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Education and Outreach for The Judge Advocate General's Corps

2016 this edition:

CHANGING "We've Always Done it This Way" THINKING

The Reporter

2016 Volume 43, Number 2

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About Us

THE REPORTER is published by The Judge Advocate General's School for the Office of The Judge Advocate General, United States Air Force. **Contributions from all readers** are invited. Items are welcomed on any area of the law, legal practice, or procedure that would be of interest to members of The Judge Advocate General's Corps.

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On the Cover: Stock Photo Illustration © mattjeacock

Message from The Commandant

The phrase "but we've always done it this way…" is collectively loathed by members of the Air Force Judge Advocate General's Corps. In this edition of *The Reporter*, our featured authors review several Air Force processes, examine their strengths and weaknesses, and discern recent or upcoming changes to them in an effort to guard against the scourge of stagnant "we've always done it this way" thinking. Mr. Mark Stoup begins our review with a detailed analysis of the current state of the law as it pertains to **victims of sexual assault**. Then, Mr. Thomas Becker recounts the history of **Article 27(b) certifications** and recommends some possible improvements. Finally, Major R. Scott Adams and Captain Micah W. Elggren provide a review of the **Air Force performance evaluation** system's strengths and flaws, with a particular focus on the merits of stratification.

In addition to our featured articles, this edition offers a series of practical primers. Captain John Reid provides a detailed review of **handling hearsay** in courts-martial. Major Nate Himert reviews the ins and outs of equitable tolling in **Federal Tort Claims Act claims**. Major Nicole Navin and Technical Sergeant Matthew Sherman explore best practices in combating **procurement fraud**. Meanwhile, Lieutenant Colonel Kristine Douglas expounds upon the differences between **confidence and competence**, and how to master both. Our book review for this edition provides further practical guidance, this time in the field of leadership. Mr. Thomas Becker pens an informative review of ***Yes, You're A Leader! A Practical Guide to Leadership for Real People***.

Finally, Mr. Jung Lowe provides a rare historical treat with his firsthand recounting of the bombing of **Pearl Harbor** on December 7, 1941, and his ensuing service in the Air Force Judge Advocate General's Corps.

Thank you to all who have submitted articles for this issue of *The Reporter*. *The Reporter* is an essential tool to our constant need to stay current and think critically about the legal issues facing the Air Force today. I encourage our readers to write and submit articles for publication. Through your efforts, the JAG Corps maintains its expertise within the ever changing world of law. I extend my congratulations to *The Reporter* editing and production team for their well-deserved win at the Air Force 2015 Public Affairs Media Contest! *The Reporter* won first place for best web-based publication. Moreover, Ms. Thomasa Paul, *The Reporter's* Illustrator, won first place at the MAJCOM level in the categories of infographic, graphics layout and design, and graphic artist of the year!

Cognitive Bias in Performance Reports

BY MAJOR R. SCOTT ADAMS AND CAPTAIN MICAH W. ELGGREN

This article discusses the potential role of cognitive bias in our performance evaluation systems.

The purpose of this article is to acknowledge the vast body of research in human resources that seeks to minimize undesirable influences in performance evaluation systems. In the Air Force, we have comprehensive evaluation systems with many benefits and some drawbacks. This article is not a critique of those systems, nor is it a critique of the individuals implementing those systems as raters. Rather, the article attempts to link the rater to the research by discussing the potential role of cognitive bias in a specific aspect of our performance evaluation systems: stratification.

The article's discussion of bias is limited in scope to only a few, less-apparent cognitive biases. Beyond recognizing that bias exists and can be overcome, the article does not attempt to prescribe solutions. Instead, we hope the content becomes food-for-thought as raters seek to shape the future of the Judge Advocate General's Corps.

U.S. Air Force Illustratation/Thomasa Paul

INTRODUCTION

Every aspiring Airman hopes to stand out among his or her peers and, if eligible,[1] receive "stratification" at performance evaluation time. The rack-and-stack of peers in the Air Force performance evaluation system has taken a place of special importance. Consequently, an exceptional stratification is not just significant to an individual's career—accurate stratifications are also important to the Air Force as an institution to distinguish future leaders.

Defined as a "quantitative comparison of an individual standing among peers,"[2] stratification allows the rater[3] to differentiate among the individuals within his or her area of responsibility. The stratification manifests itself as a line in the individual's performance report, such as, "#3 of 27 Master Sergeants in wing." But beyond the technicalities of when stratification is authorized and what the scope of the stratification should be, official Air Force guidance provides little insight into the subjective process of stratification.[4] The Air Force Instruction does not tell raters who should be stratified or for what reasons.

In light of the vast library of human resources and psychological research on performance evaluation systems, this article seeks to identify potential obstacles to a rater's ability to accurately compare a ratee against his or her peers. The article begins with a comparison of performance evaluation systems of the different military branches. It then considers two prominently studied cognitive biases that, when left unchecked, may make it difficult for a rater to provide an accurate stratification. It is worth noting that this article operates under the assumption that raters seek to give a strict stratification (e.g., "#1 of 10") to their ratee with the best overall work performance. While some raters may take a more strategic approach, such as giving a generous stratification based on an upcoming promotion board or giving a qualified stratification (e.g., "#1 of 19 as CGO of the year") to offer more stratifications among ratees, those considerations are not taken into account in this article. While such approaches should be understood by raters and ratees alike, this strategic angle does not easily lend to objective analysis. This article assumes raters only have one #1 ratee and that the rater will always attempt to give that to the best overall performer.

COMPARISON

Every branch of military service has some form of stratification for performance evaluations. The Navy does not use the term "stratification" but authorizes a "numerical ranking among peers"[5] in the comments portion of its performance evaluation forms.[6] The main body of the forms includes numerical ratings for different categories of performance where a rating of 1 is "disappointing performance…should not be promoted" and a rating of 5 is "superstar performance…could be promoted two pay grades, and still be a standout in this trait."[7] The "numerical ranking among peers" found in the comments section tends to be rarer in the Navy than stratifications in the Air Force.

The Army's Officer Evaluation Report is similarly oriented toward quantified data on the form itself. The rater must mark an officer's overall performance as (1) Excels, (2) Proficient, (3) Capable, or (4) Unsatisfactory and must include the total number of officers he or she rates in the same grade as the ratee.[8] The rater is not permitted to mark "Excels" on more than 49% of his or her evaluations. This limitation

[1] An enlisted member in the grade of E-7 may receive a senior rater's stratification if the member is in the senior rater's top 10 percent of master sergeants who are time-in-grade/time-in-service promotion eligible. An enlisted members in the grade of E-8 may receive a senior rater's stratification if the member is in the senior rater's top 20 percent of senior master sergeants who are time-in-grade/time-in-service promotion eligible. Any officer can be stratified by his or her rater. U.S. Dep't of the Air Force, Instr. 36-2406, Officer and Enlisted Evaluation Systems paras. 1.12.1.4.1–.2, 1.12.1.6.1-.3 (2 Jan. 2013) (CA, 5 Apr. 2013) (C3, 30 Nov. 2015) [hereinafter AFI 36-2406].

[2] *Id.* at Attachment 1 – Terms at 340.

[3] For purposes of this article, the term "rater" is limited to those raters that are authorized to give stratifications. In addition, the article will discuss the enlisted and officer performance evaluation systems as if the two systems were one, though there are numerous differences outside the concept of stratification.

[4] AFI 36-2406, *supra* note 1, paras. 1.12.1.4.1–.2, 1.12.1.6.1-.7.

[5] U.S. Dep't of the Navy, Bureau of Naval Pers. Instr. 1610.10C, Navy Performance Evaluation System, enclosure 1, para. 10, at 7 (20 Apr. 2011).

[6] The Fitness Report and Counseling Record (FITREP) is used for officers (W-2–O-6), while the Chief Petty Officer Evaluation (CHIEFEVAL) is used for chief petty officers (E-7–E-9) and the Evaluation Report and Counseling Record (EVAL) is used for other enlisted members (E-1–E-6). *Id.* Enclosure 1, para. 2 at 2.

[7] *Id.* para. 9, at 6-7.

[8] U.S. Dep't of the Army, Regulation 623-3, Evaluation Reporting System para. 3-7a(3)(c)1-4, at 35-36 (4 Nov. 2015).

is tracked and enforced through an electronic Evaluation Entry System.[9] However this system still allows the rater to make comments, which may include stratification.[10]

In the Marine Corps's performance evaluation system, the rater is limited to simple, fact-based descriptions of the ratee's performance.[11] Stratifications are not used in these comments, and raters are encouraged to "make comments objective" and "omit superlative adjectives, needless statistics and imprecise phrasing."[12] The report also asks the rater to grade the ratee on a scale of G through A (with G being the best and A being the worst) on a series of attributes and performance markers, such as "courage."[13] The rater is provided detailed instruction on a proper grade for each marker. Once complete, the graded ratings are converted to a numerical scale and compared to other ratees of the same rank under the same rater. This comparison results in an overall score on an 80 to 100 scale, where 100 represents the highest ratee by that rater, 80 represents the lowest, and 90 is the median ratee.[14]

Each of these systems seems to present unique advantages but each is subject to the same challenges faced by Air Force raters in providing accurate stratifications.

The civilian business world is, of course, filled with a wide variety of performance evaluation systems. Recently, many corporations have begun utilizing "360-degree feedback" in which an employee is rated by superiors and subordinates, in addition to completing a self-rating. Quantified ratings of an employee's overall performance are often included in these types of evaluation systems. Though the term "stratification" is not commonly found in the human resource literature of the civilian business world, it is common for evaluations to quantify individual performance.

One especially relevant example is from Deloitte LLP, the largest professional services corporation in the world, which recently revised its entire performance evaluation system.[15] Deloitte's dramatic change was prompted by a finding that after spending nearly 2 million hours per year on completing forms and holding meetings on performance ratings, 58 percent of managers did not believe the performance evaluation system effectively improved future performance.[16] In the past, Deloitte distilled each employee's rating into a single number in an attempt to "express the infinite variety

Although no system of evaluation can completely **REMOVE** the effect of cognitive **BIAS**, a rater who is aware of the potential influence of such biases is more likely to come to an accurate result.

[9] *Id.* para. 3-9a(3)(e)4, at 40.

[10] *Id.* para. 3-7b(3)(d), at 38.

[11] U.S. Dep't of the Navy, Marine Corps Order 1610.7, Performance Evaluation System, Enclosure 1, para. 3a(3), at 1-2 (Feb. 13, 2015).

[12] *Id.* Enclosure 1, para. 4c(3)(a)-(b), at 4-18.

[13] *Id.* Enclosure 1, para. 6d(1)(a)-(b), at 4-22.

[14] *Id.* Enclosure 1, para. 7b-c, at 8-5-8-6.

[15] Marcus Buckingham & Ashley Goodall, *Reinventing Performance Management*, Harv. Bus. Rev., Apr. 2015, https://hbr.org/2015/04/reinventing-performance-management [hereinafter *Reinventing Performance Management*].

[16] *Id.*

There is a problem when the person performing the evaluation might matter more than the performance of the ratee.

and nuance of a human being" with a single data point. Deloitte found that this approach produced inconsistent data on employee skills. As explained by a Deloitte manager, "Objective as I may try to be in evaluating you on, say, strategic thinking, it turns out that how much strategic thinking *I* do, or how valuable *I* think strategic thinking is, or how tough a rater *I* am significantly affects my assessment of *your* strategic thinking."[17] This variance in performance evaluation is often known as the "idiosyncratic rater effect."

IDIOSYNCRATIC RATER EFFECT

In an attempt to quantify the idiosyncratic rater effect, researchers Steven E. Scullen, Michael K. Mount, and Maynard Goff conducted a large scale study in the year 2000 with over 4,000 subjects, examining the impact three factors (actual job performance, rater biases, and measurement error) have during performance evaluations.[18] The study found that the greatest portion of variance in performance ratings came not from actual performance but from rater biases. Put another way, the person performing the evaluation might matter more than the performance of the ratee. The study found rater biases accounted for 62 percent of variance in ratings, while differences in actual performance accounted for only 21 percent of that variance.[19] As the authors of the study explain, "actual job performance has a positive but less than optimal effect on ratings."[20]

These results have led many experts to conclude that "although it is implicitly assumed that the ratings measure the performance of the ratee, most of what is being measured by the ratings is the unique rating tendencies of the rater. Thus ratings reveal more about the rater than they do about the ratee."[21]

Fortunately, the Air Force has institutionalized mechanisms that mitigate the idiosyncratic rater effect. For example, individuals have usually had several different raters by the time they reach a promotion board, thereby neutralizing the idiosyncrasies found in one rater.

The idiosyncratic rater effect is generally a hurdle to any evaluation system that relies heavily upon raters. One of the most significant inputs to the idiosyncratic rater effect is natural cognitive bias. As the Scullen, Mount & Goff study concludes: "The obvious implication of our finding is that decision makers should be aware of the impact of idiosyncratic bias and attempt to control its effects."[22] Although no system of evaluation can completely remove the effect of

[17] *Id.*

[18] Steven E. Scullen, Michael K. Mount & Maynard Goff, *Understanding the Latent Structure of Job Performance Ratings*, 85 J. Applied Psychology, 956 (2000) [hereinafter *Understanding the Latent Structure*].

[19] *Id.* at 963, 965–967.

[20] *Id.* at 957.

[21] Manual London, How People Evaluate Others in Organizations (2001), *cited in Reinventing Performance Management, supra* note 15.

[22] *Understanding the Latent Structure, supra* note 18, at 967.

cognitive bias, a rater who is aware of the potential influence of such biases is more likely to come to an accurate result. Two well-studied biases are especially important for raters to keep in mind and will be given further analysis here: (1) the halo effect and (2) the availability heuristic.

The Halo Effect

The halo effect is a type of confirmation bias that causes an individual to allow his or her *overall* impression of a person to shape the understanding of that person's *specific* characteristics. For example, if a chef is known for making delicious cookies, people will be tempted to think the chef cooks everything well. In another example, the average height of male Chief Executive Officers at Fortune 500 companies is approximately 2.5 inches taller than the average American male. Height is a specific and conspicuous characteristic that tends to affect our overall impression of a person. That impression will then affect how we view other specific characteristics, such as an individual's ability to lead a large company.[23]

"Halo effect" was coined in 1915 by psychologist Edward Thorndike in reference to a person appearing to have a halo. Thorndike, in fact, studied Army evaluations to introduce the concept. He asked several aviation cadets to evaluate their subordinates in four areas: physical qualities, leadership, character, and intelligence. Thorndike told the commanders to judge each criterion individually, setting aside other considerations and evaluating only the immediate criterion for the subordinate.[24]

Thorndike found a strong correlation among the four separate categories. For instance, individuals rated high in physique were also rated high in intelligence, though no legitimate connection between physique (i.e., bearing, neatness, voice, energy, endurance) and intelligence (i.e., accuracy, ease in learning, decision making) existed. Thorndike found that the correlation among categories was uncharacteristically high. He concluded the commanders were unable to compartmentalize the criteria and tended to think of the subordinate generally as "rather good" or "rather inferior." That overall impression dictated how the commander evaluated specific characteristics of the subordinate.[25]

More recently, researchers have attempted to distinguish between a true and illusory halo. For example, a strong voice probably makes a teacher an overall better instructor. That same attribute does not improve the performance of an accountant, but our overall impression of an accountant is inevitably improved by a strong voice. Thus, a strong voice creates a true halo for a teacher but an illusory one for an accountant. The real problem is that it is often impossible to distinguish between true and illusory halos. The overall impression we have of people is inevitably colored by a wide variety of factors which can only be individually assessed through a concentrated mental effort.[26]

An antithetical "horns effect" can also be observed: one bad characteristic will spoil the observer's overall impression of the individual. Indeed, the horns effect may be more influential than the halo effect. As psychologist Paul Rozin explained, "A bowl of cherries can be ruined by one cockroach, but a cherry does nothing for a bowl of cockroaches."[27]

Building upon Thorndike's halo effect research, a study completed in 1974 asked 60 male undergraduates to rate the quality of an essay on a scale of one to nine. Two essays were used in the study, one written well and one deliberately written poorly. One third of the raters also received a photograph of an attractive woman and was told she wrote the essay. Another third received a photograph of an unattractive woman and were told she was the author. The final third (i.e., the control group) did not see a photograph. The score for the well written essay presented with a photograph of an attractive woman averaged 6.7 on the scale, while the same essay with a photograph of an

[23] Jonathan Rauch, *Short Guys Finish Last*, Economist, 23 Dec., 1995.

[24] Edward Thorndike, *A Constant Error in Psychological Ratings*, 4 J. Applied Psychol. 25-29 (1920).

[25] *Id.*

[26] Emily R. Lai, Edward W. Wolfe, & Daisy Vickers, *Differentiation of Illusory and True Halo in Writing Scores*, 75 Educ. & Psychol. Measurement 102, 102-25 (24 2015).

[27] Daniel Kahneman, Thinking, Fast and Slow 32 (Macmillan, 2011) [hereinafter Thinking, Fast and Slow].

unattractive woman averaged 5.9. The score for the well written essay given to the control group averaged 6.6. The difference was even greater for the poor essay: the attractive photograph averaged 5.2, while the unattractive photograph averaged 2.7. The control was 4.7. The study concluded that evaluators place higher value on the substantive work performed by attractive people even when the work was exactly the same as less attractive peers.[28]

In 1997, the collection of data from the top five U.S. based symphony orchestras showed that the use of "blind" auditions increased a female contestant's probability of selection beyond preliminary audition rounds by 50 percent. In a blind audition, all indicia of gender are removed from selection panel and the contestant plays the instrument behind a screen, rather than facing the panel. The authors of the study explained that the dramatic increase in selection for female musicians in blind auditions was due, at least in part, by unconscious bias in the selection panel.[29]

In the Air Force, most supervisors, particularly those with a small number of ratees, are provided significantly more time and opportunity to solidify their impression of a ratee. The students rating the essays and the orchestra judges based their decisions on a brief first impression, unlike the extensive interaction most raters have with their ratees. However, more time may not always mitigate problems from cognitive bias. Thus, it is important for raters to keep the pitfalls of halos and horns in mind while evaluating ratees.

The challenge of the stratification process, from the perspective of the halo and horns effect, is ensuring that the overall conclusion (i.e., stratification) is derived from legitimate characteristics valued by the Air Force rather than characteristics that generally have no bearing on leadership or mission success. For instance, Airmen should not receive superior stratifications because they are more attractive, taller or have a more pleasant voice. Again, a rater that is cognizant of the pitfalls of the halo and horns effect is more likely to produce an accurate stratification.

The Availability Heuristic

The term "availability heuristic" is used by psychologists to describe a mental shortcut that causes an individual to rely disproportionately on the first impression that comes to mind when evaluating a subject. This shortcut tends to create an illusion that information is significant if it is easily recalled.[30] One famous, albeit controversial, example is from the economist Steven Leavitt. In 2001, Leavitt published a study showing that children are more than 100 times more likely to drown in a swimming pool than to die from a firearm. However, many parents with a pool in the backyard have a greater fear of their children being injured or killed by firearms. This disproportionate fear exists because accidental firearm deaths receive significant attention and are, therefore, easily recalled, while pool-related accidental deaths are rarely reported.[31]

The idea of the availability heuristic was first detailed by psychologist Daniel Kahneman, a recipient of the Nobel Prize in behavioral economics, who explained that "people tend to assess the relative importance of issues by the ease with which they are retrieved from memory."[32] However, Kahneman also warned, "Nothing in life is as important as you think it is when you are thinking about it."[33]

The seminal study on this subject, authored by Kahneman and Amos Tversky in the early 1970s, asked a large group of subjects to estimate whether more words in the English language begin with the letter K, or have K as the third letter. In fact, there are nearly three times more words in English with the letter K as the third letter, but identifying those words is a difficult mental process. By contrast, letters that begin with K come to mind easily. Kahneman and Tversky found that nearly all subjects

[28] David Landy & Harold Sigall, *Task Evaluation as a Function of the Performers' Physical Attractiveness*, 29 J. Personality & Soc. Psychology 299 (1974).

[29] Claudia Goldin & Cecilia Rouse, *Orchestrating Impartiality: The Impact of Blind Auditions on Female Musicians* (Nat'l Bureau Econ. Research, Working Paper 5903 Jan. 1997).

[30] Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, 5 Cognitive Psychol. 4 (1973).

[31] Steven D. Leavitt, *Swimming Pools v. Guns*, Chi. Sun Times, 2 July, 2001.

[32] Thinking, Fast and Slow, *supra* note 27, at 8.

[33] *Id.* at 402.

incorrectly estimated more words would begin with K.[34]

In a similar study by psychologists Michael Ross and Fiore Sicoly, spouses were asked to individually identify their individual contribution to twenty separate household matters. For example, a husband would identify his percentage of contribution to grocery shopping. Most of the household matters were positive, such as washing the dishes, but others were negative, such as starting arguments. When the individually assessed percentages of the husband and wife were added together, an average of sixteen of the twenty tasks totaled significantly more than 100 percent, indicating each individual had overestimated his or her own contribution. Ross and Sicoly concluded that because an individual's memory of his or her own household work comes to mind readily, that work is given more significance in the mind.[35]

The availability heuristic creates an obstacle to accurate stratifications by causing evaluators to confuse higher visibility for superior performance. Kahneman succinctly described the problem: "What you see is all there is." A potential problem with the stratification process, from the perspective of the availability heuristic, is that even those characteristics valued by the Air Force can be disproportionately applied in the evaluation

[34] Tversky & Kahneman, *supra* note 30.

[35] Michael Ross & Fiore Sicoly, *Egocentric Biases in Availability and Attribution*, 37 J. Personality & Soc. Psychol. 322 (1979).

People tend to assess the relative IMPORTANCE of issues by the EASE with which they are retrieved from memory.

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process. For example, a rater might be initially inclined to give a higher stratification to a recent quarterly award winner rather than taking the full year of performance into consideration. Or a rater might give a lower stratification to an attorney that recently failed to secure a conviction in a court-martial but had otherwise performed above standards for the year. But perhaps most significantly and more commonly, a rater with a large number of ratees will likely be tempted to consider the work product that he or she sees most often to be the most significant, even though superior performance may be occurring outside the rater's immediate field of vision. However, by being aware of the availability heuristic, a rater can actively avoid the natural tendency to rely disproportionately on easily retrieved memories when making a stratification. Avoiding the halo effect is extremely difficult, but the availability heuristic can often be overcome with effective data and a concentrated mental effort.

RATER PERSPECTIVE

During the course of researching and writing this article, we met with several senior Judge Advocate General Corps leaders who candidly discussed their thoughts on the stratification process. Some of the leaders stated that it is typically easy to identify the best and worst performers but generally difficult to parse out performers in the middle. Others found it extremely difficult to identify the top performer among a pool of excellent performers. Some leaders stated that they actively sought out as much information as possible before distributing stratifications, while others seemed comfortable that they had already seen sufficient work product in the normal course of business to give an accurate stratification. All leaders seemed to agree that the impact of a stratification is strengthened by breadth and quantity. Thus, a wing commander's "My #3 of 200 CGOs" might be more significant than a staff judge advocate's "My #1 of 10 litigators."

CONCLUSION

Raters share the common goal of accurately assessing their ratees. Overcoming bias is a challenging part of that endeavor. As cognitive scientist Doug Hofstadter stated, "We have a hard time seeing our cognitive activity because it is the medium in which we swim."[36] However, overcoming cognitive bias is not impossible. Acknowledging that we each experience natural biases can help mitigate the idiosyncratic rater effect and the impact of the halo effect and availability heuristic. In their study, Scullen, Mount, and Goff suggested that awareness of natural biases in the performance evaluation process allows the rater to make efforts to control the effects of those biases.[37] Awareness of the availability heuristic, for example, causes us to pause and research whether K is more commonly the first or third letter in a word. Absolute and objective certainty may be forever illusive. However, by being aware of the biases a rater faces during the process of evaluating a subordinate, raters will improve the probability of accurate stratifications, thereby ensuring the Air Force retains and promotes its best potential leaders. R

[36] Douglas R. Hostadter, Surfaces and Essences: Analogy as the Fuel and Fire of Thinking (2013).

[37] *Understanding the Latent Structure*, *supra* note 18, at 957.

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WHICH MATTERS MOST: CONFIDENCE or COMPETENCE?

BY LIEUTENANT COLONEL KRISTINE M. DOUGLAS

Confidence is a powerful tool that is not always proportional to competence....

Not too long ago, a multi-starred commander called me into his office. He was perplexed by an issue in the unit that rose to his attention and he asked me a straightforward question. I responded immediately. After I answered him, he silently studied my face. I waited for his inevitable next question. "How confident are you in that answer?" he wanted to know as he continued to study my non-verbal cues. This question surprised me and caused me to wonder which mattered most; my competence…or my confidence?

As paralegals, attorneys, and leaders, we must recognize that we are judged not only by our competence but also by our confidence. This is true because people who are not trained as legal professionals may not be in a position to debate our answers, but they are still able to judge our confidence. Thus, if we are judged on our level of confidence we must also be judging theirs, either consciously or unconsciously. The trick is to learn to judge others' competence while not over relying upon their display of confidence. We can witness this interplay between others as well. Shockingly, otherwise mature, experienced, intelligent, and well-meaning people often fail to distinguish confidence from competence.

Confidence is a powerful tool that is not always proportional to competence; confidence with insufficient competence is out of balance and is

Confidence—What is it?

dangerous. For example, an SJA with little expertise in employment law confidently shoots from the hip while conversing with the wing commander about the outcome of a labor hearing. Because of her assertions, the wing commander turns down a settlement offer from a civilian employee who was proven to be the victim of a sexually harassing supervisor. The result is a costly decision reducing the wing's operational and management budget for the year.

Conversely, competence with insufficient confidence is also out of balance and is useless. For example, a junior trial counsel knows the rules of court and what punishment he wants the panel to return in an egregious rape case. However, he is so nervous that he delivers the argument unconvincingly, thereby resulting in no confinement, which is viewed by the victim as defeat. Both competence and confidence are required; finding the balance between the two is critical to our personal development as effective legal professionals as well as leaders. Additionally, learning to distinguish confidence from competence in others will significantly improve our situational awareness and more importantly, our efficient and accurate decision-making.

CONFIDENCE—WHAT IS IT?

Confidence is often defined as a belief in the mind. In fact, confidence is an emotion. Emotions are not cognitive or rationale, they are simply feelings. As legal professionals, many of us think we are intelligent beings and actually ignore or suppress our feelings because we think they can interfere with our ability to analyze problems. The effect can be a lack of self-awareness and a loss in ability to process our emotions.

Once we recognize confidence is an emotion, we can choose to feel it or not. Some of us have been taught, or have come to believe, that confidence is not polite or professional. However, this is not the case. Developing a healthy foundation of confidence is essential to personal and professional growth. Moreover, we can be both cerebral and cognizant of our emotions at the same time. If you have not practiced experiencing or processing your emotions, then the emotion of confidence is a good one to use as a starting point to begin practicing today.

Choosing to feel confident may be easier said than done, but it is an important decision to make because confidence is a powerful force multiplier. When wielded appropriately, it may be just the tool you need to employ when persuasive analysis requires that extra boost. Additionally, choose to recognize confidence in others. If you believe you already can, then challenge yourself; ask a trusted friend to name a person you both know and then compare each of your perspectives of the third person's confidence to his competence. I suspect there will be disagreement. This is an art form that takes active practice across the spectrum of time, people, and circumstances—and is not easy at the beginning. Learning to distinguish people's confidence from their other emotions allows us to better judge their true level of competence.

CONFIDENCE—HOW DO YOU DEVELOP IT?

Once we recognize confidence is an emotion and we choose to develop it, the challenge is to do it authentically so that the feeling is intrinsic and our behavior is both intentional and natural.

Initially, even if we do not feel confident, we can certainly pretend that we are for the sake of the listener, the observer, or even for ourselves. But what are we to do when faking

U.S. Air Force Illustratation/Thomasa Paul

How Do You Develop It? How Do You Recognize It?

it wears thin? There are many ways to develop true confidence; there are several books and articles written about it. One way that has worked for me over the years is to develop my competence in the area I do not feel confident. If there is more than one area, just pick one particular subject within your duty requirements and decide to master it: study it, talk about it, and practice it. Next, it is time to learn the nuances of the subject. Focus on drilling down through the details and then learn how to explain your subject simply so that a layman can understand. Through the development of competence, you will develop confidence.

For example, let's say you are either the NCOIC or Chief of Civil Law (or General Law as it may be called in your office). There is a range of issues within this division and feeling confident about them can be daunting in the first several months. After all, we are not taught in law school or in our paralegal courses the finer points of fundraising in the federal workplace. So we have to start building our competence in this area by first reading Air Force Instruction 36-3101. After we have read this relatively short guidance document, we see in the first attachment a host of additional references; so we review the relevant portions of those. Then, we should talk to our predecessor, our deputy staff judge advocate and our staff judge advocate. We should review the base procedures for getting a fundraiser approved; if there are none, then we can create a template with a default routing slip. We can reach out to the approval authority and see if he has any concerns or recommendations for the private organizations. Then we can reach out to the private organizations and ensure they are aware of the rules, the fundraiser template and the routing mechanism. Finally, during office training, we can review the rules and the procedures with the rest of the office so that when the requests come in for a legal review, everyone is aware of the current processes. By taking these steps, you are certain to build your competence and therefore confidence in this area. You are ready to move on and tackle another challenging issue.

Nonetheless, confidence is fluid and temporal. We can be confident in one subject, but not in another. We can be confident at one time, but as our focus changes, and time passes, we may lose that confidence as our competence in any particular subject wanes. Recognize that as the feeling of confidence wanes, it is time to brush up on what you previously mastered. Once the memory and skills are refreshed, the confidence will return.

CONFIDENCE—HOW DO YOU RECOGNIZE IT?

Once a subject or skill is mastered, we are then competent in that area. Once competent, confidence settles in, more intrinsically than the superficial mask we may have worn in the past to get us through. A quiet, calm strength takes over. Once we feel truly confident, very little can shake it. Similar to the feeling of dignity, no one can take it away. This strength turns to power, the kind that takes root. Grounded in this power, we stand proudly on our own two feet. We smile generously; we walk tall and with purpose; our chins are up and our eyes are forward. We do not have to overpower anyone else, because we have already conquered ourselves. Being confident does not mean we believe we are perfect. We simply feel secure in certain subjects and our skills. Recognizing confidence in ourselves is an essential gauge; with calibration, we can use the feeling to measure our progress in developing our skills as well as maturity. We become less vulnerable to negative

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criticism because we know ourselves; motion sets in, confidence begets more confidence.

Recognizing confidence in others is also critical for a variety of reasons. On one hand, if someone demonstrates a lack of confidence, we can help that person find her confidence. On the other hand, many people radiate confidence. If not objectively observed, we can be misled by appearances. Think about people you know and interact with on a daily basis including your family, friends, co-workers, subordinates, and supervisors. On a spectrum of low to high self-confidence, how would you rate each one? Then, think about their level of general competence—does it compare to where you would place them on the confidence spectrum? If you say that you have not given the matter much thought then you are allowing yourself to be unaware, which leads to vulnerability. There are verbal and non-verbal cues; after observation and practice you will start to recognize patterns and over time and become quicker at "reading" people.

Start with verbal cues; listen closely to the words people say. Remember that many professional people identify themselves as "thinkers" and not "feelers." So when this type of person is expressing his emotions, he will say "I think" instead of "I feel." Just listen to the rest of the sentence and you will start to gain a perspective of how this person feels about himself. But words are not necessarily accurate and do not tell the whole story. Also, recall that confidence can be faked. Unfortunately, many people never develop confidence intrinsically; instead they choose to fake it for most of their lives. After all, faking confidence can be easier than developing competence, and if effective on the unsuspecting receiver, the behavior is reinforced.

Observing non-verbal cues is even more insightful because they are harder to disguise. When an insecure person speaks, regardless of the words used, he can be quiet and meek, or overcompensate by being loud and disruptive, even boastful. Physically, a timid person tends to physically shrink himself, roll his shoulders

How confident are you?

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forward, sit with a slouch, or walk with a hunch in his back. He may snap at you defensively, or literally ask for your constant approval. A boastful person tends to use exaggerative words that do not have a lot of meaning. Physically, a boastful person may inflate his lungs, broaden his chest, stand with his hands on his hips, and even walk with a swagger. He rests upon his boastfulness rather than his competence to convince you of his position. He may even appear as a bully. These pretenses, timidity and boastfulness, come from a place of fear. Fear of being discovered as incompetent.

Do not pity or maltreat the insecure person, and by all means do not be fooled. Recognize the lack of inherent confidence. Practice objectively observing others' verbal and non-verbal cues; you'll discover many, many people are in fact, not confident in themselves. As leaders, we can help channel people's fears and even alleviate them. First, see past the insecurity or boastfulness. Second, share your competencies to someone who may have less experience, or point out where you might see competence in another, who may not see it in himself. Third, recognize that another person's confidence has nothing to do with yours. Finally, realize that the mask of confidence is the danger to avoid. Do not let another person's level of confidence affect your competence in solving problems and making decisions.

CONFIDENCE—HOW TO FIND THE BALANCE?

Once authentically confident, we must decide to maintain a healthy balance in order to effectively use the emotion as an accurate gauge of our own competence, as well as to maintain its power. The healthy balance is personality specific, but is a sweet spot that fits somewhere between extreme humility and arrogance. Look at yourself in mirror or watch yourself in a recording. How do you look when you walk, sit, or talk? Ask your friends, family, and co-workers for honest feedback. Listen to yourself and others. Reflect and know that the process is lifelong.

CONCLUSION

Confidence is an emotion. Confidence is a healthy, effective emotion to develop and employ, but it must be developed authentically—rooted in genuine competence. Once developed, we must keep it balanced or we lose its power. With effort, we can recognize it within ourselves and in others. We can use it as a measure to better judge another's competence, without being misled. In ourselves, we can use it like a tool, and then employ it when necessary. So when the multi-starred commander asks you, "How confident are you in that answer?" You will be that confident and competent responder who smiles, stands tall, looks the commander squarely in the eyes and states, "100 percent." R

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Indecision

May or May Not Be My Problem:[1]

Time to Decide, Once and For All, How the Air Force JAG Corps Will Handle Article 27(b) Certification (**And I'm Just the Guy to Do It**)

BY MR. THOMAS G. BECKER

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The other day at the Air Force Judge Advocate General's School (AFJAGS) staff meeting, we heard the JAG Corps' current process for Article 27(b)[2] certification was under review and might change. Our discussion was disrupted by a loud, repetitive knocking sound. It took me a few seconds, but I realized the sound came from my head banging against the table. In the nearly 40 years I have been associated with the Air Force JAG Department/Corps, we have had four different procedures for certifying the trial advocacy competence of JAGs. Why can't we figure out a process and stick with it? Well, we can and we should. Stayed tuned, gentle reader, and learn how.

Before we get to the details, you may be posing the question—just who am I to settle this thorny issue? I'm glad you asked. As it happens, I am one of the few *alter cockers* left with experience in four of the five methods the JAG Corps has used to confer Article 27(b) certification.[3] I have also studied the issue in depth. All this has given me a certain confidence in what has worked well and not so well.

STROLLING DOWN MEMORY LANE

In 1977, I got my Article 27(b) certification signed by Major General Reed in the same envelope that contained my Judge Advocate Staff Officer Course (JASOC) graduation certificate. At that time, the only criterion for certification of my competence to try courts-martial was a passing grade from JASOC. My first Staff Judge Advocate (SJA), however, knew that my solemnly certified "competence" didn't have a terribly reliable meaning. Accordingly, he didn't cut me loose to try a case alone until I had proven to his satisfaction that I could at least locate a certain part of my body with both hands.

In 1981, after a stint in the base legal office and two years as an area defense counsel (ADC), I became a circuit trial counsel. By that time (in 1978, actually), we had implemented a "field certification" procedure similar (but not identical) to what we have now. A new JAG didn't get certified out of JASOC but had to demonstrate competence in real cases as evidenced by recommendation letters from military judges and circuit counsel. It became the job of circuit trial counsel not just to prosecute the cases but also to train, mentor, and evaluate their local assistants and, when the time was right, recommend them for certification. Accordingly, a lot of what I did involved assigning trial duties to the "noobs," giving feedback, and—when I felt they could find a certain body part with both hands—recommending that their SJAs put them in for Article 27(b) certification. Most folks were happy with this system. These were the heady days of the Cold War and Big Air Force. There were lots of courts, so everyone got a chance to get the experience they needed to show they were ready for certification. Then the bottom dropped out.

The Air Force court-martial caseload first dipped sharply during the Persian Gulf War, 1990-1991. This made sense as our troops had more things to focus on than getting in trouble and, while in the "Sandbox," General Order One's restrictions on sex and alcohol—a major, nay, ***shocking*** innovation from previous conflicts—further helped keep the youngsters (and some oldsters) out of hot water.

What would have been just a temporary downturn in cases, however, became a long-term state of affairs with the collapse of the Soviet Empire, the end of the Cold War, and the so-called Peace Dividend: a dramatic downsizing of U.S. armed forces. In about a year's time, the Air Force shrunk to a little more than a third of its previous strength. Every airman with even a whiff of trouble was forced out, along with many that had spotless records. This major reduction in numbers, combined with the intense quality force scrutiny, produced an Air Force that didn't have a lot of airmen left that were likely candidates for court-martial. But we still had the same number of JAGs.[4] And so the

[1] Jimmy Buffett, *Don't Chu-Know, on* Barometer Soup (Margaritaville Records, 1995).

[2] UCMJ art. 27(b)(2012) ("[t]rial counsel or defense counsel detailed for a general court-martial…must be certified as competent to perform such duties by the Judge Advocate General of the armed force of which he is a member.")

[3] The first method we used, from 1951 to 1969 when JASOC was launched, was a correspondence course. Once the new JAG completed that course, TJAG conferred Article 27(b) certification. I have no experience with this process (I'm not THAT old, for heaven's sake), but I knew many JAGs who were certified in the pre-JASOC era. To a man (and they were all men), they had nothing bad to say about the correspondence course but emphasized that, even while they were taking the course, they learned much more from their real-world experience.

[4] *See generally* Lt Col Patricia A. Kerns, The First 50 Years: The Judge Advocate General's Department 137 (2001) (quoting the then-

question became, how do we handle Article 27(b) certification when there aren't enough courts-martial to support a field certification procedure?

ADVOCACY EVALUATION PROJECT

Enter me. From September 1992-May 1993, I conducted the "Advocacy Evaluation Project," directed by Major General Morehouse to address, among related issues, Article 27(b) certification in an era of fewer trials…lots fewer trials. In my report,[5] among my recommendations was a return of primary responsibility for recommending Article 27(b) certification to the JAG School, but with one major difference: a certification recommendation would not automatically be tied to successful completion of JASOC, but the Commandant would recommend (or not recommend) certification based on performance during JASOC. My conclusion was that, for lots of reasons, the academic setting in JASOC was the best place to determine the basic competence contemplated by Article 27(b)—that is, the ability to find a certain body part with both hands. Most new JAGs could achieve certification in this way and, for the few that did not, their SJAs would be put on notice to mentor their development and recommend certification if and when they were ready.[6] The initial response from the JAG Department leadership to this recommendation was cool.[7] Eventually, however, the Department adopted this approach along with several of my other recommendations.[8] And so it was until 2011.

And so the question became, how do we handle Article 27(b) certification when there aren't enough courts-martial to support a field certification procedure?

In 2011, I had been back with the Air Force in my current position at AFJAGS for about 18 months after spending ten years in Iowa, during most of which I was employed as State Public Defender.[9] Lieutenant General Harding had been TJAG for a little over a year, enough time to do quite a few Article 6 visits.[10] He made no secret of his concern about the lack of military justice and trial experience among installation SJAs, citing instances where a base SJA had not tried a single court-martial. General Harding attributed this to those SJAs not having been required to demonstrate proficiency in actual courts-martial before getting their Article 27(b) certification.[11]

Secretary of the Air Force that "[H]e was not going to have any warfighters left, just doctors and lawyers").

[5] Lt Col Thomas G. Becker, Advocacy Evaluation Project – Final Report (10 May 1993).

[6] *Id.* para. 30b.

[7] As I recall, General Morehouse's exact response was, "No."

[8] *See* Kerns, *supra* note 5, at 161.

[9] As an aside, I can tell you the civilian justice system is not terribly concerned with objective demonstrations of courtroom competence before turning loose a new lawyer on the unsuspecting public. It was nice to come back to a place that did care about such things, even if we have a wee bit of trouble making up our mind on how to do it.

[10] *See* UCMJ art. 6(a) 2012) ("[TJAG] shall make frequent inspection in the field in supervision of the administration of military justice.").

[11] Although I've known General Harding since he was a major, I don't pretend to be a confidante. He may have had additional reasons for changing the Article 27(b) certification procedure but, in the discussions to which I was privy, the low level of military justice experience among many SJAs was the major consideration.

And so—notwithstanding faint cries of "no, wait!" from a remote corner of the Dickinson Law Center—the Air Force JAG Corps went back to field certification. There are differences in the current version from its predecessor. In the old field certification system, there was no minimum number of courts before a certification recommendation would be considered. The current preference is at least three courts and, I'm informed, that has been consistently applied. Also, when the former field certification procedure was established in 1978, there were no Air Force advocacy training courses after JASOC. Now there are several available to the uncertified JAG.[12] Under the current system, a recommendation for Article 27(b) certification will consider a JAG's participation in these courses, and in other litigation forums such as Magistrate's Court and administrative boards, in addition to performance in actual courts-martial.[13]

Even so, in 2011 everything old pretty much became new again… including the significant flaws inherent with field certification that were present in 1993 and are still present. These flaws demonstrate why a return of primary responsibility for recommending Article 27(b) certification to the JAG School is the right thing to do.

[12] Such as the Trial & Defense Advocacy Course (TDAC) and Intermediate Sexual Assault Litigation Course (ISALC), to name a couple.

[13] U.S. Dep't of Air Force, Instr. 51-103, Judge Advocate Professional Development para. 4 (3 Sept. 2013) [hereinafter AFI 51-103].

QUESTIONS AND ANSWERS

When the JAG Corps decides how we want to handle Article 27(b) certification, we need to answer three interrelated questions:

1. Is Article 27(b) certification a *de facto* requirement for judge advocates? Put another way, will failure to achieve Article 27(b) certification be a negative factor in a JAG's career progression?

2. If there is a *de facto* requirement for Article 27(b) certification, what should "competent" to perform duties of trial and defense counsel at GCMs mean? This is an important question regardless of the procedure we use, but it becomes critical when there's an expectation that all, or nearly all, JAGs get certified.

3. Once we decide what "competent" means, what is the best procedure to determine that competence, including who is in the best position to make an informed recommendation to TJAG concerning Article 27(b) certification?

My answers to these questions are (1) yes, (2) ***minimum*** competence, and (3) a recommendation to TJAG by the AFJAGS Commandant after multiple academic evaluations during JASOC.

THE *DE FACTO* REQUIREMENT OF ARTICLE 27(B) CERTIFICATION

To anyone who says, "Failure to get certified shouldn't be a career negative," I say, "Oh, please." There has always been an expectation a JAG will get certified unless there's something wrong with him. An uncertified JAG is a pebble in the Corps' professional development shoe. The otherwise logical choice to be ADC is out of the running because she may not be certified by the time the position opens. An opportunity to send a JAG to Squadron Officer School is put on hold because he's not certified and would miss out on scheduled courts while he's away. An otherwise first-rate Master of Laws (LL.M.) candidate is not selected because of concern that, because she's uncertified, the LL.M. and follow-on assignment in that specialty will frustrate any opportunity to be certified before she meets the majors' board. And when the word comes down to stratify, from Number One through Number Umpty-Ump, an entire year group of captains facing a force-shaping board, where do you think the uncertified captains end up?

Failure to get a JAG certified is also a potential detriment to the JAG's SJA. Questions about this have been common during Article 6 visits: "Captain Schmedlap has had three courts—why isn't she certified yet?" "What are you doing to get Captain Whosis certified? I see that Captain Whatsis is assistant trial counsel on next week's court; he's already certi-

If my guy is certified, I expect to be able to assign him to prosecute, by himself, any case.

fied, so why don't you assign Whosis instead?" During one Article 6 visit, I saw Major General Nelson stand about six inches from the face of an SJA (who was pending a promotion recommendation for an upcoming promotion board) and say, "You'd better get Captain Noname certified by this summer because he's going to be the ADC." To the SJA's credit, he replied, "Captain Noname will not get my recommendation for certification by this summer; he's got too many organizational problems we're still working on." To General Nelson's credit, he accepted that evaluation, there was a direct-fill ADC assigned, and the SJA was promoted. But I'm aware of similar situations that didn't have the same result. Usually, *quelle surprise*, the problematic captain suddenly became competent and certified. In any case, to say an SJA will not be judged on her ability to recommend certification of recent JASOC graduates before their next assignments defies reality.

WHAT DOES "COMPETENT" MEAN?

If the expectation is to certify as competent all but a few JAGs, what should "competent" mean? I can tell you what it should ***not*** mean—it should not mean a certified counsel is competent to try any case that comes down the line, regardless of complexity. During the Advocacy Evaluation Project, I went to a few MAJCOM SJA conferences to brief what I was doing and get vector checks. More than once, an SJA would say to me words to the effect of, "If my guy is certified, I expect to be able to assign him to prosecute, by himself, any case." Really? So you're going to assign the just-certified-after-the-obligatory-three-courts-where-he-sat-second-chair Captain Noobee to prosecute, alone, a death penalty espionage-murder case, heavy on the computer forensics, with potentially 50 witnesses, the accused in pretrial confinement with the speedy trial clock ticking loudly, and facing three defense lawyers headed up by the best senior defense counsel in the Air Force? I guess you'd better take Noobee off the legal assistance schedule for a while, huh?

Seriously, Article 27(b) has never meant more than minimal competence.

Seriously, Article 27(b) has never meant more than minimal competence. It's what I described in my Advocacy Evaluation Report as "***fundamental*** grasp of substantive law, procedure, and evidence."[14] The metaphor I have used here—irreverent but fair, I think—is the ability to find a certain body part with both hands. That hasn't changed. This grasp of fundamentals as the benchmark for competence is reflected in TJAG's current standards for certification.[15]

[14] BECKER, *supra* note 6, at para. 30b(6) (emphasis original).

[15] AFI 51-103 para 4.4 ("Demonstrated competence in fundamental trial skills…, [d]emonstrated comprehension of fundamental principles of military criminal law and procedure, and the Military Rules of Evidence," among other

WHO YOU GONNA CALL?[16]

So, given that we're measuring fundamentals, where best to do it and by whom? I say we go to the only place where there are evaluators trained and experienced in judging advocacy performance against uniform criteria set out in a rubric that is open for all to see—AFJAGS during JASOC. I say we return principal responsibility for recommending Article 27(b) certification to the AFJAGS Commandant and faculty, and keep it there. Here's why.

Breadth and Consistency of Advocacy Experience

Cases in the real world are what they are. There's no consistency in the challenges presented to new JAGs pending field certification. Some may get hard cases, some easy ones. Some cases have hearsay issues, others involve lots of witness impeachment, and still others require demanding motion practice. Other courts-martial may have no special issues. Pre-trial mentoring will also be inconsistent, depending on the SJA, Deputy SJA, and the senior trial counsel involved.

In JASOC, our students get uniformly demanding challenges in trial advocacy, ranging from discrete exercises to full moot court trials. A nice thing about academe is you can make up any set of facts you want to present whatever issues you want. We have done that and we change things in response to current issues. The faculty meets to make sure everyone is on the same page. JASOC students all get the same experience, or as near to it as possible. While JASOC has its limitations (e.g., we can't have multi-day trials and students must play the roles of witnesses and court members), you can't beat the academic environment for consistent evaluation of fundamental competence.

In addition to their advocacy exercises, JASOC students must pass written examination on their knowledge of military law, procedure, and evidence. They also must participate in role-playing exercises testing their ability to communicate advice. On an almost daily basis, they must be prepared for small-group seminar discussions that go deeper into issues. They are evaluated on their preparation and participation in all these areas.

Quality and Diversity of Instruction

Assignment to the AFJAGS faculty is selective. The faculty experience is extensive and diverse. The Military Justice Division faculty members (which have almost all responsibility for trial advocacy instruction) have all come from trial jobs or high-level policy positions. The Reserve faculty (which augments active duty faculty for all-hands events like moot courts) are also selectively assigned and have extensive trial experience, both in and out of the military. All faculty, Active Duty and Reserve, have been trained in the National Institute for Trial Advocacy method of teaching advocacy. In just a few weeks, JASOC

Cases in the real world are what they are. There's no consistency in the challenges presented to new JAGs pending field certification.

criteria).

[16] Ray Parker Jr., *Theme from "Ghostbusters," on* Ghostbusters: Original Sound Track (Arista Records, 1984).

students get a far greater range of evaluation and feedback than is possible in preparing for and trying three courts-martial in the field.

Second and Third Tier Consequences

Field certification requires an SJA to assign trial counsel based not on who is the best person for the case, but on who needs the case to build a resume for certification. Once that JAG is certified, there is often a newer JAG that needs to be certified, so JAG #1 may not see the courtroom again for a long time. The process continues as still newer JAGs come in and need the cases. Meanwhile, JAG #1 wants to be the next ADC but isn't getting the trial experience that would make that transition easier. Sometimes, Base #1 needs to send a JAG TDY to Base #2 to get trial experience to support certification, using scarce funds and adding an outsider to the competition for cases at Base #2.

Because it's an expectation for all JAGs to be certified and an SJA will be judged on her success in getting all her JAGs certified, we also force a JAG who has no interest in the courtroom, and perhaps limited acumen, to go through the tortures of the damned so he might be certified. Speaking as a career criminal lawyer with lots of trial experience, it's OK to prefer other work—there is plenty in an Air Force legal office. We need leaders with expertise in subjects other than military justice. If it means that, on occasion, we have an SJA that hasn't tried a court-martial, how is that much different from an SJA who, many years ago as a junior JAG, was forced to try three cases and hasn't had any trials since?

Perhaps the most serious consequence of field certification is that the SJA's attention is diluted. Under the pre-2011 system, there were some JASOC graduates that did not get the Commandant's recommendation and TJAG would not certify their competence right away. In those cases, the JAGs' SJAs were on notice of serious problems and could focus their mentoring accordingly. With field certification required for everyone, this kind of focused attention by SJAs isn't going to happen with any consistency.

THE SJA'S ROLE

This is a good place to preach a little leadership gospel. ***Whatever*** procedure we use for Article 27(b) certification, the SJA's role in the new JAG's professional development remains paramount. An SJA can't forget mentoring just because his recent JASOC grad is already certified based on the Commandant's recommendation any more than an SJA can stop mentoring after her JAG gets certified based on participation in three courts. The real advantage to Article 27(b) certification based on a recommendation by the JAG School Commandant, and not a field certification procedure, it that it allows SJAs the luxury of tailoring their mentoring to the individual strengths and weaknesses of their new JAGs, and not having to worry about something that's better left to an academic setting.

THE END IS NEAR

I promise. In a nutshell, the field certification tail wags the professional development dog. SJAs need the freedom to decide what is best for each case, each JAG, and her office as a whole without the intrusion of a collateral requirement to get someone certified. The notion of field certification is one of those things that "briefs well," that is, it sounds really good until you start drilling down to the second and third tier consequences. For field certification, those consequences outweigh any advantages. This was so back in 1993 when I first studied the issue, and it is still the case.

Let field certification go, once and for all. Evaluating the fundamental competence of new JAGs is what we do at the School. We do it better than anyone else. Let's give the Article 27(b) certification recommendation back to the Commandant and keep it there. No worries, folks—we got this. R

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Is It Hearsay? A Practical Primer

BY CAPTAIN JOHN S. REID

Whether practicing in state, federal, or military court, a frequent in-court objection is "Hearsay!" The objection is easily made but difficult to understand.

Your witness is on the stand and the examination is underway. You want the witness to give that morsel of testimony that will push your case over the top. No, you *need* the witness to give that juicy testimony that will push your case over the top. However, you have a problem: the witness's answer may be prefaced by "He told me…," or perhaps "I heard that…." You reach the critical juncture, and the witness begins by stating, "Well, he said…" "Hearsay!" objects your opponent in a frenzy. The judge looks over her glasses at you and asks, "Counselor?" You freeze. Is this the moment your case is lost?

Whether practicing in state, federal, or military court, a frequent in-court objection is "Hearsay!" The objection is easily made but difficult to understand. Indeed, even among seasoned litigators, hearsay may be the most commonly misunderstood evidentiary rule. The purpose of this article is to aid the military justice practitioner in avoiding a common hearsay error: searching for admissible out-of-court statements only within the confines of Military Rule of Evidence (MRE)

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801(d)[1] and MRE 803.[2] In an attempt to help the military justice practitioner think on their feet, I identify three common categories of out-of-court statements that are not hearsay. Additionally, I have created a practical "cheat sheet" (see figure 2) to aid the military justice practitioner in overcoming hearsay objections.

THE HEARSAY MAZE

As attorneys, we like rules. Even better, we like rules we can exhaustively enumerate. Thus, MRE 801(d) and the enumerated MRE 803 hearsay exceptions are rules lawyers love. They are well-defined, comprehensive, and easily placed on a cheat-sheet for court. An attorney's love of clearly enumerated rules, however, can lead her to surrender too quickly that an out-of-court statement is subject to the clearly laid-out rules in MRE 801(d) or MRE 803. The more ambiguous and difficult question of whether an out-of-court statement meets the definition of MRE 801(c) must first be addressed.[3] Without clearly enumerated categories of out-of-court statements that do not meet the definition of hearsay per MRE 801(c), litigators too often retreat to the more stringent confines of MRE 801(d) or MRE 803. Wide categories of out-of-court statements exist beyond the pages of the rules that do not fall within the confines of hearsay. Correctly identifying out-of-court statements that are not subject to the hearsay rule may win your day in court.

In an effort to simplify the first step in Figure 1, the issue of whether an out-of-court statement meets the definition of hearsay, I have identified three categories of statements somewhat common in litigation that are not subject to the hearsay rule. They are: (1) statements that are not assertions; (2) statements offered to prove another truth; and (3) effect on the listener. This is not an exhaustive list. Rather, these categories of verbal statements are commonly confused as subject to the hearsay rule when in fact, they are not. While these categories of statements have been identified individually in scholarly writing and judicial opinions, my goal is to provide a digestible summation, in one place, of the most common non-hearsay statements for the military practitioner. Ultimately, knowledge of these common categories of non-hearsay out-of-court statements will allow the military justice practitioner to "think on their feet" more effectively in court.

Much of the confusion with the first step in Figure 1 stems from the wording of MRE 801(d). MRE 801(d) states at its outset that [a] statement is not hearsay if it is a (1) prior statement by the witness; or (2) admission by party opponent.[4] This rule is not an exclusive list of out-of-court statements that are not hearsay. Rather, it provides specific definitional exceptions to the hearsay rule. If a statement does not meet the definition of MRE 801(c), it is not hearsay, end of story. That statement's relation to an MRE 801(d) exception is immaterial. MRE 801(d) is not a rule of exclusivity as to what out-of-court statements avoid hearsay. The wording of this rule causes many trial practitioners to operate under the false assumption that if an out-of-court verbal statement does not conform with MRE 801(d), it can only be admitted through an enumerated exception per MRE 803. Instead, think of MRE 801(c) as a definitional filter that allows a number of out-of-court statements to avoid the hearsay rule altogether.

In truth, the hearsay rule seeks to avoid a narrow historical evil. When the history and purpose of hearsay is understood, its meaning is more easily grasped.

The infamous trial of Sir Walter Raleigh on treason charges, wherein numerous out-of-court statements were used for their alleged truth to convict Sir Raleigh, is often cited as the historical context for the common law prohibition against hearsay.[5] During Sir Walter Raleigh's trial for

[1] Manual for Courts-Martial, United States, Mil. R. Evid. 801(d) (2012) (hereinafter MCM). This portion of the Rules addresses prior statements by witnesses and admissions by a party opponent, *id.*

[2] MCM, supra note 1, Mil. R. Evid. 803. MRE 803 addresses exclusions to the hearsay rule when the declarant is available as a witness such as present sense impression, excited utterance, then existing mental, emotional, or physical condition, statements for the purpose of a medical diagnosis or treatment, and recorded recollections, *id.*

[3] MCM, supra note 1, Mil R. Evid. 801(c). This rule defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted," *id.*

[4] MCM, supra note 1, Mil. R. Evid. 801(d).

[5] *See* Dutton v. Evans, 400 U.S. 74, 86 n. 16 (1970); George Fisher, Evidence 334-336 (2002).

Figure 1

Admissibility Check

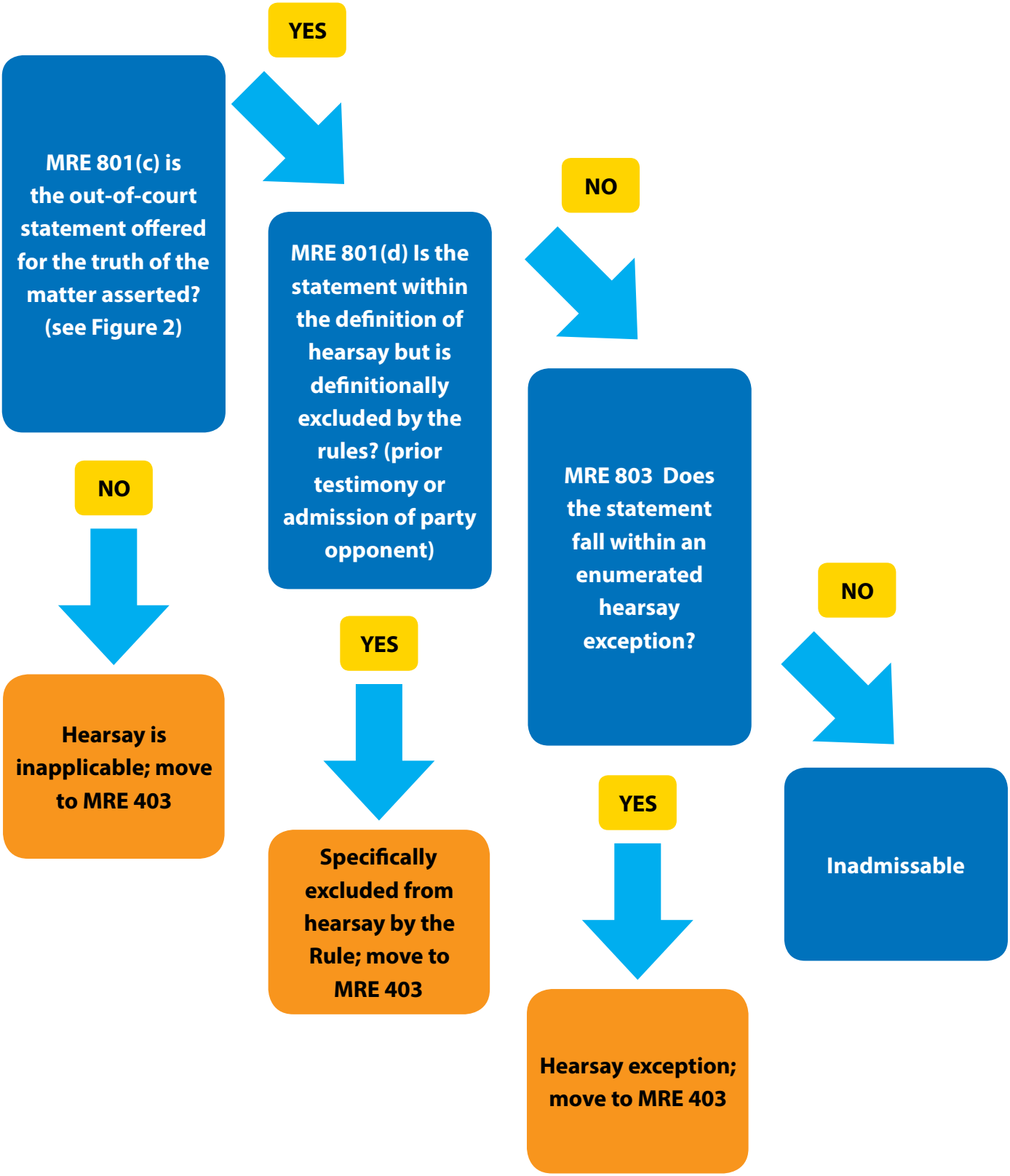


Figure 2

MRE 801(c) Analysis Cheat Sheet -"Is it hearsay?"

Statement is Not an Assertion

How to Identify: Ask "could this be a lie." If the statement cannot be classified as a truth v. lie, it is not hearsay.

Model Objection Response:

"Your honor, the rules and case law recognize that non-assertive oral conduct is not hearsay. In this case there is no assertion or declaration that is capable of being proven true or false. Such statements are not hearsay. Specifically, I cite U.S. v. Thomas, 451 F.3d 543, 548 (8th Cir. 2006); U.S. v. Rodriguez-Lopez, 565 F.3d 312 (6th Cir. 2009); U.S. v. Chung, 659 F.3d 815 (9th Cir. 2011); U.S. v. White, 639 F.3d 331 (7th Cir. 2011)."

Offered for Another Truth

How to Identify: Ask "is the truth asserted by the out-of-court declarant the same truth I am trying to prove?" If not, it is not hearsay.

Model Objection Response:

"Your honor, I am not offering this statement for its truth. The declarant asserted a truth that is immaterial to the reason I am offering the statements. The rules and federal courts hold that a statement is not hearsay if it is offered by a party who believes the statement to be untrue, or where the statement is offered to prove another matter. Specifically, I cite U.S. v. Cesareo-Ayala, 2009 U.S. App. LEXIS 17353, 18 (10th Cir. 2009)."

Effect on the Listener

How to Identify: Ask "Does this statement explain why somebody else did something?" If so, it is not hearsay.

Model Objection Response:

"Your Honor, we are not offering this statement for the truth of the matter asserted. Rather, it is offered to show why the witness took a subsequent action. It is settled that an 'investigating officer should not be put in the false position of seeming just to have happened upon the scene; he should be allowed some explanation of his presence and conduct.' and that is U.S. v. Cass, 127 F.3d 1218, 1223 (10th Cir. 1997) a 10th Circuit case, quoting McCormick on Evidence. The Navy-Marine Corp Court of Appeals accepted this same proposition in U.S. v. Combest 2011 CCA LEXIS 638 (USNMCCA 2011)."

treason, witnesses were produced who offered testimony regarding what they were told by out-of-court declarants who were not present at trial.[6] These out-of-court statements made by unavailable declarants resulted in the conviction of Sir Walter Raleigh. Based on academic research, it may be a suspect claim that Sir Walter Raleigh's trial was truly the watershed moment for the creation of the hearsay rule.[7] However, regardless of the true historical genesis, the common law's concern with hearsay was the ability of the fact-finder to judge the veracity of the statement without the declarant's presence at trial. We have all played the game of "telephone" as children where a statement is whispered to an individual at one end of a line of children, and each child passes along the statement to the next. When the statement is relayed to the last child, it emerges garbled and confused. This is the historical concern with hearsay: the more layers of declarants involved in relaying a truth, the more error is possible.[8] As Wigmore comments, when the ultimate source of the "truth" is not available for cross-examination, the veracity of the assertion is impossible to test.[9] Further supporting this view, the Supreme Court cited the presence of a witness and the opportunity for the fact-finder to observe a witness's demeanor as a "norm of Anglo-American criminal proceedings."[10] Put simply, the historical concern with hearsay is the potential inaccuracies of a statement resulting from the relaying of a "truth" that cannot be tested due to the absence of the "truth's" source. With this context, the definition of hearsay becomes clearer. What also becomes apparent is that many out-of-court statements bear no relation to the historical concerns that resulted in the hearsay rule.

WORDS THAT ARE NOT ASSERTIONS

Not all out-of-court words are "statements" under the hearsay rule. MRE 801(a) defines a verbal statement as "an oral or written assertion."[11] Black's Law Dictionary defines an assertion as "a declaration or allegation."[12] In light of this definition, endless possibilities come to mind of verbal words that are not assertions. For instance, involuntary expressions of pain or surprise ("ouch," "whoa!") are not assertions. Courts have also interpreted words that are not assertions more broadly than simply involuntary expressions. In *Headley v. Tilgham*, the 2nd Circuit addressed an out-of-court statement made by an unidentified Jamaican caller to an alleged drug dealer facing trial for drug crimes.[13] The unidentified caller asked the Defendant "Are you up? Can I come by? Are you ready?"[14] The Court held that those words did not amount to a statement offered for the truth of the matter asserted under hearsay.[15] Again, consider that hearsay is historically concerned with the offering of a statement for its truth. What is the ultimate truth asserted by "Are you up? Can I come by? Are you ready?" In these statements, there is no attempt to convey any "truth" about the defendant being a drug dealer. Indeed, unbeknownst to the declarant, his words amount to helpful pieces of circumstantial evidence about the potential dealings of a drug criminal. Juxtapose this with the statements used against Sir Walter Raleigh in his trial. In that case the declarants were offering statements that they knew full-well would damn the criminal defendant. The witnesses offered those statements to prove the very truth of the matter asserted.

The Sixth Circuit addressed an analogous situation in *United States v. Rodriguez-Lopez*.[16] In that case, undercover officers arrested a defendant and then answered ten phone calls on the defendant's cell

[6] *See* D. Jardine, Criminal Trials 411 (1832).

[7] *See* Jeremy A. Blumenthal, *Comment: Reading the Text of the Confrontation Clause: "To Be" or Not "To Be,"* 3 U. Pa. J. Const. L. 722, 731-733 (2014); Kenneth W. Graham, *The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One*, 8 Crim. L. Bull. 99, 100 n.4 (1972).

[8] *See* Fisher, *supra* note 5, at 339.

[9] John Henry Wigmore, Evidence in Trials at Common Law 251 (James H. Chadbourn ed., rev. ed. 1974) ("[The concern with hearsay] is that the many possible sources of inaccuracy and untrustworthiness which may lie underneath the bare untested assertion of a witness can best be brought to light and exposed, if they exist, by the test of cross-examination. But this test or security may in a given instance be superfluous; it may be sufficiently clear, in that instance, that the statement offered is free enough from the risk of inaccuracy and untrustworthiness, so that the test of cross-examination would be a work of supererogation.").

[10] Maryland v. Craig, 497 U.S. 836, 846 (1990).

[11] MCM, supra note 1, Mil. R. Evid. 801(a).

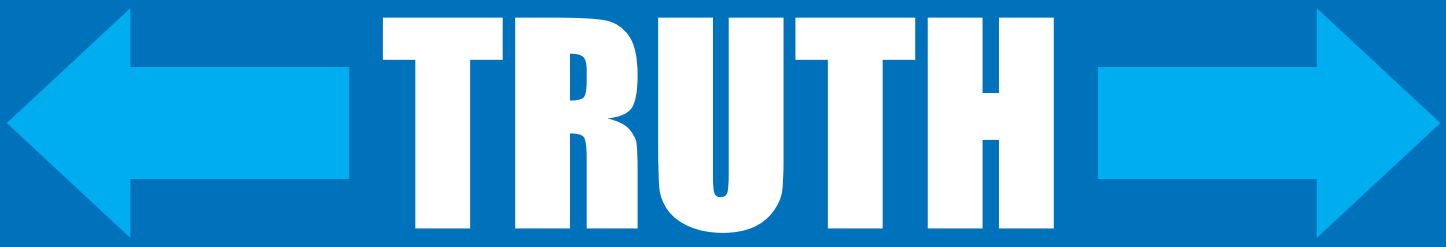
[12] *Assertion,* Black's Law Dictionary (Third Pocket Edition, 2006).

[13] 53 F.3d 472 (2d Cir. 1995).

[14] *Id.* at 477.

[15] *Id.*

[16] 565 F.3d 312 (6th Cir. 2009).



phone following the arrest.[17] Each of the 10 callers solicited drugs from the undercover officer who was using the defendant's cell phone.[18] These callers, unaware that they were speaking to a police officer and not their drug dealer, made such statements as "I want some heroine," and "Bring me some heroine."[19] Bringing these callers to court was impossible as they could not be located. When the officer testified as to the nature of these calls, it drew a hearsay objection from the defense. The court allowed the testimony over the defense's objection. The Sixth Circuit upheld the trial judge's ruling and reasoned

> [W]hatever their grammatical mood, the statements are not hearsay because the government does not offer them for their truth. Indeed, if the statements were questions or commands, they could not—absent some indication that the statements were actually code for something else—be offered for their truth because they would not be assertive speech at all. They would not assert a proposition that could be true or false.[20]

[17] *Id.* at 313-314.

[18] *Id.*

[19] *Id.*

[20] *Id.* at 314.

The federal circuits also hold "Questions and commands generally are not intended as assertions, and therefore cannot constitute hearsay."[21] Again, commands and questions assert no ultimate truth. An illuminative example comes from the Fifth Circuit, where the court held the command "go to the front door" was not an assertion that invoked the hearsay rule.[22] Similarly, a question is not hearsay because it is not asserting a truth. The Sixth Circuit held that a "Question is typically not hearsay because it does not assert the truth or falsity of a fact. A question merely seeks answers and usually has no factual content."[23] Now think to yourself for a moment of all the questions or commands that appear to be hearsay to the average litigant, but in fact, are non-assertive statements under the law. A command or question that contains no opinion of truth could hurt an accused's case at trial, but is nevertheless admissible.

[21] United States v. Thomas, 451 F.3d 543, 548 (8th Cir. 2006).

[22] United States v. Ned, 637 F.3d 562, 569 (5th Cir. 2011).

[23] United States v. Wright, 343 F.3d 849, 866 (6th Cir. 2003). *See also* Quartararo v. Hanslmaier, 186 F.3d 91, 98 (2d Cir. 1999) ("An inquiry is not an 'assertion,' and accordingly is not and cannot be a hearsay statement."); United States v. Lewis, 902 F.2d 1176, 1179 (5th Cir. 1990); United States v. Vest, 842 F.2d 1319, 1330 (1st Cir. 1988).

Do not confuse words that are not assertions with MRE 803(1), "present sense impression."[24] A present sense impression and non-assertive words often bear a resemblance to each other because they are typically made not to offer an opinion but instead as contemporaneous words said without forethought. They are different, however, and must be separated in the litigator's mind. A present sense impression must be an observation or description contemporaneous to the described or observed event. Such an impression may be offered for the truth of the matter asserted (e.g., "it's hot" to prove it was hot). In contrast, non-assertive words are offered because they contain no truth.

Perhaps the easiest way to spot whether out-of-court words are non-assertive is to ask "could this statement be a lie?"[25] A command or question cannot be categorized as a "truth" or "lie" and such words are not assertions under MRE 801(a).[26] For this reason, the military justice practitioner can skip the rest of the hearsay rules and analysis because the testimony offered is not hearsay.

[24] MCM, supra note 1, Mil. R. Evid. 803(1).

[25] Fisher, *supra* note 5, at 351.

[26] MCM, supra note 1, Mil. R. Evid. 801(a).

STATEMENTS OFFERED TO PROVE ANOTHER TRUTH

In some scenarios, a party will offer a statement to prove a truth entirely separate from the truth the declarant intended to endorse. Indeed, the proponent of the statement may know or believe the statement offered to be untrue. Such statements cannot be hearsay because they are not offered for the same truth the out-of-court declarant offered it for. In *United States v. Cesareo-Ayala*, the appellant contended that the lower court committed error by admitting hearsay statements against him at trial which were held over the telephone with another individual.[27] While the Tenth Circuit was unclear as to what statements the appellant challenged, they nevertheless performed a hearsay analysis of the telephone conversations.[28] As the Tenth Circuit analyzed the telephone conversations, they noted that some of the statements within the conversation were patently untrue, and known at the time by the declarant to be untrue, and thus not subject to the hearsay rule.[29] For instance, the statement made to the defendant after the defendant asked who the declarant was with, "a friend I ran into at the fuel station," when in fact the declarant was with police, did not invoke the hearsay rule because the statement could not be offered for its truth.[30]

Oftentimes, statements not offered for their truth are more difficult to detect. I will share a case of my own. A noncommissioned officer is on trial and accused of sexual assault. An important part of his defense is that the victim fabricated her alleged injury. During a pretrial interview with the defense, the victim states she suffered an injury during the assault at the hands of the Accused. She discusses her injuries at length and makes numerous statements such as, "He did this to me," (pointing to her injured wrist) and, "It hurts so bad I can't even pick up a piece of paper." This alleged injury is of interest to the defense because the Government provided a video-recording of the same victim's interview with police the day following the alleged assault. In that video, she used the "injured" wrist with ease: picked up objects, tied her hair in a bun, and made expressive hand motions with impunity. The victim's conduct and language regarding her injury in the pretrial interview, when viewed in conjunction with her conduct during the police interview, is damaging to the prosecution's case.

At trial, the defense seeks to offer the victim's statements during their pretrial interview regarding the victim's wrist injury in conjunction with her interview with the police the day following her allegation. The defense plays a video of her police interview (with the sound turned off) in order to demonstrate her free hand movements and lack of any injury. Next, the defense offers the testimony of the defense paralegal who witnessed the victim's statements regarding the extent and pain of her alleged injuries from the assault. The defense paralegal takes the stand and, predictably, when asked "and what did Ms. [Victim] say about her injury," trial counsel immediately rises to his feet and confidently offers a hearsay objection.

At first blush, the statements appear to be hearsay. However, consider the *purpose* for which the defense is offering this statement. It is not to prove the truth of the matter asserted by the declarant. Rather, it is to prove an untruth by the declarant. The historical concerns regarding hearsay are not present; there are no concerns regarding the opportunity

[27] United States v. Cesareo-Ayala, 576 F.3d 1120, 1128 (10th Cir. 2009).

[28] *Id.*

[29] *Id.*

[30] *Id.*

to determine the veracity of the offered statement because that statement's truth is not why it has been proffered into evidence. Consider for a moment how self-destructive this piece of evidence is for the defense if the defense counsel is offering it for the truth of the matter asserted; the defense is admitting evidence that the accused "did this" to the victim. With that realization, it is obvious that the statements are not offered for the truth of the matter asserted. In the above-referenced case, the judge allowed the paralegal's testimony, over the objection of trial counsel.

Do not confuse non-hearsay statements offered to prove *another* truth with MRE 801(d)(1),[31] which deals with prior statements by the declarant-witness or MRE 613,[32] prior statements of witnesses. While statements offered to prove another truth, MRE 801(d)(1), and MRE 613 are all commonly used to discredit a witness's testimony, they are each very different legal animals. MRE 613 is a tool for impeachment. MRE 801(d)(1) are statements actually admitted for their truth because they are determined by the drafters to be sufficiently probative and reliable. Typically, MRE 801(d)(1) and MRE 613 are both prior statements that contradict a statement offered from the witness stand. In contrast, statements offered to prove another truth fall entirely outside of the hearsay rule because they are not offered for their truth to contradict. However, they certainly may contradict by implication, as in the example given above.

A common statement a party may wish to admit is a statement that explains why an individual took a subsequent action.

EFFECT ON THE LISTENER

A common statement a party may wish to admit is a statement that explains why an individual took a subsequent action. This is commonly referred to as "effect on the listener." The Government often seeks to introduce this evidence to explain why law enforcement took certain steps. The defense may wish to introduce such statements to prejudice the Government's investigation as failing to be thorough and investigate potentially exculpatory evidence. When offered for this purpose, such a statement is not hearsay; it is not offered for its truth.

It is settled that "An arresting or investigating officer should not be put in the false position of seeming just to have happened upon the scene; he should be allowed some explanation of his presence and conduct."[33] This position has been adopted by numerous federal circuits and endorsed by the United States Navy-Marine Corps Court of Criminal Appeals in an unpublished opinion.[34] This evidence is still subject to an MRE 403 balancing test to determine if the probative value is outweighed by unfair prejudice to the defense.[35] As trial counsel, be cautious with how effect on the listener is argued. If the Government argues effect on the listener for its truth, a mistrial may result.

Another example from my own litigation experience involved statements made by an accused I represented to a military investigator regarding why his urinalysis could have been positive for a metabolite of marijuana. The client stated to the investigator words to the effect of, "it must have been something in my vaporizer," to explain how he may have unknowingly ingested marijuana. As an accused, the statement was admissible against him as an admission of party opponent. However, in this case, it was the defense who sought to admit this statement into evidence through the investigator as we did not want our client to take the stand and testify. We offered the statement as non-hearsay and for the purpose

[31] MCM, supra note 1, Mil. R. Evid. 801(d)(1).

[32] MCM, supra note 1, Mil. R. Evid. 613.

[33] John W. Strong and Kenneth S. Broun, McCormick on Evidence 104 (West Group, 4th Edition, 1991).

[34] *See* United States v. Combest, 2011 CCA Lexis 638 (USNMCCA 2011); citing United States v. Cass, 127 F.3d 1218, 1223 (10th Cir. 1997); United States v. Reyes, 18 F.3d 65, 70 (2d Cir. 1994); United States v. Martin, 897 F.2d 1368, 1371 (6th Cir. 1990), *but see* United States v. Sallins, 993 F.2d 344, 346 (3d Cir. 1993) ("[C]ases abound in which the officer is allowed to relate historical aspects of the case, replete with hearsay statements in the form of complaints and reports, on the ground that he was entitled to give the information upon which he acted. The need for the evidence is slight, the likelihood of misuse great.").

[35] MCM, supra note 1, Mil. R. Evid. 403.

of effect on the listener. The judge was initially confused as to how this statement could be effect on the listener. Our theory was that the Government investigation failed to pursue credible leads in the case, such as testing our client's vaporizer to determine if it was indeed a source of unknowing ingestion. We were offering the statement for its effect on the investigator, that leads existed, and then demonstrated that the investigator did not follow those leads. We believed the lack of a serious government investigation was sufficient for reasonable doubt as to the client's guilt. Ultimately, the judge hesitantly agreed with our argument and the client's statement was admitted into evidence through the investigator. Ultimately, our creative argument as to why the statement was not hearsay resulted in a tactical victory. The lesson of this story is not to be afraid of creative arguments why a statement is not hearsay, before falling back on hearsay exceptions.

Do not confuse "effect on the listener" with MRE 803(3), "then existing mental, emotional, or physical condition."[36] MRE 803(3) is a contemporaneous statement describing a state of mind or condition as it is occurring. Effect on the listener is a statement that is offered to explain a subsequent action. This can be confusing because, frequently, a statement that is a "then existing mental, emotional, or physical condition" may also explain why the listener took a subsequent action. It can be both! In such a case, the trial practitioner has two arguments for the admissibility of the statement: (1) the statement is not hearsay due to the reason it is offered, and (2) if it is deemed hearsay, it falls under an exception. Military justice practitioners must always be aware of the potential arguments to be made that a statement is not hearsay due to actions that statements caused others to take.

CONCLUSION

Verbal hearsay is narrower than commonly understood. The military justice practitioner should never jump to a hearsay exception without first determining if the statement truly meets the definition of MRE 801(c). Adding to the confusion of the hearsay maze, the three common categories of statements that I identify are easily confused with hearsay exceptions. The litigator must grasp the difference between statements that are not subject to the hearsay rule because they are not statements offered for their truth and exceptions to the hearsay rule. With a clear understanding of the true definition and purpose of hearsay, the military justice practitioner is at an advantage over her opponent.

Your witness is on the stand and the examination is underway. You want the witness to give that morsel of testimony that will push your case over the top. No, you *need* the witness to give that juicy testimony that will push your case over the top. However, you have a problem: the witness's answer will likely be prefaced by "He told me…" or perhaps "I heard that…." You reach the critical juncture, and the witness begins by stating, "Well, he said…" "Hearsay!" objects your opponent. The judge looks over her glasses at you and asks "Counselor?" You respond firmly, "your honor, this statement is not hearsay because…" This is the moment your case is won. R

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[36] MCM, supra note 1, Mil. R. Evid. 803(3).

U.S. Air Force Illustratation/Thomasa Paul

Most of the changes can be broken into two major categories; those that impact Special Victims and those that impact all victims in general.

What's New in the Law for Victims

BY MR. MARK D. STOUP

In the last couple years there have been a significant number of changes in the law impacting victims and their interactions with the military justice process. This article will highlight most of those changes as they apply directly to victims. Most of the changes can be broken into two major categories; those that impact Special Victims and those that impact all victims in general. However, there are a few exceptions to those general categories and each will be highlighted below. The changes are most easily identified by addressing them as they relate to a particular stage in the military justice process. The changes can be placed into an investigation phase, a post preferral/pretrial phase, a trial phase, and finally a post-trial phase. It is easy to see that the military justice system will provide different responses to victims depending on the type of crime the victim alleges.[1]

As an example, two women who are assaulted by the same person at the same time and in the same location could receive significantly different levels of victim-service depending on the nature of the assault. Airman Samantha Vincett (SV) and her 17-year old civilian friend, Ann Batten (AB), attended an off-base party. SV was intoxicated and went to a bedroom to "sleep it off." AB witnessed the Accused enter the bedroom shortly after SV. After a couple minutes passed and the Accused did not come out of the room, AB decided to check on SV. When she entered the room she witnessed SV and the accused struggling on the bed. SV shouted "What are you doing?" and "Get off me!" AB rushed into the room and separated the two by pulling the Accused off of SV. The Accused kicked AB and pushed her against the wall as he left the room. The two women immediately reported the offenses to the Air Force

[1] In most cases a person is considered a victim based upon an allegation alone. Any situation that requires proof or applies a standard beyond a simple allegation will be identified as such.

Each victim needs to be viewed individually, and not simply placed into one of two categories; special crime victims and all other victims.

Office of Special Investigations (OSI) and eventually spoke with a mental health provider and a victim advocate. Their statements alleged a Sexual Assault against SV and an Assault Consummated by Battery against AB. Since SV is the victim of a sexual offense, she will have different interactions with the military justice system then AB. Furthermore, AB will be provided some additional protections as a victim because she is a minor and because she was the victim of a violent assault. This basic fact pattern should make it clear that each victim needs to be viewed individually, and not simply placed into one of two categories; special crime victims and all other victims. Finally, when in doubt, communicate with and help the victim!

INVESTIGATIVE PHASE—ALL CRIME VICTIMS

A victim is defined for most purposes as an individual "who has suffered direct physical, emotional or pecuniary harm as the result of the commission of an offense" under the Uniform Code of Military Justice (UCMJ).[2] All crime victims are afforded eight rights under Article 6b, UCMJ. Those rights are closely aligned with the ones provided in the Federal Crime Victims' Rights Act.[3] In short a victim's rights are: (1) to be reasonably protected from the accused; (2) to reasonable, accurate, and timely notice of specified hearings; (3) to not be excluded from any public hearing[4] (hearings listed in right number 2, above);[5] (4) to be reasonably heard;[6] (5) to confer with trial counsel (regarding hearings listed under right number 2, above); (6) to receive restitution; (7) to proceedings free from unreasonable delay; and (8) to be treated with fairness and with

[2] Victims' rights are defined under Uniform Code of Military Justice, art. 6b(b). UCMJ art. 6b(b) (2016), http://jsc.defense.gov/MilitaryLaw/CurrentPublicationsandUpdates.aspx. *See also* U.S. Dep't of the Air Force, Air Force Instr. 51-201, Administration of Military Justice, para. 7.3 (6 June 2013) [hereinafter AFI 51-201] (providing the definition pertaining to the Victim Witness Assistance Program); *see also* Manual for Courts-Martial, United States, R.C.M. 405(i)(2)(A) (2015) [hereinafter R.C.M.] (providing Article 32 Preliminary Hearing information) http://jsc.defense.gov/MilitaryLaw/CurrentPublicationsandUpdates.aspx; *see also* R.C.M. 1001(b)(1) (providing presentencing information).

[3] Federal Crime Victim's Right Act, 18 U.S.C. § 3771 (2004).

[4] One of the hearings is continuation of confinement. It is extremely important to keep focus on this right. This right will take effect very quickly in all cases involving pretrial confinement. Recall that within 72 hours of imposing pretrial confinement a Commander must decide wither to continue the confinement. *See* R.C.M. 305(h)(2); *see also* AFI 51-201, para. 3.2.3. If an accused remains in pretrial confinement, within seven days, a neutral and detached officer will conduct a hearing to determine if the accused will remain in pretrial confinement. R.C.M. 305(i)(2); AFI 51-201, para. 3.2.4. A victim must be notified of an accused pretrial confinement and release. AFI 51-201, para. 3.2.8. Victims of "sex-related offenses" now have the right to be present and to be heard at a pretrial confinement hearing. U.S. Dep't of the Air Force, Guidance Memo. 2015-01, Air Force Guidance Memorandum to AFI-51-201, Administration of Military Justice, para. 7.11.10 (30 July 2015) [hereinafter AFGM 51-201]. This is a monumental change. Pretrial confinement hearings often take place within days after an offense is discovered. Additionally, in these cases notice to the victim's counsel is to be provided in a timely manner to permit counsel the opportunity to prepare for the hearing. Wise trial counsel will coordinate with the SVC at the same time they coordinate with the ADC.

[5] A military judge or Preliminary Hearing Officer under art. 32, UCMJ, can only exclude a victim from a hearing if it is shown by clear and convincing evidence that the victim's testimony would be materially altered after hearing evidence at the hearing or proceeding. UCMJ, *supra* note 2, art. 32.

[6] At the following hearings: confinement, sentencing, and clemency and parole. *See also* R.C.M. 305(i)(2)(A)(iv); R.C.M. 305(i)(2)(c); R.C.M. 906(b)(8).

(On Next Page) U.S. Air Force Illustratation/Thomasa Paul

Victims' Rights

PROTECTION
To be reasonably protected from the accused

NOTICE
To reasonable, accurate, and timely notice of specified hearings

INCLUSION
To not be excluded from any public hearing

VOICE
To be reasonably heard

COUNSEL (CHOICE)
To confer with trial counsel for case input

RESTITUTION
To receive restitution

PROMPTNESS
To proceedings free from unreasonable delay

PRIVACY
To be treated with fairness and with respect for dignity and privacy

In a normal case, unless a victim proactively contacts the legal office, a victim likely won't receive any additional information about their rights or the legal process until trial counsel or a case paralegal contacts the victim to conduct a pretrial interview.

respect for dignity and privacy of the victim. Although these crime victim rights do not create a cause of action for a victim or subject a government agent to liability for breaching these rights; they do provide an enforcement mechanism with the Court of Criminal Appeals.[7] The rights also provide a baseline for timely and professional interactions between military justice personnel and victims. More importantly, many of the rights listed in Article 6b are enumerated and expanded upon in some other procedural or evidentiary rule or instruction.

Investigators provide ALL crime victims a DD Form 2701[8] which provides the victim with basic information about their rights as well as names and phone numbers for the victim to contact Victim Witness Assistance Program (VWAP) and prosecution personnel at the legal office.[9] In a normal case, a crime victim receives a DD Form 2701 at the time they report a crime. Unless a victim proactively contacts the legal office, a victim likely won't receive any additional information about their rights or the legal process until trial counsel or a case paralegal contacts the victim to conduct a pretrial interview. The victim is eventually provided additional information by way of a DD From 2702.[10] Of course, both the DD Form 2701 and 2702 are quite outdated as they relate to victims' rights. Although VWAP liaisons provide a great deal of information to victims of all types of crimes,[11] the timing of the VWAP liaison's contact with the victim under the a new "Special Victims' Capability" suggests that victims of sexual assaults like SV will likely be provided more timely and in-depth information that other crime victims. It is also likely that the information provided by this new program during the investigative phase will be more useful to the victim.

SPECIAL VICTIMS' CAPABILITIES

In our scenario, SV alleged that she was sexually assaulted by the accused, so OSI will initiate an investigation into the offense.[12] Within 24 hours of OSI determining that the allegation by SV is a sexual assault, OSI must notify the local legal office. The legal office will activate the Special Victim Investigation and Prosecution Capability (SVIP).[13] The SVIP is a team composed of four elements; an OSI case agent, a judge advocate, a paralegal, and a victim liaison.[14] All members of the team should be specifically appointed based on their

[7] UCMJ, *supra* note 2, art. 6b(e).

[8] AFI 51-201, para. 7.17.

[9] U.S. Dep't of Def., DD Form 2701, Initial Information for Victims and Witnesses of Crime (Aug. 2013).

[10] U.S. Dep't of Def., DD Form 2702, Court-Martial Information for Victims and Witnesses of Crime (May 2004).

[11] AFI 51-201, Section 7D, *Services Provided to Victims and Witnesses*.

[12] U.S. Dep't of the Air Force, Air Force Instr. 71-101, Vol 1, Criminal Investigations Program, para. 2.19 (8 Oct. 2015).

[13] AFGM 51-201, paras. 13.34, 13.37. The SVIP applies in general to cases involving unrestricted sexual assault, aggravated domestic violence and aggravated child abuse, *id.*

[14] AFGM 51-201, para 13.37.

training and experience.[15] An SVIP team is appointed and responds to all unrestricted reports of sexual assault as well as domestic assaults and child abuse involving aggravated assault with grievous bodily harm.[16] This new provision requires the trial counsel and victim liaison to ensure victims like SV are informed of their rights, provided with a comprehensive explanation of the justice process and provided with regular case updates.[17] These rights and notifications are a significant addition to what is required of other victims as discuss above. In general, SV will be informed of her right to consult with a Special Victims' Counsel (SVC)[18] and or a legal assistance attorney[19] as well as her ability to confer with the trial counsel prior to specified hearings.[20] FY16 NDAA also requires a victim be notified of the availability of an SVC before any Military Criminal Investigative Officer (MCIO) or Trial Counsel can interview or request statements from an individual entitled to SVC services regarding a sex-related offense.[21] In short, victims of sex-related offenses will be provided the opportunity to speak with an SVC, Victim Liaison, or TC much earlier in the process than other victims. Additionally, cases involving pretrial confinement may require immediate action because a victim not only has the right to be notified of the hearing; a victim also has a right to attend the hearing and to be heard at the hearing through counsel.[22]

There are two other minor changes impacting special victims. An SVC will be able to provide consultation to a victim in matters beyond a court-martial, to include Inspector General and Equal Opportunity complaints, Freedom of Information Act requests and Congressional communications.[23] In addition, a victim of a sexual assault can request their commander determine portion of a reporting period to be considered "non-rated" and, therefore, have that period of time excluded from an evaluation. The Air Force recognizes that a sexual assault can cause a victim to be less effective at work for potentially lengthy periods of time. This new provision recognizes the potential impact a sexual crime can have on a victim's work performance and allows commanders to exclude time when a victim is not performing normal duties after reporting a sexual assault.[24]

PRETRIAL PHASE—DISPOSING OF CHARGES

After a commander makes a decision on case disposition, the process moves into a pretrial phase relating to victims' rights. The majority of the issues in this phase relate to the victim's view on how charges or offenses should be disposed of and their level of participation at a Preliminary Hearing under Article 32, UCMJ. Every victim has been given the right to not testify at an Article 32, Preliminary Hearing.[25] Any victim, who exerts this right and chooses to not testify, will be declared "not available" for the purposes of the Preliminary Hearing.[26] Just because a victim is declared unavailable for a Preliminary Hearing does not mean they will be excluded from the hearing. The Article 6b right to not be excluded at a public hearing still applies. This right is reinforced by Rules for

[15] *Id.*, paras. 13.36, 13.37.2.1, 13.37.2.2, 13.37.3, 13.39.

[16] AFGM 51-201, para. 13.24.

[17] AFGM 51-201, para. 13.41.

[18] SVC and legal assistance eligibility are currently outlined in U.S. Dep't of the Air Force, Air Force Instr. 51-504, Legal Assistance, Notary and Preventive Law Program, para. 1.3 (27 Oct. 2003)(C3, 24 May 2012). At the time of this article's publication, AFI 51-504 was being updated. The updated version of the AFI is expected to outline legal assistance and SVC eligibility in separate paragraphs. Until the publication of an updated instruction, there will be some inconsistency regarding sexual assault services provided to Department of Defense (DoD) civilians. Sexual Assault Prevention and Response services are currently provided to DoD civilians pursuant to a Memorandum from Major General Gina M. Grosso, USAF, Director, Sexual Assault Prevention and Response (25 August 2015). SVC services are not currently provided to all DoD civilians as a matter of course. SVC services can pre provided to DoD civilians who are victims of a qualifying offense committed by a person who is subject to the UCMJ. Until the new instruction is published, SVC services will be considered on a case-by-case basis as an exception to policy. The National Defense Authorization Act for Fiscal Year 2016 allows SecDef or the Service Secretary to waive eligibility requirements under 10 U.S.C. § 1044(a)(7) to allow a DoD civilian employee who is a victim of a sex-related offense access to Special Victims' Counsel. National Defense Authorization Act for Fiscal Year 2016, Pub. L. 114-92 § 532 (2015) [hereinafter FY16 NDAA].

[19] AFGM 51-201, para. 7.11.5.2, 13.40.

[20] R.C.M. 405(i)(2); R.C.M. 806(b)(3).

[21] FY16 NDAA §534. This NDAA provision was effective immediately, *id.*

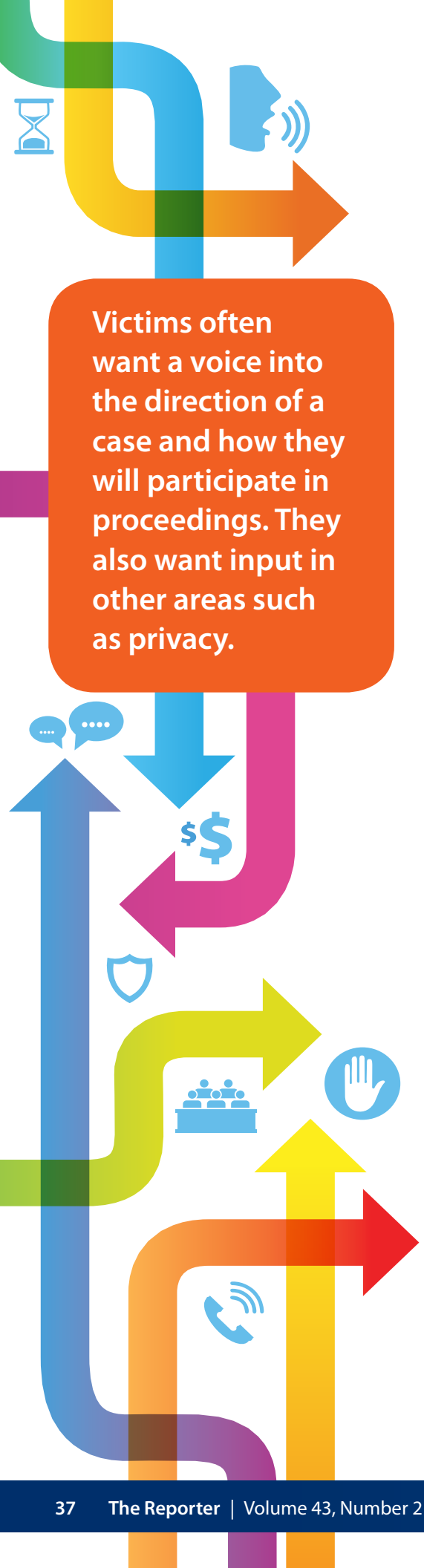
[22] UCMJ art 6b(a)(2); AFGM 51-201, para. 7.11.10.1.

[23] FY16 NDAA § 533.

[24] U.S. Dep't of the Air Force, Air Force Instr. 36-2406, Officer and Enlisted Evaluations Systems, para. 3.3.10.2 (2 Jan. 2013) (C3, 30 Nov. 2015).

[25] R.C.M. 405(i)(2)(B).

[26] R.C.M. 405(g)(1)(C). *See also* AFGM 51-201, para. 4.1.7.3.



Victims often want a voice into the direction of a case and how they will participate in proceedings. They also want input in other areas such as privacy.

Courts-Martial (R.C.M.) 405, so a victim is still allowed to have access to the Preliminary Hearing regardless of their "unavailability."[27] Along those same lines, a Preliminary Hearing Officer (PHO) can declare a victim unavailable if the victim declines to testify and then the PHO can consider other forms of evidence from that victim other than sworn testimony.[28] Finally, the fact that a victim was unavailable to testify at a Preliminary hearing or that the victim refuses to submit to a pretrial interview does not in itself equate to exceptional circumstances in order to require a deposition.[29] Both victims in our case, SV and AB, could decide to attend the entire Preliminary Hearing without testifying and without automatically being forced to submit to a deposition.

There have been some changes to the Military Rules of Evidence (MRE) that apply at a Prelimary Hearing. The privileges from Section V of the MREs have applied at a Preliminary Hearings under R.C.M. 405 for quite some time. The victim advocate-victim privilege was added to Section V and it applies at a Preliminary Hearing, with one exception; the Constitutional exception, does not apply.[30] It is important to note the definition of a victim for MRE 514 purposes. This victim right does not cleanly fit into one of the two main victim categories. A person who suffers direct physical or emotional harm as a result of a sexual or violent offense is considered a victim under MRE 514.[31] Since the definition includes victims of a violent offense, AB would be able to invoke the privilege as desired in the same manner as SV.

The final benefit conferred to all victims during this phase of proceedings, is that all victims can obtain a copy of the Article 32 recording.[32] The rule doesn't require legal offices to transcribe the recording or to provide it in any particular manner. It simply states that upon written request from the victim or counsel that the victim will be provided a copy of or access to the recording upon completion of the Preliminary Hearing report.

PRETRIAL PHASE—SPECIAL VICTIMS

At this point in the discussion some of the rules get a little bit trickier. One of the hallmarks of successful victim interaction is to give the victim "a voice and a choice." Victims often want a voice into the direction of a case and how they will participate in proceedings. They also want input in other areas such as privacy. Much of the focus in this phase is on those two points. Just as with other victims, Special Victims have the right to attend all open Preliminary Hearing

[27] R.C.M. 405(i)(2)(C). *See also* AFGM 51-201, paras. 4.1.9.10, 4.1.9.12.

[28] AFGM 51-201, para. 4.1.9.8.

[29] R.C.M. 702(a).

[30] R.C.M. 405(h)(3).

[31] Manual for Courts-Martial, United States, Mil. R. Evid. 514(b) (2015) [hereinafter M.R.E.], http://jsc.defense.gov/MilitaryLaw/CurrentPublicationsandUpdates.aspx.

[32] R.C.M. 405(i)(7); AFGM 51-201, para. 4.1.9.18.

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sessions.[33] SVCs can also exercise that right on behalf of their client. SVCs can attend all open sessions and all closed sessions involving their clients.[34] Regarding victims, most closed sessions at a Preliminary Hearing would likely involve discussions centered on the victim's sexual behavior or predisposition[35] and/or mental health privileges.[36] Both MRE 412 and 513[37] also specifically state that a victim's right to be heard includes the right to be heard through counsel.[38] Practitioners should be aware that MRE 412 is not exclusive to sexual assault cases; instead it applies to proceedings involving an alleged sexual offense.[39] At a Preliminary Hearing, MRE 412 is treated similarly to MRE 514 as discussed above. It is fairly straight forward. Both rules are applicable;[40] however, the Constitutional exception does not apply at a Preliminary Hearing.[41] MRE 513 applies to all victims, not just to victims of sexual assault. The rule applies to any person seeking to keep communications with their psychotherapist private.[42] Applying the psychotherapist-patient privilege under MRE 513 is a bit more complicated than MRE 514. First, MRE 513 expanded the scope of the privilege. More people can be considered a psychotherapist than the previous version of the rule.[43] The new rule also removed the Constitutional exception[44] and adopted a four part test to determine production and/or admissibility.[45]

When it comes to a victim providing a voice into the disposition process, one rule has remained the same, R.C.M. 306(b). Paragraph (B) in the discussion has long charged commanders disposing of an offense to consider the willingness of the victim to testify. Commanders should still consider victim input when making a disposition determination. Practically speaking, in sexual assault cases, victim input is mandatory. Securing a victim's cooperation is essential to any case. At some point the government needs to have a cooperative victim in order to produce evidence. In sexual assault cases, there are also several new requirements designed to ensure victims have an opportunity to provide a voice and choice when commanders decide whether to charge sexual assault offenses. A new section was added to Air Force Instruction (AFI) 51-201, which details the pretrial processing of sexual assault allegations.[46] The rules now expressly state that the Special Court-Martial Convening Authority (SPCMCA) considering certain serious sexual offenses should consider the factors in the discussion listed under R.C.M. 306(b),[47] one of which is the views of the victim. Additionally, cases involving rape, sexual assault, forcible sodomy, and attempts that are referred to trial, must now be referred to a General Court-Martial.[48] Charges involving these qualifying sexual offenses that are not referred to trial fit into one

[33] R.C.M. 405(i)(2)(C). *See also* AFGM 51-201, paras. 4.1.9.10, 4.1.9.12.

[34] AFGM 51-201, para. 4.1.9.11.

[35] M.R.E. 412.

[36] M.R.E. 513.

[37] M.R.E. 412 and 513 are applicable beyond special crimes and special victims, but issues with these rules will almost always involve special crimes and victims. M.R.E. 412; M.R.E. 513.

[38] L.R.M. v. Kastenberg, 72 M.J. 364 (CAAF 2013) (recognizing the right to be heard through counsel as it applies to victims in the military justice system); *see also* M.R.E. 412(c)(2); M.R.E. 513(e)(2)).

[39] M.R.E. 412 applies to cases involving an alleged sexual offense, so the case doesn't necessarily have to be assaultive or nonconsensual. M.R.E. 412. For example, M.R.E. 412 could apply in an adultery, fraternization or unprofessional relationship case, *id.* Additionally, evidence victims generally desire to keep private is that which shows the victim's sexual predisposition, *id.* Sexual predisposition refers to things such as "mode of dress, speech, or lifestyle that does not directly refer to sexual activities or thoughts but may have a sexual connotation for the fact finder." *See* M.R.E. 412(d).

[40] R.C.M. 405(h)(2); AFGM 51-201, table 4.2.

[41] R.C.M. 405(h)(2); AFGM 51-201, para. 4.1.9.6.

[42] M.R.E. 513(a).

[43] M.R.E. 513(b)(2) (adding the words "or other mental health professional" to the list of people considered as psychotherapists; *compare* Manual for Courts-Martial, United States, Mil. R. Evid. 513(b) (2012) (not containing cited language).

[44] Manual for Courts-Martial, United States, Mil. R. Evid. 513(d) (2012). The words "when admission or disclosure of a communication is constitutionally required" were removed from the M.R.E. 513(d) and not reinserted in another portion of M.R.E. 513, *id.*

[45] M.R.E. 513(e)(3). In short, before ordering the production or allowing the admission of evidence a military judge or hearing officer must first conduct a closed hearing. Prior to compelling production or admitting the evidence, the burden is on the moving party to show by a preponderance of the evidence that there is 1) a factual basis demonstrating a reasonable likelihood that the records or communications would yield admissible evidence under an exception to the privilege; 2) that the requested information meets one of the enumerated exceptions under the rule; 3) the information sought is not merely cumulative of other available information; and 4) the party made reasonable efforts to obtain the same or substantially similar information through non-privileged sources. *Id.* Any ruling by the judge will be narrowly tailored to only the specific records meeting the enumerated exception, *id.* This is essentially the same test outlined in *U.S. v. Klemick*. U.S. v. Klemick, 65 M.J. 579 (N-MC. Ct. App. 2006). For a discussion on applying the 4-part test in MRE 513, see *DB v. Lipppert*, ARMY MISC 20150769 (Army Ct. Crim. App. 1 Feb. 2016).

[46] AFGM 51-201, Section 4E – *Processing of Sexual Assault Allegations.*

[47] AFGM 51-201, para. 4.16.

[48] UCMJ art. 18(c). *See also* UCMJ art. 56(b)(2).

Finally, with the injection of Special Victims' Counsel (SVC), military justice practitioners should contact SVCs representing a victim, not the victim.

of two categories; cases in which the General Court-Martial Convening Authority (GCMCA) and the Staff Judge Advocate (SJA) disagree on referring a charge (the SJA recommends referral) and cases in which the GCMCA and SJA agree to not refer a charge.[49] When the GCMCA decides to not refer a charge, but the SJA recommends referral, the case is sent to the Secretary of the Air Force for review.[50] When the GCMCA and the SJA agree to not refer a charge, the case is forwarded to the next GCMCA for review.[51] Both cases require, among other things, a certification that the victim was notified of the opportunity to express a preference as to the disposition of an offense being considered by the convening authority.[52] There is one additional provision that is easy to overlook. Victims of "sex-related offenses" have a right to express a preference as to whether the offense will be prosecuted by a court-martial or by a civilian court. The SPCMCA through the SJA, or designee, "shall solicit the victim's preference" on this issue.[53] In short, cases involving serious sexual offenses now require victim interaction well beyond past practices. In our case involving Amn SV, she will be given a formal voice into the decision to refer a sexual assault to trial.

Finally, with the injection of Special Victims' Counsel, military justice practitioners must also be very careful when dealing with a victim who is represented by counsel. In these cases, counsel should contact SVCs representing a victim, not the victim. First, the rules for professional responsibility make this clear.[54] In addition, in order to interview a victim of a sex related offense, the defense counsel is required to request the interview through the victim's SVC.[55] The victim also has the right to have the trial counsel, victim advocate, or SVC present during the defense counsel interview.[56] It is clear to see that the interactions SV will have with the military justice system will likely be much more significant than those of AB.

TRIAL PHASE

There are only a couple changes in the law that impact victims at trial, and the changes do not distinguish between types of victims with two minor exceptions. The two provisions that apply to specific categories of victims are, first, victims of an

[49] The offenses discussed here involve those forwarded to the GCMCA under UCMJ art 34 and R.C.M. 404(c). Not every allegation of rape, sexual assault or sodomy must be forwarded to the GCMCA. If the SPCMCA authority disposes of a qualifying offense at his or her level, the SPCMCA authority must provide written notice of the disposition action to the GCMCA within 30 days. *See* AFGM 51-201, para. 4.17.

[50] AFGM 51-201, para. 4.20.

[51] AFGM 51-201, para. 4.21.

[52] AFGM 51-201, para. 4.22.3, 4.22.5, 4.22.8.

[53] AFGM 51-201, para. 7.11.9. *See also* AFGM 51-201, para. 2.6.2.1.

[54] U.S. Dep't of the Air Force, Air Force Instr. 51-110, Professional Responsibility Program, para. 4.2 (27 July 2015) [hereinafter AFI 51-110].

[55] UCMJ art. 46b. *See also*, AFGM 51-201, Section 7I, *Defense Counsel Interview of Victim of Sex-related Offenses Under Article 46.* Recall also that FY16 NDAA §534 requires victims to be notified of SVC services prior to any MCIO or Trial Counsel interview. FY16 NDAA §534.

[56] AFGM 51-201, para. 7.27.

offense for which an accused is found guilty. Second, child victims are now provided protections to ensure their Article 6b, UCMJ, rights are respected.

All victims can generally attend the entire trial.[57] Two new sub-paragraphs were added to R.C.M. 806(b). They are the "right of victim to attend" and the "right of victim to confer." In short, a victim can only be excluded from trial proceedings if it is shown by clear and convincing evidence that the victim's testimony would be materially altered if the victim hears testimony of other witnesses. Victims also have the right to confer with trial counsel.[58] MRE 412, 513 and 514 are also applied in a similar way at both a Preliminary Hearing and at trial. The only difference is that the Constitutional exception to MRE 412 and 513 only apply at trial, not at the Preliminary hearing.[59] MRE 513 was amended and the constitutional exception regarding the mental health privilege was removed from the rule. Therefore, by rule, the MRE 513 constitutional exception doesn't exist in either a Preliminary Hearing or at trial.[60]

Perhaps the most noticeable victim right at trial is in the area of presentencing evidence. Victims of any offense, of which the accused has been found guilty, now have the right to be reasonably heard at a sentencing hearing relating to that offense.[61] This right is not dependent on whether the victim testified at findings or under R.C.M. 1001, so the victim will be called by the court-martial.[62] The victim can testify about the financial, social, psychological, or medical impact of the crime if it directly relates to or arises from the offense for which the accused was found guilty.[63] In addition, the victim can make a sworn or an unsworn statement if a copy is provided in advance to the trial counsel, defense counsel and the military judge.[64] In the past, a victim would only have provided evidence through trial counsel as evidence in aggravation[65] or as evidence in mitigation, offered through defense counsel.[66] Under the new RCMs, evidence presented by a victim is presented after the trial counsel presents its sentencing case.[67]

The other significant change in the law at trial relates to victims who are minors. Since the military judge is responsible for ensuring Article 6b rights of a minor victim are observed, the military judge will appoint a suitable individual to assume the rights of the minor.[68] Not all cases with a minor victim involve sex related offenses. For all cases with minor victims, practitioners must be aware of conflicts that could potentially arise. In every case, some adult will be present to look out for the best interest of the child. The actions of those appointed to represent the child will often strongly align with the child's best interest, but this might not always be the case. One significant area to understand is the actual relationship parties might have with a minor victim. These relationships can result in natural (and legal) friction points. First, an Article 6b representative assumes the rights of the child for the purposes of Article 6b, UCMJ.[69] An SVC represents the desires of the client[70] (not necessarily what is in the best interest of the client). In some cases, a Guardian ad Litem (GAL) could be appointed. A GAL represents the best interest of the child. It is easy to see how these differing interests could conflict with one another and cause issues in a case. Being aware of them, will go a long way to help ensure cases stay on track. The case involving a minor, like AB, should not present too many

[57] R.C.M. 806(b)(2). *See also* M.R.E. 615; R.C.M. 405(i)(2)(C).

[58] R.C.M. 806(b)(3).

[59] The 2015 version of R.C.M. 405(h)(2) removed the constitutional exception to M.R.E. 412 for consideration during the Preliminary Hearing. R.C.M. 405(h)(2). "Mil R. Evid. 412(b)(1)(C) shall not apply." *Id.* The M.R.E. 514 constitutional exception was not mentioned in the 2012 edition of R.C.M. 405. The 2015 version of R.C.M. 405(h)(3) states that "Mil. R. Evid., Section V, shall apply, except that Mil. R. Evid. . . . 514(d)(6) shall not apply." R.C.M. 405(h)(3); *compare* Manual for Courts-Martial, United States, R.C.M. 405(i) (2012) ("[t]he Military Rules of Evidence–other than Mil. R. Evid. 301, 302, 303, 305, 412 and Section V–shall not apply in pretrial investigations under this rule.")

[60] The fact that the constitutional exception was removed from the M.R.E. 513, does not necessarily mean that the exception no longer exists at trial. *See* Chambers v. Mississippi, 410 U.S. 248 (1973).

[61] R.C.M. 1001A.

[62] R.C.M. 1001A(a)

[63] R.C.M. 1001A(b)(2).

[64] R.C.M. 1001A(d), 1001A(e), 1001(e)(1).

[65] Manual for Courts-Martial, United States, R.C.M. 1001(a)(1)(A)(iv) (2012).

[66] *Id. at* (a)(1)(B).

[67] R.C.M. 1001(a)(1)(B).

[68] R.C.M. 801(a)(6). *See also* AFGM 51-201, para. 7.3.4.

[69] R.C.M. 801(a)(6)(A).

[70] AFI 51-110, para. 1.2(a).

problems since the minor victim is 17 years old and, therefore, presumed to be able to represent her own desires and interests. The younger the child is, the more difficult this can be to determine.

> The victim should be notified of their right to submit a Victim Impact Statement as soon as possible, which means "immediately after trial."

POST-TRIAL PHASE

There are only a few differences our two victims will notice in the final phase of a case. Most of the rights provided apply to all victims regardless of the offense. Previously, except for presentencing, rights were conferred based on an allegation. In the post-trial phase, a conviction is the most important distinction. The biggest change is in the area of victim input during clemency. It is called a Victim Impact Statement (VIS). The clemency VIS is different from a victim statements provided at presentencing. At presentencing, the correct terminology for a victim's input would be "testimony" or "evidence." During the clemency phase of a case, the document is called a "Victim Impact Statement." Recall, that prior to taking action on the findings and sentence of a case, the accused has a right to submit matters for the convening authority to consider.[71] VIS rules fit neatly into the preexisting clemency rules. A victim now has a right to have the convening authority consider their input in the form of a VIS.[72] The rule applies to any victim of an offense upon which the convening authority is taking action.[73] It is important for practitioners to understand how this process works in order to keep post trial processing moving. The victim should be notified of their right to submit a VIS as soon as possible, which means "immediately after trial."[74] For practical purposes, keeping in touch with a victim after trial might be difficult to do. Additionally, not all victims will have counsel, potentially making it even more difficult to collect a VIS in a timely fashion. The initial notification informs the victim they can submit a VIS 10 days after they receive the Recommendation of the SJA (SJAR) and, if applicable, the Record of Trial (ROT). Not all victims are entitled to a ROT when they are served the SJAR. Victims of crimes punishable under Art 120 receive a ROT after authentication if they testified at trial and the trial resulted in a conviction.[75] All other victims receive a ROT at their request after the convening authority takes action and Privacy Act material is redacted from the ROT.[76] Just like under R.C.M. 1105, a victim can get an extension of up to 20 days, upon good cause shown. The time frame to submit a VIS after a Summary Court-Marital is seven days after sentence is announced. Victims should understand that the VIS will be provided to the defense .[77] Victims might want to know if they get an opportunity so see what the accused submits for clemency prior to action. They often want to know what the accused is saying about the victim in their clemency matters. The answer is "no." The rules do not provide a process for victims to access the matters submitted by the accused. In order to ease victims' concerns, they should know that convening authorities are generally prohibited from considering character of the victim when taking action on a case.[78] Finally, victims now have the right to have their property returned to them after the completion of related proceedings.[79] Previously, evidence was returned after 5 years.

The final rights associated with victims deals with appellate rights. For the purposes of this article,

[71] R.C.M. 1105(b); R.C.M. 1107(b)(3)(A)(iii).

[72] R.C.M. 1105A. *See also* R.C.M. 1306(a)(1) (providing Summary Courts-Martial information); AFGM 51-201, para. 9.9.

[73] R.C.M. 1105A(b). The victim must also have suffered direct physical, emotional, or pecuniary harm, *id.*

[74] AFGM 51-201, para. 9.9.2.

[75] AFI 51-201, para. 7.12.16.

[76] AFI 51-201, para. 7.12.17.

[77] AFGM 51-201, para. 9.9.3.

[78] R.C.M. 1107(b)(3)(C). The convening authority shall not consider any matters that relate to the character of a victim unless such matters were presented as evidence at trial and not excluded a trial. *Id.* The rule doesn't prevent legal office personnel from telling the victim if the accused submitted matters relating to the victim.

[79] Carl Levin and Howard P. 'Buck' McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. 113–291 § 538 (2014) [hereinafter FY15 NDAA] (amending the provision in FY12 NDAA that required retention of physical and forensic evidence for five years).

appellate rights mean to appeal to the Air Force Court of Criminal Appeals and to file a writ with the same court. A victim's right to file a writ will typically be exercised after a PHO or Military Judge makes a ruling at a Preliminary Hearing or at trial. In essence, these final rights (to petition the Air Force court) take us back to where it all began, *LRM v. Kastenberg*.[80] The holding in that case was focused on MRE 412 and 513. In the shortest form, the issues in the case were whether or not a victim in a case had legal standing to appeal a ruling by a trial judge and if so whether or not a victim had the right to be heard through counsel on the matter. The Court of Appeals for the Armed Forces held in the affirmative for both questions. Although that seminal case still bears significance, the Military Rules of Evidence were amended to reflect the court's ruling. MRE 412, specifically states that the alleged victim must be afforded a reasonable opportunity to attend an MRE 412 hearing and to be heard through counsel. MRE 513 provides identical language on the point. The MREs provide a victim an opportunity to be heard, but the FY 2015 NDAA and the FY 2016 NDAA go one step further. The FY 2015 NDAA confers the right to a victim to file a writ of mandamus with the Court of Criminal Appeals to require a trial court to comply with the victim's rights under MRE 412 and MRE 513.[81] Finally, the FY 2016 NDAA amended Art 6b, UCMJ, to provide a victim a right to file a writ of mandamus to the Court of Criminal Appeals to require a Preliminary Hearing Officer or a court-martial to enforce victims' rights under MRE 412, 513, 514 or 615 and also to request the court quash an order to submit to a deposition.[82]

[80] L.R.M. v. Kastenberg, 72 M.J. 364 (CAAF 2013)

[81] FY15 NDAA § 535.

> Many victims complained that they were not given adequate information about the process and were not treated with dignity or respect.

CONCLUSION

The belief that the military justice system has ignored the struggles of sex assault victims after they have reported their victimization has gained traction in recent years. Many victims complained that they were not given adequate information about the process and were not treated with dignity or respect. Victims also wanted to provide input into the case and to have a choice about participating in an investigation and or trial. Congress was determined to address those concerns and took significant action to rectify them by passing sweeping changes in the four most recent NDAAs. The result is a number of changes in both substantive and procedural aspects of our military justice system as they relate to victims. The best way for justice practitioners to respond is to accept these changes and to aggressively implement them. These changes are law and are here to stay. Practitioners simply need to prioritize victim rights in a way they haven't done before. The most effective approach to address the broad range of legal changes impacting victims is to identity victims early and then openly communicate with SVCs, VWAP personnel, and victims because their input matters. R

[82] FY16 NDAA § 531. This section of the NDAA was effective immediately, *id.*

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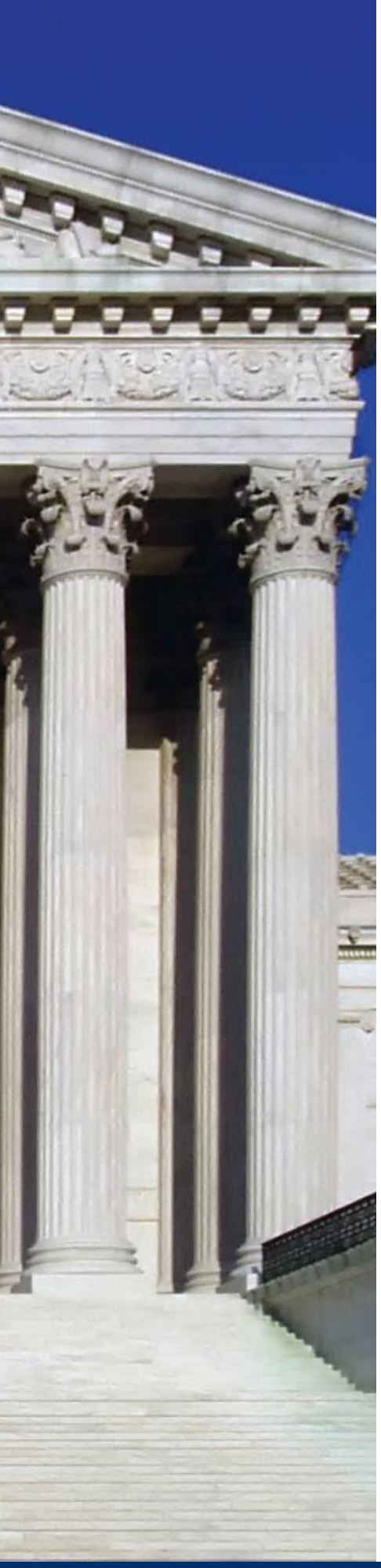
EQUAL JUSTICE UNDER LAW



With its decision in *Wong*, the Supreme Court opened up the Government to even more suits under the FTCA.

UNITED STATES V. KWAI FUN WONG:[1]

Why the Base Legal Office Needs to Remain Vigilant When Processing Tort Claims

BY MAJOR NATHANIAL G. HIMERT

On 28 July 1945, Lieutenant Colonel William F. Smith, Jr. was flying his B-25 Mitchell Bomber from Boston to New York's LaGuardia airport. Lieutenant Colonel Smith asked for clearance to land, but due to heavy fog and zero visibility, the air traffic controllers waved his plane off. Disoriented by the heavy fog, Lt Col Smith turned right, instead of left, as he passed the Chrysler Building and crashed into the north side of the Empire State Building between the 78th and 80th floors. In total, 14 people lost their lives that day. Roughly eight months after the incident the United States Government offered compensation to the families of the victims.[2] Some took the money, but others filed a lawsuit that eventually resulted in the passage of the Federal Tort Claims Act (FTCA).[3]

Prior to the passage of the FTCA, if you were wronged by the federal government, or more specifically by a federal employee acting within the scope of their employment, you had to seek relief, on an individual basis, from Congress. Can you imagine if every slip and fall victim had to petition their Congressman to get a bill passed and signed by the President that acknowledged liability on the part of the United States and compensated that victim? And you thought Congress was deadlocked now! John Quincy Adams, Abraham Lincoln, and Millard Fillmore all complained

[1] 135 S. Ct. 1625 (2015).

[2] Joe Richman, *The Day A Bomber Hit The Empire State Building*, National Public Radio (28 Jul. 2008), http://www.npr.org/templates/story/story.php?storyId=92987873.

[3] *Id.*

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When Congress waived sovereign immunity for certain tort claims they did not waive it entirely. They put limitations on not only ***what*** types of torts would qualify but also on ***when*** an individual could sue the federal government.

that during their tenures, Congress was spending an inordinate amount of time dealing with claims matters.[4] With Congress' waiver of sovereign immunity for certain torts through passage of the FTCA, what was originally left exclusively to the legislature now passed to all federal agencies and the federal district courts.[5]

To this day, the typical base office still processes many of these claims. The Air Force has thousands of employees and despite our best efforts some are negligent from time to time. Ensuring your base personnel are up to speed on the latest changes to the law in this area ensures both accurate and just adjudication of claims and saves the Air Force, and ultimately the taxpayer, money. In April of 2015, the Supreme Court decided an important issue that until that point had split the circuits. That issue was whether equitable tolling applied to the FTCA. Depending on where your base was located the Air Force (or more specifically the United States) may have been more exposed to FTCA liability. This article will provide a brief overview of the deadlines applicable to a FTCA claim, discuss the concept of equitable tolling,[6] particularly in light of the Supreme Court's recent decision in *United States v. Wong*, and review why the base legal office must continue to remain vigilant when processing these tort claims.

FTCA DEADLINES[7]

Let's start our discussion with a brief overview of the deadlines that are in play when discussing a FTCA claim. When Congress waived sovereign immunity for certain tort claims they did not waive it entirely. They put limitations on not only *what* types of torts would qualify[8] but also on *when* an individual could sue the federal government. Congress stated that "a tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate federal agency within 2 years after such claim accrues or unless action is begun within 6 months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented." [9] That means that unless a claim is filed, with the correct agency (in this case the Air Force), within two years of accruing, then the claimant cannot later sue the federal government. Similarly, if the claimant has not filed suit within 6 months of the date the agency mailed its final denial letter, the claimant is barred from suit.

Seems simple, right? Yes and no. First, we need to determine when a claim accrues for purposes of counting

[4] Paul Figley, *Ethical Intersections and the Federal Tort Claim Act: An Approach for Government Attorneys*, 8 U. St. Thomas L.J. 347 (2011).

[5] Federal Tort Claims Act, Pub. L. No. 79-601, 60 Stat. 842 (1946) (codified in scattered sections of 28 U.S.C.).

[6] For purposes of this article the term "equitable tolling" also includes "equitable estoppel."

[7] *See* Claims and Tort Litigation Division, Tort Law and Claims Action Officer Handbook, Domestic Edition (2014) for a detailed discussion on the procedure of processing a tort claim.

[8] *See* 28 U.S.C. § 2680 (2012).

[9] 28 U.S.C. § 2401 (2012).

time.[10] For our purposes, accrual simply means when the injury occurred. The next hurdle we have to jump over is whether the 2 year and 6 month statutes of limitations set by Congress is jurisdictional or simply procedural. If it is procedural, then the time limits are subject to equitable tolling, which could potentially extend the time to present a claim or file suit well beyond the limits set by Congress in 28 U.S.C. § 2401.[11] However, if the statute of limitations is jurisdictional, then once those time limits pass, regardless of the reasons why or the harsh outcome that may result, the claimant is "forever barred" from filing suit.

WHAT IS "EQUITABLE TOLLING" ANYWAY?

The United States Supreme Court defines equitable tolling in several ways. In *Wong*, they said it was a pausing of "the running of a limitations statute in private litigation when a party 'has pursued his rights diligently but some extraordinary circumstance' prevents him from meeting a deadline."[12] In *Irwin v. Department of Veterans Affairs*, the Court stated that equitable tolling was available "in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or when the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass."[13] "Though his dereliction be only incidental, a generally diligent plaintiff who files late because of his own negligence typically may not invoke equity to avoid the statute of limitations."[14] At the end of the day the burden will be on the claimant to show that he pursued his rights and that some extraordinary circumstance stood in his way.[15]

So what would then qualify as "extraordinary circumstances" thus allowing a court to toll a statute of limitations? While there is no exhaustive list that contains every possible situation where equitable tolling may apply, the most common situation where a court would invoke such a remedy would be if an agency concealed its federal status.[16] Similarly, if an agency is in discussions with a claimant and lulls that individual "into believing the issue would be resolved without need of a formal challenge to the agencies' decision," then equitable tolling may also be applied.[17] Equitable tolling may also be available if a claimant is unable to file their claim on time due to mental illness.[18] Courts however will typically not invoke equitable tolling if the reason a deadline is missed is due to negligence on the part of a claimant's attorney.[19] Courts will also *typically*[20] not extend equitable tolling to a situation where a claimant simply does not know that an organization receives federal funds and is thus subject to the FTCA.[21]

Now that we are all refreshed on the doctrine of equitable tolling, we must determine if it is even applicable to the FTCA. In *Irwin*, the Court held that there was a rebuttable presumption that time bars in suits between private parties could be equitably tolled.[22] The Court continued and

[10] United States v. Kubrick, 44 U.S. 111 (1979) (noting a plaintiff must simply know of existence and probable cause of the injury for a claim to accrue).

[11] 28 U.S.C. § 2401 (2012).

[12] *Wong*, 135 S. Ct. at 1631 (quoting Lozano v. Montoya Alvarez, 134 S. Ct. 1224, 1231-1232 (2014)).

[13] Irwin v. Department of Veterans Affairs, 498 U.S. 89 (1990).

[14] S.R. v. United States, 555 F. Supp. 2d 1350 (S.D. Fla. 2008).

[15] Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005).

[16] Arteaga v. United States, 711 F.3d 828 (7th Cir. 2013).

[17] *See* Strich v. United States, 793 F. Supp. 2d 1238 (D. Colo. 2011) (finding equitable tolling is appropriate when Forest Service's conduct in several years following establishment of a trailhead lulled the plaintiff into inaction and led him to believe there would be a solution to the dispute).

[18] *See* Harris v. United States, 2015 U.S. App. LEXIS 17266 (11th Cir. 2015); Barrett v. Principi, 363 F. 3d 1316 (Fed. Cir. 2004); Carelock v. United States, 2015 U.S. Dist. LEXIS 110955 (S.D. N.Y. 2015).

[19] Gayle v. United States Postal Service, 401 F.3d 222, 227 (4th Cir. 2005) ("Many attorney mistakes are innocent in that they involve oversights or miscalculations attributable in some part to the sheer press of business. To accept such mistakes as a ground for equitable tolling, however, would over time consign filing deadlines and limitations periods to advisory status.").

[20] *See* Santos v. United States, 559 F.3d 189 (3d Cir. 2009) (despite the clinic indicating on its website that it received federal funding, and despite the clinic doing nothing to affirmatively mislead the claimant of its federal status, court found equitable tolling justified when claimant correctly identified negligent healthcare providers, performed a public-records search and determined they were members of the clinic and claimant's attorney visited the clinic, corresponded with the clinic and reviewed claimant's medical records).

[21] *Arteaga*, 711 F. 3d at 834 (claimant failed to identify clinic as receiving federal funds for over five years after child's birth. Clinic did not hide its federal status, indicated as much on its website and claimant, and claimant's attorneys, failed to exercise due diligence in determining clinic's potential federal status).

[22] *Wong*, 135 S. Ct. at 1630 (quoting Irwin v. Department of Veterans Affairs, 498 U.S. 89, 95-96(1990)).

stated that the same rebuttable presumption of equitable tolling should also apply to suits against the United States, under a statute waiving sovereign immunity.[23]

So the FTCA is clearly a statute that is subject to equitable tolling, right? Since the Supreme Court's decision in *Irwin*, federal circuits had been split as to whether the FTCA permits equitable tolling. Some courts found that when Congress passed the FTCA it actually opted to forbid equitable tolling. Courts reasoned that the time bars at issue in the FTCA were jurisdictional and thus did not allow for equitable tolling.[24] Roughly 15 years after *Irwin* the Supreme Court resolved the split on 22 April 2015, when it published its decision in *Wong*.

UNITED STATES V. WONG

FACTUAL BACKGROUND

United States v. Wong is actually two different FTCA cases that involved the same issue; whether the time limits found at 28 U.S.C. § 2401(b)[25] are jurisdictional. Ms. Wong's case involved a claim of false imprisonment by the Immigration and Naturalization Service (INS).[26] Ms. Wong presented her claim within the two years prescribed by 28 U.S.C. § 2401. However, prior to the INS's decision on her FTCA claim, she filed suit in federal district court asserting other non-FTCA claims.[27] Anticipating that the INS was going to deny her claim for false imprisonment, Ms. Wong moved, in November 2001, to amend her complaint and add her tort claim.[28] On 3 December 2001 the INS denied her claim.[29] This would have given Ms. Wong until 3 June 2002 to file suit in federal district court for her tort claim.[30] On 5 April 2002 the magistrate judge in her case recommended she be granted leave to amend her complaint but the district court did not adopt this recommendation until 25 June 2002.[31] Originally the district court held that equitable tolling applied to the time between the magistrate's recommendation and the district court's adoption and it excluded that time. However several years later, based on an intervening Ninth Circuit decision, the Government asked for reconsideration and the district court dismissed Ms. Wong's suit.[32] She appealed and an *en banc* Ninth Circuit held that the FTCA's 6 month requirement was non-jurisdictional and thus subject to equitable tolling.[33]

The second case involved a highway crash in 2005 that resulted in a death. A car in which Mr. Andrew Booth was riding crossed through a highway cable median barrier and crashed into oncoming traffic resulting in Mr. Booth's death.[34] Roughly a year later, a suit was brought against the State of Arizona on behalf of Mr. Booth's youngest son alleging wrongful death.[35] As that litigation was ongoing, the plaintiff discovered that the Federal Highway Administration (FHWA) approved the installation of the barrier involved in Mr. Booth's death even though they knew it had not been properly crash tested.[36] Then in 2010, over 5 years after the accident, a claim was presented to the FHWA pursuant to the FTCA.[37] The claim was denied, the plaintiff sued and the district court dismissed the case, claiming that the 2 years for filing an administrative claim had passed and that deadline was jurisdictional in nature.[38] The Ninth Circuit, relying on its recent decision in *Wong*, reversed that decision and applied equitable tolling.[39]

COURT'S ANALYSIS

In *Wong* the Government argued that the statute of limitations was in fact jurisdictional. For obvious reasons, the Government did not want § 2401 to be subject to equitable tolling. Finding such would open up the FTCA to what many circuits had previously found to be time barred claims, thus increasing the Government's overall exposure to suit. The Government

[23] *Id.*

[24] *See* In re FEMA Trailer Formaldehyde Prods. Liability Litigation, 646 F. 3d 185 (5th Cir. 2011).

[25] 28 U.S.C. § 2401 (2012).

[26] *Wong*, 135 S. Ct. at 1629.

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Wong*, 135 S. Ct. at 1629.

[32] *Id.*

[33] *Id.* at 1630.

[34] *Id.*

[35] *Id.*

[36] *Wong*, 135 S. Ct. at 1630.

[37] *Id.*

[38] *Id.*

[39] *Id.*

argued that the language "forever barred" found in 28 U.S.C. § 2401 was significant and was Congress's way of indicating a jurisdictional bar, that the FTCA was a mirror of the Tucker Act (whose time limits the Court has found to be jurisdictional) and that at the time the FTCA was enacted Congress intended all statutes of limitations to be jurisdictional.[40] The majority found these arguments unpersuasive and held that *Wong* was a "clear-cut case."[41]

Relying heavily on *Irwin* the Supreme Court held that Congress must "do something special, beyond setting an exception-free deadline, to tag a statute of limitations as jurisdictional and so prohibit a court from tolling it."[42] The majority found that when Congress enacted the FTCA they did nothing of the sort.[43] The Court found this for three main reasons.

1. The text of 28 U.S.C. § 2401 speaks only to a claim's timeliness, and not to a court's power.[44]

2. The Court reiterated its position that by separating the filing deadline (28 U.S.C. § 2401) from the jurisdictional grant (28 U.S.C. § 1346(b)(1)), Congress indicated that the time bar was not jurisdictional.[45]

3. There is nothing in the legislative history of the FTCA that would suggest the time bar found at § 2401 was jurisdictional.[46]

In addition to the reasons given above, the Court also discussed how the FTCA is different than other waivers of sovereign immunity, prominently the Tucker Act.[47] Both the FTCA's jurisdictional grant[48] and its definition of substantive liability[49] treat the United States as a private person.[50] The Court stated that "in stressing the Government's equivalence to a private party, the FTCA goes further than the typical statute waiving sovereign immunity to indicate that its time bar allows a court to hear late claims."[51]

WHY SHOULD I CARE?

I know what everyone is thinking, "that's all nice and good but we don't even do claims at the base legal office anymore." While it is true that many claims have been centralized and gone are the days of a claims section within your typical base office, installation legal offices still process some tort claims.[52] This means that your decision to pay or deny these claims still could mean the difference between the federal government paying a small

I know what everyone is thinking, "that's all nice and good but we don't even do claims at the base legal office anymore."

[40] *Id*. at 1632-1635.

[41] *Wong,* 135 S. Ct. at 1638.

[42] *Id*. at 1632.

[43] *Id.*

[44] *Id*.

[45] *Id*. at 1633.

[46] *Wong*, 135 S.C. at 1633.

[47] *Id*. at 1637.

[48] 28 U.S.C. § 1346(b) (2012).

[49] 28 U.S.C. § 2674 (2012).

[50] *Wong*, 135 S. Ct. at 1637-1638.

[51] *Id*.

[52] Claims and Tort Litigation Division, Tort Law and Claims Action Officer Handbook, Domestic Edition, 20-21 (2014).

amount of money, relatively speaking, or spending thousands in litigation.

Let's take, for example, a claim that comes into your office today. It is a claim alleging that in 2012 the claimant was rear-ended by a government vehicle (GOV), being driven by an Air Force Office of Special Investigations (OSI) agent in civilian clothes who was returning to base after coordinating with a local law enforcement agency off-base. At the time of the accident the claimant was driving to her civilian job off base and she is otherwise not affiliated with the military in any way. Her claim was in the amount of $3,872 for car repairs.[53] At first glance this would be an easy case to handle. The 2 years to file her claim have passed and therefore she is "forever barred" from asserting this particular claim. So you deny the claim and send her a letter, certified mail, informing her of the Air Force's decision.[54] The claimant decides not to seek reconsideration[55] and instead files suit in United States District Court 3 months after you mailed the letter. After some back and forth the United States Attorney handling the case discovers that at the scene of the accident the OSI agent identified himself as a member of the local police department. In addition, the agent gave the claimant the phone number to the police department for any questions she might have.

The claimant continually called the civilian police department trying to resolve her issues but they had no idea why she was calling. Eventually she filed what she believed was a valid lawsuit against the police department under a state statute. The suit was dismissed and eventually the claimant became frustrated after a year and a half and gave up.

A month before she filed her SF 95 with your office she was talking with someone at the dentist office while waiting to get her teeth cleaned and she learns that the car that hit her was probably *not* a police department owned vehicle but an Air Force GOV. She then files her claim. This is a fact pattern that very well might qualify for equitable tolling. In this case, for at least a year and a half, the claimant did everything she could to collect information about where to file her claim and to actually file her claim. It was only the deceit of the OSI agent that led to her missing the 2 year deadline. Now, instead of the Government spending $3,872 to pay the claim, thousands more dollars have been spent handling the claim in district court, not to mention the man hours that AFLOA/JACC and the U.S. Attorney had to spend on the case.

For these reasons base legal offices need to ensure that they are coordinating with JACC prior to settling or denying a claim that, on its face, appears to be outside the 2 year statute of limitations period.[56]

Now, admittedly these types of situations will be rare, especially because the base legal office is limited in the tort claims they can handle. However it should be noted that at the drafting of this article the 10th Circuit has already remanded a case involving the Air Force out of Cannon Air Force Base due to the district court dismissing an action in part because it had originally found the FTCA's time limits were jurisdictional.[57] Other courts are also reversing prior rulings based on *Wong*.[58] In short, this very well could become an issue at your base, so be prepared.

So how do you ensure that you are covering all your bases when dealing with one of these claims? First, as stated above, make sure to contact JACC to discuss the case. While cases potentially involving *Wong* may be rare, it is better to engage at the start then have to dig ourselves out of a hole years into litigation. Second, dive into the facts of a case. If a claim falls below the $5,000 threshold for transfer to JACC then the base is going to be solely responsible for investigating and adjudicating the claim. Do not just rely on what has

[53] *Id.* (stating that claims under $5,000 and not involving personal injury can be adjudicated by the base legal office).

[54] 28 U.S.C. § 2675(a) (2012).

[55] 32 C.F.R. § 842.90.

[56] Brad Hunt, *Supreme Court Decision Affects FTCA Claims*, AFJAGC Online News Service (United States Air Force Judge Advocate General's Corps, Washington, D.C.), May 27, 2015.

[57] Davis v. Sec'y United States Dep't of the Air Force, 601 Fed. App'x. 753 (10th Cir. 2015).

[58] *See* Reid v. United States, 2015 U.S. App. LEXIS 17065 (10th Cir. 2015); Bhatnager v. United States, 2015 U.S. Dist. LEXIS 106238 (N.D. Cal. 2015).

always been done but take ownership of the process. Even if the claim is above the threshold or involves a matter that would otherwise mandate transfer to JACC, the base legal office is still going to assist with evidence collection and investigation. If key information is not ferreted out and sent to JACC they may make a decision that will ultimately end up costing the federal government significant money. Due diligence in this regard will ensure that just and correct results come from all FTCA claims, regardless if *Wong* and equitable tolling are implicated.

Due diligence though should not be limited to post-incident investigation and processing. Claims, just like legal assistance, can benefit greatly from preventive practices. Ensuring your units are aware of the implications of their actions will ensure that your office, JACC, and, ultimately, a United States Attorney will not have to deal with a *Wong* issue. What does that mean? Informing your personnel that they should not try to "hide the ball" if they find themselves involved in potential negligent conduct is vital. Ensuring your base populace, both military and civilian, are being honest with claimants and pointing them in the right direction is the first step. One way to ensure this is done is to inform personnel of the Westfall Act.[59] Under the Westfall Act, Air Force personnel normally cannot be sued personally for their negligent acts committed while acting within the scope of their employment.[60] If personnel are informed that they will not be personally liable for their on-duty negligent conduct then the hope is they will be honest and less likely to be like our OSI agent above.

Diligence does not end there, however. Post-incident, in addition to remaining vigilant about investigating known claims, one of the ways to ensure your office can potentially head off a *Wong* type issue, particularly if your base education/preventive law efforts do not work, is to ensure you have someone always monitoring for potential claims. This seems obvious but many times base offices develop tunnel vision, particularly when justice is involved. Timelines and a conviction are foremost on our minds. However, oftentimes there is a claim that also springs from the same set of facts; a claim that justice personnel may not be looking for because they are focused on other issues. Many times this claim can come back to haunt an office once the court-martial is complete. Take our OSI scenario above. Maybe the Chief of Justice heard about the accident during their weekly meeting with OSI and even mentioned it during the weekly justice meeting, but because no one in the office was looking at the issue from a claims angle or bothered to follow up or ask any questions, the issue ballooned. Incorporating the claims attorney or paralegal into your weekly justice meetings, and ensuring they are receiving the Security Forces blotter are two very easy solutions that offices can incorporate.

CONCLUSION

With its decision in *Wong*, the Supreme Court opened up the Government to even more suits under the FTCA. However, upon further inspection it should become clear *Wong* will only apply to a very small number of cases, and if the base is doing their job in the claims arena, watching out for potential claims and educating personnel, hopefully *Wong* and equitable tolling will never become an issue. In the end if you think you have an equitable tolling issue ensure you are speaking early, and often, with JACC so you can get it right the first time. R

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[59] The Westfall Act, 28 U.S.C. § 2679 (2012) (enacted by Congress in response to Westfall v. Erwin, 484 U.S. 292 (1988)).

[60] Pursuant to 28 U.S.C. § 2679(b)(2) the Westfall Act does not extend to actions brought against employees for violations of the Constitution or for the violation of a statute of the United States under which such action against and individual is otherwise authorized.

Aerial photograph of the USS *Arizona* Memorial, located at Pearl Harbor in Honolulu, Hawaii.

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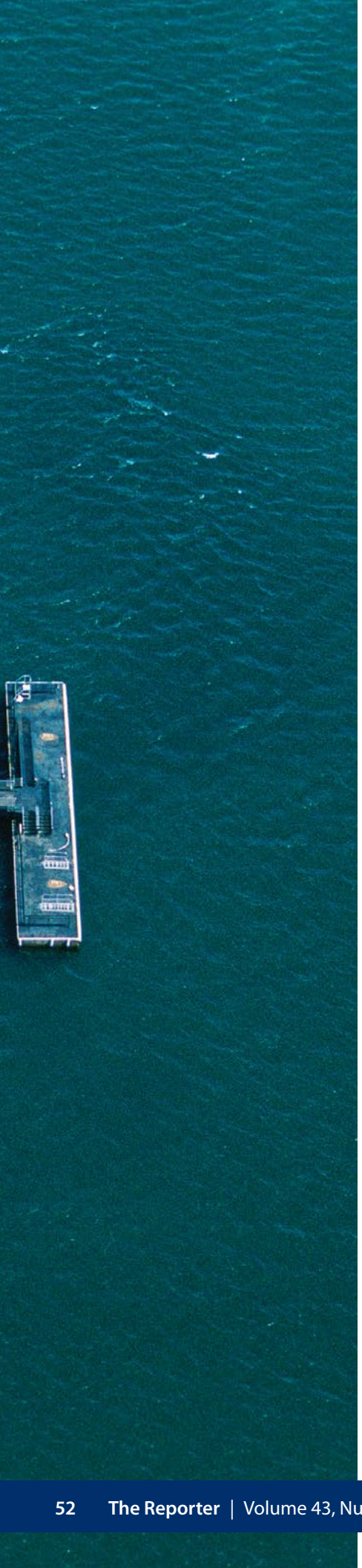

The attack on Pearl Harbor, which I witnessed as a young child. That event in large part shaped my desire to join the Air Force as a Judge Advocate.

Memories

from a Distinguished Member of the JAG Corps Family

BY MR. JUNG LOWE

I am currently an attorney and advisor working with clients in North America and Asia Pacific, particularly China, with a focus on international business, advance technology projects, personal business and family matters.[1] I became a Judge Advocate in 1958, and as a former member of the Judge Advocate General's Corps, I was encouraged by retired and current members of the JAG Corps family to share some memories and thoughts with you, including my recollection of the attack on Pearl Harbor, which I witnessed as a young child. That event in large part shaped my desire to join the Air Force as a Judge Advocate.

[1] My interests include protecting intellectual property and organizing international networks of high-technology business ventures and trade partnerships between holders of intellectual property and manufacturers who would benefit from access to the intellectual property. I also have executive administration experience in low-income community economic and business development. My own professional and business activities included work as President of AmericAsia Global Law, Ltd., Chairman of the Society of Manufacturing Engineers (SME) NanoManufacturing Technical Group, as well as Member and Advisor with the SME Rapid Technologies and Additive Manufacturing Community (including 3D printing) and as Chairman of International Business & Economic Management Corporation (IBEM).

MEMORIES OF THE ATTACK ON PEARL HARBOR

Witnessing the attack on Pearl Harbor was a very significant event in my life. December 7, 1941 was a beautiful day in Honolulu with crystal clear skies. My family's humble two-story home was built on the side of a mountain during the height of the Depression. Like a typical nine-year-old boy in Honolulu, I was enjoying time out

in the yard around my home that Sunday morning. With the sun at my back and looking to the west, billows of smoke caught my eye. At first I thought there must be one of the occasional military exercises going on at Pearl Harbor. After the intensity of the explosions and fire grew I realized no military practice or ceremony could explain the chaotic scene unfolding before me. I stared intently, wondering what the real explanation could be, and observed small dots in the sky. They seemed to be moving in every direction. I realized the small dots were military aircraft.

My sister was listening to Honolulu public radio when the announcer reported Japanese aircraft were attacking Pearl Harbor. I was amazed and astonished by the report. I sat there in my yard watching the attack for many hours. I could not imagine how an enemy force was able to make it to Hawaii, and particularly how it was able to attack an established military base of the United States. My father, who served in the Navy in World War I, was also surprised by the attack and concerned about what it might mean for our nation. But, I was too young and foolhardy to be afraid. I was confident that if the Japanese mounted a ground attack on Hawaii I could flee to the hills and evade them.

That night we had to find materials to cover the windows of our home as Hawaii was put under a total blackout. No one could drive around the island or even leave their home at night for several weeks, and we would have to black out our windows for a couple of years into the war. The morning after the attack I got up and went outside, seeking some normalcy after the chaos of the day before. To my astonishment I again saw a plane, but this one flew much closer than the planes I saw attacking Pearl Harbor. As it drew closer and closer I could see the red sun that would cause rage in the heart of American service members over the course of the war. The plane flew slowly in a circle around the mountain and drew so close I could see the pilot and co-pilot, even their flight caps and goggles. At the time, I did not know why a Japanese aircraft would be flying so close to our home, but later realized it was probably trying to assess the damage from the attack on Pearl Harbor.

The USS *West Virginia* and the USS *Tennessee* after the Japanese Attack on Pearl Harbor. Official Navy Photo. Released by Department of Defense

GROWING UP AFTER PEARL HARBOR

Even though I was a young boy, the events of December 7, 1941 profoundly impacted me. I developed a very mature realization that life can be unexpectedly dangerous with deadly results. That day also gave me a special sense of the importance of security and self-defense. I did not want to grow up to be somebody who could be exposed needlessly to unexpected attack without being prepared. That sense first motivated me to develop my own personal marksmanship and also peaked my interest in serving in the military as my father had before me.

At Roosevelt public high school in Honolulu I joined the Army Junior Reserve Officer Training Corps (ROTC) program and became an active member of its rifle team. I liked learning the skills of handling and employing a firearm. For me, the rifle symbolized the attitude of self-defense I wanted to maintain. Later at Coe College, in Cedar Rapids, Iowa, I joined the Air Force ROTC program. I again enjoyed being on the rifle team. Our team excelled and won the William Randolph Hearst collegiate Air Force ROTC national championship award in 1953 for the first time in the school's history. Many years later when I returned to the school to receive the Alumni of the Year Award, I learned our national championship remained the only one in the school's history.

After graduating from Coe College I started my law school studies in Chicago. I spent one year there before transferring to Yale Law School, where I completed my law degree with a focus on international law. After finishing law school I went back to the University of Hawaii for post-graduate studies in the school of engineering and additional courses in the Air Force ROTC program. All through law school I maintained a dual interest in both law and engineering, something that served me well throughout my life. After completing this stage of my formal education I received my commission into the Air Force as a second lieutenant in 1958.

MY AIR FORCE CAREER

When The Judge Advocate General's Corps assessed me I was immediately promoted to the rank of first

lieutenant. The Air Force saw fit to send this Hawaii native up to the northern cold of Loring Air Force Base in Limestone, Maine. Loring was a Strategic Air Command B-52 Stratofortress base at the height of the Cold War. My desire to be engaged in the defense of my nation felt very fulfilled as I watched the nuclear-armed bombers sit alert and launch at a moment's notice. As an additional duty I served as the Officer of the Day about once or twice a year, a responsibility all young officers shared. That meant I got to drive a big blue station wagon with a bright flashing red light around the base.

One of my primary duties as Officer of the Day was to pick up incoming Stratofortress air flight crew members in the middle of the night, even during heavy snow. I distinctly recall one night of waiting at the end of the long runway. I saw the incoming lights of the Stratofortress. The plane rolled up close to my car. I watched the crew come out from underneath the cockpit. They all got into my car without speaking a word. I could tell they were exhausted and fatigued, carrying suitcases with their secret documents. I drove them to the air base headquarters. No words were exchanged. No words were needed because I could imagine what they had been through for the past many hours. What crossed my mind was that if this Cold War ever got hot, some of these young men would not have come home at all.

Of course my primary duty at Loring Air Force Base was to serve as an Assistant Staff Judge Advocate (ASJA). In those days ASJAs were also assigned as defense counsel. One particular case I recall involved a young Airman charged with assault and battery of an officer. This was my first general court-martial and I had a lot of learning to do very quickly. The Airman's wife, an attractive young lady, had gone to the base hospital and the physician was unusually attentive to her. She went home upset and after hearing about it, her husband, the young Airman, rushed to the hospital, arriving close to midnight. He asked for the physician, who came out to the waiting room of the hospital. The doctor testified during the court-martial that he suddenly found himself on his back on the floor of the waiting room.

During the trial I asked the doctor "Were you struck by the defendant?" The doctor did not say, "Yes, I was struck." He simply repeated, "I fell to the ground, and I saw myself on the floor looking up at the Airman." In preparation for the case, I found out there was a witness, who was in the waiting room reading a magazine at the same time the Airman met the doctor. I had arranged for a champion U.S. Air Force boxer, who happened to be on base, to be a witness. I called the boxer as a witness and asked, "Is it possible that a man standing in a quiet waiting room could be hit or struck by another man and therefore fall immediately to the floor without making any sound that could be heard by another witness in the same room?" The boxer answered emphatically, "No way!"

Despite the fact that the witness sitting in the waiting room testified he had not heard anything at the time of the alleged assault, the Airman was convicted of assault and battery. Upon getting the report of the conviction, I immediately appealed to the higher command. During the clemency review, the conviction was overturned for lack of evidence. I gained quite a positive reputation in the brig and a significant demand arose for my services, but fortunately I received orders to Johnson Air Base in Japan before being overwhelmed.

LASTING IMPACTS OF SERVICE

The Air Force allowed me to exercise my two favorite intellectual fields – the law and engineering. I served as the advisor to an accident investigation board when an aircraft flown by a friend of mine had a brake failure and was damaged by the arresting cables. The Air Force also gave me opportunities to mature quickly. I remember that although I was a bachelor at the time I was assigned to provide both legal and personal counseling for distraught married couples, that experience helped me gain valuable insights that I think benefitted my own marriage. My time in Japan also exposed me to extreme poverty; the nation had not yet recovered from the destruction of World War II. That experience developed a keen sense of empathy for those areas struggling with poverty. When I separated from the Air Force and returned to live in Hawaii, I assisted the Hawaii Legal Aid Society in organizing new small businesses for low-income persons to improve their living standards, and have continued to focus on developing networks of large and complex communities since then.

> My service in the JAG Corps was one of the happiest experiences of my life.

After serving on active duty, I went to the Massachusetts Institute of Technology to continue my education in engineering. The more time that passes since that date in 1961 when I left the Air Force, the more I realize what a great long-lasting opportunity the Air Force provided me and the impact it left on me. My service in the JAG Corps was one of the happiest experiences of my life. Now that I reflect on how it started with the attack on Pearl Harbor and how my life came full circle, it really gives me a sense of satisfaction and gratitude. To those still serving in the JAG Corps, you have my utmost respect. I hope you enjoy your journey and recognize not just the sacrifices but also the privileges of your service. R

Mr. Jung Lowe (photo previous page)

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COMBATING PROCUREMENT FRAUD

A JA Perspective

BY MAJOR NICOLE M. NAVIN AND TECHNICAL SERGEANT MATTHEW L. SHERMAN

There are numerous ways contractors can engage in fraud against the government.

On 27 July 2015, a husband and wife admitted to engaging in a scheme to defraud the Government of over $30 million. The duo created shell companies complete with phone lines and false identities in order to fraudulently obtain contracts set aside for small businesses and service disabled veteran owned businesses. From 2007 to 2013, the shell companies were able to wrongfully obtain government contracts on multiple U.S. installations, to include Camp Lejeune, North Carolina; Andrews Air Force Base, Maryland; Beale Air Force Base, California; and Langley Air Force Base, Virginia.[1]

On 8 December 2014, two defense contractors pled guilty to major fraud against the United States in connection with a contract to provide food and water to U.S. troops in Afghanistan.[2] The contractors were ordered to pay $288 million after it was discovered that they schemed to overcharge the United States to increase their profits.[3] The fraud resulted in a loss to the government of $48 million.[4]

These are some examples of procurement fraud that occurs on military installations. When the government contracts for goods and services, there is an expectation the terms of the

[1] Press Release, Dist. of Md. U.S. Attorney's Office, Husband and Wife Admit to Procurement Fraud Scheme and to Embezzling Employee Benefits (27 July 2015), http://www.justice.gov/usao-md/pr/husband-and-wife-admit-procurement-fraud-scheme-and-embezzling-employee-benefits.

[2] Press Release, Dept. of Justice, Defense contractor Pleads Guilty to Major Fraud in Provision of Supplies to U.S. Troops in Afghanistan (8 Dec 2014), http://www.justice.gov/opa/pr/defense-contractor-pleads-guilty-major-fraud-provision-supplies-us-troops-afghanistan.

[3] *Id.*

[4] *Id.*

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contract will be met. Trusting that contractors will adhere to the terms and conditions of a contract is pivotal to the continued functioning of the Air Force procurement and contracting enterprise. Unfortunately, some contractors violate that trust and engage in fraud to further their own personal interests.

There are numerous ways contractors can engage in fraud against the government. One way is to mislabel or misrepresent the origin of the products they are selling. A recent case involved a contractor who was awarded a contract to provide slippers to Air Force Academy cadets, with the solicitation requirement that the slippers be made in America. After delivery, the government discovered the slippers were actually made in China, but the contractor placed a "Made in America" label on the packaging to hide this fact. In this example, you may have asked yourself: if the slippers met all of the other required government specifications… does it really matter? The answer to that question is yes! The government must ensure that the integrity and transparency of the procurement process is upheld at all times. Furthermore, U.S. laws, such as the Buy America Act[5] and the Berry Amendment,[6] are specifically designed to promote the use of U.S. made products. In order for all contractors to be on an equal playing field, the acquisition process must be consistent and fraud must be identified and eliminated to the maximum extent possible.

THE ROLE OF THE UNITED STATES AIR FORCE ATTORNEY AND PARALEGAL

As an attorney or paralegal in the United States Air Force (USAF) you may be asking yourself: how is this relevant to me? The hard truth is that fraud exists and is prevalent throughout the Department of Defense. There is a good chance fraud exists, at some level, at any given base at any given time. For example, in FY13, the Department of Justice (DoJ) recovered more than $890 million in procurement fraud related primarily to defense contracts.[7] In FY15, the DoJ recovered more than $1.1 billion in fraud settlements and judgments related to government contracts and federal procurement.[8] Two of the most basic and critical factors that government employees need to possess in order to be successful in combating fraud are (1) having the awareness that fraud exists, and (2) knowing what common factors to look for to identify and prevent it.

Attorneys and paralegals can play a pivotal role in combating procurement fraud, not only by educating contracting professionals on the basics of fraud and the common indicators, but also by advising the Contracting Officer (CO) on the appropriate actions to take when fraud is ultimately discovered. It is imperative that once a CO suspects an element of fraud, he/she follows the Federal Acquisition Regulation (FAR) procedures. The FAR mandates the CO "refer the matter to the agency official responsible for investigating the fraud."[9] In addition to these mandatory reporting requirements, the FAR removes from the CO's authority "[t]he settlement, compromise, payment or adjustment of any claim involving fraud."[10]

[5] Buy America Act, 41 U.S.C. § 10a-10d (2009). The Buy American Act is another law that applies to the Federal Government that promotes the use of U.S. products. This law requires the Federal Government to purchase articles, materials, and supplies that have been mined, produced or manufactured in the United States for public use and contracts for construction, alteration, or repair of any public building or public work in the United States, unless an exception applies, *id.*

[6] Berry Amendment, 10 U.S.C. § 2533(a) (2015). The law restricts any funding made available to DoD from being used to purchase end items, components, or materials that are an article or item of food, clothing, certain types of fabric, such as cotton, silk, wool, and hand or measuring tools that are not wholly of U.S. origin, *id.* There are a number of exceptions to the regulation which can be found in DFARS 225.7002-2.

[7] Press Release, Dep't of Justice, Justice Dep't Recovers $3.8 Billion From False Claims Act Cases in Fiscal Year 2013, Friday, (20 Dec 2013), http://www.justice.gov/opa/pr/justice-department-recovers-38-billion-false-claims-act-cases-fiscal-year-2013.

[8] Press Release, Dep't of Justice, Justice Dep't Recovers Over $3.5 Billion From False Claims Act Cases in Fiscal Year 2015, (3 Dec 2015), http://www.justice.gov/opa/pr/justice-department-recovers-over-35-billion-false-claims-act-cases-fiscal-year-2015.

[9] FAR 33.209, 49.106 (2015).

[10] FAR 33.210 (2015).

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There are several types of procurement fraud remedies available to the government: criminal, civil, administrative, and contractual.

EDUCATION AND TRAINING

The attorneys and paralegals at the installation legal office have the most visibility on potential procurement fraud since they are at the ground level advising their respective contracting squadrons. The base contract attorney and paralegal can get involved by educating base contracting professionals on the basics of fraud, common fraud indicators, and the various types of remedies available.[11] Your local Air Force Office of Special Investigations (OSI) agents who handle procurement fraud matters would also be a helpful resource. Inviting OSI to the training emphasizes the "one team, one fight" concept. To effectively combat procurement fraud, it is paramount that the key players involved (contracting professionals, attorneys, and law enforcement agencies) work together to maximize the government's ability to obtain favorable results.

FRAUD REMEDIES

There are several types of procurement fraud remedies available to the government: criminal, civil, administrative, and contractual. The role of the Air Force attorney and paralegal will vary depending on the type of remedy pursued. The criminal statutes relating to procurement fraud fall under 18 U.S.C. and these include, but are not limited to: Conspiracy to Defraud,[12] False Claims,[13] False Statements,[14] Mail and Wire Fraud,[15] and the Major Fraud Act.[16] The violation of any of these statutes could lead to a fine and imprisonment up to 30 years, depending on facts and statute(s) violated.[17] Since the DoJ has jurisdiction in these cases, the USAF attorney and paralegal will likely fill a support role. They will act as a liaison between the Air Force and the DoJ fielding requests for documents and additional information.

Civil remedies for fraud will likely fall under the Civil False Claims Act.[18] Examples of acts which may constitute false claims include: knowingly submitting false claims for payment, knowingly making false statements to get a false or fraudulent claim paid, and submitting a false claim to decrease the payment owed to the government.[19] A civil penalty between $5,500 and $11,000 is authorized per false claim.[20] The role of the USAF attorney and paralegal, once again, is to support DoJ and act as a liaison between the installation contracting professionals and DoJ. One important provision of the Civil False Claims Act is an individual's ability to bring suit on behalf of

[11] *Fraud Red Flags & Indicators,* U.S. Dep't of Def.: Off. of Inspector Gen., http://www.dodig.mil/resources/fraud/ redflags.html (last visited 19 Feb. 16). *See also*, *Contract Law Field Support Center CAPSIL Learning Center*, A.F. Legal Operations Agency, https://aflsa.jag.af.mil/apps/jade/collaborate/course/view.php?id=1387 (last visited 19 Feb. 16) (restricted access database).

[12] 18 U.S.C. § 286 (2015).

[13] 18 U.S.C. § 287 (2015).

[14] 18 U.S.C. § 1001 (2015).

[15] 18 U.S.C §§ 1341-43 (2015).

[16] 18 U.S.C § 1031 (2015).

[17] 18 U.S.C. § 286, § 287, § 1001, §§ 1341-43, § 1031 (2015).

[18] Civil False Claims Act, 31 U.S.C. §§ 3729-33 (2015).

[19] 31 U.S.C. § 3729(a) (2015).

[20] *Id*.

the government. These cases are referred to as "Qui Tam"[21] cases. The individual bringing suit on behalf of the government is entitled to a percentage of any damages awarded to the Government.

There are various contractual remedies that fall within the CO's authority, such as set-offs, withholding payment,[22] termination for default,[23] and voiding the contract.[24] A set-off is when the CO has an invoice for payment from a contractor, but the contractor also has a debt against the Government. In those cases the CO will subtract the debt owed from any money due the contractor and pay the contractor any remaining balance. The base attorney would advise the contracting officer on these types of remedies and would review a Contracting Officer's Final Decision (COFD) to the contractor. It is important to note that the use of one remedy does not prevent the use of another type. Parallel remedies must be coordinated with all appropriate agencies involved. For example, if DoJ pursues criminal action against an individual or company, the Air Force may still take administrative action to suspend or debar the individual or company from conducting business with the government.

SUSPENSION AND DEBARMENT PROCESS

The Air Force attorney and paralegal may be significantly involved with the suspension and debarment process. These administrative remedies are actions taken by a Suspension and Debarment Official (SDO) to exclude or disqualify a contractor for a specific period of time from contracting with the government.[25] Debarment is an action taken by a SDO to exclude a contractor from government contracting for a specified period of time, usually not longer than three years.[26] Suspensions and Debarments are not punishments, but rather business determinations that a contractor is not a responsible entity and should be suspended or debarred. Responsibility is a term of art and is defined at FAR 9.104-1.[27] To be deemed responsible a contractor must, among other factors (a) have adequate financial resources to perform the contract, or the ability to obtain them; (b) be able to comply with the required or proposed delivery or performance schedule; and (c) have a satisfactory performance record and record of integrity and business ethics.[28] Suspensions and debarments are not as uncommon as you might think. In FY15, the Air Force suspended and debarred over 110 contractors.[29]

Suspensions and debarments are not as uncommon as you might think. In FY15, the Air Force suspended and debarred over 110 contractors.

[21] 31 U.S.C. § 3730.

[22] FAR 33.210 (2015) & AFARS 5109.406-3 (2015).

[23] FAR 49.4 & 12.403 (2015).

[24] FAR 3.7 (2015).

[25] FAR 2.101, 9.4 (2015).

[26] *Id.*

[27] FAR 9.104-1 (2015).

[28] *Id.*

[29] E-mail from Ms. Isabelle Cutting, Paralegal, Sec'y of the Air Force Office of Gen. Counsel – Civilian Pers. Div., to author (24 Nov. 2015, 15:04 EST) (on file with author). *See also*, *SAF/GCR – Contractor Responsibility and Conflict Resolution*, U.S. Dep't of A.F.: Off. of Gen.

The base legal office, with assistance from JAQK, should compile the suspension and debarment package, which includes the relevant evidence of the wrongdoing and written notification letters to the offending contractors. The templates for the written notification letters can be found on the JAQK CAPSIL Learning Center.[30] These packages will ultimately be reviewed and sent out by the SDO at the Office of the General Counsel, Contractor Responsibility (SAF/GCR). The offending contractors are given the opportunity to respond prior to the SDO's determination. If the SDO determines a suspension or debarment is appropriate, the contractor will be informed of the decision. Suspension and debarment information on a contractor can be found on the SAM website—System for Award Management.[31]

JAQK- THE CONTRACT LAW FIELD SUPPORT CENTER

The importance of educating yourself and contracting professionals on procurement fraud cannot be understated. The Fraud Remedies Branch within JAQK is dedicated to providing reach-back support to base-level and MAJCOM attorneys on matters pertaining to procurement fraud and is available to provide advice and assist the base legal office with drafting the suspension and debarment package. Furthermore, the JAQK CAPSIL Learning Center web page contains suspension and debarment information, templates, links to references, briefings, and checklists. In addition to the Fraud Remedies Branch, JAQK also has a Contingency Contracting branch; Enterprise, Specialized, and Commercial Acquisition Branch; and Field Support Branch. Combined, JAQK is responsible for providing full-spectrum contract law expertise to the JAGC and other contracting professionals throughout the Air Force. Don't hesitate to give us a call if you need further information. We're here to help!

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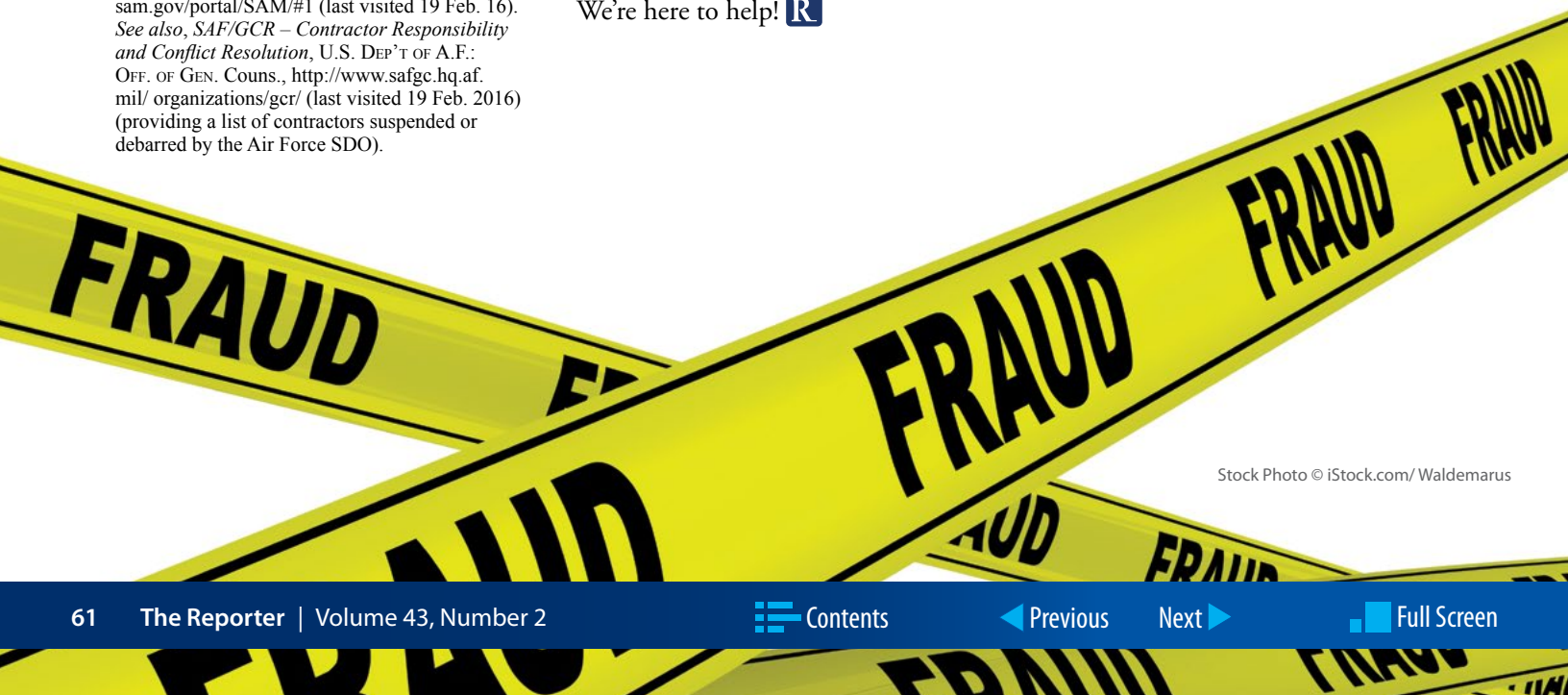
Counss., http://www.safgc.hq.af.mil/organizations/gcr/ (last visited 19 Feb. 2016).

[30] *Contract Law Field Support Center CAPSIL Learning Center*, A.F. Legal Operations Agency, https://aflsa.jag.af.mil/apps/jade/collaborate/course/view.php?id=1387 (last visited 19 Feb. 16) (restricted access database).

[31] System For Award Management, https://www.sam.gov/portal/SAM/#1 (last visited 19 Feb. 16). *See also*, *SAF/GCR – Contractor Responsibility and Conflict Resolution*, U.S. Dep't of A.F.: Off. of Gen. Couns., http://www.safgc.hq.af.mil/ organizations/gcr/ (last visited 19 Feb. 2016) (providing a list of contractors suspended or debarred by the Air Force SDO).



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YES, YOU'RE A LEADER!

A PRACTICAL GUIDE TO LEADERSHIP FOR REAL PEOPLE

BY JOHN CHARLES KUNICH & RICHARD I. LESTER , REVIEWED BY MR. THOMAS G. BECKER

The prolific writing partnership of Professor John Kunich and Dr. Dick Lester has again teamed up for an addition to the Kunich/Lester library of leadership guides, this one titled *Yes, You're a Leader! A Practical Guide to Leadership for Real People*. Both authors are familiar names and great friends of the Judge Advocate General's School–Kunich, a retired Air Force judge advocate and former faculty member here, and Lester, the long-time Academic Dean at the Ira C. Eaker Center for Professional Development at Air University, the JAG School's organizational home before the JAG Corps 21 strategic initiative moved us to the Air Force Legal Operations Agency. Kunich describes Yes, You're a Leader! as containing new material as well as revised, updated, and expanded content from Kunich and Lester's first collaboration, *Survival Kit for Leaders: An Interactive Way for a Leader to Become and Stay a Survivor* (2003).[1] The product is a diverse and interesting read (to me). Unfortunately, it is not as user friendly as other leadership guides and may not appeal to all readers, especially younger ones. Don't get me wrong–I enjoyed this book. As a (ahem) "mature" guy of the same generation as Kunich and Lester, and one who likes to win at trivia contests, *Yes, You're a Leader!* was right up my alley. However, as an educator for an organization with faculty and students of the same generation as my children (and younger), I worry the book may not hold the attention of those twenty- and thirty-somethings poised to take leadership roles in their organizations.

[1] The authors' other book is JOHN CHARLES KUNICH AND RICHARD I. LESTER, CUBS FANS' LEADERSHIP SECRETS: LEARNING TO WIN FROM A "CURSED" TEAM'S ERRORS (2009).

Notwithstanding its flaws, hanging with *Yes, You're a Leader!* has its rewards. The chapters on feedback and mentoring are first rate, to include nifty mnemonics (spelling out "feedback" and "mentoring," respectively) that help you remember what to do.

Although the subtitle of *Yes, You're a Leader!* promises it is a "practical guide," the book often strays from that approach. Along with excellent "do this, not that" advice delivered in an entertaining style, Kunich and Lester get bogged down with long discussions of historical and literary examples that illustrate their philosophy of leadership and decision making (along with their knowledge of history and literature, which is extensive). The capital offense here is a 22-page, single-spaced analysis of how Pascal's Wager-–a one-paragraph rumination from a 17th Century theologian explaining why one should not bet against the existence of God–translates into a decision matrix using, as an example, whether to buy fire insurance for your house. At various times while immersed in this chapter, I thought a more accurate subtitle for the book might be "A Zen Master's Guide to Leadership," or "An Actuary's Handbook for Decision Making." Kunich and Lester also spend a lot–and I mean **a lot**–of ink on Raoul Wallenberg, the Swedish hero of the Holocaust who rescued so many Hungarian Jews from Nazi death camps. There are no less than seven books on Wallenberg cited in the bibliography of *Yes, You're a Leader!*, all of which seem to be represented in the contents of this chapter. Like I said, I love this stuff. But I am not sure Kunich and Lester intend to target only folks like me.

Notwithstanding its flaws, hanging with *Yes, You're a Leader!* has its rewards. The chapters on feedback and mentoring are first rate, to include nifty mnemonics (spelling out "feedback" and "mentoring," respectively) that help you remember what to do. After each chapter, Kunich and Lester-–ever the professors–set out discussion questions just in case you want to use *Yes, You're a Leader!* as a text for your next leadership seminar. As an academic, I love it when someone does the lesson planning for me. The list of discussion questions might also come in handy in the event *Yes, You're a Leader!* is your monthly book club selection instead of, say, that latest vampire romance. And when the authors are not waxing long on Blaise Pascal and Raoul Wallenberg, there is a trove of great advice on acting like a grown-up leader, delegating, managing time, and writing succinctly (On this last point, the authors might have taken their own advice when writing about Pascal and Wallenberg. Just saying).

But if you are going to be long-winded from time to time, it is better to be entertaining. This is where Kunich and Lester earn big style points. As someone whose been known to abuse metaphors, I appreciate it when others do the same. It makes reading fun. Among the laugh-out-loud references are "*Fifty Shades of Grey* but without the sex," "a super-powered scapegoat," "a tricked-out Magic 8-Ball," "a volley of grappling hooks," "a tucked-in turtle," and many more.

If you have a short attention span and are looking for really, **really** practical advice and little more, probably the JAG Corps' publication *I Lead! Developing JAG Corps Leaders* is the one for you. But if you are looking for a Renaissance experience as well as real-world guidance, John Kunich and Dick Lester's *Yes, You're a Leader!* should be on your reading list. Maybe after you finish the vampire romance, but that is your call. R

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Parting Shot

The 45th Space Wing supported NASA's successful launch of Orbital ATK's Cygnus spacecraft aboard a United Launch Alliance Atlas V rocket from Space Launch Complex 41 at Cape Canaveral Air Force Station, Fla., March 22, 2016. The rocket carrying Cygnus cargo vessel OA-6 is a resupply mission to the International Space Station. (Courtesy photo/United Launch Alliance)

If you have a unique, funny, or poignant photograph of your travels in the JAG Corps for inclusion in "Where In The World?" please email the editors at AFLOA.AFJAGS@us.af.mil.

An Airman assigned to Barksdale Air Force Base, Louisiana, jumps into a pool during a Survival, Evasion, Resistance and Escape water survival class in Shreveport, Louisiana, March 15, 2016. The position reduces the chance of injury from any unseen obstacles underwater. (U.S. Air Force photo/Senior Airman Mozer O. Da Cunha)