Volume 43, Number 3

THE Reporter

afjag.af.mil/library

Education and Outreach for The Judge Advocate General's Corps

2016 this edition:

FREEDOM OF MOVEMENT

is a Critical Component of Any Successful Battle Strategy

The Reporter

2016 Volume 43, Number 3

The Reporter can be accessed online at
http://www.afjag.af.mil/library/
Cite as: *The Reporter*, Vol. 43, No. 3

Find us on: facebook

https://www.facebook.com/AFJAGS

About Us

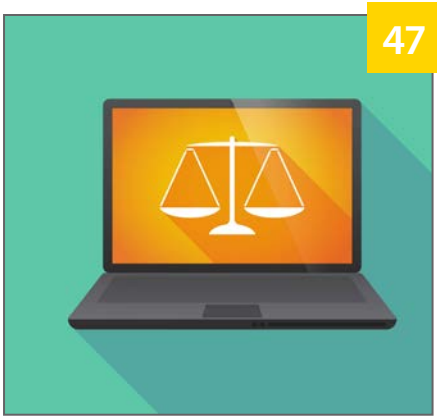
THE REPORTER is published by The Judge Advocate General's School for the Office of The Judge Advocate General, United States Air Force. **Contributions from all readers** are invited. Items are welcomed on any area of the law, legal practice, or procedure that would be of interest to members of The Judge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

VIEWS EXPRESSED herein are those of the author. They do not necessarily represent the views of The Judge Advocate General, Department of the Air Force, or any other department or agency of the United States Government. In addition, links provided do not necessarily represent the views of the author, The Judge Advocate General, Department of the Air Force, or any other department or agency of the United States Government. They are meant to provide an additional perspective or as a supplementary resource.

ITEMS OR INQUIRIES should be directed to The Judge Advocate General's School, AFLOA/AFJAGS, 150 Chennault Circle, Maxwell Air Force Base, Alabama 36112. (334) 953-2802 / DSN 493-2802. AFLOA.AFJAGS@us.af.mil

Contents

On the Cover: PACIFIC OCEAN (June 15, 2016) – The guided-missile destroyer USS Spruance steams in the Pacific while two B-52 bombers, assigned to the U.S. Air Force 69th Expeditionary Bomb Squadron, fly overhead following a joint-service targeting and bombing exercise. (U.S. Navy photo by Mass Communication Specialist Second Class Will Gaskill/Released)



Message from The Commandant

Freedom of movement is a critical component of any successful battle strategy. Our feature articles in this edition explore how the law, or the absence thereof, affects the United States' access to the global commons. Major Israel King offers a detailed examination of the United Nations Convention on the **Law of the Sea** and explains why it is relevant to today's Air Force operations. Meanwhile, Major Susan Trepczynski looks to the stars to examine international and domestic law as it pertains to **space activities** and how these laws fare in light of the burgeoning private space sector.

In addition to our featured articles, Major Kevin Gotfredson and Captain Micah Smith perform a rigorous analysis of sentencing relief statistics from the **Air Force Court of Criminal Appeals** for the past 10 years to determine if there is any truth to the assertion that overturning valid convictions is on the rise. Also, Major Christopher Baker and Technical Sergeant Christopher Sheffield take a hard look at the state of bad paper in the Air Force and whether the effects of a **letter of reprimand** have drifted too far from its intended purpose. Captain Thomas Burks rounds out this edition's military justice contributions by examining the interesting area of **immunized evidence** used at administrative discharge boards.

Major Douglas DeVore II, Captain Sarabeth Moore, Master Sergeant Jennifer Hendrix, and Senior Airman Nicole Mynatt provide this edition's legal assistance offering. They share lessons learned out of Al Udeid Air Base's legal office, where they utilized the **American Bar Association Pro-Bono Project** to better assist clients.

Finally, in fields of practice, Ms. Libbi Finelsen offers a primer on calculating **FAR Part 12 termination** for convenience settlements, and Major Aaron Jackson advocates for the virtues of **legal blog posting** in today's professional landscape.

The Reporter continues to benefit from the outstanding contributions from subject matter experts in the field. We encourage each of you to write and submit articles for publication. Through your efforts, the JAG Corps maintains its expertise within the ever changing world of law.

Securing Operational Freedoms in the Global Commons

The Importance of the U.N. Convention on the Law of the Sea to the U.S. Air Force

BY MAJOR ISRAEL D. KING

Why should we, as members of the U.S. Air Force, care about a treaty dealing with the law of the sea?

On 6 February 2015, President Barack Obama released his 2015 National Security Strategy.[1] In the midst of this document, while explaining his vision for assuring continued access by the United States to the global commons—the sea, the air, space, and cyberspace—President Obama urged the U.S. Senate to ratify the United Nations Convention on the Law of the Sea (UNCLOS), stating that the failure of the Senate to do so in years past "undermines our national interest in a rules-based international order."[2] This was not the first time that President Obama had given voice to his desire to ratify UNCLOS. Similar words are found in his 2010 National Security Strategy,[3] as well as in the testimony of those from his administration that testified during committee hearings on UNCLOS in 2012.[4] Going back further, we can find similar sentiments expressed in public statements made by Presidents Bill Clinton and George W. Bush,[5]

[1] Office of the Press Secretary, *Fact Sheet: The 2015 National Security Strategy*, The White House (6 February 2015), https://www.whitehouse.gov/sites/default/files/docs/2015_national_security_strategy_2.pdf.

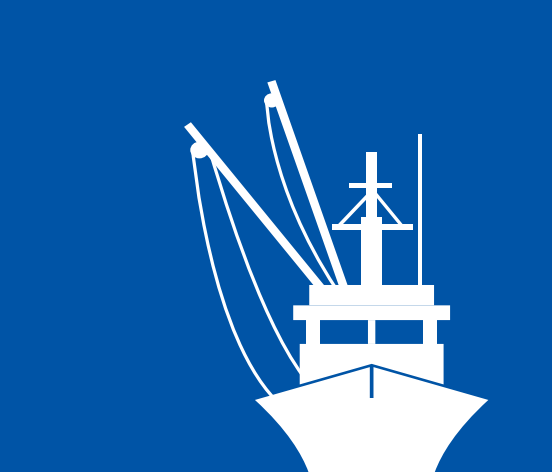
[2] President Barack Obama, National Security Strategy 13 (2015).

[3] President Barack Obama, National Security Strategy 50 (2010).

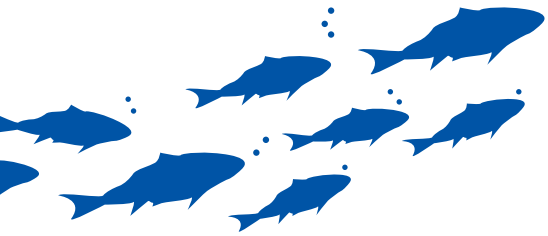
[4] *The Law of the Sea Convention: Hearing on Treaty Doc. 103-39 Before the S. Comm. on Foreign Relations*, 112th Cong. 7-12 (2012) (statement of Hillary Clinton, Sec. of State of the United States).

[5] Jim Lobe, *POLITICS-US: Bush Endorses Law*

Stock Photo © iStock.com/cosmin4000



In the mid-20th century, coastal nations became increasingly concerned about the exploitation of their maritime resources by instruments of other nations.



and in the committee hearing testimony of their advisors.[6] The Obama administration is now the third in a row in which the Senate has refused to give its advice and consent to UNCLOS, and with an election coming in just a few months, there may soon be a fourth. So, why is it that presidents of both major political parties have sought UNCLOS's ratification, only to have the Senate consistently refuse to do so? Better yet, why should we, as members of the U.S. Air Force, care about a treaty dealing with the law of the sea, and maybe even support efforts to ratify it? These are the questions that this article seeks to answer.

THE HISTORY OF UNCLOS

In the mid-20th century, coastal nations became increasingly concerned about the exploitation of their maritime resources by instruments of other nations.[7] For example, as commercial fishing fleets began to stray further and further away from their homeports in search of a good catch, coastal nations saw the rapid depletion of the coastal fish stocks that their native populations relied upon for employment and food.[8] At this same time, with the rapid expansion of worldwide commerce in goods such as oil and other hazardous materials, coastal nations became concerned about the threat of pollutants to their shares of the ocean's bounty.[9] To address these concerns, nations began to assert control over much larger parcels of ocean than they had under the historical "freedom of the seas" doctrine, which was predicated on the idea that the watery expanses of the world belonged to no one, and thus could be freely exploited by anyone.[10]

However, the rapid expansion of national claims to the world's ocean space created an environment ripe for conflict as those who stood to lose from such claims sought to continue their long-distance resource exploitation activities. For example, during the so-called "Cod War" between the United Kingdom and Iceland, when the Icelandic government threatened to use gunboats to capture British vessels caught fishing within 12 nautical miles of Iceland's coast, the British government sent warships to escort the British fishing fleet within the area.[11] Although no ships were sunk, Icelandic vessels did occasionally fire upon British fishing ships, and British and Icelandic warships on several occasions came close

of the Sea Treaty, Inter Press Service (16 May 2007), http://www.ipsnews.net/2007/05/politics-us-bush-endorses-law-of-the-sea-treaty/

[6] *See* S. Exec. Rep. No. 110-9, at 2-3 (2007).

[7] Div. for Ocean Affairs & the Law of the Sea, *The United Nations Convention on the Law of the Sea (A Historical Perspective) (1988)*, http://www.un.org/depts/los/convention_agreements/convention_historical_perspective.htm#Historical%20Perspective (last visited 14 June 2016).

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] The Nat'l Archives, The Cabinet Papers 1915-1988: The Cod Wars (UK), http://www.nationalarchives.gov.uk/cabinetpapers/themes/cod-wars.htm (last visited 14 June 2016).

to trading blows.[12] Out of a desire to avoid conflicts such as these, the United Nations (U.N.) called for the establishment of a Conference on the Law of the Sea to establish clear rights and responsibilities within different zones of the world's oceans.[13]

In 1958, this First U.N. Conference on the Law of the Sea concluded with the creation of four limited conventions governing activities in territorial seas, contiguous zones, continental shelves, and the high seas.[14] However, the conference did not result in a comprehensive treaty on the law of the sea, and those instruments it did produce failed to include agreements on several all-important questions, such as the accepted breadth of a nation's territorial sea.[15] While the U.N. convened a Second Conference on the Law of the Sea in 1960 to resolve these outstanding issues, the conference concluded after six weeks without any new agreements.[16] The U.N. would not call for another Conference on the Law of the Sea until 1973, in response to a plea from Malta's ambassador to the U.N. that the world's powers direct their attention back to the political instability and environmental degradation that the lack of a comprehensive treaty on the law of the sea had brought.[17] In 1982, after nine years of negotiations, the Conference participants submitted UNCLOS to the U.N.'s membership as a comprehensive instrument designed to supersede all treaties negotiated in 1958.[18]

Historically, the United States had long played a key role in negotiations over the law of the sea. It was a major player in the First U.N. Conference, and ratified all four of the 1958 conventions within three years of the Conference's conclusion.[19] It continued playing a major role in both the Second and Third U.N. Conferences, with the completion of a comprehensive law of the sea treaty being its principal goal.[20] However, once UNCLOS opened for signature, President Ronald Reagan opted not to sign it, on the belief that the provisions of Part XI dealing with deep seabed mining were inconsistent with aspects of U.S. political and economic policy.[21] That said, President Reagan asserted the United States would follow all other provisions of UNCLOS as if it had signed it.[22] This status quo would last until 1989, when a call by the U.N. General Assembly for more universal participation in UNCLOS led the U.N. Secretary General to initiate a new round of negotiations designed to bring industrial nations such as the United States into the UNCLOS framework.[23] These negotiations would conclude in 1994 with a supplemental agreement addressing President Reagan's concerns.[24] Upon completion of this agreement, President Clinton submitted both UNCLOS and its 1994 Supplemental Agreement to the Senate for its advice and consent to ratification.[25] This was the first in a series of failed attempts by the U.S. Executive to ratify UNCLOS. The rest, as they say, is history.

BENEFICIAL PROVISIONS

What is it about the treaty that is of interest to the Executive with respect to military operations, and should be of interest to the Air Force? Admittedly, a treaty billed quite clearly as the law of the sea does not immediately appear pertinent to

[12] *Id.*

[13] United Nations Division for Ocean Affairs & the Law of the Sea, *supra* note 7.

[14] 1 Aaron L. Shalowitz & Michael W. Reed, Shore and Sea Boundaries 210-11 (1962).

[15] Tullio Treves, 1958 Geneva Conventions on the Law of the Sea 2 (2008), http://legal.un.org/avl/ha/gclos/gclos.html.

[16] Shalowitz & Reed, *supra* note 14 at 275-76.

[17] United Nations Division for Ocean Affairs & the Law of the Sea, *supra* note 7.

[18] Tommy T. B. Koh, *The Third United Nations Conference on the Law of the Sea: What Was Accomplished?*, L. & Contemp. Probs., Spring 1983, at 1, http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3696&context=lcp.

[19] *See* United Nations, *Status of Treaties: Chapter XXI: Law of the Sea*, United Nations Treaty Collection (8 February 2016), https://treaties.un.org/Pages/Treaties.aspx?id=21&subid=A&lang=en.

[20] Presidential Statement on the Third United Nations Conference on the Law of the Sea, 18 Weekly Comp. Pres. Doc. 94 (29 January 1982).

[21] Presidential Statement on United States Oceans Policy, 19 Weekly Comp. Pres. Doc. 383 (10 March 1983).

[22] *Id.*

[23] James Harrison, Evolution of the Law of the Sea: Developments in Law-Making in the Wake of the 1982 Law of the Sea Convention 98 (2007).

[24] *Id.*

[25] *Id.*

UNCLOS's delineation of national and international airspace provide U.S. military aircraft with vitally important notice of when permission is and is not required to fly over a particular parcel of ocean…

U.S. Air Force operations. However, a closer look at the treaty provides substantial evidence to the contrary.

First and foremost, UNCLOS provides clarity as to the limits of a nation's sovereign territory. Quite simply, under UNCLOS, a nation is permitted to assert sovereign rights over its land territory and internal waters, a territorial sea 12 nautical miles in breadth, and the airspace above both.[26] All water and air seaward of the territorial sea is deemed international in character. The clarity UNCLOS provides on this point is vitally important, given the disparate rights and responsibilities applicable to military and other government aircraft operating in national airspace as opposed to international airspace.

What are these rights and responsibilities? With respect to national airspace, the Convention on International Civil Aviation (Chicago Convention), the preeminent treaty on aerial navigation, provides military and other government aircraft of one state have no right to fly over the territory of another state without having first received special permission from that state.[27] Furthermore, once a state permits such aircraft to fly over its territory, it may restrict travel by requiring them to fly a particular route or land at a particular airport before proceeding.[28] This is not the case in international airspace. UNCLOS makes clear that military and other government aircraft need not seek permission from any national authority to transit through international airspace.[29] In international airspace, such aircraft are only required to avoid harmfully interfering with the rights of other states' ability to transit through international airspace and conduct other activities on the high seas.[30]

Not only does UNCLOS's delineation of national and international airspace provide U.S. military aircraft with vitally important notice of when permission is and is not required to fly over a particular parcel of ocean, it also provides nations like the United States with a legal basis for contesting, by air and by sea, attempts by other nations to extend their territorial sovereignty beyond 12 nautical miles into international waters and airspace.[31] This would include, for example, attempts by North Korea to normalize its claims to a 50-nautical mile "security zone" off its coasts, within which it purports to have the right to unfettered control of transit by both ships and aircraft.[32] Thus,

[26] United Nations Convention on the Law of the Sea, art. 2-3, 10 Dec. 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

[27] Convention on International Civil Aviation art. 3, Dec. 7, 1944, 15 U.N.T.S. 296 [hereinafter Chicago Convention].

[28] *Id.* at 298, 300.

[29] UNCLOS, *supra* note 26, at 419, 432.

[30] *Id.*

[31] *See* U.S. Dep't of Def., U.S. Department of Defense Freedom of Navigation Program Fact Sheet (2015), http://policy.defense.gov/Portals/11/Documents/gsa/cwmd/DoD%20FON%20Program%20--%20Fact%20Sheet%20(March%202015).pdf.

[32] Choon-Ho Park, *The 50-Mile Military Boundary Zone of North Korea*, 72 Am. J.

in a very simple and straightforward way, UNCLOS provides the United States with a valuable tool in its efforts to ensure freedom of navigation for commercial and government air and sea vessels worldwide.

Other UNCLOS provisions of particular importance to U.S. Air Force operations are those that carve out exceptions to the general rule granting states absolute sovereignty over their territorial sea and the air above it. The first of these exceptions applies in international straits, which are created where states on either side of a body of water are so close to each other that their territorial seas touch or overlap.[33] With UNCLOS formally recognizing the right of states to a territorial sea 12 nautical miles in breadth, many bodies of water previously free from claims of sovereignty came to be enclosed.[34] Such situations currently exist at many of the world's most crucial maritime chokepoints, such as the Straits of Gibraltar, the Straits of Hormuz, and the Straits of Malacca.[35] Surface vessels are able to traverse through such straits without securing special permission by relying upon the right of Innocent Passage, which allows continuous and expeditious transit through a nation's territorial sea as long as such transit is not in any way prejudicial to the peace, good order, and security of the coastal state.[36] However, aircraft are not afforded the right of Innocent Passage. A surface vessel may not even launch or recover aircraft if it wishes to exercise Innocent Passage.[37]

A surface vessel may not even launch or recover aircraft if it wishes to exercise Innocent Passage.

Why might this be? Well, when the community of nations first looked to establish international rules on air travel in the late 1910's and early 1920's, thoughts on the matter were heavily influenced by the experience of World War I, in which the viability of aircraft as a weapon of war was vividly exhibited.[38] The resulting argument over permitting a right of Innocent Passage in the air as on the sea was thus framed in terms of the threat posed by aircraft versus that posed by sea-craft. In the case of aircraft, the threat was perceived as high, given that aircraft can quickly traverse the breadth of the territorial sea and penetrate deeply into a nation's land territory and wreak havoc.[39] Comparatively, the threat posed by sea-craft was perceived as relatively low, given they could not traverse the territorial sea at such great speed, and may never penetrate further than a nation's shore.[40] Thus, while the right of Innocent Passage remains a fundamental tenet of the law as applied to the sea, it has never ripened into such as applied to the air.[41]

In the absence of a right of Innocent Passage for aircraft, UNCLOS has recognized a right of Transit Passage in international straits, which allows aircraft (and ships) the right to traverse through a strait and across its entire breadth, up to the land territory of the coastal state, without permission or in compliance with other demands of the strait's bordering state(s).[42] However, in order to lawfully make use of Transit Passage, an aircraft must (1) proceed without delay over the strait; (2) not threaten or use force against the sovereignty, territorial integrity, or political independence of the coastal states, or in any other manner contrary to the legal principles found within the U.N. Charter; and (3) only perform those activities it must do to transit continuously and expeditiously

Int'l L. 866, 867 (1978). *See also* U.S. Dep't of Def., U.S. Department of Defense Freedom of navigation Report for Fiscal Year 2014 (2015), http://policy.defense.gov/Portals/11/Documents/gsa/cwmd/20150323%202015%20DoD%20Annual%20FON%20Report.pdf.

[33] Lewis M. Alexander, *International Straits*, 64 Int'l l. Stud. 91 (Horace B. Robertson, Jr. ed.,1991).

[34] Horace B. Robertson, Jr., *Passage Through International Straits: A Right Preserved in the Third United Nations Conference on the Law of the Sea*, 20 Va. J. of Int'l L. 807, 807-809 (1979).

[35] Alexander, *supra* note 33, at 104.

[36] UNCLOS, *supra* note 26, at 404-405.

[37] *Id.*

[38] M.W. Royse, *Who Owns the Air?*, 10 Aviation & Aircraft J. 463, 464 (1921).

[39] *Id.*

[40] *Id.*

[41] Sheila F. Macbrayne, *The Right of Innocent Passage*, 1 McGill L. J. 271, 276 (1954-55).

[42] UNCLOS, *supra* note 26, at 411.

through the strait, unless other activities become required through *force majeure* or by distress.[43]

In addition to Transit Passage, UNCLOS carves out a second exception to the general rule of absolute sovereignty over national airspace in the form of Archipelagic Sea Lanes Passage. This right applies within the boundaries of archipelagic states, defined as states composed of groups of islands, internal waterways, and other natural features "which are so closely interrelated that such islands, waters, and other natural features form an intrinsic geographical, economic and political entity."[44] Under UNCLOS, these states (such as the Philippines and Indonesia) are allowed to consider all the water encircled by the outermost islands of their archipelagos as sovereign territory akin to internal waters.[45] However, given that many international trade routes pass through these waters, UNCLOS requires archipelagic states to designate sea lanes and air routes through which ships and aircraft may travel without securing the permission of the surrounding state.[46] As with Transit Passage, aircraft making use of Archipelagic Sea Lanes Passage must do so continuously, expeditiously, and peacefully in their normal mode of operations.[47] However, whereas the right of Transit Passage extends across the entire breadth of an international strait, the right of Archipelagic Sea Lanes passage only extends 25 miles to either side of the line designated by the archipelagic state as the route of transit.[48] Further, aircraft making use of Archipelagic Sea Lanes Passage to traverse through an archipelagic state may not "navigate closer to the coasts than 10 per cent of the distance between the nearest points on islands bordering the sea lane."[49]

To some, the rights of Transit Passage and Archipelagic Sea Lanes Passage may seem of little importance. After all, the United States has routine procedures in place for requesting diplomatic clearance for U.S. state aircraft to transit into, through, and out of the national airspace of other nations.[50] However, a sovereign state always has the right to withhold over flight permission in certain circumstances or to withdraw completely from international agreements previously made, and so there may come a time when the rights of Transit Passage and Archipelagic Sea Lanes Passage enshrined in UNCLOS will be crucial in enabling the U.S. Air Force to conduct its operations around the world without fear of violating the sovereignty of those with whom the United States has no quarrel. Such was the case in 1986, when President Reagan sought to retaliate against the regime of Muammar Qaddafi following the bombing of a German discotheque by agents linked to Qaddafi's regime that killed one American serviceman and injured more than 75 others.[51] Believing the United States plan to retaliate against Qaddafi violated international law, France and Spain refused to permit the United States to utilize their territory or transit through their airspace in order to conduct strikes within Libya.[52] Deprived of a direct route between their bases in the United Kingdom and their targets in Libya, the 18 F-111s tasked with bombing Libyan military targets were still able to accomplish their mission by flying around France and Spain and, using Transit Passage, through the Straits of Gibraltar.[53] Thus, the right of Transit Passage has already played a key role in ensuring that the United States' ability to achieve its military and political objectives, and it may very well be needed in such capacity in the future. While in this case the United States was able to take advantage of Transit Passage without having ratified UNCLOS, as will be further explained in the next section, the United States would be remiss in

[43] *Id.*

[44] *Id.* at 414.

[45] *Id.* at 414-416.

[46] *Id.* at 416.

[47] *Id.*

[48] UNCLOS, *supra* note 26, at 416.

[49] *Id.*

[50] U.S. Dep't of Def., Department of Defense Foreign Clearance Manual 50 (31 May 2016).

[51] Judy G. Endicott, *Raid on Libya: Operation ELDORADO CANYON*, in Short of War: Major USAF Contingency Operations 145, 148 (A. Timothy Warnock ed., 2000).

[52] *Id.*

[53] *Id.*

assuming that it will be able to do so in perpetuity without acceding to the UNCLOS legal regime.

REFUTING ARGUMENTS AGAINST RATIFICATION

Having established that UNCLOS contains provisions of great interest and benefit to the U.S. Air Force, we now turn to the views of those who oppose its ratification. Admittedly, some objections to the treaty fall outside the realm of military affairs, and thus are beyond the scope of this article. Those objections which do implicate the military tend to follow three lines of argument: (1) ratifying UNCLOS would automatically limit the type of military activities the United States can perform on the seas and in the air above, (2) ratifying UNCLOS would compel the United States to subject itself to binding dispute resolution proceedings that could declare certain U.S. military activities illegal, and (3) ratifying UNCLOS is unnecessary because the United States is already able to claim its protections since UNCLOS merely codifies existing customary international law.

The objection that ratifying UNCLOS would automatically limit the activities of the U.S. military arises from treaty language that, at first blush, may appear quite limiting. The text of Article 88, for example, states simply, "[t]he high seas shall be reserved for peaceful purposes."[54] Similar language is found in the text of Article 141 and the title of Article 301.[55] From this language, opponents of UNCLOS argue treaty ratification would prohibit the U.S. military from operating outside its own territorial sea and the territorial seas of states that have given it permission to operate.[56] However, this argument is contravened by reference to other provisions of UNCLOS, the negotiating history of the treaty, and the current practice of states that have ratified it.

First, the text of UNCLOS provides evidence that the intent of the drafters was not to prohibit all military activity on or above the world's oceans, but only those activities that would constitute an unlawful threat or use of force in violation of the general principles of international law found within the U.N. Charter. This would include activities like those described within U.N. General Assembly Resolution 3314 (invasion, occupation, bombardment, blockade, etc.) that are conducted without a legal justification, such as self-defense,

The objection that ratifying UNCLOS would automatically limit the activities of the U.S. military arises from treaty language that, at first blush, may appear quite limiting.

[54] UNCLOS, *supra* note 26, at 433.

[55] Article 141 states, "The Area shall be open to use exclusively for peaceful purposes by all States, whether coastal or land-locked, without discrimination and without prejudice to the other provisions of this Part." UNCLOS, *supra* note 26, at 447. The title of Article 301 states, "Peaceful uses of the seas." *Id.* at 516.

[56] *The Law of the Sea Convention (Treaty Doc. 103-39): Hearings Before the S. Comm. On Foreign Relations*, 112th Cong. 71 (2012) [hereinafter Law of the Sea Convention Hearings].

Should the United States ratify UNCLOS, it would have the unilateral right to have its military activities excluded from scrutiny by an international court or arbitral tribunal.

or authorization from the U.N. Security Council.[57] One provision of UNCLOS that provides support for this limited interpretation of "peaceful purposes" is Article 138. In referring to the same subject matter as Article 141, Article 138 states, "[t]he general conduct of States in relation to the Area shall be in accordance with…the principles embodied in the U.N. Charter and other rules of international law in the interests of maintaining peace and security…."[58] Further, Article 301 specifically defines "peaceful uses of the seas" as refraining from "any threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the principles of international law embodied in the U.N. Charter."[59]

Further support for a more limited interpretation of "peaceful purposes" is found in UNCLOS' negotiating history, which states that the term was not included within the treaty to limit those military activities conducted in full accord with the U.N. Charter and general principles of international law.[60] If this is insufficient evidence of the intent behind UNCLOS, one need only examine the actions of others who have ratified the treaty, such as China, Japan, Russia, the United Kingdom, and Germany. Despite all having signed and ratified UNCLOS, each of these nations continues to conduct military activities on the high seas in pursuit of their own national interests.[61] Clearly the consensus understanding is that military operations are still permitted under UNCLOS.

Moving on, the objection that ratifying UNCLOS would compel the United States to submit to binding dispute resolution proceedings regarding U.S. military operations stems from the language of several provisions within Part XV of UNCLOS, which is concerned with the settlement of disputes between treaty parties. Part XV provides for two tiers of dispute resolution proceedings. The first tier, described by Article 279, consists of measures enumerated by Article 33 of the U.N. Charter that the parties can take on their own to resolve disputes between them, such as "negotiation, enquiry, mediation, conciliation,…or other peaceful means of their own choice."[62] The second tier, described by Articles 286 and 287, consists of bodies to whom the parties must submit their dispute if they fail to reach a settlement using first tier measures.[63] Specifically,

[57] G.A. Res. 3314 (XXIX), at 143 (Dec. 14, 1974); U.N. Charter art. 42, 51.

[58] UNCLOS, *supra* note 26, at 446.

[59] *Id.* at 516.

[60] William L. Schachte & John Norton Moore, *The Senate Should Give Immediate Advice and Consent to the UN Convention on the Law of the Sea: Why the Critics are Wrong*, J. of Int'l Aff., Fall/Winter 2005, at 5.

[61] *Id.*

[62] UNCLOS, *supra* note 26, at 508; UN Charter art. 33.

[63] UNCLOS, *supra* note 26, at 509-510.

the parties may choose to submit their dispute to the International Tribunal for the Law of the Sea, the International Court of Justice, or an arbitral tribunal composed of members selected by the parties and by the U.N. Secretary-General.[64]

The concern of many is that these provisions in concert could, in case of a dispute between the United States and another Party concerning the interpretation of UNCLOS with respect to military operations on and above the high seas, serve to put the actions of the U.S. military on trial before a non-U.S. court or an arbitral tribunal whose members were in part selected by parties other than the United States, the end result being a determination that certain activities conducted by the U.S. military are illegal.[65] While one may argue that this concern unfairly assumes the international bodies to which UNCLOS requires parties to submit their disputes are predisposed against the United States, one need not appeal to logic for rebuttal given UNCLOS itself specifically addresses the concern. Article 298 of UNCLOS allows states to essentially "opt-out" of compulsory dispute resolution procedures for certain categories of disputes enumerated in Article 298(b), which specifically includes "disputes concerning military activities, including military activities by government vessels and aircraft engaged in non-commercial service."[66] Thus, should the United States ratify UNCLOS, it would have the unilateral right to have its military activities excluded from scrutiny by an international court or arbitral tribunal, leaving the issue to be resolved between the United States and the other party to the dispute.

In the end, the dispute resolution proceedings contained within UNCLOS could in fact prove highly beneficial for the United States. Given that it is not a party to the treaty, the United States currently may only contest the actions of others it believes are in violation of the treaty through ad hoc diplomacy or military action, such as Freedom of Navigation Operations.[67] Ratifying UNCLOS would provide the United States with another avenue for resolving disputes when diplomacy has proven ineffective and military operations would unacceptably escalate tensions between the disputants. For example, since President Obama's announcement of an Asian "pivot" in 2012, China has aggressively pursued its historical claims of sovereignty to large swaths of the East and South China Seas, going so far as to establish military outposts on reefs, shoals, and even artificial islands that China has built and fortified as a defensive buffer far beyond its 12

There are those who argue the United States does not need to ratify UNCLOS in order to take advantage of its beneficial navigational provisions….

[64] *Id.*

[65] Law of the Sea Convention Hearings, *supra* note 56, at 70.

[66] UNCLOS, *supra* note 26, at 515-516.

[67] Law of the Sea Convention Hearings, *supra* note 56, at 70, 72.

nautical mile territorial sea.[68] While the United States and others consider these moves clearly illegal under international law, the United States has been unable to convince China to change its ways through diplomatic means, and Freedom of Navigation Operations designed to contest China's military claims seem to have only intensified China's island-building campaign.[69] There may soon come a time when the United States has no viable options left outside of UNCLOS to contest China's actions aside from open conflict. Although there is no guarantee of success in dispute resolution, it would seem the attempt would be more attractive than conflict.

Finally, there are those who argue the United States does not need to ratify UNCLOS in order to take advantage of its beneficial navigational provisions as, in their view, UNCLOS merely codifies already existing customary international law that the United States may rely upon regardless of whether it has ratified UNCLOS. What proponents of this argument fail to realize is that like other areas of the law, there is no guarantee what is the law today will be the law tomorrow. If UNCLOS embodies customary international law, what if the parties decide to amend it in a manner unfavorable to the United States, and then begin to act consistent with that amendment? Before too long, what was once customary is customary no longer, and the United States may then find itself deprived of the benefits it once had. Such changes are not unheard of in international law, and a cogent example arises from the Law of the Sea. Prior to the mid-20th Century, customary international law dictated that states had the right to assert control over a territorial sea of no more than three nautical miles in breadth, which was the effective range of the most advanced cannon available at the time this rule became the norm.[70] However, as has already been discussed, as the interests of coastal states led them to look at expanding the scope of their territorial seas out to a distance of 12 nautical miles, custom and practice began to change, ultimately leading to the codification of the 12 nautical mile limit as the norm in UNCLOS. Ratifying UNCLOS will thus provide the United States with a "seat at the table" in discussions surrounding the treaty and customary law, enabling it to play a leading role in steering future developments of the law of the sea in a manner favorable to U.S. interests.

CONCLUSION

In conclusion, while there may be concerns the United States will have to cede some aspects of its sovereignty in ratifying UNCLOS, this is true of all treaties, and, as with all treaties, should the United States ratify it and then decide that it is more detrimental than beneficial to be a part of the UNCLOS community, it may withdraw from the treaty and continue to base its military operations on and over the sea on rights accorded by customary international law. On the other hand, every year that goes by without the United States ratifying UNCLOS is another missed opportunity to enhance our credibility and influence in ensuring that the open seas remain free. There are already signs that our failure to join the treaty has emboldened those who oppose our views and raised concerns among our allies and partners that not operating under the same set of rules will create difficulties in coordinating security issues as it relates to the sea.[71] Thus, the U.S. Air Force should join with those in our sister sea services that have and continue to call for the ratification of UNCLOS at the earliest available opportunity. R

[68] Greg Torode, *China to Project Power from Artificial Islands in South China Sea*, Reuters, 19 February 2015, http://www.reuters.com/article/us-southchinasea-reefs-china-idUSKBN0LN0J820150219.

[69] Helen H. Wang, *War or Peace in the South China Sea*, Forbes, 5 February 2016, http://www.forbes.com/sites/helenwang/2016/02/05/war-or-peace-in-the-south-china-sea/#41966f3711db.

[70] NOAA Office of Coast Survey, Law of the Sea, *History of the Maritime Zones Under International Law*, http://www.nauticalcharts.noaa.gov/staff/law_of_sea.html (last visited 11 February 2016).

[71] Law of the Sea Convention Hearings, *supra* note 56, at 26.

Major Israel D. King

(AA/AS, Southwest Illinois College; BA, University of Richmond; JD, Wake Forest University School of Law; LL.M., The Judge Advocate General's Legal Center and School) is an Instructor of Operations and International Law, Air Force Judge Advocate General's School, Maxwell Air Force Base, Alabama.

New Space Activities Expose a Potential Regulatory Vacuum

BY MAJOR SUSAN J. TREPCZYNSKI

With commercial entities becoming increasingly involved in, and vital to, space activities, it has become necessary for domestic law to evolve…

The international legal regime governing space activities was created at a time when those activities were almost exclusively conducted by government actors. Consequently, the domestic laws implementing international obligations reflected the fact that space was largely a government dominated domain. However, with commercial entities becoming increasingly involved in, and vital to, space activities, it has become necessary for domestic law to evolve to ensure that private and commercial space activities are properly authorized and regulated, both for domestic policy purposes and to ensure such activities remain compliant with our international obligations. While the domestic legal regime is quite well-developed with respect to some established commercial activities, the current proliferation of commercial capabilities and proposed activities has exposed potential holes in the existing regime.

INTERNATIONAL LAW

The United States is a party to the *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies*, which makes States responsible not only for their own activities in space (i.e., governmental activities), but also for the activities of their nationals.[1]

[1] Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, 27 January 1967, 610 U.N.T.S. 205 [hereinafter Outer Space Treaty].

Stock Photo © iStock.com/Konstantin Inozemtsev

The Outer Space Treaty also contains significant legal implications for States involved in space activities.

The Outer Space Treaty also contains liability and jurisdiction and control provisions that carry significant implications for States with respect to the space activities of their nationals.[2]

Pursuant to the Outer Space Treaty, States have broad and enduring obligations related to the space activities of their nationals. Article VI establishes that States "bear international responsibility for national activities in outer space…whether such activities are carried on by governmental agencies or non-governmental entities, and for assuring that national activities are carried out in conformity with the provisions of" the Outer Space Treaty. Significantly, there is no narrowing of the term "activities," leaving States essentially responsible for all activities of their nationals in space.

Because States are responsible for the activities of their nationals, a State should have an inherent interest in overseeing and regulating the space activities of its nationals. However, the Outer Space Treaty does not stop at simply placing that implied duty upon States; Article VI goes further by affirmatively requiring States to provide "authorization and continuing supervision" for the space activities of their nationals. While the Outer Space Treaty does not elaborate on the specific requirements for authorization and continuing supervision, certain minimum requirements can be inferred from the language. As a starting point, "authorization" implies there is a requirement for some type of an initial authorization (such as a license) to undertake an activity, but initial authorization is only the beginning of a State's responsibility. In order to comply with Article VI obligations, States must also establish a means of continually supervising the activity, for as long as the activity persists. In the case of many space activities, this may require State supervision of ongoing activities for multiple years.

Other provisions of the Outer Space Treaty also contain significant legal implications for States involved in space activities. Article VII provides that the "launching State" is internationally liable for damage caused by its space object (or its component parts) to another State or its nationals.[3] Just as Article VI establishes that States are responsible for non-governmental activities, the liability provisions make the State liable for damages caused by space objects belonging to its non-governmental entities.[4] Under Article VII of the

[2] *Id.*, at Articles VI-VIII.

[3] Article VII defines a "launching State" as a State "that launches or procures the launching of an object into outer space" or a State "from whose territory or facility is launched." This language is echoed in the 1972 Liability Convention, which expands upon the liability framework established in the Outer Space Treaty. Convention on International Liability for Damage Caused by Space Objects art. I, 29 March 1972, 961 U.N.T.S. 187 [hereinafter Liability Convention].

[4] Outer Space Treaty, *supra* note 1, Article VII. Note that for any given launch, there can be more than one launching State and thus more than one State that can be held internationally liable. As previously mentioned, the Liability Convention expands upon the liability concept established in Article VII of the Outer Space Treaty and, with respect to multiple launching States, notes that those States are jointly and severally liable. As such, launching

Outer Space Treaty, such liability extends to damages caused on the "Earth, in air space or in outer space, including the Moon and other celestial bodies." The Liability Convention adds significant detail to the liability regime created by the Outer Space Treaty, to include establishing that launching States are strictly liable for damages occurring on the surface of the Earth or to an aircraft in flight, but are liable based on fault for damages occurring elsewhere.[5] Finally, Article VIII of the Outer Space Treaty provides that the State of registry has jurisdiction and control over space objects, their component parts, and personnel thereof, and specifically notes that ownership is not affected by the location of the space object (i.e., in outer space, on celestial bodies, or returned to Earth).[6] Because all space objects must have a State of registry, and that State has enduring jurisdiction and control over the object and its component parts, any activities in space that impact space objects are also impacting the interests of a sovereign.

As the above discussion demonstrates, the United States has accepted significant international legal obligations with respect to the space activities of its nationals, to include commercial entities. These obligations all must be implemented through domestic legislation. While legal and regulatory regimes are well-established with respect to many of the core space activities currently undertaken by commercial actors, such as communications, remote sensing, and launch, the growth of the commercial space sector, to include expansion into new markets and activities, is revealing potentially unregulated activities under the existing domestic legal regime. The potential voids in domestic legislation were recognized in the recently passed *Commercial Space Launch Competitiveness Act (CSLCA)*, which directs a report identifying "appropriate authorization and supervision authorities" for "current and proposed near-term, commercial non-governmental activities conducted in space," and recommending "an authorization and supervision approach that would prioritize safety, utilize existing authorities, minimize burdens to the industry, promote the U.S. commercial space sector, and meet the United States obligations under international treaties."[7]

CURRENT U.S. STATUTORY AND REGULATORY AUTHORITIES FOR SPACE-RELATED ACTIVITIES

Broadly speaking, the current U.S. statutory and regulatory regime for space-related activities can be divided into two categories: (1) laws and regulations relating to payloads (including the functional activities of those payloads); and (2) laws and regulations relating to launch. The U.S. statutory and regulatory system pertaining to two types of payloads –satellite communications (SATCOM) and remote sensing – is well-developed. Commercial operations in both areas are relatively mature, and industry is accustomed to operating within the established laws and procedures, which serve to provide some certainty to operations. Similarly, the launching State focus of the space law treaties, combined with a U.S. policy geared toward the promotion of commercial space launch, has led to a comprehensive statutory and licensing regime for launch providers. While there will certainly be further refinements in these specific areas as industry continues to develop and commercial space activities in these sectors continue to evolve, innovation and the expansion of commercial space into non-traditional sectors will highlight existing statutory and regulatory voids.

Communications

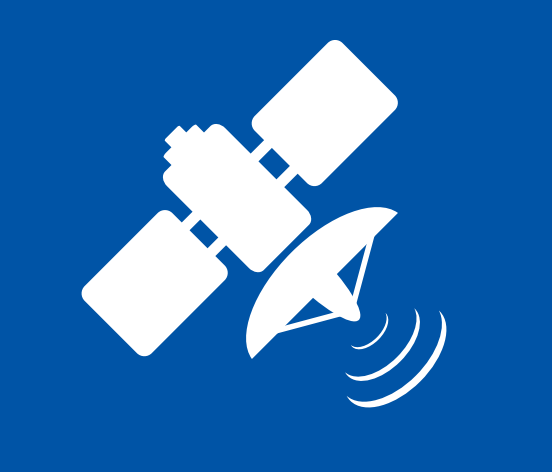
The Federal Communications Commission (FCC) has statutory and regulatory authority over communications satellites, and issues licenses

States may conclude agreements with and seek indemnification from each other, but the damaged State has the right to "seek the entire compensation due…from any or all of the launching States which are jointly and severally liable." Liability Convention, *supra* note 2, Article V.

[5] Liability Convention, *supra* note 3, Articles II and III.

[6] While there may be multiple launching States involved in a given launch, there can only be one State of registry. Pursuant to Article I of the Registration Convention, the State of registry must be a launching State. Convention on Registration of Objects Launched into Outer Space art I, Jan. 14, 1975, 1023 U.N.T.S. 15 [hereinafter Registration Convention]. In cases where there are multiple launching States, Article II of the Registration Convention requires that they jointly determine which of them will be the State of registry.

[7] U.S. Commercial Space Launch Competitiveness Act, Pub. L. No. 114-90, § 108 (space authority) (2015).



Not only are FCC regulations applicable to a broad range of spacecraft performing many different types of primary missions, they require both initial FCC authorization to transmit, and continuing FCC oversight.

for those systems.[8] In addition to implementing the U.S. obligations arising from the space treaties previously discussed, the FCC regulations also implement U.S. obligations as a member of the International Telecommunication Union (ITU), the U.N. treaty organization responsible for international telecommunications, including allocating global radio spectrum and satellite orbits, and setting technical standards related to communications.[9] As regulations pertaining to the use of the radiofrequency spectrum were already well-established by the time commercial SATCOM services were expanding, it is not surprising that the laws and regulations for communications satellites comprehensively implement U.S. international obligations, while simultaneously serving as a means to ensure domestic legal and policy interests are met.

Stating that the FCC regulates communications satellites is useful shorthand, but it is important to note the breadth of the systems impacted by the regulations. FCC regulations cover the use or operation of any "apparatus for the transmission of energy or communications or signals by space or earth stations."[10] Consequently, a satellite may serve a number of primary purposes (i.e., its primary purpose may not be SATCOM), but if it makes use of the radiofrequency spectrum, that aspect of its operations must comply with FCC regulations.[11] Because almost all satellites and other spacecraft must in some way utilize the radiofrequency spectrum, the FCC regulations impact a large portion of space objects.[12]

Not only are FCC regulations applicable to a broad range of spacecraft performing many different types of primary missions, they require both initial FCC authorization to transmit, and continuing FCC oversight. The FCC has used this regulatory authority to reach beyond transmission capabilities and regulate other aspects of spacecraft operations. For example, applications for space station authorizations are required to provide specific information relating to "the

[8] FCC statutory authority comes from the *Communications Act of 1934*, as amended (47 U.S.C. § 151 *et seq*.), and regulations specific to satellite communications are found in 47 C.F.R. Part 25 (2016).

[9] For more information on ITU regulatory publications see the ITU Radiocommunication Sector (ITU-R) webpage at: http://www.itu.int/pub/R-REG. The United States is bound by ITU documents and implements many of the specific technical obligations through regulations, such as those promulgated by the FCC. Many provisions of the ITU Radio Regulations (RR) are directly incorporated into 47 C.F.R. For example, 47 C.F.R. § 25.103 notes that "[t]erms with definitions including the '(RR)' designation are defined in the same way in § 2.1 of this chapter and in the Radio Regulations of the" ITU.

[10] 47 C.F.R. § 25.102(a) (2016). The definitions for "earth station" and "space station" contained in 47 C.F.R. § 25.103 mirror those found in the ITU Radio Regulations (RR).

[11] Note that FCC regulations apply only to non-governmental actors. In the United States, federal government use of spectrum is regulated by the National Telecommunications and Information Administration (NTIA).

[12] Oftentimes terms such as "satellite," "spacecraft," and "space object" are used interchangeably, though the specific term used may have significance in technical and legal contexts. The FCC Satellite Communications regulations (47 C.F.R. Part 25) define "satellite system," "space system," and "spacecraft," in each instance defining the terms as they are defined in the ITU RRs.

design and operational strategies that will be used to mitigate orbital debris," to include post-mission disposal plans and the quantity of fuel that will be reserved for post-mission disposal maneuvers.[13] Once the FCC has granted an authorization, it is necessary to seek approval for any subsequent modifications that would affect "the parameters or terms and conditions of the station authorization," unless those modifications are otherwise excepted by the regulations.[14] Finally, FCC licenses are not indefinite (with a few exceptions, they generally have a period of 15 years),[15] but even within the period of the license, the FCC has the power to revoke the license if milestones specified in the regulations are not met.[16]

Remote Sensing

Statutory provisions directing the licensing of commercial remote sensing systems originated with the *Land Remote Sensing Commercialization Act of 1984*, which required that any license issued, among other things, had to "observe and implement the international obligations of the United States."[17] This provision subsequently appeared in the *Land Remote Sensing Policy Act of 1992*,[18] and was carried through into the legislation as it exists today. The current statutory provisions regarding the licensing of private remote sensing space systems are found in the *National and Commercial Space Programs Act*, which authorizes the National Oceanic and Atmospheric Administration (NOAA), through its Commercial Remote Sensing Regulatory Affairs (CRSRA) office, to issue licenses to private remote sensing operators.[19] Specifically, the CRSRA mission is to "regulate the operation of private Earth remote sensing space systems, subject to the jurisdiction of control of the United States, while preserving essential national security interests, foreign policy and international obligations."[20] Accordingly, any person subject to the jurisdiction and control of the United States requires a NOAA license to operate a private remote sensing system. While a NOAA license is generally valid for the operational lifetime of the system, it is not a blanket license for a system to conduct any and all future activities; the licensee must notify NOAA of certain activities, such as the intent to enter into an agreement with a foreign entity, and is under a continuing obligation to request amendments to the license if certain changes occur, both to business operations or to the technical parameters of the system.[21] NOAA may also revoke the license for various reasons, including non-compliance with the terms and conditions of the license and in cases where the operations are inconsistent with the national security, foreign policy, or international obligations of the United States.[22]

While NOAA's statutory and regulatory authority with respect to remote sensing is comprehensive, it is limited in one significant aspect—by definition remote sensing statutes and regulations only apply to the sensing of the Earth from space.[23] However, as interest in space situational awareness (SSA) data increases, there has been a growing commercial interest in filling the demand by placing outward looking sensors, referred to as non-Earth imaging (NEI) capabilities, on remote sensing satellites. The presence of these sensors on remote sensing satellites has caused NOAA to deny licenses to several systems, because a "policy and procedure to assess NEI imagery has yet to be developed and agreed to by the IC [intelligence community]."[24]

[13] 47 C.F.R. § 25.114(d)(14) (2016).

[14] 47 C.F.R. § 25.117 (2016).

[15] 47 C.F.R. § 25.121 (2016).

[16] 47 C.F.R. § 25.164 (2016). Because licenses are granted before systems are built, the milestones represent required progress toward operational capability.

[17] Pub. L. No. 98-365, (1984).

[18] Pub. L. No. 102-555, (1992). The *Land Remote Sensing Policy Act of 1992* repealed the *Land Remote Sensing Commercialization Act of 1984*.

[19] National and Commercial Space Programs Act (51 U.S.C. § 60101, *et seq*.). Subchapter III deals specifically with the licensing of private remote sensing space systems.

[20] NOAA, About CRSRA, http://www.nesdis.noaa.gov/CRSRA/index.html (last visited 14 June 2016).

[21] 15 C.F.R. § 960.7 – 960.9 (2016).

[22] 15 C.F.R. §960.9 (2016).

[23] 51 U.S.C. § 60101(4) (2016) defines "land remote sensing" as "the collection of data which can be processed into imagery of surface features of the Earth from an unclassified satellite or satellites…."

[24] Advisory Committee on Commercial Remote Sensing (ACCRES) Meeting Minutes (30 June 2015). In the meeting NOAA also noted that from February 2015 to the date of the meeting "CRSRA has not issued any licenses, particularly in the academic sector because they have a Non Earth Imaging (NEI) component."

Historically, the primary policy concern with respect to licensing commercial remote sensing activities was resolution, largely for national security reasons. However, with relatively high resolution imagery readily available today, commercial companies are turning their attention to providing capabilities in a variety of spectrums, and to providing real time (or near real time) access to imagery. In addition, companies are looking to diversify their product by providing not just imagery, but processed information and analytics. The policy concerns that drove the regulation of imagery are also applicable to the integration of various imagery sources, but NOAA has no authority to regulate the use third parties make of imagery, and the imagery itself may only be the raw material for a more focused product. For example, a commercial company may obtain imagery data that was properly collected pursuant to a NOAA license by another company or companies, and use a proprietary process (algorithms, etc.) to create a product that would not have been authorized if the company had requested a license to image and/or produce the same information in the first instance. In addition, multi-national corporations and foreign ground stations can further complicate regulatory issues.

Launch

The Federal Aviation Administration (FAA) Office of Commercial Space Transportation (AST) is authorized by statute to oversee, coordinate, and authorize commercial launch and reentry operations, as well as to encourage, facilitate, and promote commercial launch and reentry activities.[25] FAA AST authorization and oversight serves domestic legal and policy interests, and implements U.S. obligations under the space treaties. While the FAA AST statutory authorizations are fairly comprehensive when it comes to launch and reentry activities, the authorizations are limited in scope to those specific activities and do not provide FAA AST any authority to review payloads independent of launch or reentry activities.

FAA AST is statutorily authorized to license the launch and reentry of expendable and reusable launch vehicles, and to issue operator licenses for such vehicles.[26] These statutory authorizations require FAA AST to conduct a payload compliance review as part of the licensing process, specifically giving the FAA AST the ability to ensure that those seeking licenses or permits have obtained "all required licenses, authorizations, and permits" needed for a given payload, and to deny a launch or reentry license if such requirements have not been met.[27] However, if no such licenses, authorizations, or permits are required for a given payload, FAA AST can only prevent launch or reentry if it is determined that it would "jeopardize the public health and safety, safety of property, or national security or foreign policy interest of the United States."[28] As there are presently separate statutory licensing requirements for remote sensing and communication payloads (under the purview of NOAA and the FCC, respectively), the FAA AST ensures that the appropriate licenses have been obtained prior to licensing the launch of such payloads, but conducts no further payload review on them.[29]

While it is clear that the FAA AST payload review process does provide some government oversight of all payloads that are launched on vehicles subject to FAA AST licensing authority, the review process is far from comprehensive. The information requirements associated with the review process ensure that basic information is made available, but do not request the type of information that would enable an in-depth technical review of the payload or its capabilities.[30] Furthermore, in order

[25] 51 U.S.C. § 50901 (2016).

[26] FAA AST is also responsible for licensing the operation of non-federal launch sites, or "spaceports." 51 U.S.C. 50904(a).

[27] 51 U.S.C. § 50904(b) and (c) (2016). The FAA AST has promulgated regulations pursuant to its statutory authorizations, which are found in 14 CFR, Chapter III.

[28] 51 U.S.C. § 50904(b) and (c) (2016).

[29] 14 C.F.R. § 415.53 (2016). The FAA AST payload reviews also exclude payloads owned or operated by the U.S. government.

[30] The information requirements for payload review are contained in 14 C.F.R. § 415.59 (2016) and include: (1) payload name; (2) payload class; (3) physical dimensions and weight of payload; (4) payload owner and operator, if different from the person requesting the payload review; (5) orbital parameters for parking, transfer, and final orbit; (6) identification of hazardous and radioactive materials, and amounts of each;

to deny a launch or reentry license on the basis of a payload review, the FAA AST must determine that the payload would jeopardize safety, national security, or a foreign policy interest, which seems to set a fairly high bar for denial. It is also important to note that the license over which the FAA AST has ultimate authority is being granted to the launch company, not the payload owner/operator. The relationship between the launch provider and the payload owner/operator is based on a service contract, with the payload owner paying the launch provider for launch services. As such, the launch company is only providing secondhand information about the payload, supplied by an owner that will generally have an interest in keeping details of its operation to a minimum for proprietary reasons.

Finally, it is worth noting two additional points. The first is that once the launch license has been granted, FAA AST has no continuing oversight over the activities of the payload in space. If a payload were capable of maneuvering, manufacturing other space objects, the on-orbit maintenance of other space objects, or any of a number of other activities, those activities would not be subject to FAA AST oversight or control. The conditions of a FAA AST launch license apply to the launch provider, not the payload owner/operator. This would also hold true in the case of the spacecraft– once a spacecraft is in orbit, if that spacecraft is capable of maneuver, the FAA AST has no ability to control its movements (i.e., the FAA is not authorized to provide space traffic management services).

The second point relates to the scope of the FAA AST authority, which is licensing launches and reentries that are within its jurisdictional mandate. This scope of authority significantly limits U.S. oversight of many payloads, since there is no legal requirement for non-government payloads to be launched in the United States.[31] Consequently, if a commercial entity chooses (and is otherwise able under existing U.S. law) to use a foreign launch provider, its payload will not be subject to the FAA AST payload review. Furthermore, if the payload is not one that is otherwise required to be licensed by the FCC or NOAA, the United States may effectively have no ability to authorize or continually supervise the functioning or activities of that payload.

Once the launch license has been granted, FAA AST has no continuing oversight over the activities of the payload in space.

EMERGING ACTIVITIES AND THE LAW

While the majority of current commercial space activities still fall within the SATCOM, remote sensing, and launch categories, commercial space companies are starting to develop concepts and pursue technologies

(7) intended operations during the life of the payload; and (8) delivery point in flight at which the payload will no longer be under licensee's control.

[31] Note that U.S. export control laws may impact the ability of U.S. commercial companies to use foreign launch services for certain types of payloads.

that expand upon and push beyond these 'traditional' capability areas. As noted, commercial remote sensing is moving from a business concept where imagery is the product, to one where the imagery itself is only part of the equation, which now may include proprietary analytics working in concert with imagery to provide a tailored final product to meet the demands of the consumer. In addition, commercial entities are focusing on utilizing multi-spectral imaging capabilities; improving revisit rates and factoring in latency requirements; and providing video, rather than still images. Commercial companies are looking at fielding constellations of less expensive small satellites, rather than relying on the traditional large and more costly remote sensing satellites that have been the norm until recently. Commercial remote sensing is evolving from providing a snapshot in time, to being able to provide change detection/pattern-of-life type capabilities. Commercial companies are also poised to offer their imaging capabilities not just for Earth observation, but for NEI, which would make information that was once almost exclusively in the hands of governments, generally available to the public.

Innovations are occurring in other space sectors as well. Commercial companies are developing habitation modules, researching the possibilities of on-orbit manufacturing, and examining the related concept of utilizing space resources to support such activities. The utilization of space resources presupposes the capability to find and extract those resources, which is another area for which commercial companies are developing business plans. Companies are pursuing on-orbit servicing technologies, looking at opportunities to not just provide the technology, but to provide services (which offers a much more robust business case than one solely dependent on sales of technology, such as satellites). There are also well-publicized ventures underway to support a space tourism industry, with several companies actively taking orders to provide paying customers with a suborbital space experience. All of these activities will contribute to increased activity in space, highlighted by an unprecedented increase in the ability (and need) for space objects to move and maneuver, which itself will lead to requirements for space traffic management.

As commercial space entities explore innovative technologies, products, and services, they are challenging and exposing the boundaries of the existing domestic legal and regulatory regimes. Significantly, these legal and regulatory challenges and voids are not just theoretical, contingent upon the successful development of conceptual technologies. Current capabilities, including new uses of existing technologies, are stretching the limits of the existing legal regime. The need to evolve the law in a way that is responsive to these technological developments and emerging business plans was recognized in the recent CSLCA.[32]

The CSLCA has several provisions directed at areas where the existing legal and regulatory framework may be lacking. In connection with a directed assessment of current and proposed near-term space activities, Section 108 mandates the identification of, and recommendations for, appropriate authorization and supervision authorities for such activities. Section 109 notes that it is the sense of Congress "that an improved framework may be necessary for space traffic management" and directs an

[32] CSLCA, Pub. L. No. 114-90 (2015).

independent study of alternative frameworks. Finally, in a substantive addition to the law, the CSLCA adds the *Space Resource Exploration and Utilization Act* (SREUA) to the United States Code.[33] The SREUA provides that U.S. citizens "engaged in commercial recovery" of asteroid or space resources are entitled to the resource obtained, "including to possess, own, transport, use, and sell" the resource "in accordance with applicable law."[34]

The SREUA has been welcomed by the commercial space sector (especially those with resource-based business plans), as it establishes an enforceable legal right to the resources they seek to obtain and utilize. However, it is only one provision covering one aspect of a plethora of potential space activities. As the CSLCA recognizes, there are open questions as to who should exercise authorization and supervision over emerging commercial space activities, what authorities are required for those activities, and even what the activities themselves are likely to look like in the near future. In the midst of this legal and regulatory uncertainty, the inescapable fact that commercial space is evolving remains. Emerging technologies are turning ideas that were once theoretical into actionable business plans. Similarly, the availability of knowledge and technology, combined with potential markets that appear to be receptive to the expanding utility of commercial space, is creating an atmosphere where private investment in commercial space is providing the capital that many of these entities need to take concepts to the next level. As it is established national policy to encourage and support the U.S. commercial space industry,[35] it appears essential for the United States to take steps to ensure the domestic legal regime adequately addresses emerging commercial space activities. The CSLCA recognizes the fact that legal voids exist and appears poised to attempt to address the issue by building on the existing domestic legal regime that is applicable to the more well-established commercial space activities.

[33] The Space Resource Exploration and Utilization Act, 51 U.S.C. §§ 51301-51303 (2016).

[34] *Id*, at § 51303.

[35] National Space Policy of the United States of America 3 (2010) (stating that the United States is "committed to encouraging and facilitating the growth of a U.S. commercial space sector that supports U.S. needs, is globally competitive, and advances U.S. leadership in the generation of new markets and innovation-driven entrepreneurship); National Space Transportation Policy 3-5 (2013).

Major Susan J. Trepczynski

(B.A. University of California, Berkeley; J.D., University of the Pacific, McGeorge School of Law; LL.M. Air and Space Law, McGill University) is Chief, Air and Space Law Division, HQ USAF/JAO.

Sentence Relief

At the Air Force Court of Criminal Appeals During the Last 10 Years

BY MAJOR KEVIN W. GOTFREDSON AND CAPTAIN MICAH L. SMITH

During a recent lecture in Washington, D.C., on military sexual assault prosecutions, an audience member asked the professor's opinion on the "epidemic" of valid convictions being overturned for factual sufficiency reasons by the military courts of criminal appeals. Murmurs floated through the crowd, and a vigorous debate followed, challenging whether the audience member's belief that convictions were being overturned at an alarming rate was based on reality or a perception influenced by a few newsworthy cases. The underlying proposition of this question is that military appellate courts are providing an inordinate amount of relief in the appellate process. This article explores the questions of how much and how often sentence relief is granted by military appellate courts by reviewing the cases decided by the Air Force Court of Criminal Appeals (AFCCA) during the last 10 years.[1]

To provide a better understanding of the subject, this article begins with a brief discussion of the scope of authority granted to the military courts of criminal appeals. Second, it provides a framework to analyze the frequency at which AFCCA granted different forms of sentence relief. Third, it looks at what influence, if any, the Court of Appeals for the Armed Forces (CAAF) may have had on the sentence relief granted by AFCCA. Fourth, it looks specifically at the confinement relief granted by AFCCA as a quantifiable measure of sentence relief. Fifth, it analyzes cases where sentence relief was granted on the basis of factual sufficiency of the evidence or the appropriateness of the sentence. Finally, the article uses the data collected to see whether sentence relief shares any connection to the rank of the appellant.

REVIEW BY THE AIR FORCE COURT OF CRIMINAL APPEALS

Article 66(a) of the Uniform Code of Military Justice (UCMJ),[2] requires each service's Judge Advocate General to establish a court of criminal appeals. The Air Force's court is the United States Air Force Court of Criminal Appeals.[3] Pursuant to Article 66(b)(1), UCMJ,[4] AFCCA reviews the records of trial of all cases in which the convening authority approves a sentence that includes a punitive discharge, confinement for 12 months, or death.

[1] Although the authors both work at the Air Force Court of Criminal Appeals (AFCCA) the decision to write this article was theirs alone and the judges on the court, past or present, had no influence on this article.

[2] UCMJ art. 66(a) (2012).

[3] The court was previously called the Air Force Board of Review from 1950 to 1968 and the Air Force Court of Military Review from 1968 to 1994.

[4] UCMJ art. 66(b)(1) (2012).

Stock Photo © iStock.com/_ba_

The courts of criminal appeals review cases for legal error, factual sufficiency, and sentence appropriateness.[5] For instances of legal error, a finding or sentence cannot be disturbed "unless the error materially prejudices the substantial rights of the [appellant]."[6] In conducting their unique appellate factual sufficiency review, the courts "may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses."[7] The courts review sentence appropriateness *de novo* "to ensure 'a fair and just punishment for every accused,'"[8] but they are not authorized to engage in exercises of clemency.[9]

METHODOLOGY

This article now examines the last 10 years of decisions issued by AFCCA to see how often it used the above-mentioned powers to grant relief and to see if there were any noticeable trends.[10]

The data set was limited to only cases reviewed by AFCCA under Article 66, UCMJ. No interlocutory appeals under Article 62, UCMJ,[11] or petitions for extraordinary relief were considered. Additionally, each case was only counted the last time it was before AFCCA. Therefore, the total number of cases used for analysis was not the total number of decisions issued by AFCCA each year, but rather the number of unique cases receiving a final decision that year.[12] This approach gives a more accurate picture of how often sentence relief is granted as it is not uncommon for a case to be before AFCCA on multiple occasions as it goes through the appellate process.[13] Using this approach, 3,253 unique cases were identified for the 10-year period from 1 January 2006 to 31 December 2015. The number of cases for each year ranged from 207 to 677.

Only cases that involved a sentence modified by the court were classified as having received relief.[14] Cases where a modification of findings did not impact a sentence were not considered to have received relief.[15]

CASES SEPARATED BY SUBSTANTIAL AND MINOR SENTENCE RELIEF

Armed with a substantial amount of data, the cases where AFCCA granted sentence relief were further separated into two categories: (1) substantial relief and (2) minor relief. A case was classified as having received substantial relief if one of the following occurred: (1) a punitive discharge was set aside, (2) a dishonorable discharge was upgraded to a bad-conduct discharge, or (3) confinement was reduced by at least 10 percent.[16] All other cases receiving some sentence relief but not meeting the above criteria fell into the "minor relief" category.[17]

[5] A court of criminal appeals may only affirm "findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved." UCMJ art. 66(c) (2012).

[6] UCMJ art. 59(a) (2012).

[7] UCMJ art. 66(c) (2012).

[8] United States v. Baier, 60 M.J. 382, 384 (C.A.A.F. 2005) (quoting United States v. Bauerback, 55 M.J. 501, 504 (A. Ct. Crim. App. 2001)).

[9] United States v. Healy, 26 M.J. 394, 395–96 (C.M.A. 1988).

[10] Although this article focuses on sentence relief granted in a given year, it is not taking a position on whether sentence relief should be given or not.

[11] UCMJ art. 62 (2012).

[12] In the few occasions when an appellant had multiple courts-martial for different offenses, each court-martial was counted separately. Also, in the even rarer situation when an appellant's conviction was overturned and a second court-martial was convened, the two courts-martial were considered separately because they each had unique legal and factual issues that AFCCA considered.

[13] The same cases can be reviewed by AFCCA numerous times. This can occur due to remand from the CAAF or AFCCA can reconsider cases for a variety of reasons. *See, e.g.*, United States v. Gutierrez, 2015 CCA LEXIS 525 (A.F. Ct. Crim. App. 23 Nov. 2015) (unpub. op.); United States v. Gutierrez, 74 M.J. 61, 63 (C.A.A.F. 2015); United States v. Gutierrez, 2014 CCA LEXIS 110 (A.F. Ct. Crim. App. 25 Feb. 2014) (unpub. op.); United States v. Gutierrez, 73 M.J. 128 (C.A.A.F. 2013); United States v. Gutierrez, 2013 CCA LEXIS 1014 (A.F. Ct. Crim. App. 21 Mar. 2013) (unpub. op.).

[14] We also included cases where AFCCA modified findings and returned the case for a sentence rehearing and the sentence was modified. For our later analysis we used the sentence adjudged at the rehearing.

[15] While such action in setting aside or modifying the findings undoubtedly qualifies as relief, we limited our data to cases where the relief had a practical impact on the appellant.

[16] The one case where a sentence of confinement for life without parole was changed to confinement for life was also considered significant relief. The case is United States v. Smith, 2013 CCA LEXIS 504 (A.F. Ct. Crim. App. 19 June 2013) (unpub. op.).

[17] *See, e.g.*, United States v. Escobar, 73 M.J. 871 (A.F. Ct. Crim App. 2014) (not approving forfeitures due to erroneous staff judge advocate recommendation, but approving a dishonorable discharge and 20 years of confinement).

Figure 1 shows the results of this methodology, displaying the percent of cases granted relief from 2006 through 2015 by AFCCA.[18]

On average, over the 10-year period, AFCCA granted relief in just 5 percent of cases—minor relief in 1.6 percent of cases and substantial relief in 3.4 percent of cases.[19]

No clear pattern emerges from Figure 1. There was a lull in sentence relief from 2008 to 2011 as well as a spike towards the end, with three out of the last four years being the highest. The most recent year, 2015, had a greater percentage of sentence relief than other years. However, it is important to note that 2015 also had the fewest number of cases, so any sentence relief granted had a greater impact on the overall percentage. Three fewer cases with substantial sentence relief in 2015 would drop it below the substantial relief granted in 2013.

CASES INFLUENCED BY CAAF

This section considers how CAAF has influenced sentence relief at AFCCA during the last 10 years, and if that influence can explain the increase in sentence relief in 2012, 2013, and 2015.[20] Of the sentence relief cases previously identified, cases were further separated by cases which CAAF set aside findings or created binding precedent[21] that required AFCCA to set aside findings or modify sentences resulting in sentence relief. By highlighting these cases, one can see the influence CAAF had on the number of cases receiving sentence relief.

After filtering out cases that CAAF appeared to require AFCCA to grant relief, during the ten-year period, minor relief was granted in 1.4 percent of cases (down 0.2 percent) and substantial relief was granted in 2.2 percent of cases (down 1.2 percent). Of the cases in which AFCCA granted relief from 2006 through 2015, CAAF influenced 28 percent of them (1.4 percent of all cases).[22] Figure 2 displays this result.

CAAF influenced every year except 2008 to some extent but never dramatically.[23] Based on this method, CAAF appeared to have the largest impact on AFCCA's 2012, 2013, and 2015 cases. These were the 3 years with the highest percentage of sentence relief granted by AFCCA (as seen in Figure 1). Thus, a large portion of the sentence relief granted by AFCCA in those years is accounted for by identifying CAAF influenced cases. For 2012, 2013, and 2015, CAAF influenced cases accounted for 52 percent of the sentence relief cases, while the other seven years it was just under 18 percent.

[18] The numbers are in the following table:

Year	Cases	Substantial Relief	Minor Relief
2006	677	30	9
2007	483	13	13
2008	373	7	4
2009	285	5	6
2010	252	4	3
2011	211	3	4
2012	243	11	4
2013	297	17	1
2014	225	5	6
2015	207	14	3

[19] Not every year had an equal number of cases decided by AFCCA, so an average of the percentages in the Figure 1 does not provide the actual overall average. Instead, to calculate the overall average of cases with sentence relief, the total number of cases granted sentence relief in the 10-year period (162) was divided by the total number of cases over the same time period (3,253).

[20] By presenting this information the article is not implying that less influence by CAAF is better. Not highlighted in this article are the cases where CAAF overturned AFCCA opinions that granted relief. Cases were not counted as having received sentence relief at AFCCA in the few instances where CAAF overturned all sentence relief and the case was returned to AFCCA.

[21] By "binding precedent" we are referring to new precedent that did not exist at the time of trial. For a recent example, see United States v. Atchak, 2015 CCA LEXIS 328 (A.F. Ct. Crim. App. 10 Aug. 2015) (unpub. op.), which was affected by United States v. Gutierrez, 74 M.J. 61 (C.A.A.F. 2015). Two other notable cases are United States v. Beaty, 70 M.J. 39 (C.A.A.F. 2011), and United States v. Fosler, 70 M.J. 225 (C.A.A.F. 2011).

[22] As explained in footnote 19, not every year had an equal number of cases decided by AFCCA, so an average of the percentages in the Figure 2 does not provide the actual overall average. Instead, to calculate the overall average of percentage of cases influenced by CAAF, the total number of cases where CAAF had an influence in the 10-year period (46) were divided by the total number of cases over the same time period (3,253).

Figure 1: Percentage of Sentence Relief Granted by AFCCA during the Last 10 Years

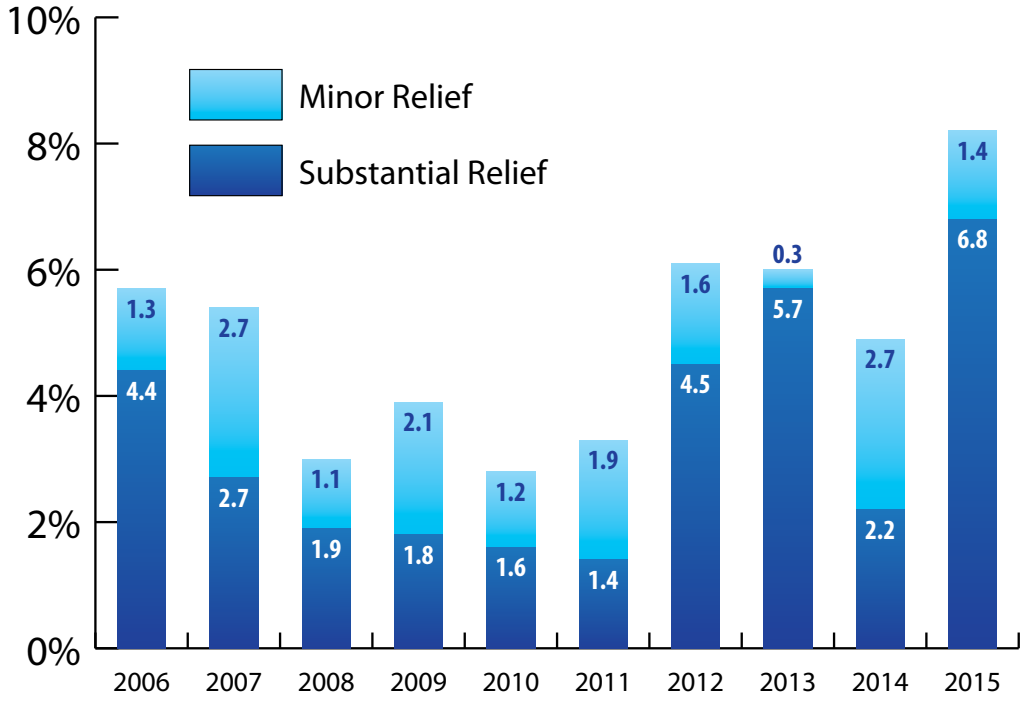
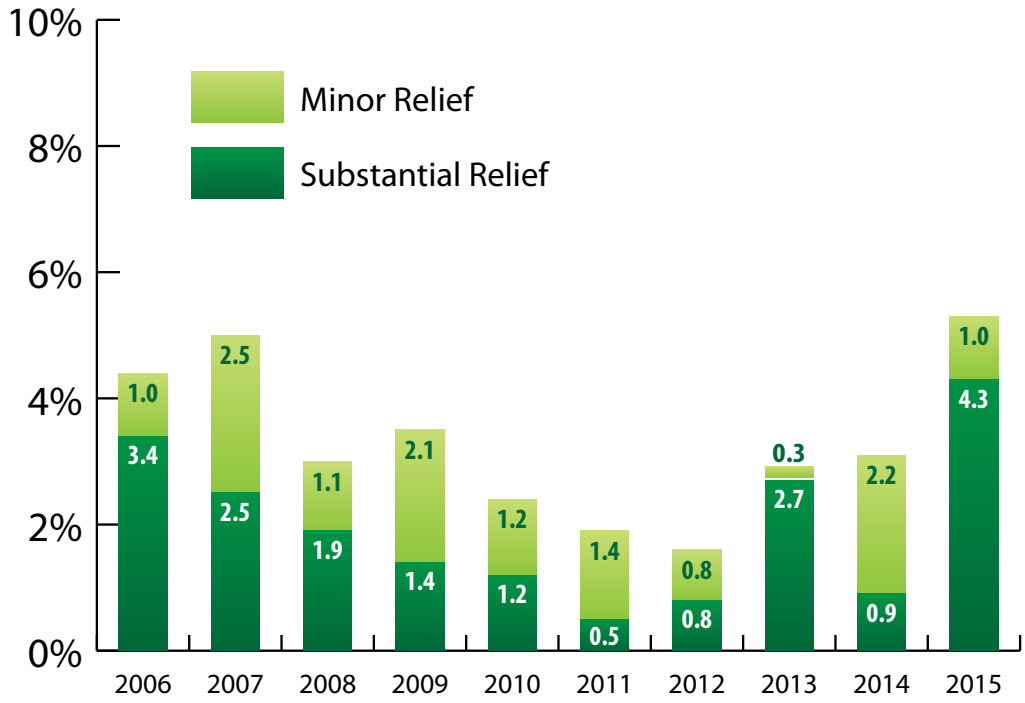


Figure 2: Percentage of Sentence Relief Excluding CAAF Cases



Even after accounting for CAAF influenced cases, 2015 still had the greatest percent of relief granted by AFCCA, but it is now close to 2006 and 2007. The variation is slight, with only a few percentage points separating the years. Just two cases decided differently in 2015 would have dropped its percentage of sentence relief cases below 2006 and 2007.

CONFINEMENT RELIEF

Confinement is the part of a sentence that is most easily quantifiable. It is possible to use the amount of confinement relief granted to get a numerical picture of the amount of sentence relief. The number of years reduced from a sentence gives a more nuanced perspective of the amount of sentence relief that cannot be captured by merely looking at whether there was some sentence relief.

To do this analysis, first, the years of confinement of all sentences AFCCA reviewed was added. Next, the number of years of confinement AFCCA removed from those sentences was calculated.[24] Using these totals, the percentage of confinement relief AFCCA granted during the 10-year period in question was calculated.[25] The results of this approach are displayed in Figure 3.

From 2006 through 2015, AFCCA disapproved just over 2 percent of the confinement approved by convening authorities. Excluding cases identified as CAAF influenced cases, AFCCA disapproved just over 1 percent of approved confinement. Additionally, when looking at sentence relief in this way, 2015 is no longer the year with the greatest sentence relief. Again, the difference between the years is relatively small.

The approach to quantify sentence relief in terms of the amount of confinement relief granted may be a better way to measure the amount of sentence relief appellants received at AFCCA because it shows a quantifiable amount of sentence relief rather than just showing whether some sentence relief was granted. The biggest drawback to this method is that it only captures confinement relief and a small percentage of cases reviewed by AFCCA do not have confinement as part of a sentence. Another drawback is that one case overturned with significant confinement can greatly alter the percentage of reduction in confinement for a given year.

[23] The numbers of CAAF influenced cases are presented in the following table:

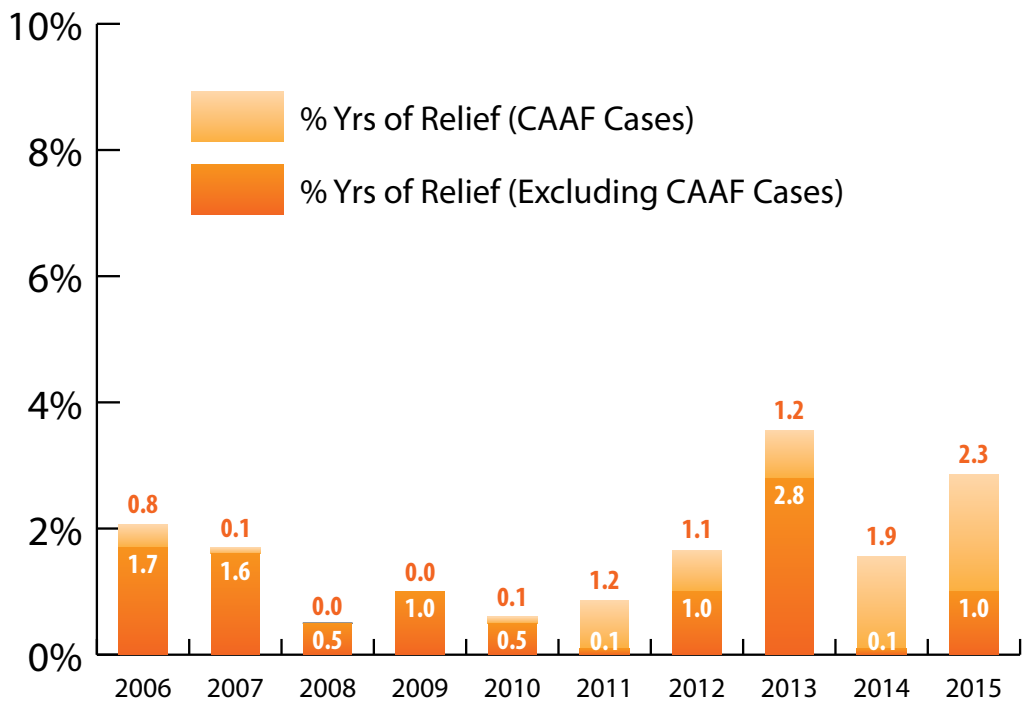
Year	Cases	Minor Relief CAAF Cases	Substantial Relief CAAF Cases
2006	677	2	7
2007	483	1	1
2008	373	0	0
2009	285	0	1
2010	252	0	1
2011	211	1	2
2012	243	2	9
2013	297	0	9
2014	225	1	3
2015	207	1	5

[24] As previously done, cases that appeared to be directly affected by CAAF were separated. A table with this data is provided below:

Year	Total Amount of Confinement	AFCCA Confinement Relief	CAAF Influenced Confinement Relief
2006	992 years	24.5 years	7.8 years
2007	569 years	9.7 years	0.8 years
2008	457 years	2.3 years	0 years
2009	483 years	5.1 years	0.1 years
2010	474 years	2.4 years	0.3 years
2011	184 years	2.4 years	2.3 years
2012	302 years	6.3 years	3.4 years
2013	592 years	24.1 years	7.3 years
2014	547 years	10.7 years	10.3 years
2015	487 years	16.5 years	11.4 years

[25] The seven life sentences that AFCCA considered were not included in this calculation. All seven convictions were upheld by AFCCA. If the life sentences would have been converted to some term of confinement and included in the analysis this would have lowered the confinement relief percentages even more. AFCCA also upheld a sentence to death that is not reflected in Figure 3.

Figure 3: Percentage of Confinement Relief Granted by AFCCA



IMPACT OF FACTUAL SUFFICIENCY AND SENTENCE APPROPRIATENESS POWERS ON SENTENCE RELIEF

With this data now collected and organized, the validity of the concern raised by the audience member identified at the beginning of this article can now be examined. The audience member's concern about factual sufficiency is looked at together with sentence appropriateness.

By way of a brief a background, the military appellate courts, unlike federal civilian criminal appellate courts,[26] have the power to overturn findings of guilt for factual sufficiency. In doing so, the appellate military judges assess the facts in the record of trial and determine whether they are "personally convinced" of guilt beyond a reasonable doubt.[27] This assessment is done without the ability of the appellate judges to hear or see the live testimony of the witnesses.

The military courts of criminal appeals also have the power to modify a sentence if the appellate military judges determine that it is not an appropriate sentence. Cases granted relief for sentence appropriateness reasons are a distinct set of the cases previously discussed as having received sentence relief. The cases granted relief for sentence appropriateness are unique in that the courts can grant relief even if the sentence is legally correct.[28]

[26] Military Justice Review Group, Report of the Military Justice Review Group Part I: UCMJ Recommendations, 608 (2015), *available at* http://www.dod.gov/dodgc/images/report_part1.pdf ("Federal appellate courts do not perform a de novo review of the facts. Generally, federal courts review verdicts only for legal sufficiency.")

[27] *See* United States v. Rivera, ACM 38649 (A.F. Ct. Crim. App. 18 February 2016) (unpub. op.); *see also* United States v. Hayes, 40 M.J. 813 (C.G.C.M.R. 1994); United States v. Nichols, 38 M.J. 717 (A.C.M.R. 1993).

[28] United States v. Nerad, 69 M.J. 138, 142 (C.A.A.F. 2010) ("[I]n exercising its statutory mandate a [court of criminal appeals] has discretion to approve only a sentence, or such part of a sentence, that it 'determines, on the basis of the entire record, should be approved,' Article 66(c), UCMJ, even if the sentence is 'correct.'").

The cases where AFCCA used either (1) its factual sufficiency or (2) sentence appropriateness powers to affect the sentence were grouped together.[29] Essentially, a subset of data was created (from the cases previously identified as having received sentence relief) for instances when the appellate military court substituted its judgment for the judgment of the trial court or convening authority.[30]

The following chart shows the percentage of cases receiving sentence relief based on factual sufficiency or sentence appropriateness.[31]

As seen in Figure 4, the most striking thing is how uncommon it is for an appellant to receive sentence relief on these grounds. AFCCA granted sentence relief for factual sufficiency in only 0.4 percent of cases during the analyzed time period. Cases received relief for sentence appropriateness at the exact same rate.

While providing this type of relief is sometimes considered controversial, these instances are incredibly rare. Moreover, when sentence appropriateness relief was granted, the sentences were not drastically reduced. The most common sentence appropriateness relief identified was upgrading a dishonorable discharge to a bad-conduct discharge.

As reflected in the anecdote in the introduction to this paper, there is some interest in whether military appellate courts are overturning sexual assault cases for factual sufficiency reasons. Because there are so few cases overturned for factual sufficiency, it is difficult to draw solid conclusions on this topic. There was no dramatic increase in factual sufficiency cases over the past few years. With that in mind, looking at the last 10 years, four sex offense cases were overturned for factual sufficiency reasons: one in 2007, one in 2014, and two in 2015. As far as sentence appropriateness is concerned, the only sex offense case to receive relief during the last 10 years was a case involving child sex abuse.

The other service courts of criminal appeals were not analyzed for this article, but it is clear that not many AFCCA cases are overturned for factual sufficiency or sentence appropriateness reasons.

SENTENCE RELIEF BASED ON RANK

To see if appellants in higher ranks received relief more often, every sentence relief case previously identified was separated by the rank of the appellant. Because of the limited numbers, master sergeants (MSgt), senior master sergeants (SMSgt), and chief master sergeants (CMSgt) were grouped together. Similarly, first lieutenants (1st Lt) and second lieutenants (2d Lt) were grouped together, and majors (Maj), lieutenant colonels (Lt Col), and colonels (Col) were also grouped together.[32] The entire 10-year period was combined to provide larger sample sizes. Collecting the data in this manner resulted in Figure 5.[33]

[29] Though technically "sentence appropriateness" cases, those cases in which AFCCA reassessed sentences after findings were modified or cases where AFCCA granted sentence appropriateness relief for untimely post-trial processing under United States v. Tardif, 57 M.J. 219 (C.A.A.F. 2002), were not counted. Only sentences modified for sentence severity or sentence comparison reasons were counted. For a thorough review of sentence appropriateness in the courts of criminal appeals see Colonel Jeremy S. Weber, *Sentence Appropriateness Relief in the Courts of Criminal Appeals*, 66 A.F. L. Rev. 79 (2010).

[30] *See* United States v. Beatty, 64 M.J. 456, 458 (C.A.A.F. 2007) (stating that under Article 66(c), UCMJ, the courts of criminal appeals have the "awesome, plenary de novo power of review" to substitute their judgment for that of the military judge and the court members."

[31] The number of cases each year is as follows:

Year	Factual Sufficiency	Sentence Appropriateness
2006	1	4
2007	4	2
2008	0	2
2009	1	0
2010	0	0
2011	0	0
2012	0	1
2013	2	2
2014	2	0
2015	2	1

[32] There were also eight cadets at the United States Air Force Academy court-martialed during the 10-year time period examined. No sentence relief was granted in these cases, and these cases are not included in Figure 5.

Figure 4: Percentage of Factual Sufficiency and Sentence Appropriateness Cases

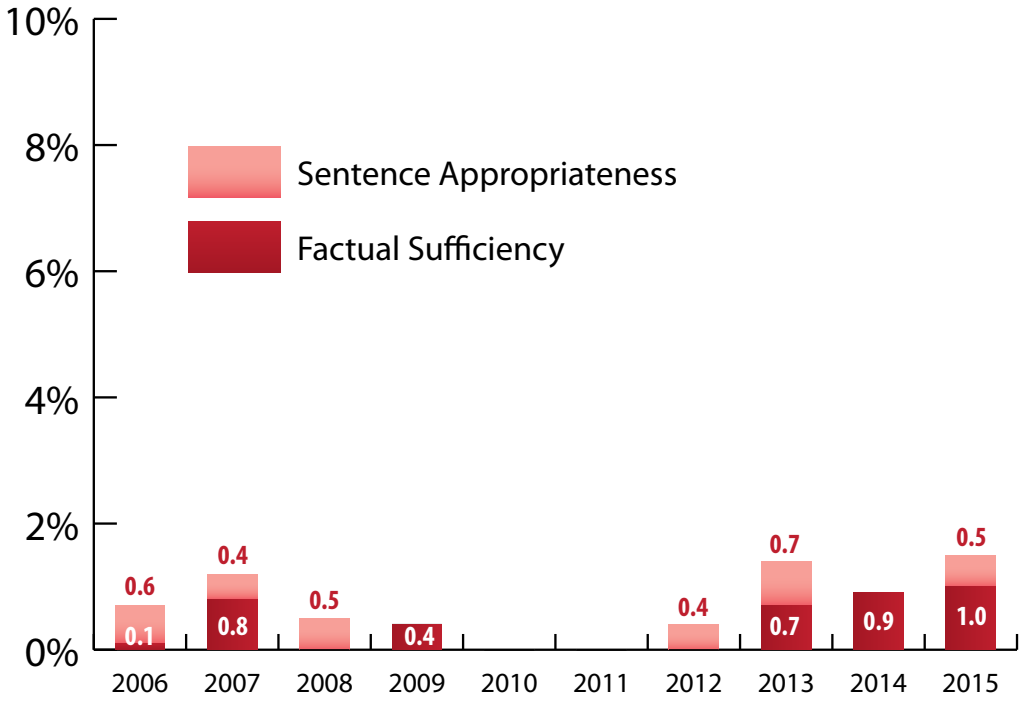
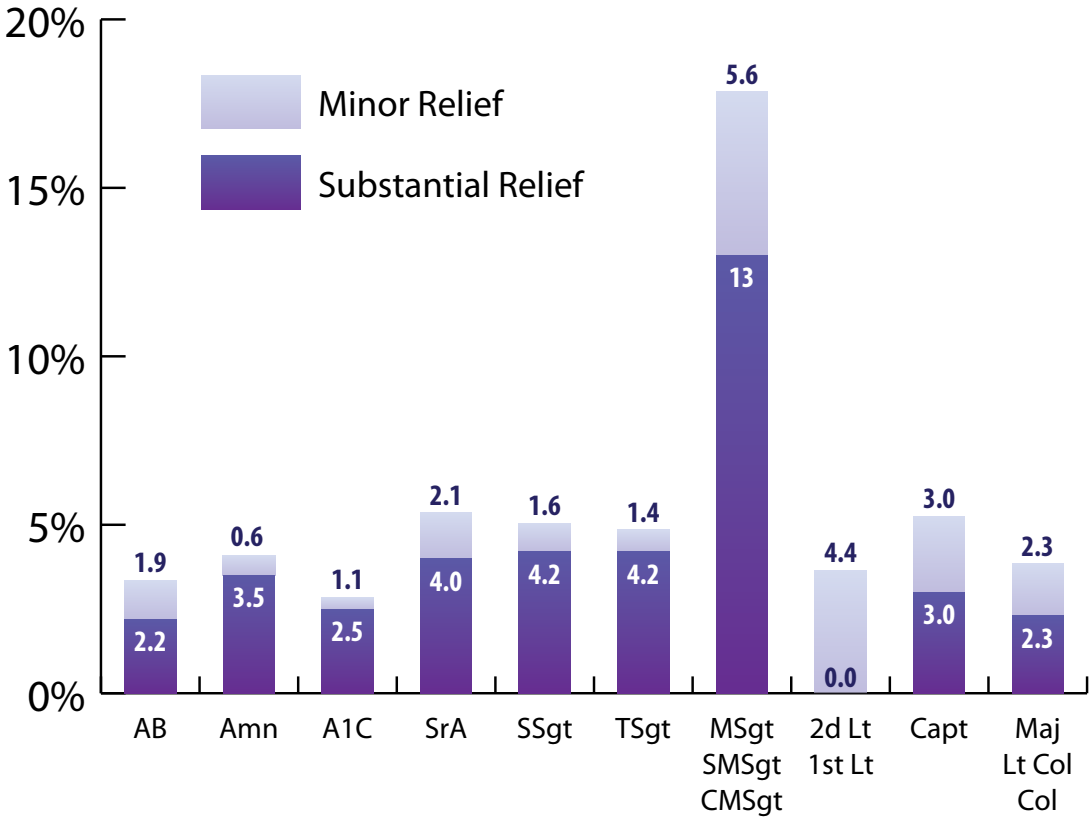


Figure 5: Percentage of Cases Granted Relief Separated by Rank



The percentage of relief granted to the senior noncommissioned officers (SNCOs) is surprisingly higher than all the other groups. However, the sample size for the MSgt, SMSgt, and CMSgt group was considerably smaller than all the other enlisted ranks. The size for the group was 54, 44 of whom were MSgts (none of the six SMSgts received sentence relief; one of four CMSgts received sentencing relief). For comparison, technical sergeant (TSgt) had 143, staff sergeant (SSgt) had 428, senior airman (SrA) had 758, airman first class (A1C) had 999, airman (Amn) had 340, and airman basic (AB) had 368. Based on the small data set, it is possible this is merely an anomaly, and not an indication that SNCOs received preferential treatment.

The idea that appellants in higher ranks received preferential treatment is contradicted by an examination of the officer ranks. Comparing "substantial" relief received by all officers versus those in ranks from AB to TSgt, the enlisted ranks were higher at 3.3 percent versus 1.9 percent for all officers.

The SNCOs received relief for a variety of reasons. None received relief for factual sufficiency or sentence appropriateness reasons. Two cases received relief due to new CAAF precedent. Because of the small set of data, it only took one SNCO each year to receive sentence relief for the group to achieve the percentage it did.

To double check the results, using the same groups, appellants were identified by whether they received any reduction in confinement. This was also done in an attempt to account for the fact that officers cannot receive dishonorable discharges upgraded to bad-conduct discharges. A similar pattern emerged with SNCO's receiving relief more than twice as often as every other group.[34]

It is unclear why SNCOs received the greatest percentage of sentencing relief. If it is not an anomaly, it could be due to a variety of reasons such as the types of cases involving SNCOs, convening authority bias in preferral and referral, or the attorneys representing them. More data is always better for smoothing out anomalies, and the four groups farthest to the right on Figure 5 had the fewest number of cases to examine, resulting in those groups being more affected by outliers. The results in Figure 5 certainly warrant watching in the future to see if the pattern continues.

[33] The numbers for Figure 5 are as follows:

Rank	Total	Substantial Relief	Minor Relief
AB	368	8	7
Amn	340	12	2
A1C	999	25	11
SrA	758	30	16
SSgt	428	18	7
TSgt	143	6	2
MSgt, SMSgt, CMSgt	54	7	3
2d Lt, 1st Lt	45	0	2
Capt	67	2	2
Maj, Lt Col, Col	43	1	1

[34] The numbers were as follows:

Rank	Total	Cases with Confinement Relief
AB	368	12
Amn	340	13
A1C	999	27
SrA	758	29
SSgt	428	17
TSgt	143	6
MSgt, SMSgt, CMSgt	54	6
2d Lt, 1st Lt	45	1
Capt	67	3
Maj, Lt Col, Col	43	1

CONCLUSION

This article showed that the vast majority of court-martial sentences are affirmed by AFCCA. On the rare occasion when sentence relief was granted, it was usually not based on factual sufficiency or sentence appropriateness. While there has been some fluctuation in how often AFCCA grants sentence relief, it is minimal and to some extent explained by the influence CAAF has on it.

An increase in rank did not correspond to an increased chance at appellate relief, but SNCOs did stand out in how often they received relief. Further review is necessary to determine if the trend of SNCOs receiving relief more often is a coincidence or a correlation.

To see a more accurate perspective on the data compiled, consider Figure 6. Figure 6 displays the same information as Figure 1, but this time the Y axis is extended to 100 percent and all sentence relief is combined together.

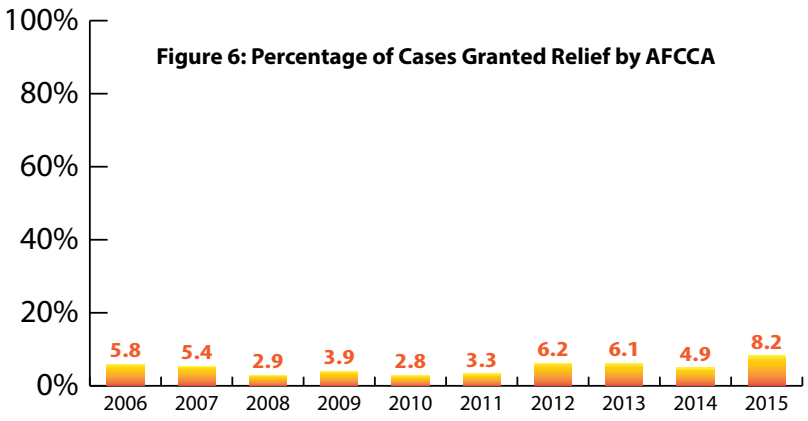


Figure 6: Percentage of Cases Granted Relief by AFCCA

Displaying the data this way provides a broader context in which to view the amount of sentence relief granted by AFFCA over the last 10 years. Viewing it in this context highlights how little variation there has been from year to year. Considering all the changes that have occurred during the last ten years—changes in the law, changes in appellate judges, changes in society—appellate relief has been rather consistent.

Major Kevin Gotfredson

(B.S., Brigham Young University; J.D., Florida State University College of Law) is an Honors Law Clerk at the Air Force Court of Criminal Appeals, Joint Base Andrews, Maryland.

Captain Micah Smith

(B.A., Taylor University; J.D., University of Richmond School of Law) is an Honors Law Clerk at the Air Force Court of Criminal Appeals, Joint Base Andrews, Maryland.

If it Ain't Broke...

How it is Time to Rethink the Letter of Reprimand Process for Enlisted Personnel

BY MAJOR CHRISTOPHER J. BAKER AND TECHNICAL SERGEANT CHRISTOPHER W. SHEFFIELD

In the current Air Force climate, an LOR, whether just or unjust, could be the difference between retention and separation.

Investigation has disclosed…that it is time to reevaluate whether the process for administering reprimands to enlisted personnel is appropriate.

Currently, a staff sergeant (SSgt) supervisor can initiate a letter of reprimand (LOR) on an airman first class (A1C) ratee, and there is virtually no recourse for the ratee short of submitting matters for the supervisor to consider (perhaps with the assistance of an Area Defense Counsel) and hoping he provided a submission compelling enough to convince the supervisor to downgrade or revoke the action, or filing an appeal with the Board of Corrections for Military Records. Although the supervisor *should* read carefully and consider all matters the subordinate submits in response, there is no explicit requirement for the supervisor to do either.[1]

In the past, an LOR served effectively as a rehabilitative tool; it raised the seriousness of the warning but did not impact the member's career permanently or become an action from which one could not recover. But, in the current Air Force climate, an LOR, whether just or unjust, could be the difference between retention and separation. Moreover, an LOR can now more severely impact a member's promotion potential. Current guidance provides too much unfettered latitude to supervisors with respect to this rehabilitative tool, and it is time the Air Force changed the process for issuing LORs to junior, enlisted personnel.

[1] U.S. Dept of Air force, Instr. 36-2907, Unfavorable Information File (UIF) Program para. 4.5.1.6 (26 November 2014) [hereinafter AFI 36-2907] (stating: "[t]he person who initiates the LOC, LOA, or LOR has 3 duty days to advise the individual of their final decision regarding any comments submitted by the individual."). Certainly, there is a common sense implication that the matters should be considered, but the AFI regrettably leaves the issue somewhat open to interpretation.

Stock Photo © iStock.com/folewu

MORE SEVERE THAN A COUNSELING OR ADMONITION

Most members of The Judge Advocate General's Corps are familiar with Chapter 4 of Air Force Instruction (AFI) 36-2907, *Unfavorable Information File (UIF) Program*, which addresses administrative counselings, admonitions, and reprimands.[2] Most have probably found it wanting in its description of when these tools are appropriate and who is the appropriate person to administer them. The former issue is not surprising, when the instruction describes an admonishment using the *unambiguous* description of "more severe than a LOC/RIC" (Letter of Counseling)/(Record of Individual Counseling),[3] or a reprimand as "more severe than a counseling or admonition."[4] Most legal professionals and many first sergeants can review the facts of a case and have a feel for which tool is more appropriate, or at least within the zone of reason, for each scenario. But there is no rule requiring anyone to review each rehabilitative tool one wants to impose.

With regard to the latter issue, the instruction states clearly that "[f]irst line supervisors, first sergeants, and commanders routinely counsel individuals, either verbally or in writing, giving advice and reassuring subordinates about specific situations."[5] Further, paragraph 4.2.3 advises "[f]ront line supervisors and first sergeants may recommend the commander file the negative or unfavorable RICs, or LOCs in the UIF" (Unfavorable Information File).[6]

The guidance for admonitions and reprimands is less clear. Admonitions should document "an infraction serious enough to warrant" the admonition, but should not be used when a reprimand is "more appropriate."[7] The only guidance provided for reprimands is the "more severe" language cited above and the proviso a reprimand reflects a "stronger degree of official censure."[8] Paragraph 4.5, which provides limited procedures for administering these rehabilitative tools, refers only to "the person who initiates" the action, although paragraph 4.5.2 gives the issuer the option to send the action to the commander or superior "for information, action, or their approval for file in the [unfavorable information file] or [personnel information file]."[9]

THE PERSON WHO INITIATES....

The authors do not suggest supervisors should be hamstrung from employing as many rehabilitative tools as necessary to correct behavior. Although commanders are "responsible for good order and discipline in their commands,"[10] most commanders and legal practitioners adhere to the notion of handling things at the lowest level. Supervisors need multiple tools to help them modify their subordinates' behavior. Supervisors utilize many techniques to reward and reinforce positive behavior. Performance feedback should be among the first tools used to let subordinates know areas in which they are performing well. Performance reports, training and leadership opportunities, time off, and award nominations are other ways supervisors incentivize good behavior.

Although there are a number of tools at the supervisor's disposal, there are a number of rewards a supervisor cannot bestow. Supervisors cannot promote subordinates under the Stripes for Exceptional Performers (STEP) program.[11] They cannot award decorations for meritorious service.[12] Supervisors cannot generally guarantee choice assignments or deployments to their subordinates. Everyone can agree supervisors need the ability to reinforce positive behavior, but there are many incentives they do not have and, for a number of reasons, should not have the power to use. That said, the supervisor

[2] *Id.*

[3] *Id.*, para. 4.3.

[4] *Id.*, para. 4.4.

[5] *Id.*, para. 4.2.1.

[6] *Id.*, para. 4.2.3.

[7] AFI 36-2907, para. 4.3.

[8] *Id.*, para. 4.4.

[9] *Id.*, para 4.5.2.

[10] Manual For Courts-Martial, United States pt. V, ¶ 1.d(1) (2012) [hereinafter MCM].

[11] *Cf.* U.S. Dep't of Air Force, Instr. 36-2502, Enlisted Airman Promotion/Demotion Programs para. 2.10 (12 December 2014) (C1, 27 August 2015) [hereinafter AFI 36-2502]. This program allows a commander to promote airmen for compelling reasons outside the normal promotion process.

[12] *See* U.S. Dep't of the Air Force, Air Force Guidance Memorandum to U.S. Dep't of Air Force, Instr. 36-2803,The Air Force Military Awards and Decorations Program app. 2 (18 December 2013).

As it stands, there is virtually no check on the person who initiates an LOR to ensure, at the very least, the preponderance of evidence standard has been met.

should up-channel the subordinate's worthiness for these incentives, and it would be prudent for the commander to have the supervisor's input prior to granting the same.

Similarly, supervisors need the ability to correct poor performance and misconduct. In addition to positive reinforcement, performance feedback should be the primary tool supervisors use to inform subordinates how to improve. If the subordinate does not improve performance, that subordinate should not earn a good performance report. If the subordinate has specific instances of behavior requiring a course correction, and written feedback does not suffice, the supervisor should be able to counsel the subordinate. The subordinate should understand how to improve and should realize additional infractions could lead to more serious manners of discipline. If the counseling fails to correct the behavior, the supervisor needs to be able to stress more strongly the behavior is inappropriate and must be corrected. Admonitions play this role well.

As with incentives, there are a number of tools outside the supervisor's power to address misconduct and poor performance. Supervisors cannot place someone on a control roster.[13] Supervisors cannot demote subordinates.[14] Supervisors cannot impose nonjudicial punishment.[15] Supervisors cannot refer a case to trial by court-martial.[16] Supervisors cannot recommend the separation authority administratively separate subordinates.[17] But, the supervisor should inform the chain of command when some of these actions may be appropriate, and for some of these actions the commander would be prudent in seeking input from the subordinate's supervisor prior to initiating action.

GOT IT—SO WHAT'S THE PROBLEM?

Currently an LOR is the strange tool that *both* the supervisor and the commander can utilize. In fact, just about anyone can give a junior enlisted subordinate an LOR.[18] As it stands, there is virtually no check on the person who initiates to ensure, at the very least, the preponderance of evidence standard has been met. It is time to rethink this policy.

As mentioned previously, AFI 36-2907 does at least state that a reprimand indicates a "stronger degree of official censure" than counselings or admonitions.[19] In fact, a reprimand is a punishment

[13] *See* AFI 36-2907, *supra* note 1, at para. 3.3.

[14] *See* AFI 36-2502, *supra* note 10, at para. 6.2.

[15] *See* MCM, *supra* note 10; Uniform Code of Military Justice (UCMJ) art. 15 (2012); Dep't of Air Force, Instr. 51-202, Nonjudicial Punishment (31 March 2015).

[16] *See* MCM, *supra* note 10, R.C.M. 404, 407.

[17] U.S. Dep't of Air Force, Instr. 36-3208, Administrative Separation of Airman 105, 110 (9 July 2004) [hereinafter AFI 36-3208], *modified by* U.S. Dep't of Air Force, Guidance Memo. AFI36-3208_AFGM2015-01 (23 June 2015).

[18] "Commanders, supervisors, and other persons in authority can issue administrative counseling, admonitions, and reprimands." AFI 36-2907, *supra* note 1, at para. 4.1.

[19] *Id.* at para. 4.4.

authorized when a person is convicted of an offense by court-martial.[20] One of the authors has actually seen a court-martial in which the court convicted the accused of wrongful appropriation but imposed *only* a reprimand as punishment. Similarly, a reprimand is a punishment option through the nonjudicial punishment process.[21] The fact a reprimand may be adjudged both through nonjudicial punishment and through a court-martial demonstrates they carry a higher weight than a counseling or admonishment.

Junior, Inexperienced Supervisors

There are several practical reasons to adjust the way LORs are imposed. In many units, a senior airman is probably not going to be a direct supervisor. There are units, however, in which senior airmen do have supervisory and leadership authority over other junior enlisted personnel. Security Forces is one such career field. Senior airmen are often thrust into leadership roles including patrol and gate leaders, as well as fire team leaders while deployed. While deployed, senior airmen are often the highest ranking airmen in patrol vehicles. They are placed in charge of very young Airmen who have the authority to enforce the law on the installation and are entrusted with the authority to use lethal and nonlethal force.

Supervisors in this career field undoubtedly need to have tools at their disposal to correct and address misconduct. But if an airman first class does not adjust his behavior after receiving an LOC from a senior airman, that airman first class is not likely to alter it if the same senior airman issues an LOR. An LOR from a senior airman does not carry a "stronger degree of official censure" than an LOC simply because it reprimands rather than counsels. Instead, if a person of higher rank and responsibility issued the letter, it would carry a "stronger degree of official censure."

Personality Conflicts

An additional concern of allowing supervisors to impose LORs involves personality conflicts. Sometimes a rater and ratee will not get along. Granted, no instruction requires everyone to like each other, and personality conflicts are natural. However, some people are less able to work professionally with those they dislike than others. In such cases, a supervisor may be more apt to be less forgiving with the subordinate. They begin to look for and focus on only the things the subordinate did wrong, and it becomes difficult if not impossible to get out from under the magnifying glass. The result is that the disfavored subordinate receives multiple corrective actions while the favored subordinate receives no paperwork or less paperwork.

At Base X, one of the authors attended the quarterly Community Action Information Board (CAIB) and the Director of the Equal Opportunity office asked the author to discuss military justice rates per thousand to give the attendees an idea of whether there were any trends in the administration of justice within the wing related to race or gender. The author indicated it is difficult to tell what the rates per thousand portend, especially when the sample is so small. The author cautioned that the legal office does not review administrative paperwork, so even if the nonjudicial punishment or court-martial rates per thousand do not evince discrimination in punishment, there may still be discrimination in the workplace.

Supervisors can be the source of discrimination and have the ability to initiate LORs without anyone checking to see whether the action was warranted by the situation and supported by facts or if it was a result of a personality dispute or prejudice. If that supervisor had to make a case to a higher ranking individual, it would be more difficult for the subordinate to receive an unfair or arbitrary reprimand. Just as the legal office helps ensure the fair administration of justice throughout the wing, and as commanders try to ensure fair discipline across a squadron, raising the rank or positional authority to impose an LOR will help ensure the fair imposition of administrative actions within a flight or a section.

[20] MCM, *supra* note 9; R.C.M. 1003(b)(1).

[21] *See id.*, pt. V, ¶ 5.c.(1).

Discharges

In 2015, the most frequent basis of involuntary separations in the Air Force was minor disciplinary infractions.[22] AFI 36-3208, *Administrative Separation of Airmen*, states infractions under this section result, "as a rule, in informal (reduced to writing) or formal counselings, letters of reprimand, or Article 15 nonjudicial punishments."[23] Often, paperwork from the supervisor composes the bulk of the evidence justifying this basis and, accordingly, an under honorable conditions service characterization. This is another example of the amount of power supervisors have. Many practitioners have probably reviewed a discharge package in which a supervisor issued several LOCs, maybe some LOAs, and several LORs before anyone higher in rank or authority became aware of any issue. By that time, the subordinate may have just given up on the Air Force.

One of the authors reviewed a discharge package in which a SSgt frontline supervisor issued three LORs to the respondent on the same day. To the legal office, it appeared the supervisor was piling on and the office recommended the squadron commander treat them as one LOR for purposes of the discharge action. The commander disagreed, and the package went forward to the separation authority. Judge advocates advise; commanders decide. In this case, one supervisor created enough paperwork to convince the squadron commander and separation authority to discharge the subordinate. It is impossible to tell whether the subordinate would have altered his behavior had his rater's rater or a master sergeant (MSgt) issued the LORs. The point is that the supervisor exercised enough authority to justify an involuntary separation. And that is too much power to give a supervisor.

Alternatively, many practitioners have probably also reviewed discharge files replete with documented misconduct. However, sometimes the supervisor did not complete the paperwork properly, rendering the document worthless as part of the underlying basis for separation. Perhaps more disappointing is the supervisor who initiates more than sufficient administrative actions to justify separation, but failed to inform the chain of command of the disciplinary issues. There could be some cases clearly warranting discharge, and the member could have been separated perhaps months before the commander learned of the mountain of paperwork the supervisor imposed. In the meantime, the Air Force continued to pay an Airman who was a drain on morale and good order and discipline.

Similarly, practitioners know there is no standard formula for the evidence to support the minor disciplinary infractions basis. Often it follows the trend of an LOC or two, an LOA or two, an LOR or two, then nonjudicial punishment. There is often a debate over whether the nonjudicial punishment should serve as the trigger event. If the nonjudicial punishment is treated as a rehabilitative tool, the legal office will often advise the commander another LOR can serve as the trigger event for involuntary separation. Again, there is no requirement that the trigger-event LOR be initiated by the commander. Accordingly, the opportunity for abuse again presents itself with the supervisor.

Unfavorable Information Files

For enlisted members, commanders are not required to place LORs into UIFs.[24] To establish a UIF, the commander informs the member through the Air Force Form 1058.[25] Although this action requires commander action, it does not afford the member an appeal right on the underlying paperwork. Rather, it simply provides

[22] In 2015, there were 869 discharges under this basis, 788 of which were notification cases. The next closest basis was paragraph 5.54, of which there were 625 discharges. Additionally, there were 20 discharges under paragraph 5.22.2.6 (Entry Level Performance or Conduct – Minor Disciplinary Infractions); there were 36 discharges under paragraph 5.26.1.1 (Unsatisfactory Duty Performance – Failure to Perform Assigned Duties Properly); and 103 discharges under paragraph 5.50.2 (Conduct Prejudicial to Good order and Discipline). Along with paragraph 5.49, these last three paragraphs involve bases for which paperwork, to include LORs from front-line supervisors, likely composed the majority of the basis for discharge. *See* United States Air Force Judge Advocate General's Corps Web-Based Administrative Separation Program, https://aflsa.jag.af.mil/AF/PARALEGAL/dmapss/dmapss_welcome.php (last visited 7 Mar. 2015) (on file with the author).

[23] AFI 36-3208, *supra* note 17, at para 5.49.

[24] *Cf.* AFI 36-2907, *supra* note 1, at 8, 18. The UIF is "an official record of unfavorable information about an individual. It documents administrative, judicial, or nonjudicial censures concerning the member's performance, responsibility and behavior." *Id.* at para 1.1.

[25] *Id.*

the subordinate with a chance to dissuade the commander from establishing the UIF. There is no burden of proof requirement for the commander to follow when establishing a UIF. It is likely few practitioners have received a call from a commander asking whether they could or should establish a UIF based on the LOR of a supervisor. Even if such a call were placed, few judge advocates would likely spend much time discussing whether the UIF were appropriate. Again, the authors are not advocating a new process for commanders to call the legal office when establishing a UIF. This example demonstrates, however, another way in which a supervisor's decision to initiate the reprimand can have long-term effects.

When a commander places a document into a UIF, the military personnel section will enter a UIF code and disposition date in the Military Personnel Data System.[26] Once a UIF is opened, one's Single Unit Retrieval Format (SURF) will reflect the UIF in the "Restrictions" section. Accordingly, when the subordinate is up for promotion and if the board convenes during the life of the UIF, the board will see the subordinate has a UIF when its members review the SURF. This will likely result in the subordinate not being selected for promotion.

Performance Reports

Performance reports are another tool potentially affected by an LOR. An LOR itself does not trigger a referral performance report.[27] Supervisors must consider unacceptable performance as failure to adhere to Air Force standards and expectations.[28] Supervisors can consider a persistent inability to adhere to standards during the rating period to refer a report.[29] Similarly, they can consider a single instance in which the subordinate departed significantly from a particular standard such that it overshadows the aggregate performance during the rating period.[30] Such a significant incident includes, but is not limited to, "comments regarding omissions or misrepresentation of facts in official statements or documents, financial irresponsibility, mismanagement of personal or government affairs, confirmed incidents of discrimination or mistreatment, illegal use or possession of drugs, AWOL, Article 15 action, and conviction by courts-martial."[31]

Often, if the LOR is capturing egregious, one-time incidents, the commander will initiate the action. It is more likely the underlying misconduct will appear in a performance report. Sometimes, the front-line supervisor is more likely to file the LOR in a desk drawer rather than a PIF or recommending a UIF. As stewards of due process, this also justifies amending the current system. If the paperwork meets the preponderance of the evidence standard, the misconduct should be documented and filed properly. Desk drawer LORs might make the LOR process less awkward for the supervisor, and might even endear the supervisor more with the subordinate. But to work properly, LORs should be documented properly. If an LOR is supposed to carry a "stronger degree of official censure," they should not be collecting dust and coffee stains in or on the supervisor's desk.

IF IT IS BROKEN, HOW CAN WE FIX IT?

There are a number of potential courses of action (COAs) the Air Force could implement to improve the system with respect to LORs.

COA One: Restrict the ability to impose LORs on enlisted personnel to unit commanders.

COA one would ensure uniformity throughout the squadron. It would ensure the "stronger degree of official censure." Moreover, it is not without precedent, as the Army already limits the authority to issue letters of reprimand of enlisted personnel to the subordinate's immediate commander.[32]

[26] U.S. Dep't of Air Force, Adverse Actions: Total Force (TF) Personnel Services Delivery (PSD) Guide 12 (25 September 2015).

[27] *See* U.S. Dep't of Air Force, Instr. 36-2406, Officer and Enlisted Evaluation Systems 48–49 (2 January 2013) (C3, 30 November 2015) (Corrective Actions Applied 5 April 2013) [hereinafter AFI 36-2406].

[28] *See id.* at para. 1.10.3.1.

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *See* U.S. Dep't of Army, Reg. 600-37, Unfavorable Information para 3-4(a)(1)(4) (19 December 1986).

COA Two: Restrict the ability to impose LORs on enlisted personnel to the first non-supervisory E-7s or higher in the chain of command.

MSgts generally have been in the service for at least 10 years. They are respected for their experience and time in the service. They lead sections and are superintendents. They supervise more personnel than do junior Airmen and noncommissioned officers. Accordingly, they are mature enough and understand Air Force standards well enough to enforce these standards more evenly throughout their area of responsibility. The respect they possess lends a "stronger degree of official censure" when they take action than when a SSgt takes the same action.

COA Three: Implement an appeal right for LORs.

This option would allow front-line supervisors to maintain the ability to issue LORs, thus alleviating the concern that changing the instruction would restrict a supervisor's ability to handle issues at the lowest level. It simultaneously affords a layer of due process to the member. If the subordinate felt the LOR were unwarranted, he or she could appeal it to the supervisor's supervisor, who would have the option to uphold the document, downgrade it, or remove it entirely. The subordinate could have three days to appeal, and the appellate authority would have three days to inform the subordinate of the final decision.

COA Four: Require a legal review for all LORs.

Adding a legal review, with or without an appeal right, is an additional option to ensure the member is not unnecessarily or unfairly reprimanded.

WEIGHING THE OPTIONS

COA one would ensure consistent use of this tool across the squadron, but it would also place a heavy administrative burden on commanders. The Army has companies, whereas the squadron is generally the lowest level of command in the Air Force. However, COA two better preserves progressive discipline since there would be a "stronger degree of official censure" while still keeping the issue at a lower level.

The proviso in COA two for the first *non-supervisory* MSgt or above obviates or greatly reduces the personality conflict issue. Personality conflicts and prejudice can still arise despite the higher grade, so the risk of the supervisor issuing an LOR to a subordinate they do not like when the same misconduct would have resulted in an LOC or a verbal counseling for subordinates they like remains. One would hope that a MSgt would be mature enough to put aside personal biases when maintaining good order and discipline, but common sense reveals that is not always the case. COA two provides the opportunity to take advantage of the person initiating the action to be at least one step removed from the subordinate but also possessing the maturity and credibility commensurate with the rank he or she holds.

One could argue the authority could simply be placed with the supervisor's supervisor, rather than requiring at least a senior noncommissioned officer. However, it is possible a senior airman or SSgt could rate a junior enlisted member, and a technical sergeant (TSgt) may be the next person in the rating chain. TSgts are technical experts and are "responsible for their subordinates' development and the effective accomplishment of all assigned tasks."[33] But senior noncommissioned officers are charged with leading and managing teams.[34] They are charged with demonstrating, inspiring, and developing "an internalized understanding of Air Force Core Values and the Airman's Creed."[35] TSgt are credible noncommissioned officers, but they still do not carry the "stronger degree of official censure."

COA three relies on the appellate authority having the requisite experience and understanding of applying facts to an evidentiary burden of proof. This might not be the case in every career field. The additional steps in the process also create more opportunities for the supervisory chain to miss a step procedurally, thus rendering the document unusable for

[33] U.S. Dep't of Air Force, Instr. 36-2618, The Enlisted Force Structure para. 4.2 (27 February 2009) (CC, 23 Mar. 2012) [hereinafter AFI 36-2618].

[34] *See id.* at para. 4.1.

[35] *Id.* at para. 5.1.4.

discharge or court-martial. There are enough supervisors who struggle to document properly the final decision and whether the member submitted matters on the underlying LOR. An additional appeal step without a legal review inserted into the process will likely become burdensome to the unit.[36]

With regard to COA four, given the current operations tempo and base-level legal office staffing, few staff judge advocates would bite at the chance to add to their offices' workloads. There is currently no way to tell how many LORs are issued each year, but the number would likely be quite large. Although this is probably the surest way to ensure a just process, it is too large of a program to take on without additional manpower.

Both COAs three and four would also likely necessitate a requirement for the supervisor to provide evidence to support the LOR, something not currently required under the instruction. The appellate authority and the legal office would need something to review to determine whether the initial action was just. The requirement to produce documented evidence may reduce the amount of improper documents.

One might also argue the entire problem could be solved if the legal office trained front-line supervisors on how to administer paperwork properly. There is always value to training, but the best training might still not remove all the concerns mentioned above, particularly that of personal bias. Training also fails to address the issue of whether a reprimand from the senior Airman or SSgt supervisor carries the "stronger degree of official censure."

RECOMMENDATION

Using COA two to restrict the authority to impose LORs on enlisted personnel to the first non-supervisory E-7s or higher in the chain of command is the COA most likely to solve the problems inherent in the current way LORs are administered. It is more likely to prevent LORs unfairly issued based on biases and personality conflicts. It will ensure more consistent maintenance of good order and discipline in the unit. Most importantly, it might more effectively serve to correct the underlying behavior, as paperwork from a senior noncommissioned officer or commissioned officer carry a "stronger degree of official censure" than the same offered by a person of a lower pay grade.

Judge advocates are stewards of due process. Even if this article's recommendations are not adopted fully, they will hopefully be a catalyst for changes in the system. Air Force instructions are not law, and they are not cast in stone. The current process should be improved. This small change for this rehabilitative tool will improve fairness throughout the Air Force while concomitantly increasing the likelihood they will help the subordinate come back in line with Air Force standards. R

Major Christopher J. Baker

(B.A. Western Michigan University – Kalamazoo; J.D. Valparaiso University School of Law) is the Deputy Commander and Staff Judge Advocate for the 426th Air Base Squadron in Stavanger, Norway.

Technical Sergeant Christopher W. Sheffield

Is the Noncommissioned Officer in Charge of the Legal Office of the 426th Air Base Squadron, Stavanger, Norway.

[36] This is not to say no portion of AFI 36-2907 might warrant an appeal right. Control rosters affect PCSs, formal training, and eligibility for promotions and reenlistments. *See* AFI 36-2907, *supra* note 1, at 27. However, given the word limit for this article, that idea may have to be explored another day.

Summarily Dismissed: The Use of Immunized Evidence at Administrative Discharge Boards

BY CAPTAIN THOMAS R. BURKS

Can statements made under a grant of immunity later be used against that person in discharge proceedings?

Like most employers the Air Force has the ability to involuntarily terminate an employee's service. But, when the Air Force wants to separate a military member it must allege a basis for the separation and use evidence to substantiate that basis.[1] One way to do this is to use the Airman's (respondent) statements as evidence against him. There are rare occasions, however, where such statements were made under the protection of immunity. These cases raise an important issue for any administrative discharge, but particularly for those that involve a discharge board, namely: can statements made under a grant of immunity later be used against that person in discharge proceedings?[2]

[1] *See generally* U.S. Dep't of Air Force, Instr. 36-3208, Administrative Separation of Airmen (9 July 2004) (C7, 2 July 2013) [hereinafter AFI 36-3208]; AFI 36-3207, Separating Commissioned Officers (9 July 2004) (C6, 18 October 2011).

[2] When and how immunized statements may be used is a matter of considerable importance. But very little military specific guidance has been provided outside of the court-martial context. For the absence of discharge guidance on the immunity question, *see generally* U.S. Dep't of Def. Instr. 1332.14, Enlisted Administrative Separations (27 January 2014) (C1, 4 December 2014); Air Force Pamphlet 36-3210, Procedural Guide for Enlisted Administrative Discharge Boards, (1 November 1995) (C3, 20 October 2011) [hereinafter AFPAM 36-3210]; AFI 36-3208, *supra* note 1; AFI 36-3207, *supra* note 1; and AFI 51-602, Boards of Officers (2 March 1992). For military courts' lack of jurisdiction over administrative discharge proceedings, see Cook v. Orser, 12 M.J. 335, 346 n.39 (C.M.A. 1982), and 10 U.S.C. §§ 866, 867(2012).

Stock Photo © iStock.com/tomloel

To answer this question this article will analyze the right against self-incrimination and consider three issues related to its application: (1) whether the right against self-incrimination applies at the discharge board itself; (2) whether it applies to statements made prior to the board; and (3) whether it prohibits the admission of pre-board immunized statements into evidence.

THE RIGHT AGAINST SELF-INCRIMINATION

The Fifth Amendment to the U.S. Constitution expressly provides that: "[n]o person…shall be compelled in any criminal case to be a witness against himself."[3] This clause "protects two distinct rights: first, a defendant's right not to testify at his own criminal trial and, second, the privilege of any witness, in any formal or informal governmental proceeding, not to answer questions when the answers might incriminate him."[4] The second prong is basically a privilege "not to answer official questions…in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings."[5]

A discharge board undoubtedly qualifies as a formal or informal proceeding at which a respondent's answers could expose him to future criminal liability. Consequently the Fifth Amendment right against self-incrimination is very much in effect at the discharge board itself.[6] While the respondent can testify if he desires, the government can no more require him to give an incriminating response than it could in a criminal trial. The question remains, however, what effect the privilege has on statements made *before* the board convenes.

The plain language of the Fifth Amendment indicates that its self-incrimination clause has no application outside of the courtroom. In the colloquial sense, even an interview with a police officer is not a "criminal case," and the person questioned is not a "witness." But statements made by the person questioned could certainly turn into a criminal case. And, if he incriminates himself, he is providing evidence in much the same way as he would as a witness at trial. So, if the privilege is to have its intended effect, the right against self-incrimination must extend to certain prehearing situations. It is important to note that the right against self-incrimination is not absolute. A person is free to incriminate himself, and the government is likewise free to use that evidence so long as it was voluntarily provided. But how does one tell a voluntary statement from a coerced statement?

What effect does the right against self-incrimination privilege have on statements made ***before*** the board convenes?

[3] U.S. Const. amend. V.

[4] Roach v. Nat'l Transp. Safety Bd., 804 F.2d 1147, 1151 (10th Cir. 1986) (citing United States v. Housing Foundation of America, 176 F.2d 665, 666 (3d Cir. 1949), and United States v. Gay, 567 F.2d 916, 918 (9th Cir. 1978)).

[5] *Id.* at 1151 (quoting Lefkowitz v. Turley, 414 U.S. 70, 77 (1973)).

[6] Additionally, AFI 36-3208, *supra* note 1, para. 8.9.4, expressly affords Article 31 rights to the respondent at a discharge board.

In *Miranda v. Arizona,* the Supreme Court held that the Fifth Amendment right against self-incrimination applies to custodial police interrogations, and that "the prosecution may not use statements…stemming from custodial interrogation…unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination."[7] The procedural safeguards mentioned are the so-called "*Miranda* warnings" (right to remain silent, right to an attorney, etc.) given to suspects at the time they are taken into custody.[8] A statement made during a custodial interrogation without these warnings is presumed to be involuntary. But if these rights are knowingly and voluntarily waived, the Fifth Amendment is satisfied and the person questioned can incriminate himself all he wants. More importantly, his incriminating statements can be used against him. Thus, generally speaking, a voluntary self-incriminating statement is one given after a person has been advised of and waives his Fifth Amendment rights.[9]

Military members enjoy the same pretrial constitutional right against self-incrimination,[10] but the privilege has broader application in the military context due to the coercive power of superior military rank.[11] A military member must be advised of the rights provided under Article 31 of the Uniform Code of Military Justice (UCMJ) any time that: (1) the military member is being interrogated or questioned by a person subject to the UCMJ; (2) who suspects the military member of committing an offense; and (3) is asking questions related to that offense.[12] As a result, the requirements of Article 31 can be triggered by something as minor as a supervisor asking a subordinate why he is late to work,[13] which is a substantially lower threshold than the custodial interrogation requirement of the Fifth Amendment. Nevertheless, like *Miranda* rights, a self-incriminating statement made after a rights advisement and waiver of Article 31 rights is considered voluntary and is generally admissible at trial against the person who made it.[14] Although this principle cannot be seamlessly applied in the discharge context,[15] as a general principle, a statement made without the benefit of rights advisement is most likely inadmissible in discharge proceedings, though an analysis of the surrounding circumstances will be necessary.

THE MAGIC OF IMMUNITY

Prohibiting the use of involuntary prehearing statements at discharge boards, while important, does not by itself settle the question whether immunized evidence can be used at such proceedings. The Constitution and Article 31 are ultimately concerned with self-incriminating evidence only if compelled by a government official. The critical question is whether statements made under a grant of immunity are voluntary. In the military, immunity from prosecution is granted by a general officer and is accompanied by an order from that officer to testify truthfully.[16] A prudent witness will generally avoid incriminating himself, which necessarily means that the grant of immunity orders him to do something he would not normally do. Thus, in the military sense, immunized statements certainly appear to be compelled.

The Fifth Amendment prevents the government from compelling self-incriminating evidence in criminal cases. However, immunity altogether eliminates the possibility that criminal prosecution could follow from statements made under its protection. Thus, once prosecution is no longer an option, the Fifth Amendment is satisfied and the government is free to require all the self-incriminating evidence it wants.[17]

[7] 384 U.S. 436, 444 (1966).

[8] *Id.* at 445.

[9] *Id.* at 444.

[10] *See* United States v. Rosato, 11 C.M.A. 143, 145 (C.M.A. 1953) (recognizing the Fifth Amendment's applicability to military members as reflected by Congress including its substance in Article 31, UCMJ).

[11] United States v. Jones, 73 M.J. 357, 360 (C.A.A.F. 2014).

[12] *Id.* at 361; UCMJ art. 31 (2012).

[13] *See* UCMJ art. 86 (2012).

[14] Mil. R. Evid. 304, 305.

[15] Involuntary prehearing statements are inadmissible in discharge proceedings; however, an Article 31 rights violation does not *per se* make a statement involuntary. AFI 51-602, *supra* note 2, paras. 2.1, 2.1.2.

[16] *See* U.S. Dep't of Air Force, Instr. 51-201, Administration of Military Justice para. 6.6 (6 June 2013) [hereinafter AFI 51-201]; *see also* manual for Courts-Martial, United States, R.C.M. 704(d) (2012) discussion.

[17] Napolitano v. Ward, 457 F.2d 279, 283 (7th Cir. 1972).

This conclusion presumes that the Fifth Amendment is the beginning and end of the voluntariness inquiry. This is a risky presumption because the scope of Article 31 protection is broader than the Fifth Amendment. Indeed, it expands the right against self-incrimination into pretrial scenarios that civilian jurisprudence might consider a casual conversation.[18] The issue, then, is whether Article 31 would consider immunized statements involuntary notwithstanding their constitutional transformation. The short answer is no: Article 31 does not further restrict the use of immunized evidence.

The longer answer is that in *Kastigar v. United States*, the Supreme Court held that a witness can be compelled to give self-incriminating testimony as long as he is first given immunity that meets Fifth Amendment requirements, i.e., immunity that protects him from the use or derivative use of his testimony to prosecute him.[19] The Court gave the right against self-incrimination exactly the breadth of the Fifth Amendment. Thus, because using immunized testimony at a discharge board will not expose the respondent to criminal liability, *Kastigar* would not prevent the use of immunized statements in that forum. The Court's holding has been adopted by the Court of Appeals for the Armed Forces (CAAF), and by doing so, CAAF implicitly embraced the notion that the Fifth Amendment is the only restriction on the use of immunized evidence.[20] CAAF's holding is, of course, binding only in the court-martial context. However, as the authority on military law and thus on the breadth of Article 31, its adoption of *Kastigar* is nevertheless instructive. Moreover, on matters of Constitutional import one should look to *some* adjudicative body for legal guidance. Given that military and civilian courts have reached the same conclusion on this issue, there is little reason to deviate from what the rest of American jurisprudence is doing. Accordingly, while there may be reasons not to use immunized statements against the respondent in a discharge board, the right against self-incrimination does not appear to be one of them.

"ADMINISTRATIVE"

If otherwise voluntary immunized statements can be used in non-criminal proceedings, and a discharge proceeding is obviously not a criminal trial, then a respondent's prehearing immunized statements can be used against him at a discharge board. Unfortunately, it's not quite that simple. It requires more than an administrative label to make a case non-criminal,[21] and consequently, it is

While there may be reasons not to use immunized statements against the respondent in a discharge board, the right against self-incrimination does not appear to be one of them.

[18] 384 U.S. 436, 444 (1966); Rosato, 11 C.M.A. at 145; Jones 73 M.J. at 360.

[19] 406 U.S. 441, 453 (1972). *See generally* Justin Biollo, *Thank You, Servicemember! But Your Process Is in Another Forum: The Misuse of Civilian Jurisprudence to Inform UCMJ Rights*, 64 Hastings. L. J. 1381 (2013) (discussing the breadth of Article 31 and arguing that CAAF's application of civilian jurisprudence does not provide sufficient protection for military members).

[20] *See* United States v. Mapes, 59 M.J. 60, 67 (C.A.A.F. 2003).

[21] *In re* Daley, 549 F.2d 469, 474 (7th Cir. 1977).

unwise to presume anything without further analysis. To find the answer, one must look to adjudicative bodies that have considered what makes an administrative hearing administrative.

The United States Court of Appeals for the Seventh Circuit considered this issue more than 30 years ago. In *In re Daley*, the court examined whether immunized federal grand jury testimony could later be used in state bar disciplinary proceedings.[22] The individual's grant of immunity expressly stated that he was safe from criminal prosecution, but also that his testimony could not be used against him in state bar disciplinary proceedings.[23] Notwithstanding that express promise, the court held that the use of his immunized testimony did not violate the Fifth Amendment right against self-incrimination. The court found that the federal prosecutor did not have the statutory authority to grant such broad immunity in the first place.[24] But more importantly, the court found that while a grant of immunity bars the use of immunized testimony in criminal proceedings, it does not bar its use in non-criminal proceedings.

The *Daley* court then honed in on what makes a hearing criminal rather than administrative. The court did not limit "criminal proceedings" to cases labeled as such.[25] Rather, a "'criminal case,' for purposes of the Fifth Amendment privilege, is one which may result in sanctions being imposed upon a person as a result of his conduct being adjudged violative of the criminal law."[26] Conversely, a proceeding which cannot result in sanction for violating criminal law is necessarily civil or administrative. Applying its definition to the facts of the case, the court determined that the principal purpose of state bar disciplinary proceedings is "remedial," not criminal, because the purpose is not to punish, but rather the "maintenance of the integrity of the courts and the dignity of the legal profession as well as protection of the public."[27] Thus, while losing the ability to practice law is certainly an adverse consequence, because it was the result of violating standards of practice, not criminal law, the disciplinary hearing was by nature administrative. Accordingly, the use of the immunized testimony was proper. In support of its holding, the court cited a variety of state and federal court cases that considered the use of immunized testimony at administrative proceedings and reached the same conclusion.[28]

The Seventh Circuit considered a similar issue a few years before its decision in *Daley*. In *Napolitano v. Ward*, a sitting Illinois trial judge was granted full transactional immunity to testify in state grand jury proceedings.[29] At a disciplinary proceeding following his testimony, the Illinois Courts Commission (hereinafter "Commission") held that the judge's actions violated its judicial canons and removed him from office.[30] The issue before the court was whether the Commission could make its case against the judge using his immunized testimony without violating the Fifth Amendment.[31] The court concluded that it could.

In arriving at its conclusion, the court mentioned the law's distaste for coerced evidence, but noted that requiring a person to incriminate himself is perfectly okay as long as he is first provided with "immunity coextensive with the Fifth Amendment privilege."[32] Removing the threat of prosecution eliminates the coercive aspect of forcing a person to incriminate himself, which means that an immunized statement is no more coerced than a statement given to investigators after a proper rights advisement and waiver. The court then analyzed the scope of the privilege against self-incrimination and determined that the judge's rights were not violated because he was never subject to or in danger of criminal prosecution.

The court then turned to the related issue of "whether the hearing before the Commission and [the judge's]

[22] *Id.* at 469.
[23] *Id.* at 472.
[24] *Id.* at 480.
[25] *Id.* at 474.
[26] *Id.*
[27] *In re* Daley, 549 F.2d at 476.
[28] *Id.* at 476 & n.6.
[29] Napolitano, 457 F.2d at 279.
[30] *Id.* at 282.
[31] *Id.*
[32] *Id.* at 283.

subsequent removal…constituted a penal aspect of criminal proceedings, thereby transcending his transactional immunity."[33] Stated another way, the court considered whether the Commission's hearing was a criminal proceeding in which the judge's immunized statements could not be used. The court concluded that the hearing was non-penal, and in doing so, noted that holding judicial office is a privilege granted by the state and that the state may require a public servant to "account for the performance of his duties upon pain of dismissal, providing…[he] is afforded the full protection of the Fifth Amendment privilege against self-incrimination."[34] The court also noted that non-criminal behavior can result in judicial discipline, a characteristic the court seemed to consider unique to administrative proceedings.[35] In the end, the court concluded that it was constitutionally permissible for the Commission to use the judge's immunized statements to build its case against him.

It is important to note that the court did not establish a blanket policy that anything other than a criminal trial means immunized statements may be considered. Nevertheless, a few instructive principles may be gleaned from these cases. First, statements provided under a grant of immunity can be used in administrative proceedings without running afoul of the Fifth Amendment. Second, a proceeding is administrative if it cannot result in punishment for violation of criminal law. Third, given that the immunized testimony in both cases involved criminal misconduct, it is reasonable to conclude that it is the nature of the proceeding, not the underlying behavior considered therein, that distinguishes administrative proceedings from criminal. Finally, in the case of *Napolitano,* it is permissible for a single sovereign to employ a person, immunize him, and then use his immunized statements to terminate his employment.

AIR FORCE APPLICATION

Applying these principles in the Air Force context, it is readily apparent that discharge boards are purely administrative. First, a discharge board is a fact finding and recommendation panel whose function is "purely administrative, not judicial."[36] Labels are not controlling, of course, but are nevertheless an excellent starting point. Second, a person can be discharged for, among other things, mental health problems, failing a substance abuse program, and failing the Air Force fitness assessment.[37] These are all non-criminal bases for discharge, which is a trait unique to administrative proceedings.[38] Finally, and more importantly, at the end of a discharge board the respondent will go home. He will be free from incarceration and will not have been

It is important to note that the court did not establish a blanket policy that anything other than a criminal trial means immunized statements may be considered.

[33] *Id.* at 284.

[34] *Id.*

[35] Napolitano, 457 F.2d at 284.

[36] AFPAM 36-3210, *supra* note 2, para. 1.1.

[37] *See generally* AFI 36-3208, *supra* note 1, Ch. 5.

[38] Napolitano, 457 F.2d at 284.

Using a witness's immunized statements against him could, once word gets out in the defense community, have a chilling effect on how cooperative immunized witnesses are in future prosecutions.

fined, reduced in rank, receive a punitive discharge, be restricted to base, or given extra duty. In other words, regardless of the nature of the conduct before the board, the respondent will not suffer *punishment* for violating criminal law. This is the hallmark characteristic of an administrative proceeding.

That is not to say discharge proceedings are consequence free. The difference, however, is that the purpose of the board hearing is not to punish for violating criminal law, but rather to determine the respondent's fitness for continued duty. A discharge board, then, is reminiscent of a proceeding that determines a judge or attorney's fitness to continue practicing law, both of which are administrative proceedings at which immunized evidence is admissible.[39] At its core, a discharge board is a non-penal employment process that holds an employee "account[able] for the performance of his duties upon pain of dismissal."[40] As such, it bears all the marks of an administrative proceeding. Accordingly, the use of a respondent's prehearing immunized statements at the hearing is permissible.

IT CAN BE USED, BUT SHOULD IT?

The final issue for this inquiry is whether immunized evidence that *can* be used *should* be used. Generally speaking, a person is granted immunity because it is the only constitutional way to get evidence the government needs. In essence, immunity is a balance between the government's need for evidence and the individual's right against self-incrimination;[41] in striking that balance, the government recognizes that the evidence to be obtained is more valuable than the ability to prosecute its source. It is fundamentally unfair to obtain the desired conviction by requiring a person to incriminate himself, and then turn around and use the evidence he provided to summarily dismiss him from the military. It is tantamount to saying: "thanks for the help…but you're still fired."

Military justice practitioners have long prided themselves on prosecuting cases because it was the "right" thing to do, even though civilian jurisdictions may not have done the same. Whether that is true is debatable, but regardless, the concept of doing the "right" thing has become part of the JAG lexicon. Consequently, as a profession, military attorneys have imposed a more rigid standard of fairness upon themselves than what a recipient of immunity might find in the civilian world. Furthermore, trial counsel and the entire legal office have an affirmative duty to seek justice in criminal prosecutions.[42] This concept includes a duty of fairness that arguably applies to every part of a court-martial, including how witnesses are treated.

[39] *See* Daley, 549 F.2d at 476; Napolitano, 457 F.2d at 284.

[40] Napolitano, 457 F.2d at 284.

[41] Kastigar, 406 U.S. at 464.

[42] AFI 51-201, *supra* note 16, Attach. 3, *Air Force Standards for Criminal Justice* 3-1.2.(c).

It is both fair and appropriate to hold a witness accountable for his actions…

Given these self-imposed standards of fairness, it is antithetical to say that the duty to seek justice is in effect until the court-martial is adjourned, at which time the proverbial gloves come off and everything is fair game.

There is also a very practical reason to not use immunized evidence in discharge boards, namely, that using a witness's immunized statements against him could, once word gets out in the defense community, have a chilling effect on how cooperative immunized witnesses are in future prosecutions. A military witness ordered to testify truthfully is required to obey that order;[43] however, the extent to which he complies is an altogether different matter. Criminal prosecutions, as a general rule, are simply more important than administrative separations. It is not a close contest. So why jeopardize the critical in favor of something considerably less so?

It is important to note that chilling effects and equity arguments only go so far. A respondent reckless or pugnacious enough to put on evidence that is contrary to his prior immunized statements has invited the use of those statements in rebuttal. Additionally, it is conceivable that a truly egregious case could arise in which the only evidence is protected by immunity. As an employer, the Air Force arguably should not be expected to retain a proven murderer in its ranks simply because the only evidence against him is immunized. Thus, in certain cases, the equity of using the evidence may shift considerably and getting rid of a truly bad actor might be worth the risk of a chilling effect. However, as a matter of policy, the use of such testimony should be reserved for the rare case in which it is absolutely the only way to meet the needs of the Air Force.[44]

CONCLUSION

An immunized witness does not get a free pass simply because he has been a prosecution witness. It is both fair and appropriate to hold a witness accountable for his actions, and it is legally permissible to use the evidence he provided under immunity to separate him from the Air Force. However, doing so abandons the standards of fairness expected of military practitioners and could detrimentally affect the outcome of future courts-martial by giving the immunized witness an incentive to withhold information. Consequently, whether immunized evidence is used in discharge proceedings is a matter that must be weighed carefully. It can be used, but absent policy guidance from above, the best practice is to do so in only the rarest of circumstances. R

Captain Thomas R. Burks

(B.A., Indiana University-Purdue University, Indianapolis; J.D., cum laude, Indiana University School of Law-Indianapolis) is an employment law attorney at Tinker Air Force Base, Oklahoma.

[43] 10 U.S.C. § 892 (2012).

[44] Extra-constitutional restrictions are nothing new in the Air Force. For example, the Air Force can exercise jurisdiction over retirees, reservists, and reservist retirees but chooses to do so only in unusual circumstances, and even then, secretary-level approval is required. AFI 51-201, *supra* note 16, Ch. 2; 10 U.S.C. § 802. Additionally, in cases where a state government retains jurisdiction over a military member's alleged crimes, the Air Force generally does not also prosecute him. AFI 51-201, *supra* note 16, para. 2.6. A similar policy (ideally requiring something less than secretary-level approval) would account for the exceedingly rare case in which the needs of the Air Force can only be served by using immunized evidence.

Ready, Set, Post!

The Influence of Legal Blogs in Today's Professional Landscape

BY MAJOR AARON L. JACKSON

Legal blog sites provide an excellent publication avenue for time-strapped attorneys in the JAG Corps...

I hear it often in the JAG Corps: "I would love to publish something; I just don't have the time!" Many legal professionals dream of publishing a scholarly article. Unfortunately for many in the JAG Corps, it remains exactly that: a dream. Well, wake up! Publication no longer requires a lengthy and time-consuming submission to a law review. We live in a new era, one with less "reams" and more "memes." Legal blog sites provide an excellent publication avenue for time-strapped attorneys in the JAG Corps–one that, as will be discussed below, offers significant advantages over the more traditional option.

PUBLICATION SPEED

No longer are legal publications constrained to the stereotypical 90-page law review article with 400-plus footnotes. In today's fast-paced, professional world, more impact may be done through 1,500 words on a prominent, national blog site than 50 pages in a reputable law review. What used to require months of dedicated study and articulation, therefore, may now be accomplished in days. One need not even bother with exacting footnotes; simply hyperlink the sources within the words of the article. It is that easy.

While this may sound simple, do not let the idea of a "post" confuse you. Contributing to a legal blog site is not synonymous with posting a message on Facebook. Submission to an influential blog requires more than a few sentences and a click of the "submit" button. Contributors within this medium provide well-written articles to an editorial staff, who then select appropriate pieces for publication. Editors will often work with the author for days to refine the final product before it blasts into cyberspace. While this process may take some time, it far surpasses the more traditional publication methods in terms of speed and efficiency. Posting, therefore, provides one of the fastest ways to reach a reading audience and finally achieve one's goal of publishing.

IMMEDIATE IMPACT

General George S. Patton once famously stated, "A good plan, violently executed now, is better than a perfect plan next week."[1] The same may be said of a good legal blog post. Professionals often spend months—if not years—developing articles for law review publication. This level of devotion to a particular topic of law carries with it many benefits. For example, the ability to "deep-dive" into a particular legal issue may provide invaluable insight and/or guidance to its readers. This chosen method of contribution, however, often comes at a cost. The impact of a lengthy law review article may be significantly diminished by the time thoughts reach the published page. As noted by George Washington University law professor Orin Kerr, "[b]y the time a law review publishes an article on a new development, the development often is no longer new. Traditional journals simply can't compete with blogs on this front."[2]

Unlike law review articles, blog posts are commonly released days—if not hours—after the emergence of important events or issues. The ability to provide thoughtful contributions within a matter of hours allows for immediate legal impact to a readership anxious for insight and professional direction. Undoubtedly such posts do not provide "deep-dive" ability. According to Professor Kerr, the legal blog will in no way match a traditional law review article in terms of legal scholarship.[3] Blog articles will also rarely find their way onto the pages of Supreme Court opinions, though they have been cited on at least two occasions.[4] More often, blog posts begin a legal exploration that ends with law review articles ripe for court adoption. As stated by Professor Kerr, blog posts are "likely to become

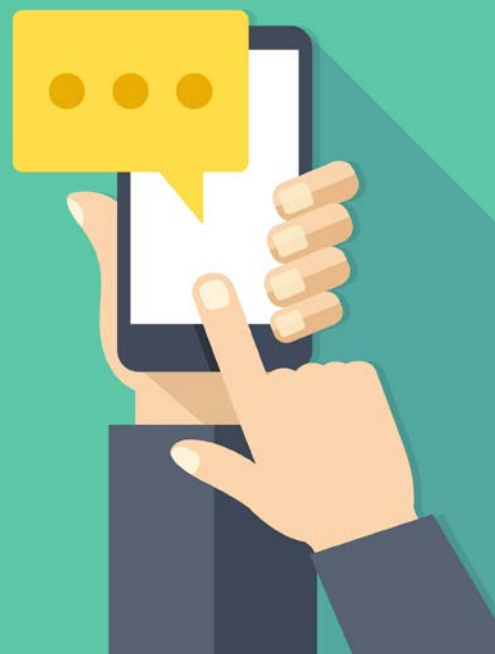
[1] The Official Website of General George S. Patton, Jr., http://www.generalpatton.com/quotes/ (last visited 8 May 2016)

[2] Orin Kerr, *Blogs and the Legal Academy*, 84 Wash. U. L. Rev. 1127, 1131 (2006).

[3] *See id.*

[4] *See* Yair Rosenberg, *The Volokh Conspiracy Is Out To Get You – And Everyone Else in America*, Tablet Magazine (3 April 2014, 12:00 a.m.), http://www.tabletmag.com/jewish-news-and-politics/168389/the-volokh-conspiracy.

Contributing to a legal blog site is not synonymous with posting a message on Facebook.



Stock Photo © iStock.com/Jane_Kelly

the first rough draft of legal scholarship on new developments."[5] In short, legal blog posts are capable of quickly and succinctly getting to the heart of an issue and presenting for the reader those legal issues that require greater intellectual and professional focus.[6] More importantly, they do so *now* rather than *next week*—or even years from now.

As of 2014, viewership continued to rise, as the top 50 legal blogs received a quarterly viewership ranging from 184,979 to over 14.5 million

WIDER AUDIENCE

There will always be a prominent place for the law review. But let's face it, aside from the standard group of academic scholars, legal professionals, and motivated law students buzzing about the latest articles released within the academic community, your typical attorney will rarely pine for the latest edition of any law review. Not so with legal blog sites. In short, they are booming. As of 2006, there were "more than 34.5 million U.S. blogs, 600 law-related blogs, and 235 law professor blogs."[7] Legal blogs receive a depth of readership unlike anything within the law review community. Compare, for example, readership of the most popular law review (*Harvard Law Review*) against one of the top legal blog sites (*The Volokh Conspiracy*). In 2006, the *Harvard Law Review* released 8,000 copies per issue while *The Volokh Conspiracy* "received approximately 25,000 visits per day."[8] Another popular site, *SCOTUSblog*, boasted in 2012 of "roughly five million hits and one million simultaneous users."[9] As of 2014, viewership continued to rise, as the top 50 legal blogs received a quarterly viewership ranging from 184,979 to over 14.5 million.[10] Just this past winter, the American Bar Association again confirmed that the legal blog medium is "flourishing."[11] While these data points are in no way statistically definitive, they do point to the value—and popularity—of today's legal blog.

Additionally, unlike the narrow audience generally associated with law review articles, legal blogs enjoy a breadth of readership far beyond legal professionals, to include policy makers, political staffers, academics, professionals, as well as the "average, interested Joe." Take, for example, *Just Security*, a popular National Security Law site. Its submission guidance states:

> As you write, please keep in mind that our audience is broader than just lawyers. It includes congressional staff, policymakers and experts, and national security journalists. A large part of *Just Security*'s mission is educating this broad audience of decision-makers and influencers about all of the important issues we cover.[12]

Such readers often rely on legal blogs to provide the latest updates on key areas of law and policy. Not only does this allow contributors to reach a wider audience, it also offers a unique and very real opportunity to directly—and immediately—shape the law and national policy.

INCREASED PRESTIGE

The idea of "blogging" may bring to mind the image of an opinionated 20-something, sipping coffee and offering what can only be described as free association of ideas to an empty, cyber audience. This may have

[5] Kerr, *supra* note 2.

[6] Editors of the National Security Law blog site *Just Security* state that they "receive regular feedback from…time-pressed readers that one of the things they value the most about *Just Security* is [the] ability to quickly get to the heart of, and explain, complex issues." *Style Guide*, Just Security, https://www.justsecurity.org/ ?page_id=24273/.

[7] Paul L. Caron, *Are Scholars Better Bloggers? Bloggership: How Blogs are Transforming Legal Scholarship*, 84 Wash. U. L. Rev. 1025, 1030 (2006).

[8] Crispulo Marmolejo, *Globalization and Legal Culture. The Influence of Law & Economics' Blogs in Developing Countries*, 1 Latin Am. Iberian J. L. & Econ. 1 (2015).

[9] Tom Goldstein, *Ten Years*, SCOTUSblog (1 October 2012, 7:00 a.m.), http://www.scotusblog.com/2012/10/ten-years/.

[10] *See* Paul Caron, *Law Prof Blog Traffic Rankings*, TaxProf Blog (29 July 2014), http://taxprof.typepad.com/taxprof_blog/blog_rankings/.

[11] Molly McDonough, *What is the State of the Legal Blogosphere?*, ABA Journal (1 December 2015, 5:10 a.m.), http://www.abajournal.com/magazine/article/the_state_of_the_legal_blogosphere.

[12] Just Security, *supra* note 6.

been the case in the early blogging days, but not today. Legal blog sites are highly influential and provide a well-respected medium through which to publish.

The rising popularity and prestige of legal blogs over the past decade drastically shifted the contributing population from that described above to some of the most influential minds in the legal community today. Legal blogs are commonly run, not by 20-somethings, but by academic and professional institutions, from Harvard and New York University to *The Washington Post*. Law firms consistently push for prominence within the blogosphere.[13] Academics are also highly encouraged to contribute, [14] providing a wealth of information and analysis with each daily post. One look at the "contributing authors" page of any influential blog will confirm the prestige of this medium. Noted within the 2006 "Bloggership Symposium" presented by Harvard Law School, "Web logs ('blogs') are transforming much of American society, including government, politics, journalism, and business. In the past few years, blogs have begun to affect the delivery of legal education, the production and dissemination of legal scholarship, and the practice of law."[15] Legal blogs have rapidly emerged as a legitimate—if not invaluable—source of legal discussion and publication for academics and legal practitioners alike.

JAG CORPS INFLUENCE

The JAG Corps exists as one of the most prestigious and "battle-hardened" groups within the legal community. And yet, our role within the larger intellectual exchange is often limited. It is time for a change. Law blogs provide an opportunity for JAGs to establish themselves as experts in various areas of law. The JAG Corps provides lawyers with a wide array of professional experiences in record time. Even our newest JAGs have the ability to provide valuable insight into contemporary and complex legal issues. More real-world experience may arguably be gained in one year in the JAG Corps than five years in any given law firm. And where academics may offer much to the intellectual debate, their contributions may be limited by a lack of operational experience. JAGs, on the other hand, run the gamut in terms of professional involvement. From criminal law to international law to national security law, we are the "boots on the ground" and have much to offer the global conversation. Doing so not only provides greater depth to the conversation, it further enhances the prestige of the Corps. We have an enormous opportunity here. Let's pursue it.

* * *

We all want to contribute something to our profession—to move, shape, and develop the law in an important and meaningful way. The blog has arguably shifted the epicenter of legal influence in America. Contributing to a prominent legal blog site is a quick and easy way to shape emerging legal issues and finally fulfill that dream of publishing. So what are you waiting for? Post![16]

Major Aaron L. Jackson

(B.S., United States Air Force Academy; J.D., University of Oklahoma College of Law; LL.M., The George Washington University Law School), is an Assistant Professor in the Department of Law at the United States Air Force Academy, Colorado.

[13] *Between Lawyers Roundtable: The Future of Legal Blogging*, Law Practice, July–August 2005, at 44, http://www.americanbar.org/publications/law_practice_home/law_practice_archive/lpm_magazine_articles_v31is5an4.

[14] *See* Pat Thompson & Inger Mewburn, *Why Do Academics Blog? It's Not for Public Outreach, Research Shows*, The Guardian (2 December 2013, 8:44 a.m.), https://www.theguardian.com/higher-education-network/blog/2013/dec/02/why-do-academics-blog-research.

[15] Caron, *supra* note 7, at 1033.

[16] For those looking for a good place to begin their legal blog experience, I suggest the following (just to name a few): https://www.justsecurity.org; https://www.lawfareblog.com; http://www.scotusblog.com; https://www.washingtonpost.com/news/volokh-conspiracy; and http://opiniojuris.org.

Improving Use of the ABA Military Pro-Bono Project to Assist Clients in Need

BY MAJOR DOUGLAS E. DEVORE II, CAPTAIN SARABETH A. MOORE, MASTER SERGEANT JENNIFER W. HENDRIX, AND SENIOR AIRMAN NICOLE M. MYNATT

Legal assistance is a core function of the Air Force Judge Advocate General's Corps.

Legal assistance is a core function of the Air Force Judge Advocate General's Corps (JAG), and an effective legal assistance program supports and sustains command effectiveness and readiness.[1] Judge advocates and paralegals have provided legal assistance to the armed forces since 1943, and it has come to be viewed as one of the benefits of service.[2] The extent of legal services provided by paralegals and judge advocates is not unlimited,[3] but legal offices are encouraged to satisfy these needs to the maximum extent possible. One area where Air Force judge advocates and paralegals can focus their efforts is with personal civil legal matters.[4]

Resources and expertise can limit the type of legal assistance that can be provided to legal assistance clients, but even where resources and expertise do not limit provision of legal services, geography and deployments do. Legal assistance attorneys often advise clients with legal issues that arise across the country, and this is complicated when service members

[1] U.S. Dep't of Air Force, Instr. 51-504, Legal Assistance, Notary, and Preventative Law Programs para. 1.1 (27 October 2003) (C3, 24 May 2012) [hereinafter AFI 51-504].

[2] *See* AFI 51-504, *supra* note 1, at para. 1.1. The provision of legal assistance and services specifically

[3] The federal law which authorizes Air Force attorneys to provide legal assistance and services specifically states that it is "contingent upon the availability of legal staff resources and expertise" to do so. 10 U.S.C. § 1044 (2016).

[4] *Id.*

Judge advocate providing legal assistance. (U.S. Air Force photo by Staff Sergeant Nick Wilson/Released)

are stationed or deployed overseas. These and other factors impose burdens in advising clients. Accordingly, legal assistance attorneys are expressly authorized to make referrals to the bar referral services operated by the American Bar Association (ABA) and state or local bar associations.[5]

One of these services is the Military Pro Bono Project (MPBP), a case referral resource for military legal assistance attorneys and one of three programs started by the ABA and the ABA Standing Committee on Legal Assistance for Military Personnel to assist legal assistance attorneys in providing help to their clients.[6] On 9 April 2015, Mary C. Meixner, MPBP Director, presented a webcast on the MPBP to the Air Force JAG Corps.[7] Ms. Meixner's presentation discussed the history of the MPBP and gave a general description of how cases are placed with volunteer attorneys.[8] She noted that since the MPBP's launch, about 50 percent of referred cases result in a volunteer attorney accepting the case.[9] Ms. Meixner discussed the five steps for a case to be accepted by the MPBP.[10] She also described the types of cases that typically qualify for MPBP placement as well as factors that influence successful placement.[11]

Ms. Meixner's prior Webcast is available on CAPSIL,[12] the JAG Corps' learning management and social networking system, where it may be reviewed, so this article does not provide a detailed explanation of the MPBP or how it works. Instead, this article will share strategies which were developed and implemented by the 379th Air Expeditionary Wing's Office of the Staff Judge Advocate at Al Udeid Air Base, Qatar, (379 AEW/JA) in the summer and fall of 2015. The lessons which maximized the benefits of the MPBP were learned in a deployed environment, but they are easily transferred to legal offices overseas and in the United States. The four areas outlined in this article are places where military legal professionals can have the greatest impact in increasing successful referrals: (1) outreach; (2) screening; (3) client preparation; and (4) referral preparation.

OUTREACH

The first area where legal offices can significantly increase utilization of the MPBP is outreach, and this is an excellent area where judge advocates and paralegals can work together. Outreach is imperative when it comes to helping people and to increasing awareness of the MPBP. 379 AEW/JA conducted extensive outreach regarding the MPBP, and this outreach greatly contributed to its success. First, 379 AEW/JA briefed the MPBP during the mandatory Right Start briefings.[13] Second, 379

[5] *Id.* at para. 1.7.7.2.

[6] *See Connecting Active-Duty Servicemembers with Pro Bono Legal Representation for Civil Legal Matters*, Military Pro Bono Project, http://www.militaryprobono.org/library/attachment.205521 (on file with author). This brochure is available only to military attorneys who have registered with the MPBP. The other two programs are "Operation Stand-By," a resource where civilian practitioners are available to provide consultation to military legal assistance attorneys; and "ABA Home Front," an online source for legal information and resources to military families.

[7] Mary Meixner, *The American Bar Association Military Pro Bono Project*, ABA (April 9, 2015), http://stream.americanbar.org/services/player/bcpid2059188277001?bckey=AQ~~,AAABsp7SiCE~,aEBLYbQyvvDzG_ilsy3VR1brzH8RuBIr&bctid=4534109838001.

[8] *Id.*

[9] *Id.*

[10] *Id.* Ms. Meixner identified a five-step process to utilize the MPBP. First, a service member meets with a legal assistance attorney, who provides legal assistance to the fullest extent possible and then determines whether a referral to the MPBP is appropriate. Second, the referral is electronically routed to a military attorney designated to supervise referrals made to the MPBP who reviews the case for completeness, legal merit, and whether it meets the MPBP's guidelines. The case may be approved, rejected, or returned for further work. Third, if a case is approved, the MPBP Director is notified electronically of the approval and begins seeking a pro bono attorney. Fourth, a volunteer attorney is secured to handle the case pro bono. Take care that the mere fact that an attorney agrees to take the case does not automatically mean the pro bono attorney will represent the client. The client must be notified that an attorney has been found, and the client must then speak with the pro bono attorney and agree to the representation. Fifth, the MPBP monitors case progress and closes the matter when representation is concluded.

[11] *Id.* Cases that typically qualify for placement involve consumer law, landlord/tenant law, probate, trusts and estates, guardianship, employment, expungement, tax law, and family law. Family law cases involve additional analysis by the military legal assistance attorney. Among the factors that influence successful placement are: case location, case type, thoroughness of the case referral, responsiveness of volunteers, and limits of the MPBP staff. This list is not exhaustive.

[12] Editor's Note: In late June 2016, The Judge Advocate General's School upgraded learning management systems from CAPSIL to Campus. This webcast was migrated and is now available in the Campus webcast library.

[13] Air Force policy establishes a newcomer orientation program that assists members who receive overseas duty assignments. *See* U.S. Dep't of Air Force, Instr. 36-2103, Individualized Newcomer Treatment and Orientation (INTRO) Program para. 1.1 (30 April 2012). The INTRO program contemplates a permanent relocation, and the vast majority of members assigned to Al Udeid are on a temporary basis. However, all incoming members are still required to in-process regardless of the duration of assignment. "Right Start" is the series

AEW/JA paralegals briefed the MPBP at the quarterly Helping Agency Team[14] meetings where it received interest and support from the Wing Commander and Command Chief.[15]

The third and most effective outreach efforts were by a judge advocate and paralegal team with the 379 AEW first sergeants through First Sergeant Councils and one-on-one interaction. Outreach with this group was important, because even though deployed first sergeants had also been first sergeants at home station, most had never encountered the MPBP. As a result of judge advocate-paralegal team the first sergeants became very interested in the pro bono referrals. They recognized that this could be a valuable tool in helping their airmen and asked many questions about the vetting process and eligibility requirements.

The screening process for potential referral candidates begins like any other legal assistance visit with a paralegal verifying an individual's eligibility to receive services from a legal assistance attorney.

All three of these outreach efforts increased the MPBP's visibility on base. Paralegal briefings at Right Start and with the HAT were important, because they gave the MPBP visibility with new arrivals and with wing leadership. After 379 AEW/JA started briefing at Right Start and the HAT, a few clients came to the legal office specifically requesting assistance through the MPBP. This showed that the outreach efforts were successful. The first sergeants embraced the MPBP as a potential tool in helping their members, and the effectiveness of these briefings was evident when first sergeants began calling 379 AEW/JA directly to make legal assistance appointments for members they thought had issues that may be eligible for the pro bono referrals. And a few legal assistant clients even requested participation in the MPBP specifically, a further indication that 379 AEW/JA's outreach efforts were successful.

SCREENING

The second way legal offices can significantly increase utilization of the MPBP is by effectively screening cases. At a minimum, effective screening ensures that the member is entitled to services from legal assistance attorneys.[16] Effective screening also ensures that the case subject matter qualifies for the MPBP and that the client meets the financial eligibility requirements. As with outreach—where legal assistance attor-

of briefings which all personnel assigned are required to attend within the first few days of arrival. 379 AEW/JA paralegals assumed the primary responsibility for Right Start briefings, but they were occasionally conducted by JAGs.

[14] The Helping Agency Team (HAT) is Al Udeid's version of the Community Action Information Board (CAIB) and Integrated Delivery System (IDS), which may not exist in a deployed setting. *See* U.S. Dep't of Air Force, Instr. 90-501, Community Action Information Board (CAIB) and Integrated Delivery System (IDS) para. 1.1 (15 October 2013) (C1, 14 August 2014).

[15] The Wing Commander and Command Chief were also briefed directly at the quarterly HAT meetings, and they were very interested in the MPBP. At one HAT meeting, the Wing Commander and Command Chief were briefed that the Legal Office had successfully referred several members of multiple services to the MPBP. They were impressed with these results and pleased that this support was extended to deployed members of the wing and base.

[16] AFI 51-504, *supra* note 1, at para. 1.3.

neys and paralegals worked together to brief Right Start, the HAT, and the First Sergeant Councils—attorney-paralegal cooperation and coordination are key to effectively screening cases. This is because paralegals can evaluate many of the MPBP's eligibility criteria before the client ever meets with a legal assistance attorney. When the paralegal carefully collects relevant data from the client, a legal assistance attorney has advance knowledge of the case and potential issues. With this information, the attorney-paralegal team crafts a workable course of action to best meet the needs of the client and, if necessary, makes a referral to the MPBP.[17]

The screening process for potential referral candidates begins like any other legal assistance visit with a paralegal verifying an individual's eligibility to receive services from a legal assistance attorney. The MPBP has additional guidelines for acceptance. First, members in the paygrade of E-6 or below are presumed to be eligible for the MPBP,[18] and higher ranking members are "strongly presumed" to be ineligible absent an additional showing.[19] Second, referral to the MPBP is generally available to active-duty members, including National Guard and Reserve members on federal active-duty on Title 10 orders.[20] Depending on the circumstances, a National Guard member on Title 32 orders or not currently on active duty may also be accepted.[21] A non-military spouse or parent can also qualify for the MPBP under limited circumstances.[22]

After determining eligibility, the paralegal asks routine follow-up questions about why the individual needs to speak with a legal assistance attorney. This inquiry is useful because it may identify why an individual would be a good candidate for referral. It also gives the legal assistance attorney an idea of the issues the member will need to discuss. This is particularly important, because the MPBP accepts case referrals with subject matter falling into certain defined categories.[23] Reviewing these categories is especially important in family law cases, and additional criteria should be considered when referring a family law case.[24]

After scheduling the member's appointment, the paralegal provides the legal assistance attorney with preliminary details about the upcoming appointment and informs the attorney why the client may be a good candidate for the MPBP. Once the initial screening of a potential referral is complete, the legal assistance attorney can discuss the MPBP with the member. Providing outreach and identifying members that could be helped with the MPBP became a normal part of the process in scheduling legal assistance appointments at 379 AEW/JA. Even though individuals self-referred and first sergeants contacted 379 AEW/JA about potential cases, the majority of referrals were identified by the paralegal's initial screening and scheduling of legal assistance appointments.

[17] A formal referral to the MPBP is made by the legal assistance attorney; however, the paralegal often have important insights that the attorney uses in making a determination whether to formally submit the case to the MPBP.

[18] *ABA Military Pro Bono Project Guidelines for Military Legal Assistance Attorneys*, Military Pro Bono Project, http://www.militaryprobono.org/library/attachment.268565 (on file with the author). This attachment is available only to military attorneys who have registered with the MPBP.

[19] *Id.* A client in the rank of E-7 or above may be accepted if compelling circumstances exist and such circumstances are documented.

[20] *Id.* at 2.

[21] *Id.* The ABA states that a "referral may also be made for National Guard and Reserve members on Title 32 active-duty status or who are not currently on active duty *so long as the referral is for a legal matter related to or arising from mobilization, de-mobilization, or military status*" (emphasis added).

[22] *Id.* A non-military spouse or parent may qualify for placement if three criteria are met: (1) the legal issue directly affects the military member or his family as a whole; (2) the legal interests of the spouse and member are aligned; and (3) the spouse is acting as a surrogate to protect the non-present member's interests and the surrogate's interest are not adverse to the military member. *See supra* note 19 at 2.

[23] *Id.* at 3–4. As mentioned previously, these areas include: consumer law, landlord/tenant law, family law, guardianships, probate, trusts and estates, and employment. This list is not exhaustive.

[24] *ABA Military Pro Bono Project Guidelines for Military Legal Assistance Attorneys*, Military Pro Bono Project. The ABA identifies five elements when family law matters are accepted. At least one of these elements should be present: (1) The service member is deployed outside of the country and needs a lawyer in the U.S. to handle the legal matter; (2) the opposing party is represented by counsel; (3) the Servicemembers Civil Relief Act is implicated; (4) the service member's physical custody of children is at issue; and/or (5) the service member has established, to the satisfaction of the referring military attorney, that the service member has experienced domestic violence perpetrated by the adverse party and is seeking legal assistance for a divorce, order of protection, child custody, and/or visitation. Exigent circumstances may dictate accepting a case when these criteria are not satisfied, but a detailed explanation will be required to justify acceptance.

The MPBP will make every attempt to find a placement for applicants; however, there is no guarantee that a volunteer attorney will be found.

One particular case highlighted the importance of having 379 AEW/JA's paralegals and attorneys work together to screen potential cases. The legal office processed an Article 15 for minor misconduct, but the member's response commented on certain personal issues that suggested the member might be a prime candidate for pro bono assistance. After reading the response, the military justice paralegal reached out to the member's first sergeant to explain the MPBP and how it could help the member. The military justice paralegal provided the unit with information about how to schedule an appointment with a legal assistance attorney who did not have a conflict with the military justice issue. The military justice paralegal then briefed the legal assistance attorney about the issues involved with the case, taking care not to involve the attorney who had advised the command on the Article 15. When the member contacted 379 AEW/JA for legal assistance, the legal assistance attorney was prepared and provided the member with needed help on the civil law matters they were facing.[25]

CLIENT PREPARATION

The third area where legal offices can have a significant impact in utilizing the MPBP is client preparation. First and foremost, the client must understand the benefits and limitations of the MPBP. A legal assistance attorney cannot set unrealistic expectations for the client. The MPBP relies on volunteer attorneys who are of limited quantity with limited resources to donate. In addition, not every applicant to the MPBP whose case is accepted has a volunteer attorney agree to represent the client. The MPBP will make every attempt to find a placement for applicants; however, there is no guarantee that a volunteer attorney will be found. If the legal assistance attorney tells a client that the MPBP *will* find them an attorney to assist, the attorney does the client a disservice. An explanation to each client about the matching system will encourage them to continue to take proactive steps on their case while the MPBP seeks a volunteer attorney. Applicants are required to acknowledge this by reading and signing the MPBP's *Applicant Acknowledgement Letter*.[26]

It is also useful for the legal assistance attorney to brainstorm alternate courses of action by discussing other potential referral resources, what

[25] This fact pattern is similar to one described during the 2016 annual legal assistance refresher. Lt Col Ryan D. Oakley, *2016 Annual Legal Assistance Refresher*, The Judge Advocates General's School (AFJAGS) (28 January 2016), https://aflsa.jag.af.mil/apps/jade/collaborate/mod/scorm/index.php?id=1084 (training webcast presented by Professional Outreach Division, AFJAGS, available for access for Air Force judge advocates).

[26] *Client Referral Letter*, Military Pro Bono Project, http://www.militaryprobono.org/library/attachment.256870 (on file with the author). This attachment is available only to military attorneys who have registered with the MPBP.

self-help steps can be taken, and mitigation steps that can be taken.[27] In addition to explaining the placement process at the onset of a referral, be sure to keep in continued contact with the client after the referral is made. Keeping in contact with a client serves the dual purpose of ensuring the alternate courses of actions discussed above are followed as well as keeping the MPBP informed of whether a continuing need exists. If the client no longer requires an attorney due to changed circumstance, be sure to alert the MPBP so they can be removed from the placement list. Should a case go unplaced by the MPBP with a pro bono attorney within 60 days of approval of the referral, the Project Director may return the case as "unplaced."[28] The legal assistance attorney who made the referral should immediately contact the client to discuss alternate options to resolve the case.

REFERRAL PREPARATION

The final area where legal offices can have a significant impact is preparation of the actual referral to the MPBP. Prior to making an actual referral, the legal assistance attorney should thoroughly review the *ABA Military Pro Bono Project Guidelines* and the *Affirmation Good Cause* Checklist.[29] Referring a case through the MPBP's Web portal is simple, with step-by-step prompts that ensure all necessary information is provided. However, this simple referral form is of crucial importance in making successful referrals. Just as in trial practice, a referring attorney should utilize their advocacy skills to effectively "sell" the case to the MPBP and potential volunteer attorneys. The areas in which you can make the biggest impact are: (1) steps taken prior to referral; (2) factors of urgency; (3) legal issues involved; and (4) client's claim and/or defense.

First, focus on steps taken prior to referral. One of the requirements of the MPBP is that the legal assistance attorney is unable to provide the legal services required. Prior to submitting any referral, the referring attorney must certify that "other available avenues for resolution of the issue have been exhausted."[30] The legal assistance attorney should specifically advise on whether pro-se representation is feasible or appropriate in the case, provide self-help materials, and assist in drafting correspondence. These efforts are part of the referral process itself. A successful referral should assess what alternative resources or means of resolving the issue are available and explain how these have been exhausted.

In one situation, a client sought legal assistance on a family law matter. The paralegal correctly flagged the case as a potential referral because it satisfied all of the criteria for placement. After further consultation with the client, the legal assistance attorney discovered that the client was a deployed Guardman. As a civilian, the member was also a union member, and the union had a civilian law firm on retainer to represent its members in these types of cases. This avenue had not been exhausted, so rather than referring the member to the MPBP, the member, with help from the legal assistance attorney, contacted the civilian law firm and explained the facts of the case. The member received the needed assistance without utilizing the MPBP.

[27] *Supra* note 18, at 5.

[28] *Id.* at 6.

[29] The *ABA Military Pro Bono Project Guidelines* is a publication available to legal assistance attorneys which describes factors which should be considered when referring clients to the program. *See* supra note 19. The Affirmation of Good Cause is actually a series of questions that the legal assistance attorney answers when filling out the Web-based intake form. In addition to ensuring that the client meets the financial eligibility requirements, the legal assistance attorney: (1) concisely states the operative facts related to the client's legal issue; (2) states the client's specific objective for the pro bono representation and how the objective is attainable under the facts and law; (3) explains the statutory and/or case law supporting the client's legal position in the matter; and (4) describes the client's formal or informal attempts to resolve the legal issue, whether with the help of military attorneys or otherwise. After covering these elements, the legal assistance attorney affirms good cause by affirming the following statement: "To the best of my knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, that the client I am referring to the Military Pro Bono Project has a bona-fide legal dispute, that the client's position is legally meritorious, with a good-faith basis for proceeding with the client's claim or defense, and that other available avenues for resolution of the issue have been exhausted." Further discussion about the Affirmation of Good Cause is available in the *ABA Military Pro Bono Project Guidelines*, *supra* note 19 at 4–6.

[30] *Supra* note 18, at 5.

In order to effectively communicate the urgency of a client's case, the referring attorney must understand the client's legal and personal-professional timelines.

Another Al Udeid client presented a situation where taking steps prior to referral to the MPBP was crucial in successful placement with a pro bono attorney. In this case, the member was involved in a consumer law dispute with a commercial retailer. The retailer filed suit against the member, but the member was unable to answer the complaint because of the deployment. As a result, the retailer obtained a default judgment against the member for the original dispute plus court costs and attorney fees.

The member sought help from 379 AEW/JA. The legal assistance attorney immediately recognized that relief could be sought under the Servicemembers Civil Relief Act (SCRA.)[31] With the help of the legal assistance attorney, the member prepared a letter requesting the court to set aside the default judgment.[32] The member then requested a stay of proceedings until the member returned home from deployment.[33] In the referral to the MPBP, 379 AEW/JA noted the steps that were taken by the member and provided copies of the client's letters as part of the MPBP referral. In this particular instance, the case was accepted by the MPBP and a civilian attorney agreed to represent the member; however, the steps taken by the member were instrumental in buying enough time for the case to be successfully placed.[34]

In order to effectively communicate the urgency of a client's case, the referring attorney must understand the client's legal and personal-professional timelines. For this reason, referring attorneys are also asked to state the "factors of urgency" related to a client's case as they completed the Web-based intake form and permit MPBP directors and volunteer attorneys to triage incoming cases. A

[31] In this case, the SCRA specifically protected the member against default judgments. *See generally* 50 U.S.C. § 3931 (2016). In addition, the SCRA also provides that a

> [C]ourt may on its own motion and shall on application by the servicemember (1) stay the execution of any judgment or order entered against the servicemember; and (2) vacate or stay an attachment or garnishment of property, money, or debts in the possession of the servicemember or a third party, whether before or after judgment.

50 U.S.C. § 3934(a) (2016).

[32] The legal assistance attorney carefully reviewed the default notice in this case. In this review, the attorney discovered that the commercial retailer signed an affidavit that the member was not in the Armed Forces as a justification for the default judgment. This material fact was raised to the court.

[33] The SCRA requires that the service member set forth specific reasons why a stay should be granted, including the manner in which current military duties materially affect the member's ability to appear, when the member will be available to appear, a letter from the member's commander stating that the member's current military duty prevent appearance, and that military leave is not authorized at the time of the letter. 50 U.S.C. § 3932 (b)(2) (2016).

[34] In our experience, there has been a lot of interplay between the SCRA and the MPBP. The SCRA does not shield service members from civil obligations, but we have found that it provides a cooling period which gives the members time to get help with their civil law matters. Many courts are not familiar with the intricacies of the SCRA or its protections. Legal assistance attorneys play a vital role by educating courts about the SCRA's relevant provisions involving stays of proceedings or vacation of judgments. In nearly every instance where we prepared a letter to a court on behalf of a client that sought a stay of proceedings under SCRA, the request was granted.

Referring attorneys are also asked to state the "factors of urgency" related to a client's case as they completed the Web-based intake form and permit MPBP directors and volunteer attorneys to triage incoming cases.

legal timeline should include dates of pertinent filings, response due dates, any scheduled court proceedings, and statutes of limitations. A personal/professional timeline should also include any upcoming PCS or extended TDY dates, available leave, major exercises or mission-related events, activation or deactivation from active duty, major life-events which may affect the case or client participation, and information pertaining to when a client is returning to home station from a deployed location. Accurately convening the reality of a client's individual situation is essential. Providing this information can assist a client in receiving assistance in sensitive or timely cases, whereas failure to provide this information can prevent a client from receiving assistance where it otherwise could have been provided.

In another case, a member was referred for legal assistance after the member reported that an ex-partner was sending harassing text messages. During the meeting with the legal assistance attorney, it became clear that this harassment had crossed a line into threats of violence, and the member feared returning home. The legal assistance attorney worked to coordinate the issuance of a temporary protective order in an attempt to resolve this problem, but the harassment escalated rather than ceased. Therefore, the legal assistance attorney and client agreed that a referral to the MPBP was appropriate.

When formally referring the case to the MPBP, the legal assistance attorney included a timeline for the member's redeployment, the length of time a temporary restraining order would cover, and the local jurisdiction's requirement of a hearing prior to granting a permanent order. The legal assistance attorney stressed that if the member used a local domestic violence resource center to apply for a permanent order after returning home and completing in-processing required by the military, there would be a gap during which the member would remain vulnerable. Based on the compelling facts and circumstances of the case, 379 AEW/JA recommended the MPBP expedite the placement of this case with a volunteer attorney in advance of the member's redeployment. In just over two weeks after the initial legal assistance appointment, the member was placed with a volunteer attorney and accepted the offer of services. With continued coordination through the both volunteer attorney and military channels, 379 AEW/JA ensured that the member felt safe enough to attend the unit's homecoming party upon redeployment.

As a final matter, the legal assistance attorney must also take the time to state the operative facts related to the client's legal issue in the "Legal Issues Involved" and "Client's Claim/Defense" blocks of the referral form. As with other sections, the client benefits from the legal assistance attorney who carefully and thoroughly describes the facts of the case as well as the impressions about the claims and defenses.

One case involved a client who sought assistance after the client's ex-spouse tried to alter the divorce decree and child custody agreement after the client had deployed. In accordance with the terms of the decree and custody agreement, the member gave notice of the pending deployment and ancillary training required prior to departure. This notice provided dates when the member would leave his home. After the member had departed, the ex-spouse filed a motion to change the divorce decree and custody agreement and served the motion at the member's now-empty home. The member was obviously

unable to answer the motion in accordance with the local rules, so the ex-spouse sought a default judgment with a request for attorney's fees and additional costs. The legal assistance attorney recognized fairly quickly that this case was a family law case. Only after methodically walking through the facts with the client was the legal assistance able to ascertain what appeared to have happened, both in terms of the legal timeline as well as the military timeline. What appeared to be a "simple" family law case became much more involved, and these specific details gave a more complete picture of the case and were crucial in referring the case to the MPBP. The legal assistance attorney referred the case to the MPBP with a fuller picture of what happened at home. It was accepted and a civilian attorney agreed to represent the client in this dispute.

CONCLUSION

Not every client who was seen by the 379 AEW/JA qualified for the MPBP, and some clients were able to receive services in other ways. Although the steps described above were not new when they were implemented by 379 AEW/JA, their use greatly benefited 379 AEW/JA's legal assistance clients. Over the course of six months, 379 AEW/JA's three attorneys and two paralegals dramatically increased utilization of the MPBP's referral system by following these steps.[35] This increased focus resulted in the 379 AEW/JA referring 11 cases for placement.[36] All 11 were accepted for placement,[37] and five cases were successfully placed with volunteer attorneys.[38] Of the remaining cases, one was closed after the client no longer needed pro bono representation.[39] The remaining cases are still open as the MPBP continues to look for volunteer attorneys.[40] Although these numbers were a small percentage of the total legal assistance clients seen by the 379 AEW/JA's attorneys and paralegals, they illustrate how the MPBP can provide real benefits in the lives of deployed service members. The techniques described in this article were developed at a deployed air expeditionary wing, but they are easily transferrable to wings at home, too. When these steps are implemented, the ABA Military Pro Bono Project becomes an important tool in providing superior legal assistance to the men and women of the United States Armed Forces.

[35] E-mail from Mary C. Meixner, Staff Attorney & Project Director, American Bar Ass'n Military Pro Bono Project, to author (1 December 2015, 8:02 PM AST) (on file with the author). Between 2009 and 2013, a total of six cases were referred to the MPBP from Qatar, and three were successfully placed with volunteer attorneys.

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *Id.* The 379 AEW/JA's dramatic improvement over this six-month period is also impressive when compared case referrals by the entire Air Force. From 1 June to 30 November 2015, Air Force Legal Assistance offices referred a total of a total of 47 cases, 22 of which have been placed with volunteer attorneys. 379 AEW/JA was responsible for 23 percent of all referrals and 23 percent of all placements over this period.

Major Douglas E. DeVore II

(B.A., Brigham Young University; J.D., S.J. Quinney College of Law, University of Utah; LL.M., The George Washington University Law School) is Deputy Staff Judge Advocate at the 502d Air Base Wing, Joint Base San Antonio, Texas.

Captain Sarabeth A. Moore

(B.A., Virginia Commonwealth University; M.S., Maxwell School of Citizenship and Public Affairs, Syracuse University; M.A., S.I. Newhouse School of Public Communications, Syracuse University; J.D., Syracuse University College of Law) is an Area Defense Counsel at the United States Air Force Academy, Colorado.

Master Sergeant Jennifer W. Hendrix

(A.A. Community College of the Air Force; B.A., Ashford University) is the Noncommissioned Officer in Charge for General Law, 86th Airlift Wing, Ramstein Air Base, Germany.

Senior Airman Nicole M. Mynatt

Is a military justice paralegal at the 50th Space Wing, Schriever Air Force Base, Colorado.

No Audit, No Problem

Calculating FAR Part 12 Termination for Convenience Settlements

BY MS. LIBBI J. FINELSEN

No one contests that the government has the authority to terminate contracts for convenience. However, the challenge for contracting officers is administering the termination settlement process.

The Department of Defense Acquisition process can be complex and time consuming. However, some purchases by the federal government can be simplified, based either on the price or items that are being acquired. The acquisition of "commercial items" is a great example. Federal Acquisition Regulation (FAR) Part 12 governs commercial items contracts and was intended to make acquisitions of commercial items easier for both the U.S. Government and contractors. The FAR defines a "commercial item" in part as:

> Any item, other than real property, that is of a type customarily used by the general public or by non-governmental entities for purposes other than governmental purposes, and—
>
> (i) Has been sold, leased, or licensed to the general public; or,
>
> (ii) Has been offered for sale, lease, or license to the general public[1]

[1] FAR 2.101

Stock Photo © iStock.com/Anastasiia_New

While the settlement process described in FAR Part 12 should be a straight-forward process, it can be more difficult to execute than it appears.

While the acquisition process for commercial items is arguably more streamlined than the process for non-commercial items, the same cannot necessarily be said for settling terminations of a contract for convenience of the government. No one contests that the government has the authority to terminate contracts for convenience. However, the challenge for contracting officers is administering the termination settlement process.

While the settlement process described in FAR Part 12 should be a straight-forward process, it can be more difficult to execute than it appears. FAR 52.212-4(l), the FAR clause that outlines the standard terms and conditions for commercial items contracts, offers a process that is intended to ensure contractors are fairly compensated when their contracts are terminated for the convenience of the Government.[2] However, the devil is in the details when it comes to implementation. As discussed in greater detail below, FAR Part 12 offers a potentially confusing process for contracting officers to use when calculating a settlement amount following a termination for convenience. Unfortunately, there is limited case law to help sort out the confusion. Although contracting officers can rely on the principles explicitly set forth in FAR Part 49 when settling terminations of non-commercial contracts for convenience, those provisions can only be used as guidance when settling commercial contract terminations.[3] The lack of explicit guidelines can make it difficult for contracting officers to settle terminations and for program attorneys or base counsel to provide termination settlement advice.

TWO-PRONG SETTLEMENT METHODOLOGY

FAR 52.212-4(l) is intended to set forth the process to be used when settling a commercial contract termination proposal to ensure that contractors are fairly compensated for the early termination of their contracts. Pursuant to this process, the government is required to pay "a percentage of the contract price reflecting the percentage of the work performed prior to the notice of termination, plus reasonable charges the Contractor can demonstrate to the satisfaction of the Government using its standard record keeping system, have resulted from the termination."[4] This provision clearly establishes a two-prong approach to follow when evaluating a termination settlement proposal. The problem is that the regulatory language does not define the "percentage of the work performed" or the types of costs that fall within the scope of "reasonable charges." This makes calculating settlement amounts a problematic exercise for contracting officers.

[2] FAR 52.212-4(l)

[3] FAR Part 49 establishes the policies and procedures relating to the termination of non-commercial item contracts for the convenience of the Government or for default. Contracting officers have the discretion to use FAR Part 49 as guidance to the extent that it does not conflict with FAR 12.403 and FAR 52.212-4. FAR 12.403(a).

[4] FAR 52.212-4(l).

CALCULATING THE PERCENTAGE OF COMPLETION

Prong one of the settlement approach requires the contracting officer to calculate the percentage of the work performed prior to issuance of the notice of termination. When calculating this percentage, the contracting officer must do more than count how many items were delivered by the contractor and accepted by the government. For purposes of this analysis, work performed and products delivered are not synonymous.[5] It is likely that supplies are at different stages of completion when the contractor receives the termination notice. The government may have received and accepted some items, but other items may still be on the production line at various points in the assembly process. All of these items represent "work performed" under the contract. Thus, when the contracting officer calculates the percentage of work performed prior to issuance of the termination notice, he or she must remember that the percentage of completion "applies to all work performed including partially completed items on the production line at the time of termination."[6]

Use of this relatively straightforward methodology will ensure compliance with prong one of the settlement approach. For each item, the contracting officer must determine the percentage of completion at termination and then multiply the percentage of completion times the contract price for that item.[7] This calculation does not require submission of cost or payroll data. Therefore, contracting officers and their technical advisors must look at the items and decide how far along they are in the production process.

CALCULATING REASONABLE CHARGES

The second prong of the settlement approach is calculating the "reasonable charges" that resulted from the termination. Reasonable charges include both settlement expenses as well as other termination–associated costs that are incurred by the contractor due to the termination. The scope of settlement expenses includes those expenses incurred by the terminated contractor to prepare and present a settlement claim to the contracting officer.[8] For example, settlement expenses may include the costs associated with hiring an attorney or accountant provided those expenses are "reasonably necessary" to prepare and present the termination proposal.[9]

FAR 52.212-4(l) also permits the recovery of other reasonable charges to provide fair compensation to the terminated contractor. These reasonable charges include costs that cannot be discontinued immediately after the termination despite reasonable efforts to do so.[10] For example, the cost of a lease that the contractor cannot immediately end after receiving a termination notice may be a reasonable charge that should be compensated as part of the termination settlement. Other examples of costs that have been considered to be reasonable charges that could not be discontinued immediately after termination include:

- Start-up costs that were not captured when calculating the percentage of completion;[11]
- Storage costs for items that were not delivered to the government;[12]
- General & Administrative expenses (hereafter G&A) or home office overhead if the terminated contractor can establish that these costs resulted from the termination and were appropriate;[13]
- Labor costs of contractor employees who drafted the termination settlement proposal and claim; who responded to government requests for information in support of the settlement proposal and claim; and who negotiated the settlement;[14]

[5] TriRAD Tech., Inc., ASBCA No. 58855, 2015-1 BCA ¶ 35,898, at 175,496.

[6] *Id.* at 175,497.

[7] *Id.*

[8] Dellew Corp., ASBCA No. 58538, 2015-1 BCA ¶ 35,975, at 175,784.

[9] *Id.*; SWR, Inc., ASBCA No. 56708, 2015-1 BCA ¶ 35,832, at 175,231.

[10] Dellew Corp., 2015-1 BCA ¶ 35,975, at 175,784 (citing FAR 31.205-42(b)).

[11] TriRAD Tech., Inc., 2015-1 BCA ¶ 35,898, at 175,499.

[12] TriRAD Tech., Inc., 2015-1 BCA ¶ 35,898, at 175,501-502.

[13] Dellew Corp., 2015-1 BCA ¶ 35,975, at 175,785; SWR, Inc., 2015-1 BCA ¶ 35,832, at 175,231-232.

[14] TriRAD Tech., Inc., 2015-1 BCA ¶ 35,898, at 175,500; Pros Cleaners, ASBCA No. 59797, 2015 ASBCA Lexis 391, at *10 (Oct. 20, 2015).

- Labor costs of contractor employees who performed work in preparation for performance provided those costs were not captured as part of the percentage of completion calculation;[15]

- Settlement costs incurred by the terminated contractor to terminate a lease;[16] and

- Profit on the reasonable charges; however, profit on settlement expenses and G&A, and anticipatory profits are not recoverable.[17]

These are just some examples of the types of costs that could fall under the rubric of reasonable charges. There may be other charges that are properly compensable. That is why it is important for contracting officers to carefully examine the documentation provided by terminated contractors to ensure that the settlement proposal includes all charges that resulted from the termination and that could not be discontinued immediately after the termination.

THE BURDEN OF PROOF

The contractor must prove the amount of the costs it incurred when performing work that was terminated "with sufficient certainty" to establish that its damages are not speculative.[18] This burden of proof does not require compliance with the cost accounting standards or cost principles and does not compel contractors to undergo any sort of audit to support proposed settlement costs.[19] Instead, the contractor may support the costs in its termination settlement proposal by using its standard record keeping system.[20] If the contractor's record keeping system lacks sophistication, it can rely on records, such as e-mails between itself and the government, to establish the amount of its damages.[21]

As a result, contracting officers can expect to see a myriad of invoices, receipts, pay stubs, e-mails, or other documents in addition to balance sheets as support for a termination settlement proposal. Accordingly, contracting officers should rely on their business judgment and on the advice of their program attorneys or base counsel when determining whether a terminated contractor has adequately supported its damages.

CONCLUSION

While calculating termination settlements may appear to be a daunting task, the settlement process need not be as problematic as it seems. The process is less challenging if contracting officers rely on their business judgment when deciding whether a specific charge resulted from the termination and when computing the percentage of completion of the items procured under the contract. In addition, they must be willing to consider nontraditional records to support the settlement amount. These steps should make it easier to achieve the goal of ensuring that contractors are fairly compensated and made whole for the costs incurred due to the termination.

Questions regarding how to calculate FAR Part 12 termination settlement proposals should be referred to the Contracting Field Support Branch at usaf.pentagon.af-ja.mbx.afloa-jaqk-andrews@mail.mil or 240-612-6700.

Ms. Libbi J. Finelsen

(B.A., University of Nevada Las Vegas; J.D. Lewis and Clark College Northwestern School of Law) is a Department of the Air Force civilian attorney assigned to the Air Force Legal Operations Agency, Contract Law Field Support Center, Enterprise Specialized Commercial Acquisition Branch at Joint Base Andrews, Maryland.

[15] SWR, Inc., 2015-1 BCA ¶ 35,832, at 175,228-229.

[16] SWR, Inc., 2015-1 BCA ¶ 35,832, at 175,226.

[17] TriRAD Tech., Inc., 2015-1 BCA ¶ 35,898, at 175,499; SWR, Inc., 2015-1 BCA ¶ 35,832, at 175,222 (Dec. 4, 2014).

[18] Dellew Corp., 2015-1 BCA ¶ 35,975, at 175,784.

[19] FAR 52.212-4(l).

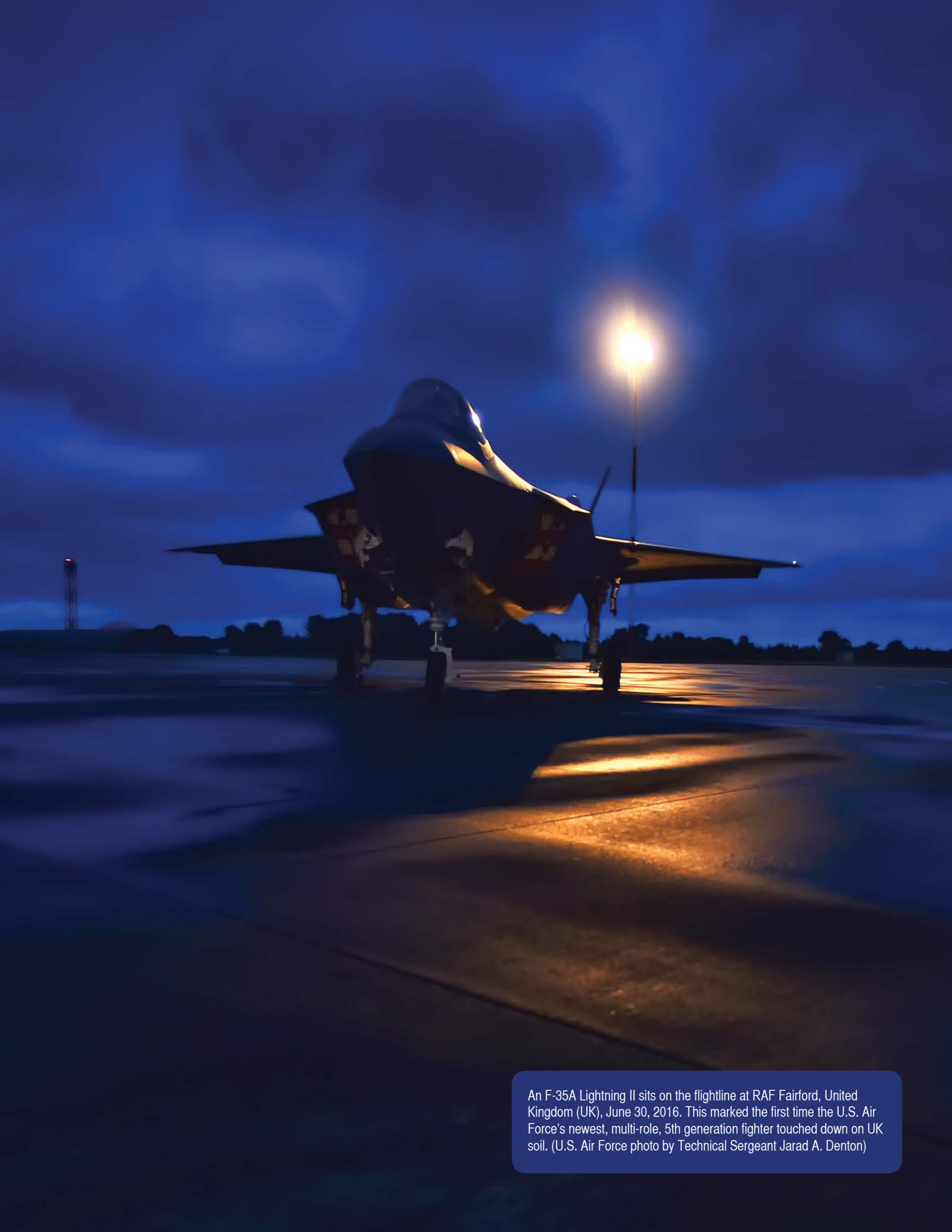
[20] FAR 12.403(d)(1)(ii).

[21] *See, e.g.*, SWR, Inc., 2015-1 BCA ¶ 35,832, at 175,227 n4 (ASBCA relied on contemporaneous e-mails between the Army and the contractor discussing a site lease when allowing recovery of a payment to end that lease).

Parting Shot

An F-35A Lightning II from Eglin Air Force Base, Florida, receives fuel from a KC-135 Stratotanker assigned to MacDill Air Force Base, Florida about 100 miles off the Gulf Coast after 58th Fighter Squadron's first successful munition employment at a nearby range. (U.S. Air Force photo/Captain Hope R. Cronin)

If you have a unique, funny, or poignant photograph of your travels in the JAG Corps please e-mail the editors at AFLOA.AFJAGS@us.af.mil.



An F-35A Lightning II sits on the flightline at RAF Fairford, United Kingdom (UK), June 30, 2016. This marked the first time the U.S. Air Force's newest, multi-role, 5th generation fighter touched down on UK soil. (U.S. Air Force photo by Technical Sergeant Jarad A. Denton)