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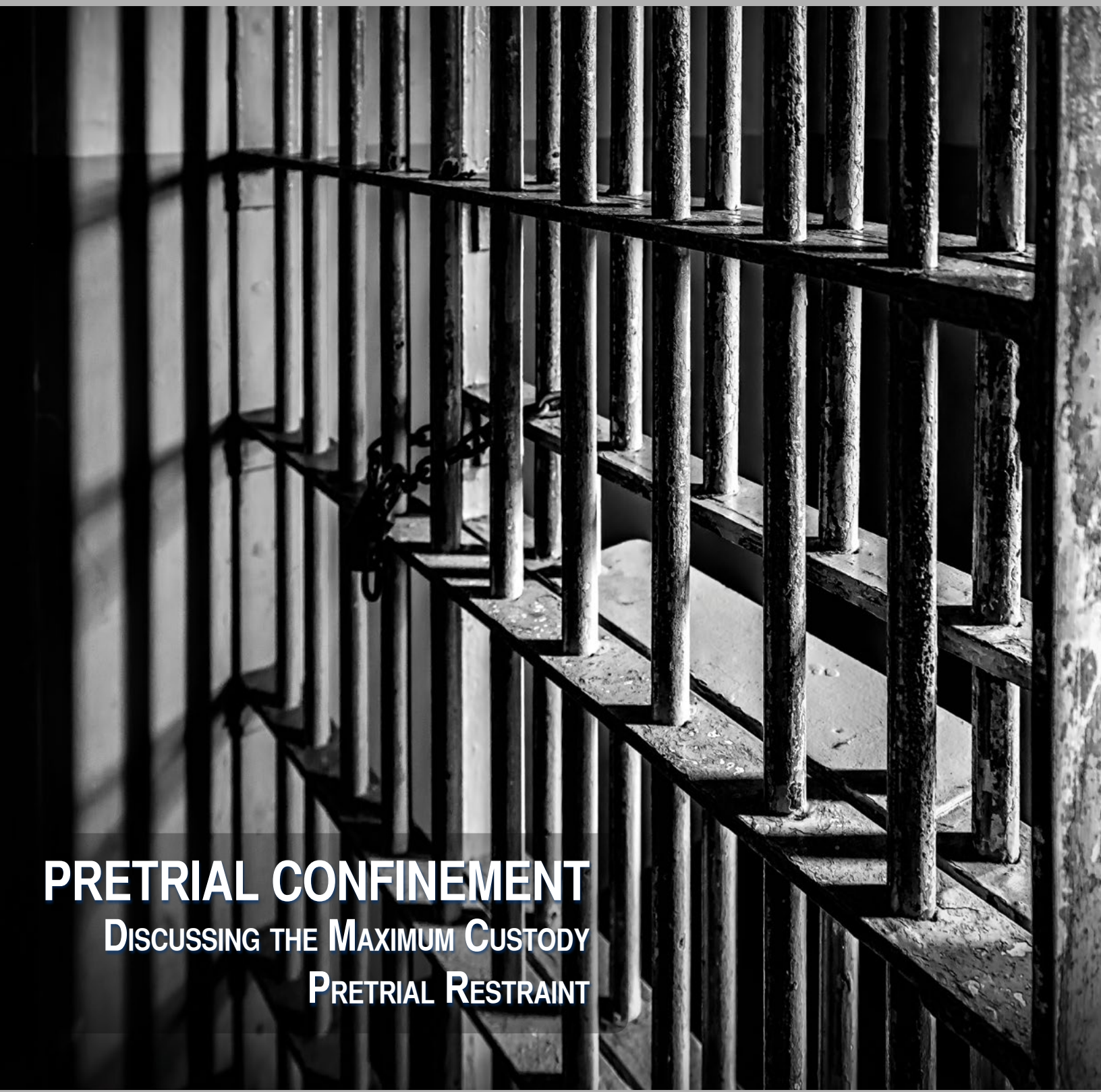
Education and Outreach for The Judge Advocate General's Corps

2016 this edition:

- Fifth Amendment in the Digital World–**2**
- Maximum Custody Pretrial Confinement–**7**
- Meaningful Clemency: Aftermath of the 2014 and 2015 NDAAs–**15**



PRETRIAL CONFINEMENT

Discussing the Maximum Custody Pretrial Restraint

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Contents

THE FIFTH AMENDMENT IN THE DIGITAL WORLD 2

Technology has breathed new life into the interpretation of constitutional provisions

MAXIMUM CUSTODY PRETRIAL CONFINEMENT 7

The Air Force's Self-Imposed Pretrial Punishment Problem

FINDING AVENUES FOR MEANINGFUL CLEMENCY 15

In the Aftermath of the 2014 and 2015 NDAAs

FIT TO ADVISE 28

Keys to Strengthening Your Legal Assistance Program

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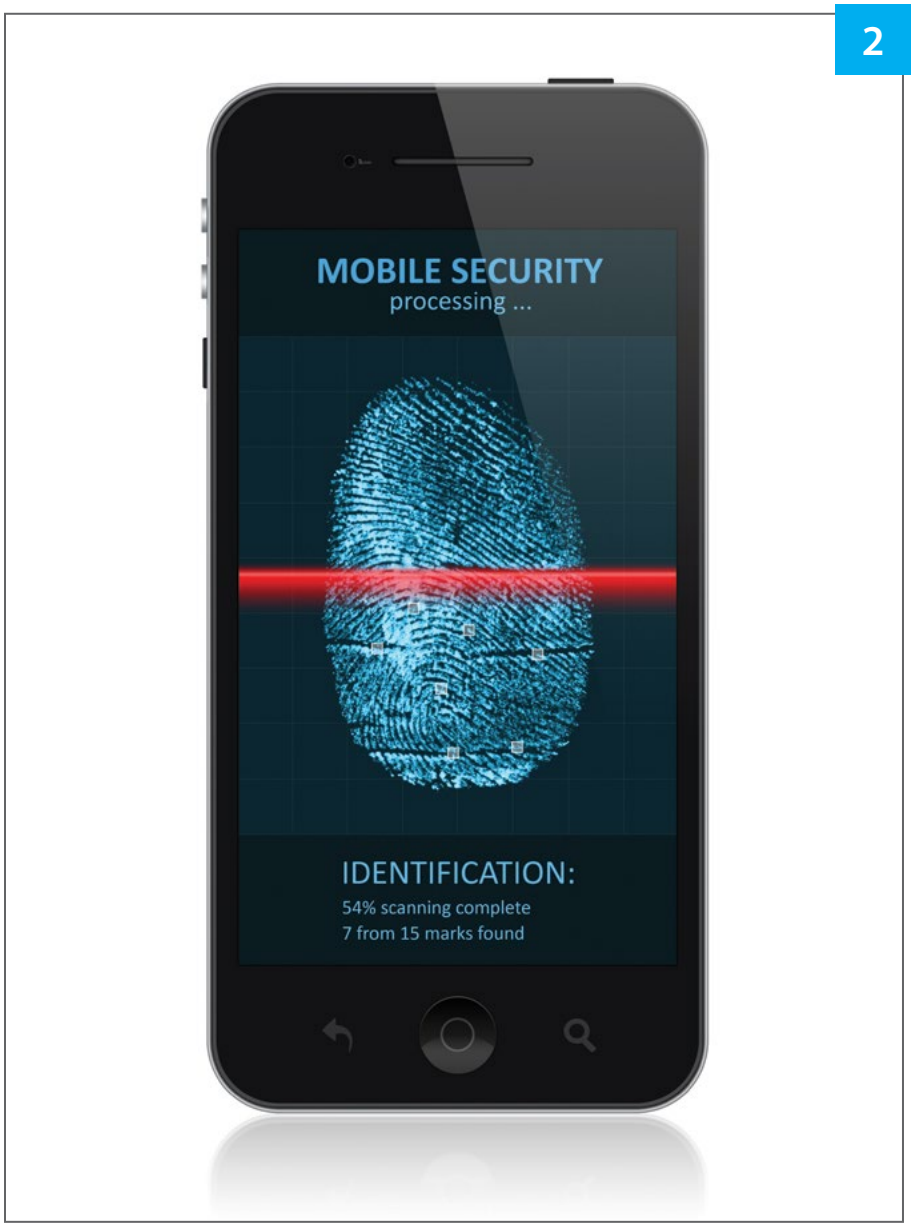


EXCEPTIONAL TRANSITIONAL COMPENSATION 34

Help for Family Member Victims When Discharge Happens Before the Offense is Adjudicated

DISPUTE RESOLUTION WITHOUT SELLING THE FARM 39

The Erosion of Traditional Forms of Alternative Dispute Resolution in Afghanistan, the Misplaced Emphasis on the Formal Legal System, and the Resurrection of the Taliban

OVERSTANDING 50

The Paralegal Instructor Perspective

Message from The Commandant

In this edition of *The Reporter* our feature articles examine recent changes in law and regulation that present implications to the rights of an accused. Captain David Jacobs begins with a review of the law as it pertains to the search and seizure of **locked mobile electronic devices**, Captain Jenny Liabenow presses further with an examination of recent changes in Air Force **pre-trial confinement procedures**, and Captain Tyler Sena concludes with a **review of the state of clemency** in the aftermath of the 2014 and 2015 National Defense Authorizations Acts.

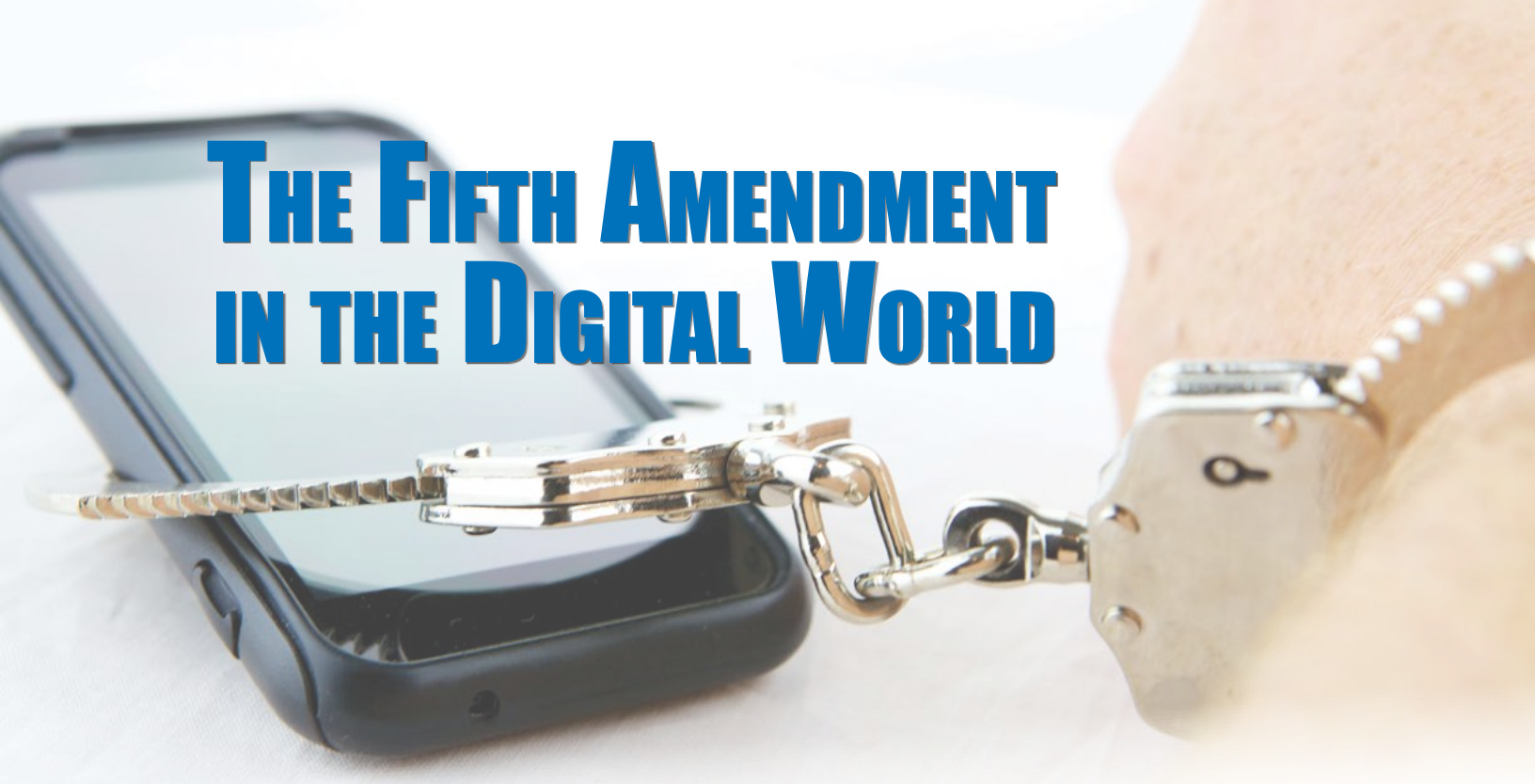
In our legal assistance section, Lieutenant Colonel Jin-Hwa Frazier, Lieutenant Colonel Ryan Oakley, and Captain Rodney Glassman provide an outstanding primer on **how to improve a base legal assistance program**. Meanwhile, Major Janet Eberle and Ms. Teresa Widrick offer an intriguing case study on the **Transitional Compensation** for Abused Dependents program.

In the operational and expeditionary law section, Major Shane McCammon provides an in-depth analysis on the influence of culture on **national dispute resolution infrastructures** with a specific eye towards Afghanistan.

Finally, in the leadership section, Technical Sergeant Kalvin Johnson pens an editorial on **"overstanding" what it takes to be a paralegal instructor** at The Judge Advocate General's School.

Thank you to all of our authors who make this and every edition of *The Reporter* a success through the sharing of their expertise with the Corps. As we begin the new year, I encourage each of you to consider writing an article for publication in 2017!

The Fifth Amendment in the Digital World



BY CAPTAIN DAVID F. JACOBS

Technology has breathed new life into the interpretation of constitutional provisions once thought to be nearly settled law.

Technology has breathed new life into the interpretation of constitutional provisions once thought to be nearly settled law. One of the constitutional provisions recently brought to the forefront of the technological debate is the Fifth Amendment. Specifically, the application of the Fifth Amendment to passcodes, fingerprint readers, facial recognition, and other locking mechanisms, now available on mobile electronic devices. In fact, some mobile devices could contain several different locking mechanisms to access one piece of evidence. To further complicate the issue, each locking mechanism potentially requires a separate legal analysis. This presents a challenge to law enforcement investigators, such as the Air Force Office of Special Investigations (AFOSI), the legal offices advising the investigators, and the defense counsel representing the accused. The advantage in the courtroom will go to the party who best understands the settled legal principles and can apply that knowledge to these developing areas. It is best to look at the law applied to a hypothetical scenario in order to understand the guiding legal principles.

THE SCENARIO

Suppose AFOSI believes a subject is distributing several controlled substances and communicating about the deals with a cellular device. A confidential informant (CI) recently told AFOSI that the subject set up a meeting with an unknown-third-party Air Force member to sell pills of psilocybin. Psilocybin is the substance in over 200 species of mushrooms that causes a mind-altering effect on the user. The CI stated that the subject has two iPhone 6 cellular devices (which

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look identical), and the subject uses one for personal use and the other to set up his drug sales. One device unlocks by fingerprint recognition. The other device requires an eight-digit passcode. The CI does not know which device has which password protection. Upon questioning the subject immediately invoked his right to counsel. Under a valid search and seizure authorization, AFOSI seized both of the subject's devices.

AFOSI has come to you, the judge advocate, for advice whether it is legal to require the subject to provide the passcode and fingerprint, or alternatively, to have a magistrate order the subject to unlock the cell phones and disable any locking mechanisms.

BUILDING BLOCKS OF THE ISSUE

The Fifth Amendment provides that no person shall be compelled in any criminal case to be a witness against himself.[1] When determining whether a specific communication is protected, whether vocal or physical, courts have examined whether the communication from a subject makes the subject the source of real or physical evidence.[2] In other words, courts traditionally examined whether the sole source of the evidence came from the subject, regardless of the type of communication. The Supreme Court, in *United States v. Wade,* examined whether a subject's observable physical features could be used as evidence even though that evidence came solely from the subject himself.[3] Specifically, the Court addressed whether the Fifth Amendment was violated when a subject was asked to speak, walk, or otherwise conduct himself during a police lineup. The Court held that the Fifth Amendment requires the exclusion of communication from the defendant, but not an exclusion of the defendant's body as evidence.[4] Expanding upon this concept, the courts have outlined specific activities that fall under the "body" exclusion of the Fifth Amendment, such as fingerprinting, photography, measurements, writing, walking, appearing in court, making a particular gesture and putting on particular clothing items.[5] The Supreme Court drew a clear distinction between utilizing observable physical aspects to demonstrate something already known by the government and utilizing observable physical aspects to demonstrate something not known by the government. For example, a subject could be compelled to say a specific phrase requested by the government or walk a certain way, but a subject could not be forced to say something incriminating which is unknown to the government. The "body" exclusion developed into a three-pronged inquiry into whether a communication is protected under the Fifth Amendment. The three-pronged inquiry requires courts to examine whether there has been a (1) compulsion of a (2) testimonial communication that is (3) incriminating.[6]

When addressing self-incrimination, it is settled law that the Fifth Amendment protects against "compelled self-incrimination," not simply self-incrimination.[7] The contents of a person's cellphone are generally not considered compelled under the Fifth Amendment.[8] This is because communications and evidence contained within the cell phone were not created by compulsion, but are voluntarily made by the creator of those communications and evidence. Courts have made a comparison between the contents of a cell phone and documents, or notes, created during the regular course of business and personal life.[9] Those documents, like the contents of a cell phone, are not protected under the Fifth Amendment, even if they contain incriminating information because their creation was not "compelled within the meaning of the privilege."[10] As a result, any communications on a cellular device are likely not protected under the Fifth Amendment and may only be protected under the Fourth Amendment.[11]

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

[2] United States v. Wade, 388 U.S. 218, 222–23 (1967).

[3] *Id.* at 221.

[4] *Id.* at 222; *see also* Holt v. United States, 218 U.S. 245, 252–53 (1910).

[5] *Wade,* 388 U.S. at 222–23; *Holt*, 218 U.S. at 252–53; Schmerber v. California, 384 U.S. 757, 761–64 (1966).

[6] United States. v. Authement, 607 F.2d 1129, 1131 (5th Cir. La. 1979).

[7] United States. v. Hubbell, 530 U.S. 27, 35–36 (2000); Fisher v. United States, 425 U.S. 391, 401 (1976); Commonwealth v. Baust, 89 Va. Cir. 267 (Va. Cir. Ct. 2014).

[8] *Baust*, 89 Va. Cir. at 268.

[9] *Hubbell*, 530 U.S. at 35–36.

[10] *Id.*

[11] *Baust*, 89 Va. Cir. at 268.

Courts have determined that fingerprints do not amount to a testimonial statement…. Use of a fingerprint to swipe a fingerprint reader is akin to fingerprinting.

The passcode, or fingerprint, needed to unlock the phone is a separate issue from the contents contained within the phone. While a valid search authorization allows the investigators to look at communications already written down under the Fifth Amendment, it does not extend to those communications that an investigator now seeks to require a subject to divulge. There is no question that an order to compel is compulsive and the forced production of a passcode or fingerprint would likely lead to incriminating evidence in our scenario.[12] The issue is whether the communication is testimonial.

THE FINGERPRINT PROTECTED IDENTIFICATION

Courts have determined that fingerprints do not amount to a testimonial statement because providing a fingerprint does not require any communication of knowledge which is in the defendant's possession.[13] Fingerprints are a part of the body; open and accessible to the public. This makes logical sense when examined in light of the past cases addressing the Fifth Amendment.

Use of a fingerprint to swipe a fingerprint reader is akin to fingerprinting routinely conducted by law enforcement when booking or in-processing a subject. A fingerprint does not require any personal knowledge on the part of the accused to divulge to law enforcement. It is something already observable, in-existence, and "known" to law enforcement at the time of the search. This brings to light one of the key distinguishing elements of a Fifth Amendment analysis: whether the subject relayed something in their own personal knowledge that was otherwise not obtainable by the government. In other words, a fingerprint does not require the subject to provide personal knowledge which the government does not already have in its possession, thus ensuring that the subject is not a witness against himself.

Applying the law to our hypothetical scenario of the fingerprint locking mechanism leads to a likely result that AFOSI will be able to access the fingerprint-locked device through an order by a military magistrate, so long as there is a valid search and seizure authorization for the device, even if the magistrate did not articulate that the subject be ordered to provide a fingerprint. This is equivalent to what civilian law enforcement was able to do in *Commonwealth v. Baust*.[14] There the court determined that a subject's Fifth Amendment rights would not be violated if law enforcement, pursuant to a lawful search and seizure authorization, compelled the subject to unlock his cellular device with his fingerprint. Accordingly, a motion to compel the subject to do just that was granted. That reasoning would likely support the issuance of a lawful order from a military commander to

[12] *Id.*; Kastigar v. United States, 406 U.S. 441, 445 (1972).

[13] *E.g.*, *Baust*, 89 Va. Cir. at 271.

[14] *Id.*

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unlock a fingerprint-locked device.[15] It is important to note that the commander—like a civilian judge—must still ensure that probable cause exists under the Fourth Amendment to use any information gathered, if done without subject's consent. Otherwise, the evidence obtained from the cell phone, and any evidence derived therefrom, could only be used for administrative action.[16]

THE PASSCODE PROTECTED IDENTIFICATION

The difference between a fingerprint and a passcode is the personal knowledge of the defendant. A passcode is a set of numeric digits, or in some cases alphanumeric characters, used in a unique combination to unlock a particular locking mechanism. Passcodes are created in the mind of the individual who conceived them and are only shared through disclosure by the creator. To put it another way, a passcode only exists through the use of knowledge from the creator of the passcode. While it is possible for another individual to guess a passcode, or gain knowledge of a passcode (say, if the creator wrote it down), the passcode is often known only to its creator.

Requiring a defendant to divulge personal knowledge of incriminating information not in the government's possession clearly violates the Fifth Amendment.[17] Courts have held that compelling a verbal disclosure of a passcode from a subject would violate their Fifth Amendment rights if it would likely lead to incriminating evidence.[18] A logical extension of being compelled to provide a passcode verbally is being compelled to provide a passcode by writing it down. In fact, the courts have been clear that the reason a passcode is protected is because it requires a defendant to communicate knowledge, unlike the production of a handwriting sample or a voice exemplar.[19] Writing down a passcode, something exclusively within a subject's personal knowledge, is distinct from requiring a subject to write down a known phrase in an effort to examine the handwriting structure of a subject.

In our hypothetical, AFOSI could not compel the subject to provide his passcode either verbally or in written form. In other words, AFOSI would not be allowed to hand the subject the passcode-locked device and require that they unlock the device while observing the subject type in the passcode, or otherwise have the subject communicate the passcode to AFOSI. Likewise, a military magistrate could not compel the subject to disclose the password to law enforcement through any means, because such a disclosure would involve requiring the subject to divulge incriminating personal knowledge. AFOSI's most straightforward approach would be to get the passcode through other means, such as witnesses who may know the passcode for the device, or by sending the cellular device to a forensic laboratory specializing in computers, such as the Defense Computer Forensic Laboratory (DCFL), to attempt to break the passcode.

ENTER THE UNSETTLED LAW

Recently, another option has been proposed in the legal community to gain access to a cellular device locked by a passcode that involves the application of unsettled law.[20] The proposed solution involves having a military magistrate order a subject to unlock their passcode protected device by typing in their passcode into the phone, but law enforcement will not observe what subject is inputting into the locked device. Proponents of this option submit that the subject is not disclosing personal knowledge to law enforcement and therefore, there is no individual receiving the "testimony" of the subject.[21] In fact, they compare it to ordering a subject to unlock a lockbox or unlock a door to his home. While on its face this approach seems to get around the Fifth Amendment issue, it is best to take a cautious approach to applying this position in search authorizations.

[15] Manual For Courts-Martial, United States, Mil. R. Evid. 315(d)(1).

[16] *Id.*, Mil. R. Evid. 311.

[17] *Baust*, 89 Va. Cir. 267.

[18] United States v. Kirschner, 823 F. Supp. 2d 665, 669 (E.D. Mich. 2010); *Baust*, 89 Va. Cir. 267; *see also* United States v. Djibo, 151 F. Supp. 3d 297, 306 (E.D.N.Y. 2015) (making a similar point in the context of a *Miranda* violation); United States v. Bondo, 2015 CCA LEXIS 89, 16–20 (A.F.C.C.A. Mar. 18, 2015) (Sixth Amendment invocation of counsel).

[19] Doe v. United States, 487 U.S. 201, 211 (1988).

[20] Maj Brett Landry, *Searching Cell Phones*, Air Force Judge Advocate General's Corps Online News Service, Volume XVI, Issue 15 (13 April 2016).

[21] *Id.*

The first issue with this proposed course of action is that it gives a subject potential unfettered access to his cellular device. Law enforcement officials cannot receive the subject's disclosure of incriminating personal knowledge under the Fifth Amendment, and therefore cannot observe what the subject is typing in his phone. A subject could take this opportunity to erase his cellular device. There are certainly scenarios where a subject would rather receive a charge of violating a lawful order or destruction of evidence, rather than have law enforcement officials discover evidence contained within the cellular device. It may also be difficult to prove a violation of a lawful order or destruction of evidence, if law enforcement cannot determine whether the subject intentionally erased information on the device in the first place.

The potential legal risk should also be considered when pursuing this course of action. The legal risk stems from the current argument comparing unlocking the device with a passcode to having a subject unlock a door or lockbox; however, that is the incorrect comparison to make under the applicable law. The analysis for unlocking a door or lockbox is more akin to requiring someone to provide a fingerprint. A door that is locked with a physical key is a tangible object that exists in the physical world that does not require a subject to use their personal knowledge against themselves to unlock. There is no transfer of personal knowledge to a law enforcement official that could lead to incriminating evidence. Ordering a subject to unlock their cell phone with a passcode is more comparable to ordering a subject to disclose information that leads to law enforcement discovering where a crime occurred. The courts have been clear that the Fifth Amendment protects against any disclosures which law enforcement reasonably believes could be used in a criminal prosecution, or could lead to other evidence which might be so used.[22] By ordering a subject to type in a passcode, regardless of whether law enforcement officials watch the subject while they do so, the subject is compelled to use his or her personal knowledge to effectively provide evidence against themselves. Arguably, the testimonial statement itself occurs once the subject uses personal knowledge to assist law enforcement in accessing incriminating evidence. Law enforcement receives the benefit of the disclosure regardless of whether they actually receive the testimonial statement itself. Until this particular issue is settled by courts, it is best to use caution when issuing any orders compelling a subject to use their personal knowledge to unlock a passcode protected device.

CONCLUSION

The Fifth Amendment has gained new attention due to expanding capabilities associated with electronic devices. Central to the debate on whether a disclosure violates the Fifth Amendment, is whether a subject is required to disclose personal knowledge to law enforcement. Courts have held that a fingerprint is not protected under the Fifth Amendment, while disclosure of a passcode is protected. Courts have not addressed whether a subject can be compelled to unlock his passcode-protected device without law enforcement observing the disclosure, and there is an argument to be made on both sides as to whether such an order is lawful. When passcodes are concerned, a safer approach, after attempting consent, is to work within the legal framework of already settled law. Law enforcement should access the device through means outside of using a subject's personal knowledge, whether directly or indirectly received. R

[22] *Doe*, 487 U.S. at 211; *Kastinger*, 406 U.S. at 445; Curvio v. United States, 354 U.S. 118, 128 (1957).

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Maximum Custody Pretrial Confinement

The Air Force's Self-Imposed Pretrial Punishment Problem

BY CAPTAIN JENNY A. LIABENOW

This article discusses how the Air Force's maximum custody requirement for pretrial confinees implicates the prohibition against illegal pretrial punishment under Article 13, UCMJ.

On 15 June 2015, the Air Force published a new Air Force Instruction (AFI) requiring all pretrial confinees to be confined in maximum custody pretrial confinement for the duration of their pretrial confinement. Previously, confinement officials had discretion to classify pretrial confinees in the custody level they determined was most appropriate for the individual confinee and the security needs of the confinement facility. This article discusses how the Air Force's maximum custody requirement for pretrial confinees implicates the prohibition against illegal pretrial punishment under Article 13, Uniform Code of Military Justice (UCMJ).

ILLEGAL PRETRIAL PUNISHMENT

The due process clause of the Fifth Amendment to the U.S. Constitution prohibits the deprivation of liberty without due process of law.[1] The U.S. Supreme Court has long held that pretrial detention violates the due process clause when imposed with an intent to punish and when a particular condition or restriction of the detention is not reasonably related to a legitimate government objective.[2] Ensuring an accused's presence at trial and the effective management of a detention facility are well-recognized legitimate governmental objectives for pretrial detention.[3]

[1] Bell v. Wolfish, 441 U.S. 520, 535 (1979).

[2] *Id.* at 536–37.

[3] *Id.* at 537–38.

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Article 13, UCMJ, is the military's statutory prohibition against illegal pretrial punishment. It codifies the constitutional due process test for pretrial detention articulated by the Supreme Court. Article 13, UCMJ, states,

> No person, while being held for trial, may be subjected to punishment or penalty other than arrest of confinement upon the charges pending against him, nor shall the arrest or confinement imposed upon him be any more rigorous than the circumstances require to insure his presence, but he may be subjected to minor punishment during that period for infractions of discipline.

In short, Article 13, UCMJ, has two general prohibitions: "(1) the imposition of punishment on an accused before his or her guilt is established at trial; and (2) arrest or pretrial confinement conditions that are more rigorous than necessary to ensure the accused's presence at trial."[4] The first prong of Article 13 involves a "purpose or intent to punish," while the second prong "prevents imposing unduly rigorous circumstances during pretrial detention."[5] "Arbitrary or purposeless" conditions of pretrial detention may give rise to an inference that an accused is being punished.[6]

Illegal pretrial punishment is grounds for a defense pretrial motion for appropriate relief under Rule for Courts-Martial (R.C.M.) 906. If the accused establishes, by a preponderance of the evidence, that he or she has suffered illegal pretrial punishment, he or she is entitled to appropriate sentencing credit or other meaningful relief.[7] The nature of the illegal pretrial punishment dictates the remedy for the accused. While such relief is typically seen in the form of additional confinement credit, the Court of Appeals of the Armed Forces has recognized that such relief can include "disapproval of a bad conduct discharge" to "complete dismissal of the charges, depending on the circumstances."[8] An accused is entitled to meaningful relief if he or she has suffered illegal pretrial punishment, so long such relief is not disproportionate to the harm suffered or nature of the offenses of which he or she was convicted.[9]

MAXIMUM CUSTODY PRETRIAL RESTRAINT

When a violation of Article 13, UCMJ, is alleged by an accused, the military judge must scrutinize the government's purpose for the pretrial restraint to determine whether it was done with an intent to punish, "determined by examining the intent of detention officials or by examining the purposes served by the restriction or condition, and whether such purposes are reasonably related to a legitimate governmental objective."[10] The Court of Appeals for the Armed Forces has recognized that maximum custody is a condition of pretrial restraint deserving of careful scrutiny.[11] The court has expressed concerns with the placement of pretrial confinees in maximum custody based on a single factor, such as the nature of the charges, rather than a reasonable evaluation of all the facts and circumstances, and has sternly cautioned lower courts that it will "closely scrutinize any such claim on appeal."[12]

Maximum custody is the highest form of custody detention in the military corrections system and it is qualitatively different from any other custody level. A confinee warranting maximum custody is one who "[p]ossess[es] serious significant risk of escape or harm to self/others" and "[d]emonstrates behavior disruptive (noncompliant) to the operation of the facility."[13] Confinees in maximum

[4] United States v. Crawford, 62 M.J. 411, 414 (C.A.A.F. 2006).

[5] United States v. King, 61 M.J. 225, 227 (C.A.A.F. 2005).

[6] United States v. James, 28 M.J. 214, 216 (C.M.A. 1989).

[7] United States v. Zarbatany, 70 M.J. 169, 175 (C.A.A.F. 2011) ("[A]lthough R.C.M. 305(k) is the principal remedy for Article 13, UCMJ, violations, courts must consider other relief for violations of Article 13, UCMJ, where the context warrants.").

[8] *Id.*

[9] *Id.* at 170 ("Where relief is available, meaningful relief must be given for violations of Article 13, UCMJ. However, relief is not warranted or required where it would be disproportionate to the harm suffered or the nature of the offense.").

[10] United States v. Adcock, 65 M.J. 18, 22 (C.A.A.F. 2007) (internal quotations omitted).

[11] *Crawford*, 62 M.J. at 416 (explaining that the court "does not condone arbitrary polices imposing maximum custody upon pretrial prisoners").

[12] *Id. See also* United States v. Harris, NMCCA 200500452, 2007 CCA LEXIS 55 (N-M. Ct. Crim. App. February 15, 2007), *aff'd*, 66 M.J. 166 (2008); United States v. Anderson, 49 M.J. 575, 577 (N-M. Ct. Crim. App. 1998).

[13] U.S. Dep't of Air Force, Instr. 31-105,

custody may not be comingled with other confinees,[14] they are not to be removed from the confinement facility except in emergencies or unusual circumstances,[15] and when outside their cells they must be escorted by two personnel (at least one armed) at all times[16] while wearing restraining devices, such as handcuffs, belly chain/belt, and leg irons as appropriate.[17] In the Air Force, besides pretrial confinees, the only other confinees automatically classified and held in maximum custody for the duration of their confinement are death sentence inmates.[18]

Maximum custody results in *de facto* segregation for the pretrial confinee since he or she cannot be comingled with other confinees.

The qualitative difference between maximum custody confinement and lower custody levels is significant.[19] Most importantly, maximum custody results in *de facto* segregation for the pretrial confinee since he or she cannot be comingled with other confinees. To carry out this segregation requirement, confinement officials will often times house the maximum custody confinee in a segregation cell, separate from the confinement facility's general population. Usually these segregation cells are only intended for temporary use, such as for an observation cell for a confinee's first 48 to 72 hours of confinement. Depending on the nature of the isolation created by the segregation cell, sometimes the segregation of a pretrial confinee can be tantamount to solitary confinement. In contrast, confinees in lower custody levels reside in the facility's general population and are not segregated or isolated from other confinees. They can associate with other confinees through conversation, share the facility's recreation and exercise rooms, and eat meals together. This includes post-trial confinees who have been convicted of the most violent and heinous felony level crimes under the UCMJ, such as sexual assault of a child, robbery, and aggravated assault with a dangerous weapon.

The amount of restraint imposed on maximum custody confinees is also significant.[20] The armed escort and physical restraint requirements for maximum custody generally keep the pretrial confinee from being able to perform jobs around base, which confinees often volunteer to do to break up the monotony of continuous confinement and demonstrate rehabilitation. Jobs are physically impossible for a maximum custody confinee who is handcuffed or wearing a belly chain and leg irons. Moreover, AFI 31-105 does not recommend jobs for maximum custody confinees. For the same reasons, maximum custody confinees are generally precluded from participating in outdoor physical fitness and eating meals in the base dining facility. In contrast, confinees in lower custody levels are supervised, but not required to wear

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Air Force Corrections Systems para. 5.4.1 (15 June 2015) [hereinafter AFI 31-105].

[14] *Id.*

[15] *Id.*

[16] *Id.*, para. 8.3.1.

[17] *Id.*

[18] *Id.*, para. 5.5.7.

[19] *Id.*, table 8.1.

[20] *Id.*

Table 8.1 from AFI 31-105. Basic Controls For Common Activities

ACTIVITY	MINIMUM	MEDIUM	MAXIMUM
Observation level from staff is	Occasional and appropriate to situation	Frequent and direct	Always escorted when outside cell; use handcuffs, Hoffman Cuffs™, or chains/leg irons
Day movement inside facility is	Unrestricted	Observed periodically by staff	Always escorted when outside cell; use handcuffs, Hoffman Cuffs™, or chains/leg irons
Meal periods	Intermittent observation	Supervised	Always escorted when outside cell; use handcuffs, Hoffman Cuffs™, or chains/leg irons, or meals in cell. Use only spoon.
Access to jobs	Eligible for both inside and outside facility perimeter	Inside facility perimeter only, unless the Defense Force Commander (DFC) authorizes escorted work details outside the facility under direct and continuous supervision	Not recommended
Visits	Contact, periodic supervision, indoor and/or outdoor	Contact, supervised	Always escorted when outside cell; use handcuffs, Hoffman Cuffs™, or chains/leg irons. Non-contact and closely supervised (one on one).
Leave the facility	Escorted. Or, supervised when assigned a work detail	Always escorted when outside facility; use handcuffs, Hoffman Cuffs™, or chains/leg irons; armed escort (optional)	Always escorted when outside cell; use handcuffs, Hoffman Cuffs™, or chains/leg irons. Minimum of two Security Forces (SF) escorts with one armed.

physical restraints (unless outside of the facility if in medium custody), and do not require an armed escort. They are also allowed to perform jobs in and outside of the facility.

AIR FORCE CUSTODY CLASSIFICATIONS

Air Force Instruction 31-105, *Air Force Corrections System*, is the governing regulation for military confinement. The regulation was published on 15 June 2015, and was a complete rewrite and renumbering of the previous confinement regulation, AFI 31-205. One of the significant substantive changes to the confinement regulation was a change to the custody classification process for pretrial confines. It now requires *all* pretrial confinees to be held in maximum custody for the duration of their pretrial confinement. Paragraph 5.3 of AFI 31-105 reads (emphasis added),

> Confinee Status. In the [Air Force Corrections System], a confinee's status is immediately determined as either pretrial or post-trial. **Pretrial detainees are automatically classified as maximum custody classification.** (T-0)[21]
>
> NOTE: The need to incarcerate a pretrial detainee means presence of a flight risk or a risk to harm self/others and therefore is graded as maximum custody.

The new confinement regulation does not provide the confinement officials any discretion in making the initial custody classification determination for pretrial confinees, nor does it provide any mechanism where a pretrial confinee can be reclassified into a lower custody level later on during their pretrial confinement.

The regulation that preceded AFI 31-105, did not require maximum custody for pretrial confinees. Instead, AFI 31-205 gave the confinement officials complete discretion to determine the appropriate custody level classification for pretrial confinees.[22] Under the previous regulation, the confinement officials had discretion how to classify the pretrial confinee's custody status—from minimum, to medium-in/out, to maximum—based on a variety of factors related to the pretrial confinee's behavior and security needs of the confinement facility.[23] In fact, the regulation required a totality of the circumstances analysis, stating that the confinement officials "should consider many factors when determining an inmate's custody grade."[24]

The regulation that preceded AFI 31-105, did not require maximum custody for pretrial confinees…gave the confinement officials complete discretion to determine the appropriate custody level.

[21] *See* U.S. Dep't of Air Force, Instr. 33-360, Communications and Information table 1.1 (1 December 2015)."T-0" refers to the tier waiver authority for this requirement. The "T-0" waiver authority is the highest tier-waiver authority, and waiver is approved by the respective non-Air Force authority (*e.g.*, Congress, White House, OSD, JS).

[22] U.S. Dep't of Air Force, Instr. 31-205, Air Force Corrections Systems para 5.6 (27 January 2014) [hereinafter AFI 31-205] ("Upon initial confinement, the confinement officer or NCOIC may convene a panel to determine the inmate's custody grade or may personally determine the inmate custody grade.").

[23] *Id.*, para. 5.6.1.

[24] *Id.*

Those factors included, but were not limited to, the confinee's "indications of emotional instability or disturbance, irresponsibility, prior escapes, Absent Without Leave (AWOL), maturity, degree and severity of offense and charges still pending…an inmate's history of emotional stability, violence and demonstrated sense of productive work."[25]

Additionally, the previous regulation gave confinement officials the discretion to initiate a custody reclassification for a pretrial confinee at any time during the confinee's pretrial confinement.[26] Interestingly, even under the new regulation, confinement officials are still permitted to make custody reclassification decisions for *post*-trial inmates as they see fit. In fact, for those post-trial inmates held in maximum custody, the regulation requires the confinement officials to reconsider the maximum custody classification at a minimum of every two weeks.[27]

THE AIR FORCE STANDS ALONE

The Air Force's requirement that all pretrial confinees be classified as maximum custody for the duration of their pretrial confinement is unique among the armed services. Neither the Army nor the Navy have instituted such a provision. Instead, these services require custody classifications for pretrial confinees to be made on an objective evaluation of all the facts and circumstances on a case-by-case basis.[28]

The Air Force custody classification guidance for pretrial confinees also appears to be at odds with the governing Department of Defense Instruction (DoDI) for the administration of military correctional facilities, which encourages an "objective classification system" where "all facts and circumstances shall be considered" in determining the appropriate custody grade for confinees.[29] Indeed, DoDI 1325.07 directs each military correctional facility to use Department of Defense (DD) Forms 2711 and 2711-1 for initial custody classification and custody reclassifications, respectively.[30] Both forms clearly contemplate use for pretrial confinees by requiring the confinement official to select "PRE-TRIAL" or "POST-TRIAL" for the confinee being classified.[31] However, while the Air Force's new

The Air Force's requirement that all pretrial confinees be classified as maximum custody for the duration of their pretrial confinement is unique among the armed services.

[25] *Id.*

[26] U.S. Dep't of Def., DD Form 2711-1, Custody Reclassification (Mar. 2013) [hereinafter DD Form 2711-1].

[27] AFI 31-205, *supra* note 22, para. 8.1.3 ("For post-trial inmates in maximum custody, reconsider at a minimum of every 2 weeks if a maximum custody classification is still necessary by using the DD Form 2711-1.").

[28] *See* U.S. Dep't of Army, Reg. 190-47, The Army Corrections System para. 11-1(a) (15 June 2006) [hereinafter AR 190-47] ("Prisoners will not be assigned to a permanent custody grade based solely on the offenses for which they were incarcerated. Classification will be at the minimum custody grade necessary to be consistent with sound security requirements and DoDI 1325.7."); U.S. Dep't of Navy, Sec'y of Navy Instr. 1640.9c, Department of the Navy Corrections Manual sec. 4202 (3 January 2006).

[29] U.S. Dep't of Def., Instr. 1325.07, Administration of Military Correctional Facilities and Clemency and Parole Authority para. 5c (11 March 2013).

[30] *Id.*

[31] *See* U.S. Dep't of Def., DD Form 2711, Initial Custody Classification (March 2013); U.S. Dep't of Def., DD Form 2711-1, Custody Reclassification (March 2013).

confinement regulation still directs confinement officials to use DD Forms 2711 and 2711-1 for custody classifications, it does not allow confinement officials to classify pretrial confinees in any custody grade other than maximum custody—even if the confinement officials believe the facts and circumstances warrant a lower custody classification.

Furthermore, the Air Force's own definition of "custody levels" in AFI 31-105 seems to contradict its automatic maximum custody requirement for pretrial confinees. The regulation's glossary of terms defines "custody levels" as "[t]he classification level assigned to **each confinee** signifying the degree of supervision and type of restraint appropriate based upon the confinee, the circumstances of the confinement and all other appropriate factors."[32] Yet, the Air Force has seemed to carve out an exception within its own definition for pretrial custody classifications by requiring maximum custody for pretrial confinees based solely on their detention status without any analysis of "the circumstances of the confinement and all other appropriate factors."

WHY THE AIR FORCE MUST REFORM

The Air Force's maximum custody requirement for pretrial confinees might violate the prohibition against pretrial punishment under Article 13, UCMJ. A blanket classification requirement for a class of confinees effectively eliminates any discretion by the confinement officials in making custody level determinations. The two legitimate governmental interests for pretrial detention recognized by the Supreme Court are to ensure an accused's presence for trial and effective management of the detention facility. However, in carrying out those interests the government must not impose conditions on detention that are unduly rigorous under the circumstances. The confinement official is the responsible party for both carrying out the government's legitimate interests in imposing pretrial confinement and ensuring the conditions of confinement are not unduly rigorous on the confinees. Without any discretion to classify pretrial confinees into a custody level other than maximum custody, the confinement official is unable to employ an objective analysis that considers all the facts and circumstances of the case when assigning a custody level to the pretrial confinee.

The Air Force's own definition of "custody levels" in AFI 31-105 seems to contradict its automatic maximum custody requirement for pretrial confinees.

For example, consider the situation where a pretrial confinee has been ordered into pretrial confinement based on three consecutive positive urinalysis results for heroin and where restriction to base has been ineffective to keep the accused from testing positive for the controlled substance. While pretrial confinement may be the least restrictive means necessary to ensure the accused does not commit further serious misconduct, i.e., wrongful use of heroin, it does not necessarily follow that maximum custody is the appropriate classification level for the confinee while he or she is in pretrial confinement. Because heroin is a highly addictive Schedule I controlled substance, simply eliminating the person's access to the substance by way of confinement is often enough to prevent further serious misconduct prior to trial. Furthermore, under an objective analysis considering factors such as the confinee's commitment to rehabilitation, access to treatment services, and behavior towards other inmates and confinement officials, the confinement official in this confinee's case may determine that maximum custody is not warranted by the circumstances. Under the current Air Force regulation, the confinement official would be forced to classify the confinee as maximum custody even though such restraint may be excessive for the confinee and the needs of the detention facility. The confinement officials are responsible for carrying out the government's legitimate interests in imposing

[32] AFI 31-105, *supra* note 13, att. 1 (emphasis added).

pretrial confinement in a manner that is not unduly rigorous for the confinee so as not to violate Article 13, UCMJ. But the confinement officials cannot carry out these duties in accordance with the law if they do not have discretion to make pretrial custody classification decisions which are appropriate for each individual pretrial confinee.

> The Air Force should abolish the current policy in AFI 31-105 requiring maximum custody confinement for pretrial confinees.

The Air Force's purported justification for requiring maximum custody for pretrial confinees does not save the policy from illegal pretrial punishment concerns. The note in AFI 31-105, paragraph 5.3, states, "The need to incarcerate a pretrial detainee means presence of a flight risk or a risk to harm self/others and therefore is graded as maximum custody." However, by the Air Force's own definition, a mere "presence" of a flight risk or "risk" of harm does not meet the high threshold required for maximum custody. By definition, maximum custody is only warranted for confinees who "[p]ossess serious significant risk of escape or harm to self/others."[33] By contrast, medium custody is warranted for those confinees who possess moderate risk of escape or harm toward self/others, and minimum custody is warranted for those who possess minimal risk of such behavior.[34] While a presence of flight risk or risk of harm to others may be sufficient to warrant pretrial confinement, these concerns may be appropriately mitigated by minimum or medium custody levels. By simply comparing custody level definitions, the regulation's justification for requiring maximum custody for pretrial confinees appears more closely aligned with the definitions of medium and minimum custody than that of maximum custody. Maximum custody requires more than a mere "presence" of flight risk or harm to others; it requires the accused "to possess a serious significant risk." The standard for the imposition of pretrial confinement is qualitatively different than the standard for maximum custody classification, and equating the two standards risks imposing unduly rigorous conditions of confinement on pretrial confinees in violation of Article 13, UCMJ.

CONCLUSION

The Air Force should abolish the current policy in AFI 31-105 requiring maximum custody confinement for pretrial confinees. Confinement officials need to be given back full discretion in custody classification decisions to ensure pretrial confinees are not subjected to unduly rigorous conditions while in pretrial confinement. The Air Force's consideration of only one factor, the status of the confinee, to the exclusion of all others, violates Article 13, UCMJ, because it is arbitrary and not based on a totality of the circumstances analysis. The prohibition against pretrial punishment codified in Article 13, UCMJ, is necessary to ensure an accused is not deprived of his or her constitutionally guaranteed liberty without due process of law. To protect an accused's due process rights, the Air Force must reinstate an objective custody classification analysis that allows confinement officials discretion to consider all the facts and circumstances of the case when deciding on an appropriate custody level for pretrial confinees. R

[33] AFI 31-105, *supra* note 13.

[34] AFI 31-205, *supra* note 22, paras. 5.4.2–5.4.3.

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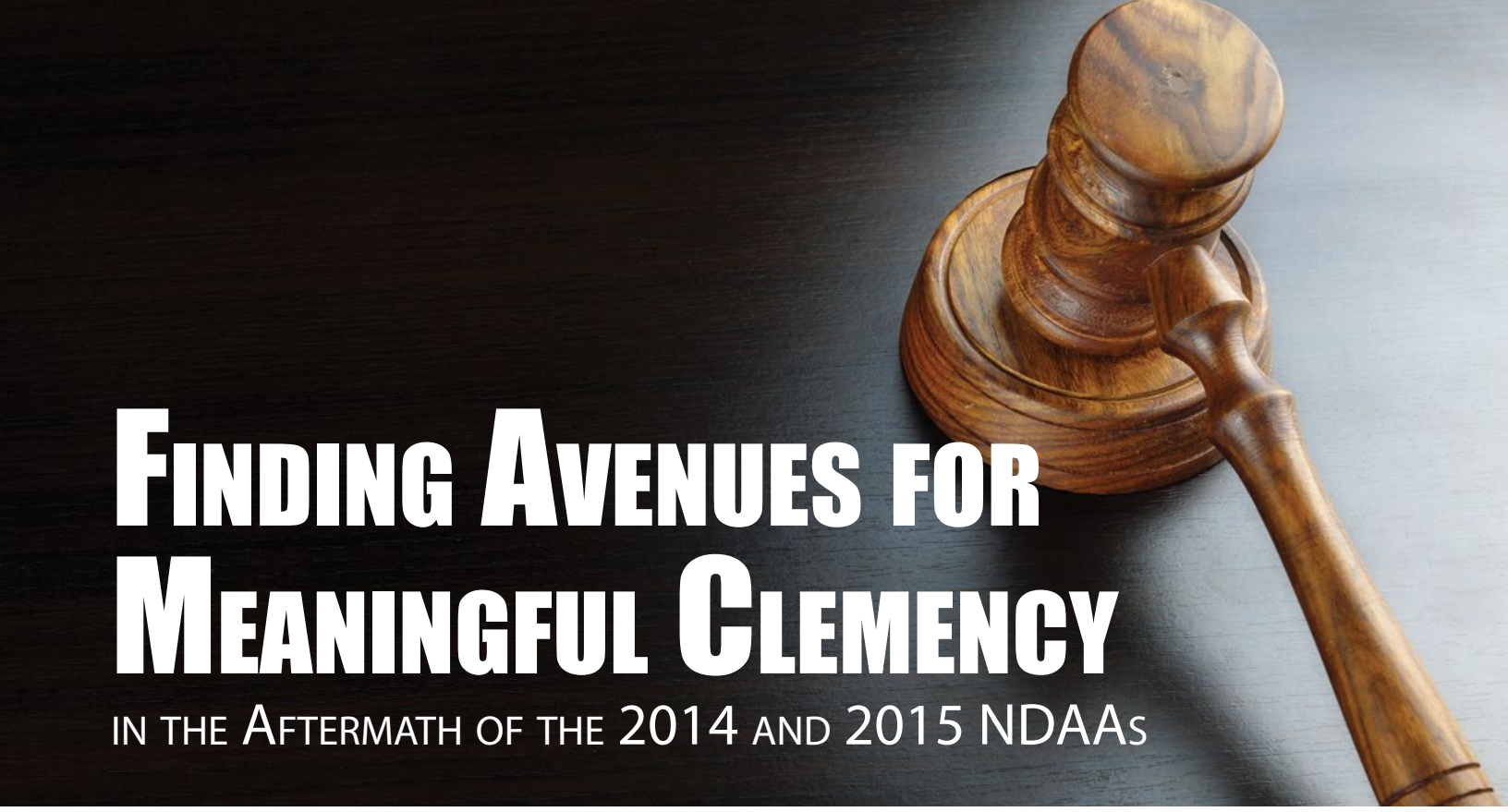

Finding Avenues for Meaningful Clemency

in the Aftermath of the 2014 and 2015 NDAAs

BY CAPTAIN TYLER J. SENA

The purpose of this article is to familiarize the reader with some available avenues for meaningful post-trial relief outside of the appellate courts and the Secretary of the Air Force.

Nearly 60 years ago the United States Court of Military Appeals said that "[i]t is while the case is at the convening authority level that the accused stands the greatest chance of being relieved from the consequences of a harsh finding or a severe sentence."[1] This was true for many years.[2] But not after the sweeping changes by Congress in the National Defense Authorization Acts (NDAAs) of 2014 and 2015.[3] Now, for many offenses committed on or after 24 June 2014, meaningful post-trial relief outside of the appellate courts must find other paths. This is because the ability of a convening authority to act on the finding, sentencing, or both has been severely limited.

Other avenues of relief do exist, though they are rarely used and not as familiar to military-justice practitioners. The purpose of this article is to familiarize the reader with some available avenues for meaningful post-trial relief outside of the appellate courts and the Secretary of the Air Force. Additionally, this article will highlight the opportunity for relief by the Judge Advocate General under Article 69 of the Uniform Code of Military Justice (UCMJ) to fill a significant need, for deserving cases, resulting from the changes to Article 60.

[1] United States v. Wilson, 26 C.M.R. 3, 6 (C.M.A. 1958).

[2] *See* 10 USCS § 860, History (LEXIS through 2014 amendments). Prior to the FY13 and FY14 NDAAs, Article 60 only had minor amendments made in 1983, 1986, and 1996.

[3] Pub. L. No. 113-66, §§ 1702(b), (c)(1), 1706, 127 Stat. 955; Pub. L. No. 113-291, § 531(a)(1)–(3), (5), 128 Stat. 3362, 3363.

ARTICLE 60, UCMJ

Background

Prior to the changes in the Fiscal Year 2014 (FY14) NDAA, Congress had given convening authorities broad power and discretion when taking action on the findings and sentence of courts-martial. The law said, in part, "[t]he authority under this section to modify the findings and sentence of a court-martial is a matter of command prerogative involving the sole discretion of the convening authority."[4] When making the decision to modify the findings and sentence of a court-martial—or not—a convening authority should weigh the interests of an accused and the Air Force, then decide what is best, "uncontrolled by the judgment and conscience of others."[5] The convening authority had absolute power to disapprove all or part of the findings and sentence for any reason or no reason, legal or otherwise.[6] While this power is unique to the military-justice system, the military-justice system itself is a unique system of laws differing from the civilian justice system to ensure good order and discipline in the Armed Forces.[7]

The convening authority's broad power to impact an accused's sentence was subject to some rules. The former Article 60(b) laid out a well-orchestrated process where the accused could submit his or her request, along with the accused's justification and support for such a request, directly to the convening authority. After the request was submitted, the convening authority could receive counsel from her Staff Judge Advocate (SJA), and then make a deliberate and reasoned decision. As a practical matter, this is also one of many reasons for an accused to submit matters, even if they were already introduced into evidence during the court-martial, perhaps as part of a sentencing package. While a convening must consider the matters submitted by the accused under Article 60, there is no such requirement to review the record of trial (ROT).

Before the sweeping changes to Article 60, convening authorities could dismiss any charge or specification by setting aside a finding of guilty, or change the finding of guilty to a charge or specification to a finding of guilty to a lesser included offense.[8] The convening authority, in his or her sole discretion, had the authority to "approve, disapprove, commute, or suspend the sentence in whole or in part."[9] Among other significant authority and responsibility inherent in command, a convening authority had the ability to approve the outcome or take action favorable to the accused; the convening authority could not make things *worse* for an accused after a court-martial. Save executive clemency, this authority is unparalleled in our civilian justice system. But it is necessary because of the unique organization and structure of the military. Senior commanders have long been expected to accomplish all parts of the mission, including good order and discipline, with thoughtful efficiency. For many years their broad authority in the military-justice arena remained largely undisturbed.

Catalysts for Change

In January 2012, a documentary called *The Invisible War* was released. It included interviews with veterans from various branches of the military who discussed personal experiences of sexual assault.[10] Individuals involved with the documentary advocated changes regarding how the military handled sexual assault.[11] The documentary got significant publicity and strengthened a movement toward changing the UCMJ.

Another significant event occurred in 2013 which further fueled calls for reform, specifically Article 60 of the UCMJ. In November 2012, Lieutenant Colonel James Wilkerson was found guilty of aggravated sexual assault by a panel of members, including four colonels and a lieutenant

[4] *See* UCMJ, art. 60(c)(1) (2012), *superseded* by Pub. L. No. 113-66 (26 December 2013).

[5] United States v. Brooks, 12 M.J. 558, 559 (A.F.C.M.R. 1981); UCMJ art. 71, 74.

[6] United States v. Rivera, 42 C.M.R. 198, 199 (C.M.A. 1970); *United States v. Smith*, 36 C.M.R. 430, 433 (C.M.A. 1966); United States v. Nassey, 18 C.M.R. 138, 147 (C.M.A. 1955).

[7] One need only look to Articles 86, 87, 91, 92, etc. of the UCMJ to note that the same conduct which may have administrative consequences as a civilian would be an offense which a service member could be convicted of by a courts-martial.

[8] UCMJ art. 60(c)(2–3).

[9] UCMJ art. 60(c)(2).

[10] Information about the documentary and movement can be found at http://www.notinvisible.org/.

[11] *Id.*

A convening authority modifying a sentence must complete a written explanation of the reasons for the action and make it part of the record of trial.

colonel.[12] At the time of the alleged assault, Lt Col Wilkerson had been selected for promotion to colonel and was serving as the Inspector General at the 31st Fighter Wing at Aviano Air Base, Italy.[13] The sentence included 12 months of confinement and a dismissal; 3 months of the sentence were served before the convening authority took action on the case.[14] After reviewing the case and matters submitted by Lt Col Wilkerson, the convening authority, Lieutenant General Craig Franklin, commander of the Third Air Force, dismissed the case under his Article 60 authority because he "concluded that the entire body of evidence was insufficient to meet the burden of proof beyond a reasonable doubt."[15]

The aftermath of the dismissed case, among other issues bringing military justice to the center of political attention, ultimately resulted in sweeping changes to the UCMJ. Shortly after the dismissal, Senator Barbara Boxer of California and Senator Jeanne Shaheen of New Hampshire, wrote a letter to the Secretary of Defense.[16] The letter asked the Secretary of Defense to review the decision to overturn Lt Col Wilkerson's case, and expressed concern that reforms taken by the Department of Defense (DoD) related to handling sexual assault were "irrelevant when a case of this magnitude can be thrown out at the discretion of a Convening Authority."[17] Additionally, the senators wrote, "we urge you, in the strongest possible terms, to take immediate steps to restrict Convening Authorities from unilaterally dismissing military court decisions. We also ask that you work with us as we consider additional legislative options."[18] The Secretary of Defense, Chuck Hagel, responded in part that he "believe[s] this case does raise a significant question whether it is necessary or appropriate to place the convening authority in the position of having the responsibility to review the findings and sentence of a court-martial, particularly prior to the robust appellate process made available by the UCMJ."[19]

Reform

Not long after Lt Col Wilkerson's case brought long-undisturbed authority under Article 60 into serious question, Congress significantly restricted that power to what we have today. The changes are not limited

[12] Nancy Montgomery, *Senator asks AF leaders to consider firing general in Wilkerson case*, Stars & Stripes (6 March 2013) (available at http://www.stripes.com/news/air-force/senator-asks-af-leaders-to-consider-firing-general-in-wilkerson-case-1.210700).

[13] Nancy Montgomery, *Report: Lieutenant colonel in sex assault case to retire as major*, Stars & Stripes (17 October 2013), http://www.stripes.com/news/air-force/report-lieutenant-colonel-in-sex-assault-case-to-retire-as-major-1.247732).

[14] Montgomery, *supra* note 12.

[15] Nancy Montgomery, *Hagel orders review of UCMJ after Wilkerson sex assault case*, Stars & Stripes (11 March 2013), http://www.stripes.com/news/hagel-orders-review-of-ucmj-after-wilkerson-sex-assault-case-1.211333) (quoting a written statement released by Third Air Force).

[16] The link to the letter on the Senators' websites did not work; however, a copy of the letter sent is available at http://www.stripes.com/full-text-of-sens-boxer-and-shaheen-s-letter-to-hagel-1.210550.

[17] *Id.*

[18] *Id.*

[19] Montgomery, *supra* note 15.

to sexual-assault cases. Instead, the changes to the law distinguish between offenses committed before 24 June 2014, and those committed on or after that day. Convening authorities still have the same power under Article 60 regarding both the findings and sentencing for offenses committed before 24 June 2014.[20] For any offense committed on or after 24 June 2014, a convening authority may not modify an adjudged sentence of confinement for more than six months or a punitive discharge.[21] A few exceptions exist. Upon recommendation of trial counsel for "substantial assistance by an accused in the investigation or prosecution of another person who has committed an offense" the convening authority has the authority to "disapprove, commute, or suspend" the sentence adjudged by the court regardless of whether a mandatory-minimum sentence exists for the offense which the accused was found guilty.[22] Additionally, a convening authority may modify a sentence under the terms of a pretrial agreement, except where a mandatory-minimum sentence exists.[23] Where a mandatory sentence of a dishonorable discharge exists, it may only be modified to a bad conduct discharge.[24] A convening authority modifying a sentence must complete a written explanation of the reasons for the action and make it part of the record of trial.[25]

A convening authority may modify the findings of a court-martial for "qualifying offenses" committed on or after 24 June 2014.[26] Qualifying offenses are those where the maximum sentence to confinement that can be adjudged is 2 years or less, and the adjudged sentence does not include a dismissal, discharge, or confinement for more than 6 months.[27] The convening authority *cannot* modify findings on some excluded sexual offenses.[28] A convening authority modifying findings on a qualifying offense must give a written explanation of the reasons and include it in the record of trial.[29]

Practical Results on Clemency

These reforms leave little room for meaningful clemency by the convening authority, once considered the best chance for the accused to receive relief. For offenses occurring after 24 June 2014, a convening authority can still modify a reprimand, forfeiture, fine, reduction in rank, restriction to specified limits, or hard labor without confinement. The convening authority can also modify sentences of confinement of six months or less. But there is little practical benefit of modifying a reduction in rank or forfeitures when an accused receives either a punitive discharge with any confinement, or confinement in excess of 6 months. Under Article 58b, UCMJ, a sentence of more than 6 months of confinement, or any confinement with a punitive discharge, triggers automatic forfeitures.[30] Thus, neither regaining rank nor reducing forfeitures helps without either confinement or a discharge being modified too. A limited exception may exist where adjudged forfeitures are modified, either alone or in conjunction with restored rank, to allow for or increase in the amount of automatic forfeitures which may be waived in favor of the accused's dependent(s).[31] Careful planning and discussion with defense counsel and the client should occur to determine the best position to take given the circumstances.

The result of these changes in the law is that a convening authority cannot fix a court-martial's unusually harsh or excessive sentence if one is adjudged. Consider, for example, a case involving a random positive urinalysis for marijuana (or the drug of your choice). After notification of the positive test, investigators try to

[20] *See* UCMJ art. 60. Although there are additional rights related to a person who meets the statutory definition of a "victim," which include the right to submit matters for the convening authority to review prior to taking action. *See* UCMJ art. 60(d).

[21] UCMJ art. 60(c)(4)(A).

[22] UCMJ art. 60(c)(4)(B). For a review of similar rules in the federal civilian criminal justice system, *see* Federal Rule of Criminal Procedure 35, and the United States Sentencing Guidelines §5K1.1 (2014).

[23] UCMJ art. 60(c)(4)(C).

[24] UCMJ art. 60(c)(4)(C)(i).

[25] UCMJ art. 60(c)(2)(C).

[26] UCMJ art. 60(c)(3)(A).

[27] UCMJ art. 60(c)(3)(D)(i).

[28] UCMJ art. 60(c)(3)(D)(ii). These offenses include offenses under Articles 120(a), 120(b), and 125, UCMJ.

[29] UCMJ art. 60(c)(3)(C).

[30] UCMJ art. 58(a).

[31] United States v. Emminizer, 56 M.J. 441, 443 (C.A.A.F. 2002); *see also* U.S. Dep't of Air Force, Instr. 51-201, Administration of Military Justice para. 9.28.7 (6 June 2013, including Air Force Guidance Memorandum 2016-01, 3 August 2016) [hereinafter AFI 51-201].

question the accused, who ultimately admits to using the substance. But there are no other witnesses or evidence. The case goes to a special court-martial where the accused pleads guilty without a pretrial agreement. The matters in aggravation are slim, and the matters in extenuation and mitigation, as well as evidence of rehabilitative potential are average or better. Trial counsel, of course, argues for a bad conduct discharge and months of confinement, as well as reduction in rank and forfeitures. The defense makes no specific recommendations, but argues that a punitive discharge is not appropriate and confinement, if any, should be limited. The defense further points out any positive facts about the client and the facts and circumstances in the case. After deliberating, the panel (typically the problem will come from a panel) comes back with a sentence including more than 6 months confinement (but not 1 year, thus not triggering an automatic review by the Air Force Court of Criminal Appeals under Article 66), a reduction to E-1, and forfeitures.[32] If an AMJAMS report or review of trial summaries shows the sentence to be excessive, perhaps two to three times the average sentence to confinement (and-or a punitive discharge where one is rarely adjudged for a similar offense), finding meaningful relief for this client is now even more complicated.

If an AMJAMS report or review of trial summaries shows the sentence to be excessive…finding meaningful relief for this client is now even more complicated.

The initial efforts to help that sort of client are still similar to past efforts. Recommendations from panel members, the military judge, trial counsel, the chief of justice, as well as other individuals, are all still helpful. Positive behavior reports (DD Form 2712, Prisoner Evaluations) and a reference letter from the confinement facility personnel are also valuable. Additionally, typical clemency letters and other helpful material from any other appropriate source, and a well-written request from the client and defense counsel should still be submitted. The letter from the defense counsel to the convening authority is an excellent opportunity to explain the enduring importance of the clemency process despite the recent changes, what the client wants, why it should be granted, and what the convening authority can do to help. While the convening authority may not be able to reduce the confinement from, say, 8 to 6 months, he or she can certainly put in writing, "If I had authority to grant AB Snuffy's request, I would." The Convening Authority's letter memorializing that they would grant the clemency request if they still had the power to do so can be a valuable attachment to an application pursuant to Article 69, UCMJ, or recommendation for action taken in accordance with Article 74. The defense letter is also a good opportunity to explain any timeline concerns to the convening authority and other readers to encourage timely action.[33] Timeline concerns are especially important for the client who wishes confinement to be reduced, because the time needed to get confinement reduced can easily be several months. At that point the client has already served his or her adjudged sentence. After the initial effort, the options for finding meaningful relief will depend on the client's particular scenario.

ARTICLE 64

The first Article to consider for the client whose scenario was mentioned above is Article 64, UCMJ. Article 64 provides an easily overlooked avenue of relief. Article 64(a) review by a judge advocate is required in any case where there is a finding of guilty which is not reviewed by the U.S. Air Force Court of Criminal Appeals or the office of the Judge Advocate

[32] Any number of combinations could arise here, but consider, for example and for reference in this article, a two-time cocaine use client or four-time marijuana use client with no aggravating factors and average to good mitigation and extenuation evidence who receives a reduction to E-1, forfeitures, and most importantly, nine months of confinement.

[33] An application for relief under Article 69(b) has a number of prerequisites, which include completion of convening authority action and review by a judge advocate under Article 64, UCMJ. *See* AFI 51-201, *supra* note 31, para. 11.6.1. Applications for relief under Article 69(b), UCMJ, will likely take a while to process, so it is important for the application to get to JAJM as soon as possible for processing so that if relief is granted related to confinement, the member does not spend unnecessary time incarcerated.

General.[34] An interesting door opens through Article 64(b) because the record of trial in each case reviewed under Article 64(a) "shall be sent for action" to the general court martial convening authority [GCMCA] in any one of three scenarios.[35] First, the judge advocate conducting the Article 64(a) review recommends corrective action.[36] Second, the sentence approved under Article 60 includes a dismissal, punitive discharge, or *confinement for more than 6 months*.[37] Lastly, a case is sent for action if it is otherwise required by regulations of the secretary concerned.[38] The second of those provides the most likely scenario for a client like the hypothetical client described above seeking relief from a seemingly excessive sentence to confinement and its secondary effects under Article 58 that cannot be modified under Article 60.

The authority of the person (the GCMCA) taking action under Article 64(c) is still essentially the same power that convening authorities used to have under Article 60. A person taking action under Article 64(c) may:

(A) disapprove or approve the findings or sentence, in whole or in part;

(B) remit, commute, or suspend the sentence in whole or in part;

(C) except where the evidence was insufficient at the trial to support the findings, order a rehearing on the findings, on the sentence, or on both; or

(D) dismiss the charges.[39]

There is no right for the accused to submit additional matters for the person taking action under this section, but there appears to be nothing that prohibits it either. Given the uncertainty of whether additional information would be considered by the Article 64(c) reviewing authority, the best course of action for a member seeking relief is to submit, in the initial clemency request to the convening authority, any matters he desires the Article 64 reviewing authority to consider. On its face, Article 64(c) does not include any particular grounds, as Article 60 now does, that have to be met before action may be taken that would include remitting, commuting, or suspending an Accused's sentence. Thus, from a literal reading of the statute, it appears that if the case meets one of the three criteria under Article 64(b) requiring action, the person taking action under Article 64(c) may modify the sentence (and/or findings) for any reason, or no reason at all. Practically speaking it is hard to imagine dismissal of charges of a caliber similar to those in Lt Col Wilkerson's case. However, it is not inconceivable that, in the example used in the Practical Results on Clemency section, above, the person taking action would reduce an apparently excessive sentence of confinement that the convening authority would if he could, but no longer has the power, for example, from 9 months to 3 months of confinement.

There is a likely argument that Article 64(c) is not meant to be a way around Congress's intent to limit the ability of commanders in the clemency process. However, after the numerous changes Congress made to the UCMJ in FY14 NDAA and FY15 NDAA, neither Article 64(c), nor Article 64, were changed. As a practical consideration, reviews pursuant to Article 64 are conducted by an experienced judge advocate (as typically judge advocates serving at the NAF and MAJCOM level are), and the action taken is by a more senior officer (typically the GCMCA is at least an O-8). Ultimately, the law as it reads today appears to allow for modification under Article 64(c) that can provide meaningful relief to clients in qualifying circumstances.

ARTICLE 69

Another way for meaningful relief in certain cases is review in the office of the Judge Advocate General, in accordance with Article 69, UCMJ. It can occur through different scenarios. Review through Article 69(a) occurs for every general court-martial where an accused is found guilty of any offense, does not waive or withdraw his right to appellate review, and the case is not otherwise reviewed under Article 66 by the Air Force

[34] UCMJ art. 64(a).
[35] UCMJ art. 64(b).
[36] UCMJ art. 64(b)(1).
[37] UCMJ art. 64(b)(2).
[38] UCMJ art. 64(b)(3).
[39] UCMJ art. 64(c)(1).

Court of Criminal Appeals.[40] For cases reviewed pursuant to Article 69(a), the Judge Advocate General may modify or set aside the findings, sentence, or both, "[i]f any part of the findings or sentence is found to be unsupported in law or if reassessment of the sentence is appropriate…"[41] Unlike Articles 60 and 64, the ability to modify the outcome of a court-martial is restricted to cases that lack support in law or where the sentence is not appropriate.

Cases may also get reviewed in the office of the Judge Advocate General through Article 69(b). Under this provision, the Judge Advocate General may modify or set aside, in whole or in part, the findings or sentence of cases not reviewed under Article 69(a) or by the Air Force Court of Criminal Appeals.[42] Again, modification is contingent upon specified grounds. The specified grounds include: (1) newly discovered evidence; (2) fraud on the court; (3) lack of jurisdiction over the accused or the offense; (4) error prejudicial to the substantial rights of the accused; or (5) *the appropriateness of the sentence*.[43] While the authority under Article 69 is not new, the ability to modify an excessive sentence under Article 69 is an opportunity to fill a gap created by Congress's changes to the UCMJ, specifically Article 60. While there were more than forty post-trial reviews under Article 69(a) in 2012, there were only six applications for relief under Article 69(b) that year.[44] The number of reviews under Article 69(a) slightly rose in 2013, and the number of applications under Article 69(b) stayed the same.[45] Prior to the significant changes in Article 60 and the clemency process, the amount of reviews and applications pursuant to Article 69 have been small (where a problem existed it could be solved at a lower level); however, as Article 60 may no longer be the accused's best hope for relief in certain deserving cases, like the scenario presented in the Catalyst For Change section, above, reviews and applications under Article 69 should begin to increase.

As a practice tip, the defense counsel is wise to contact JAJM and discuss the process with the office who will be receiving and initially reviewing the application. One of the advantages of doing so is that the defense counsel may be advised of any best practices in submitting an application, such as submitting the application with the required contents from AFI 51-201 modeled after Figure 11.1 and a

As a practice tip, the defense counsel is wise to contact JAJM and discuss the process with the office who will be receiving and initially reviewing the application.

[40] UCMJ art. 69(a).

[41] *Id.* The step by step details of when matters may be submitted for TJAG's consideration, requirements that must be met for the application, and how the process flows is detailed in AFI 51-201, *supra* note 31, para. 11.5.1.

[42] UCMJ art. 69(b).

[43] *Id.*

[44] 2013 Annual Report from The Judge Advocate General of the Unites States Air Force to the American Bar Association, http://www.afjag.af.mil/shared/media/document/AFD-130806-067.pdf.

[45] 2014 Annual Report from The Judge Advocate General of the Unites States Air Force to the American Bar Association, http://www.afjag.af.mil/shared/media/document/AFD-140807-114.pdf.

standard motion used before the Air Force Judiciary.[46] Appendix A to this article contains an example that conforms to the requirements and practice tips received. Additionally, a letter in support of the accused's request, again modeled after Figure 11.1 and standard motions used before Air Force Judiciary, was suggested and is considered permissible. Appendix B to this article contains an example that conforms to the requirements and practice tips received.

One initial concern that should be considered and addressed in an application is whether an application for relief based upon the appropriateness of a sentence is an effort to get around Congressional intent to restrict clemency. As this is a likely concern, an application that addresses that issue would be wise, especially given that the denial authority for Article 69(b) applications has been delegated to JAJM, while approval authority is with the Judge Advocate General.

When considering why an application for relief based on sentence appropriateness is not subverting Congressional intent, the following issues are noteworthy. While Article 60 allowed a convening authority to modify the outcome of a court-martial for any reason (or no reason at all), Article 69(b) allows for relief only if related to five specific grounds, such as an inappropriate sentence. Furthermore, rather than a commander without significant legal training modifying a sentence, one would expect Congress to believe the senior lawyer in the Air Force, confirmed by the Senate, is capable of making an appropriate decision; otherwise, Congress could and would have altered Article 69. Instead, Article 69 remains intact, is the law, and provides an opportunity outside of the appellate courts to fill a gap where an accused receives an excessive sentence that can't be meaningfully modified under Article 60 any longer. A case that includes the favorable recommendation of members of the panel, the military judge who presided over the case, or a convening authority, and especially when combined, should provide substantial justification for relief at this level, and clearly indicate it is not the decision of just one person to overturn the outcome of a panel. And, unlike a panel who has little-to-no reference beyond the maximum and minimum authorized sentences, additional reviewers have multiple tools and various information at their disposal to help them determine whether the adjudged sentence is excessive in light of the facts and evidence. Adjustments in appropriate cases will serve to strengthen our justice system with a sense of equality and fairness as offenders of like crimes receive similar, predictable sentences.

In the case of an accused where a sentence to confinement appears to be excessive and the relief requested will include reduction in confinement

One initial concern that should be considered and addressed in an application is whether an application for relief …is an effort to get around Congressional intent to restrict clemency.

[46] AFI 51-201, *supra* note 31, fig. 11.1.

time, a few items in the process are important to keep in mind. Before submitting an application for relief under Article 69(b), the convening authority must have taken action and Article 64 review must be complete.[47] Given the time that it can take for the transcript to be completed and reviewed, the record of trial to be completed and served on the parties, submission and review of matters pursuant to Rule for Courts-Martial 1105, action by the convening authority, and completion of the Article 64 review, it is important for the accused and her counsel to consider submitting the clemency request to the convening authority as soon as possible after receiving the ROT (thus having what they intend to submit prepared as much as possible prior to receiving the ROT, rather than taking all ten days allotted to submit matters). Additionally, the defense counsel is wise to point out in his letter to the convening authority that an application under Article 69 may not be made until the items above are complete, thus action and a favorable recommendation at the earliest convenience will best enable meaningful relief. An approved application will not be worth much if it reduces a sentence only after the accused has served most or all of it due to lengthy processing times.

[47] AFI 51-201, *supra* note 31, para. 11.6.1.

FINAL THOUGHTS

While many of the sweeping changes recently made to the UCMJ were initiated in response to certain sexual-assault cases, the entire military-justice system has been profoundly impacted. Unfortunately, some of these changes have eroded the longstanding, carefully created balance between the authority of the commander and his responsibility to maintain good order and discipline, an accused's due-process rights, and the proper administration of military justice. To restore that balance, new avenues, or unused existing avenues, for clemency for meaningful relief should be explored in appropriate cases. Some may argue the changes to Article 60 are not problematic because compared to the civilian system, even after the changes, there is a robust clemency process in place. But that kind of surface comparison does not account for other differences between the civilian justice system and the military-justice system. For example, an accused's sentence does not require a unanimous vote of the panel members, as is often required in civilian systems. Moreover, numerous crimes (for example, first time drug offenses) that commonly are disposed of through deferred prosecutions, agreements, or with minor punishment and little to no confinement in civilian courts are dealt with much more severely in the military system. Therefore, it only makes sense that there are additional levels of review to ensure due process and appropriate outcomes in the military-justice system. Post-trial options that should be considered, and where appropriate, pursued, exist under Article 64 and Article 69. R

Captain Tyler J. Sena

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SPECIAL COURT-MARTIAL

UNITED STATES	)	Application for Relief Under
	)	Article 69(b), UCMJ
v.	)	
	)	
AB First M. Last	)	[DATE]
Unit (MAJCOM)	)	
Base	)	
	)	

TO: The Judge Advocate General, United States Air Force

The following information is provided under AFI 51-201, paragraph 11.6.3:

1. The accused's name, service number, and present mailing address:
First M. Last
xxx-xx-xxxx
Address

2. Date, place and type of court-martial:
Date
Base
Type of Court-Martial

3. The sentence of the court as approved and any subsequent reduction by clemency or otherwise:
Reduction to E-1 (from E-4)
Forfeiture of $1,031.00 pay per month for 8 months
Confinement for 8 months
There have been no subsequent reductions by clemency or otherwise

4. AB xxxxx requests that his sentence to confinement be reduced from [eight months to six months]. The specific grounds upon which AB xxxxx requests relief is as follows:

a. [Succinct statement of reasoning. For example–The sentence to confinement for x months is disproportionate to the offense committed and evidence presented at trial, and under the totality of the circumstances in this case, a modification as requested would result in an appropriate sentence….]

b. [Grounds continued, if appropriate. For example–Had the misconduct in this case occurred less than two months prior than it did, the SPCMCA would have been able to address the appropriateness of the sentence by reducing it by x months, which he indicated he would have done, thus a modification is appropriate. A gap has been created by the changes in FY NDAA 14, leaving no meaningful remedy at the level of

the convening authority to address cases like this. However, Congress left the power to address the appropriateness of a sentence to The Judge Advocate General by not altering Article 69(b), UCMJ.]

c. [Under Article 69(b) of the UCMJ, you have the authority to modify the sentence in this case based upon, amongst other grounds, the "appropriateness of the sentence." Given the xxxxx in this case is disproportionate to the facts and circumstances surrounding the offense, and in light of subsequent recommendations, we respectfully ask that you modify AB xxxxx's sentence from xt to x months.]

_____ _____

FIRST M LAST, AB, USAF Date:

_____ _____

TYLER J. SENA, Capt, USAF Date:

Subscribed and sworn to before me this __ day of _____, 2015.

_____

SPECIAL COURT-MARTIAL

UNITED STATES	)	Application for Relief Under
	)	Article 69(b), UCMJ
v.	)	
	)	
AB First M. Last	)	[DATE]
Unit (MAJCOM)	)	
Base	)	
	)	

TO: The Judge Advocate General, United States Air Force

APPLICATION

COMES NOW, the Accused, AB First M. Last, by and through counsel, and respectfully requests The Judge Advocate General, United States Air Force, to modify AB xxxxx's sentence from x to y. This request is submitted in addition to AB xxxxx's application and pursuant to Article 69(b), Uniform Code of Military Justice (UCMJ), Rules for Courts-Martial (RCM) 1201, and Air Force Instruction (AFI) 51-201, *Administration of Military Justice*, 25 Sep 14.

FACTS

1. [Key facts]

2. [Key case details, such as plea, sentencing evidence, sentence, etc.]

3. [Key post trial notes. For example–After the trial concluded, two panel members, Lt Col xxxxx and Capt xxxxx, stated they support a reduction in confinement from x to y months. Additionally, the SPCMCA, Col xxxxx, submitted a statement that if he still had the power under Article 60 of the UCMJ to reduce the sentence from x to y, he would.

LAW

4. Article 69(b), UCMJ, authorizes The Judge Advocate General to grant relief through modification or set aside, in whole or in part, of the findings or sentence, or both, in certain cases not reviewed under Article 69(a) or Article 66. Modification or set asides must be based in one of five specified grounds, including "the appropriateness of the sentence." Article 69(b), UCMJ.

5. The Judge Advocate General, *sua sponte,* or upon application, may amongst other actions, modify or reassess the sentence of a court-martial case which has become final in law but has not been reviewed

by the Air Force Court of Criminal Appeals or The Judge Advocate General. RCM 1201(b)(3). The sentence may be reviewed on any ground specified in RCM 1201(b)(3)(A), which includes "the appropriateness of the sentence." Applications may not be filed and are not reviewed until the convening authority has taken action, and review is completed pursuant to Article 64, UCMJ. AFI 51-201, para. 11.6.1.

DISCUSSION

6. Reasoning supporting the request, including citations when and where possible.

7. This is the rare case where the appropriateness of the sentence should be addressed under Article 69(b), and the level at which it can properly be addressed now is with The Judge Advocate General.

CONCLUSION & RELIEF REQUESTED

WHEREFORE, the Defense respectfully requests that The Judge Advocate General modify the sentence for AB xxxxx to x, thereby addressing the appropriateness of the sentence in this case.

Respectfully submitted,

TYLER J. SENA, Capt, USAF
Defense Counsel

Attachments:
1. Application of AB First M. Last, 2 pgs
2. Letter in support of modification, SPCMCA, 1 pg
3. Email in support of modification, Panel Member xxx, 2 pgs
4. Email in support of modification, Panel Member yyy, 1 pg
5. Confinement NCOIC letter, SSgt xxxxx, 1 pg
6. DD Form 2712, Prisoner Evaluations (Date range), 4 pgs

Fit to Advise

Keys to Strengthening Your Legal Assistance Program

BY LIEUTENANT COLONEL JIN-HWA L. FRAZIER, LIEUTENANT COLONEL RYAN D. OAKLEY, AND CAPTAIN RODNEY B. GLASSMAN

When a client walks through your door with a challenging issue, are you prepared?

When underscoring the importance of the U.S. Air Force Comprehensive Airmen Fitness standards, former Air Force Chief of Staff General Mark A. Welsh III said,

> "[o]ur job is to fight and win the nation's wars. We'll never be good enough at it; we've got to get better every day…. Our focus is on the well-being and care for ourselves, each other and our families so we can be more resilient to the many challenges military service brings."[1]

This statement rings equally true about a judge advocate's fitness to advise and assist clients on legal-assistance matters. Providing legal assistance is something we do daily, but how do we maximize the end result for the client? When a client walks through your door with a challenging issue, are you prepared? If not, do you know where to get additional training? What tools and resources can your office rely upon?

It is our duty to be "fit to advise" so that as attorneys, partnering with paralegals, along with other on-and-off-base entities, we can provide for the well-being of all Airmen and their families so they can be more resilient to the many challenges military service brings. This is about quality—skilled, compassionate customer service—not quantity. It's also about effective teamwork. Does your office train and work together or operate as a collection of independent contractors? Are you building best practices

[1] SSgt Carlie Leslie, *Comprehensive Airman Fitness: A Lifestyle and Culture*, Air Force Public Affairs Agency OL-P, AF.Mil (19 August 2014), http://www.af.mil/News/ArticleDisplay/tabid/223/Article/494434/comprehensive-airman-fitness-a-lifestyle-and-culture.aspx.

for the future or simply trying to survive walk-in days? And are you leveraging local and national resources to expand the potential courses of action for clients?

As we saw at this year's inaugural Air Force Legal Assistance (In-Residence) Course at Maxwell Air Force Base, by focusing on the overall health of the office legal-assistance program, availability of services (*e.g.* appointments and walk-in hours), the quality of customer service, and the feedback of your staff members and clients, it is possible to elevate your office legal-assistance program to one of the most critical resources provided by a base legal office by Wing leadership. Ultimately, it's the ability for you, regardless of rank, to provide effective counsel and support in a manner consistent with the quality, resources, and consistency every Airman, dependent, and retired member deserves.

ATTITUDE IS (ALMOST) EVERYTHING

In his book, *Start With Why*, author Simon Sinek states most organizations are preoccupied with what they do and how they do it, but overlook why they exist in the first place.[2] Yet, "the why" is the most important part of this analysis; if people don't understand this, they don't buy in. In a base legal office, this includes both your staff members and your customers. The key to a successful legal-assistance program starts with a positive attitude. This puts the client first and reflects the ultimate goal of legal assistance—improving readiness. Helping people solve problems means they can return their focus back to the mission.

Leaders at all levels should be mindful of the priority assigned to and their outlook towards legal assistance. Leadership and support for a vibrant legal-assistance program does not mean a staff judge advocate (SJA) should draft wills regularly or manage the office legal-assistance program. However, if the provision of legal assistance is relegated to an "additional duty," attorneys, paralegals, and, most importantly, our clients may receive an unintended message. Instead, leaders should create an environment which encourages innovation, promotes collaboration, and supports going the extra mile for the client. For example, if you are a SJA or deputy staff judge advocate (DSJA), do you share your expectations with your office team on how they should serve the base community? Is everyone putting in their fair share, or are there perceived disparities in attorney schedules? Is everyone all-in, or alternatively, getting burned out?

Moreover, we must recognize that our clients are also juggling a number of other tasks to take care of their families, their units, and the mission. They are investing some of their precious time to visit the base legal office to help them solve an important problem. What is the client's first impression when he or she arrives at the legal office? Are they treated respectfully, diligently, and skillfully—so they can return their focus to accomplishing the mission? We've all had a negative customer service experience where we've felt treated like a number, and concluded we wasted our time and won't go back. Likewise, negative word of mouth spreads like wildfire. To paraphrase General Colin Powell, the day service members stop bringing you their problems is the day you stopped being of service to them. "They have either lost confidence that you can help them or concluded that you do not care. Either case is a failure of leadership."[3] Would you go to a new restaurant that had received overwhelmingly negative Yelp reviews or take your business elsewhere? Likewise, will our clients tell others to do so if their experience is subpar? Fortunately there is a way for us to grade ourselves and learn what we are doing right and what we can improve on. Here, you can review customer feedback on the Legal Assistance Website (LAWS). Every base, Numbered Air Force (NAF, and Major Command (MAJCOM) legal office can pull reports in WebLIONS and LAWS to spot trends.[4] The vast majority of feedback on LAWS is overwhelmingly positive—be sure

[2] Simon Sinek, Start With Why: How Great Leaders Inspire Everyone To Take Action 16 (2011).

[3] Oren Harari, *Quotations from Chairman Powell: A Leadership Primer*, GovLeaders.org, http://govleaders.org/powell.htm (last visited 16 August 2016).

[4] WebLIONS also allows your leadership team the ability to quickly run reports on client savings, which may be helpful for performance reports, decorations, and individual/group awards.

Legal-assistance training is not only an important inspection item, but the lifeblood of a successful program.

to share with your team and make sure their hard work does not go unnoticed.[5]

TRAINING FOR TOMORROW

Legal-assistance training is not only an important inspection item, but the lifeblood of a successful program. The key to developing a successful training plan for your office legal-assistance program is to develop a timeline and calendar and incorporate it into weekly staff meetings, monthly trainings, or other structured office activities. As a once four-time SJA shared, rather than simply providing "white space" into the office training calendar, it is important that legal assistance program materials are infused, on a regular basis, and addressed as an office-wide priority. If events and conflicting schedules keep overcoming an office's training plan, perhaps other meeting schedules, as well as legal-assistance hours, need to be reassessed. There are also time-saving tools available on Campus and FLITE KM (which has replaced CAPSIL) to make an SJA/DJSA's job easier. Currently, there are over 40 recorded legal assistance webcasts and the Notary Training Toolkit, all accessible in FLITE KM's Legal Assistance Learning Center.

Effective training is also critical for maintaining ethical standards. Under Rule 5.1 of the Air Force Rules of Professional Conduct supervisors can be responsible for the ratification of or failure to correct a subordinate's mistakes.[6] Supervisors can reemphasize the fundamental Air Force ethical rules on competence, diligence, communication even when training on specific and substantive subject matter, such as drafting wills. To prepare for inspections, there are three requirements for legal-assistance training which must be met. Each requirement has a timeframe for compliance to which offices need to pay attention.

The Annual Legal Assistance Refresher

Each January, AFLOA/CLSL broadcasts this important update to the field on changes in law and policy. Viewing is mandatory for all active duty, ARC, and covered civilian JAG Corps members, who must watch the recorded webcast no later than 15 April of the year.[7]

Military Continued Legal Education (MCLE) in Legal Assistance

All uniformed JAGs and covered civilian attorneys are required to certify completion of four hours of

[5] When legal offices or higher headquarters want to access LAWS survey data, there are two different options for how to view it. If you select the summary report, it will give you the total number of tickets processed and total number for surveys for the report period, as well as your average ratings. The summary report also lists the average ratings for individual legal office members. If you pull the client survey answer report, you will see every individual customer survey. In addition to the ratings, you can see any comments that the client may have made about the office.

[6] U.S. Dep't of Air Force, Instr. 51-110, Professional Responsibility Program att. 2 (27 July 2015) (incorporating the Air Force Rules of Professional Conduct, Rule 5.1) [hereinafter, AFI 51-110].

[7] U.S. Dep't of Air Force, Instr. 51-504, Legal Assistance, Notary, and Preventive Law Programs para. 1.14.1 (Incorporating Change 3, 24 May 2012) [hereinafter, AFI 51-504].

MCLE in a set time period.[8] You can rely on a broad range of training to satisfy your MCLE requirement. For example, legal assistance in-residence courses, annual refreshers, webcasts, Campus distance learning modules, sessions at Keystone and Annual Survey of the Law, ABA LAMP CLE. and SJA approved office-wide training all qualify as MCLE. The purpose of this mandatory training requirement is to provide the opportunity for all JAGs and civilians with legal assistance in their position description to gain new skills in areas that will assist in the provision of effective, competent legal assistance to their clients.

Advanced Core Training (ACT)

In accordance with AFI 51-504, paragraph 1.14.2, this online distance learning training is intended to provide legal assistance attorneys with in-depth instruction in key practice areas. Two of the four ACT modules are currently available to the field on AFJAGS new distance learning site, Campus (ACT SCRA/USERRA and ACT Wills and Estates). AFLOA/CLSL is working with AFJAGS to field the two remaining ACT modules on Consumer Law and Family Law, and will update the field when this training is available.[9]

Additional legal assistance training can be taken in various in-residence courses through the Army and Air Force JAG Schools. In 2016, AFJAGS offered the first ever in-residence Air Force Legal Assistance Course, open to all levels of Air Force active duty and Air Reserve Component JAGs and paralegals. The Course focused on the three primary areas for legal assistance: family law, estate planning and consumer law/cats and dogs. Through the use of lectures, seminars, and daily exercises, all overseen by Subject Matter Experts (SMEs), legal assistance practitioners were able to learn and apply their training in a school environment.

PREVENTIVE LAW

As Benjamin Franklin once said, "[a]n ounce of prevention is worth a pound of cure."[10] Our Air Force preventive law and legal-assistance programs will continue to be critical in strengthening not only the individual resilience of military families, but also the combat readiness of the United States Air Force. Air Force Instruction 51-504, paragraph 3.2.1.5., reads "[n]o legal assistance program can succeed without a vigorous preventive law program." Offices should be vigilant to identify novel legal concerns, such as new consumer scams, and promptly develop and disseminate educational materials. Whether through Right Start and commander's calls, key spouse meetings, pre-deployment training, retiree appreciation days, or events outside of normal hours, developing new avenues to disseminate important information as a component of your legal assistance program can pay huge dividends and, most importantly, deliver significant value to your base community.

Successful legal offices have built an effective communications plan as a cornerstone to promote their legal assistance, preventive law, and tax- assistance programs. Examples include introducing a monthly publication such as the "Barracks Attorney" or simply working with Public Affairs to have attorneys and paralegals write articles for the base newspaper (or to be distributed through social media). Pick the fora that work best for your base community, so that your office team will be a visible presence on the installation.

BUILDING A NETWORK OF OPTIONS

Legal Assistance and Outreach are captured in our JAG Corps Strategic Goals because a robust preventive-law program and proactive approach to outreach and engagement with your community supports your command and our Corps. Sometimes the nature of a client's legal problem may exceed the competence of the initial attorney

[8] *Id.*, para 1.14.3. Specifically, all active duty judge advocates, as well as any civilian attorney whose core document or position description references legal assistance, must certify completion of four hours of MCLE in legal assistance each year. All ARC judge advocates must certify completion of four hours of MCLE in legal assistance every other year.

[9] Active duty judge advocates assigned to an office that provides legal assistance must complete all available ACT modules within 120 days of assignment. ARC judge advocates assigned or attached to an office that provides legal assistance, as well as judge advocates assigned at Air National Guard state headquarters offices, must complete all four ACT modules within one year of assignment or attachment. Any civilian attorney whose core document or position description references legal assistance must complete all four ACT modules within 120 days of employment in the position. See AFI 51-504, *supra* note 7, paras. 1.14.2.1—1.14.2.4.

[10] Benjamin Franklin, Poor Richard's Almanack (1732).

Ultimately, legal assistance is about enhancing readiness and supporting our fellow Wingmen so they can accomplish the mission.

consulted or the scope of the Air Force legal-assistance program. Over the last decade, many bases around the world built bridges with government agencies, local bar associations, and pro bono organizations. One of the most powerful off-base time investments that an SJA (but not necessarily only the SJA) can make within the greater community is to build relationships and meet regularly with their local and state bar associations. Ultimately, our clients reap the benefits by having a broader menu of options. Ideally, these referral resources pick up where the scope of the base legal assistance program ends while often complimenting base programs, thus expanding the range of possibilities for clients.

Across the whole of government, the Air Force benefits from cooperative working relationships with the Department of Justice, the Consumer Financial Protection Bureau, sister Services, numerous Federal partners, as well as State Attorneys General. Additionally, if civilian legal representation is needed, the ABA's Military Pro Bono Project ("Project") can locate volunteer attorneys to assist eligible clients on more complex issues such as landlord-tenant law, consumer law (including bankruptcy), family law, trusts and estates, probate involving next of kin, guardianship, and employment law.[11] Last year, the Project placed over 177 service member cases representing over 3,600 donated hours of pro bono services for our service members, valued at over $1 million.[12] If you want to talk to a civilian subject-matter expert in a particular practice area, the ABA's Operation Stand-by allows for attorney-to-attorney advice. The list of participating attorneys in Operation Stand-by is accessible to those registered with the ABA Military Pro Bono Project.[13] Likewise, the American Immigration Lawyers Association launched its Military Assistance Program in 2008, and has assisted over 1,000 military families with immigration issues.

While the above examples focus on programs with a nationwide reach, there may be untapped resources right outside your front door. Encourage your judge advocates and paralegals to seek out available referral partners. Think broadly. Identify the specific needs and unique challenges of your local community, then tailor your legal services to meet those needs. For example, this year's winner of the ABA's Legal Assistance for Military Personnel Distinguished Service Award (group category), the legal office at the 81st Training Wing at Keesler Air Force Base, Mississippi, created an innovative partnership with the U.S. Citizenship and Immigration Services (USCIS). The legal office recruited and brought UCCIS officials on-base to assist technical training students with their immigration process. This arrangement expedited the path to citizenship for the Air Force's newest members while ensuring there were no gaps in training. Moreover, the legal office took the lead in organizing the first-ever naturalization ceremony on-base, bringing together 50 leaders to cheer for Airmen becoming citizens.

Another example to emulate comes from MacDill Air Force Base, where the 6th Air Mobility Wing legal office partnered with the local bar association's Military and Veterans Affairs Committee (MVAC). Gaining access to MVAC's robust legal services and

[11] A legal assistance attorney will make clear to the client that a referral to bar referral services operated by the ABA or state or local bar associations, legal aid or law school clinics, or a list of local attorneys maintained by the legal office in locations not covered by a referral service does not constitute a federal or Air Force endorsement of any of the individual attorneys participating in these services. *See* AFI 51-504, *supra* note 7, paras. 1.7, 1.7.8.

[12] ABA Military Pro Bono Project, http://www.militaryprobono.org (last visited 16 August 2016).

[13] Please note that clients should not communicate directly with Operation Stand-By volunteers. *See Operation Stand-By: Seek Attorney-to-Attorney Advice from a Civilian Attorney*, ABA Military Pro Bono Project http://www.militaryprobono.org/about/item.2727-Operation_StandBy (last visited 16 August 2016).

continuing legal education program, 6 AMW/JA personnel were able to secure additional pro bono resources to help active duty service members connect with local attorneys. This partnership quickly obtained a volunteer attorney to help a client complete emergency guardianship paperwork, so that the client could care for his minor siblings. Additionally, the legal office recruited 20 mentors to support an emerging partnership with the Veterans Treatment Court, providing access to care and an alternative to criminal punishment. The 6 AMW/JA also established a first-rate relationship with the Veterans Pro Bono Initiative Team directed by Stetson University College of Law, opening up an additional avenue of free legal services for eligible veterans.

As you identify referral resources in your local area, one recognized best practice is to develop your own Legal Assistance Prescription Pad. Designed for use at the end of the client consultation, the Prescription Pad provides a quick-reference guide for most-utilized resources while also allowing clients to leave with helpful information, clear instructions, and added confidence.[14] Thus, your preventive-law program can build a network of options, especially for cases that may not justify the expense of hiring an attorney or for clients who cannot afford one.

ARE YOU READY?

There is no greater opportunity to interact with and make a positive difference for active duty, dependent, and retired members than through our legal-assistance programs. Across the Air Force, we see an average of over 4,500 clients per week or 70 visits per base. In 2015 alone, this equated to 199,173 total clients served, 43,566 wills drafted, 189,857 powers of attorney and 364,811 notaries. When combined with our base tax programs, these services saved Airmen over $18 million. As The Judge Advocate General has stated, "legal assistance is a core competency that every JAG Corps member, even those not currently providing legal assistance, must stay abreast of. To those serving on the front lines of legal assistance, thank you for your enthusiasm, dedication, and innovative problem-solving in performing our legal-assistance mission, even as you juggle a number of other responsibilities at the base level. You are making a huge difference-every day, each appointment, one client at a time."[15] Ultimately, legal assistance is about enhancing readiness and supporting our fellow Wingmen so they can accomplish the mission. When a challenging time comes, you will be fit to advise. R

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[14] Capt Rodney Glassman & SrA Diego Bermudez, "*Exporting Best Practices to Your Next Base,*" 40 Reporter, no. 1 (2015).

[15] Air Force Judge Advocate General Corps, Online News Service, Volume XV, Issue 30, (29 July 2015).

Exceptional Transitional Compensation

Help for Family Member Victims When Discharge Happens Before the Offense is Adjudicated

BY MAJOR JANET C. EBERLE AND MS. TERESA G. WIDRICK

She left the marriage with no assets, relying on friends and family members who let her sleep on their couches.

In 2013 civilian authorities arrested and charged a Hill Air Force Base (AFB) maintenance Airman in the state of Utah for Simple Domestic Violence Assault against his spouse. The Hill AFB legal office submitted a request for jurisdiction, which the civilian authorities denied, and the member pled guilty in Utah State Court. The Airman received a letter of reprimand, an unfavorable information file entry, and placement on the control roster, which memorialized this misconduct in his military records. Rather than involuntarily discharge the Airman, the unit separated him through the Date of Separation Rollback Program. The Airman's foreign national spouse lacked a work visa and relied on the Airman for support. With the help of her Domestic Abuse Victim Advocate (DAVA), Ms. Nicole Sather, she obtained a work visa so that she could remain in the United States, work, and divorce her abusive husband. She left the marriage with no assets, relying on friends and family members who let her sleep on their couches. Ms. Sather and the Hill AFB legal office Victim Witness Assistance Program (VWAP) Coordinator, Mr. Jace Hall, searched for a way to help the victim. The abusive Airman was not administratively discharged on the basis of misconduct, nor court-

martialed for a dependent-abuse offense and thus his victim spouse did not qualify for traditional eligibility transitional compensation under Air Force Instruction (AFI) 36-3024, *Transitional Compensation for Abused Dependents*.[1]

In 2003, Congress expanded eligibility for transitional compensation to dependents of members separated for dependent abuse under 10 U.S.C. § 1059.

However, the Airman's spouse was eligible for another category of transitional compensation. In 2003, Congress expanded eligibility for transitional compensation to dependents of members separated for dependent abuse under 10 U.S.C. § 1059.[2] This new "exceptional eligibility" provides compensation in cases where the member abused their dependent, but was not administratively separated or court-martialed for their crime.[3] In 2008, Mr. Michael Dominguez, the Principal Deputy Under Secretary of Defense for Personnel and Readiness, issued a memorandum implementing the exceptional eligibility program and establishing the Secretaries of each Service as the approval authority for the compensation.[4] Unfortunately, in 2013, when Ms. Sather and Mr. Hall realized their victim met the requirements for exceptional eligibility transitional compensation, the Air Force did not yet have any application procedures in place. Utilizing templates and guidance from the Army, they drafted a request for transitional compensation under this basis of eligibility. Sixteen months, numerous phone calls, countless e-mails, and two VWAP Coordinators later, the Secretary of the Air Force approved the victim's transitional compensation. The victim received her first check of more than $19,000 and payments continued for 3 years past her husband's separation from the Air Force. Exceptional eligibility transitional compensation allowed her to move off her friend's couch into a place of her own, buy a car, and finally find independence from her abuser.

WHAT IS TRANSITIONAL COMPENSATION?

Transitional compensation allows for payments to victims of dependent-abuse offenses.[5] Dependent-abuse offenses are offenses committed "by a military member on active duty for more than 30 days involving abuse against a current spouse or a dependent child of the member."[6] These are criminal offenses as defined by the Uniform Code of Military Justice

[1] U.S. Dep't of Air Force, Guidance Memo. 2015-01 to Instr. 36-3024, Transitional Compensation for Abused Dependents para. 2.1 (19 November 2015) [hereinafter AFI 36-3024_AFGM 2015-01]. AFI 36-3024 does not refer to "traditional eligibility," however, the authors utilize this category to delineate transitional compensation eligibility that existed prior to the 2003 "exceptional eligibility" expansion under 10 U.S.C. § 1059.

[2] 10 U.S.C. § 1059 (2012) ("Dependents of members separated for dependent abuse: transitional compensation; commissary and exchange benefits.").

[3] National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, § 573 (2003).

[4] Memorandum from Principal Deputy of Pers. & Readiness, Office of the Under Sec'y of Defense to Serv. Sec'ys, Dept. of Defense et al., subject: Exceptional Eligibility for Transitional Compensation for Abused Dependents (14 April 2008).

[5] AFI 36-3024_AFGM 2015-01, *supra* note 1, para. 4.

[6] *Id.*, para. 3.1.

(UCMJ) or the criminal code of the jurisdiction where the abuse occurred. While AFI 36-3024 gives examples of qualifying offenses that include sexual assault, rape, battery, murder, and manslaughter,[7] any criminal offense, even a simple assault, may be eligible for transitional compensation. Transitional compensation involves two categories of eligibility: traditional and exceptional.[8] Traditional eligibility requires that the active duty member be administratively separated, voluntarily or involuntarily, with the basis including a dependent-abuse offense; or receive either a punitive discharge or forfeitures of all pay and allowances as punishment for conviction of a dependent-abuse offense.[9] For example, if charges of assault against their spouse are referred to a court-martial, and the member either requests discharge in lieu of court-martial or is found guilty and receives a punitive discharge, or forfeitures of all pay and allowances, then their spouse is eligible for compensation.[10] Alternatively, if the misconduct is adjudicated in civilian court and the member is involuntarily separated for the misconduct against their spouse, the spouse would also be eligible.[11] Exceptional eligibility comes into play when the member is separated, either voluntarily or involuntarily, for reasons not related to the dependent-abuse misconduct.[12] This could include separation due to a date of separation rollback, as in the case described above, or a member reaching high-year tenure.[13]

Dependents eligible for transitional compensation include spouses and former spouses who were married to the member at the time of the abuse.[14] Eligible individuals also include unmarried children who lived with the member during the abuse who are under 18 years of age; those who are over 18 years of age, but incapable of supporting themselves to due to mental or physical incapacity and rely on the member for at least one-half of their support; and those who are over 18, but under 23 years of age and are enrolled as a full-time student and rely on the member for more than half of their support.[15] This includes biological, adopted, and step-children of the member.[16] Additionally, the November 2015 Guidance Memorandum that accompanies AFI 36-3024 expanded the definition of dependent child to include children of the member who were in utero at the time of the abuse and were later born alive.[17]

Payments for transitional compensation are made to the spouse and increase for each dependent child in their custody.[18] If the dependent child does not live with the spouse, but maintains legal custody, then the spouse can receive the child's portion of the compensation.[19] If there is not an eligible spouse, such as when the dependent spouse is deceased or the spouse is a military member and not the dependent of the abuser, then payments are made to the dependent children.[20] Dependent spouses become ineligible for payment if they remarry, cohabitate with the member, or were active participants in the abuse.[21] In this case, payments may be made to the dependent children as long as they do not reside with the member or the ineligible dependent spouse.[22] Dependent children lose their eligibility if they reside with the member while receiving payments.[23] Eligible dependents receive transitional compensation payments for 36 months[24] and are paid from a dedicated centralized Air Force fund. The Air Force does not consider these payments to be taxable income.[25]

[7] *Id.*

[8] *Id.*, paras. 2 and 4.1.

[9] *Id.*, para. 2.1.

[10] *Id.*

[11] *Id.*

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

[13] High-year tenure represents the maximum number of years enlisted Airmen may serve on active duty based on the current grade held or, if applicable, their projected promotion grade. U.S. Dep't of Air Force, Instr. 36-3023, Service Retirements para. 2.10 (18 September 2015). This is not an exhaustive list of situations in which exceptional transitional compensation could be granted, but are common situations in the experience of the authors.

[14] AFI 36-3024_AFGM 2015-01, *supra* note 1, para. 5.1.1.

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

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

[17] *Id.*, para. 3.2.4.

[18] *Id.*, para. 5.1.1.

[19] *Id.*

[20] *Id.*, para. 5.1.3.

[21] *Id.*, para. 5.5.

[22] *Id.*, para. 5.1.2.

[23] *Id.*, para. 5.1.

[24] *Id.*, para. 5.2.2.

[25] *Id.*, para. 5.7. The instruction does not

Transitional compensation under traditional and exceptional eligibility compensation is an incredible asset for victims of dependent abuse.

PROCESSING EXCEPTIONAL ELIGIBILITY APPLICATIONS

The process to apply for exceptional transitional compensation became much easier in November 2015, when the Air Force published a guidance memorandum to AFI 36-3024, detailing who is eligible and how to apply for exceptional transitional compensation.[26] Additionally, the personnel community published a Total Force Personnel Services Delivery Guide (PSDG) in December 2015 detailing how to process both traditional and exceptional eligibility transitional compensation requests on behalf of abused dependents.[27]

Applications for exceptional transitional compensation require Department of Defense Form 2698, *Application for Transitional Compensation*, completed by the Military Personnel Customer Support Section and signed by the installation commander.[28] The application also includes a memorandum signed by the installation commander requesting the exceptional eligibility, confirming the former member engaged in a qualifying dependent abuse offense, and was separated from active duty other than through a misconduct based discharge or court-martial. Attachments to the memorandum must include documentation showing the date of entry on active duty, date of expiration of active obligated service, evidence of the dependent-abuse offense, and basis for separation. The documentation and memorandum should sufficiently detail the circumstances behind the member's separation. Finally, the application requires a direct deposit sign-up form and, if applicable, court orders for custody and guardianship of the dependent child.[29] Completed exceptional eligibility applications are submitted by the Military Personnel Customer Support Section through Air Force Personnel Center to the Headquarters Air Force level for approval by the Secretary of the Air Force.[30]

OTHER CHANGES TO TRANSITIONAL COMPENSATION

In addition to detailing the process for exceptional eligibility, the guidance memorandum to AFI 36-3024 makes some important changes to the transitional compensation program. Previously, if a member's remaining active duty service commitment was less than 36 months, transitional compensation payments would only be made for the greater of 12 months or the unserved portion of their ser-

specify the authority for the tax treatment of the compensation.

[26] *See id.*

[27] U.S. Dep't of Air Force, Total Force Personnel Services Delivery Guide, Transitional Compensation for Abused Dependents (3 December 2015) [hereinafter PSDG].

[28] AFI 36-3024_AFGM 2015-01, *supra* note 1, para. 10.11.1.1 ("The installation commander or designee signs block 22a of DD Form 2698 and includes the words, 'Per the OSD Memo dated 14 April 2008, DoD Policy Memorandum.").

[29] *Id.*, para. 10.11.1.5.

[30] *See id.*, para. 10.11.1; PSDG (providing more detailed information on how the application is processed).

vice commitment.[31] Now payments are made for 36 months regardless of the length of the member's remaining service commitment.[32] Additionally, the guidance memorandum changed the criteria for determining when a child is considered "dependent." Previously the determination was made as of the date when the member was convicted or separated for dependent-abuse.[33] Now the determination is made as of the date when the court-martial is approved or the administrative separation is initiated.[34] Finally, dependents' medical and dental benefit eligibility is no longer contingent on the dependent having medical or dental issues associated with the abuse.[35] For example, previously a dependent spouse could receive medical and dental care for surgery necessary to reconstruct their jaw if it was broken by the member. Now dependents are eligible for health care benefits while receiving transitional compensation payments no matter if they are seeking treatment for abuse-related injuries or everyday ailments.[36]

CONCLUSION

Transitional compensation under traditional and exceptional eligibility compensation is an incredible asset for victims of dependent abuse. Educating your victims about transitional compensation early in the process will aid in gaining their cooperation and facilitate their transition to life without the abuser. The payments will help answer the question of "what happens to us?" when the active duty member is court-martialed or separated from the Air Force. The expansion of the program to include dependent victims whose abuser was not administratively separated or court-martialed for the abuse means more victims are able to recover and have a fresh start at life. Actively engaging victims early in the process and providing information on how the Air Force will continue to help them can only improve our success at prosecuting and separating members who abuse their family.

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[31] U.S. Dep't of Air Force, Instr. 36-3024, Transitional Compensation for Abused Dependents para. 5.2.2 (15 September 2003) [hereinafter 2003 AFI 36-3024].

[32] AFI 36-3024_AFGM 2015-01, *supra* note 1, para. 5.2.2.

[33] 2003 AFI 36-3024, *supra* note 31, para. 5.1.4.

[34] AFI 36-3024_AFGM 2015-01, *supra* note 1, para. 5.1.4.

[35] 2003 AFI 36-3024, *supra* note 31, para. 5.9.1.

[36] AFI 36-3024_AFGM 2015-01, *supra* note 1, para. 5.9.1.

DISPUTE RESOLUTION WITHOUT SELLING THE FARM

The Erosion of Traditional Forms of Alternative Dispute Resolution in Afghanistan, the Misplaced Emphasis on the Formal Legal System, and the Resurrection of the Taliban

BY MAJOR SHANE A. MCCAMMON

As these officials patiently explained, things were done differently in Afghanistan.

In February 2011, Colonel Abdullah[1] of the Afghan National Army's (ANA) Judge Advocate General Corps reported wide-spread abuse in Afghanistan's flagship military hospital.[2] He photographed patients—Afghan soldiers wounded in battle—who were starving in their hospital beds.[3] Colonel Abdullah also documented instances where nurses demanded bribes from wounded soldiers. Unable to afford to pay those bribes, the wounded soldiers defecated on themselves and urinated in their beds.[4] Medication was hard to find, even for the amputees, because many of the hospital's doctors and pharmacists had pilfered the drugs to sell in Kabul's robust black market.[5] An investigation revealed that the hospital leadership either was directly involved in the corruption or turned a blind eye to it.

Colonel Abdullah was livid at the treatment of the patients, and so too were his NATO mentors. Most of

[1] To protect his identity, Colonel Abdullah's name has been changed.

[2] Interview with Colonel Abdullah, Afghan National Army Staff Judge Advocate, in Kabul, Afghanistan (2011) (on file with author).

[3] *Id.*

[4] *Id.*

[5] *Id.*

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these mentors were American military lawyers who were experienced prosecutors, and they began encouraging and even demanding that the hospital leadership be prosecuted in the country's nascent military justice system.[6] This system—largely modeled on the U.S. military-justice system—had struggled to gain traction among Afghan military leaders and attorneys, many of whom did not see the benefits of a formal legal process and its emphasis on retributive justice.

But much to the mentors' chagrin, individuals within the higher echelons of the ANA and the Ministry of Defense (MoD) were hesitant to initiate criminal proceedings against anyone at the hospital. As these officials patiently explained, things were done differently in Afghanistan. Prosecuting any wrongdoers, explained the Afghan leaders, would not only go against traditional Afghan principles but stood a very real chance of upsetting the delicate peace that had been forged between previously warring tribes and ethnic groups. The NATO mentors often left their meetings with ANA and MoD leaders in disgust, and privately grumbled about the corruption in the "god-forsaken" country in which they had been dumped for 6- or 12-month deployments.[7] Ultimately, the hospital commander avoided any prosecution, but he was removed from his position and stripped of his rank. While the firing and loss of rank was a cause of great shame in Afghan culture, the NATO mentors were unsatisfied.

What the NATO mentors did not understand is that Afghanistan *is* different in the way in which its people prefer to settle disputes. Rather than adhere to a Western model of formal, adversarial, and often litigious dispute resolution in which retribution and a winner-takes-all approach govern, Afghans traditionally have used a form of alternative dispute resolution (ADR) which stresses restorative justice and community harmony. For many Westerners, this form of ADR—known as the "*jirga*"—is foreign and mistakenly believed to contribute to the corruption plaguing Afghanistan. Consequently, the Western legal advisors who have flooded the country since 2003 have tried to reduce the use and impor-

What the NATO mentors did not understand is that Afghanistan is different in the way in which its people prefer to settle disputes.

[6] The author of this paper was deployed to Afghanistan from November 2010 to May 2011, as part of the NATO Training Mission-Afghanistan (NTM-A) program. The author was part of a four-person team responsible for mentoring the members of the Afghan National Army's Judge Advocate General Corps assigned to the Afghan Ministry of Defense's headquarters in Kabul. The team consisted of United States and Canadian personnel, and its members mentored the one-star Judge Advocate General of the ANA (Brig. Gen. Karim), his staff, teams of headquarters-level prosecutors and military investigators, and staff judge advocates located throughout Kabul. The author also accompanied Brig. Gen. Karim on site visits throughout Afghanistan, during which the NTM-A staff would mentor ANA military lawyers and investigators located in the field. Notes from the author's experiences, including minutes from the almost daily meetings with ANA legal personnel, are on file with the author.

[7] *See also* Sarah Chayes, Thieves of State: Why Corruption Threatens Global Security 140–43 (2015) (detailing the intervention of President Hamid Karzai in a close friend's corruption investigation, causing U.S. federal prosecutors assigned to mentor their Afghan counterparts to lodge protests and attempt unsuccessfully persuade Afghan officials to prosecute the president's friend).

More than 300 leaders and elders attend a *Jirga*
(Air Force photo by Captain Tony Wickman/RELEASED)

tance of the *jirga* and replace it with a more Eurocentric form of dispute resolution.[8]

Despite the best intentions of these advisors, their efforts have been disastrous. Rather than trying to create a legal infrastructure for a more modern Afghanistan, the superimposition of Western ideals on a culture unfamiliar with retributive justice have eroded the rule of law in many parts of the country.[9] In this vacuum, the Taliban—experts in the interpretation of sharia law and the use of the *jirga*—have re-established their influence and presence in areas starved of a familiar form of dispute resolution.[10] To reverse the Taliban's growth—and to prevent similar mistakes occurring in other places in which NATO may find itself fighting in the future—Western legal advisors must learn from their mistakes and strive to understand, respect, and allow to flourish a country's traditional form of ADR. By incorporating and even embracing indigenous forms of ADR rather than trying to replace them, NATO will be better poised to help re-establish the rule of law in war-torn nations.

Part I of this article examines the sources of Afghan law and discuss the role the *jirga* plays in Afghan society. Part II then analyzes the relative insignificance of a Westernized formal rule of law within Afghan society, and details the deleterious effect of imposing a formal rule of law on Afghan society and how the diminished use of the jirga created a dispute-resolution vacuum. Finally, Part III will advocate for the incorporation of the jirga in future rule of law efforts within Afghanistan. While the jirga is not a perfect system of ADR—particularly in the way in which women and other relatively powerless individuals are treated—a system that incorporates both Western and traditional forms of dispute resolution is the best model for a future Afghanistan.

Using an informal, community-based form of ADR is critical in Afghanistan….

Part I

AFGHAN LAW AND THE USE OF THE JIRGA

Shari'a Law:

To fully understand the importance and use of the *jirga*, one must first recognize that Afghanistan's legal system consists of a tense balance between competing sources of law.[11] These sources of law spring from the many empires that have invaded Afghanistan over the centuries: from Alexander the Great to the Arab caliphate, Victorian-era Britain, Czarist Russia, and the Soviet Union. Each invading army left its own imprint on Afghan society, but none was as influential as the Arab caliph-

[8] Katherine McCullough, *Out with the Old and in with the New: The Long Struggle for Judicial Reform in Afghanistan*, 19 Geo. J. Legal Ethics 821, 821–22 (2006).

[9] *See id.*; *see also* Azam Ahmed, *Taliban Justice Gains Favor as Official Afghan Courts Fail*, N.Y. Times (31 January 2015), http://www.nytimes.com/2015/02/01/world/asia/taliban-justice-gains-favor-as-official-afghan-courts-fail.html?_r=0.

[10] Ahmed, *supra* note 9.

[11] Dana Cook-Milligan, *NOTE: What Is Really so Bad About a Different Rule of Law? The Afghan Legal System Reanalyzed,* 41 Hastings Const. L.Q. 205, 207 (2013).

Individuals who do not agree with the majority's opinion not only can express their own views, but they may leave the *jirga* and therefore are not bound by the majority's decision.

ate's contribution to Afghanistan's rule of law. With the caliphate came Islamic religious law, or *shari'a*.[12] Under the form of *shari'a* that exists in predominantly Sunni countries like Afghanistan, clerics (collectively known as "*ulema*") who specialize in the law interpret the intricacies and complexities of *shari'a* and issue opinions (known as "*fatwas*") for the religious community.[13] Despite its reliance on the issuance of formal opinions from the *ulema*, *shari'a* is not a formalized legal system.[14]

Customary law—the power of Pashtunwali and its form of ADR, the *"jirga"*

Customary law is "the means by which local communities resolve disputes in the absence of (or opposition to) state or religious authority."[15] Customary law derives from a community's shared cultural and ethical practices.[16] Even when unwritten, customary law can have a powerful binding effect on its members.[17] In Afghanistan, customary law plays a critical role in dispute resolution. The most widespread form of Afghan customary law is *Pashtunwali*.[18] One of the core tenets of *Pashtunwali* is its form of ADR, the *jirga*.[19]

The *jirga* is "an open forum that puts great stress on the nominal equality of the participants."[20] *Jirgas* are used to settle disputes ranging from minor bodily harm and grazing boundaries to murder and violent conflicts between different villages over communal land.[21] The *jirga* places "strong emphasis on reconciliation and making peace among disputants."[22] The ultimate goal is to promote restorative justice and "help to restore peace and dignity among the victims, offenders, and the community."[23] Participants must consent to resolving their dispute through the *jirga*.[24] The participants sit in a circle and everyone has an equal right to speak.[25] Rather than vote, the participants decide the outcome based on consensus—a process that can take months.[26] Individuals who do not agree with the majority's opinion not only can express their own views, but they may leave the *jirga* and therefore are not bound by the majority's decision.[27] The *jirga* can collapse if

[12] *Id.*

[13] *Id.* at 208–09 (citing Toni Johnson & Lauren Vriens, *Islam: Governing Under Sharia*, Council on Foreign Rel. (25 July 2014), http://www.cfr.org/religion/islam-governing-under-sharia/p8034).

[14] *Id.* at 209.

[15] *Id.* (quoting Thomas Barfield, *Culture and Custom in Nation-Building: Law in Afghanistan*, 60 Me. L. Rev. 347, 351 (2008)).

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *See id.*

[20] Thomas Barfield, Neamat Nojumi, and J. Alexander Thier, *The Clash of Two Goods: State and Nonstate Dispute Resolution in Afghanistan,* in Customary Justice and the Rule of Law in War-Torn Societies 159, 166 (Deborah H. Isser ed. 2011).

[21] Ali Wardak, *State and Non-State Justice Systems in Afghanistan: The Need for Synergy*, 14 U. Pa. J.L. & Soc. Change 411, 418 (2011).

[22] *Id.*

[23] *Id.* (internal citation omitted).

[24] Cook-Milligan, *supra* note 11, at 211.

[25] *Id.*

[26] *Id.* (citing Barfield, *supra* note 20).

[27] *Id.*

too many of its members leave, but members may face expulsion from the community if they quit the *jirga*.[28] By promoting notions of equality and consensus-based decision-making, the jirga attempts to fulfill its overreaching goal of restoring the community's harmony and avoid revenge-based blood feuds.[29]

Using an informal, community-based form of ADR is critical in Afghanistan, which traditionally has had a weak central government unable to effectively penetrate the area outside of Kabul due to inaccessible terrain and tight tribal bonds.[30] Given the relative weakness of the central government, most Afghans simply cannot rely on or have confidence in the Kabul-based state to promptly or effectively resolve disputes. Through the use of *Pashtunwali*'s *jirga* system, however, individuals living throughout Afghanistan—even in the most remote, mountainous regions—"can have complete, or near complete, confidence in the available local remedy without involving the state."[31]

The *jirga* system is not perfect, however. There are two key problems with the *jirga* system: (1) its exclusion and treatment of women, and (2) its potential to be influenced by local warlords and strongmen. Each will be discussed in turn.

First, women largely are excluded from the *jirga*.[32] Further, because they generally are excluded from the process, women also struggle to obtain justice through the *jirga*.[33] Even more problematic than the lack of access, however, is the occasional practice of using women as bargaining chips or even as payment to settle a dispute between men.[34] While the forced marriage of women to settle a dispute is increasingly rare, its existence "has serious implications for the human rights of women in Afghan society, and for their fundamental freedoms."[35] It is important to note, however, that forced marriages and the general exclusion of women from the jirga are neither inherent nor "an outcome of community-based dispute resolution or customary law itself, but [are] instead a consequence of prevailing gender roles and relations in Afghanistan more widely."[36]

In addition to the treatment of women, the jirga suffers from its susceptibility to influence by local warlords and strongmen.

[28] *Id.*

[29] *Id.* (citing Barfield, *supra* note 20).

[30] *See id.* at 211 (citing William Maley, *The Rule of Law and the Weight of Politics: Challenges and Trajectories*, in The Rule of Law in Afghanistan: Missing in Inaction 61, 68 (Whit Mason ed., 2011)).

[31] *Id.*

[32] Wardak, *supra* note 21, at 419. Wardak points to data collected by the United Nation's Centre for Policy and Human Development (CPHD). *Id.* at 419, n.41. The CPHD sampled 2,339 men and women from 32 of Afghanistan's 34 provinces. *Id.* at 419, fig. 4. The CPHD found that "ordinary elders" always participated in the jirga 65 percent of the time and sometimes participated 25 percent. *Id.* Religious leaders—mullahs—always participated 36 percent of the time; they sometimes participated 43 percent of the time. *Id.* Similarly, local leaders either always or sometimes participated 67 percent of the time. *Id.* In contrast, the survey respondents indicated that women always participated just 2 percent of the time and only sometimes participated 6 percent of the time. *Id.* at 420. In fact, the respondents indicated that women rarely participated 21 percent of time and never participated 67 percent of the time. *Id.*

[33] *See id.* at 420 (noting that the lack of female participation "not only has serious implications for gender equality within these local institutions of dispute settlement, but for the actual delivery of justice to women at a local area").

[34] *Id.*

[35] *Id.*

[36] *Id.* (citing Noah Coburn & John

Afghans often cite the formal legal system's corruption as the reason why they regularly bypass the system and instead resolve disputes through the *jirga*.

Regardless of whether the of exclusion of women and the occasional use of forced marriage stems from the *jirga* itself or from Afghan customary law as a whole, the fact remains that women often are powerless relative to the men participating in the *jirga*.

In addition to the treatment of women, the *jirga* suffers from its susceptibility to influence by local warlords and strongmen. Because the *jirga* is consensus based, local strongmen and warlords may be able to unduly influence other *jirga* members to produce unfair outcomes.[37] But one effect of the U.S.-led invasion is that many of these local strongmen and warlords have been appointed to important government positions.[38] Perhaps an unintended consequence of incorporating these strongmen into the state is the significant reduction of their influence over *jirgas*, particularly in rural areas.[39]

As explained in more detail *infra*, the *jirga*—even despite its problems—is the most effective form of dispute resolution available to Afghans. It is more accessible than state courts, and Afghans report much higher rates of confidence and satisfaction with *jirgas* than they do with state courts.[40] Unfortunately, the international community's misguided attempts to establish a Western-style formal legal system have eroded the usage and effectiveness of the *jirga* system, which has helped the Taliban regain footholds in areas of the country where they previously had been forcibly removed.

Part II

THE NEGATIVE EFFECT OF EXPANDING A WESTERN-MODELED FORMAL LEGAL SYSTEM IN AFGHANISTAN

A Eurocentric view of Rule of Law ignores the benefits of the *jirga* system

Almost from the moment American bombs started falling on Afghanistan in late 2001, the U.S. and other NATO countries have stressed the importance of establishing the "rule of law" in Afghanistan.[41] One of the problems with this

Dempsey, United States Institute of Peace, Informal Dispute Resolution in Afghanistan 4 (2010), http://www.usip.org/files/resources/sr247_0.pdf).

[37] *See* Wardak, *supra* note 21, at 421.

[38] *See id.*

[39] *Id.* at 412 (citing Centre for Policy and Human Development, Afghanistan Human Development Report, Bridging Modernity and Tradition: Rule of Law and the Search for Justice 4, 97–98 (2007), http://hdr.undp.org/en/content/bridging-modernity-and-tradition).

[40] *Id.* at 419 (citing The Asia Foundation, Afghanistan in 2010: A Survey of the Afghan People 134 (2010), http://asiafoundation.org/resources/pdfs/Afghanistanin2010survey.pdf). Specifically, 86 percent of Afghan respondents strongly or somewhat agreed that *jirgas* are accessible (vs. 73 percent with regard to state courts); 73 percent strongly or somewhat agreed that *jirgas* are fair and trusted (vs. 53 percent with regard to state courts); 70 percent strongly or somewhat agreed that *jirgas* follow the local norms and values of the people (vs. 51 percent with regard to state courts); 69 percent strongly or somewhat agreed that *jirgas* are effective at delivering justice (vs. 54 percent with regard to state courts); and 66 percent strongly or somewhat agreed that *jirgas* resolve cases timely and promptly (vs. 42 percent with regard to state courts). The Asia Foundation, Afghanistan in 2010: A Survey of the Afghan People 134 (2010), http://asiafoundation.org/resources/pdfs/Afghanistanin2010survey.pdf.

[41] McCullough, *supra* note 8, at 821.

emphasis, however, is that the rule of law means "different things to different people at different times."[42] Scholarly definitions of the rule of law typically include the following principles: (1) a country's laws should be clear, stable, and open; (2) the law should be secular; (3) the law should be applied equally and not arbitrarily; and (4) the law should be interpreted and applied by a truly independent judiciary.[43] Regardless of how it is defined, the rule of law "as understood in the Western world… is often equated with democracy or Americanization."[44] Further, the American and European approach to the rule of law "suggest[s] that without Rule of Law, chaos would ensure—that the only manner in which modern, civilized society may continue is if it controls and fiercely protects the law upon which *society* is based."[45] For Americans and other Westerners, the law upon which society is based is a Eurocentric law, one rooted in ancient Greek history and embraced by theorists such as John Locke and Thomas Jefferson.[46] As a result of this Eurocentric view, Western legal advisors deployed to Afghanistan tend to view the *jirga*'s foreign, consensus-based system with suspicion rather than as a valid (and even laudable) form of dispute resolution. These advisors are the foot soldiers in the trench warfare between the West's "intent to civilize the rest of the world through the dissemination of Western Rule of Law"[47] and a society trying desperately to retain an informal but effective system of dispute resolution.

The expansion of a Euro- and American-centric formal legal system breeds corruption

One of the tools used to develop a Western interpretation or model of the rule of law is NATO's efforts to build both the physical and legal infrastructure of a formal judicial system in Afghanistan. After NATO forcibly removed the Taliban from power in 2001, Western governments discovered that Afghanistan's justice system had been obliterated by decades of war.[48] Not only had the physical infrastructure—the courthouses, the jails, and the police stations—been destroyed, but the country's legal decisions, studies, and texts had been scattered.[49] In an effort to eliminate the perceived anarchy in Afghanistan and replace lawlessness with the rule of law, the U.S., Italy, and other Western governments began to flood Afghanistan with money to "rebuild" the judicial system.[50] The money—and the advisors who came with it—helped organize "rule of law programs that range from prison building, to public legal education campaigns, to the training of judges, lawyers, and prosecutors."[51]

Fueled by hundreds of millions of dollars and an army of legal advisors, the formal legal system expanded throughout Afghanistan in the first decade of the 21st century.[52] This expansion often was at the expense of the *jirga*—and with the expansion came the unintended consequence of worsening the endemic corruption in Afghanistan.[53] Afghans often cite the formal legal system's corruption as the reason why they regularly bypass the system and instead resolve disputes through the *jirga*.[54] Corruption

[42] Cook-Milligan, *supra* note 11, at 219.

[43] *See id.* (citing Maley, *supra* note 30, at 63, and Ricardo Gasalbo-Bono, *The Significance of the Rule of Law and Its Implications for the European Union and the United States*, 72 U. Pitt. L. Rev. 229, 231 (2010)).

[44] *Id.* at 220.

[45] *Id.* at 225–26 (emphasis added).

[46] *See id.* at 222–25 (citations omitted) (detailing the history of the rule of law).

[47] Cook-Milligan, *supra* note 11, at 226.

[48] *See* Cynthia Alkon, *The Flawed U.S. Approach to Rule of Law Development*, 117 Penn St. L. Rev. 797, 814 (2013). The Taliban's decade in power was particularly damaging to Afghanistan's formal legal system; Prof. Alkon notes that because the Taliban did not recognize the secular law on which the formal legal system was based, most Afghans had "the choice of bringing their disputes to an informal or customary tribal dispute resolution process or doing nothing to resolve them." *Id.* at 824. As a result of the Taliban's systematic dismantling of the formal legal system, "the low level of legal development in 2001 meant that the international community was not required to restore the justice system in place, but to build it up for the first time." *Id.* (citation and internal quotation omitted).

[49] *Id.* at 814.

[50] *See id.* at 815 (citations omitted) (detailing the international community's rule of law assistance in Afghanistan, and noting that the United States funded "as much as 71 percent of all justice sectors in Afghanistan").

[51] *Id.* at 815–16 (citations omitted). Prof. Alkon also notes that "[b]etween 2004 and 2007, the United States also built 40 courthouses throughout Afghanistan." *Id.* at 816 (citation omitted). These courthouses were built "despite serious questions about having judges and lawyers available to staff them." *Id.* n. 99.

[52] *See id.* at 817 (noting that, starting in 2005, "the U.S. State Department invested $383 million in rule of law and justice institution development as part of its counter-narcotics efforts) and *id.* at 802 n.18 (noting that donor nations—many of them Western nations—"pledged $360 million specifically for rule of law development" at a conference held in Rome in 2007) (citations omitted).

[53] *See id.* at 826.

[54] *Id.*

thrives in the formal legal system because "prosecutors, police, and justices are all reportedly susceptible to pay-offs in exchange for dropping cases," particularly due to their low pay and the "relatively large amounts of cash from illegal drugs"[55] available for bribes. In addition to bribery, the formal legal system breeds other abuses, such as arbitrary detention.[56] In some cases, arbitrary detention resulted from judges' and prosecutors' misunderstanding or misinterpretation of the law.[57] In other cases, however, "people have been detained or imprisoned so that pay-offs will be made to judges, prosecutors, police officers, and the complaining victim to get charges dismissed or cases thrown out."[58] While the *jirga* system is not perfect and there still is the potential for corruption in the form of undue influence by local strongmen, the *jirga*'s emphasis on consensus, restorative justice, and community harmony reduces the potential for the kinds of abuses that have flourished under the expanding formal legal system.

[55] *Id.* 826–27 (citing Int'l Crisis Group., Reforming Afghanistan's Broken Judiciary, 20 (2010), [hereinafter Reforming Afghanistan's Broken Judiciary]). Prof. Alkon further notes that 90 percent of the prosecutors working in the Afghan Attorney General's Anti-Corruption Unit indicated deception during a polygraph exam that tested whether the prosecutors were involved in bribery schemes or were linked to insurgents. *Id.* at 827 n. 185 (citation omitted).

[56] *Id.* at 827.

[57] *Id.* (citing Reforming Afghanistan's Broken Judiciary, *supra* note 55).

[58] *Id.*

Taliban influence grows in the vacuum created by a corrupt formal legal system

Even from the beginning of the West's efforts to implement the rule of law, some members of the international community and the Afghan government recognized the critical role *Pashtunwali* and the *jirga* play in fairly and effectively resolving disputes.[59] The Western governments rebuilding Afghanistan did not share this view, however, and "in the early years of the assistance effort, there was little attention or assistance given to aid the informal justice sector."[60] This lack of attention not only de-emphasized the importance of *Pashtunwali* and the *jirga*—it *de-legitimized* it.[61] Thus, rather than using a *jirga* to settle disputes, Afghan disputants were shunted into the unfamiliar and often corrupt formal legal system. What they found was that the system was slow, expensive, and ineffective—and a joke began to circulate that "to settle a dispute over your farm in court, you must first sell your chickens, your cows[,] and your wife."[62]

The lack of access to relatively fair and effective dispute resolution is hardly a laughing matter, however. The Taliban, once on its heels, has stepped into the vacuum created by the formal legal system's inability to effectively resolve disputes.[63] The *New York Times* reports that in Quetta and Chaman, Pakistan—which are havens for exiled Taliban leaders—"local residents describe long lines of Afghans waiting to see judges" who apply *shari'a* and *Pashtunwali*.[64] In some areas of Afghanistan, the Taliban "have set up mobile courts to reach villages outside their zones of influence" and even embed *Pashtunwali* legal experts with military units "to provide services to locals and the fighters."[65]

It may seem a curious choice to seek dispute resolution from a brutal regime that employed public executions and harsh punishments for violation of *shari'a* principles. But ordinary Afghans have rediscovered that, under the Taliban's rule, there is less corruption in the justice system, where bribes are uncommon, and "[t]he power of litigants and their extended clans matter[] less."[66] A schoolteacher quoted by *The New York Times* best sums up Afghans' views of the formal legal system in their country: "There are no people who think that government justice is better than the Taliban's."[67]

[59] *Id.* at 826–27.

[60] *Id.* at 827 (citing United States Agency for Int'l Development (USAID), Afghanistan Rule of Law Stabilization Program (Informal Component) Assessment: Final Report 13 (2011), http://pdf.usaid.gov/pdf_docs/PDACS254.pdf).

[61] *See id.* at 827–28.

[62] Ahmed, *supra* note 9.

[63] *Id.*

[64] *Id.*

[65] *Id.*

[66] *Id.*

[67] *Id.*

Recent attempts to support informal dispute resolution in Afghanistan have backfired

Many within the international community now recognize the mistakes made in emphasizing the creation, use, and expansion of the formal legal system in Afghanistan.[68] To remedy the harm caused by diminishing the importance of informal dispute resolution, some experts advocate redirecting more aid to supporting the informal justice sector.[69] And, in fact, the United States now spends significant sums of money "to support local councils and connect them more publicly with the government."[70]

Unfortunately, throwing money at the informal justice sector has not remedied the damage caused by years of essentially creating a dispute-resolution vacuum in Afghanistan.[71] As discovered by an independent monitoring organization, the United States' efforts to improve the image of the Afghan central government by supporting the informal justice system have backfired.[72] Instead of remedying the situation, the effect of re-emphasizing informal dispute resolution after years of neglect has "mostly reinforced the primacy of the informal courts—of which Taliban justice could be considered a radical extension, wielding a mix of Pashtun tradition and extreme interpretations of Islamic law."[73]

[68] *See* Alkon, *supra* note 47, at 827 (citation omitted).

[69] *See id.* (citation omitted).

[70] Ahmed, *supra* note 9.

[71] *See id.*

[72] *See id.*

[73] *Id.*

Part III

A MODEL FOR THE FUTURE

So what is to be done? For Afghanistan, the harm created by the de-emphasis on traditional forms of ADR may be irreversible. The best chance for success would be to implement a "hybrid model" of dispute resolution. This model, which is supported by the Afghanistan Independent Human Rights Commission, would consist of human-rights staffers monitoring the decisions made by local *jirgas*.[74] This oversight would help ensure women participants are represented and protected, along with ensuring *jirgas*' decisions are consistent with human-rights principles.[75] The human rights units also could educate and train local leaders in fairness and other ADR principles.[76] One suggestion is to add another layer of review which could include the district state courts of the formal legal system.[77] There are dangers in increasing the levels of review and the formality of the process, however; any such attempt tends to diminish the agility and overall effectiveness that makes the *jirga* system so appealing to Afghans in the first place. As the international community has learned the hard way, creating artificial barriers to quick, effective dispute resolution in Afghanistan can have disastrous effects on the war on terror.

Rather than impose a Western view of justice, the international community should recognize the cultural importance of restorative justice, community-based decision making, and consensus where applicable.

[74] *See* Wardak, *supra* note 21, at 422–23.

[75] *See id.*

[76] *See id.* at 423.

[77] *Id.* Wardak advocates the use of this level of review, to ensure *jirgas*' decisions comply with Afghan law.

Most important, the international community must learn from its mistakes in Afghanistan. For as long as NATO and its allies wage war against terror groups, these Western-influenced armies and diplomats can expect to encounter traditional forms of ADR throughout the developing world.[78] Rather than de-emphasize the importance of systems like the *jirga*, the international community should recognize the benefits of traditional forms of ADR. While those forms often may not adequately represent the interests of women and other relatively powerless groups, grafting a formal legal system on a country or a culture ill-equipped to resolve disputes quickly and efficiently through formal proceedings can have violent repercussions. Rather than impose a Western view of justice, the international community should recognize the cultural importance of restorative justice, community-based decision making, and consensus where applicable. Doing so will reduce the potential for a justice vacuum like that seen in Afghanistan while simultaneously maintaining credibility with local peoples.

CONCLUSION

The international community had good intentions when it attempted to establish a formal legal system in Afghanistan following the Taliban's ouster in late 2001. Unfortunately, those attempts ignored the presence of an imperfect but uniquely effective system of alternative dispute resolution—a system that emphasized consensus, restorative justice, and community while de-emphasizing formality and oversight by a central government. While the concepts of the *jirga* seemed impenetrably foreign to many Western legal mentors and advisors, the erosion of the *jirga* during the 2000s due to the West's fevered attempts to build a formal legal infrastructure has only emphasized the benefits of ADR within Afghanistan. By stressing the importance of the *jirga* and allowing it to again flourish, the West can perhaps atone for its earlier mistakes. Finally, as the international community inevitably encounters traditional forms of ADR throughout the developing world, hopefully the legal experts and mentors who attempt to establish the rule of law in nascent democracies will remember the mistakes made in Afghanistan and incorporate local forms of ADR where it already has proven effective in resolving disputes. R

[78] *See, e.g.*, Ruxton McClure, Note, *"Can the Leopard Change Its Spots?" A Call for an African Dispute Resolution Mechanism*, 29 Ohio St. J. on Disp. Resol. 333, 342 (2014) (noting that "alternative dispute resolution mechanisms have existed in African traditional societies for generations" and that "[w]here national governments have implemented domestic ADR procedures, such procedures have been largely successful") (citations omitted))

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OVERSTANDING

The Paralegal Instructor Perspective

BY TECHNICAL SERGEANT KALVIN R. JOHNSON

To have long term success as a coach or in any position of leadership, you have to obsess in some way.

As a student in the Paralegal Craftsman's Course (PCC or 7-Level), I watched how my instructors presented the curriculum and I looked at them with a smirk on my face as if to say: "Instructing is too easy." Not particularly impressed by the instruction, and sometimes bored with the presentation, I would find myself daydreaming or even discussing the possibility of becoming a paralegal instructor myself. After all, from where I sat, it seemed like anyone could excel at the job. At times my cavalier attitude irritated the instructor staff. So I'm sure you can imagine how awkward it was when I showed up less than 3 months later and was greeted by those same instructors, who were now my peers and co-workers. I was quickly humbled by the monumental challenges of being a paralegal instructor at The Judge Advocate General's School (JAG School) and eventually had to apologize to my fellow instructors for my hubris. In the end, however, I mastered the skills I needed to instruct. How did I do it? I'm glad you asked!

As a paralegal instructor at the JAG School my primary goal is to turn United States Air Force Airmen into legal professionals. A legal professional is one who studies, develops, and applies the law. Becoming a legal professional, whether a lawyer or a paralegal, requires special training. My fellow instructors and I have the unique opportunity to provide that training to a diverse population of students, varying in age (18–50), experience, service (active duty, guard, and reserve), and education level. There is immense pressure on instructors to educate a diverse student body which could contain a

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student straight out of high school sitting right next to a student who has already completed or is in the process of completing law school in their civilian capacity. Pat Riley once said, "To have long term success as a coach or in any position of leadership, you have to obsess in some way."[1] I remind myself of this quote every time I prepare to teach the diverse group of students who flow through the JAG School. I embrace the obsession that I feel is required to be a competent instructor by implementing what I call "overstanding."

OVERSTANDING VS UNDERSTANDING

Overstanding is my way of describing the level of knowledge and preparation one must possess to lead a class of paralegal students, and—for that matter—to be a leader in general. Leaders must understand their subject and situation in a way that allows them to think on their feet, analyze the situation, and then respond quickly and accurately. Overstanding is a level of knowledge above understanding. It involves incorporating the different types of learning to create a dynamic learning environment. How can I teach or lead if I only "understand" the subject I'm expected to teach? Students taking the class want to understand to pass the test; I need to overstand to produce the type of inspired teaching that will help them pass the test *and* learn the skills they need to effectively accomplish their mission as legal professionals. Instructors must be subject matter experts in estate planning, civil law, and criminal law to teach students competently. The common saying in the JAG Corps is: "JA stands for 'just ask.'" This quote implies that everyone asks legal professionals questions about anything you can imagine.

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But who do legal professionals ask? The students at JAG School expect their instructors to be competent and diligent. We are mentors, leaders, and wingmen. Students, mentees, subordinates, and superiors all want answers and results, which is why the concept of overstanding is so important. The training to become a paralegal instructor goes a long way to helping would-be instructors to begin to overstand.

INSTRUCTOR TRAINING

The first step to become a paralegal instructor is completion of the 5-week Basic Instructor Course. Then new instructors complete an internship in which they must achieve a minimum of 120 contact hours of supervised instruction with students. These contact hours include teaching under the supervision of an experienced and fully qualified instructor; classroom management; and integrating technology into various phases of the curriculum. While going through the internship, the new instructor is called a "student instructor." Student instructors "backseat" the Paralegal Apprentice Courses (PAC or 3-Level). The process is called "back seating," because the student instructors sit in the back of a classroom and observe a qualified instructor teach the class. Shortly after "back seating," the student instructor is then required to teach PAC, twice before being a certified Subject Matter Expert Instructor. I coined it "the 16 weeks of stress." It is an especially difficult time filled with long days of instruction, grading, mentoring, and then long nights of preparing to do it all over again. I realized during that part of my training that this career path was not for the faint of heart.

Once an instructor has completed his or her internship, and demonstrated proficiency as an instructor in the classroom, a wide array of teaching, curriculum development, and leadership opportunities become available. Active duty, reservists, and

[1] Pat Riley Quotes, BrainyQuote.com, http://www.brainyquote.com/quotes/quotes/p/patriley147937.html (last visited 11 September 2016).

guardsmen come to the JAG School for both initial skills training in the PAC and upgrade training in the Paralegal Craftsman Course (PCC or 7-Level). Most paralegal instructors work in the Paralegal Development Division (PDD), which is responsible for teaching PAC PCC, and Serving as course directors for in-residence courses as well as Distance Learning courses. Paralegal instructors can also transition into the Military Training Leader (MTL) position. MTLs focus on enforcing military training and standards that support the newly enlisted Airmen's continued transition into military life. The MTL and paralegal instructors have the opportunity to educate commissioned officers as well. From uniform inspections to teaching Military Justice and Adverse Actions, paralegal instructors have a direct effect on personnel development. Paralegal instructors also have an opportunity to work outside of PDD and transition to the Accreditation, Curriculum and Evaluation (ACE) Division. This role requires an evaluation of course curriculum and Paralegal Instructor development and training. ACE is tasked with the responsibility of making sure the paralegal program meets the Community College of the Air Force (CCAF) requirements and remains certified by the American Bar Association (ABA). Being well rounded is just one of the attributes required to perform. Paralegal instructors also have direct effects on the operation of the JAG School and the operational Air Force. Instructors train students that go directly into the workforce using their acquired knowledge and skills.

BEYOND INSTRUCTING

Another part of being an Air Force instructor is the requirement to demonstrate impeccable adherence to Air Force customs and courtesies, dress and appearance, and core values. For this reason, I like to think of Air Force instructors as "culture pilots." We are expected to epitomize these areas of the Air Force profession of arms and rely on them when mentoring our students. As non-commissioned officers (NCOs), we lead subordinates toward a deeper understanding of self-discipline and adherence to the high standards of the Air Force, but we also advise and support our superiors to facilitate efficient mission accomplishment. As instructors, we are expected to know everything about how to wear the uniform properly, to how to conduct an advisement of Article 31 rights, and the meaning and implications of the Fourth, Fifth and Sixth Amendments. How can one lead in any area when they are not versed on the topic? Successful instructor leaders cannot afford to merely understand; they must overstand. Overstanding requires an obsession with success. You must think and function at a higher level in anticipation of what may come. Overstanding benefits the individual as well as the team. If the leader clearly overstands the issues at hand, the leader can effectively communicate the path to a solution. When we overstand each other, we can overtake any obstacle. Overstanding is also a professional gift to superiors.

CONCLUSION

To say being an instructor is demanding is an understatement. The concept of overstanding is paramount to the overall success of an instructor in any environment. When it comes to teaching at the JAG School, I learned that it takes diligence and commitment to walk into a classroom ready to teach the finest Airmen in the Air Force to be legal professionals. It takes character and confidence to embody the highest standards of leadership and to embrace the role of "culture pilots" for both the newest Airmen and the seasoned NCOs. Using overstanding as a vehicle has allowed me to relish the challenging and ever-changing world of being an JAG School paralegal instructor. And now I can truly say the rewards are well worth the endeavor. R

Technical Sergeant Kalvin R. Johnson

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Senior Airman Tariq Russell, a 21st Security Forces Squadron military working dog handler, shakes the paw of his partner, at Peterson Air Force Base, Colorado. (U.S. Air Force photo/Airman First Class Dennis Hoffman)