

The Reporter

THE JUDGE ADVOCATE GENERAL'S CORPS



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The Reporter

THE JUDGE ADVOCATE GENERAL'S CORPS

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The Reporter

2012
VOLUME 39, NUMBER 1

The Reporter is published quarterly 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. Items or inquiries should be directed to The Judge Advocate General's School, AFLOA/ AFJAGS (150 Chennault Circle, Maxwell AFB, AL 36112-6418) (334) 953-2802/DSN 493-2802).

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Message from The Judge Advocate General

This edition of *The Reporter* is dedicated to Mr. Everett G. Hopson, former Chief of the General Law Division (now JAA) who passed away earlier this year. By dedicating this edition of *The Reporter* to him, we hope to honor a true giant of our Corps...a man whom many of us are better for knowing.

Mr. Hopson entered active duty with the U.S. Army Air Corps in 1943 and received signal corps training at the Massachusetts Institute of Technology before serving in India and China during World War II. In 1946, he left active duty and began his legal studies at the University of Illinois College of Law, receiving his Juris Doctor in 1949.

Mr. Hopson entered the Air Force in 1951 where his dedicated service to the JAG Corps spanned over four decades. After retiring from active duty as a Colonel in 1971, Mr. Hopson worked for the Department of the Treasury, Department of Defense, and United States Postal Service. In 1973, he returned to the Air Force as Deputy Chief of the General Law Division. In 1975, he was appointed to the Senior Executive Service as Chief of the General Law Division where he served until his retirement in 1994. Mr. Hopson was awarded the Meritorious Executive Presidential Rank Award in 1982, 1987, and 1992. He helped shape the JAG Corps into what it is today and was a mentor to all.

Mr. Hopson took mentoring seriously. As one TJAGC member who worked for him stated: "I've never had a more intense and rewarding learning experience than working for Mr. Hopson...I learned more about the Air Force and Air Force JAG than all my other jobs combined. And he also taught us about the Pentagon—boy, did he ever." Many senior leaders in our Corps today received similar mentoring and inspiration from Mr. Hopson. We proud graduates of "Hopson University" understand that our success was not achieved merely through our own efforts. We were pulled along by giants such as Mr. Hopson who understood that building leaders is a team sport.

Reprinted in this edition of *The Reporter* is our 25 April 2012 Online News Service tribute to Mr. Hopson. I encourage those of you that knew "Mr. H" to share with your junior colleagues the valuable lessons of his legacy...dedication, integrity, leadership.

Richard C. Harding
Lieutenant General, USAF
The Judge Advocate General

In Memoriam:

Mr. Everett G. Hopson, a Legacy of Service



In the JAG Corps, we stand on the shoulders of giants, dedicated men and women who bestowed upon us a legacy and tradition of excellence in providing legal support to the Air Force. I regret to report that last week one of the giants of our Corps, Mr. Everett G. Hopson (Col, USAF, Ret.), passed away.

Mr. Hopson served 41 years in our JAG Corps Family, holding senior leadership positions as both a judge advocate and civilian attorney. After retiring from active duty, Mr. Hopson became a Senior Executive Service (SES) attorney and served as Chief of the General Law Division (today's AF/JAA) from 1975-1994. Judge advocates and civilian attorneys, who had completed an assignment working for "Mr. H," were said to be graduates of "Hopson University." I can think of no other member of the JAG Corps, who trained more senior leaders, than Mr. Hopson. He was a mentor extraordinaire, and I count myself very fortunate to be a graduate of Hopson University (Class of 1990).

Mr. Hopson was a skilled educator. A master of the Socratic method of teaching, he sharpened our legal skills through challenging questions, intense "OJT," and unselfishly sharing tough "lessons learned" to his subordinates. Mr Hopson taught scores of judge advocates and civilian attorneys how to write persuasively. As a fellow "Hopson U" alum recently said, "We all learned to write better, not just the Air Force way, but the *Hopson Way*." We will all remember his charge to us, "Let common sense prevail and reason rule the land."

Mr. Hopson led the General Law Division under seven TJAGs, and each deeply respected his insights, dedication, and mentorship. Since his passing, my staff and I have received numerous e-mails and notes sharing fond memories of Mr. Hopson. One particularly heartfelt letter referenced the extraordinary generosity of Mr. H and his late wife, Doris, who often opened their home for social events. Their annual holiday party was always a highlight of the season.

Throughout his life, Mr. Hopson was a leader, a pioneer, and a gentleman serving his community and Nation with honor. With 41 years of extraordinary service, Mr. Hopson's place among other giants in our JAG Corps "Hall of Fame" is secure. Yet even in retirement, Mr. Hopson continued to serve our Corps as a founding member and Trustee of the JAG School Foundation. His involvement in, and generosity to, the JAG School Foundation helped to ensure that our JAG School continues to be a first class learning environment for all members of the Air Force JAG Corps.

Mr. H's mentorship of others serves a shining example we can all aspire to follow. His style of mentorship was borne of a love of service that he deeply felt; it transcended his active duty and civilian service and propelled him to continue to serve even in retirement and into his last days. As we reflect on the giants of our Corps, who preceded our service, let us hold up the example of Mr. Everett Hopson as the gold standard.

Richard C. Harding
Lieutenant General, USAF
The Judge Advocate General



PRAGMATIC EXECUTION of FOUNDATIONAL LEADERSHIP

*“A leader must set the vision, state the mission,
and set the tone.”—David Rockefeller*

by Lieutenant Colonel James H. Kennedy III, USAF

Like many of you, I attended KEYSTONE 2010 in Orlando, where The Judge Advocate General unveiled his vision of Foundational Leadership and its four pillars: military justice, training, teaming and legal assistance. As TJAG described the situation he found himself in on the morning of September 11, 2001, I reflected on a number of situations, albeit less dramatic, where I was called upon to provide quick and important legal advice to a commander. Like TJAG, all I had was “what I brought:” The knowledge and experience resident in my corporate memory at that moment. As members of the military, we all have a responsibility to keep our skills sharp and to be prepared to respond to whatever situation we face. As a leader, we must always be looking for ways to help others meet that responsibility.

Upon leaving KEYSTONE, I began to search for a tangible and practical way to foster Foundational Leadership within the office. It would not be enough to simply extol its benefits. Rather, I needed to find a sensible and palpable way to begin to institutionalize the concept.

This article discusses just one training exercise we held at the Yokota base legal office. The exercise focused on a set of pretrial and trial events that involved all the attorneys and paralegals in my office, the Yokota area defense counsel (ADC), and all Yokota Office of Special Investigations (AFOSI) agents who are involved in the criminal investigation process.

EXERCISE CONCEPT AND LOGISTICS

In a nutshell, I wanted to have a pretrial preparation and trial exercise that focused on training, teaming and military justice. The primary emphasis of the teaming was between the attorney and paralegal. However, we also looked at teaming and training, vis-à-vis the military justice process, from a macro level. In furtherance of this we involved both AFOSI and the ADC in our pre-trial and trial exercise.

As an initial planning step, I reached back to the JAG School to see if they had any training materials useful for conducting direct and cross examinations

of witnesses as well as common issues for motions and legal research. The JAG School was more than willing to assist and provided us with a significant mock case file which we could tailor. The local ADC served as opposing counsel, and AFOSI agents agreed to play the roles of the witnesses. Each assistant staff judge advocate (ASJA) was teamed with a paralegal to prepare the case. Likewise, the ADC and his paralegal worked the preparation of the defense, and were encouraged to employ the teaming concept. The teams studied the case file, researched relevant case law, interviewed the witnesses, and formulated their theme, theory and question strategy, all with the paralegal playing just as active a role as the attorney. Teams also engaged in extensive pre-trial preparation with the AFOSI agents who would serve as AFOSI case witnesses, planning direct and cross examinations. As in real-world trial preparation, the ADC and his defense paralegal were also afforded the opportunity to interview and work with the AFOSI agents prior to cross examination in the courtroom.

After all had completed their pretrial preparations, exercise participants came to the courtroom for the second part of the exercise: The mock trial. This second part lasted approximately five hours. Each attorney conducted direct or cross examinations of the AFOSI agents they had worked with during pre-trial preparation. I served as the judge for purposes of objections. At the conclusion of each examination, the Deputy Staff Judge Advocate (DSJA), the AFOSI detachment commander and I all gave participants thorough feedback.

FOUNDATIONAL LEADERSHIP CONCEPTS MET DURING THE TRAINING EVENT

TEAMING

The importance of teaming within the JAG Corps cannot be overstated. In light of today’s deployment and work tempo, we cannot afford to squander the skills and potential contributions of any member of our JAG Corps. Not only does failing to fully utilize all of our JAG Corps members negatively impact the mission, it can be injurious to morale and, in the end, is inconsistent with the culture of professionalism

We do not become better at any pursuit by merely showing up for, or even necessarily by taking part in, an exercise.... We must seek to challenge ourselves and see each experience as an opportunity to learn and grow.

and fair dealing we value in our Corps. Simply stated, fully utilizing each individual's skills and talents is the correct thing to do for the JAG Corps, the Air Force, and our people. This is best done through teaming which fully integrates the skills and talents between attorneys and paralegals so that the product of the team is greater than the single effort of either.

A critical aspect of the teaming concept was the assignment of JAG/paralegal teams to work closely together on all aspects of case preparation, from reviewing the file to conducting research to working on direct and cross examinations with witnesses. The DSJA and I monitored the pre-trial preparation process closely to ensure that each team member participated substantially in the exercise.

TRAINING

We do not become better at any pursuit by merely showing up for, or even necessarily by taking part in, an exercise. As attorneys and paralegals, we can best improve our skills by demonstrating the same dedication to training and practice displayed by professional athletes. We must seek to challenge ourselves and see each experience as an opportunity to learn and grow.

To ensure every participant actively took part in training, individuals were not simply told how to prepare for and then examine witnesses, they were required to actually do it. All participants remained in the courtroom even after their portion had completed so they could benefit from all the feedback the DSJA, AFOSI leaders and I could give. Additionally, by witnessing different styles of direct and cross examination along with different witnesses' behavior on the stand, individuals were able to see what worked and what was less effective.

One noteworthy way in which the exercise touched on the Foundational Leadership training pillar is that it reached beyond the JAGs and paralegals in this office to involve AFOSI agents and the area defense counsel (macro view of training and teaming). When all of these groups are properly trained and can execute their duties with the highest level of proficiency justice, the ultimate goal, is better achieved.

MILITARY JUSTICE

Military justice is job #1 for the JAG Corps. Therefore, it is critical that we, as judge advocates, hone our justice skills. By requiring exercise participants to actually prepare a case, rather than merely to hold a mock trial, the exercise stressed the most important and hardest part of being a successful military justice attorney: preparation. Just as military justice cannot be effective without teaming and training, it cannot be effective without thorough preparation by all parties. Preparation involves more than building a case file and proof analysis, it requires meaningful and productive interaction with investigators, witnesses, and the ADC.

By bringing the ADC and AFOSI into this training exercise, this led to a more robust and realistic military justice training experience for the office as well as AFOSI and the ADC. In fact, this was part of the point of the training. A truly effective justice program requires all organizations involved, not just the legal office, to be fully proficient at their part in the process.

FOUNDATIONAL LEADERSHIP IN OTHER ORGANIZATIONS

AFOSI AND MILITARY JUSTICE

It bears repeating that some pillars of Foundational Leadership are not limited to the JAG Corps. I

sought to team with AFOSI in this exercise because both TJAG and AFOSI leadership have emphasized the need for our organizations to work more closely together on cases and courts-martial to achieve greater celerity and efficacy. I met with the head of PACAF AFOSI during her staff assistance visit here at Yokota several months back. She emphasized the aforementioned, which is in direct consonance with TJAG's long-articulated mandate. Moreover, most of the AFOSI agents here at Yokota have minimal experience testifying, and some had never taken the stand at all before this training exercise. The time for these individuals to take the stand for the first time should not be when a critical General Court Martial conviction hangs on the presentation of their testimony. Losing a case because an AFOSI agent's lack of experience makes them a weak witness is unacceptable because it is so easily avoidable.

By planning the training exercise as a joint JA/AFOSI endeavor from the planning stages, rather than as an AFOSI-supported JA endeavor, we were able to garner AFOSI's full support and commitment. This was critical, as the time commitment for the pretrial preparation and trial exercise was substantial. I was highly impressed by the degree of seriousness with which each AFOSI agent took this exercise. They clearly made the exercise a top priority and were fully involved during both the pre-trial and trial phases. This commitment was to their benefit, along with the significant benefits to my legal office and the ADC.

ADC AND MILITARY JUSTICE

A Foundational Leadership exercise designed to emulate the teaming, training, and military justice pillars absolutely required the participation of the Office of the Area Defense Counsel. Both the ADC and his defense paralegal participated wholeheartedly in this exercise, and their commitment was evidenced by their performance.

Just as AFOSI's participation did not solely benefit their organization, the ADC's participation did not benefit just the ADC and legal office—the AFOSI agents also benefitted from observing and participating in cross-examinations by a practicing defense counsel. Finally, all participants realized

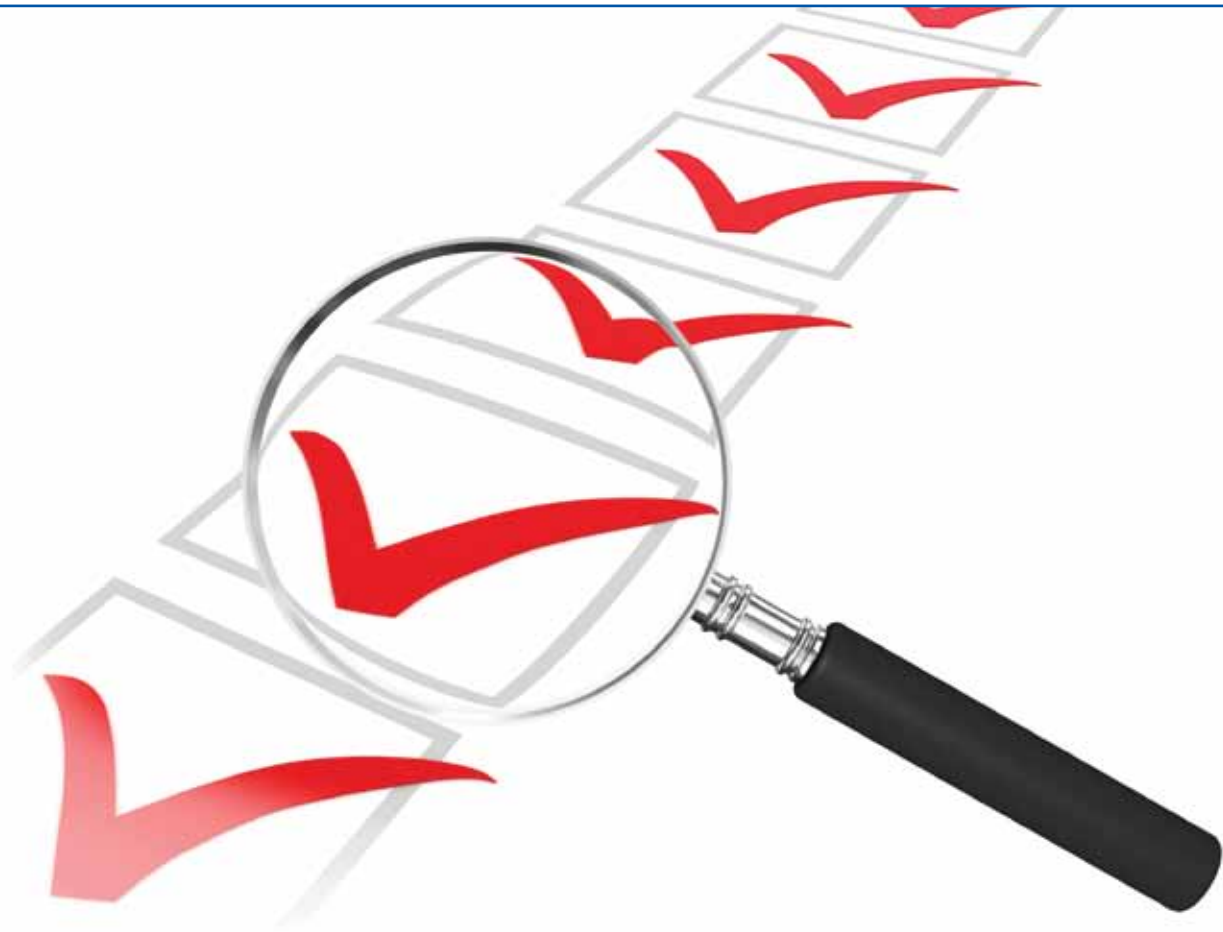
the benefit of a perspective easily lost by members of each organization: That the legal office, ADC, and AFOSI have a common mission of achieving justice by demonstrating true expertise in their trade. By working together, each organization realized a newfound appreciation for the other organizations' important roles in the military justice process.

FEEDBACK

After the training exercise, the feedback from all participants was universally positive. Members of my office, the ADC, and AFOSI all said this training event was very valuable and they looked forward to the next event. The value was not limited to AFOSI agents and attorneys—the insight and contributions of the paralegals to the process was noteworthy, and the value added was unquestionable. Moreover, the benefit was not just practical. The paralegals were all enthusiastic about the opportunity to contribute to the justice process in such a direct and tangible way—it made them feel like the valued members of this office that they are.

CONCLUSION

The goal in this training exercise was to hold a high quality event that touched as many of the Foundational Leadership pillars as practicable and involved, as much as possible, the largest number of people involved in the military justice process. However, a critical piece of the “training” pillar, as logic would dictate, is that one event is not enough. Each of us as leaders must on a daily basis look for ways to foster focus, improvement and increased alacrity on the areas of military justice, teaming, legal assistance, and of course, training. It has been penned by the writer Laurence Smith that “[a] leader is an individual who has an inspiring vision and can get others to buy in to it.” In regards to TJAG's vision, which has been enthusiastically supported by both my MAJCOM and NAF SJAs, the Yokota AB legal office is “all in!” 🦋



Inspections and Training

Processes without Borders

by Mr. John J. Martinez Jr., and Lieutenant Colonel David M. Houghland, USAF

Inspections can guide training objectives, and well-trained people take care of inspection list items as a matter of routine.

Living in a complex world can seem a little more manageable when simple labels are attached to things, whether they are people, objects, or processes. Labels help us determine how we should approach or handle them. Think about the terms we use to describe individual job levels or personalities, document security classifications, or the processes we are involved in daily, like personnel, financial, or managerial functions.

THE LIMITS OF LABELS

Labels may provide us with mental shortcuts, but they can also limit our thinking. They may cause us to categorize things to the extent that they wind up in mental “boxes” having little connection to others. When dealing with processes, like Article 6 inspections and training, rigid categories can hide opportunities to use each process to improve the effectiveness of the other.

In a busy legal office, inspections and training can seem to be two very different functions. During inspections, office personnel, or outside inspectors, fill out a report card on the office. Many of the questions simply ask whether the office did or did not complete its array of required tasks. Deficiencies and commendable practices are pointed out.

Training, on the other hand, is the way one learns how to do perform tasks, most of which are not included in inspection checklists.

On the surface, there isn't a connection between the two. Looking at them simplistically, people can undergo a lot of training and never face an inspection. And, inspections can occur whether people are trained or not. To put it another way, inspections and training do not appear to be interdependent, and they really don't have to be.

This is where labels can blind us to an important way to improve our offices. Instead of thinking of training and inspections, especially self-inspections, as two processes in separate boxes, much can be gained by looking at inspections as a springboard to needed training. Doing that starts with how you view self-inspections.

INSPECTIONS CAN GUIDE TRAINING

Conducting regular self-inspections should do more than simply fulfill a requirement to perform them or, once deficiencies are corrected, provide a basis for confidence that the office would pass an external inspection. This is not to say these objectives are not important. But the big payoffs come when the SJA does more than turn "reds" into "greens." Self-inspection results, if reviewed thoughtfully and creatively, can open eyes to steps you can take to make the office a more productive and rewarding place to work.

The self-inspection is a unique window into the operations of an office. It may seem to be a binary analysis, but when done well, and interpreted with imagination, it can reveal much more. For example, self-inspections reveal workloads, trends, critical pressure points, and patterns that run across the

entire staff. When you overlay these factors with the people responsible for the various office functions, you gain insight into their individual learning requirements and capabilities.

That's where training comes into play. When you understand that current or future demands will stress staff capabilities, whether as to individuals, sections, or the entire office, you can determine what training is needed to build their knowledge, skills and abilities. The checklist becomes the framework for tactical additions to individual training plans.

But the training value of self-inspections is not only reactive. Many SJAs have gotten into the routine of having new division chiefs and NCOICs run the portion of the checklist applicable to their sections when rotations occur. This practice both updates the checklist and provides a foundation for an introduction to the major aspects of the new job. It is a powerful way to maintain satisfactory performance and provide goal-oriented on-the-job training.

TRAINING LEADS TO SATISFACTORY INSPECTIONS

Once people are fully trained on inspection-related tasks, benefits begin to flow from the training process to the inspection process, and beyond to office operations. That is, well-trained people know their job requirements, including inspection checklist items, and how to fulfill them. When they are properly resourced and motivated, they take care of completing those items satisfactorily as a matter of routine.

A TOOL TO HELP

Using inspection checklists to guide training is made easier using the CAPSIL Portfolio program to reflect training needs associated with specific checklist items. Portfolio provides a way to record and monitor progress on self-inspections and can reveal what training measures are needed to accomplish each item correctly.

Inspections and training are not isolated processes. Used together as a mutually supportive team of office improvement utilities, they can help people know their jobs, and do them well. 🦋



ORI READINESS

by Captain Chris T. Stein, USAF

On 19 December 2011, North Korea announced its Dear Leader, Kim Jong-il, had died. I was in Seoul at the time visiting my wife's South Korean relatives. As we listened to the news reports, I had relatives express a lack of fear because of the U.S. military's presence.

Later, standing in the tense Joint Security Area of the Demilitarized Zone, I felt the importance of that responsibility. North Korea prepares for war daily, devoting their full national energy toward sustaining their "military-first revolution." Thankfully, however, they are not the only ones preparing. Just days before Kim Jong-il's death, our wing validated its combat preparedness through an Operational Readiness Inspection (ORI).

At the 35th Fighter Wing, Misawa Air Base, Japan we are called to protect U.S. interests in the Pacific by providing a forward presence from Northern Japan. Our "Wild Weasel" F-16s could be tasked to be the "First In" to any conflict in the theater. This ORI—and the monthly Operational Readiness Exercises (ORE) that preceded it—was a good opportunity for both the wing and our legal office to develop and test our warfighting skills. Ultimately, our office earned an Excellent rating, was selected as an Outstanding Team, and had one member (Staff Sergeant Daniel

Vargas) named a Top Outstanding Performer. We learned some important lessons and implemented new processes that can help other legal offices hone their operational readiness and shine during the next ORI. Success begins with robust training, is enabled by quality JAG-Paralegal teaming, and bears fruit in proactive engagement.

TRAINING

Lieutenant Colonel Suzette Seuell, the Staff Judge Advocate, led the office through five months of intense training in preparation for the ORI. In addition to regular OREs and "Warrior Days," we used our weekly office training to study substantive legal topics, get hands-on experience in self-aid and buddy care (SABC), and test our ability to survive and operate (ATSO) knowledge.

Initially, some of us did not even know what an ORI was. In an ORI, the Inspector General evaluates two phases of operational readiness: Initial response and combat employment. Phase I evaluates the unit's transition from peacetime readiness as it generates combat-ready aircraft and deploys forces and cargo, while sustaining essential home station functions. Phase II evaluates the unit's ability to meet wartime taskings by employing combat power, sustaining the force, and surviving in a contingency environment. Judge Advocate operations are interwoven into each

of these aspects, but the IG specifically grades us in a “Rules of Law” category. This encompasses understanding and applying the Law of Armed Conflict and Rules of Engagement; providing legal assistance; supporting wartime operations; and maintaining legal office operational and mission readiness. We learned the IG expected us to understand wing operations at this broader level, not just to know our legal specialty. For example, paralegal Staff Sergeant Keshia Scott, at the Personnel Deployment Function (PDF), impressed the Inspector General (IG) by fully explaining not just the Judge Advocate (JA) role, but the way the entire PDF process functioned.

STUDYING THE BATTLEFIELD

During weekly training, we studied topics such as immunization refusal, religious accommodation, conscientious objectors, and legal assistance on estate and family care issues to prepare for questions members and commanders might have at the PDF. To support our contingency contracting team, we learned about the role of civilians and contractors in the battlefield and looked at tools like sole source justifications, statements of work, cure notices, and contract termination notices. To help us prepare for Phase II operations, Lt Col Seuell explained the command relationships in U.S. Forces Korea, ensured we were familiar with the U.S.-ROK Status of Forces Agreement, and helped us research the implementing agreements that outline the mutual logistic support process. We also learned about the role of non-governmental organizations in a combat zone, looked at fiscal law ways to support humanitarian assistance, and ensured we knew the process for handling refugees, defectors, and enemy prisoners of war.

ROTATING TRAINERS

We found that by rotating trainers, each office member gained the experience of thoroughly researching a topic, organizing it, and presenting it in a coherent manner as they might be called on to do during the ORI. This paid dividends as the IG complimented the way we thoroughly answered each question without additional prodding. The IG explained they were looking for more than narrow, unreferenced answers that demanded extensive follow-up. Much like a law school exam, the IG expects answers that include supporting legal citations, explore contingen-

cies, and if more information is needed either ask for it or explain how the answer would be different depending on the facts.

OPERATIONS LAW SMARTBOOK

We used the materials and research compiled during training to build an Operations Law Smartbook. This is a must for every legal office because it serves as the go-to reference throughout both phases of the inspection. Our Smartbook incorporates summaries from essential resources, including *The Commander and the Law*, *Air Force Operations and the Law*, and the Army’s *Operations Law Handbook*. It also includes sections of the Geneva and Hague Conventions as well as the governing Status of Forces Agreements so we can answer questions with precision. Finally, we included examples discussed during training to use as templates for future responses.

During exercises and Warrior Days, we practiced the ATSO basics: Donning mission oriented protective posture (MOPP) gear, performing our post-attack reconnaissance (PAR) sweeps, securing the workplace, and providing SABC. Practice is essential, because, during an emergency, we cannot afford to waste time flipping through the Airman’s Manual. For example, while performing a PAR sweep in MOPP 4, SSgt Vargas discovered an Airman unconscious without a gas mask on. He sprinted to the Airman, donned the gas mask, tightened the hood, and administered the antidote treatment nerve agent autoinjector in an amazing 14 seconds as clocked by the IG. The IG commended SSgt Vargas for his quick reaction in responding with what he knew, rather than relying on the time consuming crutch of searching through manuals or guides while an Airman was lying exposed to chemical weapons.

TEAMING

JA is asked to stretch its role during contingency operations, and we can meet the call only by effectively using our number one resource: Our personnel. During Phase I, the entire legal office participates as the wing mobilizes to meet the expeditionary tasking. With 24-hour operations, our SJA staffed the Emergency Operations Center/ Installation Control Center (EOC) during the day, while our LOS staffed it at night. This ensured we

It is important for paralegals to be as proficient with common legal issues as the attorneys, because they may be the only ones around to spot potential problems as they develop.

had our most experienced personnel—whether JAG or paralegal—in this crucial position.

To the PDF, we sent teams of one JAG and two paralegals. Each of the paralegals had a computer so they could quickly research legal issues and draft powers of attorney. The paralegals were also ready to discuss legal readiness with members and give the basic LOAC briefing if needed. This redundancy proved useful during hectic times when multiple issues surfaced at once, leading the IG to compliment the consummate teaming that optimized limited JAG resources.

It is important for paralegals to be as proficient with common legal issues as the attorneys, because they may be the only ones around to spot potential problems as they develop. For example, on the PDF line, JA personnel overheard someone calling for a chaplain because a member processing through mobility bags wanted to talk to someone about his “second thoughts” on deploying. Understanding that “second thoughts” could turn in to refusal to deploy, Technical Sergeant Eduardo De La Torre and SSgt Vargas responded, beating the chaplain to the mobility bag warehouse. When they arrived, they discovered the JA IG team waiting to test them. The two paralegals discussed with the chalk commander the process of filing for conscientious objector status and helped him notify the unit to get a replacement ready to deploy in case the member refused.

In addition to understanding the law, paralegals should be ready to draft legal reviews for attorney signature. As the scenario discussed above developed, the IG asked us to draft a legal review of the con-

scientious objector’s application for relief. The IG then followed the attorney into the holding room to watch the Law of Armed Conflict (LOAC) briefing. When the briefing was over, the IG came back to find SSgt Vargas—a 5-level—drafting the review. Without being asked, he was half way through the review, having already completed the facts and law sections. On another occasion, the IG asked for a point-paper on the use of trusts in estate planning. TSgt De La Torre researched the issue, drafted the paper, and, after attorney review, sent it to the IG. Offices will find that attorney-paralegal teaming provides a challenge that keeps paralegals engaged in the mission, multiplies the impact JA can have on operations, and drastically reduces the time needed to get the job done.

PROACTIVE ENGAGEMENT

The key to effective contribution is proactive engagement. It can be challenging for JA to justify taking one of the limited seats in the EOC, at the PDF line, or in specialized meetings like the Threat Working Group. However, when JA takes an interest in the mission and searches for ways to contribute, the rest of the team quickly realizes JA’s value. Many times our EOC representatives branched out from the exclusively “legal” function to coordinate information flow between organizations or advise the wing on unfamiliar processes. At other times, we were able to recognize legal issues in scenarios in which we were not expected to participate. For example, on the floor of the EOC, Lt Col Seuell overheard a Security Forces scenario involving a robbery at the shoppette. Realizing JA would ultimately be involved in either transferring jurisdiction to local authorities or prosecuting a military offender, she filtered the information to the rest of the office so we could begin exploring the jurisdiction and pretrial confinement issues.

Legal offices will face other unforeseen obstacles that will present challenges that must be overcome. For example, as the PDF personnel refined their process, they decided that the five agencies briefing on the PDF line would have a combined seven minutes to brief all their information. While this hastened chalk completion times, it left us scrambling with how to effectively convey the JA message when we had a little more than a minute to do so. This challenge forced

us to proactively use pauses in chalk processing to develop tailored slide presentations to help convey our information. It also pressed us to revise our process to go from casual briefers to active players on the line. Ultimately, the IG recognized our PDF practice as “best seen to date.”

We began by meeting the bus as it arrived with passengers at the mobility line. There, we discussed legal readiness issues, like having a will, medical directive, and powers of attorney, with Airmen waiting to receive their chemical bags. When Airmen began to trickle into the holding area prior to processing the PDF line, we briefed them and passed out worksheets covering estate planning and powers of attorney. By the time members finally passed our table on the PDF line, they had already interacted with us multiple times, had plenty of time to think about their affairs, and had the opportunity to complete the worksheets if they needed documents drafted. This early—and persistent—emphasis on legal readiness ensures members get what they need without delaying chalk completion. Offices will find that when pressed, they can uncover hidden opportunities to connect with mobilizing personnel. Offices may even want to try e-mailing estate planning and power of attorney (POA) worksheets to unit deployment managers (UDMs) to distribute to members tasked to deploy. This would give members even more time to consider their legal readiness and might even get them into the legal office for documents before they process the PDF.

If members need documents drafted on the line, offices must be ready to assist. We drafted a special power of attorney with every potential power so we could quickly delete those powers that a member did not want. We recommend legal offices consider something like this to avoid having to generate new POAs for each client. We also drafted simple wills we could use and even printed out statutory wills from the few states that accept them. Offices should have a plan for providing services without power and network access. This might include storing files on a disk, keeping paper versions of most resources, and having the capacity to request support from personnel at a different location.

In addition to offering legal services, we gave deploying members a LOAC card with basic information tailored to their role: Airman, Medical, Security Forces, or Pilot. This gave them something to read as they waited and allowed us to refer back to it during our briefing. We found that, in a hectic environment, putting paper in an Airman’s hand—whether a will worksheet or LOAC card—can help narrow the focus so the JA message does not get overlooked.

As Airmen completed PDF processing, they gathered in a holding room to await chalk completion. While they waited, a PowerPoint slide show cycled through, teaching them—and then quizzing them on—legal readiness, LOAC, treatment of enemy prisoners of war (EPWs), and the Status of Forces Agreement. Eventually, we expanded the rolling slides to include contributions from other agencies: Finance, Public Health, and the Chaplain. These rolling slides were lauded by the IG and from different functionals as an ideal way to impart additional information as Airman waited. Furthermore, as we waited for the final flight manifest or for all the agencies to arrive for the briefings, we gave an expanded LOAC/Rules of Engagement (ROE) briefing, which covered the full Advanced Distributed Learning Service (ADLS) content and lasted between 15 and 30 minutes as the situation allowed. We still gave the short LOAC basics briefing as part of the all agency PDF briefing, but found this expanded training kept deploying members engaged during the process and allowed for detailed consideration of these important concepts.

CONCLUSION

An ORI is a great opportunity to train the JA team on operational issues that ensure we are able to fully support our nation’s defense. It provides the refining fire that can bring the office together as a close-knit team and encourage the natural leaders to rise to the top. It also leaves with the Wing a lasting impression of JA’s contribution to the broader mission. Through comprehensive training, effective teaming, and proactive engagement, legal offices can ensure they are ready to meet any challenge set before them. As Kim Jong-il’s sudden death demonstrated, the U.S. military must be ready to respond at a moment’s notice. We hold the keys to global stability and we must be prepared to use them when called upon. ✈️



REMOVING THE OBSTACLES TO JAG/PARALEGAL TEAMING

by Captain Elvis Santiago, USAF in collaboration with Airman First Class Jose Sanchez, USAF

As a new JAG assigned to the General Law section fresh out of JASOC, it didn't take long for me to come face to face with the importance of the concept of JAGs and paralegals teaming in the base legal office. It also caused me to examine some of the obstacles that stand in the way to teaming.

MY FIRST CASE

It all started with a phone call from an AFOSI agent as she painstakingly described the events of a horrific sexual assault. My head was spinning a bit as she detailed how the victim claimed that shortly after a deployment, her husband returned home with a vendetta to sexually abuse her. During the latter part of our conversation, I asked the agent what she planned to do next. "Our goal is to bring the subject in for questioning later this week. We want guidance on how to approach his interview."

As this was my first military justice case, I reflected for a moment on my next course of action and how to provide guidance to the AFOSI agent without having

much experience. I ran through some of the logical choices I thought of as a result of my legal training and what I learned in JASOC. I knew I would need to review the MCM, draft a proof analysis, and draft charges. But being so "green" I really didn't even know where OSI was located or even know how to begin opening a case. That is when the training I received as a young platoon leader in the U.S. Army kicked in—look for someone with experience who can help a young officer: Find an NCO!

I marched over to the military justice section, found the NCOIC, and explained the situation. Not to my surprise, she was already ten steps ahead of me. Somehow, she was already well aware of the details of the case. She knew the victim, the accused, and the fact they were going through a bitter divorce. She drafted a Special Interest Report in AMJAMS, began to prepare the preferral packet, and notified the victim advocate. Most importantly, she helped me see the path ahead. Little did I know that this was the beginning of my quest to incorporate such competence into my daily JAG career.

THE REALIZATION

After speaking with the NCOIC, I decided to visit OSI to review the evidence. I asked a fellow JAG if our paralegals typically attend our OSI meetings. The JAG gave me a negative reply and told me not to worry about what paralegals exactly do during the processing of a case because “that’s something only the paralegals do.” This answer puzzled me which caused me to start questioning whether segregating our efforts was a useful way to work together. The prevailing notion in our office was that attorneys and paralegals stayed in their own lanes. We simply weren’t working together which made no sense to me since a paralegal could obviously help me in the development of the case.

The obstacle to teaming usually is reluctance towards expanding roles.

INCORPORATING TEAMING

While recently emphasized, teaming has always been, and will always be, a key to success in other AFSCs and sister services. Applied correctly, this concept can be most beneficial to young attorneys and paralegals struggling to adapt to the Air Force and JAG Corps. The lessons gained during my first military justice case permeated into other areas of our legal office. With my leadership’s support, I endeavored to incorporate TJAG’s teaming pillar into every aspect of our legal office. As a result, our general law paralegals routinely draft legal reviews for fundraising and private organization requests as well as manage our ethics program under the Army’s Financial Disclosure System. Our military justice paralegals recognize their value to the team and are always involved from the proof analysis phase through the investigative process all the way to completion.

REMOVING THE OBSTACLES

It is important to emphasize that success on teaming works both ways; attorneys and paralegals must step out of their comfort zones for the betterment of the team. To get a sense of the paralegal perspective on

this issue, I discussed the concept of teaming with one of our newly assigned paralegals, the super sharp Airman First Class Jose Sanchez. I asked A1C Sanchez about his understanding of teaming. Sanchez told me, “It’s all about putting strengths together—whatever you need to do to perform and get the job done.” A1C Sanchez explained that there still is a prevailing view among new paralegals that when it comes to labor division, most paralegals think, “These are my tasks, and that’s something the attorneys do.” To break through that preconceived notion, A1C Sanchez works with other paralegals to expand their horizons and approach their duties differently, even if it goes outside the normal duty description.

Attorneys must also understand that for teaming to succeed, attorneys need to take an active approach to understand the many tasks commonly performed by paralegals. For example, paralegals assemble records of trial, update AMJAMS, process and fund witness requests, and arrange for experts and confidential consultants. If the need should arise, an attorney must be able to perform these tasks without a paralegal’s assistance. Furthermore, as I did on my first case, attorneys should identify their paralegals as a vital source of knowledge. Paralegals draw upon a broad array of experiences from their years in the Air Force and dealings with the base community. Often times, JAGs gain new information about a case through the informal channels of the NCO community. JAGs must provide paralegals the opportunity to express their insights and perspectives.

THE THREE STEPS TO SUCCESSFUL TEAMING

Ultimately, teaming can be conceptualized in three steps. First, identify a need. Second, assess the team’s strengths. Finally, provide an opportunity to excel. Both attorneys and paralegals can execute this concept. A failure to incorporate teaming has never been because of an attorney or paralegal’s inability to do so. Rather, the obstacle to teaming usually is reluctance towards expanding their roles. Now, more than ever, we have to do more with less. There has never been a better time to remove the obstacles that inhibit teaming. Through teaming, both attorneys and paralegals can serve as force multipliers to accomplish the AF JAG Corps’ mission more effectively. 🦋

Tenant Rights and Legal Assistance



What Do You Need to Know to Help Your Clients?

by Major Scott A. Hodges, USAF

The historic 25 billion dollar unlawful foreclosure settlement splashed onto the headlines in February of this year, including its important benefits and protections for servicemembers who own homes.¹ Legal assistance practitioners need to understand what is available for Airmen who are underwater on their mortgages, but what about the Airmen facing eviction because the bank foreclosed on the family's rental home? A significant majority of legal assistance clients rent their residence as opposed

to purchasing it.² As a result of the privatized housing initiative, the percentage of Airmen renters also increased—transforming members who reside on base into tenants of a commercial landlord. This article will cover what legal assistance practitioners need to know to help their clients with legal issues involving their rented residence. Specifically, this article focuses on a renter's rights in privatized housing, tenant protections found in the Servicemembers Civil Relief Act, as well as the Protecting Tenants at Foreclosure Act.

¹ Please visit the Homeowner's Assistance learning center on CAPSIL for more information on this topic.

² One source estimates 75% of military members rent. *Protecting Tenants: Foreclosure Act of 2009 Benefits Military Renters*, MILITARY HUB, July 7, 2009, <http://www.militaryhub.com/article.cfm?id=77> (last visited Mar. 13, 2012).

PRIVATIZED HOUSING

Whether as a result of watching Mr. Furley snoop around the “Three’s Company” apartment or enduring a difficult rental experience personally, many people hold landlords in low esteem. Skepticism abounded when the Federal Reserve issued a policy on 5 April allowing banks to more regularly engage in the property rental business.³ Speaking of another unusual landlord, privatized housing (PH) creates an interesting paradox. While in many ways the Air Force sought to make the privatization of base housing transparent to residents, the legal relationship for Airmen changed dramatically. Instead of a command relationship, a contractual relationship with a private landlord now provides Airmen their housing.

The substantial legal relationship between the Air Force and the privatized housing contractor sometimes complicates the analysis of landlord-tenant disputes.

The substantial legal relationship between the Air Force and the PH contractor sometimes complicates the analysis of landlord-tenant disputes. The first issue to resolve in providing legal assistance for a PH landlord-tenant client is the potential conflict of interest. Attorneys who provide advice regarding the relationship between the Air Force and PH contractor, on issues such as contract or environmental law, should not provide legal assistance for PH clients. Furthermore, legal assistance attorneys who do provide advice on PH landlord-tenant disputes should ask the client to sign a conflict of interest disclosure and waiver form.⁴ Despite the conflict waiver, if the issue does directly involve command interests at the installation level, then the legal assistance attorney should probably terminate the relationship with the client.⁵ For example, if a client was evicted because

he or she was barred from base by the installation commander, the legal assistance attorney should not provide advice regarding the eviction.

A multitude of issues could arise in base housing, and many issues will fall within the standard analysis for landlord-tenant concerns. The legal assistance attorney should start by looking to the lease. The Community Legal Services Division (JACA) has discovered that some of the current PH leases were poorly drafted. Previously, no office within The Judge Advocate General’s Corps reviewed the draft tenant leases before use by the PH contractor.⁶ JACA began looking at leases more closely because of a couple of concerns raised in the legal assistance setting.

In one case, the lease specified that rent would equal the Basic Allowance for Housing (BAH) provided to the highest ranking member, but in fact some tenants were paying more than their BAH. This occurred because the PH agreement with the Air Force establishes target tenants, typically military families assigned to that installation. While other military families may live in the housing due to waterfall provisions they may be charged the BAH for that installation vice what they receive, which is based on their unit of assignment. For example, if an O-3 with dependents ROTC instructor stationed at the University of Richmond decided to live on Fort Belvoir, which is in the National Capital Region, he or she would likely pay \$2,742 in rent, instead of the \$1,581 received in BAH. The lease agreement ultimately stipulates the rent amount due, and the servicemember should be aware how much he or she is paying, but junior servicemembers in particular could put themselves in a financially precarious position. This example highlights the paradox, because while the residence appears to members in many ways as base housing it is in fact a contractually agreed upon lease that establishes duties different than traditional obligations when living on base. It seems counterintuitive for Airmen living on an installation to forfeit more than their BAH. Servicemembers may not feel they can negotiate terms of the lease, such as rent, because it is base housing. It may be worth reminding your client population that they are able to negotiate such things.

para. 1.2.1.

⁶ JACA anticipates it will review model leases in the future.

³ Broderick Perkins, *Banks Fail to Sell Distressed Homes, Get Landlord Job Instead*, Realty Biz News, at <http://realtybiznews.com/bank-fail-to-sell-distressed-homes-get-landlord-job-instead/98711634/>, 27 April 2012.

⁴ A sample can be found in the Housing Privatization and Landlord-Tenant learning center on CAPSIL.

⁵ AFI 51-504, LEGAL ASSISTANCE, NOTARY, AND PREVENTIVE LAW PROGRAMS (IC-2 17 August 2011),

Another PH issue worth incorporating into the office's preventive law program concerns the availability of renter's insurance.

Another PH issue worth incorporating into the office's preventive law program concerns the availability of renter's insurance. Most leases inform the tenant the PH company will "make Residents Renter's Insurance available...." What the lease language does not highlight very well is that the PH company will pay for the coverage, but in order for coverage to take effect the tenant must affirmatively request it. While the Air Force claims process will provide some coverage for PH tenants, everyone should also take advantage of the landlord provided insurance. As the PH lease review process starts to include JACA, hopefully leases will more clearly explain the insurance situation to tenants.

In the meantime, when lease disputes arise, understand that although the PH company has a unique relationship with the Air Force legal assistance attorneys, JAGS are free to advocate on behalf of their clients and attack an ambiguous lease. Also remind clients that in all rental situations a careful review of the lease before signing will often avoid subsequent disputes. As a legal office, also keep in mind the holistic approach to resolution of PH issues. In other words, sometimes a systemic lease problem is best addressed through the command's interactions with the PH company.

**SERVICEMEMBERS CIVIL RELIEF ACT
—LEASE TERMINATION RIGHTS**

Whether they reside on base or off, our Airmen clients have important Servicemembers Civil Relief Act (SCRA) lease rights. The most common SCRA issue for which tenant clients seek legal assistance is lease termination. SCRA (50 USC Appx.) Section 535 empowers Airmen who receive orders for activation, deployment for at least 90 days, or for a permanent change of station (PCS), to send their landlord a notice for termination of the lease. The

effective date of the termination often surprises clients because it can take up to two months after they send the termination notice. Paragraph d of Section 535 explains that the lease will terminate 30 days after the date on which the next rental payment is due, from the time the landlord receives notice of termination from the tenant. The tenant's notice of termination must be in writing and include a copy of the Airman's orders. While the effective date in the SCRA is not tied to the actual reporting date in the orders, state law sometimes limits the termination of the lease according to the necessary departure date. For example, Virginia stipulates that the effective date of termination cannot be more than 60 days prior to the date of departure necessitated by the military orders.⁷

Most landlords understand military tenants have a right of termination, but disputes arise surrounding a few common issues. One source of dispute is the controversy over whether a move due to separation from the military constitutes a PCS. The statute does not define PCS, but federal regulation does. The Joint Federal Travel Regulation (JFTR), Volume 1, Appendix A defines a move from the last permanent duty station upon honorable separation from the military as a PCS. A recent settlement obtained by the Department of Justice (DOJ) reinforces this principle.⁸ An apartment complex outside of Offutt AFB refused to terminate a separating service member's lease. When the complex rebuffed the legal assistance attorney, Capt Joel Lofgren, the Air Force Chief of Legal Assistance at the time, Maj Jeff Green, referred the case to the DOJ. The DOJ's ability to recover the Airman's economic loss establishes a precedent, although clearly not a binding one, to which you can refer a stubborn landlord.

Another lease termination controversy surrounds early termination fees. Section 535, paragraph e, of the Veteran's Benefits Act of 2010, prohibits the imposition of early termination charges when Airmen lawfully terminate leases under the SCRA. While landlords seldom call it an early termination fee, they sometimes build financial disincentives for termination into the lease. For example, a landlord

⁷ Virginia Residential Landlord and Tenant Act, Section 55-248.21:1.

⁸ U.S. v. Empirian Property Management, Inc., Civil Action No. 8:12-cv-00087 (D. Neb. Mar. 1, 2012).

may offer the first month of the lease for “free,” but include a clause stating early termination of the lease requires repayment of this incentive. The fact the tenant contractually agreed to the arrangement does not end our analysis. The SCRA, by design, trumps contractual arrangements and other civil obligations. While Airmen can waive their rights under SCRA (50 USC Appx.) Section 517, the waiver must be a separate document written in twelve point font. Furthermore, a waiver is only valid if executed after entry into military service. So the ultimate question is whether Airmen have legitimately waived their protection against early termination fees. If not, the first month “free” benefit should not be recoverable by a landlord.

Legal assistance practitioners should also remember the scope of the SCRA termination right. Section 535 explicitly applies only to leases executed by the military member.⁹ Imagine a client who is a dependent spouse and solely signed a lease for an apartment at the family’s anticipated duty station while the Airman was attending extended training in another location. After arriving at the permanent duty station, the member receives orders for a remote PCS and the dependent spouse decides to move to be with family in a different state. Can the spouse terminate the lease? Not under Section 535, because only the spouse signed it. SCRA (50 USC Appx.) Section 538 extends the lease termination right to the dependent spouse, if the dependent’s ability to comply with the lease is materially affected by the member’s military service. In our hypothetical, the spouse would probably have to show a financial savings in moving to be with family to satisfy the material effect requirement. The downside of Section 538 is it requires application to a court to invoke is protection.

The best practice is always for the servicemember to sign the lease, or else give a power of attorney to the spouse to sign for him or her. Landlords will sometimes try to prevent this, particularly if the servicemember is not currently residing in the premises. A preventive law tip is that if the landlord won’t allow the servicemember to at least co-sign

⁹ Section 535 (b)(1)(a) also covers leases executed by, or on behalf of, a person who after execution enters the military service.

the lease, then the family should go elsewhere. As long as the Airman has signed the lease, paragraph a(2) of Section 535 explicitly and automatically allows termination of the servicemember’s and any dependent’s obligations under the lease, without any requirement to petition a court.

SERVICEMEMBERS CIVIL RELIEF ACT

—EVICITION PROTECTION

The SCRA provides important protections for tenants against non-judicial eviction. SCRA (50 USC Appx.) Section 531 prohibits a landlord from evicting any servicemember on active duty—which encompasses reserve and guard members on orders as well as permanent active duty—without a court order. In fact, the SCRA applies the prohibition on non-judicial foreclosures to those with paramount title to the landlord as well. If the landlord is foreclosed upon, this protection would still provide the servicemember tenant protection from non-judicial eviction.

While the eviction protection is not absolute, Section 531 also provides for a stay of proceedings, thus amplifying the significance of the landlord’s requirement to go to court. The Section 531 stay of proceeding is separate and apart from the traditional SCRA stay, which is SCRA (50 USC Appx.) Section 522. Instead of depending on whether military service materially affects the ability of the servicemember to appear, as Section 522 does, the Section 531 stay can be invoked when military service materially affects the ability of the servicemember to pay the rent. Therefore, the Section 531 stay will only be available to those who entered into a lease before entering the current period of military service. Significantly, Section 531 also states that upon the request of the servicemember whose ability to pay has been materially affected, the court will ***adjust the terms*** of the lease “to preserve the interests of all parties.”

The primary caveat to Section 531 is that in order to invoke its protections the rent may not exceed \$2,400 per month, as adjusted annually since 2003.¹⁰

¹⁰ The amount is adjusted annually based on a formula explained in SCRA (50 USC Appx.) Section 531 paragraph (a)(2)(B), and is published by the Office of the Secretary of Defense (Personnel and Readiness) in the Federal Register. The amount is typically published in late February. JACA will put the amount in the SCRA learning center on CAPSIL shortly thereafter.

The 2012 adjusted maximum rental amount is \$3,047.45. However, for those leases entered into before the current period of active service, SCRA (50 USC Appx.) Section 532 provides protections regardless of the rent amount. Section 532 is the installment contracts provision, but it also applies to a lease for real property. It states that when an Airman starts paying on a lease before entering military service, the lease may not be terminated without a court order. Similar to the stay under Section 531, Section 532 requires the court to stay the proceedings if the servicemember's ability to pay has been materially affected by military service. Keep in mind that the discussion of the Section 538 protection for dependents in the last section also applies to the eviction protections found in Sections 531 and 532.

Without education from the legal office, some Airmen may suffer a hardship because of ignorance about their right to terminate a lease or to stay in a rental residence despite foreclosure.

PROTECTING TENANTS AT FORECLOSURE ACT¹¹

While the SCRA provides important procedural protections against eviction, a savvy and efficient attorney may be able to navigate state judicial procedures and evict an Airman quickly without violating the SCRA. Imagine an active duty technical sergeant who faithfully pays rent for a home near the installation, and has been the model tenant. Then one day the Airman discovers a notice on the residence indicating the home is being foreclosed upon because the landlord defaulted on the mortgage. Remember that the Section 531 stay would not be available because the Airman was on active duty at the time she entered the lease, and therefore cannot show material effect.

While some state laws address this issue, the Protecting Tenants at Foreclosure Act of 2009 now provides a minimum baseline of federal protection for any federally-related mortgage. If the technical sergeant in our example was in a month to month or at will lease situation, then the technical sergeant must be given at least 90 days notice after the foreclosure prior to eviction. If the Airman is within a set lease term, then the protection is even greater. In that case, the foreclosing party can only evict the tenant before the end of the lease term if the property is sold to a purchaser who is going to occupy the home as a primary residence. In this unlikely event, the tenant still gets a 90 day grace period after the sale to the incoming resident.

If all of the above protections fail to keep the Airman's family in the home during the remainder of the lease period, and the family is evicted due to foreclosure, the JFTR provides some financial relief. Chapter 5, Section 5, paragraph U5355-D3 authorizes a short distance household goods move for military members, or their dependents, who relocate from a foreclosed rental residence. The move must be to a residence from which the member is going to continue commuting to the permanent duty station.

CONCLUSION

Remember Benjamin Franklin's advice, "an ounce of prevention is worth a pound of cure," and incorporate some of the above points into your preventive law education and outreach. Without education from the legal office, some Airmen may suffer a hardship because of ignorance about their right to terminate a lease or to stay in a rental residence despite foreclosure. Federal law provides important rights to tenants. In legal assistance, writing a letter to a landlord referencing the applicable law can work wonders for your client. In those situations where a stubborn landlord persists in violating the law, remember your referral resources. If your office needs assistance in interpreting the SCRA or other statutory protection for tenants, call JACA. Legal assistance attorneys should stand ready to help Airmen when it comes to the roof over their family's heads. 🦋

¹¹ Protecting Tenants at Foreclosure Act of 2009, Pub. L. No. 111-22, 123 Stat. 1660, 12 U.S.C. § 5220 Note.



THE SURGE IN SPICE USE

AND THE AIR FORCE'S RESPONSE

by Major Jackie M. Christilles, USAF

From 2010 to 2011, the Air Force saw a sharp increase in the number of courts-martial with a specification involving spice. In 2010, one in every eight drug courts-martial had a spice specification. By 2011, the number had increased to one in every three drug courts-martial. The good news is that in 2011, the Air Force took significant steps in its battle against spice use among Airmen.

Spice is the common name for a family of harmful and sometimes deadly synthetic drugs. The scientific term for this group of harmful substances is synthetic cannabinoids.

FEDERAL CONTROLS ON SPICE

At the same time that the Air Force was leaning forward in its efforts to detect and deter spice use, the Drug Enforcement Administration (DEA) was taking steps to combat the spice epidemic. In March 2011, the Administrator of the DEA issued a final order to temporarily place five spice compounds

on Schedule I of the Controlled Substances Act for a period of one year.¹ Schedule I is a category of substances that have a high potential for abuse and have no currently accepted medical uses in the United States.² According to the DEA's findings, the scheduling action for spice was necessary "to avoid an imminent hazard to the public safety." On 1 March 2012, the DEA published its intent to extend the scheduling of these substances for an additional six months.

In addition to the DEA exercising its emergency scheduling power, several bills were introduced during the 112th Congress to confront the issue of synthetic drug use and abuse. In December, the House passed House Bill 1254, Synthetic Drug Control Act of 2011, a bill that would permanently add 30 synthetic substances to the Controlled Substances Act, including the five temporarily scheduled spice

¹ Schedules of Controlled Substances: Temporary Placement of Five Synthetic Cannabinoids Into Schedule I, 76 Fed. Reg. 11075 (Mar. 1, 2011) (to be codified at 21 CFR 1308).

² 21 U.S.C. §812.

Spice products are perceived as “legal” alternatives to marijuana, although they are typically marketed as incense and labeled “Not For Human Consumption.”

compounds. Currently, Senate Bill 605, Dangerous Synthetic Drug Control Act of 2011, is stalled in the Senate. Additionally, as of 28 March 2012, 39 states had legislatively banned several different spice compounds.³

HISTORY

Although DEA controls are fairly recent for spice, researchers have been investigating synthetic drug alternatives to the main active ingredient in marijuana, delta (9)-tetrahydrocannabinol (THC), since the 1970s.⁴ Synthetic drugs, as opposed to natural drugs, are chemically produced in a laboratory. For instance, the active ingredient in prescription dronabinol is synthetic THC. It is identical to THC but it is man-made. Dronabinol is used for the treatment of nausea and vomiting in cancer chemotherapy patients and weight loss in AIDS patients. Since it is chemically identical to THC, dronabinol still has some of the adverse reactions associated with THC. Researchers hoped to separate the therapeutic properties of THC from its undesirable psychoactive effects but this proved to be difficult. From 1984 to 2011, John W. Huffman of Clemson University created 460 synthetic cannabinoid compounds (his initials, JWH, form part of the name for these compounds). At the same time, several other groups were creating synthetic cannabinoids for research purposes. None of these compounds developed into drugs approved for human use.

The term spice is now used to define this large family of man-made synthetic cannabinoid compounds.⁵ These compounds are chemically produced to mimic

the biological effects of the active ingredient in marijuana by activating the cannabinoid receptors. There are eight general groups of spice, based on the type of chemical substitution made to alter the original substance.⁶ Although some of these synthetic compounds are structurally similar to THC, there are many that are structurally unrelated.

Unfortunately, alert entrepreneurs identified these research chemicals, published in scientific journals, as a new business venture. The initial appearance of spice in the United States occurred in 2008. By June 2011, Businessweek reported that the market for these products was a billion dollar industry.⁷ The products are perceived as “legal” alternatives to marijuana, although they are typically marketed as incense and labeled “Not For Human Consumption.” They are commonly sold on the Internet and in “head shops.” Some of the popular brand names for these products include “Spice,” “K2,” “Yucatan Fire,” “Serenity,” and “Skunk.” The compounds can be found in powder form, but are generally dissolved in solvents, such as acetone, and then sprayed on plant material. The most common method of using these substances is smoking.

SPICE EFFECTS

The compounds are produced in laboratories with no regulatory oversight, sometimes in basements and garages.⁸ For that reason, spice products vary in levels of one or more active ingredients from product to product and even batch to batch within the same product line. Additionally, the spice products are not ordinarily labeled to disclose their active ingredient(s) and there is no guarantee that products marketed as legal do not contain compounds banned

³ Synthetic Drug Threats, National Conference of State Legislatures (Mar. 28, 2012), <http://www.ncsl.org/issues-research/justice/synthetic-drug-threats.aspx>.

⁴ Simon Hudson and John Ramsey, *The emergence and analysis of synthetic cannabinoids*. DRUG TESTING AND ANALYSIS, available at <http://www.drugtestinganalysis.com> (Jan. 11, 2011).

⁵ Lisa N. Sacco and Kristin M. Finklea, CONG. RESEARCH SERV., R42066, SYNTHETIC DRUGS: OVERVIEW AND ISSUES FOR CONGRESS, pg. 5, available at <http://www.fas.org/sgp/crs/misc/R42066.pdf> (Oct. 28, 2011).

⁶ Hudson, *supra* note 4.

⁷ Ben Paynter, *The Big Business of Synthetic Highs*, BLOOMBERG BUSINESSWEEK, June 16, 2011, available at http://www.businessweek.com/magazine/content/11_26/b4234058348635.htm.

⁸ Sacco, *supra* note 5.

by federal and/or state statutes.⁹ This means that there is a much higher potential for overdose than with marijuana because people do not know the chemical compounds or the potency of the product they are consuming. Additionally, research indicates that these chemicals create a stronger bond to the cannabinoid receptors than traditional THC, again increasing the risk of overdose.

***Law enforcement officials
have reported that many
suspected Driving Under the
Influence of Drugs incidents
are due to spice use.***

There are very few formal human use studies on the effects of spice. Poison control centers, emergency rooms and public health departments, however, have received reports of symptoms including intense hallucinations, psychotic episodes, elevated blood pressure, seizures, nausea, vomiting and tachycardia (fast, racing heartbeat).¹⁰ In addition, law enforcement officials have reported that many suspected Driving Under the Influence of Drugs incidents are due to spice use.¹¹ Reports of adverse effects are not limited to the civilian community. Between August and December 2010, ten otherwise healthy men in their early twenties were admitted to the psychiatry ward at the Naval Medical Center San Diego.¹² The men reported varying symptoms including suicidal ideations, disorganized speech, hallucinations and paranoid delusions. None of the men had a history of psychosis, but all reported that they had smoked spice products on more than one occasion. All of the men denied having psychotic symptoms before using spice. Although most of the symptoms

⁹ Synthetic cannabinoids and "Spice," European Monitoring Centre for Drugs and Drug Addiction, available at <http://www.emcdda.europa.eu/publications/drug-profiles/synthetic-cannabinoids>.

¹⁰ Schedules of Controlled Substances, *supra* note 1.

¹¹ *Id.*

¹² Psychosis Associated with Synthetic Cannabinoid Agonists: A Case Series, Letters to the Editor, *AM J. PSYCHIATRY* 168:10, Oct. 10, 2011, available at <http://ajp.psychiatryonline.org>.

resolved between 5 and 8 days after admission, three patients continued to have symptoms for more than 5 months.

AIR FORCE REGULATIONS

As early as 2009, Air Force commands at various levels began issuing written orders or guidance memorandums specifically prohibiting use of spice by Airmen. On April 11, 2011, the Air Force revised AFI 44-121. The new revision included a specific prohibition on use of spice by Airmen. The update expressly gave commanders the ability to take disciplinary action against Airmen suspected of use and possession under Article 92, UCMJ. Taking punitive action under Article 92 does not require establishing the specific compound involved. Unfortunately, prior to FY11 besides investigative tools, there were few resources available to commanders to detect use.

AIR FORCE SPICE TESTING PROGRAM

The only urinalysis testing option for spice at the beginning of FY11 was limited availability at the Armed Forces Medical Examiner System (AFMES) Division of Forensic Toxicology. AFMES continues to accept specimens for spice testing but its capability is limited to thirty samples per month from each of the services. AFMES will only accept specimens for spice testing if the specimen was collected as part of an open law enforcement investigation and was collected pursuant to probable cause or consent. AFMES tests specimens for metabolites of the JWH-018 and JWH-073 compounds.

There were several reasons for the limited testing availability. While urine testing for some JWH compounds was developed in late 2010, it was expensive and only available at a handful of specialized labs around the country. The testing process to detect spice and its purported metabolites is different than the traditional testing process utilized by the DOD drug testing laboratories. Drugs currently on the DOD drug testing panel are subjected to three separate tests.¹³ The initial screening test identifies those samples that are "presumptively positive." The sample is then rescreened and if the rescreen is also

¹³ DODI 1010.16, TECHNICAL PROCEDURES FOR THE MILITARY PERSONNEL DRUG ABUSE TESTING PROGRAM, Dec. 9, 1994.

Currently, spice is not part of the DOD testing panel. Therefore, random samples submitted to the Air Force Drug Testing Laboratory as part of the drug demand reduction program are not tested for spice.

“presumptively positive,” the specimen is tested using a gas chromatography-mass spectrometry (GC/MS) instrument. The screening process is a relatively quick process that eliminates roughly 99% of active duty samples as negative. The confirmatory testing process, however, can take several hours for a single batch of specimens. Currently, no DOD authorized immunoassay or other rapid screening mechanism has been identified for spice. Additionally, confirmatory testing for spice is accomplished using the liquid chromatography-tandem mass spectrometry (LC/MS/MS) technique on a completely different instrument—an LC/MS/MS instrument. Most DOD drug testing labs do not even have an operational LC/MS/MS instrument in inventory although the AFDTL did purchase two LC/MS/MS instruments in FY11 to set-up its own in-house testing capability.

In FY11, the Air Force began funding a contract for spice testing at a contract laboratory, NMS Labs. Initially, commanders could only submit samples to NMS Labs collected pursuant to a command-directed urinalysis. By the end of FY11, however, commanders were free to submit samples collected pursuant to a unit, dorm or gate sweep. Currently, spice is not part of the DOD testing panel. Therefore, random samples submitted to the Air Force Drug Testing Laboratory (AFDTL) as part of the drug demand reduction program are not tested for spice.

In FY12, the Air Force again funded a contract for spice testing at NMS Labs. Currently, NMS Labs can test for the metabolites from five spice compounds—JWH-018, JWH-019, JWH-073 and JWH-250 and AM-2201.¹⁴ According to its own Designer Drug Trends Report, NMS Labs saw a sharp decline in blood positive rates for JWH-018, JWH-019, JWH-073 and JWH-250 after the DEA scheduled JWH-018 and JWH-073. However, it saw an increase in urine metabolite positive rates

for JWH-018. NMS Labs opined that this could be evidence that the JWH-018 metabolite might be a metabolite of other compounds. Because of this possibility and the rapid advances in the forensic science and the law in this area, it is important that base legal offices contact JAJG for guidance on charging any case involving a positive urinalysis result for spice, especially if considering a charge under Article 112a.

In March 2012, the AFDTL ran its first official sample through its own spice testing protocol. As of 10 April 2012, the AFDTL had tested 83 samples in-house with one positive result. In FY11, the Air Force forwarded 1,032 specimens to NMS Labs for testing with 23 resulting positives. As of 10 April 12, the AFDTL had sent 1,931 FY 12 specimens to NMS Labs. Of those FY12 specimens, 20 have been reported as positive, although the AFDTL has not received results for all 1,931 specimens. According to the AFMES March 2012 report, it has tested 370 Air Force specimens since March 2011. Of the 370 specimens tested, 201 were positive for one of the spice compounds.

DOD DRUG TESTING PROGRAM

Testing for spice is different from testing for other drugs at the AFDTL. The drugs currently on the DOD testing panel include marijuana, cocaine, amphetamines, opiates (morphine, codeine and heroin), ecstasy and Phencyclidine (PCP).¹⁵ Ecstasy (MDMA/MDA), oxycodone and oxymorphone were added to the panel after DODI 1010.16 was last published and Lysergic Acid Diethylamide (LSD) was eliminated from the panel in 2006. PCP will be removed and hydrocodone and hydromorphone will be added to the panel effective as of 1 May 2012.

To add a new drug to the drug testing panel, the DOD Drug Demand Reduction Program takes several steps. First, it determines the prevalence of a substance in the DOD population through a

¹⁴ K2, Spice and Other Synthetic Cannabinoids Testing, NMS Labs, available at <http://www.nmslab.com/services-forensic-K2-testing>.

¹⁵ DODI 1010.16, *supra* note 13.

prevalence study. Second, the DOD program determines if there is a sufficient screening mechanism that will allow the DOD labs to quickly identify presumptively positive specimens for the presence of the substance. This is necessary based on the volume of specimens received by the DOD labs each year. The AFDL estimates it will receive one million specimens in FY12. After establishing that a valid screening mechanism exists, the DOD program will establish a common protocol for detecting the substance and for confirming its presence. The final step is to establish a concentration level for reporting a positive result.

Although the analytical methods of testing for drugs can identify drugs or drug metabolites at low concentrations, the DOD has established artificially high concentration levels as a prerequisite to reporting a specimen as “positive.” We call this concentration a “cutoff.” These are administrative, rather than analytical cutoffs. The DOD set drug cutoffs reasonably high for two reasons: (1) so that laboratories certified to perform regulated drug testing can reproduce the results of other laboratories, a factor critical for accurate retesting and (2) to eliminate claims of incidental exposure (i.e., passive inhalation, handling of United States currency contaminated with cocaine, etc.). The DOD did **not** intend cutoffs, however, to: (1) identify the means of ingestion, dose or frequency of use (2) eliminate valid claims of innocent ingestion (i.e., marijuana laced brownies, punch spiked with cocaine, hemp oil containing THC, etc.); or (3) correlate to behavioral and physiological effects. The DOD is working on several prevalence studies concurrently to determine the prevalence of spice in the DOD active duty population. As mentioned earlier, it has not identified a sufficient screening method for large volumes of spice specimens. Likewise, the DOD has not established a spice testing protocol or a cutoff level.

LEGAL CONSIDERATIONS

Since spice is not part of the DOD drug testing panel and the science on these drugs is still emerging, there are some legal considerations before initiating a case involving use of these substances. On 26 July 2011, the Office of the Under Secretary of Defense

issued a memorandum cautioning against the “use of urinalysis drug testing results alone for prosecuting or taking adverse administrative actions against service members for use of Spice” based on the forensic science available at the time.¹⁶ On 10 November 2011, AF/JAA issued a memorandum for “All Staff Judge Advocates,” outlining the permissible actions on positive spice results.¹⁷ Primarily, the memorandum addressed the limitations on use of positive spice urinalysis results alone (i.e., “naked”) for adverse actions against Airmen. The memorandum did encourage SJAs to utilize urinalysis results to initiate an investigation in order to develop additional evidence of spice use.

It will be interesting to observe the development of case-law involving spice use. An evolving discussion is ongoing on how best to charge the use of spice based on regular advances in the forensic science in this area and it is highly unlikely the spice issue will fade in the near future. The world of synthetic drugs expands every day. Use of synthetic cathinones (a topic for another day), commonly known as “bath salts,” is also on the rise. Luckily, the efforts put in place to deter spice use is likely to provide a model for how we deal with subsequent rounds of synthetic drug threats to the health and good order and discipline of our Airmen. ↗



¹⁶ Memorandum Re: USAF “Spice” Testing Program (26 July 2011).

¹⁷ Memorandum Re: Synthetic Cannabinoid (“Spice”) Urinalysis Testing and Legal Constraints (10 November 2011).



THE AREA DEFENSE COUNSEL'S ROLE IN ACCIDENT INVESTIGATION BOARDS

by Captain Nicholas D. Carter, USAF

Sometimes in between the clients who have received Article 15s for DUIs or Airmen who have popped positive for an illegal substance you get a different client. This client does not have an alcohol or drug problem, nor is he having trouble passing his PT tests. He seems more concerned about getting back in the cockpit than the type of discipline he perhaps could face. This client has received notice that he is being called to answer questions before an Accident Investigation Board (AIB).

WHAT IS AN ACCIDENT INVESTIGATION BOARD?

When a Class A mishap occurs, there are usually two investigations. A Safety Investigation Board (SIB) conducted pursuant to AFI 91-204, and an AIB con-

ducted under AFI 51-503 or AFI 51-507 in the case of a Ground Accident Investigation Boards (GAIB). The SIB usually convenes before the AIB. Prior to the SIB beginning its investigation, an Interim Safety Board (ISB) will convene at the mishap location. The ISB members are the first people on the scene, charged with preserving evidence and taking initial statements. However, unlike the SIB and the AIB, the ISB is not an investigatory body.

The sole purpose of the SIB is mishap prevention, and to further that goal, the SIB's findings, recommendations, deliberative process, analysis, and conclusions, as well as any witness testimony obtained through a promise of confidentiality are considered privileged under the military safety privilege. The



military safety privilege is an executive privilege vital to mishap prevention and tied to our national security. As such, safety privileged information is accessible only to people with a need to know for mishap prevention purposes.

AIBs and GAIBs are legal investigations conducted to inquire into the facts surrounding an aircraft, aerospace, or ground accident; to prepare a publicly-releasable report of the facts and circumstances of the mishap, including a statement of opinion of the cause(s) of the mishap and/or substantially contributing factors in an AIB; and to gather and preserve evidence for use in litigation, claims, disciplinary actions, and administrative proceedings. The overall goal of an AIB is the protection of the safety privilege.

Following the investigation, a final report is composed and can be used for the following: a copy is provided and personally briefed to the Next-of-Kin of accident fatalities; it is released to members of the public, media, Congress, and government agencies upon request; it is used to adjudicate claims; and perhaps most importantly to an Area Defense Counsel,

it is used as a factual source document by Air Force commanders if punitive or adverse administrative action is taken against persons whose negligence or misconduct caused and/or substantially contributed to the accident.

MAJCOMs are the convening authority for AIBs and GAIBs. An AIB normally consists of at a minimum a Board President (BP), often an O-5 or above, and a Legal Advisor (LA), a judge advocate who has attended the Accident Investigation Course. Other members typically include a recorder, usually a paralegal, a pilot member, a maintenance member, and a medical member. The board conducts investigations by reviewing available evidence and interviewing those involved in the mishap, as well as those who witnessed the mishap or who have relevant information.

Though commanders can use the AIB report to review the facts and determine whether a member should be disciplined or undergo some form of administrative action, the AIB's primary purpose is to protect the safety privilege by preparing a publicly-

AIBs are not conducted to find out whether a crime has been committed. AIBs are convened to investigate accidents, not suspected cases of wrongdoing.

releasable report of the facts and circumstances of the mishap, including the cause(s) of the mishap, and those factors that substantially contributed to the mishap. According to 10 U.S.C. § 2254(d), the BP's statement of opinion regarding the cause(s) of the mishap and/or substantially contributing factors cannot be used as evidence in any criminal or civil proceeding. Also, the AIB is not permitted to make recommendations of any kind. Moreover, an AIB is not a criminal investigation, nor is it designed to be an adversarial process. AIBs are not conducted to find out whether a crime has been committed. AIBs are convened to investigate accidents, not suspected cases of wrongdoing. Should the Board discover evidence of wrongdoing during its investigation, it will only look into the matter until it can determine whether the wrongdoing is either causal or contributory to the mishap. If the answer is in the negative, the Board will refer the matter to the MAJCOM SJA for appropriate action and continue with the accident investigation.

Once the AIB has convened and the SIB has completed its investigation, the LA obtains the factual non-privileged evidence from the SIB. Once this material has been screened, the full Board reviews all non-privileged evidence received from the SIB, which can include transcripts of any voice recordings and non-privileged testimony given to the ISB or SIB.

Oftentimes the Board will review information retrieved from the mishap aircraft's data recording device(s). This data shows what the mishap aircraft and mishap crew were doing prior to and during the mishap. The Board may use this information to create a computer animation of the mishap flight.

After the Board has a good grasp of the evidence and the mishap, it will arrange witness interviews and prepare interview questions. The Board receives a witness list from the SIB that lists the name of every person the SIB interviewed who was not granted a

promise of confidentiality. The AIB can elect to interview any witness it believes has relevant testimony relating to the mishap. This can include all, none, or some of the same witnesses the SIB interviewed.

ROLES OF ATTORNEYS IN ACCIDENT INVESTIGATIONS

The LA's principal duty is to provide legal advice and assistance to the BP until the convening authority approves the report. The LA serves as liaison between the AIB, the convening authority's SJA and the host installation's SJA. The LA coordinates release of information with the BP, the convening authority's SJA, and the convening authority's Public Affairs office. He/she oversees the appropriate collection, preservation, and transfer of evidence, and also participates in all witness interviews to ensure proper procedures, questions, and issuance of rights advisements, if necessary.

In essence, the LA serves as the BP's SJA. However, because the investigation is considered a legal investigation, the LA's role is also akin to a project manager, ensuring that the logistics and resources needed to facilitate the AIB are in place. One BP described the LA's role as a hybrid between lawyer, director of operations, and executive officer.

Although the LA and ADC have different clients, purposes, and roles, that in itself does not mean the two cannot coordinate their efforts. A key factor to having an AIB run smoothly is effective communication between the ADC and the LA.

TESTIMONY BEFORE THE BOARD

The questions the AIB chooses to ask a witness is largely dependent on the evidence available to the AIB. Some mishaps will primarily involve issues related to equipment or weapons systems. Sometimes the issues involve the operators. Regardless of whom the witness is, the BP, in conjunction with other board members, compose witness interview questions he/she will ask in a formal, recorded, and

sworn interview. ADCs should keep in mind that AIB witness interviews differ substantially from SIB interviews in that SIB interviews are not under oath, they can be privileged, and they are much less formal, so a client may not be accustomed with more formal questioning.

Prior to a witness testifying before the AIB, the LA will speak with each witness to discuss the purpose of the AIB, cover interview protocol, remind witnesses to avoid speculation or making corrective or disciplinary recommendations, obtain personal and contact information, and address any witness concerns. During the discussion, the LA is not going to ask any questions relating to the mishap. If the LA knows that a witness is already represented by an attorney, the LA must contact the attorney prior to the interview rather than contacting the witness directly. Witness interviews will be transcribed and publicly released after the investigation is completed. Depending on which MAJCOM is conducting the AIB, the witness' name may be omitted in the final report.

***The central question
that every person called to
testify before an AIB has to
answer is whether they should
make a statement during an
AIB interview.***

Because AIBs cannot offer a promise of confidentiality, witnesses have the right to avoid compulsory self-incrimination. Therefore, if a military witness is suspected of a criminal offense, the provisions of Article 31, UCMJ, will apply. Likewise, if a civilian witness is suspected of having committed a crime, 5th Amendment protections will apply. The LA is responsible for ensuring applicable rights advisements are issued properly and appropriately. These interviews are not meant to catch someone by surprise. If the Board suspects UCMJ violations prior to the interview, the LA will inform the member, or his/her attorney if represented, of the Board's intent to administer a rights advisement during the interview.

AIB interview questions are factual in nature, and seek to elicit from the witness what he/she saw, heard, did, etc, with the ultimate goal of gathering sufficient evidence to explain the sequence of events and support the BP's statement of opinion. Depending on the circumstances, the LA may share information about what the AIB plans to ask the witness with the ADC prior to the interview. Defense counsel may also attend the witness interview with a client, either in person or telephonically, in order to give advice. However, defense counsel may not answer questions for the client or ask questions during the interview, though they may, of course, consult with their client and stop questioning at any time. Witnesses may also have counsel present during the interview even if the Board does not suspect them of any offense. It is also possible for witnesses to request to make a written statement under oath with the assistance of counsel instead of, or in addition to, oral testimony.

**WHY LAWYERS GET PAID THE BIG BUCKS:
"SHOULD MY CLIENT MAKE A STATEMENT?"**

The central question that every person called to testify before an AIB has to answer is whether they should make a statement during an AIB interview.

As an ADC, it is important to examine the strategic components of whether a client should invoke his/her right to remain silent. First, it is essential for ADCs to discuss with the LA the extent and nature of the interview. Second, ADCs must consider whether the privilege against self-incrimination exists and what the precise basis is. Not wanting to testify against a buddy, boss, or wingman by itself is not a basis for refusing to make a statement. However, not wanting to disclose one's own violation of procedure, failure to comply with established duties, or other misconduct is a basis. If a basis does exist, the next question is whether the right against self-incrimination should be invoked by the client?

In dealing with an aircraft mishap, for example, a witness may be subject to discipline or removal from flying status regardless of whether he or she makes a statement. Conversely, though a witness may feel that potentially his/her actions were the cause of the accident, the cause could, in fact, not involve his/her actions at all.

***Though each AIB is different,
there are some situations
where rights advisements are
commonly issued.***

In an aircraft mishap there is potentially a mountain of evidence to sift through: voice recorders, other crew members' testimony, maintenance records, flight checklists, etc. Despite this evidence, sometimes there are still blanks that need to be filled. In many cases the Board will have a good understanding of *what* happened, and they are searching as to *why* or *how* it happened.

If an integral witness is not filling in these blanks left by other witnesses and evidence, the AIB attempts to fill in those blanks with reasonable inferences, past experiences, mishap simulations, or other areas of information. These "fill-ins" may be worse for your client than what in fact happened. Remember that sometimes the member's commander may want to hear the member's recollection of events prior to returning the member to flying status.

Though each AIB is different, there are some situations where rights advisements are commonly issued. One such example may involve a crew member suspected of dereliction of duty because the member did not follow appropriate procedures. Another common situation may occur where from the records it appears that a maintainer may have missed a step or not have possessed the authority to perform a certain function. In these cases, it is understandable for the member to want to avoid talking to the AIB about what happened because he/she may think that his/her misstep might have caused the accident.

However, these impressions may be incorrect. A misstep may not have had any effect upon the accident sequence of events. A Board will not call a witness to "grill" or interrogate him about his potential lapses in performance. That is not the purpose of this investigation. The AIB identifies cause(s), substantially contributing factors, and other areas of concern. These areas can be broad. For example,

depending on the specifics of a mishap it may be just as important to discuss in addition to the mishap, the supervision, training, and ops-tempo of the unit. The AIB is the appropriate forum where these questions will be explored. In an AIB, the board will look at these other factors if they have evidence to explore it. Without the testimony of a key participant, telling the board *why* or *how*, these items may not be explored as thoroughly as needed. An AIB report detailing deficiencies in training may ultimately better help your client, rather than having these issues brought up in response to some type of disciplinary or administrative action.

The short answer to whether your client should make a statement is the same answer lawyers are famous for: "it depends." What is crucial to the understanding of an ADC and an Air Force member called to testify is that this process is not adversarial. AIB members are not criminal investigators. They are simply other Air Force members who are charged with a duty to prepare a report of investigation releasable to the public. Because of the unique nature of AIBs, ADCs may request through the LA an advance copy of the interview questions to review with their clients prior to making any statements before the Board. Ultimately, the decision to answer self-incriminating questions or invoke the right to remain silent regarding any self-incriminating statements is the client's to make.

The interests of the Air Force and a client can both be served during an AIB, but ADCs need to do their homework. Thoroughly review the regulations and familiarize yourself with the process. Ask to review any evidence or background material about the incident. Learn what you can about the airframe involved. Discuss the matter at length with the client so you know every detail from start to finish, to include what non-privileged statements have already been made. Most importantly, engage with the LA to determine what are the real issues and real risks. This way, individual rights can be protected, answers can be found, and the Air Force can continue to fulfill its mission. Because AIB clients are relatively few and far between, ADCs should always seek guidance from their SDC or CSDC in these important cases to ensure they are giving our Airmen the best possible legal advice. ✈️

THE CONFINEMENT OF MILITARY MEMBERS IN CIVILIAN FACILITIES

How a Broadening Interpretation of Article 12, UCMJ Impacts Military Justice

by Captain Joshua R. Traeger, USAF

The day after General Curtis LeMay launched our newly-minted United States Air Force in the Berlin Airlift, President Harry Truman signed the Selective Service Act of 1948 into law. A major revision of the Articles of War of the United States, the “Elston Act” codified the Selective Service System and set the groundwork for the Uniform Code of Military Justice. For the first time in history, the following statement became federal law:

No person subject to military law shall be confined with enemy prisoners or any other foreign nationals....¹

This key provision, lost in a bill notorious for establishing the current version of the “draft,” became what we now know as Article 12, Uniform Code of Military Justice (UCMJ). In its current form, Article 12 is a twenty-seven word clause prohibiting military members from confinement with enemy prisoners or foreign nationals. What it lacks in length, it makes up for in impact. This piece discusses Article 12’s application, judicial interpretation and the implication experienced by military justice practitioners Air Force wide. At its conclusion, this article advocates a revision of Article 12 and the creation of Department of Defense (DOD) confinement facilities, which could achieve the original goals of the Elston Act while reducing the claims of improper comingling of confinees.

¹ Selective Service Act of 1948, Pub. L. No. 80-759, § 212, 62 Stat. 604, available at: http://www.loc.gov/rr/frd/Military_Law/pdf/act-1948.pdf.

*In its current form,
Article 12 is a twenty-seven
word clause prohibiting
confinement with enemy
prisoners or foreign nationals.*

EVOLUTION OF ARTICLE 12, UCMJ

Soon after the enactment of the Elston Act, both Congressmen and military leaders (including Secretary of Defense James Forrestal) campaigned for a uniform system of courts-martial for the military services. The original draft was delivered to Capitol Hill on February 8, 1949. Known as the “Morgan Draft” for committee chairman and Harvard Law Professor Edmund M. Morgan, the text included the following under Article 12, titled “Confinement with Enemy Prisoners Prohibited”:

No member of the armed forces of the United States shall be placed in confinement in immediate association with enemy prisoners or other foreign nationals not member of the armed forces of the United States.²

With the exception of changing the word “shall” to “may” and removing the last four words of the

² “Uniform Code of Military Justice: Text, References and Commentary based on the Report of the Committee on a Uniform Code of Military Justice to The Secretary of Defense,” 1949, available at: http://www.loc.gov/rr/frd/Military_Law/pdf/morgan.pdf.

Military courts have significantly broadened Article 12's application.

clause, the Morgan Draft of Article 12 is exactly as it appears in today's UCMJ. However, notable changes were made between the Elston Act and the Morgan Draft, leaving today's practitioners with challenging everyday applications.

First, where the Elston Act merely stated that servicemembers could not be "confined with" enemy prisoners or foreign nationals, the Morgan Draft (and today's UCMJ) also illegalizes placement "in immediate association." This change is crucial. Instead of the narrow language of the Elston Act, which could plausibly be interpreted only to limit confinement in the same cell, the Morgan Draft seemed to increase that distance from the four walls of the cell to anything in "immediate association." The practical implications of that change are seen across the Air Force and, especially at locations like Moody Air Force Base, as will be discussed later.

Furthermore, the Elston Act had a clear limitation in mind. It only prohibited confinement of servicemembers with enemy prisoners "outside the continental limits of the United States."³ In 1948, Congress was undoubtedly concerned with the troubling conditions of confinement experienced in World War II, the continuing military tension with the Soviet Union and the implications of the Third Geneva Convention, which took effect in the summer of 1949. Congress sought to eliminate the concern that American servicemembers would be confined with foreign prisoners of war, and that concern is well documented.

When the United States Senate Committee on Armed Forces considered the Morgan Draft before it became the UCMJ, it included specific commentary with its recommendation to pass the bill. Finding that the Morgan Draft prohibited confinement with "prisoners of war," the Committee also sought to ensure that "prisoners from an enemy vessel" could be held in the

brig of a ship even if American servicemembers were housed in the same brig. In the end, the Committee asserted that the article was "intended to permit confinement within the same facilities," provided servicemembers were segregated from prisoners of war.⁴ Therefore, despite the fact that the Morgan Draft (and UCMJ) eliminated the Elston Act's language of "outside the continental limits of the United States," it is apparent that Congress maintained the same original goal: To eliminate the co-confinement of American servicemembers and foreign prisoners of war, especially in foreign locations.

However, military courts have significantly broadened Article 12's application. This expansion is first recognizable in the case of *United States v. Palmiter*, in which the Court of Military Appeals reviewed the circumstances of a sailor being held in pretrial confinement with sentenced prisoners.⁵ In his concurring opinion, then-Chief Judge Robinson O. Everett⁶ opined that "Article 12 seems to recognize that a prisoner may have a legitimate interest in being confined apart from persons who are in a distinctively different class of prisoners."⁷ Cleverly, Chief Judge Everett interpreted Article 12 as a broad classification of prisoners, instead of the narrow prohibition it originated as in 1948.

This broad interpretation continues today. Most recently, on 16 March 2012, the Air Force Court of Criminal Appeals reviewed the propriety of credit for an Accused's confinement with "foreign nationals."⁸ In *United States v. Towhill*, the Accused was jailed in a "housing pod" in the Grand Forks County Correctional Center near Grand Forks Air Force Base, North Dakota. The Accused spent a number of days in a cell next to a Spanish-speaking inmate nicknamed "The Mexican." Despite the fact that the Accused and "The Mexican" were confined in completely separate cells, the Court concluded that

³ Selective Service Act of 1948, *supra* note 1.

⁴ Uniform Code of Military Justice, *supra* note 2.

⁵ *United States v. Palmiter*, 20 M.J. 90 (C.M.A. 1985).

⁶ Colonel (Ret.) Robinson O. Everett literally wrote the book on military justice, appropriately titled *MILITARY JUSTICE IN THE ARMED FORCES OF THE UNITED STATES*. A worthwhile profile of his legacy can be found at: <http://www.law.duke.edu/everett/story#jump>.

⁷ *Palmiter*, 20 M.J. at 97.

⁸ *United States v. Towhill*, ACM 37695 (A.F. Ct. Crim. App. 2012), available at: http://afcca.law.af.mil/content/afcca_opinions/cp/towhill-37695.u.pdf.

their “immediate association” merited seventeen days of confinement credit.⁹

Evidently, in the span of sixty-three years, the language and interpretation of Article 12, UCMJ has gone from prohibiting “confinement” with “prisoners of war” outside the United States to granting credit for “immediate association” in a “housing pod” with a “Spanish-speaking inmate” in Grand Forks, North Dakota. And as we’ll discuss more below, the practical implications of such a transformation are seen on a daily basis across the United States Air Force and at places like Moody Air Force Base.

Unfortunately, the use of local confinement facilities (vice facilities on base) is prevalent across the Air Force and, more specifically, Air Combat Command (ACC).

APPLICATION OF ARTICLE 12 AT MOODY AIR FORCE BASE

Since at least 2007, Moody Air Force Base (Moody) and the Cook County Jail (Jail), a small, rural facility about twenty miles away from the base, have operated under a Memorandum of Agreement (MOA) providing for the confinement of military personnel in pretrial confinement or serving short-term sentences. The need for this MOA was largely driven by the demands of the Base Realignment and Closure (BRAC) process in 2005.

The practical result for security forces, the legal office and every unit at Moody is the reliance on Cook County to house an average of ten to fifteen military confinees a year. The Jail itself is approximately 2000 square feet in size, with a bay-style general population area, a seventy-square-foot segregation cell, a small gym, administrative offices and minimal outdoor space.

⁹ *Id.* As highlighted by TJAGC Online News Service dated 21 March 2012, a similar holding was announced in *United States v. Alexander-Lee*, ACM S31784 (A.F. Ct. Crim. App. 2012), available at: http://afcca.law.af.mil/content/afcca_opinions/cp/alexander_lee-s31784.u.pdf.

For legal professionals at Moody, use of the Jail has presented quite a conundrum. The bay-style general population area is, by all accounts, tolerable and certainly not nearing any overly oppressive conditions. However, if during a military member’s pretrial or post-trial confinement, the Jail admits a foreign citizen or migrant worker, the military member is moved to the seventy-square-foot segregation cell.

This move is directly attributable to the broadened interpretation of Article 12. Consistent with *Palmiter* and *Towhill*, the Staff Judge Advocate at Moody has advised the Jail to segregate foreigners and military members. And to avoid “immediate association” between those groups, military members must remain in the segregation cells, save a few minutes of recreational time. The implication sometimes becomes so bad that general population is filled with three to four migrant workers, while the tiny segregation cell houses one, two or even three military members at a time (the third sleeping on the floor). This move is sometimes necessitated simply by a local cotton farmer forgetting to bring his immigration papers to work, prompting his incarceration and the subsequent segregation. Legally speaking, there is no other solution under the current Article 12.

Unfortunately, the use of local confinement facilities (vice facilities on base) is prevalent across the Air Force and, more specifically, Air Combat Command (ACC). An informal poll of ACC military justice sections revealed that about fifty percent of ACC wings utilize civilian confinement facilities for at least portions of their confinement operations.¹⁰ Each of these bases acts consistent with *Palmiter* and *Towhill*, directing the facility to segregate “foreign nationals” and military members. Although Moody has seen a huge impact on military confinees, other bases have had their issues. From fistfights to cold showers, solitary confinement to reduced privileges, the need to separate military members seems to counteract Article 12’s original intent by further burdening the member himself. A poignant example of this impact comes from here at Moody, where a military member in pretrial confinement provided the following details of his ongoing jail time:

¹⁰ Thank you to Capt Jaime Espinosa (366 FW/JA), Capt Sarah Kress (355 FW/JA), Capt Jonathan Carroll (20 FW/JA), Capt Ervin Harris (7 BW/JA), SSgt David Schwartz (7 SFS/S30), Capt Michael O’Brien (55 WG/JA) and Capt Eric Morley (633 ABW/JA) for their assistance in gathering this and other data.

[I am] locked in an 8x10 cell for about 23 hours per day. I am allowed out to shower each night and briefly use the phone. I eat alone in my cell....The first three nights at the Jail, I slept on the floor in a “boat,” essentially a sleeping pad that sits in a large Tupperware container that prevents vermin from crawling on the occupant while he sleeps. I am permitted to go to a “rec room” for about one hour, four days per week....On one occasion, I shared the rec room with a fellow inmate who spoke no English at all.

That singular characteristic—“who spoke no English at all”—was all it took for this member to be subjected to such harsh conditions. All the while, the overnight migrant workers and illegal immigrants shared an open space, warm beds and plenty of time out of their cells. This is the danger of our current application of Article 12, UCMJ.

MOVING ON AND MOVING FORWARD

To adequately remedy these situations and reflect the original Congressional intent of Article 12, two things should happen: A revision of the language itself and a recreation of Air Force confinement facilities across the world.

We need not go far to find appropriate language for a rewrite of Article 12. The Elston Act had it right: Military members should not be confined with foreign prisoners of war. Therefore, where detainees exist, military members should not. Considering that the vast majority of our detainee operations are in Afghanistan, Cuba or on Navy vessels in international waters, adding the language “outside the continental United States” does more good than harm.

A modification of Article 12 is currently circling on Capitol Hill. Major Dustin Lane, Chief of Joint Service Policy & Legislation for the Air Force Legal Operations Agency, reports the Air Force has “raised the problem of Article 12 violations due to confining military members in the same confinement facilities that house illegal immigrants with

the Joint Service Committee on Military Justice, the committee responsible for making legislative recommendations to Congress.” According to Maj Lane, the Committee plans to “review the issue and, if appropriate, make recommendations to Congress to revise the UCMJ.”¹¹ Absent this complete revision, Staff Judge Advocates and their trial counsel should raise Article 12’s original intent before their trial judges and ensure that the Elston Act and Morgan Draft are given their due.

Even in this fiscally constrained environment, the Air Force should invest in reestablishing military confinement facilities. These need not be at every base, as the justice tempos and confinement numbers vary across the Air Force. However, organizing regional confinement facilities, perhaps structured consistent with the current defense regions, would alleviate these concerns and save installation funds by eliminating MOAs with local facilities. We do a phenomenal job at providing well-staffed, comprehensive confinement to our military offenders, evidenced by the low recidivism rate. According to the Air Force Security Forces Center, recidivism by Air Force members is under twenty percent within the past five years; federally, those numbers are more than double.¹² Equipping Security Forces with regional confinement facilities would eliminate the concerns of Article 12, supplement a dwindling talent (confinement management) to our Security Forces personnel and align with the Judge Advocate General’s goal of excelling in military justice.

Although the Air Force has undergone many changes since 1949, the language of Article 12, UCMJ has remained the same. Its interpretations, however, have varied and today, the broad view of how Article 12 impacts military justice threatens to challenge our system of fair punishment and subject military confines to unnecessarily harsh conditions. Returning to Congressional intent and refining our confinement system could alleviate these threats while continuing to ensure that “justice” is done. 🦋

¹¹ Thank you to Maj Dustin Lane, AFLOA/JAJM, for this and other input.

¹² Thank you to Mr. Michael Beard, AFSFC/SFCV, for this and other data.

IMMUNITY ISSUES

AND THE NATURE OF

FUTURE CRIMES



by Captain Christopher K. Mangels, USAF and Captain Saleem S. Razvi, USAF
with contributions from Mr. Daniel Ridlon

In the science fiction thriller, *Minority Report*, Tom Cruise portrays John Anderton, a police officer charged with preventing “future-crimes.” With the aid of three psychics able to predict acts of extreme violence, such as murder, Detective Anderton prevents crimes before they occur by arresting people who are identified as future perpetrators. In one scene, Detective Anderton debates the legality of these arrests with an FBI Agent, Danny Witwer, played by Colin Farrell.

John Anderton: Why’d you catch that?

Danny Witwer: Because it was going to fall.

John Anderton: You’re certain?

Danny Witwer: Yeah.

John Anderton: But it didn’t fall. You caught it. The fact that you prevented it from happening doesn’t change the fact that it was going to happen.

While such psychic colleagues would prove helpful, prosecutors are forced to assume that crimes are not, in fact, inevitable and that the witness we immunize today will not commit a crime tomorrow. As Hegel states in his discussion of Kant in the lesser *Logic*, “No one knows, or even feels, that anything is a limit or defect, until he is at the same time above and beyond it.” In other words, we cannot tell that our current actions are a mistake until something has occurred which reveals the error. While the

Kastigar and its progeny prohibit any prosecutorial decision adverse to an accused based on statements made by the accused under a grant of immunity.

consequences are in the future, the potential issues involving immunity stem from actions that prosecutors take in the present.

The correct manner by which military courts should resolve the situation of an immunized witness committing subsequent misconduct has not been resolved by military courts, but it presents a dilemma that all judge advocates should be aware. This article examines two cases involving military members who were granted immunity and testified at court-martial proceedings in late 2009 and early 2010. Both military members were in the process of being administratively discharged in 2010 when new criminal conduct came to light.

THE FACTS

There were two main players in these cases, A and B.¹ Both had been involved with the use and distribution of prescription drugs. Both had also witnessed or aided Airman, C in his use of prescription drugs. Both were punished, A via Article 15 and B via special court-martial, and both were subsequently granted immunity to testify against C. C had previously been granted immunity to testify against B, and so his defense counsel raised the *Kastigar*² issue in his court-martial. The military judge ruled that the Government had violated C's rights and prohibited B from testifying during C's case in chief. But the judge allowed most of the specifications against C to go forward, and A was allowed to testify under immunity in the case in chief. An OSI agent was in the gallery during A's immunized testimony. On March 31st following the presentation of evidence against C including A's immunized testimony, C was acquitted of all five remaining specifications.

One day following the acquittal, 1 April, the same OSI agent who had watched A testify under immu-

nity reactivated a confidential source (CS), who had previously informed OSI that he had information regarding A. OSI requested that the CS attempt to get close to A and determine if he was still dealing and using drugs. The CS gained the confidence of A, partially through B, with whom the CS was friends. On that same day, the CS talked to A, who stated that he was willing to sell the CS drugs. The CS reported this conversation to OSI on 2 April 2010. On 5 April 2010, the CS got a ride from A to a local town where A bought some OxyContin. The next day, A again told the CS that he can get him OxyContin and again went to a local town to buy them. Later that day, the CS joined A, B and another Airman in B's room where he observed all three using the drugs. This was the first time the CS became aware that B was still involved with drugs. Following his witnessing the use by the three other Airmen, which he recorded on his phone, the CS reported what he had seen and provided the video he had recorded to OSI. Subsequent urinalysis testing confirmed the use of OxyContin by both A and B, and cases against them proceeded to trial. Following *Kastigar* hearings in both cases, the military judge in A's case dismissed the charges based on a violation of the accused's Fifth Amendment rights, while the military judge in B's case held that there was no violation. B was subsequently convicted.

ANALYZING THE OUTCOMES

Kastigar and its progeny prohibit any prosecutorial decision adverse to an accused based on statements made by the accused under a grant of immunity. In order to grasp the military judges' decisions we must ask, "What is a 'prosecutorial decision?'" This broad term of art could include actions taken by the Government at any time during the trial or investigative process. Consider the case against A. The judge rooted his decision in the fact that the OSI agent had heard A testify under a grant of immunity and had subsequently re-opened an investigation on A. He did not believe that there was any bad faith on

¹ The names have been changed to protect the privacy of the accused.

² A *Kastigar* hearing is held to determine if any use, direct or indirect, was made of immunized testimony in a prosecution for crimes about which the accused had the Fifth Amendment right not to testify.

the part of the OSI agent, or even that there was a conscious decision to re-open the investigation based on the immunized testimony. But the judge was concerned with the unconscious motivations of the agent. Based on the judge's reasoning, even if the use of immunized testimony is subconscious, the prosecution has still violated the witness' Fifth Amendment rights.

So is it the case that every piece of knowledge known could affect every trial or prosecutorial decision? Does this preclude every future prosecution even if all the prosecutors know is the fact of the prior immunized statement and not the substance? This result is rejected in *United States v. Gallo*, where the Court stated that a leak of the immunized testimony between prosecutorial authorities cannot be totally prevented and that, given its inevitability, we should look instead to the impact of the leak rather than its mere existence.³ So what impacts then violate the rights of the witness?

Case law provides no bright line answer to this question, and the issue becomes even more complex in the context of future crimes. Consider the arguments advanced in the cases of A and B. The government contended in both cases that the court should deny the defense Motion to Dismiss because doing otherwise would be to hold that a defendant who was previously granted testimonial immunity would have the ability to commit whatever later crimes he or she would like with no fear of prosecution. This perverse situation could not be the result of the Fifth Amendment's protection against self-incrimination, which seeks to protect individuals from being compelled to incriminate themselves, not to shield their future criminal acts from prosecution.

Applying the Fifth Amendment, the government argued it was clear that using immunized testimony to prosecute criminal activity committed after the immunized testimony would almost never violate the Fifth Amendment because, at the time the testimony is given, there is almost never a substantial or real risk of incriminating oneself for criminal behavior that has not yet occurred. As a result courts have traditionally held that grants of immunity apply

only to past criminal acts about which the witness is compelled to testify.⁴

The criminal conduct at issue in these cases did not represent a continuing course of conduct, but instead was conduct that did not occur until after A and B had testified under their grants of immunity. As a result, even if their immunized testimony affected the investigative or prosecutorial process, this did not violate their Fifth Amendment Rights because they were never compelled to testify against themselves as to the crimes with which they were later charged, e.g. future crimes. The use of Oxycodone did not occur until after they had provided immunized testimony; therefore, at the time they testified under immunity, they were not confronted with a substantial or real hazard of incriminating themselves.

The government then argued that the court should follow the Third Circuit's holding in *United States v. Quatermain*,⁵ and hold that the accused's Fifth Amendment rights were not implicated by the potential use of the immunized testimony because neither accused could have claimed privilege as to the crimes at issue in their case when they testified under immunity. As in *Quatermain*, A and B were granted immunity to testify about past criminal activity. As in *Quatermain*, A and B later committed additional misconduct, after immunity was granted. In *Quatermain* the government conceded that its major witness was motivated to testify against the defendant because of the immunized testimony he gave. Whereas in the case against A, the judge found the only influence on the prosecutorial decision was the unconscious effect that A's testimony had on the OSI agent. Thus, the influence the immunized testimony did have was clearly less than that in *Quatermain*, where the primary witness was motivated by the defendant's immunized testimony. Even with this extensive influence, the court in *Quatermain* ruled that the defendant's Fifth Amendment rights were not violated because, at the time of his immunity, he could not have claimed privilege against the future criminal activity. The government acknowledged that *Quatermain* was a Third Circuit case, and thus only persuasive authority, but argued its holding was entirely consistent with the principles announced by

³ 671 F. Supp. at 138 (E.D.N.Y. 1987).

⁴ U.S. v. Brown, 767 F. Supp. at 1531 (citing U.S. v. Bryan, 339 U.S. 323, 340 (1950)).

⁵ 613 F.2d 38 (3rd Cir. 1980).

the Supreme Court in *United States v. Apfelbaum*,⁶ *United States v. Freed*,⁷ and the Supreme Court's other rulings on this subject.

The defense, in similar motions in both cases, argued that the accused's Fifth Amendment rights were violated by the alleged subsequent use of the compelled testimony in the prosecution and investigation of crimes, which the defense conceded had not been committed at the time the testimony was compelled. Citing *United States v. Mapes*⁸ and the broad language in *Kastigar* of "any use,"⁹ the defense focused on the fact that the investigation of A immediately followed his immunized testimony at C's trial, and that therefore there must have been some use of the immunized testimony. The defense further stated that their interpretation of caselaw led them to believe that no use or derivative use could be made of compelled immunized statements in any criminal case, either before or after the immunized testimony even for a subsequent crime.¹⁰ However, every case the defense cited to support their arguments involved a situation in which an individual was compelled to testify and then was prosecuted for the same criminal conduct about which he was compelled to testify, not future misconduct.¹¹ In response, the government reiterated that the Fifth Amendment simply does not shield individuals from the use of immunized testimony in prosecutions for crimes that they had not committed when they were compelled to testify. Indeed, this was the very issue the Supreme Court considered in *Apfelbaum*.

The defense attempted to distinguish *Apfelbaum* by claiming it was inapplicable, involving, as it did, perjury, and the immunity statute at issue specifi-

cally listed perjury as an exception. The government argued that the distinction was not compelling for two reasons. First, the Court in *Apfelbaum* specifically rejected the notion that the exception discussed in that case was unique to perjury. Secondly, the government argued the scope of the immunity statute was immaterial because the central question in *Apfelbaum* was not the scope of the immunity granted by the statute, but whether the immunity statute's allowance of the use of immunized testimony in the prosecution for perjury violated the Fifth Amendment. In other words, even though the *Apfelbaum* Court did consider the scope of the immunity at issue, the immunity statute could not have provided less protection than the Fifth Amendment allows. As a result, the *Apfelbaum* Court, after concluding that the immunity statute allowed for use of the immunized testimony against the defendant, went on to consider whether that provision was constitutional and found that it was. The defense also attempted to distinguish *United States v. Quatermain*, claiming the court in *Quatermain* did not find that the immunized statement had affected the subsequent prosecution. The government argued that this was getting into a full *Kastigar* hearing, which was unnecessary since the crime committed was a future crime.¹² When A took the stand he could not have invoked his right not to testify because his testimony would not tend to show he was guilty of future criminal conduct he had not yet committed, and so he was never compelled to testify as to these future crimes.

The military judge did not agree. Although on the stand the OSI agent stated that he was not influenced by the testimony, the military judge held that the OSI agent must have been, even if it was completely unconscious and unknown to the agent.

We would argue that this holding is not consistent with the state of the law. Even if a court refuses to follow non-binding federal circuit court opinions, it must still consider *United States v. Freed*.¹³ Was A presented with a substantial and real hazard of incrimination at the time he provided his immunized

⁶ 445 U.S. 115 (1980).

⁷ 401 U.S. 601 (1971).

⁸ 59 M.J. 60 (C.A.A.F. 2003)

⁹ *Gillette v. U.S.*, 401 U.S.437, at 460 (1971). Note that this language was later described by the Court in *Apfelbaum* as "a source of further difficulty" and not intended to be taken literally. 445 U.S. at 120, fn. 6.

¹⁰ This despite several courts holding to the contrary. See, e.g. *Gallo*, 671 F. Supp. 124; *Phipps*, 600 F. Supp. 830; *Quatermain*, 613 F.2d 38.

¹¹ *U.S. v. Mapes*, 59 M.J. 60; *United States v. McGeeney*, 44 M.J. 418 (C.A.A.F. 1996) (Government met burden of showing no use of immunized statements where appellant had spoken with one prosecutor regarding co-conspirator's role in false check scheme and was subsequently prosecuted for his role in the scheme); *United States v. North*, 910 F.2d 843 (D.C. Cir. 1990), modified on other grounds, 920 F.2d 940 (D.C. Cir. 1990), cert. denied, 500 U.S. 941 (1991) (Defendant testified before Congressional committee under grant of immunity regarding Iran/Contra Affair and contemporaneously indicted by independent counsel).

¹² Given that the use of prior immunized testimony in a prosecution for a future crime is irrelevant (because no Fifth Amendment right exists with respect to that crime), the court can make an initial determination that the crime for which the accused is being prosecuted is a future crime unrelated to the immunized testimony and thereby avoid a *Kastigar* hearing.

¹³ 401 U.S. 601.

testimony?¹⁴ When viewing the testimony and crime in chronological order, the holding does not make linear sense. Is every defendant now shielded just because the same OSI agent is used in both cases, or because the same SJA is overseeing the military justice system? No hazard with respect to a future crime existed at the time the immunized witness was interviewed and testified because those had occurred before the new crime was committed. Before we address the next case study, we will distinguish this case with *United States v. Mapes*.¹⁵

The main difference between A's case and *United States v. Mapes* is that A's case involved a future crime. In *United States v. Mapes*, the military judge ruled that the accused's rights had been violated because information from his immunized testimony was used against him. In that case investigators did not know about Mapes' prior act of distributing heroin until hearing immunized testimony from a witness during an Article 32. This then influenced the prosecution's decision to go forward with charges against Mapes.¹⁶ The whole picture could not be seen until the United States Army Criminal Investigation Command (CID) agent heard the immunized testimony concerning this prior act. A's case involved a future crime that no one learned of until the confidential source communicated and showed OSI the evidence he obtained. A's testimony at the earlier court-martial revealed no new information; indeed, it could not have, simply because, without the crime having been committed, there was no information to relay. The only commonality between *Mapes* and A is the involvement of the special agent with respect to hearing the immunized testimony and then later investigating the accused. If A's case did not involve a future crime, but a prior act about which the government did not know, it would be directly analogous to *Mapes*. However, how is an agent to even know if A is going to commit a crime in the future? How is the special agent to know or even be influenced in his future investigation by testimony concerning a past event? There are several subconscious motives that lead one down this path, such as revenge, completing a job or investigation, or pure spite towards an

accused that got an acquittal. Do we now have to eviscerate our emotions and become a prosecutorial and investigative robot to avoid these *Kastigar* pitfalls? Where does seeking evidence go beyond what can be obtained from verbal testimony? Do we project our subjective thoughts on what could have influenced the prosecution team? The military judge in A's case essentially ignored the future crime argument and fixated exclusively on *Kastigar* and the factors laid out in *Mapes*. By doing so, he reached the perverse result of which the court in *Gallo* warned,¹⁷ allowing past immunized testimony to be a warrant for future criminal behavior.

The companion case, *United States v. B*, came a mere week after A's case was dismissed. This case produced a different outcome, despite nearly identical facts. B was not the subject of the investigation, but got caught using a controlled substance as part of the investigation into A's misconduct. Despite the government's contention that B had no standing to assert A's Fifth Amendment claim, the defense tried to argue substantially the same argument as had prevailed in A's case. Even though a future crime was involved, the military judge presiding over the case proceeded into a full *Kastigar* hearing. The military judge applied the *Mapes* factors, although he did not specifically address each factor. This analysis, we argue, is inapplicable to any case involving a future crime. The *Mapes* factors are largely retrospective.¹⁸ Applying them to a future crime is counter-intuitive and so yields illogical results.

In response to the first factor, "whether the immunized statement revealed anything unknown to the government by virtue of an accused's pre-trial statement," the immunized statement could not reveal anything to the government because the accused himself does not know anything about the future crime, so there is nothing to reveal. In response to the second factor, "whether the investigation against the accused was completed prior to the immunized statement," the investigation of the future crime, by definition, must always be completed subsequent to the immunized statement. Should a judge consider the government to have failed this factor in every case involving a future crime? Any test, when applied to a

¹⁴ *Id.* at 606. See also *Rogers v. United States*, 340 U.S. 367, 374 (1951); *Brown v. Walker*, 161 U.S. 591, 600 (1896); *United States v. Apfelbaum*, 445 U.S. 115, 128 (1980) (citing *Marchetti v. United States*, 390 U.S. at 53).

¹⁵ 59 M.J. at 62-63.

¹⁶ *Id.*

¹⁷ 671 F. Supp. at 138.

¹⁸ 59 M.J. at 67.

There is no way to predict what could happen in the future...but we can take certain measures to protect against Kastigar taint.

certain broad class of cases, that necessarily fails every single time cannot provide a meaningful analysis. In response to the third factor, “whether the decision to prosecute the accused was made prior to the immunized statement,” we again face the fact that, by definition, a decision to prosecute an accused for a future crime will be sometime after the immunized statement was made. Finally, in response to the fourth factor, “whether trial counsel who had been exposed to the immunized testimony participated in the prosecution,” we question the relevance of this factor to the issue of a future crime. Even if the future crime was of the same type as the crime to which the accused testified previously, the two events are entirely disconnected in time. Trial counsel can gain no advantage from the immunized statements because, at the time they were made, the future crime was wholly unrealized. The only conceivable use would be show a similar pattern of behavior or modus operandi, which is clearly prohibited by the language of the immunity grant. As stated in *Gallo*, “even where immunized testimony was in some literal sense ‘used,’ that use is of no constitutional significance if it had no effect at all on events, because it leaves the witness in the same position as if the testimony had never been heard. It is but a leaf dropping unobserved in a deep forest.”¹⁹ Regardless, the military judge found that while the investigation of A may have been improperly triggered by his immunized testimony, B was not the subject of the investigation and was merely caught up as an additional player. Given that B was precluded from asserting A’s rights and B had previously waived his Fifth Amendment rights prior to being granted immunity, there was no violation of B’s Fifth Amendment rights based on the immunized testimony and therefore *Kastigar* did not require dismissal. Although the prosecution prevailed on the outcome, the future crime issue was still left unaddressed.

CONCLUSION...OR IS IT?

The military is often reluctant to accept outside pressures and influences that may not seem to apply

or fit within our standard practices. On the issue of future crimes, we should make an exception. With drug cases continuing to constitute a high percentage of courts-martial within the Air Force, immunity is never far behind. There is no way to predict what could happen in the future, like in *Minority Report*, but we can take certain measures to protect against *Kastigar* taint. One thing to always remember is documentation. Documentation can be recorded on who was in the court room when listening to an immunized witness and who interviewed the immunized witness throughout the investigation and court-martial process. Always be on the lookout for possible conflicts within OSI and the legal office when new investigations arise involving repeat offenders. Remember to separate rings into defined areas of responsibility within the legal office and in OSI. Make sure that only necessary information is channeled to the Staff Judge Advocate. As in *United States v. Mapes*, the SJA is as susceptible as any other attorney,²⁰ perhaps more so, since they are advising the convening authority on what action to take for multiple cases. This may also mean that an SJA should document how and when they recommended a certain way forward for an investigation. This will memorialize when the decision was made to move forward and what was considered when making the decision. Also consider keeping a strict timeline, either the SJA or the Chief of Justice, to monitor when interviews and hearings are taking place and when prosecutorial decisions are made.

Immunity is an important tool that prosecution teams have been using for years and will keep using for years to come. With established law in this area, the military justice courts should acknowledge the extent of future crimes and be ready and able to extend the military case law in this area. A bright line rule in connection with federal precedent is needed in these cases so the future can proceed to trial. ↘

¹⁹ 671 F. Supp. at 137.

²⁰ *Mapes*, at 68-69.

From the COURTROOM TO THE CAOC: Operational Litigation and NATO in Libya

by Major R. Aubrey Davis III, USAF



When Operation ODYSSEY DAWN (OOD) broke out, our Aviano legal team was in the midst of operating a tax-center, litigating six courts-martial and conducting a media-intense pre-trial confinement hearing on a captain. My role went from leader/litigator to briefing ROE to a continually growing contingent of operators. Less than two weeks later, operations transitioned into the NATO-led Operation UNIFIED PROTECTOR (OUP) and my duty location was moved from Aviano to the Combined Air Operations Center (CAOC).

This article is intended to relay my observations starting at the tactical up through the strategic level of operations spanning a seven-plus month period from a litigator's perspective. This article is not intended to propose that if you are a successful litigator that you will necessarily be a successful operational lawyer. It is intended to illustrate how the skills developed in the courtroom can translate well into the mission of advising commanders on targets across the spectrum of air operations. What might be termed as Operational Litigation was how I personally saw

my role once I began working in the CAOC. Many of the skills that I had developed in the court-room; like tackling novel law under Article 120, UCMJ or the like, I found very helpful in my role as a NATO Legal Advisor (LEGAD).

YOUR CLIENT

One of the most important aspects of any case is getting to know the client. In this instance, OUP was a NATO-only operation. My role was to deploy from Aviano to a NATO billet which meant that the operational chain of command for operations flowed directly from NATO. My client then became those senior NATO decision-makers conducting operations in Libya. Thus, it was important not only to know and understand how NATO was organized and functioned, but what specific mission NATO had undertaken to accomplish.

My first step was to understand the chain of command. The NATO chain of command for Operation UNIFIED PROTECTOR (OUP) flowed through Supreme Allied Command Europe (SACEUR) down to the Joint Task Force Commander (CJTFUP), Lieutenant General Joseph J.C. Bouchard, Royal Canadian Air Force (RCAF). The Allied Air Component Command (ACC) was under the command of Lieutenant General Ralph J. "Dice" Jodice, II, USAF, who was the OUP Combined Forces Air Component Commander (CFACC). The composition of OUP was a pure coalition. It was clear from the very beginning that there was not just one nation leading with the rest of the coalition in tow as may have been the case in past conflicts.

THE MISSION

The next step was to fully understand my client's mission. Like preparing for court, in the operational context I wanted to understand what my client needed to achieve. In OUP this was borne almost exclusively out of some very important United Nations Security Council Resolutions (UNSCRS). NATO framed the UNSCRS and the ultimate mission set through the implementation of several products which included Operations Orders (OPORDS), Fragmentary Orders (FRAGOS), Rules of Engagement, and other higher-headquarters guidance. To add to the operational complexity, OUP was preceded by the twelve-day long U.S.-led Operation

ODYSSEY DAWN (OOD), which resulted in some very pronounced confusion when the operation transitioned from one to the other.

For example, from a base-level perspective, my operational legal team was faced with unlearning and “un-teaching” the mission and mission-specific Rules of Engagement (ROE) of OOD to all seven attack squadrons operating from Aviano AB. I directed my team to build a comparison chart where we went line-by-line through both ROEs to demonstrate just how different they were from one another. This was important during the initial stages of OUP because several operators were under the mis-impression that OUP was just OOD with a different name. In fact, at its simplest and to underscore that point, I would describe OUP as now being a humanitarian operation where we drop bombs.

This fact came as a surprise to many operators. Despite the OOD and OUP missions operating under the exact same UNSCRs, the approach to mission accomplishment was entirely different. For example, from the NATO total force perspective, the mission was to enforce a no-fly zone, enforce a naval arms embargo, and to protect civilians all while allowing for humanitarian assistance to enter Libya. By comparison, the U.S.-led OOD, from an air combat perspective, was focused on the destruction of the Libyan Integrated Air Defense System (IADS), destroying Libyan air assets, and protecting civilians from attack in Benghazi and Ajdabija. The OOD air campaign was focused on dropping bombs and pushing Col Ghaddafi’s forces away.

Given the timing of the operation, the OOD focus made complete sense, but the means by which execution was undertaken was different in almost every way. For instance, OOD operated out of a massive U.S. CAOC staffed with nearly a thousand people. OUP only had a couple of trailers within which the OUP CAOC “floor” occupied one room which was around 900 square feet. I actually found that the intimate workspace improved effective cross talk and situational awareness on the floor which paid large dividends.

Those dividends were proven during the course of operations. In OUP, NATO launched approximately

100 sorties a day originating from over fourteen air bases across Europe spreading from Moron, Spain, all the way over to Cyprus. To put it into context, the distance between Moron and Cyprus is approximately 2,200 miles; the same distance between Los Angeles, CA, and Washington, D.C. Libya itself was likewise vast and diverse.

Libya is the fourth largest country on the African continent, approximately the size of the Alaskan mainland with a 1,100 mile coastline. The country consisted of highly populated coastal cities and towns which graduated almost immediately into the open desert and then into the vast Sahara desert. Nevertheless, the CAOC was able to operate easily across this vast area.

RED CARD HOLDERS

The OUP CAOC itself was operationally similar to those you might see in other theaters of operation, but much smaller. The composition of the OUP coalition was unique on many levels. OUP was officially comprised of fourteen NATO members and four non-NATO partners.¹ The partner nations were Sweden, Qatar, Jordan and the United Arab Emirates (UAE).² Nearly all eighteen countries were represented at the CAOC and each country played key roles in intelligence, targeting, weather, operations, and other critical CAOC functions.

The OUP CAOC in particular also had present a large number of senior national representatives that served as their nation’s “red-card holders” (RCHs) along with their national Legal Advisors (LEGADs). Every nation that employs weapons in a coalition environment traditionally sends an RCH/LEGAD team to ensure that the coalition tasking does not conflict with the individual nation’s politics, ROE, or laws. They are not part of the NATO CAOC staff, but are rather sent independently by their respective governments.

¹ Ambassador Ivo H. Daalder and Admiral James G. Stavridis; “NATO’s Success In Libya,” New York Times.Com: http://www.nytimes.com/2011/10/31/opinion/31iht-eddaalder31.html?_r=2, dated 30 October 2011 (accessed on January 21, 2012).

² Ambassador Ivo H. Daalder; “Remarks to the Press on Libya and Unified Protector,” United States Mission to NATO: <http://nato.usmission.gov/libya-oup-90811.html>, September 8, 2011 (accessed on January 21, 2012).

THE VENUE—CAOC 5 ITALY

NATO CAOC 5, one of several NATO CAOCs located throughout Europe, is located in Italy and currently carries on the mission of air policing over Kosovo. Once OUP was fully underway, CAOC 5 hosted both that mission and OUP. We at the CAOC had a legal staff of no more than four attorneys at any given time. Our team was led by Col Robin “Tink” Kimmelman, USAF, a highly-regarded operational lawyer, who served as the CFACC LEGAD. Her primary responsibility was advising Lt Gen Jodice on the full spectrum of legal matters relating to NATO air operations and advising on all aspects of deliberate targeting for the command. Col Kimmelman further served on myriad CAOC strategy and planning functions like those responsible for publication of the Air Operations Directive (AOD) and Air Campaign/Component Plan (ACP).

Col Kimmelman had very straight-forward initial guidance which was, “compromise where you can, but never compromise your integrity because you can’t un-bomb something” and “stay in your lane.” What this meant was you are a legal expert, not a targeteer or intelligence officer. It is important to know and understand what they do so that you can ask good questions, do not try to do their job. This is what I used on the CAOC floor as guidance every single day.

The CAOC floor is where the three remaining Current Operations (CUROPS) LEGADs were posted 24 hours a day, seven days a week, working in rotating shifts. On any given day the combination changed. One day I found myself advising an Italian Director of Operations (DO) and a British Chief of Current Operations (CCO), received INTEL from an Irish Senior Intelligence Defense Officer (SIDO), got weather from a Swedish weatherperson, all while listening to radio calls sent by a Greek fighter pilot. Though everyone spoke excellent English, my personal goal was to say the greeting and farewell of the day, “please,” and “thank you” in every language of every country represented at the CAOC in their own language.

The composition of our NATO LEGAD team was likewise impressively diverse. National contributors to the CAOC legal staff were France, the Netherlands,

the United Kingdom and the United States. These nations supported the operation with many highly qualified and technically competent individuals over the course of the operation. This was clear testimony to how seriously the several countries took OUP and in ensuring that operations were fully compliant with the law.

APPLYING THE LAW

As a lawyer, you must be the expert on the law. Your client may not know it and certainly should not know it as well as you do. The law as it applied to OUP, and targeting in particular, was two-fold. First, there were two different UNSCRs that applied. Second, NATO uses a very specific approach to international humanitarian law (IHL) which is somewhat different than how the U.S. approaches what we term as the Law of Armed Conflict (LOAC).

When NATO took over operations in 31 March 2011, UNSCRs 1970 and 1973 were in effect. UNSCR 1973 was most relevant to air operations because it officially established the no-fly zone (NFZ). Moreover, UNSCR 1973 had some very specific and historic language. First, it stated that military coalitions were authorized to use “all necessary measures” to “protect civilians and civilian populated areas from the threat of attack.” As the air operation unfolded, this language ultimately became the focal point of much discussion between legal professionals in the CAOC, and many of our legal issues became framed by it. Furthermore, our clients—the warfighters—were intensely sensitive to how “all necessary measures” was interpreted and applied in combat.

Second, UNSCR 1973 specifically excluded “a foreign occupation force of any form on any part of Libyan territory....” Finally, UNSCR 1973 mandated that the no-fly zone (and naval embargo) allow for the in-flow of humanitarian assistance. Thus, NATO, from an air combat perspective, was faced with enforcing a NFZ while facilitating non-NATO humanitarian aid flights into Libya all while protecting civilians and civilian populated areas from the threat of attack without the assistance of a ground component. For reasons discussed below, this made vetting targets a challenge.

A BRAND NEW LAW?—THE RESPONSIBILITY TO PROTECT

Many litigators likely remember when the National Defense Authorization Act, 2007 made significant changes to Article 120, UCMJ. Litigators were expected to proceed to court with little more than some drafter's analyses and persuasive authority from other non-military jurisdictions in order to prosecute serious criminal misconduct. The law applicable to OUP was much the same. As noted above, UNSCR 1973 was historic for those reasons but also because it included language from the United Nations (UN) doctrine of the "Responsibility to Protect" (RtoP). What became OUP was the first-ever air campaign to be executed pursuant to RtoP principles.³ By way of background, RtoP is a comparatively recent development of international legal parlance and, with the exception of a very few instances, was a doctrine largely untested in combat operations.⁴

RtoP gained its most significant notoriety during the UN World Summit in 2005 which summarized its findings in the "2005 World Summit Outcome" document.⁵ The two areas relating to the RtoP can be found at paragraphs 138 and 139, and though they may not constitute "law" standing alone, they are clear indicia of the direction in which the law may be moving. Paragraph 138 states "[e]ach individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity...[t]he international community should, as appropriate, encourage and help States to exercise this responsibility."

Paragraph 139 of the Outcome Document goes on to say that "we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate

³ See e.g. Keerthi S. Kumar, "Responsibility to Protect—The Case of Libya" Institute for Defense Studies and Analysis (IDSA) Comment, 2 May 2011: http://www.idsa.in/idsacomments/ResponsibilitytoProtectTheCaseofLibya_kskumar_020511, (accessed on 26 April 2012).

⁴ Though scholars differ considerably regarding whether RtoP is or is not international normative law, the author's view is that this emerging area has significant *jus cogens* affect. See e.g. Report of the Proceedings of the Committee of the Whole, May 21, 1968, U.N. Doc. A/Conf. 39/11 at 471-72.

⁵ United Nations General Assembly, "2005 World Summit Outcome," A/60/L.1, 16th Session, 15 September 2005. [hereinafter Outcome Document]

and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity." Thus, as the Outcome Document might imply, a state might arguably, through omission or commission, waive its sovereignty in favor of a UN authorized force. This concept obviously makes the Responsibility to Protect approach to the law very controversial.

In essence RtoP proposes that the privileges of sovereignty are inexorably intertwined with the burdens of protecting the population from genocide, war crimes, ethnic cleansing and crimes against humanity. As one scholar notes "[t]he corollary of sovereignty as responsibility is accountability. Through this concept, the host state is made accountable both to its citizens and to international society, and the latter acquires a responsibility to assist the host state or, in extreme cases, to act without the state's consent in order to protect the fundamental rights of [non-combatants]."⁶

The Outcome Document provisions noted above were echoed almost verbatim in UNSCR 1973. Since the doctrine had been largely untested and thus unproven, understanding the source of the law, here UNSCR 1973, and its origins was critical to successfully advising NATO leaders. Consequently, the law and its status made drawing from the lessons of the past next to impossible. For example, NATO Operation ALLIED FORCE (OAF) during the Kosovo War in 1999 was heavily criticized for the number of civilian casualties suffered from airstrikes. Clearly OAF and Lieutenant General Michael C. Short, the Joint Air Force Component Commander (JAFCC), faced alternative challenges and obstacles the full exploration of which falls outside of the scope of this discussion. This aspect notwithstanding, OUP's mission was protecting civilians and humanitarian operations, so targeting methodologies used in OAF were clearly not something that could be taken and used off the shelf in large part.

HUMANITARIAN LAW AND TARGETING

Closely related to the complexities of understanding the authorization for the mission itself was how NATO approaches IHL generally. All aspects of IHL are extremely important and just like any trial

⁶ Alex J. Bellamy, *RESPONSIBILITY TO PROTECT*, Polity Press, Cambridge UK, 2009, (23) 249 pp.

practitioner, you must be absolutely fluent in the law and the ROE. NATO's view of IHL is very similar to that practiced and taught by the International Committee of the Red Cross (ICRC), and you will quickly find that many of your NATO colleagues and national red-card holder LEGADs follow the ICRC approach exclusively. One of the most important tasks will be to read the NATO RESTRICTED Military Committee (MC) 362/1, *NATO Rules of Engagement* and then the mission ROE. As a U.S. JAG it is also important to know the classified U.S. Standing Rules of Engagement to understand our ROE process and how we may view some of these concepts differently from our allies in order to avoid advising NATO as you might advise in a U.S. operation.

My focus during OUP was on the doctrines of distinction, military necessity, and proportionality when giving my commander or his designee proper and thorough IHL targeting analysis. Humanity or the prevention of unnecessary suffering caused by the either the misuse of lawful weapons or use of illegal weapons, despite critically important to any complete targeting scrutiny, was not a scenario which often presented itself based on the parameters of the OUP mission. Further, "chivalry and stratagems" which proscribes perfidious or treacherous acts of deception were not encountered during OUP operations based on the same and for reasons clarified below.

Regarding distinction, the OUP mission of protecting civilians and civilian populated areas from attack or threat of attack made this a crucial step in proper IHL analysis. In operational terms, this is loosely associated with positive identification (PID). Generally, proper PID draws from a number of CAOC functions including various country and partner nation "all-source" intelligence, imagery, and essentially any other reliable means which might contribute to a clear picture of the target area. This was extremely critical to proper targeting in OUP because, as noted above, we were not legally authorized an "occupation force," which in practice meant that no ground component was allowed in Libya.

This legal restriction had a two-fold impact. First, NATO did not have any "eyes on the ground." From a legal perspective, it was very important to ensure that we were able to distinguish between a legal mili-

tary objective and civilians, non-military objects or some other protected property or place.⁷ Verification was done in a number of ways which fall outside of the classification of this discussion. However, it is important as the CAOC practitioner that you fully understand your intelligence and trust your SIDO's professional opinion. Second, as a practical matter, it was very unlikely for us to have a "troops in contact" (TIC) scenario, because NATO did not have any ground "troops." Generally, a "TIC" requires very simple analysis—your troops are in contact, drop on whatever is shooting at them in self defense. In OUP, however, even these required scrupulous review and tireless scrutiny to ensure we were targeting a valid military objective, and meeting both proportionality and CDE requirements prior to engagement.

Military necessity finds its origins in the Hague tradition. Necessity proscribes belligerents from destroying or seizing an enemy's property "unless such destruction or seizure be imperatively demanded by the necessities of war."⁸ In OUP, this analysis was straightforward due to the OUP mission to protect civilians. Military necessity analysis relied heavily on whether civilians or population centers were being attacked, by whom and from where.

Alternatively, striking targets in Benghazi months after there was no longer a presence of forces attacking civilians would probably fail to meet a military necessity analysis. Likewise, it would not stand to reason to strike the same IADS target twice once it had been struck the day before as long as it was totally destroyed. It is important to the practitioner to be abundantly aware of the current status of the operation and to also have a detailed understanding of what military objectives the commander seeks to achieve.

Regarding proportionality, Geneva Protocol I proscribes targeting and attack where collateral effects would be "excessive in relation to the concrete and direct military advantage anticipated." While the

⁷ The 1977 Protocols Additional to the Geneva Conventions, December 12, 1977, U.N. Doc. A/32/144, 16 I.L.M. 1391, art. 52 (2) [hereinafter Geneva Protocol I]. Defining a valid military objective as "those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage."

⁸ Convention Respecting the Laws and Customs of War on Land (Annexed Regulations), Oct. 18, 1907, art. 23(g), 36 Stat. 2277, 205 Consol. T.S. 277 (Hague IV).

U.S. has not ratified Protocol I, most NATO nations have and the U.S. recognizes the principle as reflective of customary international law. In the operational context, the requirement that attacks be proportional is largely met by the collateral damage estimation (CDE). The majority of the CDE methodology is unclassified. It is important as the practitioner to review both AFI 14-117, *Air Force Targeting* (13 May 2009) and CJCSI 3160.01, *No-Strike and The Collateral Damage Estimation Methodology* (U) prior to deployment if time permitting.

CDE is conducted by the targeting “shop.” It is important to trust the CAOC targeting staff because they go through a rigorous training protocol in order to be certified. However, there are going to be several points during the targeting development process that will require you to ask additional questions in order to render a proper proportionality analysis to the commander. This part has to be right. For example, NATO International Security Assistance Force (ISAF) targeting resulted in the Pakistani government closing Shamsi Air Base in Baluchistan after a drone attack accidentally killed 24 Pakistani soldiers. Though likely a distinction issue, the CDE portion of the analysis was nevertheless affected. Thus, when targeting is wrong, it clearly carries with it operational and strategic level consequences.

In OUP, the unclassified statistics are that NATO successfully destroyed over 5,900 military targets including over 400 rocket launchers and nearly 600 tanks. The Naval Component covered over 61,000 square miles of sea and hailed 3,100 ships enforcing the embargo. The Air Component launched over 26,500 sorties nearly half of which were lunched to perform strike missions. Finally, over 2,500 air and maritime humanitarian assistance shipments were able to land for the benefit of the Libyan people.

As is the case in all aspects of courtroom litigation, a successful “operational litigator” must have a close understanding of the law, the facts, and the inner workings of the “courtroom” (i.e., the CAOC and its assigned personnel).

CONCLUSION

None of the above can occur without effective communication between you, the commander and the other members of the CAOC targeting function. Like any case, effective communication with the court, the client, and the jury is critical. During the prosecution of any target, you must ensure that you are fulfilling your role of telling the commander or designee whether each target complies with international law, the applicable ROE, and any other controlling authorities. There is little to be gained by not wanting the commander woken up in the middle of the night or keeping things at the “executive level.” Your boss wants to be woken up and hear the facts—that’s their job and they take it very seriously.

From a practical perspective, a NATO LEGAD will need to be able to articulate clearly and quickly to the CCO, DO or the Commander why a target is valid, meets the ROE, appropriately distinguishes innocent civilians from belligerents, and is proportionate in the midst of tracking several other targets in various stages of development and monitor radio traffic all while discussing the national-level perspectives of the RCH and their LEGAD assigned to the target. This requires courage, concentration, and operational awareness. Consistently over the seven-plus months of OUP, Lt Gen Jodice told us to be “bold, aggressive, relentless, but never reckless.” The role that the LEGADs played touched every single aspect of his approach to the mission.

Finally, the most critical aspect of any case is effective communication with yourself. You will quickly learn that this is not a game. What you are doing is very serious business and certainly much more than a cool break from the legal office. You are responsible for properly advising your commander on operations involving the lives of people. In OUP, these people were dentists, mechanics, lawyers, hotel workers, teachers, and the list goes on and on. The Libyan people were faced with the option of fighting or being “killed like rats” by Col Ghaddafi’s forces. The Libya mission was successful because we worked as a team, stayed in our lanes and struck a perfect balance between the law and the needs of the operation. 🦋



TWELVE O'CLOCK HIGH

review by Captain Eric J. Morley, USAF

More than just a good movie, the 1949 film, *Twelve O'clock High*, starring Gregory Peck and Dean Jagger, is a tool for leadership training. Training is a vital part of how we in the JAG Corps maintain and sharpen our skills. As Lieutenant General Harding explained, "The progress and growth of every segment of the Total Force JAG Corps depends on effective training." Although traditionally used to teach concepts of command leadership, *Twelve O'clock High* can instead be viewed from the legal perspective and provide insights into leadership specifically relevant to today's JAG Corps members.

BACKGROUND

The film takes place in 1943 as the American air war is beginning over Nazi-occupied Europe. The 918th Bomb Group is suffering staggering casualties and a debilitating loss of confidence. Higher headquarters relieves the Group commander of duty. Brigadier General Frank Savage, played by Gregory Peck, is brought in to turn the Group around, which he ultimately accomplishes.

Twelve O'clock High is widely considered to be one of the best films ever made about World War II and American air forces.¹ In 1998, the Library

¹ DONALD L. MILLER, *MASTERS OF THE AIR: AMERICA'S BOMBER BOYS WHO FOUGHT THE AIR WAR AGAINST NAZI GERMANY 8* (Simon & Schuster 2007) (2006) ("... *Twelve O'Clock High!*, the finest novel and movie to come out of the European Air War"); GERALD ASTOR,

Those of us who will never lead a bomber group (or similar organization) can still find applicable and timeless leadership lessons in the film through the character of Major Harvey Stovall.

of Congress chose to preserve *Twelve O'clock High* in the National Film Registry because it was deemed “culturally, historically or aesthetically significant...”² For decades, training based on the film has been used to illuminate the qualities of a strong leader.³ The leadership focus taught from the film has been largely centered on the film’s primary hero, Brig Gen Savage. Brig Gen Savage is portrayed as a leader who sets standards and holds people accountable, as a courageous leader, as a charismatic leader, and as a decisive leader.

COMMAND LEADERSHIP PERSPECTIVE

Major Attila J. Bogнар’s 1998 article presents a typical military training perspective on *Twelve O'clock High* and leadership. Maj Bogнар cites the film as a “superb treatise” on the idea of “charismatic leadership.”⁴ Charismatic leadership is defined as “the ability to create a compelling vision that followers readily accept and share.”⁵ Once cast, the vision is “a focal point to energize followers to accept organizational changes and commit to new ideals.”⁶ Citing the end of the film where the Bomber Group succeeds in its mission without Brig Gen Savage, Maj Bogнар

THE MIGHTY EIGHT: THE AIR WAR IN EUROPE AS TOLD BY THE MEN WHO FOUGHT IT 171 (Dell 1998) (“Veterans of the Air War over Europe consider *Twelve O'clock High* to be the best movie ever made on the subject.”); John T. Correll, AIR FORCE MAGAZINE, (Jan. 2011) 70, at 70 (*Twelve O'clock High* may be “the best movie ever made about the Air Force...” and was “something of a cult film for several generations of Air Force members.”)

² 36 C.F.R. § 704.10 (2003); 36 CFR § 704.29 (2003); James H. Billington, The Librarian of Cong., 1998 Film Selections for the Nat'l Film Registry (Nov. 16, 1998), available at <http://www.loc.gov/film/nfr98.html> (last visited Jun. 25, 2011).

³ For decades, *Twelve O'clock High* has been used for training in both military and corporate settings. See ALLAN T. DUFFIN & PAUL MATHEIS, THE 12 O'CLOCK HIGH LOGBOOK 90-91 (Bear Manor Media 2005).

⁴ Major Attila Bogнар, *Tales From Twelve O'Clock High: Leadership Lessons for the 21st Century*, MILITARY REV., Jan.-Feb. 1998, at 94.

⁵ *Id.* at 94.

⁶ *Id.*

concludes that his “conduct and actions are now clear and stand as a testament to a charismatic leader’s power and its effect on an organization.”⁷

LEADERSHIP FOR THE JAG CORPS

While vision, character, and courage are universal, the study of Brig Gen Savage as typically examined most directly applies to those who are in direct combat or operational roles. Fortunately, those of us who will never lead a bomber group (or similar organization) can still find applicable and timeless leadership lessons in the film through the character of Major Harvey Stovall.

In the film, Maj Stovall is a veteran of World War I, but he is unable to serve as a flier. Maj Stovall serves as the Group Adjutant, reporting directly to the Group Commander, and is responsible for much of the non-flying administration of the Group. For example, Maj Stovall is ordered several times to cut orders installing a new officer in the position of Air Executive or Ground Executive, and he processes the belongings of deceased airmen.

Specifically relevant for judge advocates, Maj Stovall is also an attorney. As someone who advises and assists the commander in accomplishing the mission, Maj Stovall’s role and job in the group is to some extent analogous to the work judge advocates and paralegals do.

A JAG CORPS TRAINING TOOL

If you have seen the film before, I recommend re-watching it from the perspective of Maj Stovall. Using Maj Stovall as the focus, *Twelve O'clock High* can be used to discuss and train on leadership for judge advocates and paralegal. Here are three suggested applications of the film’s leadership lessons to judge advocates. These could be used as the basis for a training session and discussion on leadership within the JAG Corps:

LESSON 1 – STRONG JUDGE ADVOCATES PROVIDE THEIR COMMANDER OPTIONS

When Brig Gen Savage takes command of the Bomber Group, loyalty to the previous commander is strong. The air crews are especially loyal to the fired commander and do not wish to serve under

⁷ *Id.* at 99.

Brig Gen Savage. Brig Gen Savage announces he will allow anyone who desires to leave the group to transfer out.

Back at his office, Brig Gen Savage is told that all the air crews applied for transfer. As someone who was also fiercely loyal to the previous commander, Maj Stovall was initially unsupportive and unhelpful to Brig Gen Savage.

However, by this point, Maj Stovall has bought in to the Brig Gen Savage’s vision of turning around the Group. Maj Stovall states:

I’m a lawyer by trade. I think I’m a good one. And when a good lawyer takes on a client, he does it because he believes in the client’s case. And that’s all that matters. When I came over to England I took on my biggest client, that client is the 918th Bomb Group. I want to see my client win its case.⁸

Brig Gen Savage tells Maj Stovall he needs time to turn the Group around before the transfers go through. After realizing that Brig Gen Savage can do something positive, and remembering that his “client” is the Group, not the previous commander, Maj Stovall buys into the vision and offers to help. Maj Stovall explains that it is going to take time for the transfer packages to reach his desk and to be checked. Because Brig Gen Savage will want them to be error-free, they may have to be sent back to the squadrons for correction which will cause additional delay. Maj Stovall declares, “I don’t want this Group criticized for sloppy paperwork.”⁹ Maj Stovall is offering to slow walk the transfers to give Brig Gen Savage more time to turn the Group around.

Importantly, Maj Stovall did not propose to act illegally. Rather, he employs his discretion and understanding of bureaucratic and legal process to make space for the Commander to accomplish the mission.¹⁰ As attorneys, we provide commanders

advice on their range of options. As Maj Stovall recognized, our client is not an individual person, but always remains the Air Force. However, if we can lawfully help the commander achieve the mission our client is engaged in, then we fulfill our role and contribute to mission accomplishment.¹¹ By lawfully using the rules to buy Brig Gen Savage time, Maj Stovall was providing the commander options and contributing to mission accomplishment.

LESSON 2 – EFFECTIVE JUDGE ADVOCATES DO NOT UNDERMINE THEIR COMMANDER

Toward the end of the film, Brig Gen Savage returns from flying a successful mission when he realizes Sgt McElveny, the clerk from his office, flew as a “stow-away” on the bomber. Brig Gen Savage is told that McElveny has flown on several missions and is actually an accomplished gunner. Brig Gen Savage is infuriated because he believes having non-qualified personnel on the aircraft endangers the mission and the crew. Brig Gen Savage initially disciplines Sgt McElveny by reducing him in rank, but is informed that doing so would be “complicated.” The Air Executive explains reducing Sgt McElveny would create a precedent that would require Maj Stovall, the Group Chaplain, the doctor, and “the whole ground echelon”¹² to get busted because they had also flown on combat missions. Brig Gen Savage explains to the chaplain and to Maj Stovall, “I’m going to weaken just this once. You’ve got the bulge on me, I can’t bust everyone.”¹³ Brig Gen Savage then gives a clear order that ground personnel will not fly on missions and decides not to punish Sgt McElveny or any of the others.

Judge advocates are relied on for their legal counsel. When a judge advocate, chaplain or other staff officer crosses the line from working in his specialty to free-lancing in an area where he or she is unqualified and explicitly unauthorized, the staff officer undermines the commander. Certainly, judge advocates should willingly engage in opportunities that expand their

⁸ TWELVE O’CLOCK HIGH (Twentieth Century Fox Film Corporation 1949).

⁹ *Id.*

¹⁰ Major John C. Johnson, *The Air Force Judge Advocate: An Independent Legal Advisor*, THE REPORTER, Summer 2007, at 22 (“Judge Advocates are taught an ethic of helping commanders achieve their objective by lawful means. If the law permits the commander to achieve his goal, the judge advocate should help the commander achieve it.”).

¹¹ “The Judge Advocate General’s Department (TJAGD) provides professional legal services needed to accomplish the mission of the US Air Force and maintain the highest degree of effectiveness and readiness.” AFI 51-102, THE JUDGE ADVOCATE GENERAL’S DEPARTMENT at ¶ 2 (Jul. 19, 1994).

¹² TWELVE O’CLOCK HIGH, *supra* note 8.

¹³ *Id.*

***When viewed from the perspective of the film’s lawyer,
Twelve O’clock High provides leadership lessons directly applicable
to today’s JAG Corps members.***

role and contribution, but this must be done with the consent of the commander.¹⁴

In this *Twelve O’clock High* example, the well-meaning but inappropriate behavior of Maj Stovall resulted in the commander’s credibility being compromised. By “getting out of his lane,” Maj Stovall’s action tied Brig Gen Savage’s hands and degraded the good order and discipline of the unit. A strong judge advocate provides the commander with options and advice, and never intentionally undermines the commander’s ability to accomplish the mission.

LESSON 3 – EXCEPTIONAL JUDGE ADVOCATES EMBRACE THE RESPONSIBILITIES OF THEIR RANK

When Brig Gen Savage arrives at the headquarters of the 918th Bomber Group, he finds no one is exercising command. The command headquarters is abandoned, except for a sergeant who is out of uniform. Brig Gen Savage asks where the first two officers in the chain of command are, the Air Executive and the Ground Executive. The sergeant reports the Air Executive is off-post and the Ground Executive is in the hospital. Brig Gen Savage asks where the Group Adjutant is and the sergeant replies that Maj Stovall is at the Officer’s Club.

A few minutes later, Maj Stovall reports to Brig Gen Savage, but is drunk and unhelpful. Brig Gen Savage asks, “are you the only one around?”¹⁵ The major replies, “probably sir.”¹⁶ Judging by Brig Gen Savage’s reaction and his admonishment to Maj Stovall to bring him the major’s personnel file, it is clear that Maj Stovall discredited himself, made a terrible impression and failed to embrace the responsibility accompanying his rank.

Although staff officers do not serve in command positions, and may be ineligible to assume command, each must understand that he/she bears a commission and must assume the responsibilities of their rank.¹⁷ As the Group Adjutant, Maj Stovall was ineligible to assume command of the Bomber Group. However, as a high-ranking officer within the Group, he had authority to oversee non-flying operations, and to ensure those junior in rank to him were provided for. A staff officer’s rank affords him or her significant moral authority, in addition to the authority derived from the UCMJ.¹⁸ If the chain of command disintegrates, a staff officer must act to preserve good order and discipline, while ensuring the readiness of the unit to execute the mission once the chain of command is operationally restored.¹⁹ Every judge advocate, medical officer, and even chaplain, must realize leadership may mean taking responsibility for military personnel as the senior officer, even if not assuming command.

CONCLUSION

Despite its age, *Twelve O’clock High* can still serve as an effective training tool by providing leadership lessons to military personnel. The film provides much more than lessons on command leadership as exhibited by Brig Gen Savage. When viewed from the perspective of the film’s lawyer, *Twelve O’clock High* provides leadership lessons directly applicable to today’s JAG Corps members. To be effective, a training program must be interesting and relevant. Over 60 years after the film first took off, it still delivers timely lessons for today’s military, including the JAG Corps. ✈

¹⁴ For an example of where judge advocates expanded outside their typical roles, with command consent, to serve on watch at the base command post during alerts, see “Wing-Wide Problem-Solving Creates Office Opportunities” in UNITED STATES AIR FORCE JUDGE ADVOCATE GENERAL’S CORPS, I LEAD! DEVELOPING JAG CORPS LEADERS 93-94 (2005).

¹⁵ TWELVE O’CLOCK HIGH, *supra* note 9.

¹⁶ *Id.*

¹⁷ JEFFREY C. BENTON, AIR FORCE OFFICER’S GUIDE 20 (Stackpole Books 35th ed. 2008) (“A young officer should recognize that all officers are leaders, not just those in command positions.”).

¹⁸ During World War II, the UCMJ’s predecessor was titled the Articles of War.

¹⁹ “Officers restricted from command under the above provisions retain the power to give lawful orders and to exercise all the normal incidents of officership.” AFI 51-604, APPOINTMENT TO AND ASSUMPTION OF COMMAND, at ¶ 4.2.12 (Apr. 4, 2006). When discussing Chaplains, who are statutorily prohibited from command, the AFI states that Chaplains “do have the authority to give lawful orders and exercise functions of operational supervision, control and direction.” AFI 51-604 at ¶ 4.2.3.

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Where in the World?



Museum of Islamic Art, Doha, Qatar

photo by Major Mark B. McKiernan, USAF

If you have a unique, funny, or poignant photograph of your travels in the JAG Corps for inclusion in "Where In The World?" please e-mail the editors at mark.mckiernan@us.af.mil or thomasa.paul@us.af.mil.



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