Admitting Hearsay

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

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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.

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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. Bailar*, 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 7 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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