensible contextual reading is that all monetary charges must be nondiscriminatory.
- [26] Of course, the Supremacy Clause is not a source of federal rights, but it does “secure” existing federal rights by according them priority whenever they come in conflict with state law. In that sense all federal rights created by statute, or by regulation, are “secured” by the Supremacy Clause. *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 613 (1979).

- [27] See Murchison, *supra* n. 8 at 359.
- [28] Such action is far too akin to state taxation of federal entities. See Bill S. Forcade & Elizabeth D. Anderson, *How to Minimize Civil Penalties in Environmental Enforcement*, 30 E.L.R. 11031 (Like taxes, “most state civil penalties are paid to the general revenue fund.”) State taxation of federal entities is expressly prohibited. See *infra* n 25. For an extensive discussion of the caselaw addressing state taxation of federal entities and intergovernmental immunity doctrine see also *U.S. v. New Mexico*, 455 U.S. 720 (1981).
- [29] 17 U.S. (4 Wheat) 316 (1819).
- [30] *Id.*
- [31] See *First Agricultural National Bank of Berkshire County v State Tax Commission*, 392 U.S. 339, 349-51 (1968) (Marshall, J., dissenting).
- [32] 435 U.S. 444 (1976).
- [33] *Massachusetts v. US* specifically addressed a federal levy against the states, but the fundamental principle still applies. In fact, the “Massachusetts test” is the standard applied by the federal government when evaluating intergovernmental charges. See also *U.S. v. City of Renton*, 2012 U.S. Dist LEXIS 73261 (2012) (citing *Massachusetts* and explaining that the key to the discrimination analysis is whether or not the federal government is being treated differently than “nongovernmental entities.”).
- [34] Breen, *supra* n. 4 at 10330 (quoting Unpub. Comp. Gen. dec. B-191747 (June 6, 1978)).
- [35] Christopher D. Carey, *Negotiating Environmental Penalties: Guidance on the Use of Supplemental Environmental Projects*, 44 A.F. L. Rev. 1, 13 (1998).
- [36] For a general discussion of how to proceed after receiving a Notice of Violation or other Enforcement Action see Risley, *supra* n. 7. See generally Forcade and Anderson *supra* n. 26, for a general discussion of how the enforcement process works and how to minimize penalties in enforcement actions.
- [37] For an extensive discussion of both civil penalty policies and the factors used to calculate penalties See *id supra* n. 26 at 11035. In most cases, states consider three factors when calculating a penalty amount: (1) the potential for harm, (2) the extent of deviation, and (3) a “multi-day factor” that increases the amount of the penalty by a set amount for each day it was committed. Generally, the greater the potential for harm, extent of deviation, and number of days the violation was committed, the higher the fine will be. Additionally, states will also have “upward” adjustments for fines in cases in which they perceive particularly egregious behavior such as “willful and negligent conduct” as well as “downward adjustments” for positive factors like “history of compliance” and “cooperative behavior.” When it comes to these penalty policies and the matrices therein, some states will just adopt the EPA Penalty Policy for the governing statute in question. See e.g. EPA RCRA Penalty Policy at <https://www.epa.gov/enforcement/resource-conservation-and-recovery-act-rcra-civil-penalty-policy> (last visited July 15, 2020). Others will implement their own policies but even these will substantially mirror the guidelines in the EPA policies. In any event, these penalty policies and matrices are the starting point for determining how the state calculated a fine in a particular case, and if the fine is fair.
- [38] See e.g., the Georgia Environmental Protection Division’s Enforcement page at <https://epd.georgia.gov/rules-laws-enforcement/enforcement> (page last accessed on July 10, 2020).
- [39] In states that do not feature a public database of previously executed enforcement actions, regulators will sometimes be reluctant to provide records from other cases. If this situation presents itself, counsel should aver that the documents are needed as part of the government’s assessment to determine if sovereign immunity has been waived and, if necessary, include the demand in a formal request. Such a request can be styled either as a discovery request (enforceable by an administrative adjudicator) or as a FOIA request under the state rules.
- [40] This is how the “Cooperative Federalism” arrangement described at *supra* n. 4 frequently works in practice.
- [41] Some cases involve fines in the millions of dollars, but a case with a small fine like this one is particularly instructive. This is because when faced with the option of paying a small fine for an undisputed environmental violation, installation commanders will often prefer to just pay the fine for the purpose of achieving a quick solution (and fear of damaging the base’s relationship with the regulators if they balk at paying the fine). Military environmental attorneys need to be prepared to hold the hard line and firmly assert that fines—no matter how small—cannot be paid in the absence of a waiver of sovereign immunity. To do so is a violation of the Anti-Deficiency Act at 31 U.S.C. 1341, which is a criminal violation.
- [42] When initially presenting this argument to state officials, it is often best to present it as a fiscal law issue under the Anti-Deficiency Act, rather than a constitutional one under the Supremacy Clause. This is because they are frequently unfamiliar with sovereign immunity doctrine. Also, be advised that many state officials will be taken aback by the use of the word “discriminatory” because tend to think of discrimination in the invidious sense that it is used in civil rights law. Military environmental law attorneys should just make clear that we use the term in the sense that the U.S. government must be treated “in the same manner, and to the same extent” as nongovernmental entities.
- [43] Given that sovereign immunity is a matter of constitutional magnitude, the burden is clearly on the state to demonstrate exactly why a given fine is nondiscriminatory. Accordingly, another approach to take before making a formal counter-offer, could be to approach the state officials with the evidence of discrimination and demand that they explain why it is not discriminatory.
- [44] In the event a state is unrelenting in its insistence that it can assess and enforce a discriminatory fine against a federal instrumentality, one additional option for the federal attorneys before resorting to litigation is to contact the U.S. Government Accountability Office (GAO) for a formal opinion on whether or not a particular fine can be paid. Total impasse is unlikely, but the Department of Justice needs to be consulted before resulting to litigation, as the risk of even higher monetary liability increases with litigation.
- [45] See AFI 32-7001, para 7.2.3.10.2 (“Installations shall seek, through appropriate organizational-levels, approval of the AFLOA/JACE Division Chief . . . prior to paying a fine or penalty [] to a regulatory agency or host nation as part of a settlement. When substantial legal issues are involved, AFLOA/JACE will consult with SAF/GCN and SAF/IEE before approving payments of fines [or] penalties. . . .” See also DoDI 4715.06.

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The Killing of Qassem Soleimani

Assassination or Lawful Military Strike?

BY LIEUTENANT COLONEL SCOTT A. HODGES
EDITED BY MAJOR DANIELLE CROWDER

Did President Trump violate international law when he directed the strike on Soleimani? This article will examine three different theories for justifying the strike, and conclude that Soleimani was a lawful target.

This article relies on information reported in the public domain and not on any first-hand knowledge about the strike as such information would be classified. The opinions presented in this article are solely the author's and should in no way reflect upon the U.S. Department of Defense or the OIR Coalition.

In September 2020, Iranian officials promised additional retribution for what they described as the unlawful assassination of Qassem Soleimani (aka Suleimani) on 3 January 2020 outside of Baghdad International Airport (BIAP).[1] Just a few days after the Soleimani strike, Iran responded with a dramatic attack on Al Asad Air Base, notable not just for the destructive power of the ballistic missiles it launched into western Iraq but also for the undeniable attribution of the attack.[2] Iran is not alone in condemning the Soleimani strike. The United Nations special rapporteur on extrajudicial, summary, or arbitrary executions, wrote a

report branding the killing unlawful, which she presented to the UN Human Rights Council in July of 2020. Her report argued, “absent an actual imminent threat to life, the course of action taken by the United States was unlawful.”[3] However, many others joined Senator Lindsey Graham in praising President Trump’s decision as a righteous blow against a person directly tied to sponsoring terrorism with American blood on his hands.[4] Did President Trump violate international law when he directed the strike on Soleimani? This article will examine three different theories for justifying the strike, and conclude that Soleimani was a lawful target.

LEGAL THEORIES JUSTIFYING THE STRIKE

Unlike military strikes against high value targets such as Osama Bin Laden or Abu Bakr Al Baghdadi, press reports of the Soleimani strike frequently labeled it as an assassination, which implied that President Trump violated the U.S. domestic law banning political assassinations.[5] A couple of

weeks after the strike, two Army judge advocates assigned as faculty members at the U.S. Military Academy at West Point, Colonel Shane Reeves and Lieutenant Colonel Winston Williams, published an article on the Lawfare blog website entitled, “Was the Soleimani Killing an Assassination?” As COL Reeves and LTC Williams discuss in more depth, it is only accurate to label the killing of Soleimani an assassination if the strike violated international law.[6] The article briefly laid out three possible justifications under international law for the strike, without analyzing whether any of them justified the strike under the circumstances.[7] This article examines all three and concludes that each independently justifies the strike. First, if the strike took place during international armed conflict involving Iran, then targeting Soleimani as the commander of the Quds Force, an Iranian military unit, was lawful. Second, even if the United States was not engaged in international armed conflict with Iran, if Soleimani was an operational leader or military adviser to a Shia militia groups (SMG) which had been attacking U.S. Forces (USFOR) in Iraq, and the United States had a right of self-defense as to the SMG, then the Soleimani strike was lawful. Third, even outside of conflict with Iran or the SMGs, if Soleimani himself posed an imminent threat to the United States or its citizens then a self-defense strike was justified.

This article examines three possible justifications under international law for the strike.

1 International Armed Conflict with Iran

Congress never declared war against Iran and no President has notified Congress of hostilities in accordance with the requirements of U.S. Code Title 50 Section 1543, the War Powers Resolution. Despite this domestic law context, the reality is that armed conflict has existed between Iran and the United States. The threshold for international armed conflict is intentionally low and is not dependent on declarations under domestic law.[8] The low threshold ensures participants, particularly

individual lawful combatants, receive the full protections of international law. While Common Article 2(1) of the Geneva Convention does not define “other armed conflict” further, the definition used by the International Criminal Tribunal for Yugoslavia in Tadic has been widely accepted: “a resort to armed force between States.”[9] In early 2019, the State Department divulged that based on declassified U.S. reports the Iranian Revolutionary Guard Corps was responsible for killing 608 USFOR members in Iraq, separate and apart from those killed by Iranian proxies.[10] The State Department also insinuated the number represented deaths between 2003 and 2011, from the beginning of Operation IRAQI FREEDOM (OIF) until the withdrawal directed by President Obama.[11]

Some would argue that while the Daesh campaign was active, some semblance of a truce existed between the United States and Iran.

While it appears that the United States and Iran met the low threshold for international armed conflict during OIF, that armed conflict ostensibly ended with the United States withdrawal in 2011. When USFOR returned to Iraq in 2014 for Operation INHERENT RESOLVE (OIR), the relationship with Iran was dramatically different given the threat against the Shia population in Iraq from Daesh, also commonly referred to as ISIS or the Islamic State.[12] The United States and Iran engaged in parallel and complimentary campaigns to defeat Daesh.[13] Some would argue that while the Daesh campaign was active, some semblance of a truce existed between the United States and Iran.[14]

The honeymoon ended abruptly after the fall of Baghouz marked the end of the Daesh caliphate on 23 March 2019. Rocket attacks against coalition force locations across Iraq increased in May 2019.[15] Although targeting coalition bases, the attacks primarily took the lives of Iraqi citizens. U.S. intelligence connected the attacks to Iran or its proxies.[16]

In addition to rocket attacks, Iran shot down a U.S. remotely piloted unmanned aerial system (UAS) in mid-June.^[17] Disagreement ensued about the rationale for the attack, with the Iranians claiming the UAS violated its sovereignty and the United States denying that claim, but it was unquestionably a use of force by Iran against U.S. military equipment. Then, in September came the massively destructive attack against the Aramco oil fields of the U.S. ally, Saudi Arabia.^[18] Again, attribution was an issue, with Tehran continually denying involvement. However, Reuters reported in late November 2019 that Ayatollah Khamenei approved of the attack as a way to respond to the crippling sanctions imposed by the United States after President Trump's decision to withdraw from the Joint Comprehensive Plan of Action.^[19] The commander of the Islamic Revolutionary Guard Corps (IRGC) is credited with describing the attack as an opportunity to "take out our swords and teach [the U.S.] a lesson."^[20] The attack on Aramco clearly amounted to armed conflict; but perhaps did not independently establish an international armed conflict with the United States.

The attack on Aramco clearly amounted to armed conflict; but perhaps did not independently establish an international armed conflict with the United States.

The proxy war in Iraq escalated as 2019 waned with an increase in the frequency and intensity of IDF attacks. U.S. reports credited Kata'ib Hezbollah (KH), a Shia Militia Group (SMG), for many of the attacks on USFOR in 2019. On 27 December 2019, KH launched 30 rockets at K-1, a small base outside of Kirkuk in northern Iraq.^[21] The strike injured U.S. and Iraqi military personnel and killed an American interpreter assigned to a SOJTF-OIR subordinate unit, Nawres Waleed Hamid. In response, USFOR launched a massive attack against KH installations on the Iraq-Syria border, reportedly killing an estimated 24 KH personnel, and wounding an additional 50.^[22]

KH made the next move, a demonstration in front of the Baghdad Embassy Compound (BEC) that escalated to the point of protesters breaching the embassy's outer perimeter and setting fire to an exterior guard structure.^[23] The head of KH at the time, Abu Mahdi al-Muhandis, was present at the protest, the most likely explanation for why the mob was allowed to enter the closed road in front of the BEC.^[24] In addition to leading KH, al-Muhandis had a role in the Iraqi government as the deputy commander of the Popular Mobilization Forces.^[25] President Trump responded forcefully by issuing "not a warning" but a "threat" that Iran would be held fully responsible for the attack on the embassy.^[26]

The evidence justified striking Soleimani as a military target of an international armed conflict.

A few days later, Soleimani arrived at the Baghdad International Airport (BIAP) and shortly thereafter was dead. Al-Muhandis was accompanying Soleimani at the time of the strike and shared his fate.^[27] If immediately prior to that 3 January 2020, strike Iran and the United States were engaged in armed conflict, then the strike is the justifiable killing of a military leader. Iranian proxies had engaged in armed conflict with the United States and vice versa, with respect to the 27 December 2019 strike. Under international law, if one state exercises effective or overall control of a proxy group, such as Iran held over KH, then the state is held responsible for the actions of the proxy.^[28] KH is an SMG with a strong alignment and responsiveness to Iran. In fact, according to Westpoint's Combating Terrorism Center, KH was formed by the IRGC Quds Force.^[29] National Public Radio (NPR) described al-Muhandis as "having the backing of Suleimani," and cited sources supporting the proposition that if he had survived the Suleimani strike, he would have taken on the role of advancing Iranian interests in Iraq.^[30] Iran provides KH with weapons and funding and the operational guidance on how to use them.^[31]

The evidence justified striking Soleimani as a military target of an international armed conflict. The U.S. Secretary of State issued a statement shortly after the strike saying

What we did is take a decisive response that makes clear what President Trump has said for months and months and months.... [We] will not stand for the Islamic Republic of Iran to take actions that put American men and women in jeopardy.[32]

The President, the Secretary of Defense, and the Secretary of State had all warned that Iran would pay the price for what they described as proxy attacks on USFOR.[33] Soleimani's life was that price.

2 Soleimani as Part of KH

Even if one is unwilling to accept that Iran exercised a sufficient level of control over KH to be held accountable for its actions and considered a party to international armed conflict, Soleimani would still be a legitimate target if he was part of an armed group attacking USFOR in Iraq. Secretary of Defense Mark Esper discussed the strike at a 7 January 2020 press conference and relayed that Soleimani “was clearly on the battlefield...conducting, preparing, orchestrating military [operations]. He was a legitimate target and his time was due.”[34]

As previously mentioned, just a few days before the strike, USFOR launched a major attack against KH. Although Iraq expressed outrage that they did not authorize a strike against KH within their sovereign nation, no serious questions have been raised about whether the KH strike was legal.[35] KH was an armed group that had consistently attacked coalition forces and presented an ongoing threat to USFOR.[36] The only question is whether Soleimani was in fact part of KH. Soleimani's presence in Iraq shortly after the attack on the BEC, at a time of significant tension between KH and USFOR, indicates some level of influence or cooperation. The fact that al-Muhandis, the leader of KH, was at BIAP to meet and escort Soleimani reflected Soleimani's influence over KH. A report for PBS NewsHour described al-Muhandis as “Soleimani's man in Iraq.”[37] Chairman of the Joint Chiefs of Staff General Mark Milley was “100

percent” confident that Soleimani cleared the KH attack on K-1 that killed Hamid.[38] Similar to the first legal basis—international armed conflict with Iran—a strong justification exists to consider Soleimani a de facto leader of KH, which justified the strike against him.

The Commander in Chief, and every commander subordinate to him down to the lowest level, has the responsibility and authority to exercise self-defense.

3 Self-Defense Strike

An unresolved legal issue for both of the first two approaches stems from U.S. domestic law. In May of 2020, the President vetoed a joint congressional resolution “To direct the removal of United States Armed Forces from hostilities against the Islamic Republic of Iran that have not been authorized by Congress.”[39] The resolution affirmed Congress' view that neither the 2001 nor the 2002 Authorization for the Use of Military Force (AUMF) authorized force against Iran. The President's veto statement argued the strike on Soleimani was authorized by the 2002 AUMF and Article II of the Constitution.[40] The President also objected that by carving out self-defense from its restriction on using force against Iran, Congress limited the exception to responding to a threat of imminent attack. He expounded the “Constitution recognizes that the President must be able to anticipate our adversaries' next moves and take swift and decisive action in response.”[41] The focus of this article is on the international law considerations, not domestic ones, but the difficulty of finding a solid authorization for using force against Iran or KH may help explain why the President and his administration have primarily justified the strike on Soleimani in terms of self-defense.

The Commander in Chief, and every commander subordinate to him down to the lowest level, has the responsibility and authority to exercise self-defense. The President immedi-

ately owned the decision to strike and described it as killing “the number-one terrorist anywhere in the world.”^[42] The President’s statement emphasized the message the strike sent as a broad principle of self-defense of “diplomats, service members, all Americans, and our allies.”^[43] The statement then provided the following justification: “Soleimani was plotting imminent and sinister attacks on American diplomats and military personnel, but we caught him in the act and terminated him.”^[44]

The administration’s legal justification for striking Soleimani was the inherent right to act in self-defense, consistent with Article 51 of the Charter of the United Nations and customary international law.

The administration’s legal justification for striking Soleimani was the inherent right to act in self-defense, consistent with Article 51 of the Charter of the United Nations and customary international law.^[45] The Secretary of Defense echoed the President’s self-defense rationale and expanded upon it, saying in a press conference on 7 January 2020,

over the last few months [Soleimani] planned, orchestrated and/or resourced attacks against the United States that resulted in the killing of Americans and the siege of our embassy in Baghdad, and was in Baghdad to coordinate additional attacks.^[46]

The Honorable Paul Ney, the DoD General Counsel, spoke at Brigham Young University Law School and offered the following justification a couple of months after the strike:

to protect U.S. personnel; to deter Iran from conducting or supporting further attacks on U.S. forces and interests; to degrade Iran’s and Qods Force-backed militias’ ability to conduct attacks; and to end Iran’s strategic escalation of attacks on U.S. interests.^[47]

Democratic leaders in Congress questioned the administration’s self-defense justification, specifically whether there was sufficient imminence of any pending attack. Congressman Adam Schiff said that in the briefings for the defense and intelligence committee chairmen he did not recall a specific plan to bomb the BEC.^[48] He admitted that Secretary Pompeo described threats against U.S. personnel but did not know the precise time or location of specific targets. Similarly, Senator Tim Kaine said he was not “happy” with the administration’s justification because imminence requires more than a plan, and in fact requires some affirmative step toward executing that plan.^[49]

In discussing the Soleimani strike, Ney argued that in light of the previous attacks from Iran and the expectation that Iran would attack in the future, imminence was not a necessary condition of a self-defense strike.^[50] Ney’s position arguably blends the rationale of ongoing international armed conflict with self-defense. If the United States and Iran are engaged in international armed conflict, then there is no requirement for the threat of an imminent attack, and the use of force is not limited to self-defense.

If the United States and Iran are engaged in international armed conflict, then there is no requirement for the threat of an imminent attack, and the use of force is not limited to self-defense.

However, Ney’s point highlights that the analysis of self-defense should consider all the relevant facts and circumstances. If person A is met on the street by person B, the fact that person B has attacked person A on multiple occasions in the past is certainly a factor in considering whether person A reasonably perceives person B an imminent threat. Even if Iran and the United States are not currently engaged in international armed conflict, a pattern of attacks by Iranian proxies on U.S. personnel must be considered in weighing

what threat Soleimani, and his presence in Baghdad, posed to U.S. personnel in Iraq.

Determining whether an attack is imminent involves weighing multiple factors including whether the attack is part of a concerted pattern of continuing armed activity, the likelihood of opportunities to undertake effective actions of self-defense, and modern-day capabilities and techniques of terrorist organizations.

The former Deputy Judge Advocate General of the Air Force, Major General (Ret.) Charles Dunlap, also delved into the question of an imminent threat surrounding the Soleimani strike.[51] He highlighted the standards of imminence discussed in the Obama Administration’s report on the legal framework for use of military force.[52] The United States has adopted the understanding of international law that determining whether an attack is imminent involves weighing multiple factors including whether the attack is part of a concerted pattern of continuing armed activity, the likelihood of opportunities to undertake effective actions of self-defense, and modern-day capabilities and techniques of terrorist organizations. It is worth noting that the United States designated Soleimani a terrorist over a decade ago.[53]

Finally, the U.S. position explicitly does not require “specific evidence of where an attack will take place or of the precise nature of an attack,” to determine such an attack is imminent.[54]

The aforementioned members of Congress complained that the intelligence failed to identify a specific time or place of attack. Such precise intelligence was not required to strike Soleimani out of self-defense under the United States understanding of customary international law and the circumstances. The Iranian proxy force he exerted control

over had just attacked the American Embassy in Baghdad. Soleimani arrived in Baghdad to meet with the leader of that proxy force. Intelligence indicating additional attacks were being planned on that Embassy or other American interests was more credible and imminent given the past behaviors of Soleimani and surrounding circumstances. Perceiving Soleimani as a threat, and concluding he was likely to imminently be involved in an attack on American personnel, was reasonable and the strike on him was therefore lawful.

CONCLUSION

In conclusion, three theories provide a justification for striking Soleimani in accordance with international law. The Trump administration focused on the self-defense rationale, likely because of the lack of a declaration of war under domestic law. However, even if one concludes there was a lack of imminence sufficient to justify the strike under self-defense, the relationship between Soleimani and the attacks of Iranian proxies on U.S. personnel provides sufficient justification for the strike either in international armed conflict against Iran, or against Soleimani as a part of KH. Soleimani’s direct involvement in attacks against U.S. service members coupled with his intent to continue threatening U.S. service members justify taking his life as a legitimate military target.

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ENDNOTES

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- [2] The ballistic missile attack shockingly took no life, but over 100 service members suffered traumatic brain injuries from the massive explosions that destroyed several buildings and military equipment. Alissa J. Rubin, *'It Was Like a Scene From an Action Movie'* N.Y. TIMES (Jan. 13, 2020), <https://www.nytimes.com/2020/01/13/world/middleeast/iran-missile-attack-american-base.html>; Oriana Pawlyk, *'Emotions and Chaos': Air Force Releases Eyewitness Accounts of Al Asad Missile Attack*, MILITARY.COM (Apr. 22, 2020), <https://www.military.com/daily-news/2020/04/22/emotions-and-chaos-air-force-releases-eyewitness-accounts-al-asad-missile-attack.html>. Nick Givas & Jennifer Griffin, *US troops say they braved Iranian missile attack despite being warned hours earlier*, FOX NEWS (Apr. 21, 2020), <https://www.foxnews.com/world/dod-firsthand-accounts-us-troops-iranian-ballistic-missile-attack> (recounting the destruction and severity of the 7 Jan. 20 attack). To provide some context for the 100 casualties, according to a DoD report updated as of Sept. 21, 2020, a total of 224 American troops have been wounded in action in Operation INHERENT RESOLVE, which started in 2014. DoD, *Immediate Release: Casualty Status*, <https://www.defense.gov/casualty.pdf> (last visited Sept. 23, 2020). Iran also launched missiles towards Erbil, Iraq, which hosts a significant presence of coalition forces, but there have not been reports of any casualties or damage to military infrastructure there. Hamdi Alkhshali, *Two ballistic missiles hit Erbil*, CNN (Jan. 7, 2020), https://www.cnn.com/middleeast/live-news/us-iran-soleimani-tensions-intl-01-07-20/h_c633b7ccb8e78db079f9e3079f989870.
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- [5] See Peter Baker *et al.*, *Bin Laden Is Dead, Obama Says*, N.Y. TIMES (May 2, 2011), at A1 (Americans rightfully celebrated the killing of Osama Bin Laden as did the media), Courtney Kube *et al.*, *ISIS leader Abu Bakr al-Baghdadi killed in U.S. raid in Syria, Trump confirms*, NBC NEWS (Oct. 27, 2019), <https://www.nbcnews.com/news/world/abu-bakr-al-baghdadi-leader-isis-targeted-u-s-raid-n1072506> (favorably describing the killing of the "world's most wanted terrorist"); *contra* Colonel Shane Reeves & Lieutenant Colonel Winston Williams, *Was the Soleimani Killing an Assassination?* (Jan. 17, 2020), <https://www.lawfareblog.com/was-soleimani-killing-assassination> (discussing the decision by NPR and other media sources to label Soleimani's killing an assassination).
- [6] Executive Order 12333, paragraph 2.11, entitled "Prohibition on Assassination," says no U.S. agent "shall engage in or conspire to engage in assassination." Part two of the executive order where this prohibition resides is entitled "Conduct of Intelligence Activities." While assassination is not defined in the Executive Order Merriam Webster defines it as "murder (a usually prominent person) by sudden or secret attack often for political reasons."
- [7] Reeves & Williams, *supra* note 9.
- [8] The Rule of Law in Armed Conflicts project (RULAC) of the Geneva Academy of International Humanitarian Law and Human Rights, Classification, International armed conflict, <http://www.rulac.org/classification/international-armed-conflict#collapse1accord> (last visited Sept. 15, 2020).
- [9] ICTY, Tadić Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (1995), para. 70.
- [10] Special Representative for Iran and Senior Advisor to the Secretary of State Brian Hook, U.S. Dep't of State Press Briefing (Apr. 2, 2019), <https://www.state.gov/briefings/department-press-briefing-april-2-2019>.
- [11] *Id.*
- [12] *About CJTF-OIR*, OPERATION INHERENT RESOLVE, <https://www.inherentresolve.mil/About-CJTF-OIR> (last visited Sept. 5, 2020) (the coalition prefers the term Daesh as it removes any connection between the terrorist organization and the religion of Islam). Although the OIR mission remains focused on Daesh, force protection is always of primary concern and Daesh was not the only, or even the main, threat to coalition forces in the field. While the fight against Daesh has always been a global coalition this article focuses on legal justifications in the context of USFOR, primarily because the response to Soleimani specifically, and Iranian aggression generally, was typically an American action outside of the scope of the OIR coalition.
- [13] Murtaza Hussain, *THE INTERCEPT* (Nov. 17, 2019), <https://theintercept.com/2019/11/18/iran-isis-iraq-kurds>.
- [14] See Julian E. Barnes, *U.S. Launches Airstrikes on Iranian-Backed Forces in Iraq and Syria: The strikes were a response to a rocket attack that killed an American contractor*, N.Y. TIMES (Dec. 29, 2019), <https://www.nytimes.com/2019/12/29/world/middleeast/us-airstrikes-iran-iraq-syria.html> ("Since the United States military returned to Iraq in 2014, Iranian-backed forces and American forces have refrained from attacking each other because of a common enemy: the Islamic State.").
- [15] Shawn Snow, *Rocket attack hits near US Embassy in Baghdad's Green Zone*, MILITARY TIMES (Sept. 23, 2019), <https://www.militarytimes.com/news/pentagon-congress/2019/09/24/rocket-attack-hits-near-us-embassy-in-baghdads-green-zone>.

- [16] See Rebecca Kheel, *Top general: Iran-backed militia in Iraq 'only group known' to have carried out type of attack that killed two US troops*, THE HILL (Mar. 12, 2020), <https://thehill.com/policy/defense/487202-top-general-iran-backed-militia-in-iraq-only-group-known-to-have-carried-out> (“While we are still investigating the attack, I will note that the Iranian proxy group Kataib Hezbollah is the only group known to have previously conducted an indirect fire attack of this scale against coalition forces in Iraq,” [U.S. Central Command commander Gen. Frank McKenzie] added.”).
- [17] Joshua Berlinger et al., *Iran shoots down US drone aircraft, raising tensions further in Strait of Hormuz*, CNN (June 20, 2019), <https://www.cnn.com/2019/06/20/middleeast/iran-drone-claim-hnk-intl/index.html>.
- [18] Hon. Paul C. Ney, Jr., Gen. Counsel of the Dep’t of Def., *Legal Considerations Related to the U.S. Air Strike Against Qassem Soleimani*, presented at BYU Law Sch., (Mar. 4, 2020), at 5, <https://www.defense.gov/Newsroom/Speeches/Speech/Article/2181868/dod-general-counsel-remarks-at-byu-law-school/2/11>, (“In June 2019, an Iranian surface-to-air missile destroyed an unmanned U.S. Navy surveillance aircraft while it was on a routine mission in international airspace monitoring the Strait of Hormuz.... Moreover, on September 14, 2019, Iran launched a devastating air attack on a gas plant and an oil refinery in Saudi Arabia.”).
- [19] Michael Georgy, *Special Report: 'Time to take out our swords' - Inside Iran's plot to attack Saudi Arabia*, REUTERS, REUTERS (Nov. 25, 2019), <https://www.reuters.com/article/us-saudi-aramco-attacks-iran-special-rep/special-report-time-to-take-out-our-swords-inside-irans-plot-to-attack-saudi-arabia-idUSKBN1XZ16H>.
- [20] *Id.*
- [21] Barnes, *supra* note 18 (“Kataib Hezbollah launched more than 30 rockets against the base, which is near Kirkuk and is known as K1. The rocket attacks killed the American contractor and wounded four American service members and two members of the Iraqi security forces, Mr. Hoffman said. That attack was one of the two largest over the last two months and the only one to kill an American citizen, the American official said.”).
- [22] *Id.* (“Sayyid Jaafar Al-Husseini, the Hezbollah military spokesman in Iraq, claimed that 24 were killed and more than 50 wounded.”).
- [23] Alissa J. Rubin, *Iraq Raids Iranian-Backed Militia Accused of Attacking U.S. Forces*, N.Y. TIMES (June 26, 2020), <https://www.nytimes.com/2020/06/26/world/middleeast/iraq-militia-iran-hezbollah.html>.
- [24] Arwa Damon et al., *Trump threatens Iran after protesters attack US embassy in Baghdad*, CNN (Dec. 31, 2019), <https://www.cnn.com/2019/12/31/middleeast/iraq-protests-us-embassy-intl/index.html> (Al-Muhandis is also known as Jamal al-Ibrahimi).
- [25] PMF is the name given to all of the SMGs collectively in their semi-legitimate role established by Prime Minister Maliki in 2014 after the fall of Mosul. See Matthew S. Schwartz, *Who Was The Iraqi Commander Also Killed In The Baghdad Drone Strike?*, NPR (Jan. 4, 2020), <https://www.npr.org/2020/01/04/793618490/who-was-the-iraqi-commander-also-killed-in-baghdad-drone-strike> (describing al-Muhandis as deputy commander of PMF); Renad Mansour, *More than Militias: Iraq's Popular Mobilization Forces are Here to Stay*, WAR ON THE ROCKS (Apr. 3, 2018), <https://warontherocks.com/2018/04/more-than-militias-iraqs-popular-mobilization-forces-are-here-to-stay/> (describing the establishment and nature of the PMF).
- [26] Damon, *supra* note 29.
- [27] Some question whether al-Muhandis was collateral damage or deliberately targeted, but no doubt exists whether or not the United States intended to kill Suleimani. Schwartz, *supra* note 30.
- [28] “The notion of control necessary to establish the link between an armed group and a state has been debated. Two different standards have been proposed: effective control and overall control. The International Court of Justice adopted the test of effective control for the purposes of determining state responsibility in Military and Paramilitary Activities in and against Nicaragua (Nicaragua v the United States of America), Judgment (Merits), 27 June 1986, § 115; and Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment (Merits), 26 February 2007, §§ 392 ff; whereas in the context of conflict classification, the International Criminal Tribunal for the Former Yugoslavia adopted the test of overall control in The Prosecutor v Duško Tadić, Appeals Chamber, Judgment, IT-94-1-A, 15 July 1999, § 131. The overall control test has since been adopted by the International Criminal Court, The Prosecutor v Thomas Lubanga Dyilo, Pre-Trial Chamber, Decision on the Confirmation of Charges, ICC-01/04-01/06, 29 January 2007, § 211 and The Prosecutor v Thomas Lubanga Dyilo, Trial Chamber, Judgment pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842, 14 March 2012, § 541. The International Committee of the Red Cross considers the overall control test to be more suitable, see T. Ferraro and L. Cameron, ‘Article 2: Application of the Convention’, ICRC, Commentary on the First Geneva Convention, 2016, § 271f; L. Cameron, B. Demeyere, J.-M. Henckaerts, E. La Haye, I. Müller, with contributions by C. Droege, R. Geiss and L. Gisel, ‘Article 3: Conflicts Not of an International Character’, ICRC, Commentary on the First Geneva Convention, 2016, § 409ff. In any event, even the International Court of Justice admits that the overall control test is suitable for the purpose of conflict classification, see ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment (Merits), 26 February 2007, § 404. It is therefore the test to be used for the purposes of RULAC.” RULAC, *supra* note 12.
- [29] Michael Knights, *The Evolution of Iran's Special Groups in Iraq*, CTC SENTINEL, Vol. 3, Issue 11-12 (Nov. 2010), <https://ctc.usma.edu/the-evolution-of-irans-special-groups-in-iraq>.
- [30] Schwartz, *supra* note 30.

- [31] Press Release, U.S. Dep't of Treas., *Treasury Designates Vast Network of IRGC-QF Officials and Front Companies in Iraq, Iran* (Mar. 26, 2020), <https://home.treasury.gov/news/press-releases/sm957> (identifying KH as a terrorist organization funded by Iran); Barnes, *supra* note 18 (“Iran also provides broad direction on what kind of attacks the groups make and how often they target American or allied forces.”).
- [32] Barnes, *supra* note 18.
- [33] *Id.*
- [34] Brian W. Everstine, *Esper: Soleimani ‘Days’ Away From Attack on Americans When Killed*, AIR FORCE MAG. (Jan. 7, 2020), <https://www.airforcemag.com/esper-soleimani-days-away-from-attack-on-americans-when-killed>.
- [35] Alissa J. Rubin et al., *Outrage in Iran After Killing of Suleimani: Here’s What You Need to Know*, N.Y. TIMES (Jan. 5, 2020), <https://www.nytimes.com/2020/01/05/world/middleeast/Iran-us-trump.html>.
- [36] *See, e.g.*, Kheel *supra* note 21 (CDR USCENTCOM referencing KH as source of multiple large scale IDF attacks), and Rubin *supra* note 28 (referencing multiple attacks on US and coalition forces from KH).
- [37] Ali Fathollah-Nejad, *What the killing of Qassem Soleimani could mean*, PBS NEWS HOUR (Jan. 3, 2020), <https://www.pbs.org/newshour/world/column-what-the-killing-of-qassem-soleimani-could-mean-for-iran>.
- [38] Elizabeth McLaughlin, *Soleimani approved attack on Iraqi military base that killed American: Top US general*, ABC NEWS (Jan. 3, 2020), <https://abcnews.go.com/Politics/soleimani-approved-attack-iraqi-military-base-killed-american/story?id=68056126>.
- [39] S.J. Res. 68, 116th Cong. (2020).
- [40] Statement from the President Regarding Veto of S.J. Res. 68 (May 6, 2020), <https://www.whitehouse.gov/briefings-statements/statement-president-regarding-veto-s-j-res-68/>.
- [41] *Id.*
- [42] Remarks by President Trump on the Killing of Qasem Soleimani (Jan. 3, 2020), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-killing-qasem-soleimani>.
- [43] *Id.*
- [44] *Id.*
- [45] Ney, *supra* note 23, at 2.
- [46] Press Briefing, Dr. Mark T. Esper, Sec. of Def. (Jan. 7, 2020), <https://www.defense.gov/Newsroom/Transcripts/Transcript/Article/2052367/press-briefing-by-secretary-of-defense-mark-t-esper>.
- [47] Ney, *supra* note 23, at 1.
- [48] CBS News “Face the Nation,” Full Transcript on Jan. 12, 2020, <https://www.cbsnews.com/news/full-transcript-of-face-the-nation-on-january-12-2020>.
- [49] *Id.*
- [50] Ney, *supra* note 23, at 7.
- [51] Major General (Ret.) Charles J. Dunlap, Jr., *The killing of General Soleimani was lawful self-defense, not “assassination,”* LAWFIRE (Jan. 3, 2020), <https://sites.duke.edu/lawfire/2020/01/03/the-killing-of-general-soleimani-was-lawful-self-defense-not-assassination>.
- [52] The White House, *Report on the Legal and Policy Frameworks Guiding the United States’ Use of Military Force and Related National Security Operations* (Dec. 2016), https://www.justsecurity.org/wp-content/uploads/2016/12/framework-report_final.pdf.
- [53] Treasury and State Department Iran Designations Identifier Information Pursuant to E.O. 13224 (Terrorism) and E.O. 13382 (WMD) (Oct. 25, 2007), <https://www.treasury.gov/press-center/press-releases/Documents/hp644report.pdf> (last visited Sept. 24, 2020).
- [54] The White House, *supra* note 54, at 9.