

THE Reporter

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Education and Outreach for The Judge Advocate General's Corps

2017 this edition:

- ♦ THE LEGAL LANDSCAPE AND CHALLENGES OF UNMANNED AERIAL SYSTEMS—2
- ♦ GTMOCOM—13



A NEW THREAT TO AIR FORCE OPERATIONS IS QUICKLY EMERGING—THE RAPID ADVANCEMENT AND USE OF UNMANNED AERIAL SYSTEMS USERS.

The Reporter

2017 Volume 44, Number 3

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ABOUT Us

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

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Message from The Commandant



IN this edition of *The Reporter*, our **operations and expeditionary law** articles offer experienced insight on a variety of unique issues. Colonel Stephen Shrewsbury begins by providing a call to action for all Air Force JAGs and legal professionals to increase their knowledge of the laws and regulations applicable to the use of Unmanned Aerial Systems. Then, Major Jeffrey Lorek and Senior Master Sergeant Jacob Wolf argue why the detainee operations mission performed by Joint Task Force Guantanamo should be transferred to a new, subunified command within SOUTHCOM.

In our **leadership section**, Colonel Jeffrey Palomino and Master Sergeant Todd Wivell discuss the mission of Public Affairs and why it is critical for a Staff Judge Advocate to nurture a strong relationship with Public Affairs, given modern media trends.

Next in our **legal assistance section**, Lieutenant Colonel Rhea Lagano, Major Sarah Edmundson, and Major Dustin Grant provide a historical review of the Special Victims' Counsel program and offer a few practice tips along the way as well. Then, Captain Ashley Norman shares useful insights to aid those transitioning from the base legal office to an assignment as Area Defense Counsel or Special Victims' Counsel.

In our **military justice section**, Lieutenant Colonel Tiffany Wagner, Captain Mark Steitz Jr., and Captain Brittany Tedford provide us with an experienced approach to mental competency hearings under RCM 706. As our penultimate article, Major Mark Coon and Captain Matthew Blyth provide welcome clarity regarding the procedural rule of sentencing rehearings, RCM 810. Finally, Captain Patrick Milott translates the digital language of emojis and emoticons and their impact in legal proceedings.

Thank you to all of our authors and editors who make this and every edition of *The Reporter* a success. *The Reporter* is a unique forum that allows authors to express their legal insight or to generate sincere discourse about a particular topic. I encourage each of you to help continue this success by writing an article for publication.



We Better Get Ready

The Legal Landscape and Challenges of Unmanned Aerial Systems

BY COLONEL STEPHEN M. SHREWSBURY, (RET.)

It is estimated that 700,000 UAS were sold in 2015, up 63 percent from 2014. That number is expected to have exceeded 7.3 million in 2016 and hit **29 million by 2021.**

A new threat to Air Force operations is quickly emerging—the rapid advancement and use of unmanned aerial systems (UAS)¹ by non-military users. Of course, the U.S. military has used unmanned aircraft since at least 1999 for surveillance and military operations in international and territorial airspaces.² But, in the last few years, UAS use by the business community

and private individuals has rapidly expanded both in the United States and abroad. There are now more than 70 companies producing UAS,³ and it is forecast that the 2016 worldwide civil UAS market will total \$65 billion⁴ and rise to \$127 billion by 2020.⁵

¹ Various terms have been used to describe UAS, including unmanned aerial vehicles (UAV), remotely piloted aircraft (RPA), and drones. The Department of Defense uses “unmanned aircraft system.” See JOINT CHIEFS OF STAFF, JOINT PUB. 1-02, DICTIONARY OF MILITARY AND ASSOCIATED TERMS, at 252 (8 November 2010) (As Amended Through 15 February 2016). This article refers to UAS for aerial systems and UAV for only the aerial portion of the system.

² Symposium, *RPA's and Non-International Conflict—A Strategic/Legal Assessment*, 36 CARDOZO L. REV. 667, 672 (2014).

³ See Alan Pertman, *70 Drone Companies to Watch in 2017*, UAV COACH (23 January 2017), <http://uavcoach.com/drone-companies>.

⁴ Press Release, Teal Group Corp., Teal Group Predicts Worldwide Civil UAS Production Will Total \$65 Billion in Its 2016 UAS Market Profile and Forecast (6 March 2017), <http://www.tealgroup.com/index.php/about-teal-group-corporation/press-releases/129-teal-group-predicts-worldwide-civil-uas-production-will-total-65-billion-in-its-2016-uas-market-profile-and-forecast>.

⁵ Wojciech Moskwa, *World drone market seen nearing \$127 billion in 2020*, BLOOMBERG TECHNOLOGY (9 May 2016), <http://www.bloomberg.com/news/articles/2016-05-09/world-drone-market-seen-nearing-127-billion-in-2020-pwc-says>.

Air Force legal practitioners have long understood that outside activities on or around air bases and training ranges can have profound effects on the ability of military units to effectively carry out air training and operations. Base and range encroachment matters are continuing issues currently managed through the Air Installation Compatible Use Zones Program (AICUZ),⁶ which involves consistent and close cooperation between military and local community officials.⁷ On the legal front, AICUZ influences local communities with regard to zoning laws and other ordinances to keep areas around Air Force bases safe for aircraft use and prevent degradation of air operations at bases.⁸ Judge Advocates are key participants in AICUZ programs,⁹ so Air Force lawyers must also understand and appreciate developments in the law of UAS to guide commanders on available legal options as this technology and its use mature.

The scope of the expanded use of UAS is breathtaking. Companies like SkyViewHD are among many that are capitalizing on simple, cheap, and plentiful technology to use UAS for a wide variety of applications.¹⁰ Such

⁶ U.S. DEPT OF AIR FORCE, INSTR. 32-7063, AIR INSTALLATIONS COMPATIBLE USE ZONES PROGRAM (18 December 2015) (implementing U.S. DEPT OF DEF., INSTR. 4165.57, AIR INSTALLATIONS COMPATIBLE USE ZONES (AICUZ) (2 May 2011)) [hereinafter AFI 32-7063, AICUZ].

⁷ *Id.*, para. 1.2.5.

⁸ *Id.*, para. 1.1.2.1.

⁹ *Id.*, para. 2.25.

¹⁰ See SKYVIEWHD, *About SkyViewHD*, <http://skyviewhd.com> (last visited 21 May 2017).

companies are capitalizing on the ability to go where aerial systems have not gone before, including UAS use for such applications as inspections of cellular towers, dams, wind turbines, power grids, oil and gas towers, and agricultural surveillance.¹¹ Other uses include search and rescue operations, and goods delivery.¹² Hobbyist use of UAS is also exponentially expanding. It is estimated that 700,000 UAS were sold in 2015, up 63 percent from 2014.¹³ That number is expected to have exceeded 7.3 million in 2016 and hit 29 million by 2021.¹⁴ The largest manufacturer of UAS in the world is DJI, with a 70 percent market share for commercial and consumer drones.¹⁵

UAS LAW IN THE UNITED STATES

Many might assume that the laws and regulations governing UAS operations in U.S. airspace are in place and fully adequate. But the law governing UAS use has lagged behind the technology.¹⁶ Anticipating the need, the Federal Aviation Administration (FAA) Modernization and Reform Act of 2012 (FAA Act)¹⁷

¹¹ *Id.*

¹² Jordan M. Cash, Note, *Droning On and On: A Tort Approach to Regulating Hobbyist Drones*, 46 U. MEM. L. REV. 695, 703 (2016).

¹³ *Who's Leading the Drone Market?* BBVA INNOVATION CENTER (5 July 2016), <http://www.centrodeinnovacionbbva.com/en/news/whos-leading-drone-market>.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ See Elaine D. Solomon, *PART ONE: Unmanned Aircraft Systems ("UAS") – aka Drones Usages and Regulation: Where Are We Headed?*, BLANK ROME LLP (June 2014), <http://www.blankrome.com/index.cfm?contentID=37&itemID=3330>

¹⁷ FAA Modernization and Reform Act of

directs the FAA to integrate UAS into the national airspace system by September 2015.¹⁸ As part of that process, the FAA issued a Notice of Proposed Rulemaking on 23 February 2015 pertaining to a new Federal Aviation Regulation (FAR) Part 107, which would be applicable to UAS being used for work, business, or non-recreational reasons.¹⁹ On 27 August 2016, the Federal Aviation Administration implemented the new FAR Part 107, which includes the use of UAS by business and for non-recreational use.²⁰

There are numerous new requirements under FAR Part 107. Among them, to be operated the Unmanned Aerial Vehicle (UAV) must weigh less than 55 pounds, not be operated out of visual line of sight from the operator, only be operated in daylight, at speeds of 100 miles per hour or less, and at an altitude of 400 feet or less above ground level.²¹ UAS operators must also be licensed pilots or obtain a small UAS rating, which requires the operator to be at least 16 years of age and pass an aeronautical knowledge test.²² In addition, the UAV

2012, Pub. L. No. 112-95, 126 Stat. 11.

¹⁸ *Id.* § 332.

¹⁹ Operation and Certification of Small Unmanned Aircraft Systems, 80 Fed. Reg. 9544, 9552 (proposed 23 February 2015) (to be codified at 14 C.F.R. pt. 107).

²⁰ Operation and Certification of Small Unmanned Aircraft Systems, 81 Fed. Reg. 42064, 42065-42066 (rule in effect 28 June 2016); 14 C.F.R. Part 107.

²¹ See *Summary of Small Unmanned Aircraft Rule (Part 107)*, FAA NEWS (21 June 2016), https://www.faa.gov/uas/media/Part_107_Summary.pdf.

²² *Id.*

cannot be operated over people or in controlled airspace without air traffic control (ATC) permission.²³ ATC permission is not required to operate UAS in FAA Class G (uncontrolled) airspace.²⁴

As stated above, the new FAR Part 107 rules cover non-recreational use. For guidance on the recreational use of model aircraft, including UAS, lawyers and operators must turn to Section 336 of the FAA Act. This section prohibits the FAA from creating any rule regarding model aircraft flown for recreational use so long as certain criteria are met.²⁵ The aircraft must be flown strictly for hobby or recreational use, operated in accordance with a community-based set of safety guidelines, not weigh more than 55 pounds, its operation must not interfere with manned aircraft, and notice must be given to an airport if the aircraft is operated within 5 miles of an airport.²⁶ Thus, UAS recreational users have two options for legally operating a UAS.

²³ *Id.*

²⁴ There are a number of Classes of airspace under FAA rules. Class G airspace is uncontrolled airspace, which is the majority of airspace in the U.S. Most controlled airspace is near airports or around other sensitive facilities or flying areas. See FED. AVIATION ADMIN., *Types of Controller Airspace*, https://www.faa.gov/gslac/ALC/course_content.aspx?cID=42&sID=505&preview=true (last visited 25 March 2017); see also, Swayne Martin, *This is How Class G Airspace Works*, BOLDMETHOD (14 July 2016), <http://www.boldmethod.com/learn-to-fly/airspace/class-g-airspace>.

²⁵ See 14 C.F.R. § 101.41 (2016); see also FED. AVIATION ADMIN., 14 C.F.R. Part 91 (2014), *Interpretation of the Special Rule for Model Aircraft*, at 6, https://www.faa.gov/uas/media/model_aircraft_spec_rule.pdf.

²⁶ *Id.*

They may follow Part 107 requirements or, in the alternate, follow the Section 336 requirements.²⁷ These new regulations are a good start but will require the cooperation of UAS users to be successful.

THE STATES ARE GETTING INVOLVED, TOO

In addition to this new body of federal regulation, States have also gotten into the game of regulating UAS, despite federal authority in this area of law. In the seminal 1946 case of *United States v. Causby*, the U.S. Supreme Court confirmed the principle of federal rights in the national airspace system, confirming the federal government's exclusive authority for regulation of "navigable airspace," which at that time was set at 500 feet above the ground during daylight.²⁸ The issue in the case was whether aircraft overflight of private property at altitudes as low as 83 feet was a taking of private property within the meaning of the Fifth Amendment to the U.S. Constitution.²⁹ The Court left for another day authority over the regulation of airspace below navigable airspace, and whether authority would differ based on the purpose of the regulation sought.³⁰

Since that time, however, the federal government has continued

²⁷ See FED. AVIATION ADMIN., *Unmanned Aircraft Systems (UAS) Frequently Asked Questions, Flying For Fun (recreational or hobby)*, para. 2, <https://www.faa.gov/uas/faqs/>.

²⁸ *United States v. Causby*, 328 U.S. 256, 263 (1946).

²⁹ *Id.* at 258.

³⁰ *Id.* at 266.

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FAR Part 107 - Highlights

Operations

- Non-recreational use
- Less than 55 lbs.
- Max airspeed of 87 knots
- Max altitude of 400' AGL
- Min visibility of 3 miles from control station
- Flown within VLOS of PIC and Operator
- No operations over people
- Daylight or civil twilight only
- Must yield right-of-way
- Requires "Authorization" for controlled airspace
- Requires preflight inspection
- One PIC per aircraft
- No ops from moving aircraft
- No ops from moving vehicle except sparsely populated areas
- No reckless/careless operations
- Waiverable rules

Reporting Requirements

- Must provide UA to FAA for inspection upon request
- Must notify FAA* within 10 days if:
 - Serious injury
 - Loss of consciousness
 - Property damage >\$500

Pilots

- RPC with small UAS Rating
- Min 16 years old
- If Part 61:
 - Flight review in previous 24 months
 - Online training
- If not Part 61:
 - Knowledge test
- No practical experience required
- No practical demonstration required



Aircraft Certification

- Aircraft must be registered
- No airworthiness standards
- No airworthiness certificate
- Remote Pilot must:
 - Ensure UA is safe for flight
 - Perform preflight inspection
 - Verify UA is functioning properly—Operational Check

ACRONYMS*

- AGL – above ground level
- PIC – pilot in command
- RPC – remote pilot in command
- UA – unmanned aircraft
- UAS – unmanned aerial system
- VLOS – visual line-of-sight
- VO – visual observer

Information courtesy of Professor Joe Serrata, Embry-Riddle Aeronautical University, with changes noted by *, taken from 14 CFR 107.

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A good place to find the latest on state UAS law is on the **website** of the National Association of Criminal Defense Lawyers (NACDL), specifically NACDL's Domestic Drone Information Center.

to zealously protect federal rights to regulate aviation, primarily through the authority of the FAA.³¹ This includes regulation of safety, licensing, and national airspace, among other areas.³² In theory, States and local governments have little legal authority to regulate airspace above their jurisdictions.³³ These rights are even more limited with regard to regulation of the operation of UAS,³⁴ especially since FAA rules now govern the operation and use of UAS from ground level to 400 feet and above.³⁵ But this has not stopped state governments from attempting to regulate UAS outside of these specific areas.³⁶

Currently, most state regulation of UAS relates to the protection of individual privacy; that is, regulating when and how UAS can be used to record images of individuals.³⁷ There are, however, a number of States that have adopted “time, place, and manner” laws and regulations for UAS use.³⁸ It is these laws and regulations

that most concern the FAA.³⁹ The FAA recommends state and local consultation with the FAA about the creation of any state or local law or regulation creating operational UAS restrictions regarding altitude, flight paths, area bans, and navigable airspace regulation, and equipment or training for UAS related to aviation safety.⁴⁰

A good place to find the latest on state UAS law is on the website of the National Association of Criminal Defense Lawyers (NACDL), specifically NACDL's Domestic Drone Information Center.⁴¹ The site contains a state-by-state list of laws related to several subject areas, including enacted laws and active legislation.⁴² For example, Texas has legislated prohibitions on flying UAS over critical infrastructure.⁴³ A complete survey of the current state laws and regulations of UAS is beyond the scope of this article. However, it is important that Air Force legal practitioners understand whether state laws and regulations, including local ordinances, exist near

³¹ Daniel Friedenzohn & Mike Branum, *Unmanned Aircraft Systems and Technologies: Challenges and Opportunities for States and Local Governments*, 10 FLA. INT'L UNIV. L. REV. 389, 391 (2015).

³² See FED. AVIATION ADMIN., *What We Do*, <https://www.faa.gov/about/mission/activities/> (last visited 21 May 2017).

³³ Richard M. Tast, *Unmanned Aerial Systems: Domestic Statutory Issues*, 93 NEB. L. REV. 773, 789 (2015).

³⁴ *Id.* at 790.

³⁵ See *Summary of Small Unmanned Aircraft Rule (Part 107)*, *supra* note 21.

³⁶ See, e.g., Friedenzohn & Branum, *supra* note 31, at 393-400.

³⁷ Dawn M.K. Zoldi, *Drones at Home: Domestic Drone Legislation—A Survey, Analysis and Framework*, U. MIAMI NAT'L SEC. & ARMED CONFLICT L. REV. 48, 50 (2014).

³⁸ *Id.* at 61.

³⁹ See FED. AVIATION ADMIN., *FAA Issues Fact Sheet on State and Local UAS laws* (17 December 2015), <https://www.faa.gov/news/updates/?newsId=84369>.

⁴⁰ See FED. AVIATION ADMIN. OFF. OF THE CHIEF COUNS., *State and Local Regulation of Unmanned Aircraft Systems (UAS) Fact Sheet*, at 3 (17 December 2015), https://www.faa.gov/uas/resources/uas_regulations_policy/media/uas_fact_sheet_final.pdf.

⁴¹ See NAT'L ASS'N OF CRIM. DEF. LAWYERS, *Domestic Drone Information Center*, <https://www.nacdl.org/domesticdrones/billmap> (last visited 21 May 2017).

⁴² NAT'L ASS'N OF CRIM. DEF. LAWYERS, *DDIC Bill Map*, <https://www.nacdl.org/usmap/news/27169/39138/d/> (last visited 21 May 2017).

⁴³ TEX CODE ANN. § 423.0045 (2016).



Despite UAS **rules for use**, the increasing number of UAS in operation and advances in technology create greater and greater potential for **interference with base and air operations** as a consequence of ever-increasing UAS hobby and business use.

Air Force bases in states within the U.S. to properly advise commanders and policy makers. This necessarily includes knowledge of any local country regulations near U.S. air bases overseas.

SO WHY DOES THIS MATTER TO AIR FORCE LEGAL PRACTITIONERS?

As is generally understood in aviation, laws and rules have great value in mitigating and, hopefully, preventing accidents, mishaps, or other negative outcomes. Of course, laws and regulations that serve preventative purposes are not always successful. It is becoming increasingly clear that despite UAS rules for use, the increasing number of UAS in operation and advances in technology create greater and greater potential for interference with base and air operations as a consequence of ever-increasing UAS hobby and business use.⁴⁴

This was expected. Even as the new UAS rules were being debated, the FAA envisioned that the number of UAS operating in the national airspace would “operate well beyond the operational limits proposed” in the rule.⁴⁵ As in all of aviation, errors and mistakes happen, and potential UAS mishaps are no exception. In the latest FAA report, UAV sightings to air traffic control facilities continued

⁴⁴ See BBVA INNOVATION CENTER, *supra* note 13.

⁴⁵ Operation and Certification of Small Unmanned Aircraft Systems, 80 FED. REG. 9544, 9552 (proposed 23 February 2015) (to be codified at 40 C.F.R. pt. 107), <https://www.regulations.gov/document?D=FAA-2015-0150-0017>.

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to increase during 2016, with 1,274 reports from February through September, an increase from 874 during the same period the year prior. The vast majority of UAS operators are hobbyists,⁴⁶ but even if licensed and trained, the mere proliferation of UAS raises risk. Therefore, knowledge of laws that regulate and govern responses where prevention has failed is also important.

ALLIED PARTNER NATIONS FACE THE SAME THREAT

Besides the United States, there are numerous nations⁴⁷ that have also regulated UAS in some form.⁴⁸ As is the case in the U.S., the dangers of UAS use is increasingly understood.⁴⁹ Two representative U.S. allies provide a good representation of the other legal responses to UAS.

Japan

On 22 April 2015, a UAV containing small amounts of radiation landed on the roof of the Japanese Prime Minister's Office.⁵⁰ Prior to that

time, the focus in the Japanese legal community seemed to be on the legal regime governing the use of UAS in international airspace and within territorial seas, primarily from China.⁵¹ For example, in reviewing the state of Japanese law and UAS, the emphasis was on foreign use of UAS during acts of aggression.⁵² Japanese public concern was similar, with numerous articles published on the Chinese drone threat, especially near disputed territories.⁵³

However, senior legal officials within the Japanese Self Defense Force (JSDF) foresaw potential threats from UAS use within the Japanese mainland and asked U.S. Forces representatives in Japan to meet and discuss possible legal and operational approaches to countering this emerging threat.⁵⁴ In March 2015, military officials from JSDF and U.S. Forces Japan met to discuss options,

just one month prior to the April 2015 incident.⁵⁵ That incident was a wake-up call for Japanese authorities of the potential dangers of drones, including in possible terror attacks.⁵⁶

Implementation of Japan's first regulation of UAS occurred on 9 December 2015,⁵⁷ and the rules are basic. The Japanese UAS law requires UAS operators to get government approval to fly over densely populated areas, events, or near airports. UAS operators also must have 10 hours of experience flying the UAS to exercise these privileges.⁵⁸

United Kingdom

Attention to UAS in the United Kingdom (UK) is also very high. UAS regulations in the UK are contained in the country's current Air Navigation Order.⁵⁹ Under the Order, there is virtually no regulation for a UAV weighing under seven kilograms except a requirement to maintain visual contact with the UAV and operate it so as to "not endanger persons or property."⁶⁰ A

⁴⁶ Press Release, *FAA Registered Nearly 300,000 Unmanned Aircraft Owners*, FED. AVIATION ADMIN. (22 January 2106), https://www.faa.gov/news/press_releases/news_story.cfm?newsId=19914. Nearly 300,000 UAS owners registered with the FAA in the first month of its new registration system.

⁴⁷ For purposes of this article, the author uses the term "states" to refer to one or more of the 50 U.S. states, and "nations" to refer to foreign states.

⁴⁸ See, e.g., LAW LIBR. OF CONG., *REGULATION OF DRONES 1* (2016), <https://www.loc.gov/law/help/regulation-of-drones/regulation-of-drones.pdf>.

⁴⁹ See *id.*

⁵⁰ *Drone 'Containing Radiation' Lands on Roof of Japanese PM's Office*, THE GUARDIAN (22 April 2015), <https://www.theguardian.com/world/2015/apr/22/drone-with-radiation-sign-lands-on-roof-of-japanese-prime-ministers-office>.

⁵¹ See, e.g., Hitomi Takemura, *Unmanned Aerial Vehicles: Humanization from International Humanitarian Law*, 32 WIS. INT'L L.J. 521, 521–522 (2014).

⁵² *Id.* at 523–525.

⁵³ See, e.g., Jonathan Kaiman and Justin McCurry, *Japan and China Step up Drone Race as Tension Builds Over Disputed Islands*, THE GUARDIAN (9 January 2013), <https://www.theguardian.com/world/2013/jan/08/china-japan-drone-race>; see also, Daniel Schearf, *Japan, China Territorial Tensions Rising Over Unmanned Drones*, VOA NEWS (31 October 2013), <http://www.voanews.com/a/japan-china-territorial-tension-rising-over-unmanned-drones/1780574.html>.

⁵⁴ This assertion is based on the author's professional experience as the U.S. Staff Judge Advocate for U.S. Forces Japan from July 2012 to July 2015. The former Legal Affairs General for the Japanese Self Defense (JSDF) Joint Staff, CAPT Seiji Kurosawa, called the author of this article to set up these detailed discussions, which both participated in on 11 March 2015. The Legal Affairs General within the JSDF is equivalent to the Legal Advisor to the Chairman of the Joint Chiefs of Staff in the U.S. Department of Defense.

⁵⁵ *Id.*

⁵⁶ See Yoshitaka Hirauchi, *Investigating Drone Timeline*, NHK WORLD NEWS (23 April 2015), <http://www3.nhk.or.jp/nhkworld/english/news/shoanalysis/20150423.html>.

⁵⁷ Television Broadcast, *Regulations on Drones Take Effect on Thursday*, NHK WORLD NEWS (9 December 2015) (on file with author).

⁵⁸ *Id.*; see also, LIBR. OF CONG., *GLOBAL LEGAL MONITOR, Japan Current State of Unmanned Aerial Vehicle (UAV) Regulation* (citing Aviation Act art. 132, as amended by Act No. 67 of 2015), <http://www.loc.gov/law/foreign-news/article/japan-current-state-of-unmanned-aerial-vehicle-uav-regulation/>.

⁵⁹ The Air Navigation Order 2016 (SI 2016 No 765), Art. 94, <http://www.legislation.gov.uk/uksi/2016/765/contents/made>

⁶⁰ *Id.*

UAS threats

to Air Force operations can come in two forms: unintentional and intentional.

UAV weighing over seven kilograms must remain within 400 feet of the ground and UAS operators must have permission from air traffic control to operate in controlled airspace.⁶¹ Additionally, if the UAV is equipped for data surveillance, it may not fly within or over any congested area or open-air assembly of more than 1000 people, or within 50 meters of a vessel or person.⁶²

However, as noted above, the existence of these rules has not prevented all UAS incidents. Despite the UK's UAS regulations, there have been numerous incidents of a UAV flying dangerously close to commercial aircraft in the UK with the number of near misses involving aircraft and a UAV quadrupling in 2015 from the prior year.⁶³ As an example, on 18 July 2016, an A320 Airbus aircraft on approach to Heathrow International Airport nearly collided with a UAV at an altitude of 4,900 feet when the UAV passed over its right wing.⁶⁴ It was the third such

near miss for aircraft approaching Heathrow for landing.⁶⁵

The UK Airprox Board, which is comprised of members of the UK Civil Aviation Authority and Military Aviation Authority, as well as members from air traffic control, commercial air transport, and general aviation⁶⁶ is increasingly concerned. Air proximity incidents involving a UAV are rapidly becoming more common as the numbers of proximity reports involving a UAV accelerates.⁶⁷ Members from the Royal Air Force and the U.S. Air Force are equally concerned about such incidents near or over military airfields within the UK. For example, in the UK, "Tailspotting" is a popular pastime, often involving dozens of individuals with sophisticated camera equipment congregating at the ends of active military runways in a bid to capture photographs of US and UK military aircraft operating out of Royal Air Force bases.⁶⁸ It's easy to imagine that the capability to get high quality photographs from a UAS is an attraction that could lead to potential incidents.

⁶¹ *Id.*, art. 94(4)(c).

⁶² *Id.*, art. 95.

⁶³ See Meenal Dhande, *The Current Scenario of Global Drone Regulations and Laws*, GEO SPATIAL WORLD (19 November 2016), <https://www.geospacialworld.net/article/present-global-drone-regulations-laws/>.

⁶⁴ *Passenger Plane Approaching Heathrow 'in Near-miss with Drone 650ft to the East of the Shard'*, THE TELEGRAPH (17 November 2016), <http://www.telegraph.co.uk/news/2016/11/17/passenger-plane-approaching-heathrow-had-near-miss-with-drone-650/>; see also, Robin Perrie, *DRONE DISASTER DODGED: Major Air Disaster Narrowly Averted Over London After Drone Nearly Collides with Passenger Plane Near the Shard*, THE SUN (16 November 2016), <https://www.thesun.co.uk/news/2200187/major-air-disaster-narrowly-averted-over-london-after-drone-nearly-collides-with-passenger-plane-near-the-shard>.

⁶⁵ *Id.*

⁶⁶ See THE UK AIRPROX BOARD, <https://www.airproxboard.org.uk/Learn-more/About-us/>.

⁶⁷ See, e.g., *Monthly Airprox reviews*, THE UK AIRPROX BOARD, <https://www.airproxboard.org.uk/Reports-and-analysis/Monthly-summaries/Monthly-Airprox-reviews/>.

⁶⁸ This article's author has observed small and large groups of "tailspotters" with sophisticated camera equipment at the ends of the runways at RAF Lakenheath and RAF Mildenhall on numerous occasions between July 2015 and March 2017.

MITIGATING THE THREAT— BEING LEGALLY PREPARED

Whatever the potential cause of a UAS incident near or on an Air Force installation in the U.S. or overseas, Air Force legal practitioners need to be prepared to deal with the possibility. As outlined above, incidents are occurring more frequently and with greater potential consequence. UAS threats to Air Force operations can come in two forms: unintentional and intentional. Of course, in both cases, prevention is the best approach, but preparation for post-incident response must also occur, both in security preparedness and in legal preparedness.

Unintentional Threats to Operations

Unintentional threats entail accidental UAS use and trespass over or into air bases despite laws and regulations. This can occur from UAS operators flying a UAV unknowingly near or over Air Force installations. However, a more probable situation is the desire of the public to see Air Force air operations. The ease with which UAS can now be operated and the high-quality imaging equipment available on UAS likely make Air Force air bases and other airports tempting targets for UAS operators.

On the legal front, issues of potential liability should be of special concern. Potential UAS incidents could involve a collision with Air Force aircraft, UAV guidance failure, or accidental operational failure over air bases resulting in damage to infrastructure

or injury to persons on the ground. Thus, if not already happening, Air Force lawyers should ensure that UAS issues are being discussed as part of the AICUZ or other similar forum at bases in the U.S.,⁶⁹ or in similar forums at overseas locations. Close cooperation with local authorities in planning for prevention of trespass or overflight of Air Force facilities is crucial to mitigate the risk of potential accident from both commercial and hobbyist UAS operators.

Legal deterrence as a result of incursions or accidents must also be considered. Where violations of the UAS rules do occur, Air Force lawyers should be proactive in cooperating with local and base law enforcement authorities in collecting evidence for potential prosecution, whether within the U.S. or overseas. This includes potential prosecution for trespass into areas of exclusive or concurrent federal jurisdiction under the Federal Assimilative Crimes Act⁷⁰ by Air Force judge advocates or civilian attorneys appointed as Special Assistant United States Attorneys.⁷¹

⁶⁹ See AFI 32-7063, AICUZ, *supra* note 6.

⁷⁰ 18 U.S.C. § 13 (1996). The Assimilative Crimes Act makes state criminal law applicable to conduct occurring on lands reserved or acquired by the Federal government as provided in 18 U.S.C. § 7(3) (1994), when the act or omission is not made punishable by an enactment of Congress. See U.S. DEP'T OF JUSTICE, CRIMINAL RESOURCES MANUAL § 667. Assimilative Crimes Act, 18 U.S.C. § 13 (1996), <https://www.justice.gov/usam/criminal-resource-manual-667-assimilative-crimes-act-18-usc-13>.

⁷¹ 28 U.S.C. § 543 (2010) (providing for Special Assistant U.S. Attorneys); see also U.S. DEP'T OF AIR FORCE, INSTR. 51-905, USE OF MAGISTRATE JUDGES FOR TRIAL OF MISDEMEANORS COMMITTED BY CIVILIANS, para. 2.3 (30 September 2014).

Intentional Threats to Operations

A far more difficult problem for the Air Force to overcome is the intentional UAS threat to operations near or on air bases. Intentional threats entail deliberate UAS use and trespass into air bases where laws and regulations are insufficient to prevent. Preparation for operational responses and their legal consequences must be robust.

History has demonstrated that intentional base incursions can occur suddenly and at great cost. As an example, on 31 January 1981, long before the era of UAS, members of a Puerto Rico independence group were able to cut through a fence and quickly destroy eight fighter aircraft.⁷² The potential threat of similar types of incidents from UAS is more pronounced and growing, especially in the area of terrorism. In January 2017, the Islamic State released on social media images of commercially available drones adapted for dropping small bombs on Iraqi military targets with pinpoint accuracy and devastating results.⁷³ These UAS vehicles are simply airborne delivery platforms for improvised explosive devices.⁷⁴

⁷² See Harold Lidin, *Terrorists in Puerto Rico Destroy Guard Jets*, WASH. POST (13 Jan. 13 1981), <https://www.washingtonpost.com/archive/politics/1981/01/13/terrorists-in-puerto-rico-destroy-guard-jets/70ed9e1e-2b4b-475d-b54b-8ae393a8a01f>.

⁷³ Rowan Scarborough, *How ISIS-controlled drones like this are striking new fear within the U.S. military*, WASH. TIMES (24 January 2017), <http://www.washingtontimes.com/news/2017/jan/24/isis-drone-dropping-precision-bombs-alarms-us-mili/>.

⁷⁴ *Id.*; see also, *ISIS Weaponized Drone Usage*, YOUTUBE (24 January 2017), <https://www.youtube.com/watch?v=7X2ORSIPJ10>.

It is **not just terrorist groups** that are the threat. According to a recent report out of the United Kingdom, the **potential threat** from UAS is also from organized crime groups, lone-wolf actors, and even corporations engaging in industrial spying or espionage.

It is not just terrorist groups that are the threat. According to a recent report out of the United Kingdom, the potential threat from UAS is also from organized crime groups, lone-wolf actors, and even corporations engaging in industrial spying or espionage.⁷⁵ Of course, in all cases, the first line of defense must be regulatory countermeasures. These can include not only the creation of civil aviation rules as noted above, but can also include point-of-sale restrictions and manufacturing restrictions.⁷⁶ Much like some gun purchase laws, point-of-sale restrictions could include identification requirements for purchase.

For circumstances where legal measures fail, detection and other counter-UAS measures must also be examined. The FAA is currently evaluating UAV detections systems around Denver International Airport as part of six future technical evaluations that will also include Atlanta, Eglin Air Force Base, and Dallas, among others.⁷⁷ The FBI is also testing a detection system at JFK airport in New York.⁷⁸

U.S. military officials are taking note. Citing unauthorized flights of UAS over Navy and Air Force installations, Air Force General John E. Hyten, the commander of U.S. Strategic Command, recently testified before Congress of the growing threat to the safety and security of nuclear weapons and personnel,⁷⁹ and testified that both the Air Force and Navy are working to design counter-UAS systems that can effectively detect and potentially engage small UAS.⁸⁰ Despite efforts, detecting intentional or malicious UAS users may be difficult. Some current small UAS can operate an amazing seven kilometers from the operator.⁸¹

Private industry is getting involved too. Manufacturing restrictions for UAS can include building “no-fly” zones into the UAS firmware and creation of device limits on carrying capacity and range from the UAS controller. A more common solution for the UAS manufacturer is adding “geofencing” software or firmware to the UAS system. Geofencing basically prevents the UAS from taking off or operating in restricted airspace, as

⁷⁵ See THE REMOTE CONTROL PROJECT, *Hostile Drones: The Hostile Use of Drones by Non-State Actors against British Targets*, 12–13 (January 2016), http://remotecontrolproject.org/wp-content/uploads/2016/01/Hostile-use-of-drones-report_open-briefing.pdf.

⁷⁶ *Id.* at 14.

⁷⁷ See *FAA Evaluates Drone Detection Systems Around Denver*, FED. AVIATION ADMIN. (16 November 2016), <https://www.faa.gov/news/updates/?newsId=86869>.

⁷⁸ See *FAA Tests FBI Drone Detection System at JFK*, FED. AVIATION ADMIN., (1 July 2016), <https://www.faa.gov/news/updates/?newsId=85546>.

⁷⁹ See Bill Gertz, *Drones Threatened Nuclear Facilities*, WASH. TIMES (8 March 2017), <http://m.washingtontimes.com/news/2017/mar/8/inside-the-ring-drones-threatened-nuclear-faciliti/>.

⁸⁰ *Id.*

⁸¹ See Douglas James, *15 Drones with the Longest Control Range*, DRONESGLOBE (5 January 2017), <http://www.dronesglobe.com/guide/long-range-drones/>. One such drone is the DJI Inspire 2, which retails from around \$3000. *Id.*; see also, CNET, *Hands on with DJI's Better, Faster \$3,000 Inspire 2 Drone* (17 November 2016), <https://www.cnet.com/products/dji-inspire-2/preview/>.

programed by the manufacturer.⁸² Although geofencing appears to have great promise, the systems are far from fool-proof, however.⁸³ Of even more concern is that some manufacturers are adding geofencing system bypasses into their software. This includes DJI, a Chinese company and the largest manufacturer of UAS.⁸⁴ The opt-out system does contain an identification feature that allows the company to provide user information to authorities for UAS misusers,⁸⁵ but that seems unlikely to dissuade the most determined intentional misuser, however.

Another company, CACI, has created a system called Skytracker that can construct a perimeter boundary around facilities to physically detect UAS. The system also detects where the operator is located, which may be critical, especially for intentional UAS intrusions.⁸⁶ The FAA began testing Skytracker in 2016.⁸⁷

⁸² See Tim Moynihan, *Things Will Get Messy if We Don't Start Wrangling Drones Now*, WIRE (30 January 2016), <https://www.wired.com/2016/01/things-will-get-messy-if-we-dont-start-wrangling-drones-now/>.

⁸³ *Id.*

⁸⁴ See Leo Kelion, *DJI Drones Gain Geofencing Safety Feature Opt-out*, BBC NEWS (5 July 2016), <http://www.bbc.co.uk/news/technology-36717538>.

⁸⁵ *Id.*

⁸⁶ See CACI, *Skytracker UAS Solution*, <http://www.caci.com/Skytracker/Solutions.shtml> (last visited 31 March 2017).

⁸⁷ See Unmanned Systems Technology, *FAA Tests SkyTracker's UAS Tracking Capabilities*, UNMANNED SYSTEMS NEWS (23 February 2016), <http://www.unmannedsystemstechnology.com/2016/02/faa-tests-skytrackers-uas-tracking-capabilities/>.

For Air Force legal professionals, understanding how counter-measures may operate is important in preparing for legal challenges to potential Air Force use of such measures, as well as legal responses where use of counter-measures could result in potential damage to persons or property. Should more advanced physical counter measures be developed, such as electronic fencing, or kinetic counter-measures, potential tort and claims liability from such operations must be considered.

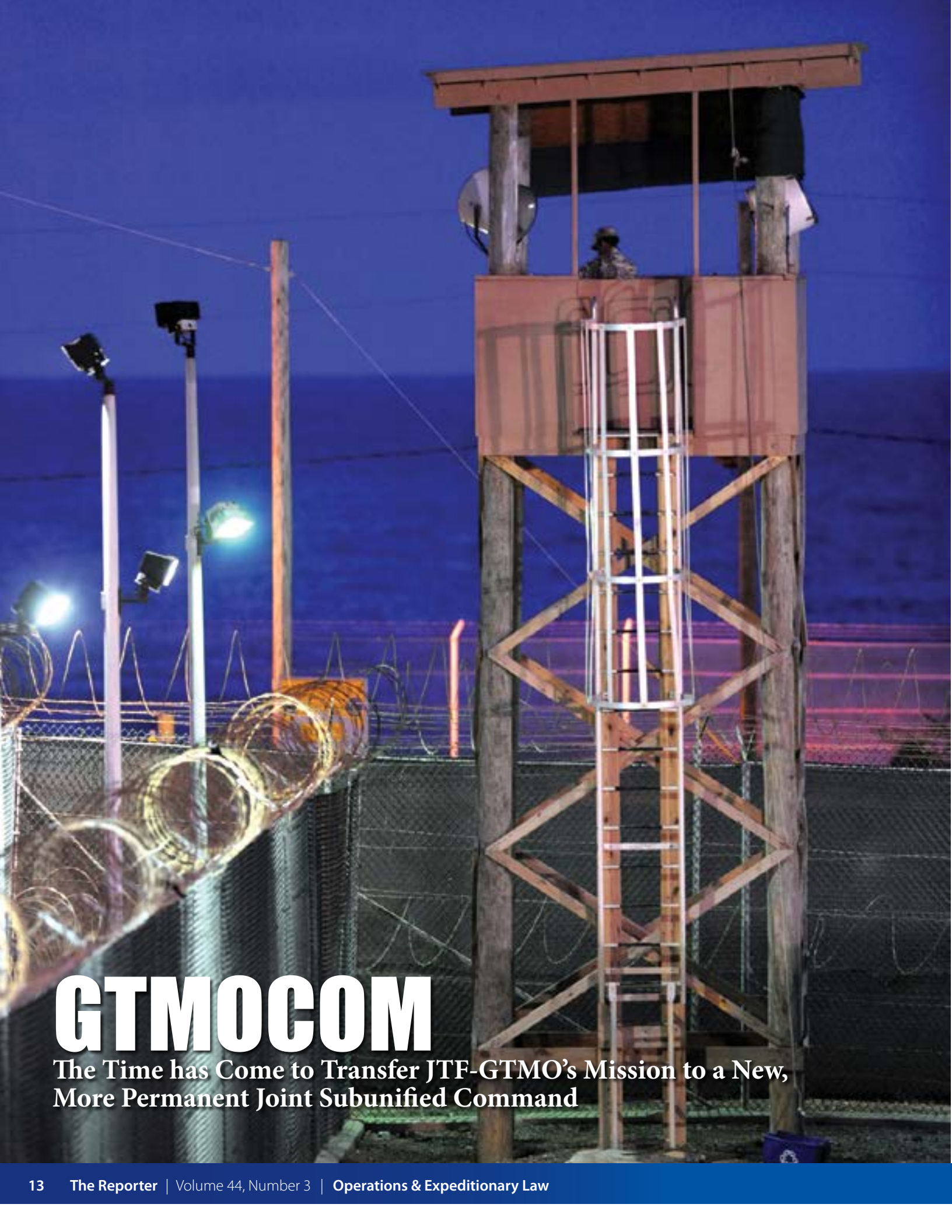
THE WAY FORWARD

Air Force JAGs and legal professionals must be aware of the growing and changing UAS industry. Potential effects on present and future Air Force operations are significant. Our legal community must be prepared to assist commanders and policy makers with an understanding of current federal and state laws and regulations surrounding UAS use within the U.S., and similar laws in host nations. An understanding of the limits of the law in preventing accidental or intentional UAS use near or over air bases is also critical. It's time to pay more attention to this major technological and legal challenge. **R**



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GTMOCOM

The Time has Come to Transfer JTF-GTMO's Mission to a New, More Permanent Joint Subunified Command

News articles and scholarly papers emphasized human rights issues, customary international law, domestic constitutional law, and fiscal considerations in arguing for the closure of GTMO.

Much has been written about the proposed closure of the detention facilities at Guantanamo Bay, Cuba (hereinafter “Guantanamo Bay” or “GTMO”). Detainee operations at GTMO are conducted by Joint Task Force Guantanamo (JTF-GTMO), a joint force composition under the combatant command, United States Southern Command (SOUTHCOM). During former President Barack Obama’s tenure in the White House, it appeared as though JTF-GTMO would, in fact, eventually wind down and shutter its operations. Learned scholars from both the private sector and within the Department of Defense (DoD) pontificated about the possible alternatives to the United States’ Guantanamo Bay detainee operations. News articles and scholarly papers emphasized human rights issues, customary international law, domestic constitutional law, and fiscal considerations in arguing for the closure of GTMO. However, with a new President in the White House and a supportive legislature, the tone concerning Guantanamo Bay has drastically changed. It does not appear that GTMO will be closing anytime soon.

This article explores what most previous authors have neglected to address—namely, the notion that our military leaders could consider an alternative to the joint task force structure in favor of a more long-

term military solution under joint doctrine. In short, this article recommends that the mission performed by JTF-GTMO be transferred to a new, subunified command under SOUTHCOM, and that the existing joint task force be disestablished.

HISTORY OF JOINT TASK FORCE GUANTANAMO

DoD has continuously been conducting detainee operations at Guantanamo Bay since 2002.¹ Shortly after the 9/11 attacks on the United States, a number of detainees captured in Afghanistan were transferred to Guantanamo and held at Camp X-Ray.² Prior to housing these captured detainees, Camp X-Ray had been used to hold migrants fleeing other Caribbean nations; it was a preexisting facility.³ Guantanamo Bay “was originally intended to serve as a temporary holding facility for Al Qaida, Taliban, and other detainees that came under U.S. control during the War on Terrorism.”⁴ SOUTHCOM, the combatant command for the geographic area

¹ *Mission Overview*, JOINT TASK FORCE GUANTANAMO (Feb. 2, 2017) [hereinafter *JTF-GTMO Mission*], <http://www.jtfgtmo.southcom.mil/About-Us/Fact-Sheets/> (“The JTF began operations in early 2002 to detain individuals who were captured on the battlefield for engaging in or conspiring to engage in terrorist activities.”).

² Colonel Donnie L. Thomas, *Joint Task Force-Guantanamo Bay, Cuba: Open or Close?*, U.S. ARMY WAR C. STRATEGY RES. PROJECT (2013), <http://www.dtic.mil/get-tr-doc/pdf?AD=ADA590370>, at 6.

³ *See id.*

⁴ *Id.*

How did JTF-GTMO become a never-ending “temporary” task force without being phased into a more structured, permanent organization or having its mission transferred to another organization within DoD?

encompassing Guantanamo Bay, was in charge of the newly established detainee operations.⁵

In January 2002, SOUTHCOM activated Joint Task Force 160 (JTF-160) with both active duty and reserve component military members from the Army, Air Force, Marines and Navy.⁶ The majority of JTF-160 was comprised of military police.⁷ JTF-160’s mission was to care for the enemy combatants who were captured during the War on Terrorism. It further supported Joint Task Force 170 (JTF-170), which SOUTHCOM established on 16 February, 2002 to coordinate DoD’s and other government agencies’ interrogation efforts in support of Operation ENDURING FREEDOM.⁸ JTF-170 served as DoD’s primary interrogation operations command in the region.⁹

Only ten months after the establishment of JTF-160, on 4 November 2002, both JTF-160 and JTF-170 were merged to form JTF-GTMO, which is the same joint task force in existence and operation today.¹⁰ Camp X-Ray closed, but JTF-GTMO continued detainee operations at Camp Delta.¹¹ Today, there are 41 detainees held at camps within

Guantanamo Bay, down from a peak population of 684 in 2003.¹² The declared mission of JTF-GTMO is to conduct the “safe, humane, legal and transparent care and custody of detainees, including those convicted by military commission.”¹³

JTF-GTMO has been the only task force at Guantanamo Bay conducting detainee operations around the clock since its formation in November 2002. In 2012, an author at the Naval War College who criticized JTF-GTMO as having an “ill-defined organizational structure” identified that, “although JTF’s are meant, by doctrine, to be temporary, unfunded organizations, this one has lasted in excess of ten years.”¹⁴ That was four years ago. JTF-GTMO has now been operating for just shy of fifteen years. How did JTF-GTMO become a never-ending “temporary” task force without being phased into a more structured, permanent organization or having its mission transferred to another organization within DoD? It is clear that partisan politics led to the uncertainty of JTF-GTMO’s fate during the Obama years.

⁵ See *id.*; see also *Area of Responsibility*, U.S. SOUTHERN COMMAND, <http://www.southcom.mil/About/Area-of-Responsibility/> (last visited Apr. 19, 2017).

⁶ Thomas, *supra* note 2, at 6.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ See *id.*

¹² *Guantanamo Bay Naval Station Fast Facts* (2017), CNN, <http://www.cnn.com/2013/09/09/world/guantanamo-bay-naval-station-fast-facts/> (last updated Apr. 7, 2017).

¹³ *JTF-GTMO Mission*, *supra* note 1.

¹⁴ Major Jamison D. Braun, *JTF-GTMO: A 10-year Relook*, U.S. NAVAL WAR C. PAPER, at 2, 6 (2012), <http://www.dtic.mil/dtic/tr/fulltext/u2/a563766.pdf>.

PRIOR ADMINISTRATION'S POSITION ON CLOSURE OF GTMO

Until recently, the Executive branch only supported JTF-GTMO's existence in the context of a temporary operation. In other words, the former Commander in Chief and the Obama Administration favored the closure of Guantanamo Bay; therefore, military leaders presumably refrained from permanency planning for JTF-GTMO. During President Obama's terms in office, the official posture of the Administration was that detainee operations at Guantanamo Bay would wind down and eventually be shuttered.

In fact, then President Obama felt so strongly about GTMO's closure, he incorporated his position into the official National Security Strategy document. First, in 2010, the document asserted, "[t]o deny violent extremists one of their most potent recruitment tools, we will close the prison at Guantanamo Bay."¹⁵ In his successive term, Obama again reaffirmed his intent to close Guantanamo Bay in his revised 2015 National Security Strategy document. He declared "[w]e have transferred many detainees from Guantanamo Bay, and we are working with Congress to remove the remaining restrictions on detainee transfers so that we can finally close it."¹⁶ Under President Obama, the

¹⁵ Barack Obama, *National Security Strategy of the United States: the White House* at 22 (May 2010), <http://nssarchive.us/NSSR/2010.pdf>.

¹⁶ Barack Obama, *National Security Strategy*

only impediment to the cessation of detainee operations at Guantanamo Bay appeared to be the Congress which, for years during his tenure, passed legislation in the form of the annual defense spending bill—the National Defense Authorization Act (NDAA)—which restricted the use of taxpayer funds to transfer or release detainees, or to construct or modify any facilities on U.S. soil that could be used to house GTMO detainees.¹⁷

CURRENT ADMINISTRATION'S POSITION ON MAINTAINING JTF-GTMO'S OPERATIONS

The political landscape shifted dramatically in November 2016 with the election of Donald J. Trump. Whatever uncertainty there was over JTF-GTMO's future now looks settled. Detainee operations are not going away in the foreseeable future. The same Congress that restricted President Obama from permanently terminating JTF-GTMO now

of the United States: the White House at 19-20 (February 2015), at 19-20, <http://nssarchive.us/wp-content/uploads/2015/02/2015.pdf>.

¹⁷ See, e.g., National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, <https://www.gpo.gov/fdsys/pkg/PLAW-112publ239/pdf/PLAW-112publ239.pdf>; National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 133-16, <https://www.gpo.gov/fdsys/pkg/CRPT-113hrpt102/pdf/CRPT-113hrpt102.pdf>; Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 133-291, <https://www.gpo.gov/fdsys/pkg/CPRT-113HPRT92738/pdf/CPRT-113HPRT92738.pdf>; National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92, <https://www.gpo.gov/fdsys/pkg/CPRT-114JPRT97637/pdf/CPRT-114JPRT97637.pdf>; National Defense Authorization Act of Fiscal Year 2017, Pub. L. No. 114-328, §§ 1032-1035, <https://www.gpo.gov/fdsys/pkg/CRPT-114hrpt840/pdf/CRPT-114hrpt840.pdf> [hereinafter "FY17 NDAA"].

enjoys ardent support from its new Executive. President Trump will almost certainly never veto legislation that restricts the use of funds to close Guantanamo Bay. On the contrary, as demonstrated *infra*, President Trump has actively sought funding that benefits JTF-GTMO. Everything he has said concerning Guantanamo Bay, from the campaign trail to the White House, reflects a position of more permanent detainee operations.

President Trump quickly reversed course from President Obama, expressing his intentions to keep Guantanamo Bay open. After the election, but before being sworn in, President-elect Trump wrote "[t]here should be no further released from Gitmo. These are extremely dangerous people and should not be allowed back onto the battlefield."¹⁸ Previously, while campaigning, President Trump even announced he would put more detainees in the facility.¹⁹ At a campaign rally, then candidate Trump decried President Obama's stance on Guantanamo Bay, saying, "I watched President Obama talking about Gitmo, right, Guantanamo Bay, which, by the way, we are keeping open. Which we are keeping open..."

¹⁸ Dan Lamothe, *Trump Says No More Detainees Should Be Released from Guantanamo Bay Prison*, Washington Post, Jan. 3, 2017), https://www.washingtonpost.com/news/checkpoint/wp/2017/01/03/trump-says-no-more-detainees-should-be-released-from-guantanamo-bay-prison/?utm_term=.dad59d64c4a (quoting President Trump's tweet at 12:20 PM on Jan. 3, 2017).

¹⁹ See Madeline Conway, *Trump sounds off on Gitmo: 'There should be no further releases'*, POLITICO (Jan. 3, 2017), <http://www.politico.com/story/2017/01/trump-guantanamo-bay-233133>.

and we're gonna load it up with bad dudes, believe me, we're gonna load it up."²⁰ In a Twitter post before taking office, he criticized President Obama's release of 122 detainees as "[j]ust another terrible decision!"²¹

As President, there has been no indication that Trump will change his campaign position. In fact, all actions to date—from press briefings to the Administration's requests for congressional appropriations—suggest that Guantanamo Bay is here to stay. Recently, speaking for the President at a daily press briefing, Press Secretary Sean Spicer answered a question on the status of Guantanamo Bay. He stated:

I don't have anything to announce with respect to its expansion or its use—expansion use. I think the President has commented on the importance of Guantanamo and the need to maintain that the people who are there are not people who seek to do anyone good. They're there for a reason, and he has no plans to close it, if that's what you're asking.²²

²⁰ William Finnegan, *President Trump's Guantanamo Delusion*, THE NEW YORKER (Mar. 9, 2017), <http://www.newyorker.com/news/daily-comment/president-trumps-guantanamo-delusion> (quoting then presidential candidate Donald Trump at an unidentified 2016 campaign rally).

²¹ *Id.*

²² Office of the Press Secretary, *Press Briefing by Press Secretary Sean Spicer*, THE WHITE HOUSE (Mar. 9, 2017) <https://www.whitehouse.gov/the-press-office/2017/03/09/press-briefing-press-secretary-sean-spicer>.

In another press briefing, Mr. Spicer conveyed that the President “believes that Guantanamo Bay does serve a very, very healthy purpose in our national security in making sure that we don't bring terrorists to our seas.”²³ Given the campaign promises of President Trump regarding GTMO, as well as the White House's official stance on JTF-GTMO's operations, the DoD would do well to emphasize joint planning for the longevity of Guantanamo's detainee operations. It is not only the President's message that compels analysis of transfer of JTF-GTMO's mission to a more permanent organization. Congress, too, has demonstrated a commitment to maintaining Guantanamo Bay and the JTF-GTMO mission there.

Before President Trump took office, Congress yet again loudly spoke on the matter by passing the National Defense Authorization Act for Fiscal Year 2017 (FY17 NDAA) in which it reflected congressional intent to continue detainee operations at Guantanamo Bay. As it had done for several years in a row, in the FY17 NDAA, Congress placed several funding restrictions related to Guantanamo Bay. First, it explicitly prohibited any funds from being used to transfer or release detainees.²⁴ Second, it proscribed the use of funds to construct or modify any facilities

²³ Office of the Press Secretary, THE WHITE HOUSE, *Press Briefing by Press Secretary Sean Spicer*, 2/21/17, #13, THE WHITE HOUSE (Feb. 21, 2017), <https://www.whitehouse.gov/the-press-office/2017/02/21/press-briefing-press-secretary-sean-spicer-2212017-13>.

²⁴ FY17 NDAA, *supra* note 17, at § 1032.

within the United States for the purpose of housing detainees transferred from Guantanamo Bay.²⁵ This restriction does not apply to construction or modification of any facilities at Guantanamo Bay.²⁶ Third, Congress disallowed any funds to be used for the transfer or release of detainees to Libya, Somalia, Syria or Yemen.²⁷ Finally, the FY17 NDAA plainly stated that “[n]o amounts authorized to be appropriated or otherwise made available for the Department of Defense for fiscal year 2017 may be used...to close or abandon United States Naval Station, Guantanamo Bay, Cuba[,]...to relinquish control of Guantanamo Bay to the Republic of Cuba,” or to modify the 1934 treaty between the United States and Cuba in a way that would constructively close Guantanamo Bay.²⁸

CONGRESSIONAL SUPPORT FOR CONTINUING JTF-GTMO'S MISSION

In the most recent NDAA, Congress also affirmatively appropriated significant funds for various military construction projects and energy conservation projects at Naval Station Guantanamo Bay, thereby enabling DoD to continue to spend on projects vital to the sustainment of GTMO's detention operations.²⁹ Despite voicing strong objection to the restrictions Congress placed on closing Guantanamo Bay, then

²⁵ *Id.* § 1033(a).

²⁶ *Id.* § 1033(b).

²⁷ *Id.* § 1034(1)-(4).

²⁸ *Id.* § 1035.(1), (2), and (3).

²⁹ *See id.* §§ 2101(b), 2402(b), 4601.

President Obama signed the FY17 NDAA into law because it contained many “vital benefits for military personnel and their families,” and provided “critical authorizations” needed to counter terrorist threats.³⁰ Hence came another year of congressional defense spending that focused, at least in part, on keeping the Guantanamo Bay detention facilities open and operational.

In addition to the NDAA signed by President Obama on the eve of the change in administrations (which already provided certain defense dollars for Guantanamo Bay projects), President Trump’s new White House quickly asked for even more congressional appropriations for GTMO. Now, the White House’s official budget requests specifically seek funds that would enhance operations and physical constructions projects at Guantanamo Bay for the benefit of detainee operations. These

³⁰ Office of the Press Secretary, *Statement by the President on Signing the National Defense Authorization Act for Fiscal Year 2017*, THE WHITE HOUSE (Dec. 23, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/12/23/statement-president-signing-national-defense-authorization-act-fiscal>. During his signing statement for the FY17 NDAA, President Obama remarked:

In February, my Administration submitted a comprehensive plan to safely and responsibly close the detention facility. Rather than answer that call and work with my Administration to finally bring this chapter of our history to a close, this bill aims to make the facility a permanent feature of our struggle against terrorism.... It is long past time for the Congress to lift the restrictions it has imposed, work to responsibly and safely close the facility, and remove this blot on our national honor. Unless the Congress changes course, it will be judged harshly by history.

Id.

actions signal a presidential resolve to keep the detention camps open and operational. In March 2017, the White House submitted its appropriations request for Fiscal Year 2017 to the Speaker of the House, which contained, *inter alia*, a request for \$1.1 billion in Department of Defense overseas contingency operations (OCO) funding. The Administration explained that the request “also includes planning and design of construction projects in support of Detention Operations at Guantanamo Bay, Cuba.”³¹

JOINT DOCTRINE GOVERNING JOINT TASK FORCE OPERATIONS

Joint Publication 1, which is “the capstone publication for all joint doctrine, presenting fundamental principles and overarching guidance for the employment of the Armed Forces of the United States,” provides the starting point for an analysis of whether JTF-GTMO, as it currently operates, is the appropriate mechanism for carrying out detainee operations in support of Operation ENDURING FREEDOM and the global war on terrorism.³² Joint Publication 1 explains how a joint task force is established. “[A] JTF is

³¹ Letter from President Donald J. Trump to Paul Ryan, Speaker of the House, re: FY2017 appropriations request, 16 March 2017 (enclosing 14 March 2017 letter from Mick Mulvaney, Director of Office of Management and Budget, to President Donald J. Trump), https://www.washington.edu/federalrelations/files/2017/03/Budget-amendment_03_16_18.pdf.

³² Joint Electronic Library, *The Joint Publications*, DEFENSE TECHNICAL INFORMATION CENTER, http://dtic.mil/doctrine/new_pubs/jointpub.htm (last visited Apr. 19, 2017).

a joint force that is constituted and so designated by SecDef, a CCDR, a subordinate unified commander, or an existing JTF commander.”³³ JTFs are typically established on either a geographical area or functional basis “when the mission has a specific limited objective and does not require overall centralized control of logistics.”³⁴ A JTF, according to joint doctrine, is viewed as a composition of forces performing a temporary mission. “The establishing authority typically establishes a JTF for a focused and temporary purpose....”³⁵ When that mission is complete, by either accomplishment or passage of time, the JTF should be disestablished. “The establishing authority dissolves a JTF when the purpose for which it was created has been achieved or when it is no longer required.”³⁶

Furthermore, Joint Publication 3-33, which specifically governs Joint Task Force Headquarters, charges the joint forces establishing authority with the responsibility of defining the joint operations area (JOA) “in terms of geography or time.”³⁷ The establishing authority is charged with preparing a directive that, among other things, “establishes the support relationships with amplifying instructions... [such

³³ JOINT CHIEFS OF STAFF, JOINT PUB. 1, DOCTRINE FOR THE ARMED FORCES OF THE UNITED STATES, at IV-10 (25 March 2013) [hereinafter “JP 1”], http://www.dtic.mil/doctrine/new_pubs/jp1.pdf.

³⁴ *Id.*

³⁵ JOINT CHIEFS OF STAFF, JOINT PUB. 3-33, TASK FORCE HEADQUARTERS, at I-4 (30 July 2012) [hereinafter “JP 3-33”].

³⁶ JP 1, *supra* note 32, at IV-10.

³⁷ JP 3-33, *supra* note 35, at I-2, Figure I-1.



Today, a **decade-and-a-half** into detainee operations, there is no indication that JTF-GTMO will serve a mere “temporary purpose.”

as the] time, place, and duration of the supporting effort...and authority for the cessation of support.”³⁸ Joint doctrine places much emphasis on geography and duration of time when determining when to disestablish a JTF or convert operations to an indefinite mission.

DETERMINING THE APPROPRIATE COMMAND AND CONTROL OPTION WHEN A JOINT TASK FORCE MISSION BECOMES MORE ENDURING

If the establishing authority finds that “the temporary circumstances that originally required joint operations may become more long-lasting,” he or she must decide on “the best option to accomplish a continuing requirement.”³⁹ There are several command and control (C2) options

³⁸ *Id.*

³⁹ *Id.* at I-4.

available to the establishing authority, some of which may be more suitable than continuing the JTF in its current state. Options include: (1) continuing the existing JTF’s mission for an indefinite period of time; (2) transition the JTF’s mission to another replacement JTF (this has been done at Guantanamo Bay in the past, when JTF-160 and JTF-170 merged to form JTF-GTMO); (3) assigning the mission to a military Service component headquarters when joint operations are not required to perform the particular mission; (4) transition the JTF’s operations to the control of a combatant command staff directorate if the focus is more on management of a long-term program rather than command and control of forces engaged in operations; or (5) the transition of the JTF to a multinational headquarters.⁴⁰ Before delving into the specifics of the checklist contained in Joint Publication 3-33 used to determine the best C2 option for a JTF, three of the above options can be dismissed.

First, JTF-GTMO’s mission should not be transitioned to yet another replacement joint task force. This occurred in November 2002 when JTF-160 and JTF-170 merged into JTF-GTMO. Because JTF-GTMO has been operating in its current state for almost fifteen years with no real changes in its mission, it does not

⁴⁰ *Id.* (“An example of a ‘permanent JTF’ is JTF NORTH in the United States Northern Command (USNORTHCOM) AOR. This JTF supports federal law enforcement agencies on a continuing basis in the identification and interdiction of suspected transnational threats within and along the approaches to the continental US.”).

make sense to transition the mission to another joint task force. Returning to basic joint doctrine, the whole premise behind a joint task force is that it is established for a “focused and temporary purpose.”⁴¹ Today, a decade-and-a-half into detainee operations, there is no indication that JTF-GTMO will serve a mere “temporary purpose.” Accordingly, transitioning the same exact mission to another joint task force, which would simply utilize the same military resources and assets as those currently used at Guantanamo Bay, runs counter to joint doctrine.

Second, JTF-GTMO’s operations should not simply be transitioned to a combatant command (CCMD)⁴² staff directorate. Joint Publication 3-33 explains that this option exists in cases where a JTF’s focus is more on management of a long-term program rather than command and control of forces engaged in operations.⁴³ Given the size and complexity of JTF-GTMO’s mission—thousands of uniformed military and civilian DoD personnel, a full complement of joint staff directorates, a medical mission, detention group mission, military commissions support mission, and even other federal agency professionals—a CCMD staff directorate would be ill-equipped to manage the actual day-to-day operations or control the

forces engaged in those operations. JTF-GTMO requires much more command and control over its operational forces than a CCMD staff directorate could provide. For this reason, transition of JTF-GTMO’s operations to a CCMD staff directorate is not a viable option.

Third, the option to transition JTF-GTMO to a multinational headquarters is arguably the least favorable option to the United States government. Given the sheer amount of negative publicity and attention—whether justified or not⁴⁴—that Guantanamo Bay has garnered in the international community, relinquishing this mission related to detainee operations to any non-U.S. governing body would be counterintuitive. Thus, even though “[a]s a law of war detention facility, [JTF-GTMO is] committed to the safe, humane, legal and transparent care and custody of all detainees...in accordance with the Geneva Conventions and [is] in compliance with all U.S. laws,”⁴⁵ it is highly doubtful that a multinational headquarters, such as the International Security Assistance Force (ISAF), would want to adopt JTF-GTMO’s mission in the first instance. More importantly, the Executive and Legislative branches

would probably never approve of this option. Accordingly, transitioning JTF-GTMO to a multinational headquarters is a poor option.

Having excluded three of the five options for determining the future of JTF-GTMO’s mission and operations, two alternatives remain which appear to be viable and worthy of further exploration. Specifically, the joint task force establishing authority, having ostensibly already made the determination that JTF-GTMO’s once-temporary mission has evolved into a more lasting one, should choose between either: (1) continuing the existing joint task force’s mission for an indefinite period of time via some appropriate organizational structure and mechanism; or (2) assigning the mission to one of the four military Service components because he or she finds that joint operations are not necessary to accomplish JTF-GTMO’s mission. The authors believe the first option would be the most appropriate, and suggest that a new, subunified command under SOUTHCOM could be the answer.

In choosing between the only two viable options for C2 of JTF-GTMO’s mission at Guantanamo Bay, the establishing authority must collaborate and work with the Commander of JTF-GTMO (CJTF), the CJTF’s subordinate JTF commanders, and other subject matter experts as needed to perform a comprehensive mission analysis based

⁴¹ *Id.*

⁴² JOINT CHIEFS OF STAFF, DICTIONARY OF MILITARY AND ASSOCIATED TERMS, at 275 (May 2017), http://www.dtic.mil/doctrine/new_pubs/dictionary.pdf (using the acronym “CCMD” for “combatant command”).

⁴³ JP 3-33, *supra* note 35, at I-4.

⁴⁴ See, e.g., Thomas, *supra* at note 2, at 12 (citing Joint Task Force-Guantanamo, *Fact Sheet-JTF Intelligence*, JOINT TASK FORCE-GUANTANAMO, 1 April 2012 (no longer available through JTF-GTMO) (“There have been no substantiated cases of ‘torture’ at Guantanamo. Additionally, contrary to popular opinion, water-boarding has never taken place at Guantanamo Bay.”).

⁴⁵ *JTF-GTMO Mission*, *supra* at note 1.

on future operational requirements.⁴⁶ In conducting this assessment, Joint Publication 3-33 contains a checklist that should be followed, with questions to be answered. Relevant “key questions” that need to be addressed before determining the best possible C2 option for more permanent detainee operations at Guantanamo Bay would include the following:

- a. What strategic guidance exists on the new mission or tasks?
- b. What is the new desired end state?
- c. What is the fundamental problem that must be solved to achieve the end state (the factors that must be addressed to move the current system to the desired system)?
- d. What is the new mission or set of tasks associated with the desired end state?
- e. Do mission analysis and a revised understanding of the operational environment and problem confirm that military presence and operations are required for the foreseeable future?
- f. Does the mission require joint operations?

g. If the mission requires joint operations, what level of joint HQ is required? [C]urrent JTF level, a higher joint HQ, or a subordinate JTF?

....

i. If the mission does not require joint operations, what Service component is most suited to assume the mission (i.e., will future operations be primarily land, air, or maritime in nature)?⁴⁷

Some of these questions are easily answered based on existing publicly available information. For example, as discussed *supra*, based on President Trump’s stated position, JTF-GTMO’s mission is expected to continue for the foreseeable future. Moreover, Congress for years has passed defense bills that ensure the longevity of detainee operations at Guantanamo Bay. Accordingly, military presence and operations are expected to be required on a more permanent basis.⁴⁸ Because JTF-

⁴⁷ *Id.* at A-A-1, A-A-2.

⁴⁸ The need to continue JTF-GTMO’s mission on a more permanent basis can be distinguished from an author’s argument to disband another SOUTHCOM joint task force, Joint Task Force Bravo (JTF-Bravo). In 1995, an article published in the Joint Forces Quarterly argued that JTF-Bravo’s mission could continue to be accomplished without JTF-Bravo’s continued existence in any form whatsoever. See First Lieutenant (1Lt) Scott M. Hines, *Standing Down a Joint Task Force*, JOINT FORCES QUARTERLY, Autumn/Winter 1994-95, at 111, <http://www.dtic.mil/dtic/tr/fulltext/u2/a529135.pdf>. While JTF-Bravo appears to be another example of a “temporary” SOUTHCOM task force that has outlived its useful life as a joint task

GTMO’s mission will continue, some of Joint Publication 3-33’s checklist questions require additional analysis by the CCMD, CJTF, JTF commanders, and experts. This planning group must determine whether there will be a new desired end state and, if so, ascertain what set of mission tasks is needed to achieve that end state. Such challenging questions will require military leaders to obtain significant guidance and direction from our political leaders. Still, other issues can be resolved by the team based on its working knowledge of how JTF-GTMO operates and the dictates of the JOA.

The authors’ understanding of the JTF-GTMO landscape leads them to conclude that the current mission does require joint operations. Therefore, they do not support the idea that one Service component should inherit the whole mission of JTF-GTMO. Even though at least

force organizational structure, the reasons for disestablishing JTF-Bravo are distinguishable from those in support of converting JTF-GTMO to a subunified command. See *generally id.* However, the authors in the present article agree with some of the arguments posited by 1Lt Scott Hines, which are supportive of the conversion of an essential joint task force mission (such as JTF-GTMO’s detainee operations) into a mission performed by a long-lasting subunified command. Specifically:

What is the message when a JTF is stood up in a crisis, then continued until political pressure terminates it? If DoD wants to exercise a degree of autonomy in choosing when to stand up JTFs, it must act responsibly by standing them down. To avoid the bureaucratic inertia arising in the case of JTF-B, standing down JTFs should be just as methodical a process as standing them up.

Id. at 113.

⁴⁶ JP 3-33, *supra* note 35, at A-A-1.

one military scholar has suggested that “the JTF could be disbanded and replaced with a single Army Military Police Brigade,” which might on its face appear logical due to the fact that the “Army is the executive agent for detention operations,”⁴⁹ there exist numerous additional peripheral “sub-operations”⁵⁰ (in support of the primary detention operations) performed by JTF-GTMO. Such a JOA creates the type of complexity that appears to exceed the Army’s resources if it were required to carry on JTF-GTMO’s operations alone. The joint contributions and expertise of the various detention group organizations, sub-organizations, staff directorates, military commissions support activities, and intra-agency partners, all tend to favor the selection of the option to continue joint operations. Transfer to one Service component is untenable. However, because GTMO’s joint operations should be implemented on a more permanent basis with a long-lasting C2 structure consistent with joint doctrine, the JTF structure must change. A subunified command under SOUTHCOM is the most pragmatic option.

⁴⁹ Braun, *supra* at note 14, at 17.

⁵⁰ Braun, *supra* at note 14, at 13. “Perhaps Commander Daniel Jones, in his article to the Navy Judge Advocate General (JAG) Journal, expressed the convoluted nature of the JTF best when he asked the question: ‘Any idea what OMC, CSRT, ARB, CITE, ELC, DMO, ISN, JDG, JMG, JIG, HHC, ICRC, JOC, DOC, and JVB mean?’” citing Daniel Jones, “IA: Life at Guantanamo Bay,” Navy JAG Journal, Winter 2007, http://www.jag.navy.mil/news/jag_mag/archive/2007_Winter/2007_Winter_JAGMAG.pdf, at 10.

A SUBUNIFIED COMMAND IS A SENSIBLE C2 OPTION TO SUSTAIN JTF-GTMO’S MISSION

Effective command and control is the linchpin of organizational success. No matter the level of command, commanders must have an organizational construct that allows for the simplest and most viable operational environment to accomplish their assigned mission(s). Combatant command subordinate units range in size, functionality, and mission focus; however, there is no “one size fits all” mold for overseas contingency operations. In fact, an in-depth analysis is the only way to ensure that a unit, such as JTF-GTMO, is properly and appropriately designated to maximize resources and effectuate efficient command and control.

When determining whether or not a subunified command is the appropriate structure for JTF-GTMO, there are six major factors that must be addressed: (1) effectiveness; (2) responsiveness; (3) readiness; (4) agility; (5) simplicity; and (6) efficiency.⁵¹ Reviewing these concerns, a subunified command seems to be a valid option to assume JTF-GTMO’s mission.

First, with respect to effectiveness, the inquiry focuses on whether the option enables accomplishment of

⁵¹ JOINT STAFF J7, DEPLOYABLE TRAINING DIVISION, GEOGRAPHIC COMBATANT COMMANDER (GCC) COMMAND AND CONTROL ORGANIZATIONAL OPTIONS, INSIGHTS AND BEST PRACTICES FOCUS PAPER, 2d ed., at 5 (August 2016).

the mission, and whether it can set conditions and provide value to subordinates.⁵² One needs only to look at current examples of both geographic (e.g., United States Forces Korea, United States Forces Japan, and Alaska Command) and functional (e.g., USCYBERCOM) subunified commands to validate the perceived effectiveness of a GTMO subunified command element. More permanent established roles and responsibilities would enhance C2, even if not on a full spectrum basis.

Regarding the second factor, responsiveness, the question posed is whether the option of a subunified command can be executed within the mission time constraints?⁵³ Here, a subunified command would be more than capable of responding to GTMO detainee operations mission requirements at least as well as the current JTF construct is presently responding, and would probably be even more responsive by having the resource (e.g., fiscal and manpower) allocations of a subunified command versus smaller, less permanent, Joint Task Force. Because there are no time constraints other than the legal statutory requirements for detainees being tried by the Military Commissions, responsiveness would not be degraded under a subunified command organization platform.

⁵² *Id.*

⁵³ *Id.*

Disestablishment
of the joint task force
structure in favor of
a new subunified
command is consistent
with joint doctrine....

Third, readiness also favors choosing a subunified command structure. In ascertaining whether such a C2 option accounts for the readiness, capability, and capacity of the designated combatant command (SOUTHCOM) to conduct the mission, a joint planning group can resolve this concern in the affirmative.⁵⁴ The more efficient exercise of C2 would allow for a GTMO subunified command to better address readiness, capability, and capacity as directed or designated. More clearly delineated lines of authority—specifically for administrative control (ADCON) as it relates to various Service component issues that frequently arise in a joint environment—would only strengthen readiness, capability, and capacity.

Fourth, a subunified command's continuation of JTF-GTMO's mission would also pass the agility test. To determine whether this C2 option would enable flexibility and agility for SOUTHCOM and the joint forces at Guantanamo Bay to respond and adapt to potential mission changes, the planning group should examine other geographic subunified commands as demonstrative examples.⁵⁵ The authors believe that SOUTHCOM's ability to flex the mission construct of GTMO would not weaken under a subunified command organization. Any change in current detainee operations, like any

change in other existing geographic or functional subunified commands, would have to be adjusted as directed by the combatant command through standard exercise of C2.

Concerning the fifth factor, simplicity, the analysis centers on whether the C2 option proposed allows for ease in understanding the roles of headquarters and relationships among relevant mission partners.⁵⁶ A subunified command at Guantanamo Bay, as previously addressed under the factors of “readiness” and “agility,” *supra*, would create a more simplified line of C2. That, in turn, would have positive second and third order effects by eliminating duplicative chains of command (e.g., service component command authorities) thus allowing for a single voice to set the tone for a vital national mission.

Finally, the sixth factor, efficiency, weighs heavily in favor of choosing a subunified command at Guantanamo Bay. This C2 option allows for efficiency in terms of force structure and headquarters personnel manning in today's resource-constrained environment, because the manner in which a permanent command is better equipped to requisition steady-state, long-term billets to fill manning requirements prevails over a joint task force construct.⁵⁷ As a subunified command, GTMO would be able to execute more regular and consistent

⁵⁴ See *id.*

⁵⁵ See *id.*

⁵⁶ *Id.*

⁵⁷ See JOINT STAFF J7, *supra* at note 50, at 5.

manning and military construction plans instead of the current process of constant short-term deployment rotations and temporary fixes to structural projects. Permanency certainly would allow for better long-term planning which, in theory, would alleviate unnecessary spending while maximizing cost savings. As one author identified, because JTF-GTMO is currently a tenant unit of Naval Station (NAVSTA) Guantanamo Bay, it is ineligible for military construction projects and defense program submissions for direct congressional appropriation.⁵⁸

This essentially means that any and all additions in infrastructure and support to the JTF must come from NAVSTA Guantanamo. However, NAVSTA Guantanamo organizationally falls neither under the JTF, nor within the auspices of SOUTHCOM. Instead, NAVSTA Guantanamo reports to Naval Region Southeast, which is completely outside the purview of the military components of the [geographic combatant command].⁵⁹

Accordingly, there is obviously both a strategic and operational disconnect between the resources needed by JTF-GTMO and those that might hopefully be obtained by NAVSTA Guantanamo for the benefit of its

most important and highest-visibility tenant unit. This tension would be relieved if JTF-GTMO's operations and mission were transferred to a new subunified combatant command at GTMO.

CONCLUSION

Military organizational structures have always been, and will forever be, constantly changing to adapt to the various threats faced by the United States. As our enemies continue to strategically attack national interests through various tactics, it is critical for DoD and combatant commands to organize subordinate units in the most efficient and resourceful way possible. Transferring the mission of JTF-GTMO to a newly created subunified command—perhaps aptly named “GTMOCOM”—that would be subordinate to the geographic combatant command SOUTHCOM in the C2 structure, would allow JTF-GTMO's vital mission to continue indefinitely at Guantanamo Bay. The disestablishment of the joint task force structure in favor of a new subunified command is consistent with joint doctrine, will streamline C2 and mission processes, and will enable conservation of resources in a fiscally austere environment. It would also comport with the collective policy positions and intentions of our elected civilian leaders to have an enduring mission. **R**



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⁵⁸ Braun, *supra* note 14, at 7.

⁵⁹ *Id.*

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BY COLONEL JEFFREY G. PALOMINO AND MASTER SERGEANT TODD A. WIVELL

In a day and age where
72%
of Americans
get news on
their **mobile device**,
everything has
the ability to
be newsworthy
everywhere all
the time.

A local story about an attack on a C-17 pilot carrying a Confederate flag goes viral and the Air Force Chief of Staff wants details.¹ Influential area leaders take a sudden interest in a sexual assault investigation after newspaper coverage of a citizen's complaint at another base.² Community residents learn your aircrew are transporting possible Ebola patients, and the wing com-

¹ See Jeff Schogol, *Police: 'Hate Group' assaults Air Force officer*, AIR FORCE TIMES (8 September 2015), <http://www.airforcetimes.com/story/military/2015/09/08/police-hate-group-assaults-air-force-officer/71895964/>.

² See Tony Lystra, *Kelso High grad takes on Air Force after daughter reports rapes*, THE DAILY NEWS (1 June 2013), http://tdn.com/news/local/kelso-high-grad-takes-on-air-force-after-daughter-reports/article_ec3671d0-cb27-11e2-845d-001a4bcf887a.html.

mander wants to hold a town hall meeting covered by local media.³ What do all these have in common? In each scenario, the wing commander will make two phone calls. First, he will call Public Affairs (PA) and second, he will call the wing Staff Judge Advocate (SJA).

The scenarios listed above are all real. They happened when we worked together as SJA and Chief of PA at the 62nd Airlift Wing, Joint Base Lewis-McChord, Washington. They illustrate several important points.

³ See SSgt Russ Jackson, *JBLM leaders ease Ebola concerns at Town Hall*, U.S. AIR FORCE (17 November 2014), <http://www.mcchord.af.mil/News/Article-Display/Article/767424/jblm-leaders-ease-ebola-concerns-at-town-hall>.

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First, there is no such thing as a local story. In a day and age where 72% of Americans get news on their mobile device,⁴ everything has the ability to be newsworthy everywhere all the time. Second, most everyone has an opinion and feels entitled to express it. In fact, many view this as their civic duty. This includes “agenda-driven and uniformed external groups” who want to “frame the narrative and optics” in a way to benefit their own special interests, not the Air Force’s.⁵ Third, to assess the situation and tell the accurate Air Force story, senior leaders need the facts and they need them fast. “Our success as an Air Force will, in part, be dependent on how well we communicate, in crises and in daily operations,” said Brigadier General Ed Thomas, Director of Air Force Public Affairs. “Our Chief of Staff, General Goldfein, highlights this best telling commanders that as soon as they pass back the guidon they must pick up the microphone.”⁶ Finally, as trusted members of the commander’s inner circle, the legal office should expect to collaborate regularly with PA and often in high-tension situa-

tions with ticking-time constraints. Put succinctly, JA and PA are a commander’s first responders.⁷

While relationships between legal offices and the Air Force Office of Special Investigations (AFOSI) have been rightly emphasized in recent years, SJAs also need to nurture strong relationships with their command’s PA office. In fact, it’s our view that the relationship between the legal office and PA is one of the most neglected relationships in a command staff. This article seeks to remedy this. First, the article begins by discussing modern media trends and what they mean for the Air Force. Second, the article details PA’s complex mission, which is often underappreciated by the legal office. Finally, the article concludes with tips for developing the legal office’s relationship with PA.

MODERN MEDIA TRENDS AND THE AIR FORCE

In July 2016, the Pew Research Center released a study entitled *The Modern News Consumer: News attitudes and practices in the digital era*.⁸ A fascinating piece on how digital platforms have reshaped the news media business, the study’s narrative prelude begins with the following observation:

Wave after wave of digital innovation has introduced a new set of influences on the public’s news habits. Social media, messaging apps, texts and e-mail provide a constant stream of news from people we’re close to as well as total strangers. News stories can now come piecemeal, as links or shares, putting less emphasis on the publisher. And, hyper levels of immediacy and mobility can create an expectation that the news will come to us whether we look for it or not.⁹

In its study, the Pew Research Center made several interesting findings. First, nearly 40% of Americans now say they often get news online.¹⁰ This makes online media second only to television news (57%) as the preferred media source with print newspapers back at a distant 20%.¹¹ While this may come as no great surprise, the “demographics speak to the fragility behind those TV numbers.”¹² Specifically, the older a person is the more likely they are to get news from television; the younger one is the more likely they are to get news online.¹³ Stated differently, someone

⁹ *Id.* at 3.

¹⁰ *Id.* at 4.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* (“While solid majorities of both those ages 50-64 (72%) and those 65+ (85%) often get news on TV, far smaller shares of younger adults do so (45% of those 30-49 and 27% of those 18-29). Alternatively, the two younger groups of adults are much more likely than older adults to turn to online platforms for news – 50% of 18- to 29-year-olds and 49% of those ages 30-49 often do so.”) *Id.*

⁴ See Katerina Eva Matsa & Kristine Lu, *10 Facts about the changing digital news landscape*, PEW RESEARCH CENTER (14 September 2016), <http://www.pewresearch.org/fact-tank/2016/09/14/facts-about-the-changing-digital-news-landscape/>.

⁵ Renée T. Walker, *Crisis Counsel: When Legal and Public Relations Collaborate*, THE PUBLIC RELATIONS STRATEGIST (22 July 2016), https://apps.prsa.org/Intelligence/TheStrategist/Articles/view/11579/1129/Crisis_Counsel_When_Legal_and_Public_Relations_Col#.WRuhApp1qM8.

⁶ Interview with Brigadier General Edward W. Thomas, Director, Air Force Public Affairs, in [abbr. location per BB R17.2.5] (18 April 2017).

⁷ Walker, *supra* note 5, at 11.

⁸ Amy Mitchell, Jeffrey Gottfried, Michael Barthel & Elisa Shearer, *The Modern News Consumer: News Attitudes and Practices in the Digital Era*, PEW RESEARCH CENTER (7 July 2016), http://www.journalism.org/files/2016/07/PJ_2016.07.07_Modern-News-Consumer_FINAL.pdf.

Social media is now a **common news source** with 62% of adults saying they get news on social media and 18% saying they do so often.

born in Generation X (1965-1980) is more likely to get news from TV whereas the Millennial Generation (1981-1997) and those enlisting in the Air Force right now are even less likely to do so.¹⁴

Second, as noted above, 72% of Americans got some form of news from a mobile device in 2016.¹⁵ This may also not seem significant but for the fact that the 72% figure is up from just 54% in 2013.¹⁶ Add to this that two-thirds of adults get news on both their mobile device and their desktop or laptop¹⁷ and these statistics show the “flash to bang” of modern media is now more accelerated than it ever has been.

Third, social media is now a common news source with 62% of adults saying they get news on social media and 18% saying they do so often.¹⁸ Which social media site is at the top for a news source? It’s Facebook, of

course.¹⁹ According to Pew’s research, 67% of U.S. adults used Facebook in 2016 compared to 48% who used YouTube, 19% for Instagram, and 16% for Twitter.²⁰ As a source of news, then, Facebook also leads the way with two-thirds of Facebook users saying they get news on the social networking site.²¹ This amounts to 44% of the general U.S. adult population.²² In contrast, only 10% of surveyed users say they get news from YouTube, 4% from Instagram, and 9% from Twitter.²³ In addition, many people use social media virtually every day. Roughly three-quarters (76%) of Facebook users say they use the site each day followed by Instagram (used daily by 51% of users), Twitter (42%) and Pinterest (25%).²⁴ Given these statistics, it’s safe to say use of a social media site is now part of many Americans’ daily life and that getting news is a big part of what people do on social media.

Finally, the Pew Research Center discovered some interesting insights in a different survey from the 2016 presidential election. While there are many that could be discussed, what’s relevant here is that more people used the candidates’ social media posts as a source of news about

¹⁴ See Richard Fry, *Millennials overtake Baby Boomers as America’s Largest Generation*, PEW RESEARCH CENTER (25 April 2016), <http://www.pewresearch.org/fact-tank/2016/04/25/millennials-overtake-baby-boomers/>. (“Millennials refers to the population ages 18 to 34). *Id.*

¹⁵ See Mitchell, Gottfried, Barthel & Shearer, *supra* note 8.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Jeffrey Gottfried & Elisa Shearer, *News Use Across Social Media Platforms 2016*, PEW RESEARCH CENTER 2 (26 May 2016), http://www.journalism.org/files/2016/05/PJ_2016.05.26_social-media-and-news_FINAL-1.pdf. The 62% figure is up from 2012, but Pew conducted their 2012 survey on the question of whether or not respondents “see” news on social media. *Id.* at 2 n.1. The 2016 question asked if respondents “get” news from social media. *Id.*

¹⁹ *See id.* at 4.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.* Though Twitter has a smaller user base, a larger portion of their users get news there than they who say they get news from YouTube or Instagram. *See Id.*

²⁴ *Social Media Fact Sheet*, PEW RESEARCH CENTER (12 January 2017), <http://www.pewinternet.org/fact-sheet/social-media/>.

the election than they did they did the candidates' websites or emails.²⁵ Specifically, 24% of U.S. adults used social media either from Donald Trump or Hillary Clinton to keep up with election news while only 10% used their websites and 9% used campaign emails.²⁶ To be certain, this trend has continued since President Trump's election and his continued use of Twitter, where he has 27 million followers on his personal account (@realDonaldTrump) and another 16 million on his official presidential account (@POTUS).²⁷ President Trump has implemented Twitter as part of his overall strategic message strategy.²⁸ "It's a great form of communication," then President-elect Trump told CBS's Lesley Stahl just days after his election.²⁹ "When you give me a bad story or when you give me an inaccurate story or when somebody other than you and another network, or whatever...I have a method of fighting back."³⁰

²⁵ Elisa Shearer, *Candidates' social media outpaces their websites and emails as an online campaign news source*, PEW RESEARCH CENTER (20 July 2016), <http://www.pewresearch.org/fact-tank/2016/07/20/candidates-social-media-outpaces-their-websites-and-emails-as-an-online-campaign-news-source/>.

²⁶ *Id.*

²⁷ Suzanne Presto, Brynn Gingras & Chris Welch, *Trump voters to President: Stop Twitter rants*, CNN POLITICS (29 March 2017), <http://www.cnn.com/2017/03/28/politics/trump-tweets-supporters-ccntv/>.

²⁸ *See id.*

²⁹ Lesley Stahl, *President-Elect Trump speaks to a divided country on 60 Minutes*, CBS NEWS: 60 MINUTES (13 November 2016), <http://www.cbsnews.com/news/60-minutes-donald-trump-family-melania-ivanka-lesley-stahl/>.

³⁰ *Id.*

What do these media trends mean for the Air Force? First, the Pew research shines a light on how Airmen get news. As of 31 March 2017, 38% of the 315,725 active duty Airmen are below the age of 26.³¹ In the officer corps, the average age is 35 years old with only 12% of officers being below the age of 26.³² In contrast, the average age of the enlisted force is 28 and 44% of enlisted Airmen are below the age of 26.³³ Looking at these numbers in light of the Pew research, we can infer most Airmen get their news online rather than by television and that trend is even more likely if that Airman is enlisted.

Second, news is now more direct to Airmen than ever. Gone are the days we remember where an Airman picked up the Friday base newspaper to find out what's been going on in the wing. Breaking news about your base – whether real or fake – now comes in the form of a push notification, a Google alert, or a ringtone an Airmen sees on the flightline or when they wake up in the morning. Moreover, the speed of media also applies to special interest groups or "opinion first" blogs who can now easily ambush the often slow Air Force bureaucracy.

Finally, with a high dependency on social media and airmen more likely to use that platform than

³¹ Air Force Personnel Center, *Air Force Demographics*, U.S. AIR FORCE (31 December 2016), <http://www.afpc.af.mil/Air-Force-Demographics>.

³² *Id.*

³³ *Id.*

they are to view a base website or a commander's e-mail, there may also be a corresponding attitude that airmen feel they are somehow entitled to direct interaction with Air Force senior leaders. Speaking of President Trump's use of Twitter, one supporter said it energizes young people.³⁴ "It's like a modern-day constituent letter," she said.³⁵ "They're tweeting at their president, they're voicing their opinion, and they're more politically involved."³⁶ The same sentiment applies to Airmen. Emboldened by instant access, they now believe they can directly influence policy. Suffice it to say, all of this ups the game for an often manpower-lean staff agency like PA.

PA'S MISSION

When it comes to PA, legal professionals often think too small. Judge Advocates often think all PA does is work with the media and they're necessary only for the occasional high-profile court-martial. However, like JA, PA touches virtually every command mission and they're one of the Commander's key agencies. Like an SJA, the Chief of Command PA has direct access to the Boss and is a trusted advisor in his or her inner circle. PA is important—even critical to mission success.

The mission of Air Force Public Affairs is to advance Air Force priorities and achieve mission objectives

³⁴ *See* Presto, Gingras & Welch, *supra* note 27.

³⁵ *Id.*

³⁶ *Id.*

through integrated planning, execution, and assessment of communication capabilities. Through strategic and responsive release of accurate and useful information, imagery, and musical products to Air Force, domestic, and international audiences, PA puts operational actions into context. They also facilitate the development of informed perceptions about Air Force operations, help undermine adversarial propaganda efforts, and contribute to the achievement of national, strategic, and operational objectives.³⁷

To accomplish this mission, PA works with various actors both on and off base. In addition, PA must establish relationships across various layers of command structure, which may include, as in our case, Joint Base leadership or another service. Moreover, PA's relational reach goes all the way up to the Headquarters Air Force and Secretariat level and beyond to the Department of Defense (DoD).³⁸

PA's activities include media operations, community engagement, command information, environmental program support and many others.³⁹ These activities often overlap in legal and ethical lanes. Working closely together protects them; you and, most importantly, your Boss. Moreover, PA operations are dizzying; they require

close coordination up and down the chain and on and off the installation.

Of course, one of the most important relationships is with their respective legal office. All PA activities must be conducted within the bounds established by laws and government ethics and it is that built-upon relationship that PAs have with JAs to ensure they are abiding by those laws and ethics. This protects command on the local level, but also helps facilitate worldwide Air Force operations and objectives.

HOW TO DEVELOP YOUR RELATIONSHIP WITH PA

So, the time to strengthen your relationship with PA is now. How?

First, SJAs should think of their relationship with PA as they would their relationship with OSI. Many legal offices take practical steps to nurture their relationships with OSI. This often includes social activities with OSI, combined training events, and even more direct lines of cooperation such as early embedding of trial counsel into OSI investigations at the start of a case, and after-action hotwashes at the end. SJAs should do the same with PA. Partner with them on something outside of a middle of the night phone call. Invite them over to talk about what you do. Play sports with them. Include them in office

hails and farewells. Make PA a regular stop on your way to see your boss. Have them take your office through media training. Or do a mock press conference for your attorneys. Given the high stakes involved, your relationship with PA is as important as your relationship with OSI, if not more. Nurture it.

Second, SJAs should take deliberate time to consider what is happening (or about to happen) in the command through the lens of what is newsworthy. In its *Guide To Communication: Tools, Techniques & Best Practices for Media Engagement*,⁴⁰ the Air Force Center for Strategic Leadership Communication states that the press "naturally skews topic selection" in news coverage toward issues that generate advertising revenue.⁴¹ This is why a friendly community event where leadership gives turkeys to junior Airmen may get zero media coverage while a perceived dry environmental report with even minor write-ups may be breaking news. Moreover, if the mainstream press naturally skews topics, how much more will special interest advocacy groups who troll for the latest egregious violation of the Establishment Clause or the latest soundbite to support their narrative that the Air Force can't prosecute sexual assault?

³⁷ See U.S. DEP'T OF AIR FORCE, INSTR. 35-101, PUBLIC AFFAIRS RESPONSIBILITIES AND MANAGEMENT para. 1.2 (12 January 2016).

³⁸ *Id.* at para. 2.4.

³⁹ *Id.* at para. 1.6.

⁴⁰ THE AIR UNIV., U.S. DEP'T OF AIR FORCE, GUIDE TO COMMUNICATION: TOOLS, TECHNIQUES & BEST PRACTICES FOR MEDIA ENGAGEMENT (2017).

⁴¹ *Id.* at 6.

So, what makes something newsworthy? The *Guide* lists several factors to consider:

- **Immediacy**—something just happened or is about to
- **Proximity**—the closer to home the better
- **Impact**—the likely effect on readers/viewers
- **Prominence**—the fame, fortune or power of the persons involved
- **Oddity**—something bizarre, unusual or unexpected
- **Conflict**—arguments, debates or situations with a winner and loser
- **Suspense**—when the outcome cannot be foreseen
- **Emotions**—situations that stir up sympathy, anger or other emotions to which a reader/viewer can relate
- **Sex or scandal**—inappropriate behavior sells⁴²

Our suggestion is SJAs run these factors through their minds at weekly events, like the command staff meeting or the SJA's weekly attorney meeting. After this, if anything seems like it may have media interest, even conservatively, then take steps to discuss these issues with PA. Getting ahead of the story helps everyone.

Finally, it's important for SJAs to understand that while the legal office and PA work directly for the boss, and both want the best interests of

⁴² *Id.*

the Air Force, each agency tends to operate out of different playbooks. For example, in crisis, PA generally works on a more accelerated timetable than the legal office. Often, PA has to advise the boss to respond or to say nothing at all, and this context is often a situation without many facts. PA is comfortable working in this space. They realize if they do not, then someone else will, and the "public narrative might be woefully inaccurate or highly damaging" to the Air Force.⁴³ In contrast, Judge Advocates are cautious, and prefer to work in a much more fact-heavy environment. Our unwritten mantra is often "The right legal advice on a slower time table is better than fast advice that's wrong." Simply put, our PA friends just do not work inside those same professional constraints. SJAs need to appreciate that PA sees things from different perspectives not wrong ones. The failure to recognize this and account for it can be damaging, especially in crisis.

In conclusion, in the time it has taken for you to read this article something newsworthy has probably happened in your command. The story could be a breaking headline, a blog post, a video, or something out there on social media. Of course, the PA team is already aware. The Boss will be soon. In a moment, your phone will ring. The next crisis is about to begin. Are you ready? **R**

⁴³ Walker, *supra* note 5, at 10.



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The Air Force SVC Program

The First Five Years

BY LIEUTENANT COLONEL RHEA A. LAGANO, MAJOR SARAH W. EDMUNDSON, AND MAJOR L. DUSTIN GRANT

As the Air Force SVC program enters its **fifth year**, this article will review the SVC program development and expansion, and highlight the current state of the law and guidance.

January 2017 marked the four-year anniversary of the Air Force Special Victims' Counsel (SVC) program's formal establishment. Following the Air Force's lead in creating this vanguard program, in August 2013, Secretary of Defense Chuck Hagel ordered the Secretaries of all Military Departments to establish similar victims' counsel programs.¹ Now present in all branches of Service, victims' counsel have witnessed an unprecedented growth in victims' rights and victim involvement in the military justice process. As the Air Force SVC program enters its fifth year, this article will review the SVC program development and expansion, and highlight the current state of the law and guidance.

We begin by examining the creation of the SVC program within the Air Force, the expansion of victims' counsel programs throughout the Department of Defense (DoD), and the growing list of victims' rights. In the second part of this article, we examine the current state of the law and regulations governing the SVC program, highlighting the role of the SVC, and the responsibilities and obligations of the base legal office and others who interact with victims and SVCs. Additionally, we examine the most recent development in the area of SVC representation—Air Force Guidance Memorandum (AFGM) 2016-01 to AFI 51-504.

¹ Memorandum from Sec'y of Def. for Sec'ys, of the Military Dep'ts et al., *Sexual Assault Prevention & Response* (Aug. 14 2013) [hereinafter SecDef Memo], available at sapr.mil/public/docs/news/SECDEF_Memo_SAPR_Initiatives_20130814.pdf

Our goal through this article, is for military justice practitioners to gain a better understanding of the history and development of the SVC program, what we do for our clients and how to interact with SVCs and Special Victims' Paralegals (SVPs).

HISTORY

Creation of the SVC Program

In 1985, Congress provided statutory authorization for Judge Advocate General attorneys (JAGs) to provide legal assistance to individual clients under 10 U.S.C. § 1044.² In response to several widely publicized incidents of sexual assault within the military, Congress passed 10 U.S.C. § 1565b in 2012, directing that sexual assault victims receive legal assistance.³ In order to clarify whether § 1565b limited or modified traditional legal assistance under § 1044, the Office of the Secretary of Defense General Counsel (OSD/GC) provided a legal opinion on the subject. In that 9 November 2012 memo, OSD/GC opined that §§ 1044 and 1565b, when read together, authorized JAGs to provide representational legal assistance to sexual assault victims in the criminal context, which included attending interviews and interfacing with military prosecutors, investigators, and defense counsel.⁴

Based upon the OSD/GC memo, in January 2013, the Air Force created the SVC program. This initially took shape as a base legal office function with captains performing SVC duties as an additional duty. By June of that year however, Air Force SVCs moved out of the base legal offices and established stand-alone offices operating under the Air Force Legal Operations Agency (AFLOA), similar to Area Defense Counsel (ADC) offices. By fall of 2013, other Services within the DoD began creating their own victims' counsel programs, and in a 14 August 2013 memo by Secretary Hagel (SecDef Memo), the Secretaries of all Military Departments were required to establish victims' counsel programs by 1 January 2014.⁵ The SecDef Memo specifically directed these programs to provide legal advice and representation to crime victims throughout the military justice process.⁶ About the same time, Congress established the statutory authority for the SVC program in the 2014 National Defense Authorization Act (NDAA).⁷

Expansion of the SVC Program

The 2014 NDAA contained some of the most sweeping and dramatic changes to military justice in recent memory. In addition to authorizing SVC representation under the

newly-created 10 U.S.C. § 1044e,⁸ to include representing child victims, the 2014 NDAA directed changes to the Uniform Code of Military Justice (UCMJ) that changed the way victims are treated in the military justice process. Specifically, the 2014 NDAA:

- enumerated crime victims' rights under a new **Article 6b** of the UCMJ,⁹
- **revised the Article 32 preliminary hearing process**,¹⁰
- **eliminated the five year statute of limitations** for some sex-related crimes,¹¹
- added **limitations on defense counsel interview of victims** under Article 46,¹²
- **mandated initiating discharge proceedings** for those found guilty of sex-related offenses,¹³ and
- provided **victims an opportunity to submit matters** to convening authorities on clemency,¹⁴ among other things.

² Dep't of Def. Authorization Act of 1985, Pub. L. No. 98-525, § 651 (1984).

³ Nat'l Def. Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 581 (2011).

⁴ Memorandum from Gen. Counsel, Office of the Gen. Counsel of the Dep't of Def., *Legal Assistance to Victims of Sexual Assault* (Nov. 9, 2012) [hereinafter OSD/GC Memo]

⁵ See sources cited *supra* note 2.

⁶ *Id.*

⁷ Nat'l Def. Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66 (2013) [hereinafter 2014 NDAA].

⁸ *Id.* § 1716.

⁹ *Id.* § 1701.

¹⁰ *Id.* § 1702.

¹¹ *Id.* § 1703.

¹² *Id.* § 1704.

¹³ *Id.* § 1705.

¹⁴ *Id.* § 1706.

In the 2015 NDAA, Congress further addressed sexual assault in the military and expanded the role of SVCs.¹⁵ This NDAA:

- expanded the list of persons eligible for SVCs to include **Guard and Reserve members**,¹⁶
- added a requirement for convening authorities to consult with **victims** on their **preference** for prosecution by the military or by a civilian court with **jurisdiction** over an offense,¹⁷
- amended Article 6b to clarify that **SVCs can “represent” victims and speak for them during proceedings** as opposed to simply “accompanying” victims,¹⁸
- added an **appellate enforcement mechanism for violating victims’ rights**,¹⁹
- **removed the “good military character” defense** for certain offenses,²⁰ and
- **expanded protections for victims under Military Rules of Evidence 513** and

removed the “constitutionally required” exception to the Rule.²¹

The 2016 NDAA continued the trend of expanding victims’ rights and SVC involvement in the military justice process.²² This NDAA:

- further **expanded appellate enforcement of victims’ rights**,²³
- expanded SVC representation to **DoD civilian employees**,²⁴
- expanded the authority of SVCs to **provide assistance with complaints against the government**,²⁵ and
- mandated that investigators **notify victims of their right to an SVC**.²⁶

The 2017 NDAA was signed into law on 23 December 2016.²⁷ Though this NDAA again contained sweeping changes to the military justice system, the most notable for SVC practice is the emphasis on retaliation in connection with reports of sexual assault and hazing in the Armed Forces,²⁸ as these

are a continuing issue for victims of sexual assault. The 2017 NDAA also includes the Military Justice Act of 2016, which provides significant changes to the military justice system, including changes affecting the SVC program and victims’ rights.²⁹ Specifically, the 2017 NDAA:

- mandated that **defense interviews of a victim be conducted in the presence of either counsel** for the Government, an SVC, or a victim advocate, if the victim requests this,³⁰
- mandated that **rape and sexual assault, and attempts to commit rape or sexual assault**, of either an adult or child, be **tried at a General Court-Martial**,³¹
- provided that **victims will receive a copy of the Record of Trial** in any case in which they testify, not just Article 120 cases,³² and
- provided that in imposing a sentence, a court-martial shall consider, among other things, the **impact of the offense on “the financial, social, psychological, or medical well-being of any victim of the offense,”** and the impact

¹⁵ Nat’l Def. Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291 (2014) [hereinafter 2015 NDAA].

¹⁶ *Id.* § 533.

¹⁷ *Id.* § 534.

¹⁸ *Id.* § 534.

¹⁹ *Id.* § 535.

²⁰ *Id.* § 536.

²¹ *Id.* § 537.

²² Nat’l Def. Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92 (2015) [hereinafter 2016 NDAA].

²³ *Id.* § 531.

²⁴ *Id.* § 532.

²⁵ *Id.* § 533.

²⁶ *Id.* § 534.

²⁷ Nat’l Def. Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328 (2016) [hereinafter 2017 NDAA].

²⁸ *Id.* § 5450.

²⁹ *Id.* §§ 5001-5542.

³⁰ *Id.* § 5105(c).

³¹ *Id.* § 5162.

³² *Id.* § 5238.

of the offense on “the mission, discipline, or efficiency of the command of the...victim of the offense.”³³

Specific Victims’ Counsel Provisions in the Air Force and Sister Services

Though the NDAA’s provide the framework and authorization for the SVC program, many statutory changes require specific implementation by the Service secretaries. Specifically, 10 U.S.C. § 1044 states that legal assistance programs are to be provided “[u]nder such regulations as may be prescribed by the Secretary concerned, [and that] the Judge Advocate General...is responsible for the establishment and supervision of [the Service’s] legal assistance programs.”³⁴ Within the Air Force, the Secretary of the Air Force has prescribed legal assistance broadly through Air Force Policy Document (AFPD) 51-5. AFPD 51-5 implements 10 U.S.C. § 1044 through AFI 51-504, which has been amended from time to time by The Judge Advocate General (TJAG).³⁵ On 15 December 2016, our current guidelines, AFGM 2016-01 to AFI 51-504, were published.³⁶ The

updates to AFI 51-504 through AFGM 2016-01 incorporate many changes set out in the NDAA’s and clarify how the Air Force should implement those changes.

Before diving into Air Force-specific provisions, it is important to note that each Service has implemented their victims’ counsel programs slightly differently, and there are subtle distinctions between how victims’ counsel in each Service operate. Generally speaking, regardless of which Service the subject is from, a victim requesting assistance of counsel will receive a victims’ counsel from the same Service as the victim. Consequently, Air Force SVCs appear in sister Service courts and vice versa. Air Force military justice practitioners should not be surprised if sister Service victims’ counsel appear for an Air Force court-martial, and should therefore understand some general differences between the various victims’ programs. Briefly, Army SVCs align under the base Staff Judge Advocate (SJA) by working under the Chief of Legal Assistance.³⁷ As such, Army SVCs receive guidance through their traditional legal assistance channels. The Navy Victims’ Legal Counsel (VLC) program falls under a separate chain of command, similar to the Air Force SVC program structure.³⁸ Both Army

It is important to note that **each Service** has implemented their victims’ counsel programs slightly differently, and there are **subtle distinctions** between how victims’ counsel in each Service operate.

³³ *Id.* § 5301.

³⁴ 10 U.S.C. § 1044 (2012).

³⁵ U.S. DEP’T OF AIR FORCE, POLICY DIRECTIVE 51-5, MILITARY LEGAL AFFAIRS para. 13 (27 September 1993).

³⁶ TJAG first provided specific guidance for implementing the SVC program in AFGM1 to AFI 51-504. AFGM1 predated passage of 10 U.S.C. § 1044e in the 2014 NDAA. As such, AFI 51-504 first implemented the SVC program under the guidance of the 9 November 2012 OSD/GC memo, and technically did not incorporate specific

changes from the 2014-2016 NDAA’s until later.

³⁷ U.S. DEP’T OF ARMY, SPECIAL VICTIMS’ COUNSEL HANDBOOK para. 2-2 (3d ed. 2016).

³⁸ U.S. DEP’T OF NAVY, JUDGE ADVOCATE GENERAL OF THE NAVY INSTR. 5810.3, NAVY VICTIMS’ LEGAL COUNSEL PROGRAM MANUAL

Regardless of what branch of Service the victim or victims' counsel is from though, the rules of the convening court will govern the conduct of that counsel.

and Navy victims' counsel represent only victims of sexual assault. Marine VLCs also fall under a separate chain of command outside the base legal offices,³⁹ but Marine VLCs represent victims of all crime, not just victims of sexual assault.⁴⁰ There are other differences between the ways the Services represent victims, all of which can be found by referencing each Services' instructions. Regardless of what branch of Service the victim or victims' counsel is from though, the rules of the convening court will govern the conduct of that counsel.

AFGM 2016-01 TO AFI 51-504 The Current State of the SVC Program

Returning to Air Force-specific provisions, on 15 December 2016, TJAG published AFGM 2016-01 to AFI 51-504.⁴¹ This AFGM was created in part "to provide guidance on the Special Victims' Counsel Program."⁴² One of the major changes to the AFI was the addition of Chapter 5 concerning the SVC program. Though the chapter is not extensive, it contains many provisions applicable to how SVCs and legal offices interact, codifies what Services SVCs can provide to clients, and sets out what SVCs can expect from

(2015).

³⁹ U.S. MARINE CORPS, ORDER P5800.16A, MARINE CORPS MANUAL FOR LEGAL ADMINISTRATION para. 6002(1) (1999).

⁴⁰ *Id.* para. 6003.

⁴¹ U.S. DEP'T OF AIR FORCE, GUIDANCE MEMO. 2016-01 TO INSTR. 51-504, LEGAL ASSISTANCE, NOTARY, AND PREVENTIVE LAW PROGRAMS (2016) [hereinafter AFI 51-504_AFGM 2016-01].

⁴² *Id.*

legal offices and others in the military justice process.⁴³ There are some key takeaways from the AFGM that require discussion in detail, as these provisions clarify the current state of the SVC program and what legal offices and other military justice practitioners should expect from SVCs.

One bedrock principle for SVCs is independence. Just as ADC representation of individual clients sometimes conflicts with the government's interests, SVC representation of an individual client can also conflict with the government's position on a case. Granted, victim interests often align with the government when both want to pursue a court-martial or other disciplinary action. However, it is not uncommon for the victim and the government to have divergent views on how that discipline should be carried out. In the same way legal offices advise commanders on the myriad of options available to them to dispose of a sexual assault allegation, SVCs counsel their clients on these same options and provide guidance on what to expect based upon the facts and information available to them. SVCs advise clients on the likelihood a commander will pursue various options and attempt to manage their clients' expectations based upon the SVC's experience.

⁴³ Though the AFGM was published in December 2016, the Air Force, and the Air Force SVC program specifically, have been operating in accordance with the updates to the NDAA, and largely in accordance with the guidelines published in the AFGM. Essentially, the AFGM codified much of what SVCs have been doing since the program's inception.

However, victims may want to see the government pursue a disposition that falls outside what the legal office recommends to a commander. In those instances, SVCs have a responsibility to advocate for their client's interests. This concept is set out in paragraph 5.2.3 of the new AFI: "SVCs provide independent legal representation which might include opposing the government of the United States in order to promote the individual interests of their clients without regard to how their actions might otherwise affect the Air Force as an institution." In those instances when SVCs advocate for something different from what the legal office might recommend, military justice practitioners should recognize the SVC's obligation to provide independent representation to an individual client, and that the SVC must do so with the same zeal and fervor expected of any attorney as required by the Air Force Rules of Professional Conduct and that attorney's state bar rules.

SVCs' independent representation also requires them to have adequate information in order to assess cases and advise their clients appropriately. AFGM 2016-01 to AFI 51-504 clarifies what information SVCs should expect to receive from legal offices to assist them in their professional responsibilities. Per paragraph 5.2.5, SVCs and SVPs have the authority to review relevant records within the government's control in order to perform their duties. This has been the guidance for quite some time, but is one area in which SVCs and legal

offices sometimes fail to see eye-to-eye. A 2014 AFJAG Opinion analyzed the issue of information sharing under the Privacy Act and Freedom of Information Act.⁴⁴ OpJAGAF 2014/03 states that SVCs can, "at the discretion of the record [office of primary responsibility], obtain relevant Air Force Privacy Act records that are necessary to perform their assigned duties. SVCs can also obtain relevant non-Privacy Act records pursuant to their functional/official use request for such records."⁴⁵ In the analysis portion, the opinion identifies that under DoD 5400.11-R, *Department of Defense Privacy Program*, if an SVC needs a record to perform their assigned duties, and if the intended use of the record generally relates to the purpose for which the record is maintained, the record can be released to the SVC. The new paragraph 5.2.5 in AFI 51-504 contains a condensed summation of OpJAGAF 2014/03: "Reliance on the SVC's reasonable explanation as to why a particular...record is necessary...is usually sufficient to meet the official use request test under DoD 5400.11-R." For SVCs to fulfill their professional responsibilities to their clients, they need access to relevant information within the government's control.

SVCs cannot provide the representation required of them if they do not

SVCs' independent representation also requires them to have **adequate information** in order to assess cases and advise their clients appropriately.

⁴⁴ Special Victims' Counsel Requests for Air Force Records Under the Privacy Act and Freedom of Information Act, Op. JAG, Air Force, No. 2014/03 (Jul. 1, 2014).

⁴⁵ *Id.*

Perhaps the most
confusing
area of SVC
representation
for military justice
practitioners is
determining **who is
entitled to SVC
representation.**

have sound information upon which to base their legal advice to clients. Before withholding information from an SVC or redacting significant information from a record, a legal office should consider how withholding that information might affect a victim's input on disposition. Victims have certain rights, including the right to consult with the government,⁴⁶ the right to be heard,⁴⁷ and the right to be treated with fairness and with respect for their dignity and privacy.⁴⁸ For those rights to be meaningful and for an SVC to help a victim adequately exercise those rights, the SVC must have access to relevant case information. If a victim is considering exercising or waiving any of those rights, that decision should be knowing, voluntary, and informed. Victims cannot be fully informed, or make a voluntary and knowing decision, without having all of the pertinent information. Much like ADCs, SVCs cannot simply rely upon the legal office's assessment of the evidence in advising their clients.

The SVC Detailing Process

Perhaps the most confusing area of SVC representation for military justice practitioners is determining who is entitled to SVC representation. This area has evolved with almost every NDAA, so confusion is understandable. Paragraph 5.5 of the new AFGM illustrates how to obtain SVC

services for a victim, paragraph 5.6 details who is eligible for SVC representation, and paragraph 5.7 details the Extraordinary Circumstances Request (ECR) process for those seeking SVC representation who are not automatically eligible for services under paragraph 5.6. Contained in these three paragraphs is everything a military justice practitioner needs to know about obtaining SVC services for a victim. First and most importantly, paragraph 5.5.1 mandates that victims of sexually related offenses be informed of SVC assistance *as soon as* they seek assistance. This includes victims who might seek assistance from a military justice practitioner first. Practice point—make discussion of the SVC program a matter of routine when meeting with any victim for the first time. Do not rely upon others to meet this obligation for you or assume it was properly done by other agencies. Next, if a victim seeks SVC assistance at any point, paragraph 5.5 sets out the information an SVC office will need before detailing an SVC. In order to facilitate collection of this information, the SVC program created and sent a standard form to all legal offices and SARCs. However, legal offices can also utilize the templates contained in the new Attachments 4 and 5 of AFI 51-504 to provide that information to an SVC. Another important point in paragraph 5.5.8 is that requests for specific SVCs will be considered on a case-by-case basis. SVCs are typically detailed to cases based upon geographic location, proximity to the

⁴⁶ 10 U.S.C. § 806b(5) (2012).

⁴⁷ *Id.* § 806b(4).

⁴⁸ *Id.* § 806b(10).

victim or the prosecuting base, and the individual SVC's caseload and availability. As such, requests for a specific SVC must be carefully vetted.

Though paragraph 5.6 identifies who is automatically entitled to an SVC, the SVC program routinely receives requests for SVC assistance from an individual who might not automatically qualify under paragraph 5.6. In those instances, the office receiving the request begins the ECR process by forwarding the above-referenced request form to the servicing SVP, who then forwards the request to the Senior SVC. As stated in paragraph 5.7.4, the Senior SVC routes ECRs to the Chief of the SVC Division (AFLOA/CLSV). The SVC Division Chief is the first level of approval authority for ECRs. If the Chief recommends denying the ECR, the Chief routes the request to the Director, Community Legal Services (AFLOA/CLS), who again can either approve the ECR or recommend denying the ECR. If the Director recommends denying the ECR, the Director routes the request to the AFLOA Commander for a final decision. Only the AFLOA Commander (AFLOA/CC) has authority to deny an ECR.⁴⁹ Should you meet a victim requesting an SVC who is not automatically entitled to an SVC under paragraph 5.6, first

⁴⁹ Note that in AFLOA/CC's absence, this authority is delegated to the Vice Commander. In the absence of both the Commander and Vice Commander, the Deputy Judge Advocate General (DJAG) will take final action.

review the threshold requirements for ECRs found in paragraphs 5.7.1 and 5.7.2. A non-exclusive list of factors considered in granting or denying an ECR is also found in paragraph 5.7.3. If a military justice practitioner feels strongly that a victim should receive SVC assistance, the practitioner should highlight the above factors and provide any additional information in the request that might be compelling or that might establish a nexus to an Air Force interest. ECRs are decided on a case-by-case basis. Victims receiving an SVC through the ECR process generally have a compelling reason that warrants detailing an SVC. Often the legal office, in consultation with the Senior SVC, identifies those compelling interests for consideration. Additionally, if the AFLOA Commander previously denied an ECR, but additional facts discovered after the denial make approval more appropriate, referral agencies may submit a new request by highlighting the changed facts. Should you find yourself in that situation, please contact your Senior SVC for more guidance.

Other SVC Provisions in AFGM 2016-01

Aside from providing guidance to military justice practitioners, the AFGM articulates what SVCs do day-to-day in representing their clients. The services provided vary from client to client, but broadly speaking, SVCs provide "representation, consultation, and advocacy" concerning rights and obligations as set out in paragraph

5.9 of the AFI. SVCs also provide a vast array of legal assistance to clients, where that legal assistance has a nexus to the sexual assault. One commonly overlooked matter when it comes to victims represented by SVCs is the obligation for investigators, law enforcement agencies, trial counsel, defense counsel, and their support staff to obtain SVC consent prior to communicating with a represented victim as articulated in paragraph 5.8.1 and, for legal office and defense personnel, the Air Force Rules of Professional Responsibility.

Additionally, the AFGM answers a frequently asked question of SVCs – do SVCs represent victims for collateral misconduct? "Collateral misconduct means misconduct allegedly committed by a victim of a sexually-related offense while on active duty in the Air Force and that misconduct has a direct nexus to the sexually-related offense."⁵⁰ An example of collateral misconduct is where an underage victim may have consumed alcohol prior to the sexual assault. In those instances where a victim might have committed collateral misconduct, an SVC will advise the client of their right to seek assistance from an ADC.⁵¹ If the victim wants to meet with an ADC, the SVC will coordinate with the Senior Defense Counsel or directly with the Trial Defense Division (AFLOA/JAJD) to request an ADC for the

⁵⁰ See sources cited *supra* note 41, para. 5.9.2.1.

⁵¹ *Id.* para. 5.9.2.2.

victim.⁵² Beyond instances of minor misconduct, if a victim wants to be represented by an SVC in lieu of an ADC where the misconduct may result in court-martial for the victim, the SVC coordinates with AFLOA/JAJD to process an individual military defense counsel request.⁵³

For anyone desiring to serve as an SVC or SVP, paragraph 5.3 of the AFGM discusses SVC and SVP qualifications. SVCs must be certified under Article 27(b) and their current SJA must recommend them for the position through the Professional Development Directorate (JAX) nomination process. SVPs are Special Duty Category volunteer positions. Paralegals seeking to serve as SVPs must have a favorable recommendation from their current SJA. Both SVC and SVP positions are non-deployable billets per paragraph 5.3.8. Additionally, though an SVC and SVP performs a myriad of duties, some characteristics found in all good SVCs and SVPs include justice experience, legal assistance experience, and the ability to work independently since SVCs and SVPs often work autonomously in stand-alone SVC offices. Other important characteristics include competence in the law, courage to stand up for your clients, compassion, creativity, the ability to see and solve problems from different angles, personality, and strong leadership qualities. In addition to the SVC and SVP positions, there are six O-4

or O-5 Senior SVC positions. The Senior SVC supervises all attorneys and paralegals within their circuit, in addition to representing victims in complex or high-visibility cases. If these positions are something you are considering, or something you have additional questions about, please do not hesitate to contact anyone within the SVC program to talk further about the program and about what it takes to be a good SVC or SVP.

CONCLUSION

The SVC program has greatly expanded in its short existence. Today there are over fifty Air Force SVCs and Senior SVCs, and over thirty SVPs spread throughout the five circuits at over forty-two military installations. As the program continues to expand and evolve, especially in light of the Military Justice Act of 2016, we anticipate more victim-related changes in the future. AFGM 2016-01 to AFI 51-504 is one example of the most recent developments in the SVC program, and this article highlighted only some of the changes in the AFGM. If you have questions about the SVC program, SVCs and SVPs stand ready to assist in any way possible and to aid victims of sexual assault navigate the winding road through the justice process. **R**



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⁵² *Id.* para. 5.9.2.2.1.

⁵³ *Id.* para. 5.9.2.2.3.



Advisor to Advocate

Tips for a Smooth Transition from base legal to an ADC or SVC Position

BY CAPTAIN ASHLEY D. NORMAN

In base legal, your primary role is to advise commanders... in your role as an advocate for an individual, your primary duty is to your client.

“What do you recommend I do?”

the Security Forces squadron commander asked me after I advised him on an array of options to discipline a young Airman caught drinking underage in the dorms. In this moment, I felt trusted. I felt needed. I was in my second assignment at a base legal office and I was finally feeling confident in my role as an advisor. I had established relationships. Although each case is unique, I had a working knowledge of the range of discipline that was appropriate in different circumstances.

Fast forward a few months and I am on the phone with a medical squadron commander. I am now a brand new Special Victims' Counsel (SVC). In a kind tone, the squadron commander tells me he is not going to do what my client wants and there is no more conversation to be had. I hang up the phone and try to compose myself. How did I go from trusted advisor to an annoyance? Squadron commanders used to want to hear from me. They used to call my number when they needed help. And now, here is a squadron commander indifferent to my advocacy.

For the record, many advocates have wonderful relationships with command and I have personally experienced many great interactions

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with command as an SVC. There are squadron commanders who have embraced my advocacy and made decisions that benefited my clients based on it. Squadron commanders do still call my office. And when you find success as an advocate, there truly is no better feeling. I have come a long way since that phone call with the medical squadron commander. Yet I share that story to highlight the fact that the transition from base legal to advocating for an individual can be difficult. It can be disheartening at times. Below are a few tips I found helpful, especially in my first six months as an advocate, following a base legal office assignment.

KNOW YOUR ROLE AND TALK TO OTHERS ABOUT YOUR ROLE

This seems simple—know your job, know where you fit in to the process. In reality, it is something you may have to remind yourself of on a daily basis when transitioning from an advisor to an advocate. In base legal, your primary role is to advise command.¹ When you are called upon to make a recommendation, you do so with the best interests of the Air Force in mind. However, in your role as an advocate for an individual, your primary duty is to your client.² Once you form an attorney client relationship, you are ethically bound to

represent your client's interests.³ What your client desires must become what you desire—even if it is not in the best interests of the Air Force. Given this, you need to understand that commanders will likely not do what your client wants them to do if it runs counter to the needs of the Air Force.

This is a shift from what I experienced in the base legal office, where commanders often follow your advice. Knowing that you are representing the best interests of the Air Force and that you have a well-rounded view of military justice norms, they feel comfortable following your recommendation. Although you are not the ultimate decision-maker, this can leave you with a sense that you have a fair amount of control in the ultimate result. Alternately, as an advocate in an Area Defense Counsel (ADC) or SVC role, you must zealously assert your client's position at different points in the process⁴ but you have very little control over the outcome. Nevertheless, once you come to terms with ceding control, advocacy can be liberating.

As you explore your new role as an advocate, it is also important to remember that you still advise—just not to command. You are an advisor to your client. As an advisor, you must provide your client with an informed understanding of his or her legal rights and obligations, and explain the practical implications of

such rights and obligations.⁵ All of the skills you built advising in a base legal office are just as important in an ADC or SVC position: it may not feel as “important” as when you were an O-5 or O-6's go-to-JAG, but *it is just as important*. Embrace the fact that you represent an Airman who is seeking your advice and expertise. To them, you are their protector. That is your role—and it is critical to our justice system. Try not to measure your self-worth based on the rank or gravitas of your client.

Another tip is to make your role clear to the decision-maker. Whether you're advocating to command, the Air Force Office of Special Investigations (AFOSI), or the legal office, one of the worst things that can happen is the decision-maker has no idea what you do or why you're contacting them. To complicate matters, as Mark Goulston and John Ullmen note in the Harvard Business Review, we often act as if the person we are advocating to is already on our side.⁶ This means you explain your role and make it clear that you represent your client's interests—while also demonstrating you understand the challenges the decision-maker is facing.⁷ Understand the barriers the decision-maker has to overcome to get from “A” to “B.” Be prepared to offer solutions that empower the

¹THE JUDGE ADVOCATE GENERAL'S SCHOOL, THE MILITARY COMMANDER AND THE LAW p. 10 (2016).

² See MODEL RULES OF PROFESSIONAL CONDUCT PmbL. (AM. BAR ASS'N 2000), http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preamble_scope.html.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ Mark Goulston & John Ullman, *How to Really Understand Someone Else's Point of View*, HARV. BUS. REV. (22 April 2013), <https://hbr.org/2013/04/how-to-really-understand-someone>.

⁷ *Id.*

decision-maker,⁸ but also benefit your client. As General Stanley McChrystal noted when discussing the military efforts against the Islamic State of Iraq and the Levant (ISIS), “if we don’t get a culture where [actors are] informed by information and empowered to use their best judgment, we fail.”⁹ The same arguably rings true for our military justice system. As discussed above, as an advocate, you must offer solutions, but then cede control of that final result and let the system work.

And for a shameless plug for networking, every opportunity to speak at trainings and briefings is an opportunity to explain your role to decision-makers, potential clients, and military justice actors. Even if you don’t automatically build trust and understanding through these forums, speaking at these events will build your public speaking skills—which are vital for effective communication and leadership.¹⁰

⁸ *Id.*

⁹ Gen. McChrystal on Fighting ISIS, Creating “Radical” Transparency in Military, CBS News (11 May 2015), <http://www.cbsnews.com/news/gen-stanley-mcchrystal-isis-team-of-teams-information-transparency-empowerment/>.

¹⁰ See Martin Zwillig, *Every Entrepreneur Needs to Master Public Speaking*, FORBES (23 November 2012), <http://www.forbes.com/sites/martinzwilling/2012/11/23/every-entrepreneur-needs-to-master-public-speaking/#c8bb0567674c>; see also Audra Bianca, *The Importance of Public Speaking Skills within Organizations* CHRON, <http://smallbusiness.chron.com/importance-public-speaking-skills-within-organizations-12075.html> (last visited 6 February 2017).

STAY POSITIVE AND DON'T TAKE SETBACKS PERSONALLY

To be quite honest, I did take that phone call with the medical squadron commander personally. And I can assure you that doing so only added to the stressors in my life. I complained to my co-workers and husband about it, which made me angrier. I let that commander’s dismissive attitude affect me. With time, I eventually forgot about it and moved on. A few months after that phone call, I was in a situation where I was supposed to meet with him one-on-one about a case. I worked *really* hard to not give him any indication that I had taken our previous phone call personally. We ended up having a long, productive conversation and now work closely together. He is more responsive to my client’s needs than ever before. If I had refused to meet with him and held a grudge, it would have served as a detriment to my client and my professional development. So even when you feel like the worst advocate ever, try not to hold it against the decision-maker. I truly believe we are all trying to do our best day in and day out. When a decision is made that you disagree with, think about those obstacles that the decision-maker had to overcome to get from “A” to “B.” Try to understand which barrier was too big to overcome, learn lessons from it, and then move on.

As Airmen, we hear a lot about resilience. In fact, we have entire work days dedicated to building resilience. Per the Department of the Air Force,

resilience is “the ability to withstand, recover, and grow in the face of stressors and changing demands.”¹¹ Resiliency is ever-important when you practice advocacy in an ADC or SVC role. One ADC told me that it wasn’t necessarily the courts-martial that weighed heavily on him—but rather the day-to-day battles where a Senior Master Sergeant receives an LOR that the commander decides to place in his Unfavorable Information File (UIF). That Senior Master Sergeant will now not make Chief and he is crying in your office. Or a Staff Sergeant receives a referral Enlisted Performance Report (EPR) for something out of his control, and the commander refuses to meet with you. Those battles begin to weigh on you. It feels like you are constantly swimming against the tide. Find what contributes to your resiliency and practice it. Make time for resiliency-building, whether it is exercise, worship, journaling, etc. You may find that you are a better advocate when you set aside time for activities that build your resilience.

As Abraham Lincoln famously said: “I walk slowly but I never walk backward.”¹² Success may not come easily when you begin to advocate as an ADC or SVC. In fact, it is very likely that you will have to redefine success altogether. Nevertheless,

¹¹ U.S. DEP’T OF AIR FORCE, INTSTR. 90-506, COMPREHENSIVE AIRMAN FITNESS, p.14 (2 April 2014).

¹² Kathleen Davis, *10 Inspirational Presidential Quotes*, ENTREPRENEUR (15 February 2013), <https://www.entrepreneur.com/slideshow/225769>.

approach each day as an advocate as a new opportunity to do something positive for your client. Try to engage in incremental goal setting and keep progressing forward, no matter what comes your way.

Research the decision-maker. Talk to their executive officer to get a sense of what he or she responds well to and what they respond negatively to.

BE SELF-AWARE

One of the best pieces of professional advice I ever received is to know your boss. If you are emotionally intelligent and self-aware, you can walk in to your boss's office and be able to tell almost instantly whether it is a good time to approach him or her with an issue or whether you should come back at a different time. As an advocate, it is important to know the habits and tendencies of the person you are advocating to. As trial and defense counsel in a court-martial setting, we meticulously research panel members so we can predict their response to argument and case presentation. We must retain this mindset when we advocate to military justice actors outside of the courtroom in an ADC or SVC role. Research the decision-maker. Talk to

their executive officer to get a sense of what he or she responds well to and what they respond negatively to. Try to find out how they like to make decisions. Do they utilize the "OODA Loop"?¹³ Do they make lists? Do they prefer to be briefed by various entities or advisors before deciding?

Self-awareness is critical to finding success as a leader¹⁴ and also as an advocate. To be self-aware, you must be aware of yourself and the impact you are having on others.¹⁵ It is vital that you understand the impact your advocacy is having on the decision-maker and know when to push that individual and when to back down. This will set you up for success when you practice advocacy.

¹³ The "OODA Loop" is a decision-making model that consists of "Observing, Orienting, Deciding, and Acting." See William S. Angerman, *Coming Full Circle with Boyd's OODA Loop Ideas: An Analysis of Innovation Diffusion and Evolution* (March 2004) (unpublished graduate thesis, Air Force Institute of Technology) (on file with the Air Force Institute of Technology), <http://www.dtic.mil/dtic/tr/fulltext/u2/a425228.pdf>.

¹⁴ See Victor Lipman, *All Successful Leaders Need this Quality: Self-awareness*, FORBES (18 November 2013), <http://www.forbes.com/sites/victorlipman/2013/11/18/all-successful-leaders-need-this-quality-self-awareness/#317c5ec057b4>.

¹⁵ See Nicole Gravanga, *Where does Self-Awareness Come From?*, FORBES (31 January 2017), <http://www.forbes.com/sites/quora/2017/01/31/where-does-self-awareness-come-from/#5fedff015c27>; see also Trang Chu, *Know Your Strengths to be a More Effective and Successful Leader*, FORBES (24 March 2014), <http://www.forbes.com/sites/ellevate/2014/03/24/know-your-strengths-to-be-a-more-effective-and-successful-leader/#30055487447c>.

CONCLUSION

With each Permanent Change of Station (PCS) season, many of you will move from the base legal office to an ADC or SVC role. If the transition is difficult for you, know that you are not alone. Learn your role, build your resiliency, and maintain self-awareness at all times. Best of luck to you for a smooth transition and I hope you experience both the personal and professional joy that can come with practicing advocacy on behalf of an individual. **R**



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Navigating Your Way Through a Mental Competency Hearing

BY LIEUTENANT COLONEL TIFFANY M. WAGNER, CAPTAIN MARK L. STEITZ JR., AND CAPTAIN BRITTANY D. TEDFORD

The sanity board concludes that the accused is currently suffering from a mental disease or defect and is **not competent to stand trial.... What do you do? Where do you begin?**

Defense counsel requests the military judge order a sanity board under Rule for Courts-Martial (RCM) 706. The military judge grants the request. A board convenes and answers the questions set forth in RCM 706(c)(2).¹ This almost seems pro forma. Isn't the accused always fine? Maybe the accused is depressed or has Post Traumatic Stress Disorder (PTSD)—trial is going to go as planned and there is no need to do anything out of the ordinary. But this time it is different. The sanity board concludes that the accused is currently suffering from

a mental disease or defect and is not competent to stand trial. You re-read it. Sure enough, there is a serious diagnosis.² What do you do? Where do you begin?

Whether you are a trial counsel, defense counsel, or a military judge, when you are faced with an accused diagnosed with a severe mental disease or defect, you have a unique legal mission. While it may not be common, when an accused is diagnosed with a severe mental disease that may affect his ability to stand

¹ “(a) At the time of the alleged criminal conduct, did the accused have a severe mental disease or defect? (The term “severe mental disease or defect” does not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct, or minor disorders such as nonpsychotic behavior disorders and personality defects.) (b) What is the clinical psychiatric diagnosis? (c) Was the accused, at the time of the alleged criminal conduct and as a result of such severe mental disease or defect, unable to appreciate the nature and quality or wrongfulness of his or her conduct? (d) Is the accused presently suffering from a mental disease or defect rendering the accused unable to understand the nature of the proceedings against the accused or to conduct or cooperate intelligently in the defense?”

² While these are rare occurrences, there were five sanity boards between January 2015 through September 2016 in which a finding indicated that an Air Force accused either currently suffered from a severe mental disease or defect that rendered him unable cooperate in his own defense or had previously suffered from a disease that rendered him unable to appreciate the wrongfulness of his conduct. In two of those cases, the accused wanted to represent himself and in both cases they were found to be not competent to stand trial. While a serving as a military judge, Lt Col Wagner presided over a mental competency hearing in which Capt Tedford was the Trial Counsel and Capt Steitz was the Defense Counsel. The accused in that case was diagnosed by a sanity board with schizophrenia and psychotic disorder and was found not competent to stand trial. This article includes lessons and guidance from their experience.

trial, the rights of the accused must be protected. Whatever thoughts you have about our criminal justice system or about the accused or the crimes he allegedly committed, there must still be a process which must be done correctly. The current process is a hybrid of military and civilian practice. This article provides perspectives from all three of these viewpoints. This article is not designed to be doctrine; rather, it proposes approaches to assist practitioners navigating through these complex circumstances. This article focuses on competency of an accused to stand trial, not on the affirmative defense of not guilty only by reason of lack of mental responsibility.³

FAMILIARIZE YOURSELF WITH THE LAW

The pertinent law regarding mental competency of the accused is a hybrid of military rules and federal statutes. Within the *Manual for Courts-Martial (MCM)*, the primary rules practitioners must familiarize themselves with are RCM 706, Inquiry into the mental capacity or mental responsibility of the accused; RCM 909, Capacity of the accused to stand trial by court-martial; RCM 916(k), Lack of mental responsibility; RCM 921(c)(4), Not guilty only by reason of lack of mental responsibility; RCM 1102A, Post-trial hearings for person found not guilty only by reason of lack of mental responsibility; and Article 76b, Uniform Code of Military Justice (UCMJ), Lack of

mental capacity or mental responsibility: commitment of accused for examination or treatment.

The *MCM*, at RCM 909 and Article 76b, refer practitioners to the applicable statutes within the federal criminal system: 18 U.S.C. §§ 4241–4248. An accused who is not competent to stand trial or who is found not guilty only by reason of lack of mental responsibility must be transferred to the federal system. Reviewing these laws will provide perspective as you begin the process.

RCM 706 – WHERE IT BEGINS

Sanity board requests may be forwarded by a number of parties before or after referral.

If it appears to any commander who considers the disposition of charges, or to any preliminary hearing officer, trial counsel, defense counsel, military judge or member that there is reason to believe that the accused lacked mental responsibility for any offense charged, that fact and the basis of the belief or observation shall be transmitted...to the officer authorized to order an inquiry into the mental condition of the accused.⁴

After the referral of charges to court-martial, the convening authority or the military judge may *sua sponte* order such an inquiry.⁵

The purpose of the inquiry is to make findings concerning the presence and diagnosis of a severe mental disease or defect, whether any diagnosis could have had an effect on the accused at the time of the alleged criminal conduct, and his present ability to understand the nature of the proceedings against him. Accordingly, if any evidence exists that an accused may be suffering from any sort of mental condition, if he has made statements that he is suicidal or is exhibiting aberrant behavior, it is wise to initiate a sanity board. While the usual determination of a sanity board may show that if the accused has any sort of mental disease or defect it does not affect his ability to understand the nature of the proceedings or cooperate intelligently in his defense, it is still the necessary first step in understanding the accused.

Preparing for Sanity Board—Other Considerations

Clearly Lay Out the Facts

No doubt there is a draft request for a sanity board saved in your office files. This is a good starting point, but it should not be the ending point. Whether you are requesting or responding to a request for a sanity board, there are a number of things to consider which will help the process in the long run. To begin with, both trial and defense counsel know more about the case than the convening authority or the military judge. Be clear in your justification

³ MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 921(c)(4) (2016) [hereinafter *MCM*].

⁴ *MCM*, *supra* note 4, R.C.M. 706(a).

⁵ *MCM*, *supra* note 4, R.C.M. 706(b)(2).

of why a sanity board is needed. You must clearly explain the facts that support your request. Trial counsel should consider approaching it as you would a motion: attach statements, affidavits, or other evidence to your request documenting the behaviors the accused has exhibited or the statements made. Defense counsel may opt to do the same, while taking into account client confidentiality.

Think Beyond the Basic Sanity Board

Consider whether there are other questions you want the board to answer. For example, if you are a defense counsel and the accused does not want your assistance and you believe it has to do with his mental condition, consider requesting an additional question: “Is the accused choosing self-representation both competently and intelligently?” This answer will help the military judge in deciding whether the accused can represent himself, not just at the trial but also at a competency hearing. Prior to requesting additional inquiries from the board, a defense counsel should consult with his or her senior defense counsel.

If the accused is an officer, it may be best to ensure that the board members outrank him. In a recent Air Force case, an O-3 accused refused to participate in a sanity board being conducted by one O-3 psychologist. The psychologist determined that the accused was mentally competent. Defense counsel knew this result was not accurate based on the accused’s

behavior and lack of participation, and requested a new sanity board, clearly explaining to the court his client’s specific behavioral exhibitions and outlining his lack of participation. Perhaps if someone of a higher rank had been initially appointed to the board, the accused would have been more motivated to participate. The second sanity board included two higher ranking doctors, and the accused subsequently participated.

Furthermore, it may be wise to have more than one member make up the sanity board. Only one person is required, but there are certainly advantages to having more than one. Besides the fact that there could be differing opinions, if there is a need for a competency hearing, there is more than one person you could call as a witness. This will also allow flexibility in setting the date for the RCM 909 hearing. This is not merely a defense issue; the government may request that more than one doctor be appointed to avoid future problems.

You may not always need to include any of these other considerations in your request for a sanity board. Additionally, there may be other unique factors that you may have to contemplate on a case-by-case basis. Do not be afraid to request a second or even third inquiry if you discover evidence that undermines the findings of the original results; the rule allows for this.⁶ There is no need that you always recommend appointing a

It may be wise to have more than one member make up the sanity board. Only one person is required, but there are certainly advantages to having more than one.

⁶ MCM, *supra* note 4, R.C.M. 706(c)(4).

high-ranking psychiatrist/psychologist or more than one member, but all these factors require deliberation by both trial and defense counsel. If the defense counsel has retained an expert psychologist consultant, he or she can advise on all of these considerations. If one is retained following the sanity board, have the expert consultant review the board's reports and advise on whether another board should be requested.

Using the Board Results to Prepare for the Next Step

Once you have the sanity board results indicating the accused is presently suffering from a mental disease or defect that renders him unable to understand the nature of the proceedings or to conduct or cooperate intelligently in the defense, you need to prepare for the next step—a competency determination. Both trial and defense counsel should have a firm understanding of the relevant RCMs and the accused's mental status—past, present, and future. Learn about the diagnosis and whether the accused can be restored to competency, how long it will take to restore the accused to competency, and whether the accused can be released and treated as an out-patient. Although both sides should seek to understand the diagnosis as much as possible, trial counsel should be aware that significant limitations exist regarding their access to information specific to the board inquiry.⁷

⁷ Once the board is complete, only a statement consisting of the board's ultimate conclusions should be furnished to all counsel

RCM 909(E)–INCOMPETENCE DETERMINATION HEARING⁸

An accused is presumed to have the capacity to stand trial unless the contrary is established.⁹ The Supreme Court set out the legal test for competency in *Dusky v. United States*,¹⁰ and it is refined by Article 76b. An accused cannot stand trial if he is “presently suffering from a mental disease or defect rendering the person mentally incompetent to the extent that the person is unable to understand the nature of the proceedings against that person or to conduct or cooperate intelligently in the defense of the case....”¹¹ The accused “must be able to comprehend rightly his

and the officer ordering the examination. R.C.M. 706(c)(3). This is commonly referred to as the “short report.” The full report of the board may be released by the board or other medical personnel for medical purposes and to defense counsel, unless otherwise authorized by the convening authority or if after referral, the military judge. R.C.M. 706(c)(3)(B). This is commonly referred to as the “long report,” and unless authorized by the convening authority or military judge, trial counsel does not have access to the long report.

⁸ At a pre-referral competency hearing, government counsel should begin making a record of the trial by using a court reporter to record the hearing, as one would record an Article 39(a) session, and preserve a transcript of the hearing. If the case goes to trial, the transcript of the competency hearing will be appended to the record of trial as an appellate exhibit. The official record of trial for a court-martial begins when the military judge calls the court to order at the initial Article 39(a) session for an accused's arraignment.

⁹ Mental capacity or mental competency to stand trial emphasizes an accused's ability to “consult with counsel and to comprehend the proceeding.” *Pate v. Robinson*, 383 U.S. 375, 388 (1966).

¹⁰ 362 U.S. 402 (1960). “[T]he test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding — and whether he has a rational as well as factual understanding of the proceedings against him.” *Id.* at 402.

¹¹ UCMJ art. 76b(a)(1) (2016).

own status and condition in reference to such proceedings; that he must have such coherency of ideas, such control of his mental faculties, and such power of memory as will enable him to identify witnesses, testify in his own behalf, if he so desires, and otherwise properly and intelligently aid his counsel in making a rational defense....”¹²

Whether an accused has the mental capacity to stand trial by court-martial is an interlocutory matter which must be resolved by a military judge.¹³ In order to determine that the accused is not mentally competent, the military judge must make a finding by a preponderance of the evidence;¹⁴ thus, counsel must present evidence to support their position. Unfortunately, there is no script for the incompetence determination hearing.¹⁵ Discuss with the military judge how to proceed.

¹² *United States v. Proctor*, 37 M.J. 330, 336 (C.M.A. 1993) (citing *United States v. Williams*, 17 C.M.R. 197, 204 (C.M.A. 1954)).

¹³ Pre-referral, R.C.M. 909(c) specifies the convening authority's ability to order an inquiry into the accused's mental capacity under R.C.M. 706. Although R.C.M. 909(c) does not specifically authorize a military judge to preside over a competency hearing before referral, the rule does not prohibit the judge from conducting a hearing at this stage of the process, either. Additionally, a military judge presiding over the hearing aligns with the essence of 18 U.S.C. §§ 4241 – 4248. After referral, the military judge must conduct a hearing.

¹⁴ MCM, *supra* note 4, R.C.M. 909(e)(2).

¹⁵ In the rare situation where there has not yet been referral, the convening authority makes a determination. This article is written from the perspective of the actions happening after referral of charges.

At a competency hearing the accused “shall be represented by counsel... [and] be afforded an opportunity to testify, to present evidence, to subpoena witnesses on his behalf, and to confront and cross-examine witnesses who appear at the hearing.”¹⁶ When a military judge goes through the script to begin the hearing, he will inform the accused about his right to counsel and the accused will make his choice of representation.¹⁷ The issue of mental competency is made more complex when counsel or the military judge has a concern regarding mental competency, but the accused waived his right to counsel and insists on self-representation.

When RCM 909 Intersects with RCM 506¹⁸

The constitutional right to self-representation depends on a knowing and intelligent waiver of the right to counsel. The current standard regarding the right of self-representation originates from *Faretta v. California*,¹⁹ and is set forth in RCM 506(d).

An accused, in the exercise of a free and intelligent choice and with the considered approval of the court,

may competently and intelligently waive his constitutional right to assistance of counsel.²⁰ Additionally, the waiver shall be accepted *only* if the military judge finds that the accused is competent to understand the disadvantages of self-representation and that the waiver is voluntary and understanding.²¹

In order to represent himself, the accused must “knowingly and intelligently” relinquish “the traditional benefits associated with the right to counsel.”²² If a military judge is going to deprive an accused of his constitutional right to represent himself, he will need evidence to establish facts to support this decision. A military judge will ask the accused questions to determine whether there is a knowing and intelligent waiver to establish that the member “knows what he is doing and his choice is made with eyes open.”²³ Since you have prepared for an RCM 909 hearing, you should present evidence and proceed just as you would during the competency hearing.

Evidence for the Competency Hearing

Either trial counsel or defense counsel may request a hearing. In fact, trial and defense counsel may not always have opposite positions at a competency hearing. Counsel

The issue of mental competency is made **more complex** when counsel or the military judge has a concern regarding mental competency, but the accused waived his right to counsel and insists on **self-representation**.

¹⁶ 18 U.S.C.S. § 4247(d) (LexisNexis 2017); R.C.M. 909 and Article 76 refer to the guidance in the federal statute.

¹⁷ If an accused elects to pro se representation, the judge must conduct an inquiry under R.C.M. 506 to ensure his waiver is voluntary and intelligent before conducting the competency hearing.

¹⁸ In two of the five recent Air Force cases where the accused was diagnosed with currently having a severe mental disease or defect, the accused wanted to represent himself. In both those situations, a finding was made that the waiver was not knowing and intelligent.

¹⁹ *Faretta v. California*, 422 U.S. 806 (1975).

²⁰ *Id.* at 814, explaining *Adams v. United States ex rel. McCann*, 317 U.S. 269, 275 (1942).

²¹ MCM, *supra* note 4, R.C.M. 506(d).

²² *Faretta*, 422 U.S. at 835 (citations omitted).

²³ *Id.*, quoting *Adams*, *supra*, at 279.

should approach this hearing like they would a motion hearing. No matter your position on the accused's mental competency, you will want to call a doctor from the sanity board to testify. You can be creative when looking for evidence. Think beyond the short form of the report and the sanity board members; consider calling lay witnesses who have observed the accused and his behaviors. Co-workers and friends may provide valuable information on the accused's mental digression or lack thereof. Keep in mind that proffers are not evidence. In addition to the short-form report and any other documentary evidence of the accused's mental health, the military judge will also consider any evidence presented at the hearing, the accused's demeanor and conduct in court as well as the accused's responses concerning his right to counsel, his understanding of, and thoughts relating to his request to proceed *pro se*.

A doctor from the sanity board should be present the entire hearing. Encourage and facilitate the board to evaluate the member in as many settings as possible, especially the courtroom if the opportunity presents itself. As an alternative, provide courtroom audio or a transcript to the board for its evaluation. Any opportunity for the board to evaluate the accused's ability to self-represent, interact with the military judge, and ultimately understand the implications of his or her decisions is highly useful. Did the accused question witnesses? Did the accused take the

stand? If so, did he admit to elements of a charged offense? These situations are unique opportunities for the board to determine if the accused can "cooperate intelligently" in his own defense.

Moreover, the doctor will need to testify at the hearing regarding the diagnosis and potential treatments. As an added benefit, the doctor will be able to observe the accused's behaviors during the hearing in a public, non-privileged setting, providing valuable insight to the military judge. This is especially helpful because the doctor cannot disclose comments the accused made during the sanity board inquiry. When the doctor testifies, treat the testimony as you would that of an expert witness. That is, explain the doctor's credentials, background, and, if applicable, how many other sanity boards of which she was a part. If a doctor opines that an accused presently suffers from a severe mental disease or defect rendering him mentally unfit to stand trial, it is helpful to provide evidence about the likelihood of the accused being restored to competency and the approximate time frame.²⁴ If the accused's competency cannot be restored, he will be committed to a federal institution, and no trial will be held.²⁵ If the accused's competency can be restored through treatment, he still faces commitment, but can be brought to trial.

²⁴ See MCM, *supra* note 4, 909(f) discussion.

²⁵ 18 U.S.C.S. § 4241(d) (LexisNexis 2017).

FINDING OF NOT COMPETENT TO STAND TRIAL

If the military judge determines by a preponderance of the evidence that the accused is not competent to stand trial, the military judge will stay the proceedings. The military judge's findings will be transmitted through the legal office to the General Court Martial Convening Authority (GCMCA). The GCMCA then consults his Staff Judge Advocate and determines how best to dispose of the charges. If it is determined the court-martial proceedings will continue, the GCMCA shall commit the accused to the custody of the Attorney General of the United States.²⁶ Ultimately, the GCMCA decides whether to commit the accused.²⁷

The Attorney General is the custodian of mentally incompetent persons.²⁸ The Federal Bureau of Prisons (FBOP) is the Department of Justice agency that houses and treats such persons.²⁹ Within the FBOP, the Psychology Services Branch oversees the facilities that house and treat mentally incompetent patients.³⁰

Once the accused is transferred to the custody of the Attorney General and a suitable facility for psychiatric treatment, doctors will attempt to restore

²⁶ MCM, *supra* note 4, R.C.M. 909(e)(3); 18 U.S.C. § 4241(d).

²⁷ MCM, *supra* note 4, R.C.M. 909(e)(3).

²⁸ R.C.M. 909(f); 18 U.S.C. § 4241(d)

²⁹ United States Department of Justice Federal Bureau of Prisons Program Statement, Number P5310.17, Psychology Services Manual (2016); available at: https://www.bop.gov/policy/progstat/5310_017.pdf

³⁰ *Id.*

the accused to competency through medication. The accused will be there for up to 120 days and for reasonable, but not indefinite, extensions of time.³¹ An accused can continue to suffer from a severe mental disease or defect, yet be restored to legal competency through medication such that he can cooperate intelligently in his criminal defense. The Constitution permits the government to involuntarily administer antipsychotic drugs to a mentally ill defendant facing serious criminal charges in order to render that defendant competent to stand trial, but only if certain conditions are met.³² To do so, the government must demonstrate by clear and convincing evidence that (1) that important governmental interests are at stake given the specific facts of the individual case as well as the concomitant, constitutionally essential interest in assuring that the defendant's trial is a fair one; (2) that the involuntary medication will significantly further those interests; (3) that involuntary medication is necessary, that is, an alternative or less intrusive treatments are unlikely to achieve substantially the same results; and (4) the administration of the drugs is medically appropriate.³³

³¹ MCM, *supra* note 4, R.C.M. 909(f) discussion.

³² *Sell v. United States*, 539 U.S. 166 (2003).

³³ *Id.* at 180–82 (citations omitted). The *Sell* Court did not specify the burden on the government, but courts have considered the issue have held that facts supporting the *Sell* factors must be found by clear and convincing evidence. *State v. Cantrell*, 179 P.3d 1214, 1221 (N.M. 2008); *United States v. Valenzuela-Puentes*, 479 F.3d 1220, 1224 (10th Cir. 2007); *United States v. Bradley*, 417 F.3d 1107, 1114 (10th Cir. 2005); *United States v. Gomes*, 387 F.3d 157, 160 (2d Cir.

If the accused is restored to competency, the facility director will notify the GCMCA, who must then take custody of the accused.³⁴ After the time period allowed for restoration of competency expires, if the federal psychiatric doctors determine the accused cannot be restored to a competency level at which he can stand trial, the government should dismiss the charges. The accused will then remain in the custody of the Attorney General and will eventually be released to his home state's psychiatric service.³⁵

TIPS FOR TRIAL COUNSEL

(1) Working with a *pro se* accused

Communication with the *pro se* accused through the pre-trial and sanity board process is more difficult when the accused is in pre-trial confinement. Trial counsel should work with the confinement staff to serve hard copies of emails on the accused. If this method fails, a legal office representative, not trial counsel, should physically go to the confinement facility to serve documents on the accused. It is important to document receipt of all documents served on the accused as an accused who may be suffering from a mental disease or defect may have memory issues.

(2) How to hospitalize the accused³⁶

From the trial counsel's perspective, the largest obstacles are

2004).

³⁴ UCMJ art. 76b(a)(4) (2016).

³⁵ 18 U.S.C.S. § 4246 (LexisNexis 2017).

³⁶ The authors would like to thank Maj Timothy Ward, Chief of Military Justice at

logistical. Once the GCMCA decides to commit the accused to the Attorney General of the United States, trial counsel working with their Numbered Air Force, or equivalent, legal office, contacts Army Corrections Command, which falls under the Army Office of the Provost Marshal General and is located at the Pentagon. Army Corrections Command is the single point of contact for DoD prisoners who have been committed to the Attorney General of the United States³⁷ The Army Corrections Command facilitates the GCMCA's commitment order and works with the FBOP to locate the appropriate federal medical center (FMC) to hospitalize the accused and conduct competency restoration procedures. The convening authority is responsible for facilitating and funding the transfer of the accused to the FMC. Maintaining contact with the FMC is crucial to facilitating the logistics of the transfer.

At the conclusion of the FMC's evaluation, the FMC will issue a report. It is likely that the FMC will issue the report to the military judge because in the federal court system, it is the federal judge who commits the defendant.³⁸ However, in the military justice system, it is the GCMCA who commits the accused, not the military

AFCENT/JA for his contribution to this portion of the article.

³⁷ Army Corrections Command, available at <https://www.army.mil/e2/c/downloads/340241.pdf> (accessed 28 June 2017)

³⁸ See 18 U.S.C.S. § 4241(d) (LexisNexis 2017).

judge.³⁹ This is an important distinction because if the FMC releases the accused, he or she is released to the GCMCA, not the military judge.

(3) Determining appropriate action at conclusion of hospitalization

If the *Sell* factors, above, for involuntary medication are not present, the GCMCA should withdraw and dismiss the charges. If charges are withdrawn and dismissed while the accused is hospitalized in FMC, the FMC will conduct a dangerousness assessment prior to release.⁴⁰ If an accused is determined not to be a danger to himself or others, he can be released to custody of the Air Force. If he is determined to be dangerous, he is not released to Air Force custody; rather, he is hospitalized indefinitely and possibly transferred to the appropriate state.⁴¹ If the FMC concludes that the accused is not dangerous and releases him to the Air Force, he does not go back into pretrial confinement. The legal office must work with the command and mental health providers to determine the appropriate course of action. The command can simultaneously process a Medical Evaluation Board (MEB) and an administrative discharge. This process is long and can be especially frustrating for commanders, so trial counsel and the legal office should coordinate with their medical legal consultant and mental health providers to assist

the command in determining the appropriate course of action.

TIPS FOR DEFENSE COUNSEL WHEN A CLIENT DOES NOT WANT REPRESENTATION YET MAY BE INCOMPETENT TO STAND TRIAL UNDER RCM 909

Under RCM 506(a), “The accused has the right to be represented before a general or special court-martial by civilian counsel...and either by the military counsel detailed under Article 27 or military counsel of the accused’s own selection, if reasonably available.”

When detailed to a new case, defense counsel rightfully assume their new client will be willing and able to assist in his own defense. However, unfortunate circumstances do exist when this will not be the case. The easy response for a military defense counsel might be to shake hands with the accused and wish him good luck. After all, an accused can choose self-representation. It may be worthwhile to explore further before sending the member on his way. There could be several reasons contributing to a member’s refusal to engage in an attorney-client relationship with a newly appointed military defense counsel. Distrust of attorneys and the military justice process, or sheer frustration and shock are all possibilities. These feelings could also be symptomatic of a severe mental health disorder. Newly detailed counsel need a firm grasp of RCM 506(d) in these circumstances and should consult with their supervisors.

If the member’s mental health becomes a concern and self-representation and competency might be questioned, consider the following.

(1) Do not force the issue.

Trying to forge a relationship because *you* believe it is in the member’s best interest is a mistake. An attorney making decisions the client doesn’t understand or trust could prove disastrous. Explain to the accused your detailing and what alternatives exist. Continually communicate your understanding of your relationship with the accused. Document these conversations. If taken by surprise, gather as much information from the accused as possible. It’s possible that no further military defense counsel will be appointed, so consider reaching out to the accused again with a defense paralegal. Even if the accused refuses counsel, the military judge might say otherwise and appoint an attorney. Like it or not, you may be it.

The experience of being a detailed defense counsel without an attorney-client relationship is unique. As detailed counsel, the military judge may request your presence throughout. It may feel you are walking a fine line. That is because you are; which takes us to our second consideration.

(2) Continue to educate the member while recognizing your limitations.

I hesitate to use the word advocate under these circumstances. To educate is more precise. Ultimately, avoid phrases like, “you should,” “I

³⁹ See MCM, *supra* note 4, R.C.M. 909(e)(3).

⁴⁰ See 18 U.S.C.S. § 4246 (LexisNexis 2017).

⁴¹ *Id.*

recommend,” or even “we” when communicating with the accused. The education might only occur at the counsel’s table. The accused might also desire to meet outside of that context in anticipation of a courtroom appearance. This is when recognizing the limitations and boundaries of the relationship is most necessary. Depending on the accused, it may not be wise not to do so. Maybe the member wants to know where to sit, how to obtain an *MCM*, or even the difference between a sworn and unsworn statement. A general discussion of each could certainly be accomplished.

The accused should be educated about the consequences of speaking too freely. This concept might be clear on the attorney’s end, but it is easily forgotten on the accused’s.

The accused should be educated about the consequences of speaking too freely. This concept might be clear on the attorney’s end, but it is easily forgotten on the accused’s. Re-direct the member if necessary. Remind him that the scope of the relationship is not one protected by the “Lawyer-Client Privilege” of Military Rule of Evidence 502.

(3) If competency to stand trial is apparent to you as detailed counsel, by all means, raise it.

A “sanity board” can be initiated by “any...defense counsel...or member” under RCM 706(a). A detailed defense counsel is in a good position to raise the issue. This is the limited form of advocacy alluded to above. Those documented meetings with the member might form a good basis to inquire as to whether the member has “the mental capacity to stand trial” or lacked “mental responsibility” in regard to the offense(s). The detailed defense counsel may be in the best position to make this initial assessment. Unless the trial counsel or the accused’s unit has observed odd or erratic behaviors, a sanity board may not be considered. This is especially true when the offense(s) alleged is particularly egregious. The desire to preserve “good order and discipline” may understandably fog the minds of those charged with enforcing it.

CONCLUSION

The RCM 706 sanity board often presents itself to trial and defense counsel as *pro forma* until one day it is not. Many members facing courts-martial live with mental health disorders, and it is easy to dismiss those diagnoses as irrelevant to the charged misconduct. It is incumbent upon us all to protect our members’ rights. With some forethought and understanding of the process, trial counsel will be better equipped to advise commanders and defense counsel will be better prepared to assist their clients. **R**



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An Air Force Trial Counsel's Guide to RCM 810 Sentencing Rehearings

BY MAJOR MARK E. COON AND CAPTAIN MATTHEW L. BLYTH

It is relatively **uncommon** for a military appellate court to set aside a sentence and remand a case for a rehearing on the sentence.

It is relatively uncommon for a military appellate court¹ to set aside a sentence and remand a case for a rehearing on the sentence. As such, practitioners handling sentencing rehearings may be uncertain how to proceed, especially when they flip open the Rules for Courts-Martial (RCM) to Rule 810. *Procedures for rehearings, new trials, and other trials*, and find that it says: “the procedure shall be the same as in an original trial, except that the portion of the procedure which ordinarily occurs after challenges and through and including the findings is omitted, and except as otherwise provided in this rule.”² Having had

the unique opportunity to have been involved in two such cases, we offer this article as a trial counsel's guide to the confusing and infrequently seen RCM 810 sentencing rehearing. It should be of assistance to trial counsel serving at the base-level office, as well as to general court-martial convening authority advisors at the Numbered Air Force-level office.

BACKGROUND—HOW DOES A CASE GET TO A SENTENCING REHEARING?

In preparing for a sentencing rehearing, it is helpful to understand how a case gets to this point. Under RCM 1201(a), The Judge Advocate General (TJAG) is required to refer all cases with an approved sentence including a punitive discharge or confinement for one year or more to the Air Force Court of Criminal

¹ This article contemplates a scenario in which the Air Force Court of Criminal Appeals (AFCCA) remands a case, though the guidance provided here generally applies to cases remanded by the Court of Appeals for the Armed Forces (CAAF) as well.

² MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 810(a)(2) (2016) [hereinafter MCM].

Appeals (AFCCA) for review.³ Once a case is referred to it under this rule, AFCCA “may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved.”⁴ Findings and sentences, or portions thereof, not affirmed are set aside and either dismissed or sent to a rehearing.⁵ In cases where AFCCA has set aside the sentence and ordered a sentencing rehearing, and the case has not been further appealed,⁶ the court’s decision is transmitted directly from AFLOA/JAJM to the General Court-Martial Convening Authority (GCMCA).⁷ When it does so, AFLOA/JAJM provides an accompanying memorandum summarizing the posture of the case and the required action going forward.

Upon receipt, the convening authority must publish a supplementary court-martial order indicating that a rehearing will be held or that a rehearing is impracticable.⁸ Directing a sentencing hearing can be done two

ways: (1) in a specific, standalone memorandum, or (2) in the standard member selection and referral documents⁹ signed by the convening authority. Either way, the documentation should clearly indicate that the convening authority is, in accordance with the decision of the appellate court, directing a rehearing to address the sentence for the remaining charges and specifications of which the appellant¹⁰ was previously found guilty. Once this order is signed, the stage is set for the sentencing rehearing, pending formal re-referral of the charges to that forum.

Trial counsel should be aware that once the appropriate convening authority receives the transmission from AFLOA/JAJM and the appellate court decision authorizing the rehearing, the Appellant must be “brought to trial” within 120 days from “the date that the responsible convening authority receives the record of trial and the opinion authorizing or directing a rehearing.”¹¹ While one is typically deemed to have been “brought to trial” at the time of arraignment,¹² in the case of a sentencing rehearing (where there is no arraignment) the Appellant is brought to trial at the time of the first session under

RCM 803.¹³ Periods of “excludable delay” may be approved by either the military judge or the convening authority as they would in any other court-martial.¹⁴

CONTINUED CONFINEMENT— HOW CAN AN APPELLANT REMAIN IN JAIL WHEN THE SENTENCE HAS BEEN SET ASIDE?

One might assume that when an appellate court sets aside a sentence and remands a case for a sentencing rehearing, the appellant is immediately set free during the pendency of the rehearing. After all, at that point, there is technically no sentence. This is not how it works though because military appellate court rulings are not self-executing.¹⁵ Military appellate courts rely on TJAG “and lower officials to execute” their orders.¹⁶

Therefore, the appellant remains in confinement until the government’s opportunities for reconsideration and appeal have run their course.¹⁷ However, once TJAG certifies

³ Uniform Code of Military Justice (UCMJ) art. 66(b) (2016); MCM, *supra* note 2, R.C.M. 1201(a).

⁴ UCMJ art. 66(c) (2016).

⁵ UCMJ art. 66(d) (2016).

⁶ See UCMJ art. 67 (2016) and R.C.M. 1203(c)(1). “The Judge Advocate General may forward the decision of the Court of Criminal Appeals to the Court of Appeals for the Armed Forces for review with respect for any matter of law.”

⁷ See U.S. DEPT OF THE AIR FORCE, AIR FORCE INSTR. 51-201, ADMINISTRATION OF MILITARY JUSTICE para. 11.12.1 (6 June 2013) [hereinafter AFI 51-201].

⁸ AFI 51-201, para. 11.2.4. See also, UCMJ art. 63(e) (2016) and R.C.M. 1203(c)(2).

⁹ See fn 31 *infra*.

¹⁰ While R.C.M. 810 uses the term “Accused,” the authors have chosen to use the term “Appellant” for the purpose of aiding readers in understanding this article. “Accused” is counterintuitive when considering a person who is, at every stage of the proceeding, convicted.

¹¹ MCM, *supra* note 2, R.C.M. 707(b)(3)(D).

¹² MCM, *supra* note 2, R.C.M. 707(b)(1).

¹³ MCM, *supra* note 2, R.C.M. 707(b)(3)(D).

¹⁴ MCM, *supra* note 2, R.C.M. 707(c).

¹⁵ United States v. Miller, 47 M.J. 352, 361 (C.A.A.F. 1997) (citing United States v. Kraffa, 11 M.J. 453, 455 (C.M.A. 1981)).

¹⁶ *Id.* (citing United States v. Tanner, 3 M.J. 924, 926 (A.C.M.R. 1977)).

¹⁷ From the date of the appellate court ruling, the government has 30 days to file a motion for reconsideration. Rule 19(b)(2), AFCCA Rules of Practice & Procedure (20 May 2016). If reconsideration is denied or not pursued, the government has another 60 days to certify (appeal) the case to a higher court. Rule 19(b) CAAF Rules of Practice & Procedure (1 March 2016). Once the case is certified to a higher court, the appellant must either be immediately released or brought before a continued confinement hearing.

(appeals) a case to a higher court, or makes the decision not to, the appellant “obtains an interest in the favorable lower-court decision.”¹⁸ Accordingly, at that point, the appellant must be immediately released by order of the convening authority or be brought before a RCM 305-like¹⁹ “continued confinement hearing,” as required by *United States v. Miller*, 47 M.J. 352 (C.A.A.F. 1997).²⁰ This hearing is required to be held within 7 days of TJAG’s decision,²¹ and the remedy for the government’s failure to do so is “day-for-day administrative credit (beginning on the eighth day) against the sentence as finally affirmed....”²²

When should the convening authority immediately release the appellant? In providing advice, JAGs should consider, among other factors, the time already served in confinement vis-à-vis the maximum allowable punishment for the remaining offenses, as well as the likelihood that the Appellant will engage in “serious criminal misconduct” upon release.²³ For example, it would likely

be appropriate to release an appellant who had already served three years in confinement, but who remained convicted only of adultery and dereliction of duty.²⁴ In contrast, release may not be appropriate for an Appellant who had served three years in confinement but remained convicted of aggravated sexual assault.²⁵

The convening authority may order the Appellant’s release through a signed memorandum to the confinement facility’s parole and release department indicating a determination that continued confinement is not appropriate and that he or she is thereby ordering the Appellant’s immediate release. Alternatively, if the convening authority concludes continued confinement is appropriate, that convening authority should immediately appoint a Continued Confinement Review Officer (CCRO) in writing and sign an order directing “a continued confinement hearing to be held under RCM 305 and in accordance with *Miller* to determine whether [appellant] will remain confined pending completion of the sentencing rehearing in the case of U.S. v. [Appellant].”

While the pertinent case law does not enumerate the requirements for CCROs, it would be prudent for legal offices to ensure that

individuals appointed as CCROs meet the same requirements for Pretrial Confinement Review Officers (PCROs) found in AFI 51-201 para. 3.2.4.1 and para. 3.2 of the AFLOA/JAJM Guide for PCROs.²⁶ The continued confinement hearing generally follows the script found at Attachment A of the PCRO guide, substituting references to pretrial confinement with continued confinement, as necessary. A JAG, unaffiliated with the case, is appointed as legal advisor to the CCRO.

The standard of proof at this hearing is a preponderance of the evidence and, except for Mil. R. Evid. 302, Mil. R. Evid. 305, and the rules concerning privileges, the Military Rules of Evidence do not apply.²⁷ Unlike the pretrial confinement hearing under RCM 305, the appellant in a continued confinement hearing is not entitled to multiple reviews. A single hearing satisfies *Miller’s* requirements.²⁸ Moreover, the CCRO need not make all of the findings set forth in RCM 305. Rather, *Miller* only requires the CCRO to determine whether continued confinement on appeal is necessary because 1) it is foreseeable that the Appellant will not appear at trial or 2) that Appellant will engage in serious

¹⁸ *United States v. Katso*, 2017 CCA LEXIS 82, 14 (A.F. Ct. Crim. App. February 2, 2017).

¹⁹ R.C.M. 305 deals with pretrial confinement hearings.

²⁰ *Miller*, 47 M.J. at 352.

²¹ *Katso*, 2017 CCA LEXIS 82, at 13.

²² *Katso*, 2017 CCA LEXIS 82, at 14.

²³ MCM, *supra* note 2, R.C.M. 305(h)(2)(B). “Serious criminal misconduct includes intimidation of witnesses or other obstruction of justice, serious injury of others, or other offenses which pose a serious threat to the safety of the community or to the effectiveness, morale, discipline, readiness, or safety of the command, or to the national security of the United States.”

²⁴ Adultery and dereliction of duty are nonviolent offenses and have a combined max confinement of just 18 months. See MCM, *supra* note 2, Appendix 12—Maximum Punishment Chart.

²⁵ Aggravated sexual assault, a violent offense, has a max confinement of 30 years. See *id.*

²⁶ These instructions set forth that confinement hearing officers should be “mature” and that certain personnel may not be appointed.

²⁷ MCM, *supra* note 2, R.C.M. 305(i)(2)(A)(ii – iii). See also AFLOA/JAJM Guide for PCROs, at Attachment A.

²⁸ *Katso*, 2017 CCA LEXIS 82, at 11.

criminal misconduct.²⁹ Additionally, if either of those two conditions are met, the CCRO must also determine whether less severe forms of restraint are inadequate.³⁰ At the conclusion of the hearing, the CCRO writes and submits a report to the convening authority detailing the background and posture of the case, the participating parties, the findings, and the ultimate decision. The legal advisor assists in preparing this report. The CCRO's appointment memorandum, the Report of Result of Trial from the original court-martial, and exhibits admitted at the continued confinement hearing should be attachments to the final report.

Trial teams preparing for these hearings should note that the appellant is entitled to appear at the hearing with the assistance of defense counsel.³¹ As such, trial teams should anticipate arranging for the Appellant to appear in person or via video teleconference (VTC) from the courtroom at the Appellant's confinement facility. The Air Force Security Forces Center's Corrections Division at Joint Base San Antonio-Lackland, Texas, and the Air Force Liaison on staff at the appellant's confinement facility can coordinate arrangements.³²

²⁹ *Id.* at 12 (citing *Moore v. Akins*, 30 M.J. 249 (C.M.A. 1990)).

³⁰ *Id.*

³¹ AFI 51-201, para. 3.2.4.3.

³² Notably, the United States Disciplinary Barracks at Fort Leavenworth, Kansas and the Navy Brigs, have an Air Force Liaison on staff who can assist with scheduling the use of the courtroom and the VTC there, as well as arranging the Appellant's timely appearance (or physical transfer, as the case may be).

REFERRAL—HOW DO YOU REFER A CASE THAT HAS ALREADY BEEN REFERRED?

With continued confinement handled, you turn to the question of how to take the case forward. With preferral and original referral already accomplished months or years ago—what do you do? It is time for “re-referral.”

“ADVICE REGARDING POST-TRIAL ACTION”

The first step is to write, and have the convening authority's Staff Judge Advocate sign, the “Advice Regarding Post-Trial Action.” This is the sentencing rehearing's equivalent to Pretrial Advice. In addition to containing the mandatory contents required by Art. 34 of the UCMJ and RCM 406(b),³³ the Advice Regarding Post-Trial Action should clearly articulate what charges and specifications were originally referred, what charges and specifications the Appellant was convicted of, the original sentence, the charges and specifications which were set aside (if applicable) and the charges and specifications which were affirmed.³⁴ Upon completion, the advice is forwarded to the convening authority with the rest of the referral documents.³⁵

³³ Sample Pretrial Advice can be found in AFI 51-201, Figure 4.8.

³⁴ In complex cases with multiple charges and specifications, identifying and articulating exactly which charges and specifications were set aside and which were affirmed can be an arduous task. It is recommended that trial counsel rely heavily on the appellate court's written decision to correctly identify the remaining charges and specifications.

³⁵ AFI 51-201, para. 4.6.

MEMBER SELECTION AND RE-REFERRAL MEMORANDUM

The second step is to draft the member selection/referral memorandum for the convening authority's signature.³⁶ Member selection is required in all sentencing rehearing cases because the rules provide that the appellant is not constrained by the forum selection made at the original trial.³⁷ In other words, even if the appellant was originally tried by military judge alone, appellant can still change his mind and elect to be sentenced by members at the rehearing, or vice versa. In the event the same forum is selected, members who served on the original panel may not serve on the panel in the rehearing.³⁸ There is no prohibition on the judge from the original trial presiding over the rehearing, but there is also no requirement that the original judge preside over the rehearing.³⁹

The member selection/referral memorandum should also expressly state that the convening authority is “directing a sentencing rehearing to take place at ___ to address the remaining charges and specifications

³⁶ See AFI 51-201, para. 4.7. See also MCM, *supra* note 2, R.C.M. 601.

³⁷ See MCM, *supra* note 2, R.C.M. 810(b)(2). “The existence or absence of a request for trial by military judge alone at a previous hearing shall have no effect on the composition of a court-martial on rehearing.” See also MCM, *supra* note 2, R.C.M. 810(b)(3). “The accused at a rehearing...shall have the same right to request enlisted members or trial by military judge alone as the accused would have at an original trial.”

³⁸ MCM, *supra* note 2, R.C.M. 810(b)(1). “No member of the court-martial which previously heard the case may sit as a member of the court-martial at any rehearing...”

³⁹ MCM, *supra* note 2, R.C.M. 810(b)(2).

In preparation for the rehearing, trial counsel should **anticipate defense strategies** unique to sentencing **rehearings** and prepare accordingly.

of which [the Appellant] was found guilty in accordance with the decision of the AFCCA, dated ____.”⁴⁰ After selecting members, the convening authority should sign the member selection/referral memorandum, re-referring the case and formally directing the sentencing rehearing.⁴¹ It is recommended that copies of the original charge sheet, unexpurgated court-martial order, appellate court decision, and AFLOA/JAJM transmittal memorandum accompany the advice and the member selection/referral memorandum as attachments.

THE “HINGED” REFERRAL

The third step is to complete the re-referral with the DD Form 458. This is where it gets interesting. Because the case has previously been referred, Section V on the original charge sheet will already be filled out. Therefore, the legal office must prepare a “hinged referral.” This is accomplished by taking page 2 from a blank DD Form 458 and filling out Section V to read “For a rehearing on sentence only, as ordered by General Court-Martial Order No. __, Headquarters, __, dated _____, as to the charge(s) and specification(s) of which the accused was found guilty and affirmed by AFCCA’s decision, dated ____.”⁴² The newly completed referral section

⁴⁰ The member selection/referral memorandum should select both officer members and enlisted members and identify which officers are to be excused in the event the Appellant elects enlisted members. This will prevent short-notice scrambling in the event the Appellant makes an eleventh hour change in forum selection.

⁴¹ See AFI 51-201, para. 4.7.

⁴² AFI 51-201, para. 4.9.2.

is then cut out or folded over and stapled directly on top of the Section V of the original charge sheet.⁴³ It should be attached in such a way that the new referral can be flipped up to reveal the original referral, hence the name “hinged referral.” Under no circumstances should the original referral be removed or obliterated.⁴⁴

NEW CONVENING ORDER

Once the aforementioned documents have been completed, the final step is to prepare a new convening order. In keeping with the goal of clearly identifying the case’s unique status, the prefatory language of the convening order should read “Pursuant to the authority contained in Special Order ____, Department of the Air Force, dated _____, a general (or, if applicable, special) court-martial is hereby convened to conduct a sentencing rehearing in accordance with the sentencing rehearing order dated ____.” Once officially re-referred, the sentencing rehearing is then docketed through the Central Docketing Office like any other case.

PREPARING FOR THE SENTENCING REHEARING ENSURING THE APPELLANT’S APPEARANCE

Once the case has been re-referred and docketed for a sentencing rehearing, it is time to prepare for the rehearing itself. In instances where the Appellant has remained in confinement during the pendency

⁴³ AFI 51-201, para. 4.9.1.

⁴⁴ *Id.*

of the rehearing, trial counsel's first task after docketing is to make arrangements for the physical transfer of the appellant for the rehearing. If the Appellant is still confined, these arrangements must be coordinated through the Air Force Security Forces Center's Corrections Division and through the Air Force liaison on staff at the Appellant's confinement facility. Be advised that Security Forces personnel from the base where the rehearing occurs must travel to the confinement facility and personally escort the Appellant back. If no on-base confinement facility exists, the trial team should make plans for the Appellant to be confined at a local, off-base facility through an existing Memorandum of Agreement.

MOTIONS AND HEARING PREPARATION

In preparation for the rehearing, trial counsel should anticipate defense strategies unique to sentencing rehearsals and prepare accordingly. One defense tactic may be to file a motion for appropriate relief for illegal pretrial punishment under Article 13, UCMJ.⁴⁵ Trial counsel should remember that illegal pretrial punishment analysis involves a two-prong test. First, courts address whether the complained-of actions were performed with intent to pun-

⁴⁵ Article 13 states that "[N]o person, while being held for trial, may be subjected to punishment other than arrest or confinement upon the charges pending against him, nor shall the arrest or confinement imposed upon him be any more rigorous than the circumstances required to insure his presence." UCMJ art. 13 (2016).

ish.⁴⁶ Second, if no punitive intent is found, a court must address whether the government's actions furthered a legitimate non-punitive objective.⁴⁷

Restoration of pretrial rank and pay may present a thorny issue, especially given recent changes in the law. Article 75(a), UCMJ, provides that "all rights privileges, and property affected by an executed part of a court-martial sentence which has been set aside or disapproved... shall be restored *unless a new trial or rehearing is ordered* and such executed part is included in a sentence imposed upon the new trial or rehearing."⁴⁸ In *Howell v. United States*, 75 M.J. 386, 392-93 & n. 5 (C.A.A.F. 2016), the court contradicted precedent from Article III courts and held that, after rehearing is ordered and the accused is no longer confined, the accused should then receive full restoration of rank and pay. If trial counsel have a case where rank and pay were not restored, *Howell* does provide aid. In that case, the court found that failure to restore rank and pay (in reliance on pre-*Howell* precedent) was not inherently unreasonable.⁴⁹ Thus, in those circumstances failure to restore rank and pay lacked punitive intent

⁴⁶ *United States v. Washington*, 42 M.J. 547, 562 (A.F. Ct. Crim. App. 1995).

⁴⁷ *Id.* See also *United States v. Zarbatany*, 70 M.J. 169, 176-77 (C.A.A.F. 2011) (explaining that courts examining Article 13 violations should consider "the nature of the [violations], the harm suffered by the appellant, and whether the relief sought is disproportionate to the harm suffered or in light of the offenses for which the appellant was convicted").

⁴⁸ UCMJ art. 75(a) (2016) (emphasis added).

⁴⁹ *Howell*, 75 M.J. at 393.

and would not necessarily constitute illegal pretrial punishment.

In raising this Article 13 issue, the defense may argue that any confinement after the appellate court set aside the sentence is illegal. When facing this argument, trial counsel should argue (as the facts allow): (1) that there was no intent to punish, and (2) that the government merely pursued its legitimate non-punitive objective of evaluating appellate options. Recall that when AFCCA sets aside a sentence, the government has 30 days to file for reconsideration,⁵⁰ and the appellant stays confined during this time. If AFCCA denies the motion for reconsideration, the government then has 60 days to certify the case to CAAF.⁵¹ The appellant also stays confined during this time period. As long as the government meets these timelines (and, as the case may be, a timely⁵² continued confinement hearing was properly conducted) any confinement between the appellate court setting aside the sentence and the sentencing rehearing will not be illegal, assuming no punitive intent and compliance with relevant rules and procedures.

Following the rehearing, it is possible that the appellant's new sentence will be significantly lighter than his original sentence. In this case, the defense may argue that confinement credit for

⁵⁰ Rule 19(b)(2), AFCCA Rules of Practice and Procedure (20 May 2016).

⁵¹ Rule 19(b) CAAF Rules of Practice & Procedure (1 March 2016).

⁵² See fn 22 *supra*.

time the appellant has already served should be converted into Article 13 credit for other portions of the appellant's sentence, such as the punitive discharge or reduction in rank. In the face of this argument, trial counsel should note that the military appellate courts have declined to create an equivalence between certain types of punishment because confinement and "reprimands, reductions in rank, and punitive discharges are so qualitatively different . . . that conversion is not required as a matter of law."⁵³

One of trial counsel's most difficult challenges may be locating witnesses. In most cases, a significant amount of time will have passed since the original trial and even more time will have passed since the offenses were actually committed. With the passage of such time, witnesses who testified in the original sentencing hearing may have separated from the military, moved, changed their names, or otherwise become unavailable. Moreover, witnesses who can be located will often have mentally and emotionally moved on from the first trial and have no interest in participating in the sentencing rehearing. While such witnesses can be subpoenaed to appear, there are other options. First, trial counsel and defense counsel can enter into stipulations of fact or expected testimony regarding the sentencing evidence.⁵⁴ Second, trial counsel can

have relevant portions of the record of trial from the findings portion of the original court-martial offered as a written exhibit for the members to read to themselves in open court.⁵⁵ Third, trial counsel can coordinate with the court reporter to obtain the audio record from the original trial and then have it played aloud in open court.⁵⁶ If trial counsel is attempting to admit portions of the Record of Trial from the original court-martial, either in writing or in audio format, it is strongly recommended that this be handled with a motion *in limine* to pre-admit the evidence so as to ensure all parties are on the same page and to avoid delays.⁵⁷ Finally, if the appellant pled guilty at the original trial⁵⁸ to any of the offenses for which re-sentencing was ordered, Trial Counsel can offer documentary

exchange for the Appellant's stipulation to the Government's evidence.

⁵³ "The contents of the record of the original trial consisting of evidence properly admitted on the merits relating to each offense of which the accused stands convicted but not sentenced may be established by any party whether or not testimony so read is otherwise admissible. . . ." MCM, *supra* note 2, R.C.M. 810(a)(2)(A).

⁵⁴ See fn 55 *supra*. If pursuing this approach, it is recommended that Trial Counsel coordinate with the Court Reporter well in advance because it will take the Court Reporter a long time to splice and edit the audio ahead of the rehearing.

⁵⁵ These two tactics can only be utilized if the previous record has been admitted in evidence by the military judge because "No member may, upon rehearing, . . . examine the record of any former proceedings in the same case except []when permitted to do so by the military judge after such matters have been received in evidence." MCM, *supra* note 2, R.C.M. 810(c)(1).

⁵⁶ The Accused at a rehearing only on sentence may not withdraw any plea of guilty upon which findings of guilty are based. MCM, *supra* note 2, R.C.M. 810(a)(2)(B).

or audio records of the plea colloquy (*Care*⁵⁹ inquiry) at the rehearing.

THE SENTENCING REHEARING

Once motions have been handled, it is necessary to prepare for the rehearing itself. A good first step is to prepare the script. The script for a sentencing rehearing can be found in the Electronic Military Judge's Benchbook by clicking on: "Appendices in DA PAM 27-9," and then "Rehearings, Other Trials, and Revision Procedures." It is not found under "Trial Scripts." While preparing the script, Trial Counsel should take note that there are several mandatory appellate exhibits that need to be handled at the very beginning of the rehearing. These include: the charge sheet for the original trial, the promulgating order for the prior proceedings, the appellate court decision authorizing the sentencing rehearing, the transmittal memorandum from AFLOA/JAJM returning the case to the convening authority for further action, the Staff Judge Advocate Advice Regarding Post-Trial Action, and the convening order for the rehearing.

During the rehearing itself, and especially when announcing the general nature of the charges, trial counsel should take special care to announce only those charges and specifications of which the Appellant remains convicted after the appellate court ruling, and not to announce any of the charges and specifications

⁵⁹ United States v. Care, 18 M.J. 535 (C.M.A. 1969).

which were set aside. Moreover, counsel from both sides should not disclose the previously adjudged or approved sentence from the original trial.⁶⁰ In judge-alone cases, this may be unavoidable, but the military judge must nevertheless not consider the previously adjudged or approved sentence when determining an appropriate sentence.⁶¹

Trial counsel should carefully review the procedural rules as they existed *at the time of the original trial*. Procedural rules are, in effect, “frozen” at the time of trial.⁶² This will resonate strongly in areas of the law with significant change in recent years, such as victims’ rights, where the procedural landscape has transformed. One common example is maximum punishment. Thus, when announcing the maximum punishment, trial counsel should ensure that there has not been a change in the maximum punishment since the original trial—the maximum punishment that can be adjudged at a sentencing rehearing is limited to that which was in effect at the time of the original trial (for the offenses of which the appellant remains convicted). Additionally, when calculating the sentence which will be argued for in sentencing arguments, trial counsel should be aware that Article 63, UCMJ, and RCM

810(d) prohibits sentences at rehearsings from exceeding, or being more severe than, the sentence approved at the original trial.⁶³

When offering the appellant’s Personal Data Sheet (PDS) as RCM 1001(b) sentencing evidence, trial counsel should ensure that it is current as of the date of the rehearing, and not as of the original trial date. Finally, trial counsel should be prepared to report the amount of confinement credit Appellant may receive. Aside from these specific modifications, the sentencing rehearing will proceed similarly to the standard court-martial sentencing phase procedures.

CONCLUSION

Article 63, UCMJ, and RCM 810 govern the sentencing rehearing, and Trial Counsel should be familiar with those provisions. Unfortunately, those provisions are not as helpful to the uninitiated as one might hope. While the procedures are generally the same as in an original trial, sentencing rehearsings require a unique tactical approach and certain modifications to the standard court-martial procedures, which can be confusing. This guide should help Trial Counsel overcome that confusion and prosecute these cases in a smooth and efficient manner. **R**

⁶⁰ See *United States v. Rhodes*, 64 M.J. 630, at 632. (A.F. Ct. Crim. App. 2007)

⁶¹ See MCM, *supra* note 2, R.C.M. 810(d) Discussion. “An appropriate sentence on a . . . reheard offense should be adjudged without regard to any credit to which the accused may be entitled.” See also *United States v. Cruse*, 53 M.J. 805, 809 (A. Ct. Crim. App. 2000).

⁶² MCM, *supra* note 2, R.C.M. 810(a)(1).

⁶³ UCMJ art. 63 (2016); MCM, *supra* note 2, R.C.M. 810(d)(1).



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Emojis and Emoticons in Court

BY CAPTAIN PATRICK M. MILOTT

Despite the danger of **misinterpretation** inherent in the use of **emojis and emoticons**, their popularity has increased.



Expressing emotion in our digital lives presents unique challenges. Articulating joy, sadness, or laughter in non-verbal, non-word characters is a learned skill which can be interpreted differently than the author intended. Despite the danger of misinterpretation inherent in the use of emojis and emoticons, their popularity has increased since their online debut in the early 1980s. One of the first, if not the first, use of an emotional identifier¹ was in a Carnegie Mellon University message board as a “joke marker.”² In the early 1980s, electronic message boards increased in use at Carnegie Mellon for both serious academic pursuits as well as sarcastic and funny posts.³ At

times, posts would be misinterpreted, which led to a flurry of responses that failed to grasp the original thought. Professor Scott Fahlman, a computer science researcher, suggested the use of “:-)” as a joke marker.⁴ He went on to say, somewhat sarcastically, that because of all the misinterpretation that was occurring, serious posts should use “:- (“ to identify that they are not in jest.⁵ The emotional identifiers were necessary to make up for what Professor Fahlman said was lacking in text-based communication: body language and tone-of-voice cues. While the meaning of “:-)” was that of a “joke marker” in early messenger boards, the meaning of emoticons and their pictorial counterparts, emojis, is up for interpretation.⁶ It is often said that the practice of law is behind the technology curve and that attorneys and paralegals need to do a better job of embracing society’s

¹ “Emotional identifier” is used to refer to both emojis and emoticons. The phrase “emotional identifier” may be imprecise because not all emojis or emoticons refer to emotions or feelings. For example, a mailbox emoji, in and of itself, does not evoke an emotional response. Nevertheless, the author’s use of “emotional identifier” is meant to refer to all emojis and emoticons.

² Scott Fahlman, :-) *History*, <http://www.cs.cmu.edu/smiley/history.html> (last visited 31 May 2017).

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ See generally *Enjaian v. Schlissel*, No. 14-cv-13297, 2015 U.S. Dist. LEXIS 68511, 2015 WL 3408805 (E.D. Mich. 27 May 2015).

advances. As litigators, many of us already wrestle with the meanings of emoticons and emojis.

What are emojis and emoticons? An emoji is a “colorful pictograph that can be used inline in text.”⁷ Adding to that broad definition, an emoji is commonly a type of graphic symbol that represents an idea, thing or concept, independent of any particular language, used in electronic messages and web pages. Emojis may be animated or still images. One of the most common emojis is the yellow circular smiley face.⁸ An emoticon, on the other hand, is “a series of text characters (typically punctuation or symbols) meant to represent a facial expression or gesture such as ;).”⁹

Contrasting with the popular yellow smiley face emoji, the emoticon corollary is the combination of “:”, “-” and “)” to form “:-)” a smiley face.

Attorneys, judges, investigators, and other parties should make efforts to understand emojis and emoticons in their case so as not to lose out on context which may be dispositive. Text messages, e-mails, message boards, and other types of messaging services offered in official and unofficial capacities are woven into our daily professional and personal lives. For example, there are 110 available

varied emojis for use on the desktop messaging program Lync, including a yellow smiley face, pizza, and an animated ninja that shows skill with a sword before vanishing in a cloud of smoke. Most messaging programs allow the sender to control who receives the message, thus leading to an increase in use of messages in interpersonal and intimate relationships. Given the increasing use of cell phones, social media, and other forms of digital communication in our professional and personal lives, emojis and emoticons are here to stay. These text-based communications, normally thought to be private, can eventually be obtained by investigators and made public in open hearings.

Communications made by a witness, defendant, or victim can provide insight into their intent, knowledge, or motivations. The role non-word symbols should play, if any, is an open question in the legal community because of how relatively new these emotional identifiers are in our society. How is a legal professional supposed to define an emoji or emoticon? Are there times when emojis should have no value and other times where they can be dispositive? Can they take the place of legally significant language or other words? Does context of the conversation around which the emoji is used completely define how the emoji should be interpreted or should the interpreter be looking to outside sources as well? While not all of these questions will be answered in this article, it will cover some examples

of how courts have begun to grapple with how much legal significance can be given to emojis and emoticons.

“P”: DEEPLY UNHAPPY OR SADISTIC BLOODTHIRSTY REVENGE?

Enjaian v. Schlissel

At least one federal court has interpreted the significance of an emoticon. In *Enjaian v. Schlissel*, one student sent threatening messages to another. The offending student claimed he minimized the threats through the use of emoticons. Police investigated a law student for stalking and harassing a female classmate online. After investigators seized and searched a number of electronics, prosecutors declined to press charges. The accused law student sued his female classmate, the school, and the police, seeking recourse for what he saw as an unlawful search and seizure.¹⁰

The court in *Enjaian* found that the single text message used as the basis for the search warrant for allegations of harassment was not materially changed by the addition of an emoticon. The message read in part that the plaintiff “h[o]pe[d] [the victim] likes deep dark pits of depression because [he’s] a petty bastard P.”¹¹ The plaintiff argued that the addition of the “P” was crucial since it is an emoticon and “materially affects the tone of the sentence.”¹² After the plaintiff was

⁷ The Unicode Consortium, *Unicode Technical Report #51 UNICODE EMOJI*, 1.4 Definitions, www.unicode.org/reports/tr51/#Definitions (last visited 31 May 2017).

⁸ Matthew Rothenberg, *emojitracker: realtime emoji use on twitter*, www.emojitracker.com (last visited 31 May 2017).

⁹ The Unicode Consortium, *supra* note 7.

¹⁰ *Enjaian*, 2015 U.S. Dist. LEXIS 68511, at 8–9.

¹¹ *Id.* at 3.

¹² *Id.* at 3 n.3.

Future need
for **courts**
to understand
the nuances
brought about
by technological
and **social**
change.

warned not to act by a friend, the plaintiff responded “Not that serious. Just enough to make [the victim] feel crappy -D.”¹³

The emoticons in question here, “-D” and “P,” each refer to a facial expression. The first emoticon refers to a wide open-mouth smiley face. The second emoticon refers to a tongue sticking out of a mouth. In both of these emoticons, note that eyes are not present in the original message.¹⁴ Outside of the context of a message, both of these emoticons can be used to show approval, laughter, cheerfulness, joy, or similar topics.



since the emoticons were left out of the search warrant, a reasonable reader of the messages would have seen that “he was merely ‘deeply

¹³ *Id.* at 3.

¹⁴ See University of Alberta, *Research finds that culture is key to interpreting facial emotions*, EUREKALERT! (4 Apr. 2007), https://www.eurekalert.org/pub_releases/2007-04/uoa-rft040407.php (providing a comparison between Japanese and American use of emoticons and explaining how the former focuses more on eyes as an indicator of emotion while the later utilizes changes in the mouth to show different emotions.)

unhappy...rather than sadistically bloodthirsty for revenge.”¹⁵ The court said that the lack of the emoticon does not support the plaintiff’s argument because the emoticon does not make a significant change to the meaning of the message.¹⁶ The court did not elaborate any further.

The court may have thought the plaintiff’s harassing statements were so strong that the jovial emoticon did not overcome the threatening language used. Alternatively, the court may not have given any weight to the emoticon and interpreted the message based solely on the words used. It is more likely the court gave weight to the emoticon but interpreted its meaning differently than the plaintiff may have intended. This is supported by the fact that the court took the time to explain what emoticons are and said that in this particular case, use of the emotional identifiers was not dispositive.

Because of expanding use, it is important for attorneys to know if a court will need more explanation on what these symbols are and how they are used as forms of communication in our society. *Enjaian* represents the future need for courts to understand the nuances brought about by technological and social change. Ultimately, the *Enjaian* decision is important because it is one of the few cases that took the time to explain what emoticons and emojis are, while also

¹⁵ *Enjaian*, 2015 U.S. Dist. LEXIS 68511, at 15.

¹⁶ *Id.* at 18.

explaining their differences.¹⁷ If for no other reason, attorneys can now point to this decision as a starting point for interpreting emotional identifiers for their clients and courts.

Law Schools and Moot Court Competitions

Law schools and moot court competitions are pushing the envelope with technology in the courtroom. Law schools have been offering courses focused on technology in the legal profession taught by attorneys who use cutting edge electronic tools to zealously advocate for their clients.¹⁸ In one recent moot court competition, the fact pattern utilized a text message with multiple emojis from a key witness purportedly identifying the accused in a store near in time to a burglary occurring miles away.¹⁹ While law school level classes and moot court competitions will not assist current practitioners, the legal profession should take note since future attorneys will be armed to use technology for their clients' benefit.

¹⁷ *Id.* at 15.

¹⁸ See Chicago-Kent College of Law, *Litigation Technology*, <https://www.kentlaw.iit.edu/courses/jd-courses/jd-litigation-and-practice-skills-courses/litigation-technology> (last visited on 7 November 2016); Suffolk University Law School, *LAW-2951 E-Discovery Law*, <http://www.suffolk.edu/law/academics/degrees/jd/23600.php?CourseID=521> (last visited on 7 November 2016). See generally Richard Granat & Marc Lauritsen, *Teaching the Technology of Practice: The 10 Top Schools*, LAW PRACTICE, July/August 2014, http://www.americanbar.org/publications/law_practice_magazine/2014/july-august/teaching-the-technology-of-practice-the-10-top-schools.html.

¹⁹ Jones School of Law, Faulkner University, *The Mockingbird Challenge National Trial Competition 26* (2016), www.trialteamcentral.org/wp-content/uploads/2016/09/Mockingbird-2016-fact-pattern.pdf.

DO SMILEY FACES TURN DEATH THREATS INTO A JOKE?

In Re L.F.

At least one state court is taking note of the role emojis can play in the law. A California appellate court concluded that a minor, identified as L.F., had committed a felony criminal threat for sending threatening messages, some of which included emojis. During a school day at Fairfield High School, L.F. tweeted²⁰ the following over a matter of hours to followers on an account that can be seen by the public: “If I get a gun it’s fact I’m spraying [five laughing emojis] everybody better duck or get wet”; “I’m leaving school early and going to get my cousin gun now [three laughing emojis and two clapping hands emojis]”; and “I really wanna a challenge shooting at running kids not fun [laughing emoji].”²¹ Note that the court added the brackets with a brief description of the emojis and also provided a definition of emojis.²² As described below, the use of brackets may be insufficient when referring to emojis. L.F. made other comments on Twitter along the same vein identifying the sections of her high school she was going to target during her threatened shooting spree.

²⁰ “Tweeted,” “tweets” and “tweet” refer to messages sent on Twitter, which is an online news and social media platform allowing users to send publicly viewable messages containing up to 140 characters, including emojis and emoticons. If someone is a logged in to Twitter, they can send and view messages. Those that are not logged in, can only view messages.

²¹ *In re L.F.*, No. A142296, 2015 Cal. App. Unpub. Lexis 3916, at 2–3 (Cal. Ct. App. 3 June 2015).

²² *Id.* at 2 n.3.

At the juvenile hearing, L.F.’s best friend testified that when she read the tweets, she did not take them seriously because the laughing emojis showed that L.F. was making the comments in jest.²³ L.F.’s sister testified that she also thought the tweets were jokes, in part, because of the presence of the emojis.²⁴

L.F. argued that her use of “symbols of laughing faces” and terms like “jk” shows that the statements were meant as jokes.²⁵ The court disagreed because the threats were specific as to location, descriptive in the threats execution, and were made over a number of hours.²⁶ *In re L.F.* is instructive because *how* the court interpreted the emojis can be understood as one end of the spectrum when interpreting emojis and emoticons. In the court’s view, the jovial laughing face emojis were used with overtly threatening language directed at specific people in a specific place.²⁷ Where a court views the questioned language as unequivocal, the use of a light-hearted emoji or emoticon may not change the meaning of the message. However, on the other end of the interpretation spectrum, if equivocal language is used along with jovial emojis and emoticons, then these emotional identifiers may be used in understanding the context of the message.²⁸

²³ *Id.* at 6.

²⁴ *Id.*

²⁵ *Id.* at 12.

²⁶ *Id.* at 12–13.

²⁷ *Id.*

²⁸ The imagery of an interpretation spectrum

When forensically sound data from cell phones and computers are at issue, **an emoji may not appear as the image** the user of the media observes it for a variety of reasons.

In re L.F. is also important because it is one of the few cases to define “emoji.” Relying on the *Oxford English Dictionary* from Oxford University Press, the court defined an emoji as “a small digital image or icon used to express an idea, emotion, etc., in electronic communications.”²⁹ Reference material used to define terminology in the legal world, such as *Black’s Law Dictionary* and *The Law Dictionary* available on Lexis, do not define “emoji” or “emoticon.”³⁰

Given that relatively few legal sources have taken the time to define “emoji” and “emoticon,” it is important for an attorney to have these various definitions at their disposal when drafting pleadings.³¹ While there are few cases which discuss the differences between emojis and emoticons and how to interpret them, there is nevertheless general guidance which can be used when interpreting these emotional identifiers.

is used to draw out the idea that not every use of emojis or emoticons will require a weighing of their meaning. The author nevertheless suggests that while in practice, it is best not to think of a spectrum but a graph with x, y, and z axes which can better account for the depth and complexity of most cases.

²⁹ *In re L.F.*, 2015 Cal. App. Unpub. Lexis 3916 at *3.

³⁰ See BLACK’S LAW DICTIONARY (8th ed. 2004); THE LAW DICTIONARY, <https://advance.lexis.com> (follow “Secondary Materials” hyperlink; then follow “Dictionaries” hyperlink and search “emoji”).

³¹ This author could find no military appellate court that has referenced emojis in their decision. While this is not surprising because of the few state and federal cases mentioning emojis, it is only a matter of time before emojis start making their way into more court decisions. While not documented in publicly available records, this author has prosecuted and defended multiple individuals where emojis were at least part of the evidence submitted in the adverse action.

GENERAL GUIDANCE

Below are general guidelines offered to assist in framing an understanding of an emoji or emoticon for use in legal proceedings.

TYPES OF EMOJIS

Emojis are not just yellow smiley faces anymore; they can range from bento boxes to mountains.³² Does a bento box have a meaning not mentioned in the facts of your case which may nevertheless be important to understand? The legal professional has their work cut out for them since new emojis can be created by individuals, companies, and other organizations at their leisure. For example, Kim Kardashian launched an application allowing for the use of “Kimojis” in text messages, which are Ms. Kardashian-themed emojis.³³ Despite the breadth of options available, attorneys should make an effort to know where unique emojis that are key to their cases came from, and if they have an alternate meaning.

KNOW THE LIMITS OF INVESTIGATIVE TECHNOLOGY

When forensically sound data from cell phones and computers are at issue, an emoji may not appear as the image the user of the media

³² Given the increasing number of emojis that on their face have nothing to do with emotion, the phrase “emotional identifier” does not fully capture pictographs such as yellow sneakers and bento boxes at first glance. Nevertheless, as the word “emoji” encompasses the root of “emotion,” a practitioner should not be surprised if the facts of a case point to an emotional meaning for symbols as seemingly innocuous as yellow sneakers.

³³ Leena Rao, *Kim Kardashian’s Emoji App Is Topping Apple’s Charts*, FORTUNE (5 February 2016), www.fortune.com/2016/02/05/kim-kardashian-kimoji.

observes it for a variety of reasons. For example, investigators may be using technology that does not capture the emoji. Another reason an emoji may appear incorrectly, or not at all, is that deleted messages retrieved from an electronic platform may be partially recovered and the emotional identifier may have been left out. These examples emphasize the importance of explaining technology in court and advocating for the court to recognize part of the communication (the emoji or emoticon) is missing. Knowledge regarding how emojis are preserved as evidence, and situations in which they would become corrupted, are significant when preparing motions, witness questions, expert questions, and findings arguments where an emoji is a significant factor in the case. When it comes to the collection of emojis or emoticons as evidence, take pictures of the relevant messages as thoroughly as possible so you know that the parties have documentation of the messages and any emotional identifiers as viewed by the sender or receiver. While this means of collection may not be as forensically sound as a technical extraction, it is nevertheless a way to ensure capture of these symbols in a way that the user observed them. In addition, this practice ensures that the evidence is readily available to the parties and the parties do not have to wait for a technical analysis.

KNOW THE CONSUMER ELECTRONICS AND APPLICATIONS USED

There are resources to assist lawyers in understanding this topic area. The

Unicode Consortium is a non-profit, 501(c)(3) charitable organization, whose mission it is to provide “a unique number for every character, no matter what the platform, no matter what the program, no matter what the language” for electronic communications.³⁴ If the Consortium is successful in its mission, its efforts should allow for the various computer programs used across electronic media to be able to talk to one another. For purposes of emojis, that would mean that a smiley face entered into one platform, such as an Internet messaging service on a smart phone, could be viewed by a person using a different platform, such as a different Internet messaging service on a desktop computer. The Consortium website can be used to understand some of the technicalities in transferring messages from one platform to another platform. Other resources include investigators who are well versed in electronic data storage and computer forensic experts.

CONTEXT MATTERS, OR DOES IT?

As with most language and other modes of communication, context is key to understanding the meaning a sender of a message intends to communicate to a receiver of the message. Emojis and emoticons are no different and should be understood in their context, with the caveat that where unequivocal language is used, the receiver may reasonably ignore the emojis or emoticons. This is true for all parties involved in the courtroom,

³⁴ The Unicode Consortium, *What is Unicode?*, www.unicode.org/standard/WhatIsUnicode.html (last visited 31 May 2017).

When it comes to the collection of emojis or emoticons as evidence, **take pictures** of the relevant messages.

even if your position is contrary to understanding the emotional identifier in context; knowing what the other parties to the action may think about how a key message is interpreted will better prepare you to defend against that position. Another strategy is to show that there are so many different uses of the particular symbol that neither of the parties, nor the fact finder, can independently verify how the sender meant the emotional identifier to be interpreted. Knowing the breadth of the context to use is based on your discretion and where the facts lead you. For example, conspirators working to steal equipment from the government may use emojis differently than a sexual assault perpetrator communicating with the victim. The age, education, occupation, and other attributes of the relevant parties may guide you to a more precise understanding as well. For example, the clap emoji (a pictograph of two hands coming together) has been used by pop-icons of the current generation to draw attention to or emphasize an idea (think exclamation mark).³⁵ Other examples include sexual connotations associated with eggplant³⁶ emoji and scissor³⁷ emoji. However, a legal professional may never have known these unique meanings if they didn't search

for a meaning of the emoji outside of the communication's context.

EXPLAINING EMOJIS IN FILINGS AND DECISIONS

Explaining the use of an emoji or emoticon can be difficult if all the context and definitions you find relevant are not included. Likewise, when a court is explaining the facts or its decision, extra consideration should be given to explain the emoji itself as well as the outside factors the court considered in understanding the emoji. Describing the emoji in quoted statements from text messages, such as [winking emoji] or [smiling emoji], may be insufficient if you are expecting the reader to have a fuller understanding of how the emoji was used. It can be argued that even the simple identifier of [smiling emoji] is already inadequate because there are different types of smiles, skin tones, and some smiling emojis may have other defining characteristics. This is why, if at all possible, the emoji itself should be entered as an exhibit or inserted into the text of the filing or court decision. Another option is to cite web sites in filings and court decisions that allow the reader to go to the website and see the emoji for themselves. There are assuredly technological issues to address. But given the increasing use of emojis and the multitude of variations, we may already be behind as a legal profession in explaining which emoji we are referencing, when addressing opposing parties, appellate courts, and clients.

CONCLUSION

The use of emotional identifiers has evolved from clarifying only the tone of a message at Carnegie Mellon, to a robust mode of communicating meaning. This evolution has caused a parallel shift in the thinking of courts as they confront an increasing number of evidentiary issues associated with the use of emotional identifiers. Attorneys must be attune to emojis and emoticons, and work to understand their place in our digital lives. From a cultural perspective, expanding our modes of communication through symbols adds to the nuances of how we exchange information (we've communicated through symbols for much of our history, i.e., alphabets). But courts and the various parties involved with them should spend additional time understanding these nuances and appreciating what they may do for their interests. **R**



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³⁵ Know Your Meme, *Clap Emoji*, www.knowyourmeme.com/memes/clap-emoji?full=1 (last visited 31 May 2017).

³⁶ Know Your Meme, *Eggplant Emoji*, www.knowyourmeme.com/memes/eggplant-emoji (last visited 31 May 2017).

³⁷ *Bellisle v. Landmark Medical Center*, 207 F. Supp. 3d 153, 160 (D.R.I. 15 September 2016).

Parting Shot

Lightning strikes behind a B-52H Stratofortress at Minot Air Force Base, North Dakota. In a conventional conflict, the B-52 can accomplish strategic attacks, close-air support, air interdiction, offensive counter-air and maritime operations. (U.S. Air Force photo/Senior Airman J.T. Armstrong)



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



An unarmed Minuteman III intercontinental ballistic missile launches during an operational test at Vandenberg Air Force Base, California. (U.S. Air Force photo/Senior Airman Ian Dudley)