Volume 44, Number 2

THE Reporter

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Education and Outreach for The Judge Advocate General's Corps

2017 this edition:

FOUR EXPECTATIONS OF LEADERS:

ESTABLISH STRUCTURE, MANAGE RELATIONSHIPS, BALANCE RISK, AND MAKE DECISIONS.

The Reporter

2017 Volume 44, Number 2

The Reporter can be accessed online at
http://www.afjag.af.mil/library/
Cite as: *The Reporter*, Vol. 44, No. 2

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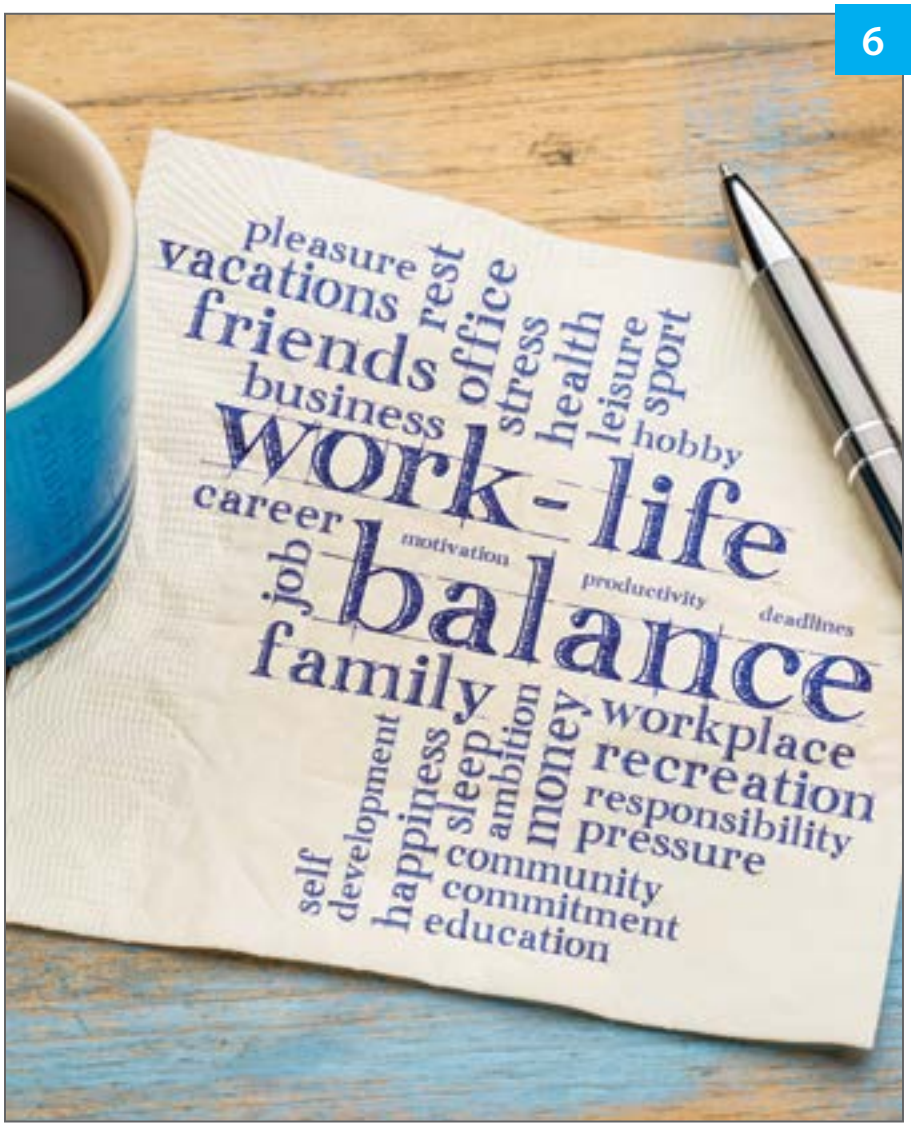

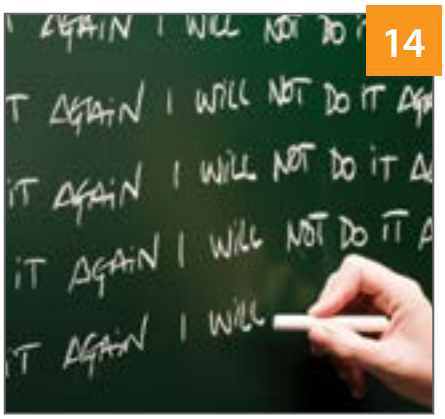

Message from
The Deputy Commandant

In this edition of *The Reporter* our **feature articles** provide practical insight on a variety of "nuts-and-bolts" tasks JAGs regularly face. Lieutenant Colonel Sterling Pendleton begins by providing a JAI Article 6 base inspection survival guide. Then, Major Dean Korsak provides an insightful catalog of base legal office leadership tips.

In our **military justice section**, Major Justin Lonergan takes a renewed look at the "extra military instruction" language found in the Manual for Courts-Martial and associated Air Force regulations. In addition, Captain Eric Welch provides a primer on the interplay between Military Rule of Evidence 414 and emerging technologies in child pornography cases. Finally, Captain James Woodruff, II explores the recent changes to Article 32 Preliminary Hearings.

In our **leadership section**, Captain Eliot Peace provides a series of insightful tips on how to better communicate through effective writing.

In our **legal assistance section**, Mr. Mark Stoup reviews the state of legal assistance services offered to crime victims.

Next, in our **operations and international law section**, Major Simone Davis reviews, as she terms it, "the world's most overlooked, yet most powerful international agreement:" the Treaty on Open Skies.

Finally, in **fields of practice**, Major Thomas McNab takes a hard look at mediation practices in employment discrimination cases, and Captain David Jacobs asks "Where is the Air Force Brand?"

Thank you to all of our authors who make this and every edition of *The Reporter* a success through the sharing of their expertise with the Corps. *The Reporter* continues to provide relevant and current legal insights because of your contributions. I encourage each of you to help continue this success by writing an article for publication.

A Practitioner's Guide

JAI Article 6 Inspections and the Air Force Inspection System (AFIS)

BY: LIEUTENANT COLONEL STERLING C. PENDLETON

This should not be cause for trepidation, but rather viewed as an **opportunity** to highlight all the great work the office is doing, as well as to showcase the incredible personnel.

Your base is scheduled for a Unit Effectiveness Inspection (UEI), and you know a JAI Article 6 Inspection will likely coincide. This should not be cause for trepidation, but rather viewed as an opportunity to highlight all the great work the office is doing, as well as to showcase the incredible personnel. Inspections are not meant to "catch" mistakes for the sake of creating "gotcha" moments. They are designed to highlight shortcomings and risk, with the goal of improving effectiveness and efficiency.[1] With that in mind, as legal professionals we operate within two inspection systems—Article 6 Inspections and Inspector General (IG) Inspections conducted within the Air Force Inspection System (AFIS). This article will delineate the key differences between the two inspection systems to facilitate success in both.

A comparison of JAI-conducted Article 6 Inspections and IG Inspections under the AFIS requires a bit of background. Prior to 2011, Air Force Inspections, known as Unit Compliance Inspections (UCI), primarily assessed compliance with functional requirements. UCI inspections of legal offices varied among Major Commands (MAJCOMs) and did not consistently inform The Judge Advocate General (TJAG) of noted deficiencies—limiting HAF/JA's ability to provide guidance or implement solutions. From 2011-2013, Air Force senior leaders began to dismantle UCIs by eliminating all functional inspections. Only inspections that were required by law remained. Of course, one of those by-law inspections was TJAG's Article 6 Inspection authority under 10 USC § 806.[2] In 2013, the Under Secretary of the Air Force signed the Program Action Directive (PAD) 13-01,[3] implementing the AFIS under which we currently operate.[4]

[1] U.S. Dep't of Air Force Inst. 90-201, The Air Force Inspection System (11 February 2016) (incorporating AFI90-201_AFGM2017-01, 26 January 2017), para. 2.4.2.1.1 [hereinafter AFI 90-201]; U.S. Dep't of Air Force Inst. 51-108, The Judge Advocate General's Corps Structure, Development, and Operational Support (9 October 2014), para. 2.1 [hereinafter AFI 51-108].

[2] 10 U.S.C. § 806 (2012).

[3] U.S. Dep't of Air Force, Program Action Directive 06-11, Implementation of the Secretary of the United States Air Force Direction to Implement a New Air Force Inspection System (10 June 2013).

[4] Lieutenant Colonel David Vercellone &

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AFIS is predicated on the concept that Airmen and Commanders must stay focused on the mission, not the inspection.[5] Inspections of old, including UCIs, often resulted in hyper preparation leading up to a week-long evaluation. These types of inspections were effective in assessing units during a snapshot in time—the inspection week—but did not facilitate sustained evaluation to provide a clearer picture of prolonged effectiveness and compliance. Now, under the AFIS, MAJCOM IG teams conduct Unit Effectiveness Inspections (UEI)—a continual evaluation that will generally span several years, providing a "photo album" of Wing effectiveness instead of a single snapshot.[6] Building the "photo album" requires MAJCOM functional staffs to perform continual evaluation through the regular monitoring of various performance indicators.[7]

The AFIS implementation drove modifications in the Article 6 Inspection, including shifting many Article 6 Inspection requirements to the AFIS. Prior to 2015, JAI Article 6 Inspections included nearly all legal office services. In 2015, however, the primary focus of JAI Article 6 Inspections became military justice, leadership, and training—understanding that TJAG may include other areas at his discretion. Moreover, now most other areas of legal services, including civil law, ethics, and contracts, are inspected under the AFIS by MAJCOM IGs, who may shift focus as they deem appropriate. One way for MAJCOM IGs to determine where focus is warranted is through Management Internal Control Toolset (MICT).

MICT is intended to facilitate communication between wing personnel and higher headquarters through Self-Assessment Communicators (SAC).[8] SACs are not inspection checklists. SACs are communication tools to improve compliance with published guidance and communicate risk and program health up and down the chain of command.[9] SACs, therefore, include those items that are most important to communicate to base-level Airmen. This communication provides MAJCOM IGs (and HAF OPRs) continuous, near real-time feedback to assist the field and improve policy.

UEI continuous evaluation culminates with a Capstone Event.[10] During this week-long base visit, IG inspectors evaluate the Commander's Inspection Program (CCIP) and assess unit effectiveness. Most JAI Article 6 Inspections are synchronized with IG UEI Capstone Events to minimize the impact to base legal offices. So, during the UEI Capstone Event JAI will also conduct an Article 6 Inspection. There are typically two IG inspectors from the MAJCOM legal office and two JAI inspectors from HAF. The two inspection teams work together to evaluate base legal offices comprehensively. The JAI inspectors follow the Article 6 Inspection checklist focusing on military justice, leadership, and training. The MAJCOM IG team assesses effectiveness through the verification and validation of SACs and examination of other legal products and processes—mostly within the civil law programs. The validation of SACs helps inform the Article 6 Inspection. A sampling of SACs will be validated and verified and be included in the overall Article 6 Inspection grade (10%), and will also inform TJAG. MAJCOM IG inspectors should also verify and validate items contained in attachment 3 to AFI 90-201—items identified by HAF subject matter experts as posing the greatest risk of undetected compliance for a Wing Commander, an Airman, or the Air Force.[11]

Notably, both the AFIS and Article 6 inspections seek to "foster a culture" of unfettered, critical self-assessment by rewarding self-identification of deficiencies, although the rewards manifest differently.[12] Under the AFIS, self-identification of non-compliance will not result in a deficiency under most circumstances; therefore, it is important to clearly identify shortcomings and outline

Mr. David Houghland, AF/JA, Air Force Judge Advocate General's School Webcast: Strengthening Inspection Capabilities (13 January 2015).

[5] AFI 90-201, para. 1.2.1.2.

[6] *Id.*, para. 4.1.

[7] *Id.*, para. 1.2.1.2.

[8] *Id.*, paras. 2.17.2, 2.17.2.3.

[9] *Id.*, para. 2.17.2.3.

[10] *Id.*, paras. 4.6, 4.8.

[11] AFI 90-201, 4.5.2.

[12] AFI 90-201, para. 2.19.2.

an improvement plan.[13] Identifying non-compliance under the Article 6 Inspection is handled differently: self-identified deficiencies allow for the opportunity to substantially correct the deficiency prior to the inspection. If the discovered deficiency is substantially corrected prior to a JAI Article 6 Inspection, it will be identified as a corrected deficiency, and result in no points deducted. Self-assessments are vitally important to both inspection systems.

Robust, candid, self-assessments help identify areas in need of attention, and if done right, focus on regulatory requirements. A shared commitment to meeting regulatory requirements normally leads to the effective provision of legal services—and also greatly reduces the need for last minute inspection preparation. Ideally, there should be very little inspection preparation. Keep in mind, inspectors merely evaluate the performance of the day-to-day legal office mission over the inspection window. Self-assessments should be conducted at least twice a year: in the spring and in the fall. A spring self-assessment provides direction for the remainder of the year, while one in the fall allows time for correction before the end of the calendar year. Staff Judge Advocates (SJA) should assign one point of contact to lead the self-assessment/inspection effort, but the entire office should contribute. Many SJAs who run successful programs break the checklist down into manageable sections and require all office personnel to review the checklist citations, answer the questions, and produce and compile substantiation. Office personnel should answer the inspection questions accurately and succinctly. More important, though, is demonstrating compliance with the regulatory requirements. Although checklist answers are important to demonstrate an understanding of the process/regulatory requirement, documents such as comprehensive legal reviews that cite the correct law and apply the correct legal standard, demonstrate compliance. Another way to demonstrate compliance is to maintain appropriate e-mails. For example, many times JAGs will provide advice to commanders/investigating officers of CDIs on framing allegations, identifying witnesses, etc., via e-mail. Maintaining those e-mails (as part of the self-assessment process) will show the JAI inspectors that personnel are providing advice on framing allegations and/or other assistance during the course of the investigation. Keep in mind, emails of this type must be maintained in accordance with record management requirements. If adequate substantiation to show compliance is lacking, the inspectors will request additional documents. Although all offices are required to provide some additional information, those offices that perform the best are required to supplement their originally provided documents very

Robust, candid, **self-assessments** help identify areas in need of attention….

[13] *Id.*, paras. 2.19.2.1, 2.17.1.1.3.

little. Office leadership should oversee the entire effort; it requires time, but will pay dividends in the effectiveness and efficiency of the office, not to mention inspection results. It will also make for a smooth inspection.

On day one of the JAI Article 6 Inspection and the UEI Capstone Event, the JAI inspectors and MAJCOM IG representatives typically arrive to the legal office at approximately 0800 hours. After the legal office gives a short (20-30 minute) in-brief, the inspectors will provide an overview of the expectations/events of the coming three-day inspection. After that the inspectors will spend the rest of day one reviewing the substantiation and validating and verifying items within AFIS. At the end of days one and two, the entire inspection team provides the legal office leadership feedback on items that may result in a deficiency unless bolstered with additional information. On day two the inspectors continue the evaluation and conduct external interviews with commanders, first sergeants, and other base personnel. On day three, typically the last day of the inspection, the inspectors will conduct interviews of legal office personnel and finish any remaining assessment of checklist items or items within the AFIS. The inspectors then calculate the final five-tiered grade. The grading tiers are unsatisfactory, satisfactory, commendable, excellent, and outstanding. The majority of offices fall within the commendable tier. Finally, the inspectors outbrief wing leadership and legal office personnel, highlighting strengths and areas for improvement. In some instances, the inspectors may recognize outstanding performers and best practices. The final JAI Article 6 Inspection report will be sent to the Wing Commander and the SJA upon TJAG's review and approval.

The purpose of inspections is to improve the effectiveness and efficiency of the Force, and critical self-assessments play an integral part in both the JAI Article 6 and AFIS inspection systems. Periodic, detailed assessments of programs and processes identify areas in which the office is doing well and areas that could be improved—and if conducted early (in the inspection window) allows time to adjust course. So when the JAI Article 6 Inspection and the AFIS Capstone event occur, ideally, office personnel have already seriously examined work product and processes multiple times, and made adjustments toward improvement. Consequently, the JAI Article 6 Inspection and the UEI Capstone event results are merely reflections of how well offices are executing the day-to-day legal mission. Drawing upon the efficiencies and improvements made throughout the inspection window via self-assessments, the Article 6 Inspection and UEI Capstone event become an opportunity to relax, highlight great work, and showcase office personnel.

Keep in mind, **inspectors merely evaluate** the performance of the day-to-day legal office mission over the inspection window.

Lieutenant Colonel Sterling C. Pendleton, USAF

(B.A., University of North Carolina at Wilmington; M.A., Appalachian State University; J.D., Ohio Northern University) is Chief of Inspections and Strategic Planning, Inspections and Standardization Directorate, Office of the Judge Advocate General, Headquarters United States Air Force.

Leadership Ideas to Enhance Your Office

BY: MAJOR DEAN W. KORSAK

Leadership emerges in many forms, especially in the military profession. Heroic acts in combat inspire courage to persevere under fire. Leadership in military organizations inspires excellent performance to ensure combat readiness. Military service requires various forms of leadership to address diverse and complex situations. Historical perspectives on military leadership provide a useful foundation in leading new generations of professionals. Decades of additional experience and scientific perspectives polish foundational ideas.

The purpose of this article is to present modern descriptions of great **leadership** that help to create and maintain work environments focused on maximizing **productivity** and increasing **morale**.

The purpose of this article is to present modern descriptions of great leadership that help to create and maintain work environments focused on maximizing productivity and increasing morale. The discussion begins with brief highlights of military leadership philosophy and transitions to a summary of recent works on leadership. Exposure to various approaches and frameworks provide ideas that can be adopted and modified in order to enhance team performance. Expanding individual leadership capacity is an inexpensive way to empower people to create and sustain offices that get the work done and even have a good time doing it. Modern perspectives confirm the enduring truth that effective leadership has been and will always be the best way to sustain group performance.

MULTIFARIOUS MILITARY LEADERSHIP TRADITION

Military organizations have always needed "an abundance of good leaders in all grades."[1] These are people "fitted by…ideas, character, or genius, or by strength of will or administrative ability to arouse, incite, and direct [others] in conduct and achievement."[2] Modern military literature expresses this same idea that a fundamental aspect of leadership is "influencing people—by providing purpose, direction, and motivation—while operating to accomplish the mission and improving the organization."[3] While a variety of leadership approaches can result in success,[4] personnel *obey* superiors

[1] The Officer's Guide 321 (The Military Service Publishing Company, 17th ed. 1951).

[2] *Id.* at 322.

[3] U.S. Dep't of Defense, The Armed Forces Officer 51 (2007).

[4] *See* The Officer's Guide, *supra* note 1, at 322-24 (explaining the need for different

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because they must; they *follow* leaders because they want to.[5] This distinction has a noticeable impact on the atmosphere and performance of an office. The unique challenge for military organizations is to go beyond good leadership and create great leaders by cultivating relationships and improving processes that empower teams. Great leaders develop other leaders.[6] Since the military internally produces its own future leaders, it must continually focus on producing great leaders. While this presents challenges, the good news is there is a vast cadre of capable leaders ready to grow into any leadership role our nation requires, including you!

One crucial point to take from this article is that there is no biological formula or personality profile required to be a great leader. It has been said that two of the most important inner qualities great leaders share is self-confidence based on expert knowledge and a sense of responsibility.[7] There are many other qualities identifiable in great leaders, but listing them is best left for individuals to define based on personal meaning and significance. Each person can develop self-confidence in personal abilities and also in a team's capacity to perform at a level greater than the individual parts. Taming strengths and improving weaknesses is a process required by all. Great leaders must maintain self-confidence and a sense of responsibility within themselves and also in the teams they lead.

The military was on to something significant in noting self-confidence as a common leadership trait and the need to grow self-confident leaders in its force. Leaders must build the confidence their team requires to enhance performance. A straightforward study confirmed that leaders can directly affect a person's confidence and self-efficacy, and that doing so will impact performance.[8] For example, if a leader reinforces what people are good at and continuously assures a team they are competent to complete a particular task, then the team will approach tasks with increased confidence and enthusiasm.[9] It does not take a certain type of person or personality to encourage a team toward success.

U.S. military leaders throughout history have come in all forms. Some of these differences are captured in an early military leadership guide.[10] There are great leaders who were extroverts and others reclusive. Some drank whisky, while others never touched the stuff.[11] They had different temperaments, backgrounds, and philosophies of life and battle.[12] Yet in all their diversity, great military leaders shared common "inner qualities," among which include "recognizing the worthwhile traits in another person…."[13] This is because "achievement develops out of unity of action," and winning battles (overseas or at the office) is the product of winning over people to create unity of action.[14] This is no easy task and requires focused effort.

For both highly effective leaders and those who feel personal growth is needed, refreshing with new perspectives and ideas is always beneficial. There is no panacea to effective leadership, but there are consistent themes. Written articulations on leadership provide useful reflection points. Leading is more intuitive for some and more challenging for others. For those with a settled leadership philosophy, consider whether the discussed perspectives have anything to offer your current practices. If you don't yet have a leadership approach, there are some easy ones you can begin to use.

A SIMPLE MILITARY APPROACH: 4-3-2-1 LEADERSHIP

A modern perspective on how the military can develop great leaders comes from U.S. Army Major General (Ret.) Vincent "Vinny" Boles.[15] I had the pleasure of discussing leadership with General Boles and his wife after he concluded

leadership approaches to different situations).

[5] The Armed Forces Officer, *supra* note 3, at 51.

[6] *Id.* at 52.

[7] U.S. Dep't of Defense, The Armed Forces Officer 94 (Government Printing Office, 1950).

[8] Stephanie L. Stolz, The Importance of Self Confidence in Performance (1999), http://www.webclearinghouse.net/volume/2/STOLZ-TheImporta.php.

[9] *See id.*

[10] U.S. Dep't of Defense, *supra* note 7.

[11] *Id.* at 79.

[12] *Id.* at 79-83.

[13] *Id.* at 79 & 84.

[14] *Id.* at 87.

[15] Vincent E. Boles, 4-3-2-1 Leadership: What America's Sons and Daughters Taught me on the Road from Second Lieutenant to Two-Star General (2013).

a leadership presentation. His reflections begin with appreciating and harnessing the immense talent of a team. Note that his leadership perspective is based on what America's sons and daughters taught him throughout his 33 years of military service,[16] not what he taught them. Leading, he explains, is "forging a connection that lights a spark in others, and encourages them to be their *best* when accomplishing a task."[17] This is distinct from managing, which is "impersonal and detached."[18] This point deserves elaboration.

There is a distinct purpose of leading compared to managing. Both are required in successful organizations and can be accomplished by one person. The distinction is commonly referenced in organizations that are far from a military culture, such as a Silicon Valley technology company. An attorney who now leads eBay devoted a considerable portion of a leadership discussion on the differences between managing and leading.[19] Summarily, management involves control and process for predictable results. Leadership is getting the best out of people. This means keeping people fired up about what they do and what the organization collectively exists to accomplish. Leadership is about a value system focused on how people interact with each other, especially how the person in charge interacts with the team. The views of corporate and military leaders align on this point. General Boles elaborates on this idea in his easy to remember framework called "4-3-2-1 Leadership."

Teams have **four** expectations of leaders: establish structure, manage relationships, balance risk, and make decisions. Establishing structure in a team is about understanding the natural dispositions of how the leader and team members are wired. Personality profile and preference must be understood to make sure the leader is telling the team what is needed and the team understands how to focus efforts on important tasks. Managing relationships helps minimize tension and stayed focused on critical internal and external relationships required for organizational success. Balancing risk requires a leader to identify, mitigate, and explain existing risks to stakeholders. Few courses of action are risk free, so it's the leader's job to guide a team through known risks in a calm and methodical manner. Making decisions requires a leader to understand what information is needed before making a decision and then providing guidance to the team, including prioritizing issues that must immediately be decided and those that can wait.

Teams have **four** expectations of leaders: establish structure, manage relationships, balance risk, and make decisions.

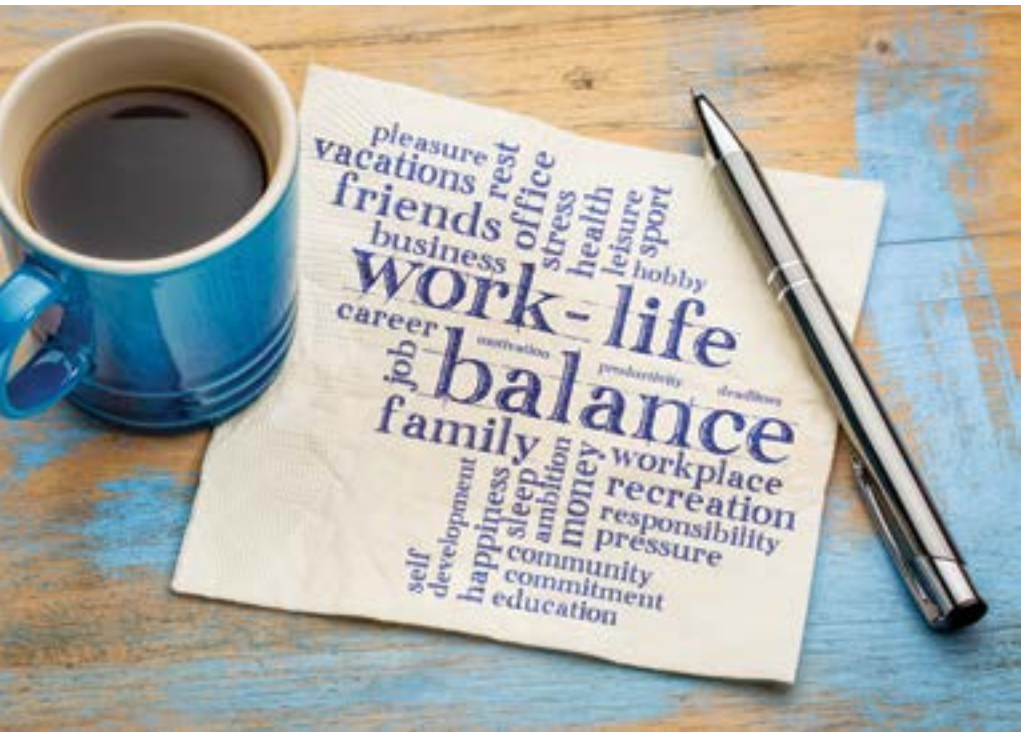
Leaders must ask and answer **three** questions: what's the standard, what's the system, and who's in charge? Every mission and task has a standard. The standard can be to meet a metric, pro-

[16] *Id.* at 17.

[17] *Id.* at 23.

[18] *Id.*

[19] Devin Wenig, President and CEO, eBay Inc., Address at Columbia Law School luncheon (4 April 2016).



Happy people have an amazing ability to accomplish more work more proficiently than a larger unhappy team.

duce a document based on a template, or perform a task to a certain required level. Knowing the standard and ensuring the team knows the standard is essential for success. Systems are used to help teams consistently meet standards. If a system does not exist then it is the leader's job to establish one with input from the team. One phrase stood out as particularly relevant to military justice: "when you substitute speed for diligence and attention to detail, you pay in the long run." Systems can speed diligence and keep folks on track to meet the standard. The final question of who's in charge means that leaders must establish they are in charge by ensuring the team understands individual importance and then ensuring each member is fulfilling the responsibilities of a position.

There are **two** reasons (but also a solution) for stress: the leader knows something the people don't and the people know something the leader doesn't know. Sources of tension often involve the constant pace of organizational change and the need for individuals to find work-life balance. The offered solution to stressors is to categorize how you will divide your time each day to personal relationships and work requirements. One suggestion offered in the book is to clearly define the organizational tasks others are accomplishing separately from the tasks which only you can accomplish. This can bring order to chaos and ensure the work is timely accomplished by the appropriate person.

Finally, trust is the **one** critical leadership component. General Boles notes that people look at their leaders and ask, "Is this leader worthy of my trust and confidence?"[20] Technical or functional brilliance does not equate to effective leadership or building trust. Leaders don't get to decide who trusts or distrusts them. Cultivating trust comes from being honest with people, providing them the required tools to perform a task, and genuinely caring about their professional and personal well-being. As a leader, some believe it is better to be trusted than loved.[21] Still, there are great leaders that are honest, trusted, and even likeable. That seems to be a worthy

[20] *Id.* at 27.

[21] *See id.* at 177, (quoting George MacDonald "To be trusted is a greater compliment than being loved.").

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goal in addition to getting the work done. Going beyond leadership lessons from a military career, other leadership perspectives emphasize incentivizing a team toward sustained optimal performance.

THE NEED AND LIMITS OF FINANCIAL INCENTIVES

An entire book dedicated to workplace incentives became a national bestseller.[22] The book begins with the data-driven yet counterintuitive idea that "money is not as powerful a reward as many people think."[23] The discussion then explains how great leadership can incentivize performance. The authors identify the following four leadership basics: goalsetting, communication, trust, and accountability.[24] Leaders can apply an "accelerator" to these basics to enhance a member's engagement and performance. For example, recognition is an accelerator where a leader acknowledges talents and contributions in a *purposeful* manner.[25] This requires some level of assessment to identify what type of recognition is most valuable to each team member.[26] There are informal and more subtle ways to recognize contributions to the team. The book lists 125 recognition ideas, ranging from lunch to providing increased responsibilities such as providing input on a new hiring action.[27] Many of the ideas are consistent with Air Force formal recognition program opportunities and also what office, branch, and section leadership can do to recognize excellent work that is accomplished. Clearly, there is untapped potential in every workplace to increase performance through meaningful recognition.

Illuminating lessons from this book align with other studies concluding that recognition and other non-financial factors can lead to peak workforce performance. Financial incentive will always play a foundational but limited role. From times of old, the term "soldier", which is generically used when referencing military personnel, derived from the term for a gold coin, *solidus*.[28] Even today, military continuation and retirement pay are often cited as key factors enabling recruiting and retention goals.[29] Although military service has historically been intertwined with financial incentives due to inherent risk and challenges, it is also one of the most fertile organizations for non-financial performance drivers. Understanding deeper human instincts can unlock more potential than financial incentives.

Military leaders can create value in the office by enhancing the lives of team members. Happy people have an amazing ability to accomplish more work more proficiently than a larger unhappy team. A fascinating study concluded that once annual compensation progresses above $75,000, people place greater value on emotional quality of everyday experience over increased income.[30] Emotional well-being includes factors like "spending time with people they like, avoiding pain and disease, and enjoying leisure."[31] Going further, emerging research suggests that financial incentives decoupled from satisfying deep human needs for meaningfulness and trust can actually decrease performance.[32]

Both physical monetary compensation and intangible philosophical ideas shape individual motivation.[33] Understanding what motivates a person enables leaders to feed that human need in an effort to enable a team toward optimal performance. Two common motivators in organizations are trust and feeling a connection to others.[34] Based on these findings it is worth every office

[22] Adrian Gostick & Chester Elton, The Carrot Principle (2009).

[23] *Id.* at 9.

[24] *Id.* at 21.

[25] *Id.* at 7 & 24.

[26] *Id.* at 108.

[27] *Id.* at 172-91.

[28] Dr. Charles Earle Funk, Thereby Hangs a Tale 264 (1950).

[29] Kristy N. Kamarck, Cong. Res. Service, Military Retirement: Background and Recent Developments (12 September 2016), https://www.fas.org/sgp/crs/misc/RL34751.pdf.

[30] Daniel Kahneman & Angus Deaton, *High income improves evaluation of life but not emotional well-being*, 107 Proceedings of the National Academy of Sciences (38) 16489-93 (2010), https://www.princeton.edu/~deaton/downloads/deaton_kahneman_high_income_improves_evaluation_August2010.pdf.

[31] *Id.* at 92.

[32] Dan Ariely, The Payoff: Hidden Logic That Shapes Our Motivations (2016).

[33] *Id.* at 3.

[34] *Id.* at 82 & 101.

leader's time to invest in building goodwill through information sharing and honest feedback.

> Two common motivators in organizations are trust and feeling a connection to others

Other growth areas to invest in motivation abound. For example, compare the standing of the military profession to that of civilian lawyers. Society perceives military professionals as contributing over four times more to our nation's well-being than lawyers.[35] Finding meaning in an organization's mission and daily tasks performed "is one of the rarest but most valuable qualities anyone can have in their job."[36] Office leaders have an essential role in helping individuals reach self-actualization through work performed.[37] Other performance incentives come in the form of flexible schedules to accommodate educational goals, family preferences, time for fitness, and satisfying other personal concerns that go a long way to keeping a team happy and at peak performance. Some of these ideas are lofty and must be grounded in practical efforts that ensure consistent production of excellent work product. Legal offices have unique challenges. Here is a perspective on how to specifically enhance legal offices.

MOTIVATE THROUGH EFFICIENT LEGAL OFFICE MANAGEMENT

The authors of a book focused on efficient law office management devote a chapter to the idea that money does not necessarily result in happiness.[38] People need to know what they want and organize their life around core goals. Building productive and efficient office processes is essential to empowering legal professionals to perform well and maintain a fulfilling life. Creating a plan for office efficiency is essential, including simple guides so new team members can quickly learn how an office operates based on the clients served, local needs, and office preference.[39] Here again, the idea of fulfilling personal needs and goals is cited as a driving force in office success.[40] That is the leadership piece of overseeing an office. The authors also highlight the consistent theme that it is impossible to manage people, so leaders must ensure processes to enable a team to produce consistent results.[41] Processes and systems are collectively managed by the team, hopefully by individuals who are actually interested in the work they manage.[42] The end result to this approach is for a legal professional to have an established systematic way of doing business so that people are an asset and not a liability in the workplace.[43]

Creating a team environment with this approach means ensuring each person knows what work they are responsible for accomplishing and requirements that apply to the entire team. The Air Force is ahead when it comes to systems for accomplishing work. For example, records management is an established process. Focus is probably needed on ensuring each person understands the Air Force records system and how it can make their lives easier. With systems in place to do the work, leadership can focus on client relationships, innovating processes, improving time management, and creating efficiencies that can grow a practice. Even business growth perspectives have application to military legal offices.

Consider that historical courts-martial workload and JAG manning fluctuates from year to year, sometimes dramatically. For example, from 1962 to 1999, the number of courts per JAG has fluctuated from a low of 0.4 courts-martial per year per

[35] *Public Esteem for Military Still High*, Pew Res. Center (11 July 2013), http://www.pewforum.org/2013/07/11/public-esteem-for-military-still-high/.

[36] Chip Conley, Peak: How Great Companies Get Their Mojo from Maslow 83 (2007).

[37] *See id.*; *see also* Shawn Murphy, The Optimistic Workplace: Creating an Environment that Energized Everyone (2015) (presenting research based strategies to create a positive workplace environment leading to enhanced performance).

[38] Michael E. Gerber, Robert Armstrong, & Sanford Fisch, The E-Myth Attorney: Why Most legal Practices Don't Work and What to Do About It (2010).

[39] *Id.* at 42-43.

[40] *Id.* at 50-52.

[41] *Id.* at 58.

[42] *Id.* at 65.

[43] *Id.* at 73-74.

JAG to a high of 11.7.[44] In the past five years for which data is available, 2011-2015 experienced more stable yearly courts per JAG, but manning has fluctuated by 8 percent and courts-martial volume has fluctuated 29 percent.[45] Cyclical fluctuations occur in every large organization demonstrating the need for processes and attitudes that are rapidly scalable to handle a changing workload.

Military justice, legal assistance, claims, litigation and general counsel on any number of issues all require great flexibility to shift focus as the mission requires. It's easy to get frustrated when pulled in many directions or when an office has vacancies. Improving process management and reinforcing factors that motivate a team will create focused energy to push through workload swings and not leave people feeling mentally or physically exhausted. If these ideas seem nice but difficult to implement, consider one other approach explained in a short article based on three simple steps.

LEAD THE TEAM YOU INHERIT

Military personnel frequently move to new assignments and face the same transition challenges. Private sector, non-profit, and civilian government work is no different. Few opportunities allow a new organizational leader to handpick a team. The work does not stop because an office has a new boss. Here is an easy way to excel at "Leading the Team You Inherit."[46] This three-step approach can make transitions quicker and a smashing success: assess, reshape, and accelerate. What is so striking about this approach is that it assumes success does not require a different group of people. The emphasis is on the new leader to figure out how to work effectively with the existing team.[47]

Assessing a team can take many forms. The article recommends assessing qualities of each team member in certain categories, including: competence, trustworthiness, energy, people skills, focus, and judgement.[48] There will certainly be other qualities to assess, but these capture the range of core requirements to perform well. The assessment process involves review of performance evaluations, one-on-one meetings, group meetings, and gaining input from people who interact with the team. Certain aspects of this approach should feel natural to service members. For example, the assessment phase is consistent with required initial feedback under the Airman Comprehensive Assessment framework.[49] Key outcomes of the assessment phase include knowing individual strengths, areas for improvement, red flags, and where people may best fit into the current organizational structure. Assessing a team will help a leader identify possibilities to improve individual and team performance, including how the team can be reshaped for optimization.

Reshaping a team is constrained by both organizational requirements and individual capabilities.[50] Still, much can be done regarding a team's composition, unified vision, operating model, and integrating rules and expectations to improve performance.[51] JAG Corps office leaders have the ability to move military attorneys and paralegals into different sections and to assign career broadening work. Underperformers may need focused leadership to creatively incentivize better performance. An overall goal of reshaping is to help the team improve on areas where the assessment indicated deficient categories.

Accelerating is designed to speed the team's development by energizing members through "early wins."[52] This is meant to build momentum and confidence. Obvious applications of this phase to a military legal office could be striving to meet all

[44] *See* Patricia A. Kerns, The First Fifty Years: The USAF Judge Advocate General's Department 210-211 (2004).

[45] Annual Report Submitted to the Committee on Armed Services of the U.S. Congress (2011-2015), available at http://www.armfor.uscourts.gov/newcaaf/ann_reports.htm; Air Force Legal Operations Agency, Military Justice Division, Annual Courts-Martial Statistics from 2011–2015, on file with the author.

[46] Michael D. Watkins, *Leading the Team You Inherit*, Harvard Business Review, June 2016, available at https://hbr.org/2016/06/leading-the-team-you-inherit.

[47] *Id.* at 2.

[48] *Id.* at 3.

[49] *See* US. Dep't of Air Force Instr. 36-2406, Officer and Enlisted Evaluation Systems, ch. 2 (8 November 2016).

[50] Watkins, *supra* note 46.

[51] *Id.* at 5.

[52] Watkins, *supra* note 46.

military justice processing metrics with zero discrepancies in a new case or more efficient processing of legal assistance appointments. Great leadership should produce some form of improvement which can be replicated and shared. Improved management of processes and great leadership of people can improve any workplace environment and work product. No matter the group composition, each JAG Corps team has tremendous potential if guided by effective leadership. Assessing, reshaping, and accelerating team development could be a pathway toward success.

CREATING INDISPENSABLE TEAMS

The JAG Corps functions well beyond office team environments. Great leadership demands that every member of a team understand the importance of each task to the big picture mission. This can also help create meaning and purpose in an office. Viewing ourselves as our clients and customers view us leads to the inevitable conclusion that each JAG Corps member is viewed as a problem solver, not a legal technician. Our mission partners often know the rules, just not how they may apply to a given situation. The heavy lifting comes in the form of developing legally sufficient options within legal parameters while also considering other factors shaping the need for an action and possible alternatives. Diversity of experience and views breed solutions. To explain this point, consider the smartphone.

One technology company envisions providing products that people can't live without.[53] One such product is the smartphone. Society functioned just fine before smartphones but now they are an essential part of life. This technology increases awareness of traffic, weather, news, nearly every aspect of life, but also makes transacting smarter and faster. Legal professionals who approach issues as problem solvers empower organizations to accomplish their mission in compliance with legal parameters while also considering other critical factors such as political oversight, public transparency, fairness to stakeholders, budgetary constraints, and many other valid concerns. Advising organizations from this perspective will make transacting smarter and faster, making JAG Corps members part of a team that an organization can't live without.

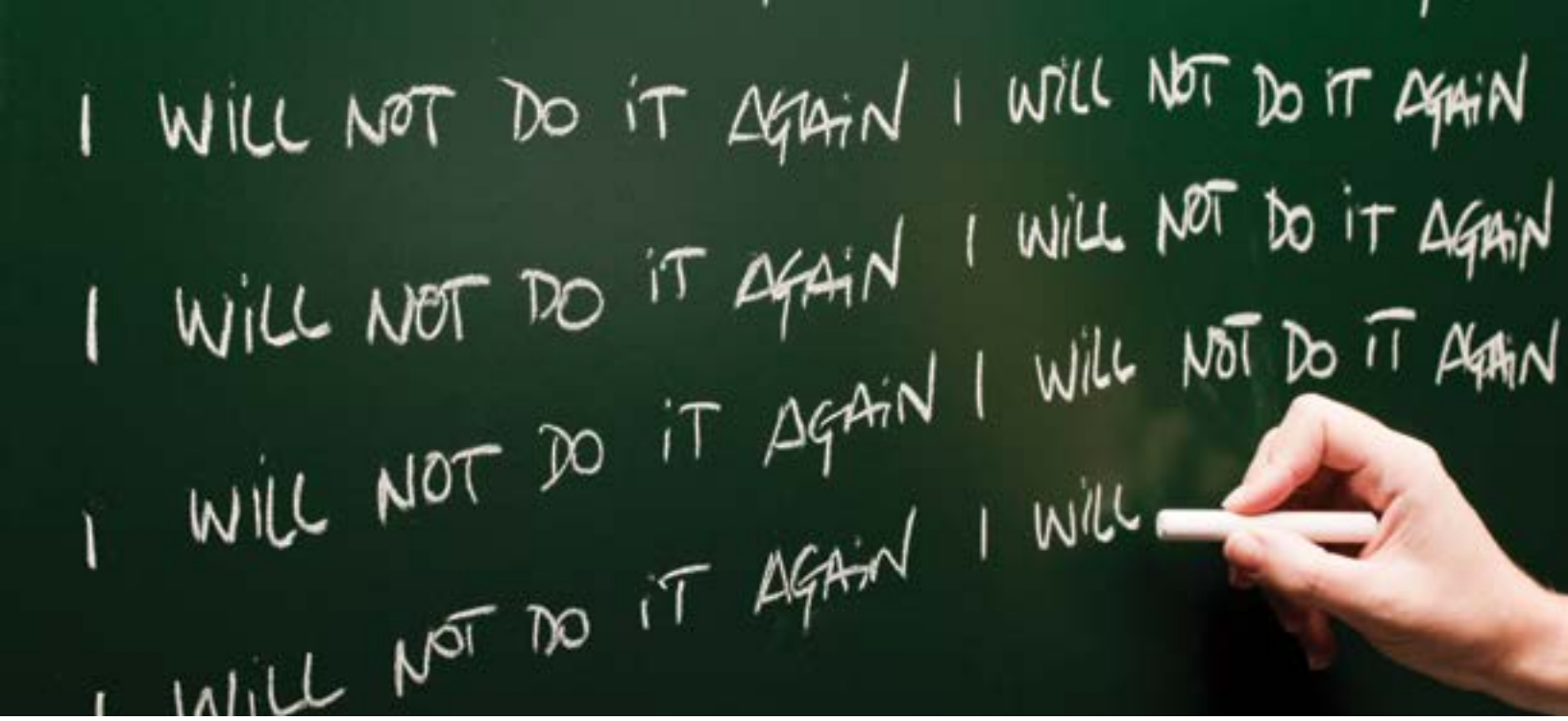
Legal offices who solve problems, instead of merely identifying problems, will be the first group consulted instead of the last group to coordinate on a package. Being the best problem solvers on base is not a required theme for highly successful legal offices, but it will not hurt to give this or some other uniting theme a try. The key is leaders must relentlessly reinforce the positive aspects of a mission, an assignment, individual strengths of team members, and the potential of the team as a whole, all toward unity of action. This will lead to teams that are indispensable in accomplishing the mission.

In closing, continue to appreciate how the military legal profession provides an enriching experience to tackle challenges as old as our nation and as new as next generation technology. Such challenges require management of processes but also effective leadership to harness the value each member brings to a team. Periodic review of historical leadership perspectives and new explanations of what works in leading teams can turn the most challenging aspects of an office into celebrated achievements. Refreshing and refining your leadership approach will reap personal and professional dividends both in your current office and beyond!

Major Dean W. Korsak, USAF

(B.S., Liberty University; J.D., Mississippi College School of Law; LL.M., Columbia Law School) in assigned to the Environmental Law and Litigation Directorate as the Environmental Liaison for Air Education and Training Command.

[53] CNBC Transcript: Apple CEO Tim Cook on CNBC's "Mad Money w/ Jim Cramer" Tonight, CNBC (3 May 2016), http://www.cnbc.com/2016/05/03/cnbc-transcript-apple-ceo-tim-cook-on-cnbcs-mad-money-w-jim-cramer-tonight.html.



A Fresh Look at "Extra Military Instruction" and the Need for a Steady Legal Role

BY: MAJOR JUSTIN P. LONERGAN

EMI requires an honest recognition that some users may **abuse** this tool as a way to **punish** without due process.

Hidden within the Manual for Courts-Martial (MCM) are a certain three words that should make any hardy noncommissioned officer smile with glee. The same three words, however, may have the opposite effect on many lawyers, causing hair on the neck to stand at full attention. The three words that could cause such opposite responses? *Extra military instruction*. Given its relative obscurity, this article will explore the concept of extra military instruction (EMI), its legal foundation, and its practical application. The goal is to demonstrate that legal professionals can take a greater role in harnessing EMI to protect and advance their clients' interests in fair, swift, and effective discipline.

LEGAL FOUNDATION FOR EXTRA MILITARY INSTRUCTION

The term *extra military instruction* may cause initial apprehension for some legal professionals because the MCM seems to casually toss it in with various other tools of enforcing good order and discipline. EMI appears only twice in the MCM, and both references neglect to include a clear and complete definition. First, Part V, *Nonjudicial Punishment Procedure*, defines the relationship of EMI to Nonjudicial Punishment (NJP) by saying that the NJP procedures *do not apply to* administrative tools like EMI, and that "[a]dministrative corrective measures are not punishment, and they may be used for acts or omissions which are not

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offenses under the code and for acts which are offenses under the code."[1] Second, Rule for Courts-Martial 306, *Initial Disposition*, comments that a "commander may take or initiate administrative action, in addition to or instead of other action taken under this rule, subject to regulations of the Secretary concerned." It then goes on to list EMI as an option.[2] Of note, this reference to EMI is in the actual rule, rather than in the non-binding discussion comments.

Well, with no thanks to the MCM for giving us left and right parameters for EMI—a traditional comfort item for many lawyers (including me—we have to turn elsewhere. Service regulations often provide additional useful guidance on military practice and procedure, but the Air Force has no guidance on EMI. AFI 51-201, *Administration of Military Justice*,[3] and 51-202, *Nonjudicial Punishment*,[4] contain no reference to or discussion of EMI.

We can, however, look to the other services for persuasive guidance. The Navy's *Manual of the Judge Advocate General* (*JAGMAN*) defines EMI as "an instruction in a phase of military duty in which an individual is deficient, and is intended for and directed towards correction of that deficiency."[5] The *JAGMAN* continues that EMI "is a bona fide training technique to be used for improving the efficiency of an individual within a command or unit through the correction of some deficiency in that individual's performance of duty."[6] The *JAGMAN* thus reinforces that EMI is really no more than a legal term for the authority traditionally recognized in noncommissioned and commissioned officers, i.e., the authority to "train away" a service member's shortcomings. Similarly, the Army provides guidance on extra instruction, albeit not to the degree or specificity of the Navy's policy. Army guidance requires the extra training or instruction be "directly related to the deficiency" and "oriented to improving the Soldier's performance in their problem area."[7] The Army notes that EMI may be "[o]ne of the most effective administrative corrective measures[.]"[8]

Nothing to worry about, right? Not quite. Truly grasping EMI requires an honest recognition that some users may abuse this tool as a way to punish without due process. To begin curtailing some of that risk, we can once again turn to the *JAGMAN*. The *JAGMAN* provides seven practical limitations to EMI:

(1) EMI normally will not be conducted for more than 2 hours per day.

(2) EMI conducted outside normal working hours should be conducted either immediately before or after the member's workday. However, if the CO or OIC (as defined in section 0106(b)) determines military exigencies do not permit such an arrangement, they may direct EMI at a different reasonable time. Reserve component personnel on inactive duty training, however, may not be required to perform EMI outside normal periods of inactive duty training.

(3) EMI will not be conducted over a period that is longer than necessary to correct the performance deficiency for which it was assigned.

(4) EMI should not be conducted on the member's Sabbath.

(5) EMI will not be used for the purpose of depriving the member of normal liberty to which the member is otherwise entitled. A member who is otherwise entitled thereto may commence normal liberty upon completion of EMI.

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[1] Manual for Courts-Martial, United States pt. V, ¶1g (2016) [hereinafter MCM].

[2] Manual for Courts-Martial, R.C.M. 306(c)(2) (2016).

[3] U.S. Dep't of Air Force, Inst. 51-201, Administration of Military Justice (6 June 2013) (including AFI51-201_AFGM2016-01, 3 August 2016).

[4] U.S. Dep't of Air Force, Inst. 51-202, Nonjudicial Punishment (31 March 2015).

[5] U.S. Dep't of Navy, JAGINST 5800.7F, Manual of the Judge Advocate General (JAGMAN) sec. 0103 (26 June 2012) [hereinafter JAGMAN].

[6] *Id.*

[7] U.S. Dep't of Army, Reg. 600-20, Army Command Policy para. 4-6 (18 March 2008) (RAR 22 October 2014).

[8] *Id.* This same paragraph takes the position that "[s]uch measures assume the nature of training or instruction, not punishment."

(6) Authority to assign EMI that is to be performed during normal working hours is not limited to any particular grade or rate, but is an inherent part of that authority over their subordinates that is vested in officers and noncommissioned/petty officers in connection with duties and responsibilities assigned to them. This authority to assign EMI that is to be performed during normal working hours may be withdrawn by any superior if warranted.

(7) Authority to assign EMI to be performed after normal working hours is vested in the CO or OIC. Such authority may be delegated, as appropriate, to officers and noncommissioned/petty officers, in connection with duties and responsibilities assigned to them, only if authorized by regulations of the Chief of Naval Operations or the Commandant of the Marine Corps, as appropriate.[9]

In conjunction with the *JAGMAN*'s definition section, these limitations serve several important functions. First, they make clear that the end goal of EMI is always to be oriented towards swift training, not punishment. Second, most of the limitations are written with particularity, which should help prevent oppressive or unduly prolonged use of EMI. Indeed, the presumptive time limits and restrictions enable consistent application of EMI by unit-level users while also constraining those same users' discretion over how EMI is conducted. Third, the limits place at least nominal unit-level oversight on EMI, which is in accord with traditional command responsibility for a unit's good order and discipline. Ultimately, there will certainly be isolated cases of abuse of EMI, but these limitations at least provide some legal guidance on EMI, rather than leaving its execution wholly up to the individual user.

EXTRA MILITARY INSTRUCTION IN PRACTICE

Let us see EMI in practice by reference to an actual example we had at Bagram. The backstory to this case is that one of our maintenance squadrons had some repeat issues with the improper completion of maintenance records (forms). This inattention to detail was having a significant impact because jets were flying on bad or incomplete maintenance and were breaking during missions, causing ground aborts or in-flight emergencies. One particular technical sergeant (TSgt X) had repeated difficulty completing his forms, which led his flight chief (MSgt Y) to take the following steps, as documented in MSgt Y's memorandum for record (underline added for emphasis):

> In order to ensure TSgt [redacted] understands the importance of forms documentation in the future, I directed him to hand-write the [redacted] MXG IPI Listing 20 times. I initially gave him a three day suspense, but on the third day he asked for an extension in which I granted a one-week extension. However, he did not meet my suspense, but did complete the assignment and turned it in over fifteen days after it was originally requested after I inquired about it.

Let's look at MSgt Y's order in the context of the *JAGMAN*'s EMI provisions. MSgt Y identified a significant deficiency in TSgt X's performance. MSgt Y decided it needed addressing and, keeping it in-shop (as opposed to going to the commander), tailored additional work to the particular area—forms documentation—where his subordinate was struggling.[10] Interestingly, MSgt Y uses the word "assignment," a word choice that confirms this is training, not punishment. As you can see from MSgt Y's memorandum for record, the EMI was not oppressive—TSgt X

[9] JAGMAN, *supra* note 5.

[10] Essentially, the IPI listing is a standard inspection document for maintenance technicians. IPI stands for "in-process inspection," meaning "[i]nspection performed during the assembly or reassembly of systems, subsystems, or components with applicable technical orders." U.S. Dep't of Air Force, Instr. 21-101, Aircraft and Equipment Maintenance Management 305 (21 May 2015).

The end goal of EMI is always to be oriented towards **swift training**, not punishment.

had ample time to do the task and was not stuck at the squadron until midnight. Overall, this portion seems like a fairly straightforward application of EMI.

From the above snippet we can see that TSgt X still demonstrated an inability to follow simple directions. So, let's take a look at MSgt Y's interesting follow-on actions in assigning additional EMI (underlining added for emphasis):

> I then tasked TSgt [redacted] to demonstrate his ability to follow directions by sweeping the floor of the Alternate Fuel Barn Clamshell from back to front. I set a clear expectation that all floor joints, mooring points, and grounding points were to be cleaned out as well. TSgt [redacted] reported back 4 1/2 hours later that he was ready for inspection. We conducted a joint inspection of the clamshell floor and I was very impressed. He stated that he received the message I was trying to deliver (it is his responsibility to follow directions and to follow them well and to the very best of his ability and that it is unacceptable to disregard direction given by his superiors), but "didn't agree with [my] tactics."

If we apply the same analysis as above, we can see the defensibility of this EMI. First, it is intended to swiftly address a specific deficiency—repeated inability to follow simple instructions. Second, even though the additional EMI exceeds the *JAGMAN*'s 2-hour guidance, a few extra hours at work is not objectively oppressive. For those of us who ever spent some time in after-school detention, you know what I mean. Third, as TSgt X himself recognized, it may be unpleasant but it is nonetheless effective. It conveys the message that TSgt X was apparently not understanding with lesser measures. Under the totality of the circumstances, then, this example of EMI seems well within the reasonable discretion allowed by the *JAGMAN*.

PRACTICAL CONSIDERATIONS FOR EXTRA MILITARY INSTRUCTION

A few other thoughts about TSgt X. I have been a defense counsel, and if I heard my noncommissioned officer client was told to sweep floors, I would be concerned until I gathered some additional facts. However, I also believed as an ADC, and still do, that many times troops need effective training, not punishment. If my client earns a couple hours of EMI instead of NJP for an Article 91 violation, gets the message, and goes on to have no further issues, I am OK with that in the big picture. On the flip side, if I as a defense counsel know the persuasive limits of EMI, I can be that much better of an advocate for

my client in cases where there is abuse of the tool.[11] If MSgt Y, for example, had ordered TSgt X to sweep for 5 straight days, the EMI rules would give me a leg to stand on as defense counsel. With the actual facts of the case, though, and if TSgt X had been my client, this instance of EMI would pass my own "Bart Simpson" gut check (remember Bart writing "I will not do anything bad ever again" on the chalkboard, over and over?).

EMI thus impacts both the command and individual sides of discipline. The goal for EMI should be, as with most legal areas, for judge advocates and paralegals to aid our military leaders and clients in executing swift and fair military justice. The time savings for EMI are fairly obvious—EMI avoids committing time on increasingly severe legal processes. Along that line, as is the case with so much that we do, effective training on EMI will pay dividends later by building credible JA-unit connections and efficiencies. We covered EMI during a recent training at Bagram, and the first sergeants were beaming when they heard there could be additional legal support for creative training. If legal professionals show a willingness to enable NCOs and junior CGOs with legal guidance for tools they are already using (perhaps imperfectly), legal professionals will have much better odds of also conveying the limits and curbing abuse. Similarly, consider how a government-defense team teaching this concept for new staff sergeants at Airman Leadership School or more senior NCO professional military education could enable our front-line leaders while "getting to them early enough" to inform them of the right way to do things. It should also go without saying that, from a professional development perspective, the JAG Corps as a whole will become better military leaders by gaining finer understanding of the missions, views, and challenges of our clients.

EMI happens every day around us—it is an **essential** part of a military leader's toolkit.

Finally, the Air Force could benefit from promulgating guidance similar to the *JAGMAN*. Although I believe that the *JAGMAN* criteria are sufficiently thorough to restrain the primary avenues of potential abuse, AFI 51-201 could easily include practical limits specific to the Air Force. If the Air Force is to promulgate guidance, however, it should be with full coordination between government and defense counsel, as clear and balanced guidance will benefit both sides.

COMING BACK AROUND…

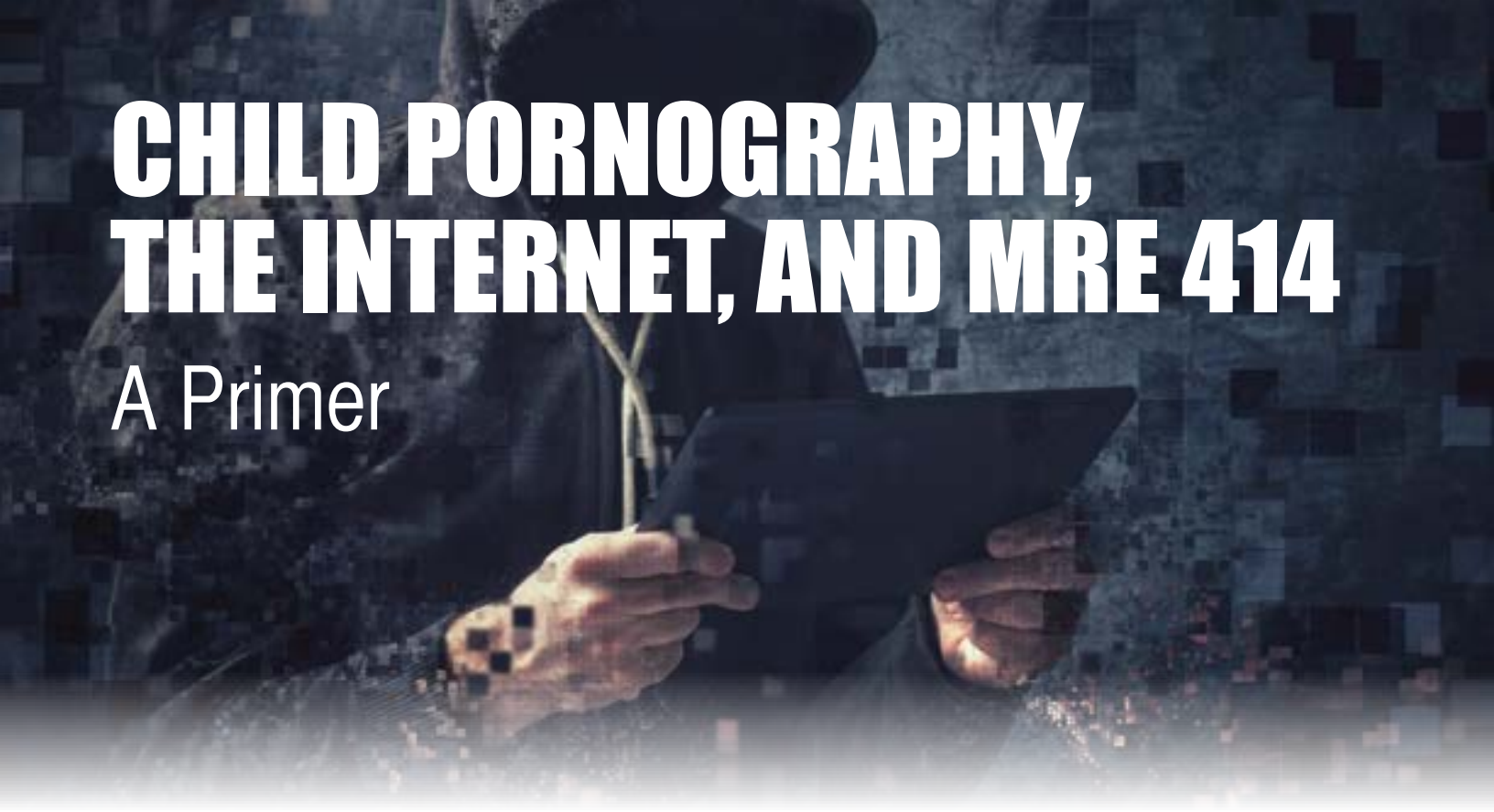
In the end, EMI happens every day around us—it is an essential part of a military leader's toolkit. It is also a perfect reminder of the unique dual nature of the Uniform Code of Military Justice—in that the Code serves justice but equally promotes good order and discipline.[12] Still, Air Force legal practitioners can bring more to the table than we currently do by training and remaining engaged with the stakeholders. By guiding our noncommissioned officers, junior commissioned officers, and commanders in proper usage of EMI, we can continue to bring principle, consistency, and fairness to another key aspect of our military justice system.

Major Justin P. Lonergan, USAF

(B.A., Roger Williams University; J.D., Roger Williams University School of Law) is the Deputy Staff Judge Advocate for the 82d Training Wing, Sheppard Air Force Base, Texas.

[11] *See, e.g.*, United States v. Hoover, 24 M.J. 874, 877–78 (A.C.M.R. 1987) (holding that certain extra military instruction, sleeping in pup tent between certain hours of the night, was tantamount to confinement and awarding pretrial punishment credit).

[12] MCM, *supra* note 1, pmbl ¶ 3.



CHILD PORNOGRAPHY, THE INTERNET, AND MRE 414

A Primer

BY: CAPTAIN ERIC W. WELCH

The emergence of the **dark web** as an online market for contraband illustrates the evolving nature of technology and crime.

In October 2013, federal agents arrested Ross Ulbricht and shut down the website he had created: Silk Road. Silk Road was a sprawling online drug market in which nearly every narcotic imaginable was up for sale. Silk Road operated in a part of the Internet often referred to as the "darknet" or "dark web." The dark web is actually a collection of websites that are publicly visible but hide the Internet Protocol (IP) addresses of the servers that run the sites and the visitors to those sites.[1] Because the IP addresses are hidden it is difficult to track who is actually behind the website. Most websites on the dark web hide their identity using the anonymity software *Tor* or *I2P*, both of which require an individual wanting to access the website to use the same software. The dark web has been used for legitimate purposes, like enabling anonymous whistle-blowing or allowing people in closed societies to access the outside world. However, as Silk Road demonstrated, the criminal applications of the dark web are obvious, and in addition to illegal drugs, the dark web has been used as an online market place for child pornography.

Under Military Rule of Evidence (MRE) 414, evidence that an accused committed an offense involving child pornography may be admitted against the accused in a child molestation case "for its bearing on any matter to

[1]Andy Greenberg, *Hacker Lexicon: What is the Dark Web?*, Wired (Nov. 19, 2014, 7:15 AM), https://www.wired.com/2014/11/hacker-lexicon-whats-dark-web/.

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In *United States v. Yammine,* the United States Court of Appeals for the Armed Forces considered whether **computer filenames** suggestive of child pornography, as opposed to the actual files, were admissible under the version of MRE 414 then in existence.

which it is relevant."[2] The emergence of the dark web as an online market for contraband illustrates the evolving nature of technology and crime. This constantly evolving nature makes it difficult to generalize across every case and address in one paper the discrete issues that might develop when child pornography accessed via the internet is offered under MRE 414. Additionally, the limited number of appellate decisions from military courts on the subject suggests that the use of child pornography as MRE 414 evidence is relatively unusual and new in military practice. For trial and defense counsel, understanding the background of MRE 414, the recent changes to the Rule, and a few overarching issues with respect to it will hopefully provide them with a foundation from which to approach their own cases and advocate for their respective clients.

BACKGROUND

The Supreme Court in *Michelson v. United States* stated:

> The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so over persuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge.[3]

Accordingly, Federal Rule of Evidence (FRE) 404(b) and its MRE counterpart sought to draw a distinction between limited, permissible uses of prior bad acts evidence and evidence offered simply to prove that the defendant is a bad person and must, therefore, have committed the alleged offense. However, with FRE 413 and 414, the latter of which was the precursor to MRE 414, Congress removed this historic wall between the jury and evidence of an accused's propensity to commit an offense.[4] In the process, Congress short-circuited the standard process for adopting new federal evidentiary rules and dispensed with the traditional understanding of character and propensity evidence developed over the history of the common law system.

FRE 413–415 were passed as part of the Violent Crime Control and Law Enforcement Act of 1994. According to the sponsors of the act, the new rules were necessary because of an increase in violence toward women and children and because of a public perception that the legal system was not adequately responding to this growing violence.[5] Senate sponsor

[2] Manuel For Courts-Martial, United States, Mil. R. Evid. 404 (2016) [hereinafter Mil. R. Evid.].

[3] Michelson v. United States, 335 U.S. 469, 475–76 (1948).

[4] Major Francis P. King, *Rules of Evidence 413 and 414: Where Do We Go From Here?*, Army Law., Aug. 2000, at 4.

[5] Margaret C. Livnah, *Branding the Sexual*

Robert Dole stated, "[t]oo often, crucial evidentiary information is thrown out at trial because of technical evidentiary rulings" and "if we are really going to get tough, and if we are really going to try and make certain that justice is provided for the victim as well as the defendant, of course, then I think we ought to look seriously at [Rules 413, 414, and 415]."[6]

In passing FRE 413–415 as part of a piece of legislation, Congress bypassed the usual rule-making procedure for Federal Rules of Evidence.[7] Under the normal procedure for enacting new rules, scholars, lawyers, and judges draft proposed rules which are then submitted for public comment, reviewed by a subcommittee of the United States Judicial Conference, and subjected to Congressional review.[8] The Violent Crime Control Act, though, created a procedure by which the Judicial Conference could review the new rules and submit recommended revisions to Congress. Congress then had a certain amount of time to adopt the recommendations. Failing that, the rules would go into effect as originally drafted.[9]

In its report to Congress on FRE 413–415, the Judicial Conference noted that it had solicited public comments from courts, evidence law professors, women's rights organizations, and 1,000 other individuals and interested organizations.[10] The Conference noted that the overwhelming majority of those who provided comments opposed FRE 413–415. The proposed rules were also reviewed by the Advisory Committee on Evidence Rules and the Advisory Committees on Criminal and Civil Rules. The Committees unanimously opposed FRE 413–415, with the lone exception of a representative from the Department of Justice.[11] The Advisory Committees believed that the concerns expressed by Congress in enacting FRE 413–415 were already sufficiently addressed in FRE 404(b) and 405, and that the proposed rules were not supported by empirical evidence. The Committees were also concerned that the new rules would significantly diminish an accused's protections against undue prejudice. The Judicial Conference suggested that Congress reconsider its policy determinations underlying FRE 413–415. If Congress was not willing to reconsider its policy determination, the Judicial Conference proposed and suggested Congress adopt amendments to FRE 404 and 405 to clarify ambiguities and avoid constitutional infirmities that the Conference believed existed in FRE 413–415, as drafted.[12] Congress refused to do either and FRE 413–415 became effective on 9 July 1995. MRE 413–414, the military counterparts to FRE 413–415, became effective by operation of law on 6 January 1996 and were formally adopted with modifications in 1998.

Despite the potential infirmities noted by the Judicial Conference and raised on appeal in civilian and military cases, the courts have consistently upheld the constitutionality of FRE 413–415 and MRE 413–414.[13] In addition to saving the rules from constitutional attack, the courts have also been called upon to resolve ambiguities in them, particularly with respect to the use of child pornography under MRE 414.

YAMMINE AND THE LEGISLATIVE FIX[14]

In *United States v. Yammine,* the United States Court of Appeals for the Armed Forces (C.A.A.F.) considered whether computer filenames suggestive of child pornography, as opposed to the actual files, were admissible under the version of MRE 414 then in existence. At the time, MRE 414(d) defined an offense of child molestation as

Predator: Constitutional Ramifications of Federal Rules of Evidence 413 through 415, 44 Clev. St. L. Rev. 169, 171–72 (1996).

[6] 113 Cong. Rec. S15072-3 (remarks of Sen. Dole).

[7] Livnah, *supra* note 5, at 174–75.

[8] *Id.*

[9] *Id.*

[10] Judicial Panel on Multidistrict Litigation, Judicial Conference of the United States, 159 F.R.D. 51, 52–54 (J.P.M.L. 1995), [hereinafter Report of the Judicial Conference], *cited in* Rosanna Cavallaro, *Federal Rules of Evidence 413-415 and the Struggle for Rulemaking Preeminence*, 98 J. Crim. L. & Criminology 31, 34 n.13 (2007).

[11] Report of the Judicial Conference, at 53; Cavallaro, *supra* note 10, at 53.

[12] Report of the Judicial Conference, at 53-54; Cavallaro, *supra* note 10, at 54.

[13] *See* United States v. Stokes, 726 F.3d 880 (7th Cir. 2013); United States v. Coutentos, 651 F.3d 809 (8th Cir. 2011); United States v. LeMay, 260 F.3d 1018 (9th Cir. 2001); United States v. Castillo, 140 F.3d 874 (10th Cir. 1998); United States v. Wright, 53 M.J. 476 (C.A.A.F. 2000).

[14] United States v. Yammine, 69 M.J. 70 (C.A.A.F. 2010).

> "an offense punishable under the Uniform Code of Military Justice…that involved—"(1) any sexual act or sexual contact with a child proscribed by the Uniform Code of Military Justice, Federal law, or the law of a State; (2) any sexually explicit conduct with children proscribed by the Uniform Code of Military Justice, Federal law, or the law of a State; [or] (5) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on a child[.]"[15]

At the time, MRE 414 did not specifically include child pornography offenses within the definition of "an offense of child molestation." Accordingly, in *Yammine,* C.A.A.F. held that the lower court erred in admitting certain computer filenames under MRE 414. The filenames did not fall under MRE 414(d)(5) because, while death, bodily injury, or physical pain may occur in the creation of some child pornography, given the breadth of conduct the term "child pornography" covers, the court could not find that all child pornography would involve such conduct. However emotionally traumatic possession of child pornography may be for the children involved, the terms "infliction of death," "bodily injury," and "physical pain" were terms that limited the application of MRE 414(d)(5).[16]

Similarly, C.A.A.F. rejected the lower court's determination that the filenames at issue fell within MRE 414(d)(2). At the time, MRE 414(d)(2) was limited to sexually explicit conduct *with* children.[17] In rejecting the lower court's decision, C.A.A.F. noted that FRE 414 was facially more expansive than MRE 414. Unlike MRE 414, FRE 414 specifically included child pornography as an "offense of child molestation." An offense of child molestation under FRE 414 included any conduct prohibited by 18 U.S.C. chapter 110. Chapter 110 includes 18 U.S.C. §§ 2252 and 2252A, which criminalize child pornography offenses. MRE 414, though, was limited to sexually explicit conduct *with* children. C.A.A.F. held that to be an offense "with" a child or children, the offense must be committed in the physical presence of a child or children.[18]

Although the court found that, under the facts of *Yammine,* the filenames at issue did not constitute an MRE 414 offense of "child molestation," the court held out the possibility that, despite the failure to specifically include possession of child pornography in MRE 414, possession of child pornography might constitute "child molestation" under the then-existing MRE 414(d)(5) given the right facts.[19] C.A.A.F. made clear, however, that whether an offense would qualify under MRE 414 was to be interpreted strictly due to the tension between MRE 414 and concerns that such evidence has been viewed as having the tendency to relieve the government of its burden of proving each element of an offense beyond a reasonable doubt.[20]

Following *Yammine,* MRE 414 was substantially revised to more closely parallel FRE 414. As currently drafted, MRE 414 permits a military judge to admit evidence that the accused committed "any other offense of child molestation" in a court-martial if the accused is charged with an act of child molestation. This evidence may be considered on any matter on which it is relevant. In pertinent part, MRE 414(d) post-*Yammine* defines "child molestation" as an offense punishable under the Uniform Code of Military Justice (UCMJ), or a crime under federal law or under state law that involves any conduct prohibited by 18 U.S.C. chapter 110.[21] Interestingly, the drafters did not specifically include child pornography offenses under Article 134, UCMJ, within the definition of "child molestation." The language from *Yammine* that whether an

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[15] *Id.*

[16] *Id.* at 76.

[17] *Id.* at 75.

[18] *Id.* at 76

[19] In *United States v. Conrady*, the Army Court of Criminal Appeals (ACCA) took up C.A.A.F.'s judicial patch on the legislative failure to specifically include child pornography under MRE 414. United States v. Conrady, 69 M.J. 714 (A. Ct. Crim. App. 2011) (rev'd on other grounds). Under the facts of *Conrady*, the ACCA found that the video at issue was properly admitted under the then-existing version of MRE 414(d)(5) because it depicted a minor in physical pain and because the Accused's act of possessing the file on his computer showed that he derived sexual pleasure or gratification from the contents of the video. *Id.* at 717.

[20] *Yammine.,* at 75.

[21] Mil. R. Evid. 414(d)(2)(B).

offense qualifies as child molestation under MRE 414 is to be interpreted strictly and must specifically fall within the rule's definition to be an offense of child molestation for purposes of MRE 414 would therefore seem to preclude using Article 134 child pornography offenses under MRE 414.

The failure to specifically include Article 134 child pornography offenses within MRE 414 raises two potential issues. First, possession and receipt of child pornography are proscribed under 18 U.S.C. § 2252(a)(2), (a)(4)(B) and 18 U.S.C. § 2252A(a)(2)(A), (a)(5)(B).[22] Unlike child pornography under Article 134, both sections 2252 and 2252A contain interstate commerce language that is not present in Article 134.[23]

In the appropriate case, if the government fails to establish this interstate commerce nexus, defense counsel could argue that the conduct does not fall within MRE 414(d)(2)(B). However, for an accused who received or possessed child pornography from the internet, this argument will be rejected as the internet has been widely recognized as a facility or means of interstate commerce.[24]

The second issue that could arise as a result of the failure to include Article 134 within MRE 414 involves "virtual" child pornography.[25] "Virtual" child pornography does not involve the use of actual children.[26] Article 134 defines child pornography as material that either contains an obscene visual depiction of a minor engaging in sexually explicit conduct or a visual depiction of an actual minor engaging in sexually explicit

The failure to specifically include Article 134 child pornography offenses within MRE 414 raises two **potential issues**.

[22] 18 U.S.C. §§ 2252-2252A(a)(5)(B) (2012).

[23] 18 U.S.C. §§ 2252(a)(2), (4)(B) and 2252A(a)(2)(A), (a)(5)(B) were expansively revised in 2008. Those sections now state, in relevant part:

> Any person who knowingly receives or distributes, any visual depiction *using any means or facility of interstate or foreign commerce*…if the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct and such visual depiction is of such conduct…shall be punished as provided in subsection (b) of this section. 18 U.S.C. § 2252(a)(2) (2012).
>
> Any person who knowingly possesses… other matter which contain any visual depiction that has been…shipped or transported *using any means or facility of interstate or foreign commerce*…shall be punished as provided in subsection (b) of this section. 18 U.S.C. § 2252(a)(4)(B) (2012).
>
> Any person who knowingly receives or distributes any child pornography that has been mailed, or *using any means or facility of interstate or foreign commerce* shipped or transported in or affecting interstate or foreign commerce by any means, including computer…shall be punished as provided in subsection (b). 18 U.S.C. § 2252A(a)(2)(A) (2012).
>
> Any person who knowingly possesses… any other material that contains an image of child pornography that has been mailed or shipped or transported *using any means or facility of interstate or foreign commerce*…including by computer shall be punished as provided in subsection (b). 18 U.S.C. § 2252A(a)(5)(B) (2012).

[24] United States v. Pierce, 70 M.J. 391, 395 (C.A.A.F. 2011) (recognizing that "every court to address the issue agrees with the unremarkable proposition that the Internet is a means of interstate commerce").

[25] *See* United States v. O'Connor, 58 M.J. 450, 454 (C.A.A.F. 2003).

[26] *See* United States v. Bach, 400 F.3d 622, 631–32 (8th Cir. 2005) (distinguishing between virtual pornography in Ashcroft v. Free Speech Coalition and "morphing" or modifying a picture of a boy in a lascivious pose by superimposing the face of a different, known child over his face, finding that such "morphing" was not protected under the First Amendment); Doe v. Boland, 698 F.3d 877 (6th Cir. 2012); United States v. Hotaling, 634 F.3d 725 (2d Cir. 2011).

conduct.[27] Virtual child pornography can, therefore, be prosecuted under the first clause of the Article 134 definition of child pornography, provided the government establishes that the material meets the legal definition of obscenity.[28] Child pornography for purposes of sections 2252 and 2252A is defined in 18 U.S.C. § 2256(8).[29] Unlike Article 134, the definition of child pornography under 18 U.S.C. § 2256(8) does not contain an explicit requirement for the government to establish that the particular visual depiction meets the legal definition of obscenity and, when applied to virtual child pornography, may run afoul of *Ashcroft v. Free Speech Coalition*.[30]

In *Ashcroft*, the Supreme Court considered an overbreadth challenge to a portion of the then-existing definition of "child pornography" in the Child Pornography Prevention Act (CPPA) of 1996.[31] In holding that the definition was overbroad, the Court noted that the definition extended to images that appeared to depict a minor engaging in sexually explicit activity without regard to the *Miller v. California* obscenity requirements. The CPPA definition was overbroad because it lacked "the required link between its prohibitions and the affront to community standards prohibited by the definition of obscenity."[32] That the visual depictions might be indistinguishable from actual child pornography was insufficient to save the CPPA definition. The Court drew a distinction between actual child pornography, which is a record of child sexual abuse, and virtual child pornography, which "records no crime and creates no victims by its production."[33] Where "speech is neither obscene nor the product of sexual abuse, it does not fall outside the protection of the First Amendment."[34]

After *Ashcroft,* the definition of "child pornography" was revised. "Child pornography" is now defined in relevant part as a visual depiction of sexually explicit conduct where "such visual depiction is a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct."[35] Sexually explicit conduct is further defined as:

> (i) graphic sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex, or lascivious simulated sexual intercourse where the genitals, breast, or pubic area of any person is exhibited;
>
> (ii) graphic or lascivious simulated; bestiality; masturbation; or sadistic or masochistic abuse; or
>
> (iii) graphic or simulated lascivious exhibition of the genitals or pubic area of any person;[36]

This definition of "sexually explicit conduct" in 18 U.S.C. § 2256(2)(B) does not include the "affront to community standards" language from *Miller.* In contrast to section 2256(2)(B), 18 U.S.C. § 1466A(a)(2) criminalizes possession or receipt of a visual depiction that is *or appears to be* a minor engaging in bestiality, sadistic or masochistic abuse or sexual intercourse *if* the depiction also lacks serious literary, artistic, political or scientific value.[37] Like child pornography under Article 134, 18 U.S.C. § 1466A is not included in the MRE 414 definition of an offense of child molestation. *Ashcroft*, and the failure

[27] Manual for Courts-Martial, United States pt. IV, ¶ 68b.c.(1) (2016).

[28] *But see* Stanley v. Georgia, 394 U.S. 557, 568 (1969) (holding that the First Amendment protects the mere possession of obscene materials in the privacy of the home); United States v. Bowersox, 72 M.J. 71 (C.A.A.F. 2013).

[29] 18 U.S.C. § 2256(8) (2012).

[30] Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002).

[31] "Child pornography" was defined in relevant part as "any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where—(B) such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct;…or (D) such visual depiction is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct[.]" 18 U.S.C. § 2256(8)(B) & (D) (2002).

[32] *Ashcroft*, 535 U.S. at 249.

[33] *Id.* at 250.

[34] *Id.* at 251 (*citing* New York v. Ferber, 458 U.S. 747, 764–65 (1982)).

[35] 18 U.S.C. § 2256(8)(B) (2012).

[36] 18 U.S.C. § 2256(2)(B) (2012).

[37] *See* United States v. Dean, 670 F. Supp. 2d 1285, 1289 n.3 (M.D. Ala. 2009).

The key to the constitutionality of MRE 413-414 is the **procedural requirements** that must be met before the government may introduce MRE 414 evidence to show propensity.

to include child pornography under Article 134 or section 1466A within the MRE 414 definition of an offense of child molestation, may leave an avenue of attack open to defense where the government is seeking to admit virtual child pornography under MRE 414, as opposed to actual child pornography.[38] For those cases involving actual child pornography, though, the fight between government and defense will not center on whether a particular visual depiction is child pornography within the meaning of MRE 414, but on what exactly the finder of fact should be allowed to know about an accused's prior offense of child molestation.[39]

ISSUE SPOTTING ALONG CURRENT BATTLE LINES

As mentioned previously, the courts have consistently upheld the constitutionality of MRE 413-414. The key to the constitutionality of MRE 413-414 is the procedural requirements that must be met before the government may introduce MRE 414 evidence to show propensity.[40] Three threshold determinations that must be made in order to admit MRE 414 evidence are: (1) the accused is charged with an offense of child molestation; (2) the evidence proffered is evidence of the accused's commission of another offense of child molestation; and (3) the evidence must be relevant under MRE 401 and 402.[41] Additionally, although not specifically mentioned in MRE 414, evidence of another offense of child molestation is also subject to a modified MRE 403 balancing test. MRE 403 prohibits introduction of evidence if the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. Unlike the MRE 404(b) context, MRE 414 evidence may be admitted to prove an accused has a propensity to molest children, and therefore, the fact that a prior act of child molestation tends to prove conduct in conformity therewith cannot be considered *unfair* prejudice for purposes of MRE 414.[42]

Before a court, conducts this modified MRE 403 balancing test, the government must offer evidence from which the court could conclude that the factfinder could find by a preponderance of the evidence that

[38] *But see* United States v. Anderson, 759 F.3d 891, 895–96 (8th Cir. 2014) (distinguishing between "morphed" child pornography where an identifiable child's face is superimposed on an adult's body as opposed to another child's body and finding that, although the former was protected speech, the government had met its burden of showing a compelling interest in prohibiting the speech and that the prohibition had been narrowly tailored).

[39] A collateral issue trial and defense counsel should be aware of is that, if the child pornography offense is a charged offense, the court will not admit the evidence under MRE 414 nor will the court instruct the members that the child pornography may be considered as propensity evidence under MRE 414. United States v. Hills, 75 M.J. 350 (C.A.A.F. 2016). In *Hills,* C.A.A.F. held that charged offenses could not be admitted under MRE 413 to prove propensity to commit other charged offenses, and that instructing members, in this context, on both propensity and the presumption of innocence would undermine both the presumption of innocence and the requirement that the prosecution prove guilty beyond a reasonable doubt. *Id.* at 14.

[40] United States v. Wright, 53 M.J. 482 (C.A.A.F. 2000).

[41] *Id.*; Mil. R. Evid. 414(a).

[42] United States v. Bentley, 561 F.3d 803, 815 (8th Cir. 2009).

the accused committed another act of child molestation. For possession of child pornography accessed via the internet and offered under MRE 414, the government will need to show that the accused had access to the child pornography and knowledge of its presence on the media seized by the government.[43] Relevant issues for defense counsel to explore in attacking the government's case include determining who else had access to the computer, including whether any viruses or malware were present on the computer that would have given someone else the ability to access and control the computer.[44] Also, defense counsel needs to explore whether contraband files were catalogued or moved from the initial or default folder where the child pornography was originally downloaded to another folder on the computer. If so, were other, non-contraband, files similarly moved from the default download folder such that contraband files accidentally downloaded may have been moved in a bulk transfer? Also, what are the file names where the contraband was located? Defense counsel will also need to investigate the accused's browser history and what search terms might be on the computer.[45] The search terms need to be evaluated in the context of other pornography that will likely be on the computer. Are the terms ambiguous like "teen," "hot," "young," etc., such that it could result in accidentally downloading contraband while searching for non-contraband pornography, or are they more indicative of child pornography like "Lolita," "pthc," "pedo," "pedo bear," etc.?

Assuming the government meets the lower burden of proof under MRE 414, the fight over the admissibility of MRE 414 evidence shifts to conducting the modified MRE 403 balancing test. C.A.A.F. established a multi-factor analysis for applying the balancing test, and instructed the trial courts to apply this test in light of the strong legislative judgment that evidence of prior sexual offenses should ordinarily be admissible. A trial court's decision to admit or exclude evidence under MRE 414 will not be reversed absent an abuse of discretion.[46] Some of the factors a court must consider before admitting MRE 414 evidence are: (1) strength of proof of the prior act—conviction versus gossip; (2) probative weight of the evidence; (3) potential for less prejudicial evidence; (4) distraction of the factfinder; (5) time needed for proof of the prior conduct; (6) temporal proximity; (7) frequency of the acts; (8) presence or lack of intervening circumstances; (9) relationship of the parties; and (10) similarity to the event charged.[47] No one MRE 403 factor is dispositive in determining admissibility under MRE 414, but in the context of child pornography accessed via the internet, several factors will be particularly relevant for trial and defense counsel.

First, the temporal proximity of when child pornography files may have been downloaded or accessed relative to when the charged child molestation offense occurred can be helpful for counsel in arguing for or against the admissibility of a particular contraband file. For PC users, the Windows operating system maintains a record of file creation date, file modification date, and date accessed for each file. These dates do not establish that an accused actually viewed the contents of a particular file, and they can be modified with third party software. However, a forensic computer analyst can assist counsel in determining when a file may have first appeared on an accused's computer. Arguably, the more remote in time the file was downloaded relative to the charged child molestation offense, the more prejudicial its admission would be, and the less inclined a court should be to admit the particular file. The date a given file may have been downloaded is certainly a point to be considered. However, temporal proximity alone will not likely to be dispositive of whether a court admits or excludes a particular contraband file, given that courts have admitted MRE 414 and FRE 414 evidence that occurred long before the alleged offense.[48]

[43] Major Brian C. Mason, *Resolving Common Issues in Air Force Child Pornography Prosecutions*, 42 Reporter, no. 1, 2015, at 2.

[44] *Id.* at 7.

[45] *Id.* at 8.

[46] *See* United States v. Wright, 53 M.J. 483 (C.A.A.F. 2000).

[47] *Id.* at 482; United States v. Bailey, 55 M.J. 38, 41 (C.A.A.F. 2001).

[48] United States v. Meacham, 115 F.3d 1488, 1491–95 (10th Cir. 1997) (holding act of child molestation that occurred 30 years prior was properly admitted under Fed. R. Evid. 404(b) & 414).

Technology is in a constant state of change, often leaving the law to play **catch-up**.

Three other factors that are likely to be in issue and interrelated are the strength of proof of the prior act, distraction of the factfinder, and the time needed to prove the prior conduct. MRE 414(b) requires the government to give notice to the accused at least five days prior to entry of pleas of any MRE 414 evidence the government intends to introduce. The scope of the evidence in this notice will likely impact the balancing of these three factors, meaning the more extensive and longer period of time covered by the MRE 414 evidence, the more likely that proving the MRE 414 evidence will turn into a trial within a trial. For an accused who had previously been convicted of possession of child pornography, the strength of proof of the prior act would be strong, while the distraction to the factfinder and time needed to prove the prior conduct would be minimal, particularly if the prior conviction were pursuant to a guilty plea with a stipulation of fact. It would be unusual, though, for a military member to have a prior conviction for possession of child pornography. This means that, in most cases, the government would likely be required to prove up the possession of child pornography. Again, the strength of proof of the prior act will, in most cases, turn on evidence of the accused's knowledge and access. Proving possession of child pornography by the accused will, most likely, require the government to call at least the law enforcement officer or officers who initially discovered the accused's activities, issued any subpoenas for the accused's address, executed any search warrants, and questioned the accused. The government would also need to call a computer forensics expert to discuss the search of the accused's media. Depending on the facts, defense counsel will want to argue—while government counsel should downplay—that the number of witnesses the government will call to prove the MRE 414 evidence and the time needed to prove the MRE 414 evidence, relative to the substantive offense, creates the risk that proving up this evidence will turn into a distracting mini-trial for the factfinder.

Two additional interrelated and important *Wright* factors for both sides to argue are the probative weight of the MRE 414 evidence and the similarity to the event charged. MRE 414 evidence is admissible for its bearing on any matter to which it is relevant. In reality, this means MRE 414 is admissible to show propensity on the part of the accused to commit the alleged offense. Arguably,

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the more similar the MRE 414 evidence is to the alleged offense, the more probative the evidence is of the accused's propensity, and conversely, the more dissimilar the MRE 414 evidence is the more it is unfairly prejudicial to the accused.[49] In a case in which the accused is charged with actual physical contact with a child and the MRE 414 evidence is child pornography, defense counsel can first argue that the offenses are so dissimilar that the admission of the MRE 414 child pornography would be unfairly prejudicial. The difficulty for defense counsel with this argument is that MRE 414 does not distinguish between the types of child molestation offenses for which child pornography offenses may be admitted to show propensity. Therefore, as a matter of policy, Congress may have foreclosed this broader argument for defense. Defense counsel should also argue the specific content of the contraband files the government offers under MRE 414 relative to the alleged offense, particularly when the alleged offense involves actual touching of a child.[50] Defense counsel should compare and contrast the ages of the children in any contraband files offered under MRE 414 with the age or physical development stage of the alleged victim. Defense counsel should also argue the actual acts depicted in the contraband files, if dissimilar to the alleged offense. Although this may not exclude all contraband files from being offered under MRE 414, this argument may be the defense's best hope for minimizing the number of highly damaging files submitted to the fact finder.[51]

Finally, defense counsel in particular should be prepared to argue the availability of or potential for less prejudicial evidence. For an accused who had previously been convicted of possession of child pornography, defense counsel can argue that, if any evidence is admissible, it should be the record of conviction alone. Admitting only the record of conviction and not the substantive contraband files themselves still allows the government to argue propensity without the danger of highly inflammatory evidence being shown to the factfinder. Again, though, it seems unlikely for a military defendant to have a prior conviction for possession of child pornography. In those instances, defense counsel may wish to consider offering a strategic stipulation that offers to stipulate to the general nature of the offense without the details of the actual files themselves if defense counsel sees the writing on the wall and reasonably believes the court would be likely to admit the child pornography under MRE 414.[52]

CONCLUSION

Technology is in a constant state of change, often leaving the law to play catch-up. For child pornography accessed via the internet, MRE 414 post-*Yammine* now makes clear that, generally speaking, this evidence will be admissible to some extent to show an accused's propensity to commit the alleged child molestation offense. For both trial and defense counsel, understanding the development of MRE 414 and current issues surrounding its application will hopefully allow each side to more effectively advocate for their respective clients. And for defense counsel with a client charged with an act of child molestation who had previously possessed child pornography, do not get discouraged by a seemingly uphill fight. Use the current case law and your computer forensics expert to at least minimize the damage to your client's case. R

[49] *See Bailey,* 55 M.J. at 41.

[50] *See* United States v. Majeroni, 784 F.3d 72, 76 (1st Cir. 2015) (finding the district court did not abuse its discretion in admitting evidence of prior conviction for possession of child pornography in current trial for possession of child pornography, stating, "The fact that the prior conduct was similar to the charged conduct enhanced its presumed probativeness").

[51] *See* United States v. Barnason, 852 F. Supp. 2d 367, 376–77 (S.D.N.Y. 2012) (holding, in the context of Fed. R. Evid. 415, the underlying facts of defendant's prior convictions inadmissible due to the limited probative value of the evidence where prior offenses involved molestation of children defendant met through his daughter, while the present offenses involved women the defendant met through work).

[52] *See* United States v. Davis, 624 F.3d 508, 512 (2d Cir. 2010) (holding the district court did not abuse its discretion in admitting a defendant's prior conviction under MRE 414, but then encouraging the parties to stipulate and redact from the record the fact that the defendant's prior victim was his daughter).

Captain Eric W. Welch, USAF

(B.S., Harding University; J.D., Ohio State University) is the area defense counsel at Ellsworth Air Force Base, South Dakota.

Finding the Smoke after the Fire

Recent Developments Regarding Preliminary Hearings

BY: CAPTAIN JAMES J. WOODRUFF, II

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December 26, 2014 brought with it sweeping changes to Article 32, Uniform Code of Military Justice (UCMJ), preliminary hearings.[1] Prior to the change, Article 32 hearings were hotly contested, adversarial proceedings looking for reasonable grounds for the preferred charges. The new incarnation provides a streamlined process solely focused on determining probable cause of preferred offenses. In other words, the Preliminary Hearing Officer (PHO) is looking for smoke evidencing the possible earlier existence of a fire.

Since Article 32's rebirth, two appellate cases assist in understanding the new Article 32 process. While both opinions are from the United States Coast Guard Court of Criminal Appeals (CGCCA), they are helpful in determining the boundaries of the new Article 32.

Both CGCCA opinions examine the strength of a PHO's recommendations. The first decision highlights the amount of evidence necessary for a probable cause finding. The second decision focuses on the binding authority of the PHO's recommendations. Both opinions also offer additional guidance on how to appeal Article 32 issues and how to remedy evidentiary or other issues arising from such hearings.

This article will first look at the evidentiary requirements necessary to support a PHO's probable cause recommendation. Then, it will look at the PHO's recommendation and what binding affect, if any, it has on the Staff Judge Advocate's (SJA) Article 34, UCMJ, recommendation and the actions of a Convening Authority. Finally, it will review the appeal of a matter arising from an Article 32 hearing and the remedy for mistakes made during that hearing.

EVIDENTIARY REQUIREMENTS

In *United States v. Mercier*, the CGCCA examined the issue of what evidence is necessary for a probable cause finding, and what evidence, if any, is required to disregard a PHO's recommendation.[2] The accused was charged with indecent language to a civilian woman in violation of Article 134, UCMJ.[3] Count II's Specification 6 included four alleged indecent statements made by the accused.[4]

At the preliminary hearing the only evidence submitted by trial counsel was a Coast Guard Investigative Service (CGIS) agent's memorandum summarizing an interview with the complaining witness and a transcript of electronic messages between the accused and the complaining witness.[5] The evidence submitted did not include two of the four statements allegedly made by the accused

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[1] National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1702 (2013).

[2] United States v. Mercier, 75 M.J. 643 (C.G. Ct. Crim. App. 2016).

[3] *Id.* at 644.

[4] *Id.* at 645.

[5] *Id.* at 644-45.

and found in Charge II, Specification 6.[6] The PHO found probable cause for all charges and specifications save Charge II, Specification 6.[7] The PHO stated that the two statements alleged in Specification 6 that did have evidentiary support were also covered by Specification 7.[8]

The SJA concurred with the PHO's recommendation with the exception of Charge II, Specification 6.[9] The SJA wrote next to the PHO's Charge II, Specification 6, recommendation that he did not concur with the PHO on the matter.[10] The SJA noted that the specification would be supported by the complaining witness' expected testimony.[11] The Convening Authority referred all charges and specifications to a general court-martial.[12]

At court-martial, the defense moved to dismiss Specification 6 on the grounds that the PHO had found it lacking probable cause.[13] The Military Judge granted the defense's objection and dismissed the specification without prejudice.[14] Trial counsel filed an appeal pursuant to Article 62.[15]

[6] *Id.* at 645.

[7] *Id.*

[8] United States v. Mercier, 75 M.J. 645 (C.G. Ct. Crim. App. 2016).

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] United States v. Mercier, 75 M.J. 645 (C.G. Ct. Crim. App. 2016).

[15] *Id.*

On appeal the CGCCA held that "the Government must present at least some evidence from which the PHO could find probable cause in support of each specification" in order to comply with Rule for Court-Martial (R.C.M.) 405.[16] The court also stated that if defense objects "a specification cannot be referred to general court-marital without substantial compliance with Article 32 and R.C.M. 405."[17] This became an issue as the PHO's report contained no evidence of the two statements alleged by Specification 6 and the SJA still recommended the Convening Authority go forward on the specification in violation of Article 34(a)(2). Had the PHO's report contained evidence of the specification, then it appears that the SJA's recommendation would have been sustained.

After the court determined that the specification was recommended in violation of Article 34(a)(2), it then turned to the question of an appropriate remedy. In this case, the CGCCA determined that a motion to correct a preliminary hearing defect should be treated as a motion for appropriate relief pursuant to R.C.M. 906(b)(3).[18] In such instances, an error is ordinarily remedied through a continuance.[19] In this case, however, the trial counsel did not request such a continuance.[20] Therefore, the court held that the military judge's dismissal of the specification was appropriate.[21] One wonders if this would have been different if the military judge had dismissed the specification with prejudice.

[16] *Id.* at 646.

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] United States v. Mercier, 75 M.J. 646 (C.G. Ct. Crim. App. 2016).

DISREGARDING THE PHO'S RECOMMENDATIONS

In *United States v. Meador*, the CGCCA held that a PHO's recommendations are not binding on the SJA or the convening authority.[22] In that matter, the PHO found Charge II and its specifications lacked probable cause.[23] Despite the PHO's findings, Charge II and its specifications were still referred.[24] This resulted in a defense motion leading to the dismissal of Charge II by the military judge.[25] Following the dismissal, the Government filed an appeal.[26]

The CGCCA reviewed the plain language of Articles 32 and 34 and found nothing binding the SJA or the Convening Authority to the PHO's probable cause determination.[27] A disconnect arises between Article 32 and Article 34. While Article 32 requires a preliminary hearing examining probable cause prior to referral to a general court-martial, Article 34 outlines a separate process that must be completed prior to general court-

[21] *Id.* at 647.

[22] *Id. at* 683-84.

[23] *Id.* at 682.

[24] *Id.*

[25] *Id.*

[26] United States v. Mercier, 75 M.J. 682 (C.G. Ct. Crim. App. 2016).

[27] *Id.* at 683.

martial referral. Under Article 34, the SJA must provide a signed, written statement regarding the matters to be referred and a recommendation to the Convening Authority regarding what action to take with regards to the charges and specifications.

Article 34(c) does, however, provide that the SJA may correct the charges and specifications to conform to the substance of the evidence contained in the PHO's report. This subsection appears to limit the SJA's recommendation to that of the evidence presented at the Article 32 hearing. The CGCCA held that the SJA's recommendation is not bound by the PHO's recommendation.[28] The court held that Article 32's only limitation on the SJA's Article 34 recommendation is the evidence actually admitted at the hearing.

HOW AND WHEN TO APPEAL

Based on the CGCCA cases, it appears the appropriate time to appeal matters arising from a preliminary hearing is following the outcome of a pretrial motion regarding the adequacy of the charges. Article 62, UCMJ, provides for an interlocutory appeal following a military judge's order resulting in termination of the proceedings on one or more charge or specification.

While *Mercier* does make mention of objecting to an unsupported charge or specification prior to referral, the ability to appeal such an unstained objection is likely delayed until the time of a hearing on the matter. In an abundance of caution, an objection should be made in writing prior to the time of referral to preserve the accused's rights. Then, following referral, a motion should be made regarding the charges referred and requesting a hearing on the matter. This would appear to be the appropriate handling of objections to preliminary hearing matters, as waiting until post-trial would result in a waiver of any objection to the hearing, its recommendations, or the post-hearing handling of the matter.

REMEDYING A DEFICIENT ARTICLE 32 PRELIMINARY HEARING

If trial counsel finds that she has additional charges, or an issue with a lack of evidence at the Article 32 hearing, she should request a continuance in order to reopen the Article 32 hearing. If this is not possible, then a new Article 32 hearing should be held on the matters lacking evidentiary support or for the additional charges or specifications.

CONCLUSION

These cases provide both trial and defense counsel a warning regarding preliminary hearings. While there may be a sense among some that the hearing is just a formality not requiring serious preparation, this is patently false. Even though the Convening Authority and SJA are not bound by the PHO's recommendations, sufficient evidence must be presented at the Article 32 hearing. Knowing this, trial counsel should ensure that adequate evidence is in existence and is presented prior to the hearing to defense counsel. Furthermore, trial counsel should ensure such evidence is admitted at the Article 32 hearing. Failure to ensure the charges and specifications are supported by some evidence will result in a rightful dismissal of the charge or specification upon defense counsel's motion. Additionally, defense counsel should pay attention to the trial counsel's evidence and create a strategy that is appropriate for their client's defense. As was seen in *Mercier*, trial counsel's failure to seek a continuance resulted in the dismissal of a specification being upheld on appeal. Regardless, it is incumbent upon both trial and defense counsel to know and apply these rules under the latest iteration of Article 32. R

Captain James J. Woodruff, II, USAF

(B.S., Texas A&M University; J.D., South Texas College of Law) is a Litigation Attorney in the Administrative Litigation Branch (East) at the Labor Law Field Support Center, AFLOA/JACL.

[28] *Id.*

Failure to Communicate

BY: CAPTAIN ELIOT B. PEACE

Learning and fine-tuning effective legal writing techniques remain critical to **effective lawyering**.

"What we've got here is failure to communicate," says the Captain, leader of a Florida chain gang, right before hitting Luke Jackson with a leather sap in the 1967 film *Cool Hand Luke*.[1] In a spark of rebellion, Luke repeats the phrase at the end of the film—moments prior to getting shot.

As lawyers, we can't afford communication failures. We need to communicate effectively. And to do so, we must write well. While poor legal writing will not, on most occasions, result in sap beatings or shootings, it could lead to client confusion or detrimental outcomes in court. Thus, learning and fine-tuning effective legal writing techniques remain critical to effective lawyering.

As judge advocates, we are incredibly busy. Our time is often divided among a variety of commitments: court-martial preparation; "chief of" jobs; demanding SJAs and commanders; meetings and training; the dreaded inspection lurking on the calendar. Peruse your average legal office shared drive and you can immediately spot which task became the lowest priority: the written legal product. While you can't improve your writing overnight, the purpose of this article is to provide guidelines—eight broad principles, followed by eight rules or practical tips—to help you refine the process.

[1] Cool Hand Luke (Jalem Productions, 1968). Strother Martin played the Captain, and Paul Newman played the role of Luke Jackson (earning an Academy Award nomination for Best Actor).

BROAD PRINCIPLES

Read good writing

The first step to developing effective legal writing is to expose yourself to good writing. Pick up opinions by Justices Antonin Scalia, Oliver Wendell Holmes, Jr., Benjamin Cardozo, Robert Jackson, or Elena Kagan—all widely regarded as the finest writers to serve on the Supreme Court. If your goal is to develop into an excellent legal writer, familiarize yourself with masters of the craft.

Don't limit yourself to legal writing; read good fiction and non-fiction as well. Read short and long form pieces by Ernest Hemingway, Shakespeare, Frederick Douglass, C.S. Lewis, J.R.R. Tolkien, William Faulkner, F. Scott Fitzgerald, Virginia Woolf, Jane Austen, George Orwell, and Flannery O'Connor. Read poetry by Robert Frost, Walt Whitman, William Wordsworth, T.S. Eliot, Lord Byron, Percy Bysshe Shelley, William Butler Yeats, John Keats, and Langston Hughes. Broaden your horizons: read political and social commentary by William F. Buckley, Jr., George Will, Jimmy Breslin, Truman Capote, Murray Kempton, and Norman Mailer. Lawyers have ingrained in themselves terrible writing habits. Exposing yourself to first-rate non-legal writing is one step toward breaking those habits. By intentionally seeking exceptional writing, you can learn how writers across a variety of disciplines effectively communicate through the written word. Which brings us to our second broad principle…

Strive for clarity

In the 1989 Academy Award-winning film *Dead Poets Society*, John Keating, played by Robin Williams, asks his class, "Language was developed for one endeavor…and that is…?" Neil Perry responds, "To communicate?"[2] Twentieth-century columnist and grammarian James J. Kilpatrick takes that point further when he states, "The primary purpose of communication is to be understood."[3]

The key to being understood—and thus the key to effective communication—is clarity. Take Justice Scalia's word: he urges lawyers to "[v]alue clarity over all other elements of style."[4] "Literary elegance, erudition, sophistication of expression[,]" he states, "these and all other qualities must be sacrificed if they detract from clarity."[5] While good practice, it is also Air Force policy, which "promotes the use of clear, concise, and well[-]organized language in documents to effectively communicate with intended audiences."[6]

While legal writing often involves dense legal concepts, you should strive to make your writing accessible to the average reader. Again, take the advice of Justice Scalia: "Pretend you're telling your story to some friends in your living room; that's how you should tell it to the court."[7] Whether you are writing for a court or a commander, clarity is paramount to communicating effectively. On the other hand, don't fail to mention critical points or gloss over distinctions. Oversimplification can negatively affect clarity as well.

Avoid verbosity

Verbosity is the enemy of clarity—and lawyers have an almost primal urge for verbosity. Lawyers simply "do not write in plain English," as Richard Wydick says.[8] Whether the reason for that is reading too many medieval English contract law opinions in law school or hiding a lack of confidence in multitudinous words, much legal writing is simply not easy to understand. To counteract the tendency to use words superfluously, lawyers should make a conscious effort to eliminate verbosity. Per Bryan Garner, lexicographer and legal writing cognoscente, "Three good things happen when you combat verbosity: your readers read faster, your own clarity is enhanced, and your writing has greater impact."[9] Eliminate verbosity for the sake of increasing impact.

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[2] Dead Poets Society (Touchstone Pictures, 1989). Robert Sean Leonard played Neil Perry; and Robin Williams earned a Best Actor nomination at the 62d Academy Awards for his portrayal of John Keating. *Dead Poets Society* won the Academy Award for Best Original Screenplay. Keating responds, tongue-in-cheek, "No. To woo women." Perry's larger point remains.

[3] James J. Kilpatrick, The Writer's Art 10 (1984).

[4] Bryan A. Garner & Antonin Scalia, Making Your Case: The Art of Persuading Judges 107 (2008).

[5] *Id.*

[6] U.S. Dep't of Air Force, Handbook 33-337, The Tongue and Quill 2 (27 May 2015) (CC 27 July 2016) [AFH 33-337] (quoting U.S. Dep't of Defense Instr. 5025.13, Plain Language Program (June 9, 2014)).

[7] Garner & Scalia, *supra* note 4, at 113.

[8] Richard C. Wydick, Plain English for Lawyers 3 (5th ed. 2005).

[9] Bryan A. Garner, Legal Writing in Plain English: A Text with Exercises 17 (2001).

As with most legal writing, removing the **unnecessary words** instantly improves clarity and makes the point easily understood.

Avoid unnecessary words

Think about it: if a judge has only a few moments to review your motion or a commander has only a few moments to read your legal memorandum, he should be able to identify your goal immediately. Compare the following two prayers for relief:

> Comes now, the Government, by and through Counsel, pursuant to RCM XYZ and Article ABC, UCMJ, and hereby respectfully requests the Military Judge deny the Defense's Motion to Dismiss.
>
> The United States requests the military judge deny the motion to dismiss.

Which is easier to understand? They say the same thing. As with most legal writing, removing the unnecessary words instantly improves clarity and makes the point easily understood.[10]

Avoid fancy words

"As writers," Kilpatrick writes, "we ought to take advantage of all of the glorious riches of the English tongue, and to use them the best we can, but always taking into account one thing: the audience we are writing for."[11] Courts and commanders, our usual audiences, will typically value clarity over complication or flowery language. Unfortunately, lawyers are inclined to use long, complicated words when less-elaborate ones will do. In Strunk and White's *Elements of Style*, the authors implore writers to "[a]void the elaborate, the pretentious, the coy, the cute."[12] They continue, "There is nothing wrong, really, with any word—all are good, but some are better than others."[13] The better ones are typically the less-elaborate ones. Novelist Stephen King echoes this point: "One of the really bad things you can do to your writing is to dress up the vocabulary, looking for long words because you're maybe a little bit ashamed of your short ones."[14]

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[10] *Id.* at 34.

[11] Kilpatrick, *supra* note 3, at 4.

[12] William Strunk, Jr., & E.B. White, Elements of Style 76 (4th ed. 2000). Elements of Style is widely regarded as the preeminent short form style guide.

[13] *Id.*

[14] Stephen King, On Writing: A Memoir of the Craft 110 (2000).

Legal writers, again, are particularly prone to this writing sin. Legal writing is full of legalisms or legal-ish terms that could be reduced to everyday English: think "herein" instead of "here"; "said" instead of "the" or "that"; "thereafter" instead of "later"; or "therein" instead of "inside."[15] The shorter word can be substituted without changing the meaning. Reject the elaborate and embrace clarity.

Avoid Latin phrases

Legal writers tend to overuse unnecessary Latin phrases. Examine any judicial opinion or brief before an appellate court and you will likely find a plethora of unnecessary Latin phrases. An anecdote: As a brand new law clerk to a state supreme court justice, I thought I would impress my boss by exhibiting my (supposed) mastery of opaque Latin terms. In my first draft opinion,[16] I littered the text with six or seven Latin phrases. The justice, without comment, removed the offending phrases and returned the document, *mutatis mutandis*, to me.[17] In pursuit of clarity, a legal writer should proceed with caution when using Latin phrases. That is, unless the Latin term has a distinct, common legal use, such as *res ipsa loquitur* or *habeas corpus*, the legal writer can largely avoid Latin phrases.[18]

Follow the rules

Rules of grammar and writing conventions are useful. They establish the common foundations, which contribute to clarity. We must differentiate, though, between rules of grammar and writing conventions. You should never break the rules of grammar.[19] Subject-verb agreement, parallel construction, pronoun-antecedent agreement, and proper spelling are all rules. Do not break them: doing so reduces clarity and damages your credibility in the eyes of the reader.[20]

But don't always follow conventions

Conventions, on the other hand, are flexible. Think about the time your high school English teacher told you never to begin a sentence with a conjunction or end a sentence with a preposition. He was teaching you time-honored, basic conventions. But, as you mature as a writer, you learn to bend the conventions when you need to.[21] Kilpatrick tells a story in *The Writer's Art* of the time he visited a Picasso exhibit. Expecting to see Picasso's trademark Cubism, he was stunned to see Picasso's early work accorded with the rules of draftsmanship, anatomy, and portraiture. "It wasn't until [Picasso] mastered the rules," explains Kilpatrick, "he began to break them."[22] The same concept applies to writing. Using wise judgment, you can bend conventions to suit your primary purpose: clarity for the reader. Follow conventions—but not to the detriment of your message.

PRACTICAL TIPS

Now that we have explored a few broad guidelines to frame the legal writing process, we can discuss some practical tips to improve legal writing.

Just the facts, ma'am. And case law.

Use of templates in the JAG Corps is widespread and can be a valuable time saver. Why do your own legal research or figure out a proper format if someone did it already? But this practice is fraught with writer's peril—templates tempt laziness. If you use a template, get your facts straight. Don't forget to update the convening authority, preferring commander, or accused. Check citations yourself. Read every case—or, at minimum, every proposition—for every case cited. And don't forget your pincites. Don't just cite to the case in general; take the time to find the exact quote or proposition and provide the proper pincite.

Headings are the reader's friend

Bryan Garner argues point headings, along with the table of contents, are "the most important part of the argument section in a brief."[23] Major, substantive points at a

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[15] Wydick, *supra* note 8, at 58–60.

[16] The case involved a plea for post-conviction relief for ineffective assistance of counsel, if I recall correctly. If you know anything about post-conviction relief actions, Latin terms are rarely relevant.

[17] *Mutatis mutandis*: "All necessary changes having been made." Black's Law Dictionary 1044 (8th ed. 2004).

[18] Wydick, *supra* note 8, at 58–60; Garner & Scalia, *supra* note 4, at 113–14.

[19] Kilpatrick, *supra* note 3 at 79.

[20] *See generally* Strunk & White, *supra* note 12; William Zinsser, On Writing Well (30th ed. 2006).

[21] *See, e.g.*, Strunk & White, *supra* note 12, at 77 ("Not only is the preposition acceptable at the end, sometimes it is more effective in that spot than anywhere else.").

[22] Kilpatrick, *supra* note 3, at 42.

[23] Bryan A. Garner, *Pointed Advice on Point Headings*, A.B.A. J., September 2015, at 24–25.

Passive voice describes who was acted upon, as opposed to who is doing the acting—and it leads to **ambiguity**.

glance "promote tight, disciplined writing."[24] While the Uniform Rules of Practice Before Air Force Courts Martial, Rule 3.6[E], requires certain headings (Specific Relief, Statement of Facts, Applicable Law, Argument, Conclusion), think of that list as a floor, not a ceiling. Substantive point headings will likely improve readability—particularly at quick glance by a busy judge. Developing point headings will have the added benefit of improving the remainder of the product: "Becoming a propositional writer—one who figures out the main points before beginning to write—is your key to efficiency and quality," states Garner.[25]

Punctuate punctiliously

Know the rules of punctuation and use them effectively. Don't be cute but develop confidence in the nuances of various types of punctuation. For example, understand the difference between an em dash, an en dash, and a hyphen.[26] Misuse of those three types of punctuation is the most frequent punctuation error in legal writing.

Relearn the Oxford comma.[27] A set of three items joined by a conjunction should include a comma before the final item. For example, "We were joined by the rappers, Kanye and Condoleezza Rice" has a different meaning than "We were joined by the rappers, Kanye, and Condoleezza Rice." Secretary Rice, being a diplomat and not a rap artist, appreciates the proper use of the Oxford comma here. Failing to use the Oxford comma can alter the meaning—and therefore clarity—of your writing.

Re-learn The Rules of Capitalization (or re-learn the rules of capitalization)

Avoid overcapitalization. Appropriate capitalization allows for far fewer capital letters than appear in the average legal document. *The Tongue & Quill* contains specific examples of appropriate capitalization, which comport with other style guides.[28] In furtherance of the maxim "trust but verify," note the samples contained in the appendices to the Uniform Rules of Practice Before Air Force Courts-Martial do not comply with capitalization rules found in *the Tongue & Quill* or other style guides.

Passive voice is eliminated in the best legal writing (or the best writers eliminate passive voice)

Lawyers tend to write in the passive voice. Don't. Passive voice describes who was acted upon, as opposed to who is doing the acting—and it leads to ambiguity.[29] Don't say, "The victim was assaulted" when you could say,

[24] *Id.* Garner urges practitioners to model their point headings after those found in briefs written by the Office of the Solicitor General; *see also* Wydick, supra note 8, at 14.

[25] Garner, *supra* note 23.

[26] An em dash—similar to parentheses—is used to set apart a thought. An en dash is used to identify a range of numbers, e.g., pages 80–95. A hyphen is used to connect compound words, among other uses.

[27] Strunk & White, *supra* note 12, at 2; Wydick, *supra* note 8, at 88; Garner, *supra* note 9, at 148.

[28] AFH 33-337, *supra* note 6, at 341–54.

[29] Wydick, *supra* note 8, at 27.

"The accused assaulted the victim." In the first phrase, it isn't clear to the reader who is doing the assaulting; in the second, it's clear the accused committed the assault.

Never spot stop editing

Always "revise and rewrite" your legal writing.[30] Justice Scalia implores the writer to continue revising and editing "until the copy is wrested from the author's grasp…."[31] After writing a draft, set it aside and come back to review it later. You will often find corrections to make, particularly with wording or phrasing. Print your draft in hard copy and edit with a red pen; you will uncover mistakes in hard copy you missed on the computer screen. Provide a copy to a friend or spouse (keeping in mind your ethical responsibilities), or perhaps a paralegal for review. What sounds great to you may fall flat or be confusing to another reader. When you are comfortable with the written product, give it a short review, much like a judge would do, to see if any final clarifications are necessary.[32]

Practice, practice, practice

The idea of practicing writing may sound odd, but mastering any craft requires practice. A common theme among Justice Scalia with a pen, Beethoven with a piano, and Tiger Woods with a putter—during their primes—is the amount of time spent honing their skills. As Air Force JAGs, we may find ourselves before a court a few times a year, writing a handful of motions. That's probably not enough to develop excellence, so write at every opportunity (legal and non-legal) and dedicate yourself to improving your writing every time you write.[33]

[30] *Id.* at 72 ("Few writers are so expert that they can produce what they are after on the first try.").

[31] Garner & Scalia, *supra* note 4, at 80.

[32] *Id.*

Effective writers are effective lawyers

Stock your bookcase

Finally, every legal writer should have available, at a minimum, an English dictionary, *Black's Law Dictionary*, the Bluebook, and a style guide. Beyond those basic tools of the trade, the following books on legal and non-legal writing are excellent guidebooks for improving your writing:

Bryan A. Garner & Antonin Scalia, *Making Your Case: The Art of Persuading Judges* (2008)

Bryan A. Garner, *Elements of Legal Style* (2d ed. 2002)

Bryan A. Garner, *Legal Writing in Plain English: A Text with Exercises* (2001)

Bryan A. Garner, *The Winning Brief* (1996)

Tom Goldstein & Jethro K. Lieberman, *The Lawyer's Guide to Writing Well* (2d ed. 2002)

William Strunk, Jr., & E.B. White, *Elements of Style* 76 (4th ed. 2000)

Richard C. Wydick, *Plain English for Lawyers* (5th ed. 2005)

William K. Zinsser, *On Writing Well* (30th ed. 2006)

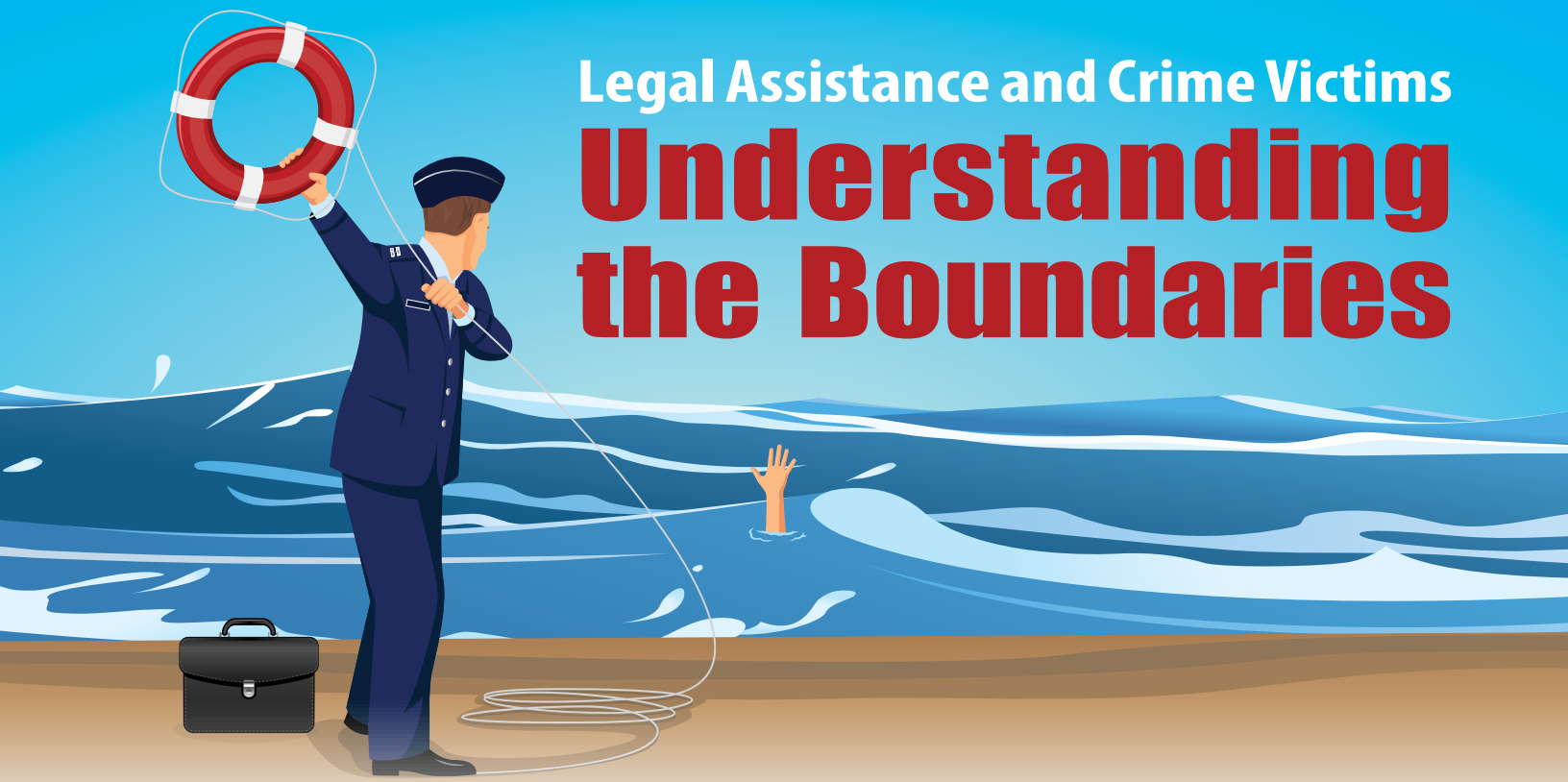
[33] Some legal writing guides, such as *Plain English for Lawyers* and *Legal Writing in Plain English*, go so far as to provide legal writing exercises.

CLOSING

Effective writers are effective lawyers—and effective officers. Know your goal and your audience. If your goal is to persuade a judge to adopt your position or convince a busy commander to accept your legal advice, make it easier for him. Improve your legal writing skills and communicate effectively through writing. Don't end up like Luke Jackson, facing an untimely demise caused by the failure to communicate.

Captain Eliot B. Peace, USAF

(B.A., University of Georgia; J.D., University of South Carolina School of Law), is currently transitioning from active duty to the reserves. He is a litigation associate at Bradley Arant Boult & Cummings in Tampa, Florida.



Legal Assistance and Crime Victims

Understanding the Boundaries

BY: MR. MARK D. STOUP

The purpose of this article is to reframe the way we approach legal assistance when **dealing with victims**.

In the last several years, the Department of Defense and the Air Force focused significant attention and resources on the fight against sex assault in the military. A wide array of laws have been passed in order to assist the military in this endeavor. A casual observer might conclude that the legal systems focus really only benefits victims of sexual assault. But that would be an inaccurate conclusion. Although additional focus has been given to victims of sexually related offenses, many of the legal changes impact all crime victims. Along these lines, a casual observer might also conclude that only military justice practitioners, Special Victims' Counsel (SVC) included, are effected by recent changes in the law. Again, not so! Legal assistance has also been impacted by these changes. In order to truly appreciate the changes in the law impacting victims, practitioners need to view this area of law in a different light. Historically, members of the JAG Corps likely associated the word legal assistance in a traditional sense, as legal advice limited to personal civil legal matters.[1] This approach suggests legal assistance practitioners are not able to provide legal advice on criminal matters[2]. Although there is some truth to that notion, it is not entirely accurate. The purpose of this article is to reframe the way we approach legal assistance when dealing with

[1] U.S. Dep't of Air Force, Air Force Instr. 51-504, Legal Assistance, Notary, and preventive law programs, paras. 1.1 and 1.4 (27 October 2003)(IC 3, 24 May 2012) [hereinafter AFI 51-504]. These two paragraphs provide the purpose of the legal assistance program and the scope of representation. The paragraphs make it clear that legal assistance is for person "civil" legal matters.

[2] *See*, for example, AFI 51-504, para. 1.2.2.

victims[3] and hopefully expanding the assistance the JAG Corps provides to victims. In order to do that, this article will address the legal entities that provide assistance to victims and their authority to do so. The article will then focus on traditional legal assistance provided to victims. This section will address the scope of representation and some substantive legal issues impacting the competency of the advice provided. Finally, the article will address some general, non-legal, considerations practitioners should consider when providing legal assistance to victims.

LEGAL ENTITIES PROVIDING ASSISTANCE TO VICTIMS

Traditionally, JAG Corps members approached legal assistance as an area of law practiced primarily at the wing level by attorneys and paralegals. Areas of traditional legal assistance include wills and estate law, powers of attorney, family law, contracts and related consumer law, and more[4]. If a victim sought legal assistance, advice was typically limited. Of course there were some cases where a legal assistance attorney might assist a crime victim, such as identity theft. If you think of legal assistance for victims from a different perspective, you will see that it is a much larger area of practice than just traditional legal assistance. Don't think about legal assistance for victims as something primarily provided by the wing legal office under the umbrella of a legal assistance program. Instead, think of legal assistance for victims as assistance provided to a victim from a legal entity or legal office. Before reading on, pause for a moment and think about the legal entities or offices that provide assistance to victims and you should think about a much broader area of practice then before.

Yes, traditional legal assistance programs provide assistance to a broad range of clients to include victims. The other areas of practice include, the Special Victims' Counsel Program, the Office of Airmen's Counsel and the Victim Witness Assistance Program (VWAP).[5]

If you think of legal assistance for victims from a different perspective, you will see that it is a much **larger area of practice** than just traditional legal assistance.

[3] For the purposes of this article the word "victim" means a victim of a criminal offense; a person who suffered direct physical, emotional, or financial harm as the result of" an offense. Victim is defined by both U.S. Dep't of Air Force, Air Force Instr. 51-201, Administration of Military Justice, para. 7.3 (6 June 2013) [hereinafter AFI 51-201] and UCMJ art. 6b (2016) [hereinafter Art 6b, UCMJ], http://jsc.defense.gov/MilitaryLaw/CurrentPublicationsandUpdates.aspx.

[4] AFI 51-504, para. 1.4, *et al.*

[5] Three of the four practice areas allow practitioners to provide "Legal Advice" through an established attorney-client relationship. AFI 51-504, para. 1.2 states "Legal assistance establishes an attorney-client relationship and consists of Air Force attorneys providing advice on personal, civil legal matters. . ." U.S. Dep't of Air Force, Guidance Memo. to AFI-51-504, Legal Assistance, Notary, and Preventive Law Programs (15 December 2016) [hereinafter AFGM 51-504, 15 Dec 16], para. 5.2.1 states "SVCs are legally authorized to enter into attorney-client relationships. . ." U.S. Dep't of Def., 1332.18-M, Provision of Legal Counsel in the Disability Evaluation Process, vol. 1, encl. 6, para. 1.a (5 August 2014), [hereinafter DoD 1332.18-M, v1], states "Provide government legal counsel to advise and represent Service members…" The fourth category of Victim assistance offered through VWAP is distinct from that offered by the other three programs. VWAP assistance is established pursuant to U.S. Dep't of Air Force, Air Force Instr. 51-201, Administration of Military Justice, Ch. 7 (6 June 2013) (incorporating AFI51-201_AFGM2016-01 (3 August 2016)) [hereinafter AFI 51-201]. The most important distinction is that no attorney-client relationship can be

These four areas of practice form a broad base of victim assistance provided by legal entities. The reason it is important to think of victim assistance in this way is because these areas often overlap. This area of practice is extremely important and is becoming increasingly dynamic, even multi-disciplinary.[6] Practitioners will provide inferior advice or assistance if they think only about their particular "lane" of victim assistance without considering other legal entities involved with a particular victim. Another reason practitioners need to refocus on this area of the law is because our rules of professional responsibility demand it. Perhaps the two most important rules to think about are Competence[7] and Scope of Representation.[8] Each will be discussed in more detail below. An additional area of concern deals with victims who are represented by another attorney[9]. This is always an area of concern when establishing an attorney client relationship, but there might be a greater likelihood of this occurring when representing victims.

established between a victim and a victim liaison under VWAP and communication between the two is not confidential or privileged (see AFI 51-201, para 7.9).

[6] For example, see AFI 51-201, para 7.1.2, "the provision of victim and witness assistance is to be a coordinated effort among all agencies providing services to individuals."

[7] AFI 51-110, Attachment 2, Rule 1.1, *Competence*.

[8] AFI 51-110, Attachment 2, Rule 1.2, *Scope of representation and allocation of authority between client and lawyer*.

[9] U.S. Dep't of the Air Force, Air Force Instr. 51-110, Professional Responsibility Program, Attachment 2, Rule 4.2, *Communicating with person represented by counsel*, (5 August 2014) [hereinafter AFI 51-110].

AUTHORITY TO PROVIDE ASSISTANCE TO VICTIMS

At this point, it is important to identify the authority for each area of victim assistance and also briefly identify the scope of representation. The most familiar area of assistance, comes from traditional legal assistance which is authorized by 10 U.S.C. § 1044 and AFI 51-504.[10] The scope of traditional legal assistance is provided in AFI 51-504 and generally allows an attorney to provide "advice on personal, civil legal matters to eligible beneficiaries."[11] There are a number of things legal assistance attorneys can assist clients with that fit into the area of personal civil legal matters. When it comes to representing victims of crimes, there are limitations. These will be discussed in more depth later, however, in general, Air Force legal assistance attorneys cannot enter into an attorney-client relationship in matters in which the Air Force has an interest; in criminal issues; and by representing clients in court or an administrative proceeding.[12] Keeping these limitations in mind, legal assistance practitioners are also directed to "[p]rovide legal assistance to victims of crimes, including sexual assault…."[13]

[10] 10 U.S.C. § 1044 (2014).

[11] AFI 51-504, para. 1.2. Legal assistance eligibility is addressed in AFI 51-504, para 1.3.

[12] AFI 51-504, paras. 1.2.1., 1.2.2., and 1.2.9. *See also* 18 U.S.C. § 205 (2012) (prohibiting an officer or employee of the United States from acting as an agent or attorney against the government when the United Sates is a party or has a direct and substantial interest. Exceptions include a person's ability to represent themselves and also if done "in the proper discharge of his official duties."

[13] AFI 51-504, para. 1.4.16.

The most robust and broad area of service provided to victims comes from the newest program, the Special Victims' Counsel (SVC). The authority for SVCs to advise clients comes from 10 U.S.C. § 1044e[14] and AFI 51-504.[15] These two references spell out specifically who is eligible to be represented by an SVC. First, SVCs only represent people who are victims of a sexually-related offense and who have filed either a restricted or unrestricted report. In general, active duty members are eligible. Additionally, Department of Defense civilian employees and those who are otherwise eligible for legal assistance under 10 U.S.C. § 1044 and AFI 51-504, provided the accused is subject to the Uniform Code of Military Justice (UCMJ) are also eligible. Finally, Air National Guard members are typically represented by a National Guard SVC.[16] Just like traditional legal assistance, SVCs can also provide assistance for personal civil legal matters,[17] but the three prohibitions, discussed above, which

[14] 10 U.S.C. § 1044(e) (2014).

[15] U.S. Dep't of Air Force, Guidance Memo. to AFI-51-504, Legal Assistance, Notary, and Preventive Law Programs (22 October 2014), first addressed SVC services by adding the words ""unless acting as a SVC" to paras 1.2.1, 1.2.2, and 1.2.9. These are provisions that prevented legal assistance attorneys from representing clients in matters in which the Air Force has an interest, in criminal law issues, and by representing clients in courts-martial or administrative proceedings. This language is no longer needed in the above paragraphs because AFGM 51-504, 15 Dec 16 added Chapter 5, Special Victims' Counsel (SVC) Program, which provides SVCs the authority to represent clients in cases in which the Air Force has an interest, in criminal law cases and in courts-marital.

[16] AFGM 51-504, para. 5.6, *et al.*

[17] *Id. at* para. 5.9, *et al.*

limit traditional legal assistance do not apply to SVCs. SVCs are able to represent a client in cases where the Air Force has an interest and even when the client's interest is adverse to the Air Force. SVCs can also represent clients in criminal matters and in a court-martial.[18]

The third legal entity providing assistance to victims is the Office of Airmen's Counsel (OAC). These attorneys represent Airmen in the Disability Evaluation System (DES).[19] While most members going through the DES process are ill or injured from the ordinary course of military life, there are occasions where a member's disability is related to a crime. For instance, sex assault victims who have experienced significant trauma could be considered disabled due to that trauma. Members going through the DES process may appear before a Formal Physical Evaluation Board (FPEB) where substantial benefits and entitlements are at stake. Timely and accurate advice is crucial as the result of their FPEB hearing might mean the difference between a medical retirement (with a pension and Tricare for life) and a much smaller severance payment. In either case, the aftermath of the DES will have life-altering financial consequences. We want to ensure that victims of crime have the best possible outcomes, which is why it is important that an SVC or traditional legal assistance attorney be familiar with this area of practice when giving advice. Referring a client to the OAC might be the most important assistance you will provide.

The final area of victim assistance provided by a legal agency is through the Victim Witness Assistance Program (VWAP). VWAP has several articulated objectives. Most relevant to this discussion are to "[m]itigate the physical, psychological, and financial hardships suffered by victims and witnesses of offenses investigated by US Air Force authorities;" and "[e]nsure best efforts are made to accord victims of crime certain enumerated rights."[20] Like traditional legal assistance, VWAP is administered at an installation legal office. Unlike traditional legal assistance, VWAP personnel do not have the ability to enter into an attorney-client relationship and the communications between a victim and VWAP personnel are not confidential.[21] This distinction is important to note since personnel in a legal office typically engage with victims from three different perspectives. The first type of interaction is between the military justice section and the victim, who is considered a complaining witness.

SVCs are able to **represent a client** in cases where the Air Force has an interest and even when the client's interest is adverse to the Air Force.

[18] *See* AFGM 51-504, paras. 5.23 and 5.24 and 10 U.S.C. § 1044e, para (b)(8) (2012).

[19] DoD 1332.18-M, v1. See also, U.S. Dep. of Def., Instr. 1332.18, Disability Evaluation System, encl. 3, para. 3.h(3) (5 August 2014). The DES is a personnel and Surgeon General process used to identify and evaluate Airmen who are unfit for continued service, to remove those who can no longer perform duties, and to compensate Airmen when warranted.

[20] AFI 51-201, paras. 7.2.1 and 7.2.3. The authority for VWAP comes from U.S. Dep. of Def., Dir. 1030.01, Victim and Witness Assistance (13 April 2004) (CC 23 April 2007) and U.S. Dep. of Def., Instr. 1030.2, Victim and Witness Assistance Procedures (4 June 2004).

[21] AFI 51-201, para. 7.9.

The second type of interaction is the relationship between a legal assistance practitioner and the victim as a client. Third category of interaction is between the Victim Liaison and the victim. Legal office personnel must always be cognizant of these varying roles and ensure they stay within the appropriate lanes when they interact with a victim. This is even more important for JAG who could serve at any given time in all three roles; trial counsel, legal assistant attorney, and victim liaison.[22]

TRADITIONAL LEGAL ASSISTANCE: SCOPE OF VICTIM REPRESENTATION[23]

Of the four previously mentioned areas of victim assistance, the area that is likely most misunderstood is the area of traditional legal assistance. The reason for this confusion probably comes from past practice and from seemingly conflicting language in AFI 51-504.[24] Again, the confusion is likely based on language preventing legal assistance attorneys from forming an attorney-client relationship in certain matters where the Air Force has an interest, criminal issues and in representing in courts-martial or administrative proceedings. There have been several recent changes in the law that not only allow legal assistance attorneys to advise crime victims, but some provisions actually mandate it.

The first step in this direction came from 10 U.S.C. § 1565b.[25] With this provision, Congress took the first step in establishing legal assistance for crime victims. The law opened the door to providing legal assistance to victims of sexual assault, but it did not go far enough to establish the SVC Program that is currently in place. In 2014, Congress passed 10 U.S.C. § 1044e, which mandated each service establish an SVC Program. The same year, the Under Secretary of Defense for Personnel and Readiness signed a Directive Type Memorandum (DTM) establishing a Prosecution and Legal Support entity for victims of sexual assault.[26] That memorandum also allows crime victims who are entitled to legal assistance to consult with traditional legal assistance attorneys.[27] The Under Secretary of Defense outlined specific areas where traditional legal assistance attorneys can and should advise all types of crime victims. In general, attorneys can advise on victim rights, the role of VWAP and Victim Advocates, MRE 514 privileges,[28] restricted and unrestricted reporting options,[29] the military justice system, victim protection and transfer, helping agencies, and appealing an administrative separation action.[30] In short, DTM 14-003 provides legal assistance attorneys the authority to advise crime victims and it outlines the scope of representation. Several AFI provisions also make legal assistance to victims a responsibility. First, AFI 51-504 states "Provide legal assistance to victims of crimes, including sexual assault…."[31] Next, AFI 51-201 addresses the issue in several locations. First, in Chapter seven dealing with victim rights, the AFI states "Victims eligible for military legal assistance may also consult a legal

[22] This comment is intended to show that a JAG could serve all three roles but with separate victims. The JAG could not serve in more than one role with an individual victim without having a conflict of interest.

[23] *See* AFI 51-110, Attach. 2, Rule 1.2, discussion. "The objectives and scope of services provided by a lawyer may be limited by agreement with the client or by the law governing the conditions under which the lawyer's services are made available to the client. Formation of attorney-client relationships and representation of clients by Air Force lawyers is permissible only when authorized by competent authority." Legal assistance attorneys derive authority to form an attorney client relationship from AFI 51-504. Additional authority addressing scope of representation can be found in this section of the article.

[24] AFI 51-504, paras. 1.2.1, 1.2.2, and 1.2.9 which appear to conflict to some degree with para 1.4.16.

[25] 10 U.S.C § 1565b (2012).

[26] U.S. Dep of Def., DTM 14-003, DoD Implementation of Special Victim Capability (SVC) Prosecution and Legal Support, (USD (P&R) (12 February 2014) (IC 3, 15 December 2016) [hereinafter DTM 14-003]. The DTM applies to cases involving unrestricted reports of sexual assault and aggravated assault with grievous bodily harm in a domestic relationship or against a child.

[27] DTM 14-003, Attach. 2, para. 4, specifically states that "victims of crimes entitled to military legal assistance are able to consult with legal assistance attorneys, in accordance with sections 1044 and 1565 of Reference (d) and Under Secretary of Defense for Personnel and Readiness Memorandum (Reference (h))." Sections 1044 and 1565 refer to 10 U.S.C. § 1044 and 10 U.S.C. § 1565b. Reference (h) is U.S. Dep't of Def Memo., Legal Assistance for Victims of Crimes, (USD (P&R) 17 October 2011), which states, "Services can provide, and in most cases are already providing, legal assistance to victims of crimes including sexual assault."

[28] Manual for Courts-Martial, United States, Mil.R. Evid. 514(b) (2016) [hereinafter M.R.E.]. http://jsc.defense.gov/MilitaryLaw/CurrentPublicationsandUpdates.aspx

[29] U.S. Dep't of Air Force, Air Force Instr. 90-6001, Sexual Assault Prevention and Response (SAPR) Program, para. 3.1. (21 May 2015) (IC 1, 18 March 2016) [hereinafter AFI 90-6001].

[30] DTM 14-003, Attach. 2, para. 4.

[31] AFI 51-504, para. 1.4.16.

assistance attorney.[32] Later in the AFI in Chapter nine, which deals with post-trial victim impact statements, the AFI provides that eligible victims may consult with a legal assistance attorney or Special Victims' Counsel about the results of the court-martial and the post-trial process.[33] Finally, in Chapter 13, which deals with the Special Victim Investigation and Prosecution Capability (SVIP), the AFI states "ensure victims of crime under this section entitled to military legal assistance are notified of the opportunity to consult with a legal assistance attorney and/or Special Victims' Counsel."[34]

There have been a number of changes in the law impacting victims. It is extremely important for legal assistance practitioners to understand their scope of representation and also to stay current with the various changes in the law. The Air Force Rules for Professional Conduct address both of these concepts; scope and competence. First, scope of representation is addressed in Rule 1.2.[35] and in Rule 5.5.[36] These rules make it clear that Air Force attorneys who practice law in a jurisdiction they are not licensed in do so under the authority of Air Force Instructions. Legal assistance is an obvious area where this applies. In order to maintain the highest standards of professional conduct under these rules, legal assistance attorneys must ensure they adhere to the scope of representation provided for in the directives and instructions listed above. Providing assistance outside of those parameters, might be considered an unauthorized practice of law as defined by Rule 5.5.

Second, legal assistance attorneys must understand the legal landscape as it applies to a client. Competence is defined as representation which "requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for representation."[37] Our rules of professional responsibility go just a little bit further though. Remember when representing a client, an attorney is also an advisor.[38] There is a likelihood

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[32] U.S. Dep't of Air Force, Guidance Memo. 2016-01 to AFI-51-201, Administration of Military Justice, para. 7.11.5.2 (3 August 2016) [hereinafter AFGM 51-201]. The provision states "Victims eligible for military legal assistance may also consult a legal assistance attorney in accordance with 10 U.S.C. § 1565b." The provision then discusses victims of sexual offenses and the right to consult with an SVC. Additionally, in AFI 51-201, para. 7.12.3, it states "Inform the victim of the availability of legal assistance. . ."

[33] AFGM 51-201, para. 9.9.4.

[34] AFGM 51-201, para. 13.40. Not all SVIP victims are eligible for SVC representation. SVIP crimes include adult and child sexual assaults as well as domestic violence and child abuse involving aggravated assault with grievous bodily harm. See AFGM 51-201, para. 13.34.

[35] AFI 51-110, rule 1.2. See the discussion following the rule "The objectives and scope of services provided by a lawyer may be limited by agreement with the client or by the law governing the conditions under which the lawyer's services are made available to the client. Formation of attorney-client relationships and representation of clients by Air Force lawyers is permissible only when authorized by competent authority"

[36] AFI 51-110, Rule 5.5. *Unauthorized Practice of Law*, the discussion states "an Air Force lawyer may perform legal assistance even though the lawyer is not licensed in the state where his or her duty station is located."

[37] AFI 51-110, Rule 1.1.

[38] AFI 51-110, Rule 2.1. *Advisor*. "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice,

a legal assistance attorney will need to consider factors in addition to the law when advising a victim of a crime. Some of those factors might include personal safety, the victim's career or psychological issues.

As stated above, the authority and scope to advise victims under traditional legal assistance come from sources such as DTM 14-003, AFI 51-201, and AFI 51-504. It is important for legal assistance practitioners to know the current state of the law in the areas outlined above as scope of representation. The remainder of this article will focus on the substantive laws and regulations impacting victims that can fit into a legal assistance attorney's scope of representation.

COMPETENCE: SUBSTANTIVE LAW IMPACTING VICTIMS[39]

Probably the most important area of legal advice pertains to victims' rights. These rights are fairly new and can be found in Article 6b, of the Uniform Code of Military Justice (UCMJ).[40] The rights apply to a victim immediately,[41] and have a broad range of impact. The rights address issues such as protection, notice of hearings, ability to attend hearings, the right to be heard, conferring with trial counsel, restitution, proceedings free from unreasonable delay, and treating victims with fairness and respect for a victim's dignity and privacy. These rights are not just aspirational concepts either. Victims can file a Writ of Mandamus to the Court of Criminal Appeals if they believe their Article 6b rights have been violated.[42] The next area practitioners should advise victims on is the role of VWAP. This program is completely addressed in AFI 51-201, Chapter 7[43]. Since the legal office is responsible for VWAP, it should be easy for a legal assistance practitioner to learn how the program is being executed at their installation. It should also be easy to coordinate efforts between the victim liaison and the legal assistance program assuming the client victim consents to this in advance.[44]

Legal assistance practitioners can also address the distinctive role of the victim advocates under both SAPR and Family Advocacy Program (FAP). In short, the SAPR program handles cases involving non-familial adult sexual offenses[45] while FAP handles sexual assaults in the context of domestic relationship as well as other intra-familial abuse and child sexual assaults.[46] When advising clients about privileges between a victim and a victim advocate, it is important to become familiar with MRE 514. It is also important to note that the victim privilege under MRE 514 is limited to cases involving a sexual or violent offense.[47] Victims of sexual assaults should also be provided advice on the differences between restricted and unrestricted reporting. The best advice can only come from a complete understanding of the agencies providing services; so it would be wise to ensure advice is consistent with the information provided by the Sexual Assault Response Coordinator and FAP manager.

Practitioners can also provide advice regarding services available from other agencies. The easiest way to learn about this is to talk with the installation VWAP coordinator. Each VWAP coordinator is required to maintain a Reference List and Victim Information Packet which should include contact information for local

a lawyer may refer not only to law, but to other considerations such as moral, economic, social, and political factors that may be relevant to the client's situation." Although the rule only lists four things to consider, it is important to note these are just examples, because the rule uses the words "*such as*" when referring to other considerations.

[39] For a more detailed explanation of victims' rights and changes in the law impacting victims *see* Mr. Mark Stoup, *Victims' Rights: What's New in the Law for Victims,* 43 The Reporter, no. 2, 2016, at 32. Although some of the language in the provisions has changed since publication, the article still provides a good overview of the current state of the law as it pertains to victims.

[40] Art 6b, UCMJ. These rights are also listed in AFI 51-201, para. 7.11 and expanded upon in AFGM 51-201, para. 11. Following the list of Victim rights, AFI 51-201, para. 7.12, also lists a number of responsibilities an installation commander has toward victims. These are called Local Responsible Official Responsibilities. The trial counsel or victim liaison assigned will typically ensure these responsibilities are accorded to the victim.

[41] AFI 51-201, para. 7.3, "A person may be identified as a 'victim' at the earliest opportunity after the detection of a crime."

[42] Art 6b(e), UCMJ.

[43] AFGM 51-201 contains a number of updates to Chapter 7.

[44] AFI 51-110, Attach. 2, Rule 1.6, *Confidentiality of information*, requires that the client give informed consent prior to revealing information relating to the representation of the client. This includes talking with VWAP personnel.

[45] AFI 90-6001, para. 3.2.1.1.

[46] U.S. Dep't of Air Force, Air Force Instr. 40-301, Family Advocacy Program, para. 2.2.9.3.1 (16 November 2015).

[47] MRE 514, (b)(1).

agencies.[48] Legal assistance attorneys shouldn't need to reinvent the wheel in this area. Much of the information should already be readily available. Planning ahead and having the information in advance of advising clients will prove to be a best practice.

When advising a victim, legal assistance attorneys should always be aware of personal safety issues. It is also important to understand the various protective tools available. Tools can include changes in duty location, assignment actions, civilian restraining orders, no contact orders, and Military Protective Orders. All the tools in this area help mitigate concerns a victim has because of the crime. Concerns could include something as obvious as the perpetrator working in the same location as the victim or might be due to a lack of support a victim has because they are not assigned near a family support network. The most common method to help a victim feel safe at work is to simply separate the perpetrator and the victim and issue a no contact order. Some cases demand a more aggressive command response. Remember commanders have the authority to control members of their command, so depending on the circumstances, commanders might be able to afford greater protection through a variety of assignment actions. There are generally three assignment actions that apply to crime victims.[49] Expedited Transfers apply in cases of an unrestricted sexual assault against an Airman. Humanitarian Reassignments and Deferments apply in cases of a sexual assault against an Airman's spouse or child. Finally, Threatened Person Assignments apply in life threatening situations, meaning threats of bodily harm or death made against an Airman or dependent.

> Collaboration and communication go a long way to help mitigate adverse impacts crimes have on victims.

The next area of victim protection deals with no contact orders. Commanders have the authority to issue a no contact order to a military perpetrator in order to protect a victim[50]. A violation of the order can be punishable under the UCMJ. A Military Protective Order (MPO),[51] might be a better tool for a crime victim. An MPO is enforceable in the same way as a no contact order, and if done properly, the order can be placed in the National Crime Information Center (NCIC) allowing civilian law enforcement to be notified of the presence of the order.[52] In application, if a victim is off the installation and notifies local law enforcement of a violation of the MPO, law enforcement can assist to protect the victim. All law enforcement have NCIC access and can access MPO information. Civilian law enforcement typically will not learn of or otherwise assist to enforce a standard no contact order. Some occasions call for protection from the civilian court system. In those cases, legal assistance practitioners should become familiar with the rules in their respective state jurisdictions relating to civilian restraining orders.

An additional area legal assistance advice can help is during sentencing and clemency in the court-martial process. Recent changes to the Rules for Courts-Marital (RCM) provide victims a significant voice in this area by way of a victim impact statement. First, victims now have a right to submit an impact statement during the presentencing phase of a court-martial.[53] Victims of crimes of which the accused is convicted can submit a sworn or unsworn statement for the court to consider when determining an appropriate sentence. Victim impact is considered any financial, social, psychological, or medical impact on the victim suffered as a

[48] AFI 51-201, Figs. 7.2 and 7.3.

[49] U.S. Dep't of Air Force, Guidance Memo. 2015-03 to AFI-36-2110, Assignments (16 July 2015). Expedited transfers are addressed in attachment 26, humanitarian reassignments and deferments are addressed in attachment 24, and threatened person assignments are addressed in attachment 12.

[50] For the lawfulness of an order, see Manual for Courts-Martial, United States, pt. IV, ¶ 14c(2)(a) (2016)

[51] U.S. Dep't of Def., DD Form 2873, Military Protective Order (July 2004).

[52] 10 U.S.C § 1567a (2012). *See also* U.S. Dep't of Def., Memo., Placing Military Protective Orders in the National Crime Information Center Protective Order File (USD (P&R) (26 June 2014).

[53] Manual for Courts-Martial, United States, R.C.M. 1001A (2016) [hereinafter RCM].

result of the offense.[54] Additionally, during the clemency phase, a victim can submit an impact statement to the Convening Authority before taking action on the case.[55] The procedures are very similar to those already provided to an accused under RCM 1105.

The last area of advice addressed by DTM 14-003 deals with victims who file an unrestricted report of sexual assault and are later being administratively separated from the Air Force. It is important for legal assistance practitioners to know that these airmen have the right to request their discharge be reviewed by the General Court-Martial Convening Authority if they made an unrestricted report of a sexual assault within the last 12 months form the date of discharge notification.[56]

OTHER CONSIDERATIONS AND FINAL THOUGHTS

The last thing legal assistance practitioners must consider is how they will prepare for a victim client. Legal assistance providers won't always know in advance of an appointment that their client is a victim. Sometimes it will be apparent because the client will make their status clear at the outset of an appointment. For instance, a client who makes an appointment for stolen credit cards will be easy to identify as a victim. There will be other cases where a client might not say anything about being a victim. Examples might include a divorce client who has been the victim of domestic assault or a client who wants to get out of a lease early but doesn't say that the reason is due to a home break-in. When advising legal assistance clients, it can be helpful to forecast problems and be proactive. Ask questions to ensure you are not simply triaging a symptom. Instead, ensure your advice goes to the root of their legal problem. This can lead to more thorough and helpful advice. One important point of this article is to encourage all legal assistance attorneys to prepare in advance of appointments involving victims. The only way you can do that with competence is to understand that some of your clients WILL be victims. You must also know what your scope of representation is and clearly convey that scope to your client. Establishing these boundaries from the outset will help clients to focus and will also keep you within proper ethical bounds. In addition, when advising victims; don't just explain the legal landscape surrounding their situation. Remember, you are also an advisor.[57] You might need to consider more than just the law when advising a victim. You will likely need to consider other things such as professional, psychological and safety issues, just to name a few. Know what the victim's rights are in general as well as the ones that apply to their particular situation. Finally, just like many areas of legal assistance, you might not be able to help with issues the victim has. Referrals will be very important. Plan ahead. Have a list of referrals to provide a victim during the appointment. At a minimum, be prepared to provide them with contact information. In some cases you might need to place a phone call for them or even provide a warm handoff to another agency.[58] It will not only provide additional satisfaction to your client, it will likely also provide them with an extra sense of security. This simply act will be well worth the effort. Collaboration and communication go a long way to help mitigate adverse impacts crimes have on victims. R

[54] RCM 1001A(b)(2).

[55] RCM 1105A.

[56] U.S. Dep't of Air Force, Air Force Instr. 36-3208, Administrative Separation of Airmen, para. 1.31.2. (9 July 2004) (IC 7, 2 July 2013).

[57] AFI 51-110, Attach. 2, Rule 2.1.

[58] Any contact must be in compliance with the rule on confidentiality of information in AFI 51-110, Attach. 2, Rule 1.6.

Mr. Mark D. Stoup, USAF

(B.A., University of Wyoming; J.D., University of Wyoming, College of Law) is Attorney/Advisor for Special Crimes and Assistance to Victims at The Judge Advocate General's School, Maxwell Air Force Base, Alabama.

The Bear in our Backyard

BY: MAJOR SIMONE V. DAVIS

The Treaty on Open Skies is one of the world's most overlooked, yet most powerful, international agreements.

On 18 February 2015, a Russian Tupolov 154M-LK1 (Tu-145) military aircraft departed McConnell Air Force Base, Kansas, flew southwest to El Paso, Texas before turning north and overflying Albuquerque, New Mexico. Two days later, the aircraft again departed McConnell, this time flying south over Oklahoma City, Oklahoma towards Austin, Texas before turning northeast towards Shreveport, Louisiana and returning to McConnell. Equipped with a wet film camera, the aircraft likely took pictures of the Pantex Plant near Amarillo, Texas—home of the United States' only nuclear weapons assembly and disassembly facility[1]—as well as images of military installations along its route, including the White Sands Missile Range.[2]

Unlike most spy novels, these flights weren't conducted surreptitiously under the cover of darkness. Rather, members of Vladimir Putin's Russian Air Force had the blessing of the U.S. Government under terms of one of the world's most overlooked, yet most powerful, international agreements—the Treaty on Open Skies.

[1] *See* Nat'l Nuclear Sec. Admin., *Pantex Plant*, U.S. Dep't of Energy, http://nnsa.energy.gov/aboutus/ourlocations/pantex-plant (last visited 4 March 2017).

[2] Joint Intelligence Operations Ctr.–N., NORAD and U.S. N. Command, Russia Conducts First 2015 Open Skies Treaty Mission over the US: 16-21 February (11 March 2015) (on file with the author).

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The Open Skies Treaty is one of the most robust international attempts to **preempt** state-on-state conflict.

THE BIRTH OF AUTHORIZED SPYING

Not to be confused with bilateral open skies agreements, which define civil aviation relationships between two nations, the Treaty on Open Skies (Open Skies Treaty or OST) is an arms control measure borne out of the heightened political and military tensions between the United States and the Soviet Union following World War II. The original brainchild of President Dwight D. Eisenhower, the OST was developed to promote "openness and transparency of military forces and activities."[3] At the height of the Cold War, during the Geneva Summit of 1955, President Eisenhower approached Soviet Premier Nikolai Bulganin with an idea of mutual aerial observation. Eisenhower envisioned an agreement whereby the United States and the Soviet Union could conduct aerial reconnaissance of each other's military facilities in order to assuage any fear of military buildup and reduce the likelihood of surprise attacks.

Unsurprisingly, the Soviets rejected Eisenhower's proposal out of concern that the United States would engage in unauthorized spying. It was not until President George H.W. Bush lobbied for its re-proposal in 1989 that this confidence-building measure gained traction. Signed on 24 March 1992 and entered into force ten years later, the Open Skies Treaty is one of the most robust international attempts to preempt state-on-state conflict. Thirty-four nations have ratified the OST, including all NATO members (except Albania) as well as Belarus, Bosnia, Finland, Georgia, Russia, Sweden, and Ukraine.[4] Under the treaty, each member state has the right to overfly another member state in an unarmed military surveillance plane.[5] All territory is subject to observation and flights may only be refused or restricted for safety concerns or non-compliance with treaty provisions.[6]

Treaty Implementation: In accordance with Article X of the OST, the Open Skies Consultative Commission (OSCC) was established to "promote the objectives and facilitate the implementation of the provisions of [the Open Skies Treaty]…."[7] The Vienna-based organization is composed of representatives from each member state and assembles throughout the year to examine treaty compliance questions as well as technical considerations such as aircraft and imagery equipment certifications.[8] One of the most important roles of the OSCC, however, is the apportioning of the

[3] Office of the Spokesperson, *Open Skies Treaty: Fact Sheet*, U.S. Dep't of State (23 March 2012), http://iipdigital.usembassy.gov/st/english/texttrans/2012/03/201203232708.html [hereinafter *OST Fact Sheet*].

[4] For a complete list of OST signatories see *id.*

[5] *Treaty on Open Skies: Article-by-Article Analysis*, U.S. Dep't of State, http://www.state.gov/t/avc/cca/os/106812.htm (last visited 3 March 2017).

[6] *See generally*, Treaty on Open Skies art. III, § I, para. 1–2, 24 March 1992, S. Treaty Doc. No. 102-37 (1992) [hereinafter Open Skies Treaty]; *id.* art. VI, § II, para. 2, art. VIII.

[7] *Id.* at art. X, para. 1.

[8] *Open Skies Consultative Commission*, Org. for Sec. and Co-operation in Eur. (1 December 2015), http://www.osce.org/oscc.

number of observation flights each member state is entitled to each year.

Flight Quotas:[9] Annex A of the Open Skies Treaty sets forth each member states' passive flight quota, i.e., the total number of observation flights a state must allow over its territory in a given calendar year.[10] This number is static and does not vary from year to year. What can change yearly, however, is the allocation of a member's active flight quota. Each year, the OSCC determines the maximum number of observation flights one state may conduct over another member state.[11] This is referred to as the distribution of a member state's active flight quota. A member's active and passive flight quota are equal, however, the distribution of active flight quotas can change annually.

By way of example, both Russia and the United States each have a passive quota of 42, which means that not only must each country accept up to 42 observation flights every year, but each may also conduct up to 42 observation flights over other member states.[12] They may not, however, conduct all of their observation flights over one country. In 2015, the OSCC allocated Russia (along with Belarus)[13] an active quota of six flights over the United States.[14] Therefore, of its total 42 observation flights, only six could have been conducted within the United States. For 2015, the United States was allocated 16 observation flights over Belarus and Russia, ten of which were allocated as joint missions with other member states.[15]

Mission Parameters: Prior to conducting an OST observation flight, an observing state must notify the observed state at least 72 hours in advance of arrival.[16] In the United States, notifications are received and processed by the Department of State's Nuclear Risk Reduction Center via the Organization for Security and Co-operation in Europe (OSCE) network before being routed to the Open Skies Division of the Defense Threat Reduction Agency for distribution. The observed state then has 24 hours to acknowledge receipt of the notification and advise the observing state of its plans to provide an observation aircraft or to allow the observing party to use its own aircraft.[17]

If an observing party uses its own aircraft, the observed state may conduct a pre-flight inspection of the aircraft and have two flight monitors,[18] one interpreter, and an additional flight monitor for each data recording station onboard during the duration of the observation flight.[19] For Russian-led flights over the United States, there can be up to 36 crew members onboard, including six Russian personnel, four observers from other member states, and an observation crew from the United States.[20] Once Open Skies personnel arrive at a designated point of entry,[21] they have 96 hours to complete their

[9] The use of the term "flight" throughout the Open Skies Treaty and this document more accurately refers to authorized "missions" since OST "flights" often encompass multiple days of flying and multiple flights routes.

[10] Open Skies Treaty, *supra* note 6, at Annex A and art. II, para. 9.

[11] *Id.* at art. III, § I, para. 7.

[12] By comparison, all other member states have passive quotas of 12 or less. The wide disparity can be explained by the fact that quota allocations are to some extent based on a country's geographic size. In addition, politics and the ability to conduct OST flights also play a large role in allocation. *Id.* at Annex A.

[13] Belarus is not allocated a separate set of passive quotas; its passive quota is set in conjunction with the Russian Federation. *Id.*

[14] *See* Open Skies Consultative Comm'n [OSCC], *Decision No. 2/15: Distribution of Active Quotas for Observation Flights in the Year 2015*, OSCC (66), Journal No. 215, Agenda item 4(b) (19 January 2015), http://www.state.gov/documents/organization/242487.pdf.

[15] *Id.* In 2015, Russia conducted four of its allotted six observation flights over the United States; the United States conducted 12 of its allotted 16 flights over Russia and Belarus in addition to one mission over Ukraine. *Id.* Since 2002, the U.S. has flown nearly three times as many OST missions over Russia than Russia has flown over the United States. Bureau of Arms Control, Verification, and Compliance, *Key Facts About the Open Skies Treaty*, U.S. Department of State (6 June 2016), https://2009-2017.state.gov/t/avc/rls/2016/258061.htm.

[16] The notification includes information such as the desired point of entry, the location of pre-flight inspection, the identification of observation aircraft, and the approximate observation flight distance. *See* Open Skies Treaty, *supra* note 6, at art. VI, § I, para. 5.

[17] *Id.* at art. VI, § I, paras. 1 & 6.

[18] Among their responsibilities, flight monitors oversee compliance with the flight plan; observe the functionality and operation of the onboard cameras, sensors, and radars; and listen to internal and external communications between the aircraft crew. *Id.* at Annex G, § I, para. 4.

[19] *Id.* at art. VI, § III, paras. 1 & 11.

[20] Seth Robson, *US Flying Over Russia to Take Photos under Open Skies Treaty*, Stars and Stripes (19 November 2014), http://www.stripes.com/news/us-flying-over-russia-to-take-photos-under-open-skies-treaty-1.315012.

[21] Although states are allowed to overfly any portion of party member's territory, the treaty designates specific points of entry/exit (POEs) and refueling airfields. For the United States, the designated POEs are Washington Dulles International Airport in Virginia and Travis Air Force Base in California. For a complete list of POEs, see Open Skies Treaty, *supra* note 6, at Appendix 1 to Annex E.

OST mission and must depart from a designated point of exit no later than 24 hours after mission completion.[22]

Sensors and Data: Open Skies aircraft can be outfitted with four types of sensors for collecting imagery: optical panoramic and framing cameras (for daylight photography) with a maximum ground resolution of 30 centimeters (approximately 1 foot),[23] video cameras with a maximum ground resolution of 30 centimeters, infrared line-scanning devices (for day/night photography) with a maximum ground resolution of 50 centimeters (approximately 20 inches), and sideways-looking synthetic aperture radar (for day/night and all weather photography) with a maximum ground resolution of 3 meters (approximately 8 feet).[24] Though relatively low-tech and low-cost, these sensors are precise enough to detect critical military infrastructure such as combat vehicles and large caliber artillery, yet cannot recognize sensitive details such as electronic equipment. For example, the optical camera would be able to identify a Humvee but unable to determine its capability. In addition, activities occurring under cover cannot be detected.

Sensors are precise enough to **detect critical military infrastructure** such as combat vehicles and large caliber artillery, yet cannot recognize sensitive details such as electronic equipment.

In recent years, some member states have attempted to modernize their imaging capabilities by introducing cameras with digital sensors. In 2013, Russia introduced the OSDCAM 4060, a new 40 lens digital electro-optical sensor, for use in flights over Europe in its medium-range turboprop aircraft, the Antonov-30B.[25] Although these sensors may ease the image-capturing process, they are still limited by the treaty's overall ground resolution provisions and do not provide increased imaging capabilities. Additionally, before any new sensor can be utilized, it must be certified, approved, and commercially available to all other member states.[26]

While most member states were quick to grant Russia's request, the United States hesitated, voicing concern that recorded digital data might be erased prematurely in violation of the OST.[27] Ultimately those concerns were settled and the United States agreed to certification in May 2014 leading Russia to conduct an inaugural flight with its new technology over Poland in July 2014.[28] Approximately 18 months later on 22 February 2016, Russia filed a second request with the Open Skies Consultative Commission to equip its long-range OST aircraft, the Tu-154, with digital sensors in order to conduct similar flights over the United States.

[22] *Id.* at art. VI, § I, para. 9 & 20.

[23] Ground resolution refers to the minimum distance on the ground of two closely located objects that are distinguishable as separate objects. *Id.* at art. II, para. 13.

[24] *Id.* at art. VI, paras. 1–2; *OST Fact Sheet*, *supra* note 3.

[25] Joint Intelligence Operations Center—North, *Open Skies Treaty Update: US Certifies Russia's Digital Camera Mounted on the AN-30B*, NORAD AND U.S. N. COMMAND (3 June 2014) (on file with the author).

[26] Open Skies Treaty, *supra* note 6, at art. IV, para. 2.

[27] *Id.*

[28] *Id.*

Again, concerns in the U.S. arose, this time focusing on a perceived intelligence-gathering advantage of the digital technology.[29] U.S. House Armed Services Committee Chairman Rep. Mac Thornberry (R-TX), for example, commented "I cannot see why the United States would allow Russia to fly a surveillance plane with an advanced sensor over the United States to collect intelligence."[30] The Department of State noted, however, that the new sensors were within the scope of the OST's technology requirements and provided an identical resolution level to that of wet film.[31] Ultimately, on 28 June 2016 the U.S. approved Russia's request paving the way for future Russian overflight with modern cameras.[32] Not to be outdone, the U.S. has begun the process of procuring and retrofitting its OST fleet with digital sensors pursuant to Presidential Policy Directive-15.[33] They are expected to fully operational by late 2019.[34]

FLYING INTO THE FUTURE?

Since its inception, some U.S. critics have questioned the need for the Open Skies Treaty given that our satellites provide equal, if not more comprehensive, intelligence data. In 2014, the DoD's Defense Science Board suggested that upgrades to the U.S.'s Open Skies aircraft were unnecessary because "existing treaty requirements can be fulfilled by sensor information readily available from commercial imagery [such as Google Earth]…."[35] What detractors fail to consider, however, is that most of the treaty's 34 signatories do not have access to sophisticated satellite systems and the OST is their only means of extensive military observation. As noted by former ambassador John Hawes, "the treaty offers each of the participating states, regardless of size or level of technological development, the opportunity for direct involvement in the observation of military forces and activities of concern… [a] kind of hard evidence relevant to their security."[36] Under the OST,

Since its inception, some U.S. critics have **questioned the need** for the Open Skies Treaty given that our satellites provide equal, if not more comprehensive, intelligence data.

[29] Eric Schmitt and Michael R. Gordon, *Russia Wants Closer Look From Above the U.S.*, The New York Times (22 February 16), https://www.nytimes.com/2016/02/23/world/europe/russia-wants-closer-look-from-above-the-us.html [hereinafter *Russia Wants Closer Look*].

[30] *Id.* In addition, at a 2 March 2016 House Armed Services committee hearing, Lieutenant General Vincent R. Stewart, director of the Defense Intelligence Agency, testified that the "digital techniques allow Russia, in my opinion, to get incredible foundational intelligence on critical infrastructure, bases, ports, all of our facilities, so from my perspective, it gives them a significant advantage." U.S. House Armed Services Committee (2 March 2016), *20160302 World Wide Threats (ID: 104618)* [video file]. Retrieved from https://www.youtube.com/watch?v=5lE9lZq9bIA (at 49:42).

[31] *Russia Wants Closer Look, supra* note 29.

[32] RadioFreeEurope/RadioLiberty, *U.S. OKs Russian Overflight Despite Worries About Intrusive Surveillance*, http://www.rferl.org/a/us-oks-russian-overflights/27826694.html (last visited 4 March 2017).

[33] Steven Pifer and Leore Ben-Chorin, *The Case for Open Skies*, The Brookings Institute (8 March 2016), https://www.brookings.edu/blog/order-from-chaos/2016/03/08/the-case-for-open-skies/.

[34] *Id.*

[35] U.S. Def. Sci. Bd., Task Force Report: Assessment of Nuclear Monitoring and Verification Technologies, U.S. Department of Defense 29 (2014) at 37, https://www.nti.org/media/pdfs/Assessment_of_Nuclear_Monitoring_and_Verification_Technologies.pdf.

[36] *Hearing on Treaty on Open Skies before the U.S. Senate, Comm. on Foreign Relations*, 102d Cong. 4 (1992).

even states that lack the resources to conduct their own missions benefit because not only are copies of all images collected supplied to the observed country, but all member states receive a mission report and have the option to purchase any recorded images.[37]

Such transparency has proved fundamental in the current political climate where the international community has grown nervous over Russia's increasing worldwide military presence and territorial expansion. Following the 2014 annexation of Crimea, the number of Open Skies flights over Ukraine multiplied with some flights initiated at the request of Ukraine.[38] In addition, member states conducted a total of 22 observation flights over Russia between 1 March and 15 August 2014, including a 24 March joint German-U.S. mission near the Ukrainian border that confirmed the presence of Russian troops.[39] Though analysis of data collected during these missions is classified, the willingness of Russia to honor these flights indicates at least some amount of trust still exists between these old Cold War foes. That is not to say, however, that U.S.-Russia OST relations are wholly without contention.

In a 2016 report, the Department of State identified what it considered several compliance "concerns" with the Open Skies Treaty. In 2002, citing safety concerns, Russia restricted OST access over Chechnya following the breakout of armed conflict in the region. Though the Russian army withdrew from the area in 2009, many OST constraints remained, including the denial of access to areas below 5,100 meters over Chechnya, areas below 3,600 meters over Moscow's ring road, and denial to certain areas along the Georgia-Russia border.[40] In addition, since 2014 Russia had limited flight plans over Kaliningrad.[41] At several OSCC meetings, the United States argued that these airspace restrictions unduly limited its right to observe the entire Russian territory as required by the OST. Nevertheless, Russia has persisted in denying full access for aerial observation. Despite these grievances, according to former Assistant Secretary of State for the Bureau of Arms Control and the Bureau of International Security and Nonproliferation, Steve Rademaker, Russia is currently in compliance with the Open Skies Treaty though it has "adopted a number of measures that are inconsistent with the spirit" of the agreement.[42]

CONCLUSION

The Open Skies Treaty is and will continue to be a valuable international confidence-building and transparency tool. In fulfilling President Eisenhower's vision, it provides first-hand verification of a member state's military capabilities in an effort to temper international concerns. Use of the treaty has steadily increased as regional conflicts emerge and nations search for peaceful resolutions and stability. As the international landscape continues to change, cooperative security measures like the Open Skies Treaty are vitally important to quelling full-scale wars and are critical tools that all operations law judge advocates should be familiar with. R

Major Simone V. Davis, USAF

(B.A., Vassar College; J.D., The Catholic University of America, Columbus School of Law; LL.M., McGill University) is the Deputy Staff Judge Advocate, USAF Warfare Center, Nellis Air Force Base, Nevada.

[37] *See* Open Skies Treaty, *supra* note 6, at art. VI, § I, para. 21; *id.* at art. IX, § I, para. 4.

[38] Hartwig Spitzer, *Open Skies Update: Cooperative Transparency Agreement Works in Stormy Times*, 146 Trust & Verify, July–September 2014, at 4.

[39] *Id.*

[40] U.S. Dep't of State, 2016 Report on Adherence to and Compliance with Arms Control, Nonproliferation, and Disarmament Agreements and Commitments (11 April 2016), https://www.state.gov/t/avc/rls/rpt/2016/255651.htm#TREATY%20ON%20OPEN%20SKIES%20(OST).

[41] *Id.*

[42] Associated Press, *Russia Wants to Fly Hi-Tech Spy Planes over U.S.*, CBS News (22 February 2016), http://www.cbsnews.com/news/russia-high-tech-surveillance-plane-flights-over-us-open-skies-treaty/.

The Value of Early Mediation in Equal Opportunity Complaints

BY: MAJOR THOMAS A. MCNAB

Mediation can be a **valuable resource** in resolving employment discrimination complaints.

Mr. Jay Swenson[1] has worked for the past 15 years as an administrative clerk for the logistics squadron at Base X. He recently applied for a promotion within the squadron. Out of 15 candidates, he was one of five selected for an interview. Mr. Swenson believed that the job was his to lose since he had worked at Base X for so long and had a solid career up to this point. Ms. Kathleen Johnson, the selecting official, selected Ms. Joanne Jones for the position. Greatly perplexed by this outcome, Mr. Swenson speculates his gender was the reason for his non-selection. He has consulted his union representative, visited the base Equal Opportunity (EO) Office, and filed an informal complaint alleging prohibited discrimination based on gender by Ms. Johnson when she selected Ms. Jones over himself for the promotion.

The attorney assigned to represent the Air Force investigated the facts and researched the case law. It is a slam-dunk case for the Air Force and the legal team is confident the case will be dismissed without a hearing. The attorney, however, receives a phone call from Mr. Troy Jones, the base Alternative Dispute Resolution (ADR) program manager, who states mediation is scheduled for one week

[1]The names used in this scenario are fictitious, but the facts are from a real case in which mediation was offered. U.S. Dep't of Air Force, Instr. 51-1201, Conflict Management and Alternative Dispute Resolution in Workplace Disputes para. 5.3.2.3.3 (17 March 2014) [hereinafter AFI 51-1201] allows information from dispute resolution proceedings to be gathered and disclosed for research or educational purposes as long as the parties and specific issues in controversy are not identifiable.

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from today. The attorney does not know a lot about mediation and is skeptical that it will do any good. Since the government has a legally defensible position for not selecting Mr. Swenson, mediation seems like a waste of time. After talking with management involved in the complaint they agree to mediation. Both sides, however, will quickly learn more about mediation and how it can be a valuable resource in resolving employment discrimination complaints.

WHAT IS MEDIATION?

There are several forms of ADR, including arbitration, settlement conferences, and mediation. The Air Force primarily uses mediation to resolve employment discrimination complaints.[2] Mediation generally requires at least two parties in conflict. Each party may or may not have representation with them at the table (including union reps for bargaining unit employees). The mediator, a neutral third party, presides over the mediation. The mediator's job is to act as an impartial catalyst to help the parties in conflict constructively address and potentially resolve their dispute.[3] A mediator often uses one of three primary models of mediation: facilitative, transformative, and evaluative. The Air Force uses the facilitative model of mediation.[4]

The facilitative model of mediation helps break through the walls of workplace disputes through active listening and sharing emotions.[5] Using this model, the mediator helps guide conversation between the parties, and assists them in understanding the underlying basis for the dispute, encouraging them to explore the reasons that led to the conflict.[6] As a true facilitator, the mediator is primarily responsible to guide the discussion so that the parties can break through the walls created by the conflict and enhance their communication to work towards possible solutions.[7]

To help the parties work through their conflict, mediators using the facilitative model of mediation primarily use interest-based problem solving techniques, often referred to as interest-based negotiation ("IBN").[8] Interest-based problem solving is often preferred in mediation because, in most instances, there will be a continuing relationship between the parties and it aims to preserve such a relationship.[9] Using IBN techniques, the mediator helps the parties: (1) separate the people from the problem; (2) focus on interests not positions; and (3) help the parties invent options for mutual gain.[10]

When a broader range of interests are considered, a broader array of possible outcomes can be created, with the potential for finding an outcome that is more satisfactory to both parties than any solution imposed by a third party based only on the parties' legal rights. By focusing on their underlying needs and interests, the parties may create a unique solution that is most appropriate for their situation.[11]

THE MEDIATION PROCESS

Once the parties agree to a date and time for the mediation, the ADR program manager will send them an agreement to mediate.[12] The agreement to mediate covers such things as confidentiality, rights of the parties, and what the parties can expect, including location, start time

[2] *See generally* AFI 51-1201; *See also* The Air Force Mediation Compendium [hereinafter Mediation Compendium] (2012), http://www.adr.af.mil/Portals/82/documents/AFD-121115-026.pdf?ver=2016-08-01-121806-170.

[3] Carrie Menkel, Lela Porter Love & Andrea Schneider, Mediation: Practice, Policy and Ethics 91 (1st ed. 2006).

[4] Mediation Compendium, *supra* note 2, at 5.

[5] *See* Carol J. Brown, *Facilitative Mediation: The Classic Approach Retains Its Appeal*, 4 Pepp. Disp. Resol. L.J. 279, 283 (2004) (explaining that "[f]acilitative mediation is based on two guiding principles: firstly, that of self-determination of the parties with respect to the resolution of their disputes and, secondly, that of the neutral third party facilitator who facilitates communication among the parties, promotes understanding of the issues, focuses the parties on their interests and seeks creative problem-solving, including creative solutions outside the legal normative box, in order to enable the parties to reach their own agreements and resolutions to their problems.").

[6] *See* Rebecca Jane Weinstein, Mediation in the Workplace: A Guide for Training, Practice, and Administration 24 (2001).

[7] *Id.*

[8] *See* Roger Fisher, William Ury, & Bruce Patton, Getting to Yes: Negotiating Agreement Without Giving In (2nd ed. 1991). This book was written for the purposes of negotiation, but not necessarily mediation.

[9] Mediation Compendium, *supra* note 2, at 33.

[10] Fisher et al., *supra* note 8, at 15. The authors define a position as something that you have decided upon (the what that brings you to the table), whereas an interest is what caused you to so decide (the why). *Id.* at 41.

[11] Brown, *supra* note 5, at 290.

[12] Mediation Compendium, *supra* note 2, at 21.

and duration. Most mediators will require the parties sign the agreement before beginning the actual mediation. Generally, in an employment discrimination complaint, the parties include the individual who filed the complaint and their representative (if they chose to be represented) and management who is responding to the complaint (along with an attorney, if needed, and any technical experts required). Each side should have someone at the table, or immediately reachable, with the authority to settle the complaint should they reach an agreement.

To begin the mediation, the mediator will usually make an opening statement. At this time, the mediator will cover ground rules for the mediation, the process they will follow, confidentiality, and settlement agreements. The mediation itself will generally continue with each party's opening statement, joint discussion, caucus, and finally, closure.[13]

During each party's opening statement is where each side has an uninterrupted opportunity to lay out their position and history of what got them there. The complainant, as the party who raised the issue, will make his or her opening statement first. Management (also referred to as the respondent) then has the opportunity to respond. The opening statement is an opportunity for the mediator to identify potential underlying interests of each party that may help the parties generate options for resolution. Upon conclusion of each opening statement, the mediator may also summarize each party's statements, giving them the opportunity to make any clarifications.

After each side has made their opening statement, the mediator may lead the parties into a joint discussion. This is the first opportunity during the mediation for the parties to interact with each other. During the joint discussion, the mediator may help the parties clarify issues and interests, but it is really a time for the parties to work through the issues together and generate options for resolution. This is a chance for each side to shape what their future working relationship can be. Since conflict may arise during this time or the parties may reach an impasse, the mediator may need to caucus individually with each party.

There is no set time, or even requirement, for a caucus to occur. Rather a mediator may caucus with either side as the need arises. Anything discussed during caucus is confidential, unless the party agrees to its disclosure.[14] During a caucus, the party and the mediator may discuss settlement options or the mediator may help the party think through their legitimate options. There should be no negative

The **value** of mediation is instantly recognizable when comparing the **costs-time** and money-of traditional dispute resolution to ADR.

[13] Mediation Compendium, *supra* note 2, at 27.

[14] Administrative Dispute Resolution Act of 1996 5 U.S.C. § 574 (2012); AFI 51-1201 para. 4.8.5. Notwithstanding confidentiality, some information may be subject to disclosure. AFI 51-1201 para. 4.8.5.3 ("Information indicating fraud, waste and abuse, criminal misconduct, or threats of violence may be subject to disclosure…. The mediator shall advise the parties of this before taking their opening statements.").

Mediation helps the parties solve the dispute themselves and **tailor an agreement** that meets the needs of each side.

inference made by either party regarding the number or length of caucuses with a mediator during mediation. A caucus can take as long as the mediator believes necessary in order to fully explore the parties' issues. After a caucus, the mediator will often bring the parties back together for further joint discussion, which can lead to closure of the mediation.

Once the parties reach a settlement agreement or reach an impasse, the mediator will close the mediation by having the parties sign a written agreement or the mediator will sign a declaration of impasse. If the parties reach resolution, the mediator will help them memorialize the agreement in writing. The mediator will likely encourage the parties to be as specific as possible when drafting the settlement to avoid future confusion regarding the agreement. Once signed by all required parties, the settlement agreement becomes a legally binding document.

Parties should expect a mediation to last up to 8 hours and need to plan accordingly. Additionally, a settlement agreement may need to undergo a legal review to become final, which may take an additional day or two. Considering all things, mediation is a relatively short process.

THE VALUE OF MEDIATION

The value of mediation is instantly recognizable when comparing the costs-time and money-of traditional dispute resolution to ADR. Recent analysis shows the average number of days to close all Air Force EO formal complaints without the benefit of ADR (e.g., settlements, final agency decisions, decisions after administrative hearings, etc.) is 529 days.[15] However, the average number of days for Air Force EO offices to close a case through ADR settlements is 44[16], a difference of 485 days! Additionally, the estimated cost of litigation to the Air Force through the full federal administrative process is $24,088.00.[17] Consider too, that during extended litigation periods the parties are most likely still interacting in the workplace, which can have a detrimental impact on morale. As such, there is a significant cost benefit to resolving a case early through mediation.

Perhaps even more important than the time and cost savings associated with mediating employment discrimination complaints is the fact that mediation helps the parties solve the dispute themselves and tailor an agreement that meets the needs of each side. Since mediation is not a legal proceeding, there is no finding of liability. This allows the parties to explore resolutions that would not be available through formal legal proceedings. This flexibility allows the parties to dig beneath the surface and

[15] U.S. Dep't of Air Force, 2014 Sec'y of the Air Force ADR Program Report (2015).

[16] *Id.*

[17] *Id.* Note that this cost does not factor in the additional cost of the actual investigation, which can be between $4 and $10,000. Additionally, if the Complainant prevails at a hearing they may be entitled to damages and attorney fees, which significantly increase the cost to the Air Force.

be creative in coming up with workable solutions. In the book Mediation Practice, Policy and Ethics[18], the authors highlight this benefit:

In mediation, the parties retain control over the dispute and its outcome. This central feature of mediation—self-determination by the parties is a facet of democratic process—that the voice and wisdom of people can shape outcomes responsive to particular situations. In this respect, mediation is fundamentally different from adjudication where the power to determine the outcome is with a judge, jury, or arbiter.

In addition to tangible benefits, such as cost savings and self-determination, mediation has intangible benefits. It offers a chance for supervisors and employees to go back to the workplace with improved relationships and communication skills. This can spread to others within the organization as they see the benefit of working together to solve everyday problems.

MR. SWENSON'S CASE RESOLVED

So what happened with Mr. Swenson's mediation? The mediation session started rough. Mr. Swenson closed his opening statement by yelling at Ms. Johnson (the management official) and his union representative had to calm him down. Ms. Johnson became angry and wanted to leave after the outburst. The mediator quickly addressed this by going into caucus with each side to see if the mediation was salvageable. As it turns out, Mr. Swenson had been very nervous about the interview, as this was only his second interview in the last 15 years. He did not sleep well the night before and admitted the interview did not go very well. The mediator helped Mr. Swenson acknowledge that he needed to improve his interviewing skills. When the mediator met with Ms. Johnson, he discovered Mr. Swenson was qualified for the position but did not interview well. Ms. Johnson stated the person selected was equally, if not more qualified, and had a phenomenal interview. The mediator asked Ms. Johnson if she would be willing to tell Mr. Swenson about his poor interview during a joint discussion. Ms. Johnson agreed.

During the joint session, Ms. Johnson explained to Mr. Swenson that all three members on the selection panel had ranked him lower than the person selected. Mr. Swenson took the criticism surprisingly well. He understood the interview did not go well and wanted to ensure that did not happen in the future. Ms. Johnson was aware civilian personnel was offering a three-hour workshop on resume writing and interviewing for federal positions next month. She asked Mr. Swenson if he would be interested in attending the workshop. He was. A short time later, the parties had a signed settlement agreement giving Mr. Johnson official time to attend the workshop the following month, thereby resolving the complaint merely 14 days after Mr. Johnson had initially contacted the EO Office. Each side was extremely happy with the outcome and the mediation process.

CONCLUSION

Not every employment discrimination complaint is going to be resolved in 14 days. There is no doubt, however, that there is time and cost savings for resolving complaints through mediation. Since mediation is not a formal legal proceeding, it provides the added benefit of allowing the parties to craft a resolution that meets their needs, along with the opportunity to improve communication and relationships. Although not every case will be resolved through mediation, there is no doubt that the use of mediation in employment discrimination complaints is time well spent. R

Major Thomas A. McNab, USAF

(B.A., University of Idaho; J.D., The University of Idaho College of Law) is a student at Air Command and Staff College, Maxwell Air Force Base, Alabama.

[18] Menkel et al, *supra* note 3, at 92.

Where Is The Air Force Brand?

BY: CAPTAIN DAVID F. JACOBS

The single largest source of **intangible value** in a company is its trademark.

As of 2011, one of Google's intellectual property assets was worth an estimated $44,000,000, about 27% of Google Inc.'s value at the time.[1] Now that asset is estimated to be worth even more. No, it's not one of the copyrights owned by Google Inc. It's not the underlying patent rights to a search-engine architecture, a self-driving car, or any other technology developed by Google… it's the *trademark* to the name. According to David Haigh, founder of Brand Finance, a brand-valuation consultancy, "[t]he single largest source of intangible value in a company is its trademark."[2] So what's the value of a name? Spoiler alert! A name can be worth a substantial amount of money. It can be one of the most important assets in any intellectual-property portfolio. To the Air Force, a trademark can carry much more than a financial asset. It can carry brand recognition and association by the public, and other federal agencies, to what a service or product represents…the hard work of the men and women who serve in the United States Air Force.[3] Such a

[1] Sean Stonefield, *The 10 Most Valuable Trademarks*, Forbes (15 June 2011), http://www.forbes.com/sites/seanstonefield/2011/06/15/the-10-most-valuable-trademarks/#587ba09f1c29.

[2] *Id.*

[3] U.S. Dep't of Air Force, Instr. 35-114, Air Force Branding and Trademark

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valuable asset to the Air Force needs to be exercised more aggressively by both securing new trademark registrations when brand association can be advantageous and using owned trademarks more frequently through licensing and branding.

This article will provide an introductory overview into trademarking in the Air Force and discuss why the Air Force should more aggressively asserting trademark rights and registration.

Pop quiz, who owns U.S. Trademark Registration No. 4,195,548, for the mark below covering sunglasses?

It isn't the Air Force. The owner is a sunglass company called Jay-Y Enterprise Co., Inc. based in Walnut, California, who uses the name to identify its aviator-style sunglasses as the "Air Force Aviator Series."[4] Seems problematic? Just think about how the average consumer feels when they see these branded sunglasses in the store.

WHAT IS A TRADEMARK TO THE AIR FORCE?

Any discussion of what a trademark is to the Air Force must start with the general basics of what a trademark encompasses. A trademark is a word, name, symbol, device, other designation, or a combination thereof, which is used to identify a source of goods or services.[5] Simply put, a trademark is how consumers, or members of the public, identify the source of a product or service. The most common trademark registration is a word mark. But numbers, letters, slogans, colors, symbols, characters, sounds, graphic design, and product packaging are also eligible for trademark registration.[6] Generally, there are four different categories that can indicate a likelihood of registration and scope of protection.[7] The categories, in ascending order of protection, are generic, descriptive, suggestive, and arbitrary or fanciful, where a generic mark offers no protection.[8] Fanciful marks are words or terms that have been invented for the sole purpose of functioning as a trademark or service mark.[9] Arbitrary marks comprise words that are in common linguistic use but, when used to identify particular goods or services, don't suggest or describe a significant ingredient, quality, or characteristic of the goods or services (*e.g.*, APPLE for computers).[10] Suggestive marks require imagination, thought, or perception to reach a conclusion to the nature of the goods and services.[11] When a mark describes an ingredient, quality, characteristic, function, feature, purpose of use of a specific product or service it's considered to be a merely descriptive mark.[12] Finally, generic marks are terms used by the relevant purchasing public as the common or class name for a particular good or service.[13]

A mark may become generic through common use by the public in the market place and when the source of the goods or services fails to protect or regulate use of its mark.[14] Termed 'Genericide' by some attorneys, a mark becomes generic if the trademark owner fails to monitor and regulate the use of its mark, fails to prevent infringement by other companies in the field using the mark, or fails to educate the public on the proper generic name for the goods and services.[15] An example of this is the term "escalator," which was originally a fanciful term, or at least

Licensing Program, para. 1.3 (26 March 2015).

[4] Trademark Electronic Search System (TESS), United States Patent and Trademark Office, http://tmsearch.uspto.gov/bin/gate.exe?f=tess&state=4803:hxakue.1.1 [hereinafter TESS] (searching "Air Force").

[5] Jane Ginsburg, Jessica Litman & Mary Kelvin, Trademark and Unfair Competition Law Cases and Materials 43 (Associated Press, 4th ed. 2007).

[6] *Id.* at 44.

[7] *Id.* at 78.

[8] *Id.*

[9] Trademark Manual of Examining Procedure § 1209.01(a) (January 2017), *available at* https://mpep.uspto.gov/RDMS/TMEP/current [hereinafter TMEP].

[10] *Id.*

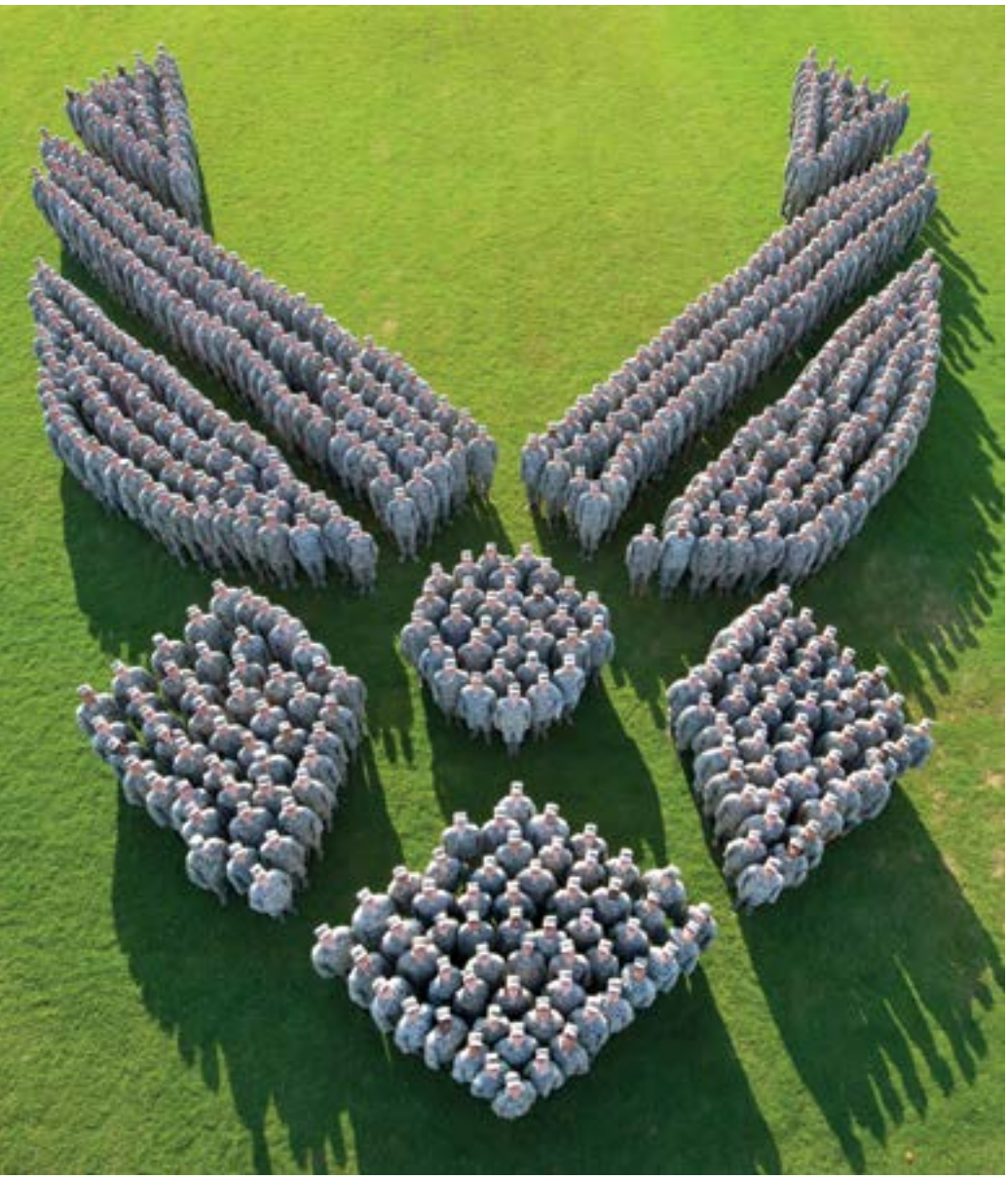
[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] Haughton Elevator Co. v. Seeberger, 85 U.S.P.Q. (BNA) ¶ 80 (Comm'r Pat. & Trademarks 3 April 1950).

[15] Gary Fechter & Elina Slavin, *Practical Tips for Avoiding Genericide*, International Trademark Association Bulletin (Nov. 15, 2011), http://www.inta.org/INTABulletin/Pages/PracticalTipsonAvoidingGenericide.aspx [hereinafter Fechter & Slavin].



U.S. Air Force photo by Donna L. Burnett

suggestive, and became a generic term through public use of the term to define a set of elevator steps.[16] Once a trademark becomes generic it's likely lost to the public domain.[17] To prevent 'Genericide', companies, such as Kleenex® are aggressive in their use of trademark identification, enforcement, and perception to the relevant consumer.[18] In fact, Kimberly-Clark Corporation is adamant about using the Kleenex® name followed by the word "tissue" to reiterate that tissue is the generic name for the product and Kleenex® is the specific brand.[19]

The Air Force operates its trademark strategy at the Air Force Branding & Trademark Licensing Office at Joint Base San Antonio-Randolph.[20] The Secretary of Air Force's Public Affairs office (SAF/PA) retains all policy-making authority and is the Air Force's office of primary responsibility (OPR) for the Air Force Branding and Trademark Licensing Program.[21] According to AFI 35-114, *Air Force Branding and Trademark Licensing Program*, paragraph 3.2, "Air Force marks are licensed for commercial use to promote and enhance the Air Force Brand, reflect the Air Force core values, and distinguish the Air Force from other brands."[22]

The Air Force Portfolio encompasses marks that are both available for commercial use and licensing and marks that are generally not authorized for commercial use.[23] Commercialization and licensing are specifically authorized for the Air Force Symbol,

[16] *Haughton Elevator Co.*, 85 U.S.P.Q. ¶ 80.

[17] Megan Garber, *'Kleenex Is a Registered Trademark' (and Other Desperate Appeals)*, The Atlantic.com (25 September 2014), http://www.theatlantic.com/business/archive/2014/09/kleenex-is-a-registered-trademark-and-other-appeals-to-journalists/380733/.

[18] *Id.*

[19] Fechter & Slavin, *supra* note 15.

[20] *Air Force Branding & Trademark Licensing*, U.S. Air Force, http://www.trademark.af.mil (last visited 8 October 2016).

[21] U.S. Dep't of Air Force, Instr. 35-114, Air Force Branding and Trademark Licensing Program, para. 2.1 (26 March 2015).

[22] *Id.*, para. 3.2.

[23] *Id.*, para. 4.1.

Air Force Emblem, Air Force One, Air Force Thunderbirds, and other marks used by the Air Force.[24] Non-commercial elements, such as the Air Force Seal and the Army Air Corps Wings, under certain circumstances, are not available for commercial use.[25] Fees earned from licensing of the Air Force's, and other Department of Defense (DoD), brands can be used for payment towards the costs associated with registering trademarks and DoD Component morale, welfare, and recreation (MWR) activities.[26] It should be briefly mentioned that use of the term "commercial" and "non-commercial" in AFI 35-114 does not seem to be connected to whether the mark would be used in "commerce" and instead attempts to reflect whether the mark can be licensed.[27] This is an important distinction to draw because marks that are not used in commerce are not trademarkable.

In addition to the potential financial benefits associated with trademark licensing, simply registering a trademark comes with several intrinsic benefits. Whether a mark is registered on the Principal Registrar or the Supplemental Registrar with the United Stated Patent and Trademark Office (USPTO), it affords the owner the right to use the ® symbol[28], to file a trademark-infringement lawsuit in federal court, to obtain monetary remedies, including infringer's profits, damages, costs, and, in some cases, attorney's fees, and it can serve as a basis for international trademark registration.[29] Federal registration is a requirement to bringing an infringement action in federal court.[30] Without the ability to bring an infringement case in federal court, the owner is stuck going to state court in each state where the violation occurs to pursue remedies. The other two extremely important benefits to federal registration include a legal presumption that the registrant is the owner of the mark with exclusive rights and public notice that the registrant claims ownership of the mark.[31]

With that brief overview of trademarks and current policy in the Air Force, we can begin to look at the Air Force's assertion of its current registered marks.

Simply registering a trademark comes with several **intrinsic benefits**.

[24] *Id.*

[25] *Id.*, para. 4.2.

[26] Dep't of Def., Dir. 5535.12, DoD Branding and Trademark Licensing Program Implementation para. 2(g)(2) (13 Sep. 2013) [hereinafter DoDD 5535.12].

[27] U.S. Dep't of Air Force, Instr. 35-114, Air Force Branding and Trademark Licensing Program, para. 4.1-4.2 (26 March 2015).

[28] The Lanham Trademark Act, 15 U.S.C. § 1111, authorizes the use of the ® symbol only for marks that have been officially been registered. Marks that have not received registration can establish "common law" rights in a mark based solely on their use in commerce by designating the mark with TM for goods and SM for service.

[29] Andrew Stockment, *Trademarks 101 Part 2: The Benefits of Federal Registration*, American Bar Association, http://www.americanbar.org/groups/young_lawyers/publications/the_101_201_practice_series/trademarks_101_part_2_the_benefits_of_federal_registration.html (last visited 8 February 2017).

[30] United States Patent and Trade Office, *Protecting Your Trademark – Enhancing Your Rights Through Federal Registration*, *available at* https://www.uspto.gov/sites/default/files/trademarks/basics/BasicFacts.pdf.

[31] *Id.*

Failing to actively police a mark, which includes proper use of the ®, has **consequences**.

THE AIR FORCE AND ITS ASSERTION OF TRADEMARK RIGHTS

Failing to actively police a mark, which includes proper use of the ®, has consequences.[32] The first problem with failing to properly designate and police a mark is the danger the mark could become generic or abandoned.[33] This can occur through non-use of the mark for a period of three years, or the mark becoming a generic description for a particular class of goods or services.[34] It doesn't seem likely "Air Force" will be used to describe commercial airlines anytime soon, but it's something to keep in mind for marks that could become synonymous with a class of goods or services. This is particularly true in areas where new technology is being developed and created by the Air Force. For example, at the Information Directorate, Air Force Research Laboratory (AFRL), we submitted a trademark registration for the name ATAK™ (U.S. Trademark Registration Application No. 86/933782), which is a computer-based tactical assault kit developed to help the warfighter.[35] At the time of this article, ATAK™ is pending official registration. Once registered, the Air Force can utilize the branding of the name, along with any patent rights, to create a valuable licensing package, while preventing companies from creating and naming their own system "ATAK." Even if the system does not receive a utility patent through the USPTO, the licensing of the name, and its association with the Air Force, carries potential value to consumers of the product.

The second problem, one demonstrated with the example provided at the beginning of this article, is the weakening and loss of distinctiveness for an Air Force mark through dilution. When a company fails to diligently protect their trademarks from infringement and other misuse, it not only harms its goodwill and reputation, but harms the value of the mark.[36] That's right, failing to enforce trademark rights can reduce the scope of protection an entity is afforded by trademark registration as other uses start to encroach upon the protected goods or services.[37] That doesn't mean a trademark owner has to pursue every infringer in full litigation, but it does mean any large entity, such as the Air Force, should be able to show they are actively pursuing infringers of its mark, including those of confusingly similar goods and services or cases of dilution. Using the sunglasses example from the beginning of this article, it's readily apparent companies will

[32] Susan Gunelius, *When and How Do I Have to Use Trademark Symbols*, Forbes.com (12 March 2014), http://www.forbes.com/sites/work-in-progress/2014/03/12/when-and-how-do-i-have-to-use-trademark-symbols/.

[33] Fechter & Slavin, *supra* note 15.

[34] *Id.*

[35] United States Patent and Trade Office, https://www.uspto.gov. (search Trademark Database for "ATAK").

[36] Oliver Herzfeld, *Failure to Enforce Trademarks: If You Snooze, Do You Lose?*, Forbes.com (28 Feb. 2013) http://www.forbes.com/sites/oliverherzfeld/2013/02/28/failure-to-enforce-trademarks-if-you-snooze-do-you-lose/#6f827e677189.

[37] *Id.*

encroach to use the Air Force designation to their benefit when possible.

How urgent is the need for a more aggressive trademark-enforcement policy? On 13 September 2016, the USPTO published opposition for an "Aim High HVAC" mark that uses the Air Force Symbol in their mark.[38] Opposition is a process in trademark registration in which a mark is published on the registrar prior to final approval so an entity who believes harm would result from registration can challenge it prior to final approval.[39] To prevent registration of the mark, the Air Force must now file a potentially costly protest to prevent the mark's registration.[40] If the Air Force fails to file a protest, it could become another registered mark, causing confusion to consumers and reducing the strength of Air Force branding.[41] Specifically, this mark would affect the strength of the Air Force Symbol and the phrase "Aim High" currently used by the Air Force in marketing.[42] This might have been prevented with a more aggressive trademarking stance (more on that later), but the Air Force does not have, nor is it currently seeking, registration of the mark "Aim High," or any variant thereof. Registered marks are used by the USPTO to prevent other marks from registering that could provide confusion to the public.[43] Another example can be found with Afterburner Inc.[44] Afterburner Inc. markets itself as a management consulting business where the teachers and students wear flight suits substantially similar to the Air Force.[45] The company also uses Air Force themed branding throughout their program design that suggests a military affiliation.[46] These are just a few recent examples of companies encroaching and potentially infringing on Air Force marks. In addition to encroachment there is the potential implication, either intentionally or unintentionally, that companies like "Aim High" have received endorsements from the Air Force. Afterburner Inc.'s website is a great example of a company using an Air Force brand, such as the flight suit and unit patches, to imply association with the Air Force.[47]

Failing to properly enforce and police a trademark doesn't just include preventing others from using a confusingly similar mark, it also includes putting others on notice through the use of the ® symbol.[48] While you aren't required to use the ® symbol for your registered trademark, failure to do so can forfeit specific rights to

In addition to **encroachment** there is the potential implication, either intentionally or unintentionally, that companies like "Aim High" have received endorsements from the Air Force.

[38] TESS, *supra* note 4 (search for "Air High HVAC").

[39] TMEP, *supra* note 9, § 1503.

[40] *Id.* § 1715.01

[41] Herzfeld, *supra* note 34.

[42] TESS, *supra* note 4 (search for "Air High HVAC").

[43] TMEP, *supra* note 9, § 1207.01.

[44] Afterburner, http://www.afterburner.com (last visited 8 Feb. 2017).

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] Anton Hopen, *Proper Use of a Federally Registered Trademark*, Smith & Hopen U.S. Registered Attorneys, 2012, available at http://www.smithhopen.com/PDFStore/Federal_Trademark_Registration_Fact_Sheet.pdf.

A more aggressive trademark policy regarding proper designation and policing of Air Force's registered trademarks is needed…

recover lost profits and damages by failing to provide notice.[49] That notice could be essential for the Air Force to recover damages and costs associated with cancellation-opposition proceedings and infringement filings likely to come from the Aim High HVAC™ and Afterburner Inc. marks.[50] Right now, the Air Force is failing to consistently utilize the ® symbol, place appropriate trademark notices on their webpage stating the USAF reserves all rights with respect to its trademarks, and otherwise put entities on notice. As I write this article, the Air Force Symbol on the Air Force's main webpage fails to contain the appropriate ® symbol after the mark to place entities on notice.[51] Perhaps even more egregious is the Air Force Symbol at the bottom of the Air Force Branding and Trademark Licensing webpage, www.trademark.af.mil, fails to contain the proper ® symbol.[52] Interestingly, the scrolling screen in the middle of the page advertising for licensing opportunities *does* have the Air Force Symbol with the proper ® symbol.[53] A trademark should always be used and designated consistently in accordance with the registered goods and services to provide proper notice and distinguish the mark.[54] A lack of consistency in proper mark designation and identification could prove costly to the Air Force in any active attempt to recover damages from infringers.

A more aggressive trademark policy regarding proper designation and policing of Air Force's registered trademarks is needed to ensure continued strength and defensibility of the marks. The trademarks associated with the Air Force are under attack right now from entities seeking, either purposely or incidentally, to reduce the scope of protection afforded to Air Force's marks and introduce confusion to consumers and the public. The most proactive step the Air Force can take to protect already registered marks is to ensure proper trademark designation (*i.e.*, ®) on its marks and an aggressive stance on asserting trademark infringement or protest where entities are potentially infringing. For more long-term protection, the Air Force should start pursuing more trademarks to expand brand recognition and add licensing value to promote the Air Force mission.

EXPANDING THE AIR FORCE BRAND

AFI 35-114, paragraph 4.1.5, paves the way for expanding the Air Force Brand for licensing and commercialization beyond what is currently registered with the USPTO by stating that any other marks the used by the Air Force and authorized for commercial use may be licensed.[55] This provision

[49] Gunellus, *supra* note 30.

[50] *Id.*

[51] U.S. Air Force, https://www.airforce.com.

[52] AF Branding & Trademark Licensing, http://www.trademark.af.mil.

[53] *Id.*

[54] *Trademark Use*, Int'l Trademark Ass'n (April 2015), http://www.inta.org/TrademarkBasics/FactSheets/Pages/TrademarkUseFactSheet.aspx.

[55] U.S. Dep't of Air Force, Instr. 35-114, Air Force Branding and Trademark Licensing Program, *supra* note 3, para. 4.1.

should be aggressively used to create a more comprehensive intellectual property portfolio for the Air Force. Licensing of registered trademarks can have a direct benefit to the members of the Air Force the brand represents by providing funds towards MWR activities.[56] It can also provide revenue and operating costs for maintaining the trademark program.[57]

The Information Directorate, Air Force Research Laboratory (AFRL), recently filed to obtain a trademark registration on the term Cyber Blue Book™ (U.S. Trademark Registration Application No. 87/146,188).[58] The mark is pending registration and may or may not receive official registration. Doctor Kamal T. Jabbour, Senior Scientist for the Information Directorate, with the help of other Air Force members, developed a method and procedure for drafting vulnerability assessments in the cyber domain.[59] Cyber Blue Book™ represents the culmination of the efforts of Dr. Jabbour and his Air Force team in a written format. It carries a sense of prestige for those involved in the product and for those entities receiving the Cyber Blue Book™ cyber assessment. Already, Dr. Jabbour and his team have received multiple requests from various entities within and outside the DoD to receive a Cyber Blue Book™ analysis. By protecting the mark Cyber Blue Book™ the Air Force can maintain the standards associated with any Cyber Blue Book™ analysis and can determine who has the authority to use the designation. As a result, when an entity receives a Cyber Blue Book™ analysis, they know the quality and effort that has gone into the product and will associate it with the Air Force.

Building a more robust trademark portfolio through trademarking can also help the Air Force protect its name, reputation, and public goodwill regardless of whether the mark is used for commercialization, under AFI 35-114, paragraph 4.1, or non-commercialization under AFI 35-114, paragraph 4.2, purposes. Federal registration provides substantial benefits to the owner of the mark by providing public notice to would-be infringers and a presumption that the mark is valid.[60] Additionally, it allows federal court jurisdiction and potential monetary remedies.[61] Having registered marks, in conjunction with proper use of the trademark after it's registered, can serve as a basis for rejection of other marks that are confusingly similar to the Air Force registered mark.[62] Being able to point to the registration itself can prevent costly fees associated with infringement lawsuits and

Building a more robust trademark portfolio through trademarking can also **help the Air Force protect** its name, reputation, and public goodwill regardless of whether the mark is used for commercialization.

[56] *Id.*, para. 1.4.3; DoDD 5535.12, *supra* note 26, para. 2(g).

[57] U.S. Dep't of Air Force, Instr. 35-114, Air Force Branding and Trademark Licensing Program, *supra* note 3, para. 1.4.3.

[58] TESS, *supra* note 4 (search for "Cyber Blue Book").

[59] *Id.*

[60] USPTO., *supra* note 28.

[61] *Id.*

[62] TMEP, *supra* note 9, at 12.07.01.

Having registered marks, in conjunction with proper use of the trademark after it's registered, can serve as a **basis for rejection** of other marks that are confusingly similar to the Air Force registered mark.

cancellation/opposition proceedings because the trademark office itself will often bar registration based upon their review.[63]

While not necessary dispositive, it's informative to note the trademarking practices of some other DoD entities when compared to the Air Force to understand their perception of trademark ownership. A search for live marks owned by the "Department of the Navy" using the basic Trademark Electronic Search System (TESS) revealed five hundred eighty three (583) records.[64] A search for live marks owned by the "Department of the Army" revealed three hundred one (301) records.[65] The Department of the Navy owns marks ranging from "Navy Dad®" for cups and mugs to "Freedom Live®" for concerts, to "USMC®" for knife blades. The Department of the Army owns marks ranging from "GoArmy Edge®" for computer software for sports training to "Gray Eagle®" for an unmanned aerial vehicle (UAV). It's important to note that this was just a basic search and more marks likely exist. In addition, the search was limited to marks that are currently "live," which means they are either registered or seeking registration. So what did a search of "Department of the Air Force" reveal? Eight (8) records, which includes registration number 2767190, the Air Force Symbol.[66] In an effort to find more marks owned by the Air Force, I expanded the search to include "Secretary of the Air Force," which revealed an additional sixteen (16) records, still well below Army and Navy's active trademark registrations and applications.[67]

Are you still unsure whether the Air Force needs to get more aggressive in trademark practices? Even though Air Force One is mentioned in AFI 35-114, paragraph 4.1.3, as a specific Air Force mark available for commercialization, it's not a registered trademark with the USPTO. No doubt Nike® would be happy to sell you a t-shirt or hat with the registered mark "Air Force 1".[68] Heating needs? Air Force One Incorporated would be happy to install their "Air Force One®" heating, ventilation, and air conditioning electronic controller and monitor.[69] A mark cited by the Air Force as a commercialization and licensing asset does not carry federal registration protection and has already lost substantial value through encroachment. "Marine One®" a similar type of mark owned by the Navy has four (4) separate federal registrations and several more pending applications.[70]

[63] *Id.*

[64] TESS, *supra* note 4 (search for "Department of the Navy").

[65] *Id.* (search for "Department of the Army").

[66] *Id.* (search for "Department of the Air Force").

[67] *Id.* (search for "Secretary of the Air Force").

[68] *Id.* (search for "Air Force One," Serial Number 86166686).

[69] *Id.* (search for "Air Force One," Serial Number 78565350).

[70] *Id.* (search for "Marine One," Serial Numbers 4698140, 4619908, 4612650, 3101346).

Recently, there have been several updates which are worth mentioning. On October 5, 2016, the mark "Aim High HVAC" (U.S. Trademark Registration Application No. 86/967,374) was expressly abandoned as a result of efforts by the Air Force Commercial Law and Litigation Directorate.[71] "Aim High HVAC" is still an important example that illustrates the need to protect the Air Force trademark portfolio and now a success story in what happens when the portfolio is protected. Cyber Blue Book® (U.S. Trademark Registration No. 5139288) and ATAK® (U.S. Trademark Registration No. 5063496) are now registered marks owned by the United States Air Force, Air Force Research Laboratory, Information Directorate.

The pieces to forming a more comprehensive and aggressive trademarking strategy are already exist, but there needs to be a centralized strategy for implementation and processes for execution. The Branding and Trademark Licensing Office (B&TLO) is responsible for directing, controlling, coordinating, and implementing all licensing trademark activities.[72] Public Affairs Offices are responsible for ensuring proper use of registered Air Force marks and identifying local activities that could impact the Air Force Brand.[73] Local commanders are the approval level, with coordination to B&TLO, of local Air Force marks, such as unit patches for licensing purposes.[74] On the legal side, the Office of the General Counsel–Acquisition (SAF/GCQ) and patent counsel are responsible for registration and maintenance of Air Force marks.[75] Air Force Legal Operations Agency, Commercial Law and Litigation Directorate (AFLOA/JAQ) is responsible for enforcement, cancellation proceedings, and litigation involving trademarks.[76] What is needed is a better line of communication between the various pieces involved in the Air Force trademark portfolio consistent with an overall trademark portfolio strategy that focuses on protecting the integrity of the Air Force marks and commercializing those marks that have value. MAJCOMs, such as Air Force Materiel Command, can fill the gap in the line of communication by becoming involved in management and enforcement, both from the legal and licensing side, of trademarks to create a centralized conduit to SAF/GCQ and B&TLO for MAJCOM and wing-level marks. MAJCOMs can designate patent counsel to register and maintain trademarks consistent with the Air Force Portfolio Strategy.

CONCLUSION

An asset longer lasting and potentially more valuable than any other intellectual property to ever come from the Department of the Air Force is in need of an aggressive strategy and implementation. Trademarks, unlike any other asset of intellectual property, carry a source identifier that ties the hard work of the men and women in the Air Force to the goods and services they produce. We should build upon the strategy set out in AFI 35-114 to create a comprehensive trademark portfolio. Now it needs to be utilized before the Air Force loses more valuable assets. This article has highlighted some of the benefits of an aggressive trademark strategy and the dangers facing the Air Force Brand today. The Department of the Army owns the trademark for "Airborne"".[77] The Department of the Navy owns a trademark for the "Judge Advocate General's Corps U.S. Navy".[78] The Air Force does not own a registered trademark for "U.S. Air Force" or "Aim High." Isn't it about time? R

[71] *Id.* (search for "Air High HVAC").

[72] U.S. Dep't of Air Force, Instr. 35-114, Air Force Branding and Trademark Licensing Program, *supra* note 3, para. 2.3.

[73] *Id.* at 2.8-2.9.

[74] *Id.* at 2.8-2.9.

[75] U.S. Dep't of Air Force, Instr. 51-303, Air Force Branding and Trademark Licensing Program, para. 11 (15 January 2015).

[76] *Id.* at 2.2.

[77] TESS, *supra* note 4 (search for "Department of the Army," Serial Number 3050842).

[78] *Id.* (search for "Department of the Navy," Serial Number 85463526).

Captain David F. Jacobs, USAF

(B.S., Arizona State University; J.D., Stetson University College of Law) is the Deputy Staff Judge Advocate and a patent attorney at the Information Directorate, Air Force Research Laboratory, Rome, New York.

The Air Force Thunderbirds during an air show. The team demonstrated the capabilities of Air Force pilots and the F-16C Fighting Falcon. (U.S. Air Force photo by Staff Sergeant Chris Willis)