

***Investigation and Prosecutorial Misconduct
Witness (alleged victims)***

1. Prosecutorial misconduct occurs when a prosecutor ““oversteps the bounds of propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense.”” *United States v. Fletcher*, 62 M.J. 175, 179 (C.A.A.F. 2005) (quoting *Berger v. United States*, 295 U.S. 78, 84 (1935)). Further, Prosecutorial misconduct is action or inaction by a prosecutor in violation of some legal norm or standard, e.g., a constitutional provision, a statute, a Manual rule, or an applicable professional ethics canon. *Argo*, 46 M.J. 454 (C.A.A.F. 1997). C.A.A.F. has recognized the interrelationship between prosecutorial misconduct and unlawful command influence. *United States v. Atchak*, 2015 CCA LEXIS 328, at *26 (A.F.C.C.A. Aug. 10, 2015).
2. The inquiry into both prosecutorial misconduct and unlawful influence does not turn on the intent of the government actor. *United States v. Hornback*, 73 M.J. 155, 160 (C.A.A.F. 2014); *Boyce*, 76 M.J. at 251 (citing *Biagese*, 50 M.J. at 151); *see also United States v. Barry*, 78 M.J. 70, 78 (C.A.A.F. 2018) (noting that attempts to coerce in violation of Article 37, UCMJ, do require intent). Rather, it is an objective inquiry in most circumstances. *Id.* Courts should gauge the ““overall effect of counsel’s conduct on the trial, and not counsel’s personal blameworthiness.”” *Id.* Thus, the intent of the prosecutor is irrelevant in analyzing allegations of prosecutorial misconduct, merely the outcome of his/her actions. *See id.* C.A.A.F. has held that “[i]t is not the number of legal norms violated but the impact of those violations on the trial which determines the appropriate remedy for prosecutorial misconduct.” *Fletcher*, 62 M.J. at 184. (internal quotations omitted).

Witness Interviews by Assistant Trial Counsel (Prosecutor)

3. Cadet #2. Cadet #2 was a Cadet Fourth Class (C-4), freshman, at the time of the alleged hazing and obstruction of justice.
 - a. On 12 January 2018, Cadet #2 was interviewed by AFOSI and, when interviewed by Defense, he stated during the interview, he felt like the agents were dangling his career over his head the entire time, threatened him with their knowledge of a private and personal relationship he had, and repeatedly accused him of lying. *Attachment 39*. A few comments in his AFOSI video (*Attachment 40*) are worth noting:

06:23	Investigator starts referring to hypotheticals about pulling info off phones or other interviewees saying things inconsistent with ‘Cadet #2’s statements.’ “Bad things happen to you, whether they be criminal or administrative.” What is it you think the upperclassmen could do to help you?” “The only people that can help you at this point is us.”
9:07	“You’ll either get kicked out of here or you’ll get charged. One way or the other. I’m not trying to threaten you, I’m just being honest.”
10:05	“The one thing that can get you the most criminal penalty and kicked out of you quicker than that is not telling the truth in here. I’m going to give you a chance to rectify this situation, and if you choose to go the other route, then I’ll ask you to write a statement, and we’ll be done.”

30:00	Investigator says it's a federal criminal investigation and that, "probably after we talk to you, the Chief of Staff of the Air Force will probably call down." Asks if Cadet #2 "sees the direct line here"—presumably referring again to the Chief of Staff.
35:05	Investigator says "OSI doesn't normally work this stuff." Rare occasion when somebody of a Chief of Staff level, or three-star level, or Secretary of the Air Force level asks them to—then says "why do you think she did that?"
46:40	Investigator goes on rant about Cadet #2 lying and asks if Cadet #2 thinks the investigator is "fucking lying" to him.
49:00	Investigator says he's tired of 'Cadet #2's bullshit.

- b. On 26 June 2018, Cadet #2 received an LOR for conspiring to obstruct justice with other members of the USAFA Men's Swim Team. *Attachment 41*. He obtained a defense counsel, Capt Brian Morecraft, on 3 July 2018 to assist him with his rebuttal. *Id.*
- c. On 5 September 2018, Cadet #2 was interviewed by the Assistant Trial Counsel in this case. *Id.* She had him write a sworn statement. *Attachment 42*. Cadet #2's attorney was not contacted prior to this interview. *Attachment 41*. During this meeting, the Assistant Trial Counsel said Cadet #2 "didn't need representation because he was a witness." *Attachment 43*. She was asking "very leading questions" that "suggested the answer" and would provide him with specific things she wanted him to agree to. *Id.* She had a "narrative" and she wanted [him] to agree to it." *Id.* He stated: "She made it really, really clear of who I had to put in the statements." *Id.* She would list off names for him. *Id.* "I felt coerced and it was an interrogation." *Id.* She alluded to the fact that "she knew I lied previously" to AFOSI agents, even though Cadet #2 states he never lied, and made it clear that his "cadet career hangs in the balance." *Id.* She would say: "You don't want to lie again...to make this situation worse for us." *Id.* She knew [he] had paperwork stating [he] had lied. *Id.* If it didn't fit the narrative or if he said "I didn't know," she would push. *Id.* He said he was "just a very scared freshmen" who "felt helpless about the entire situation." *Id.* He expressed that the experience with the Assistant Trial Counsel and the aftermath was "extremely demoralizing on more levels than I can even explain...questioned and ripped to shreds my morality. I was in the worst state I've even been in, in my life." *Id.*

4. Cadet #3. Cadet #3 was a freshman, or C-4, at the time of the alleged hazing and obstruction of justice.

- a. On 18 January 2018, CADET #3 was interviewed by AFOSI investigators. *Attachment, 1, pg 36-37*. On that day, CADET #3 stated the Commandant came to AFOSI and spoke to all the freshmen who were about to give interviews with the agents. *Attachment 44*. He remembers her message being, "If you lie, I'm kicking you out." *Id.* She assumed people were lying and she read off of a script word for word. Paraphrasing, CADET #3 remembered her saying something to the effect of "I don't want you in my Air Force if you lie." *Id.*
- b. CADET #3 received an LOR for his actions. *Attachment 45*. Shortly thereafter, he retained defense counsel. *Attachment 46*. In his LOR rebuttal, dated 9 July 2018,

CADET #3 reiterates that he did not lie, was not vague, and did his absolute best to accurately recall details when he was interviewed by AFOSI in January 2018. *Attachment 45.*

- c. On 5 September 18, CADET #3 was interviewed by the Assistant Trial Counsel in this case and she obtained a sworn statement from him. *Attachment 47.* His defense counsel was not given notice of this interview. *Attachment 46.* Assistant Trial Counsel told him “you don’t need a lawyer” and did not read him his Article 31 rights. *Attachment 44.* The meeting was held in the courtroom. *Id.* If the Assistant Trial Counsel did not like an answer that CADET #3 gave, or he was unsure of or didn’t remember something exactly, the Assistant Trial Counsel said things (paraphrasing) to him like “I’ll take you to the Superintendent to have you disenrolled, and he will sign your disenrollment orders.” *Id.* Other times she would say, “Oh so you’re going to stick with lying?” *Id.* CADET #3 made it clear that “I told OSI the truth.” *Id.* However, the Assistant Trial Counsel “made it clear that if I didn’t change my answers, I would be punished for it.” *Id.* She then “provided specific names” and made him provide a definite “yes/no” on details. *Id.*

During the interview, the Assistant Trial Counsel wrote two statements for CADET #3 and he refused to sign them. *Id.* The Assistant Trial Counsel discarded these unsigned statements. *Id.* On the third statement, the Assistant Trial Counsel “had [him] change words” and she was the one who asked him to list the “ringleaders.” *Id.* Notably, the unsigned statements have never been provided to the Defense and appear to have been permanently destroyed.

5. Cadet #4. CADET #4 was a freshman, or C-4, at the time of the alleged hazing and obstruction of justice and considered an alleged victim by OSI.

- a. On 18 January 2018, CADET #4 was interviewed by AFOSI investigators. *Attachment 1, pg 27-28.* He described the day of this interview as the “worst day of his life.” *Attachment 48.* He remembers feeling threatened with jail time and going to Leavenworth. *Id.* He also remembers hearing a speech from the Commandant just before his interview and his impression of the general message was to “fuck your upperclassmen” because they put the freshmen in a terrible position, so the freshmen should “rat them out.” *Id.* In the AFOSI interview (*Attachment 49*), the following is a sampling of pertinent quotes:

VTS_01_1_9:30	Interviewer: “I’m gonna be honest with you, you’re not getting out of here without telling the truth.” goes on to say “this is not a threat.”
28:23	CADET #4 says upperclassmen “suggested” they get the all you can eat pasta. OSI investigator stops him and says he knows CADET #4 is lying, goes on to give very long speech (speech continues until approx.. 41:00) about the importance of telling the truth and repercussions. Very little speech or interaction from CADET #4 during this time.
42:40	“There wasn’t a big concern about what we said.” Explains that upperclassmen didn’t coach him on what to say, and the upperclassmen only told him to tell the truth.

- b. In his written statement after the OSI interview on January 18, he says, “I was told multiple times by Mikey, Lars, and other seniors to just tell the truth. I am just bad w/ details under stress and easily go too vague before specific. I honestly tried to be as truthful as I could and remember what I could.” *Attachment 50.*

c. On 25 June 2018, CADET #4 received an LOR for his role in the Chunker and alleged obstruction and obtained a defense counsel. *Attachments 51*. In his LOR response, CADET #4 maintains that he never intentionally lied or omitted information to AFOSI. *Id.* Later, he says: “I fully understand that my wording was probably poor when I met with AFOSI. Even given the pressure of the situation, I should have been better able to express what I knew in a less vague way. I apologize for poorly voicing what I knew.” *Id.*, pg 2.

d. CADET #4 was granted testimonial immunity and had an interview with the Assistant Trial Counsel in this case in fall 2018. *Attachment 48*. He was represented by counsel and that attorney was not notified. *Id.* During that interview, the Assistant Trial Counsel referenced the Superintendent and stated they could “move the interview to the Superintendent’s office,” or something along those lines, when she didn’t like an answer. The Assistant Trial Counsel was very condescending and provided or suggested information to him. *Id.* After the interview was over, the Assistant Trial Counsel and/or an assistant drafted up a statement and later provided it to CADET #4 and asked him to sign it. *Id.* CADET #4 confirmed to the Defense that some of the facts contained in the statement he signed were not what he recalls telling the Assistant Trial Counsel and were not accurate. *Id.*

6. Cadet #5. CADET #5 was a freshman, or C-4, at the time of the alleged hazing and obstruction of justice.

a. On 18 January 2018, CADET #5 was interviewed by AFOSI investigators. *Attachment 1, pg 35*. Prior to the interview, CADET #5 remembers the Commandant coming and talking to a group of the freshmen. *Attachment 53*. She was there to “talk about the importance of integrity.” *Id.* He thought they had all the freshmen together and the Commandant was there to “scare us” because it was a general talking to a bunch of cadets and they wanted to make it a “severe and important matter.” *Id.* He confirmed with Defense that he did not lie or omit information intentionally when he spoke to AFOSI. *Id.*

b. In the summer of 2018 CADET #5 retained defense counsel after he received an LOR for his role in the Chunker. *Id.* In his response, he admits to being vague in some answers, but when “asked to be more specific, I complied and did not lie.” He further explains that he legitimately forgot details and that the suspected active shooter all the cadets believed was on USAFA that evening only added to the stress and confusion. *Id.*

c. On 5 September 2018, CADET #5 was interviewed by the Assistant Trial Counsel and provided a sworn statement. *Id.* His attorney was not contacted prior to this interview. *Id.* The Assistant Trial Counsel explained what the immunity meant and told him that if he lied he would be prosecuted. *Id.* The Assistant Trial Counsel said she had seen all the reports about what happened and said “She knew what happened.” *Id.* When interviewed by Defense, CADET #5 said he was “not confident in the things he was saying” and there were a lot of “I don’t know” and “I can’t remember.” *Id.* The Assistant Trial Counsel wanted CADET #5 to include certain things and at the end of the meeting, took him to another room to write a statement. *Id.* She gave CADET #5 her notes to reference when

writing his statement and highlighted key points to put in the statement, including who the “ringleaders” were. *Id.*

- d. CADET #5 believes to this day he was not “hazed” or forced to do anything he didn’t want to do by the Men’s Swim Team. *Id.* CADET #5 stated that “OSI said I was hazed, legal said I was hazed,” but everything I did was completely voluntary. *Id.*

7. Cadet #6. CADET #6 was a freshman, or C-4, at the time of the Chunker and the alleged hazing and obstruction of justice.

- a. On 11 January 2018, Cadet #6 was interviewed by OSI. *Attachment 53*. He remembers being threatened with Leavenworth and asking for a lawyer, but that request was denied. *Id.* In that recorded AFOSI interview (*Attachment 54*), the following exchange took place:

VTS_01_1_7:37	<p>“There’s been some allegations about some things going on with the swim team. Everything with the lacrosse team, everything with the Academy is kind of high visibility.”</p> <p>“We don’t typically work on this type of thing, but we are working on this because of the visibility I guess.”</p>
16:20	<p>When asked if he had to take part in initiation event: “No, it was like, completely like optional. Our captain made it clear. He’s like: we will have nothing against you like this is a choice like if you want to do this like you have to be all in. Like all this stuff. But he was like, and if you don’t there’s nothing wrong with you.” Interviewer asks if he could just leave. CADET #6 responds: “Yeah you could just head out at any time. You could just say hey” ::he mimics waving goodbye:: He goes on to say that they weren’t at the park very long and anyone could have left to go wait by the cars and still “be my friend, my teammate, everyone would still like him a lot.”</p>
17:55	<p>Investigator says: “I’m going to try to stop you from making a catastrophic mistake.” Implies he thinks CADET #6 is lying.</p>
19:10	<p>Investigator says: “You’re not very good at lying. You’re not very good at deception.”</p>
25:01	<p>CADET #6 repeats that the “Chunker” initiation was voluntary. Paraphrases that freshmen were told “Hey, if you’re not feeling this, opt out now, you can still opt out during that.” (Chunker.) “But if you don’t want to come, let us know now please.”</p>
26:07	<p>CADET #6: “Honestly, the food’s pretty gross but it was kinda like fun.”</p>
26:55	<p>CADET #6: “Sir, is there any point where, like, am I allowed to have a lawyer at all?” Interviewer: “Uh, well, as a witness, you don’t get a lawyer.” CADET #6: “Okay, as a witness?” Interviewer: “Yeah. Um, no, as a witness you don’t get a lawyer. So that’s a good question, let’s explain this. Okay, as a victim, if you were a sexual assault victim, which apparently you’re not, right? If you were a sexual assault victim you could get what they call “special victims counsel.” As a witness in the military, you don’t get a lawyer, okay? Because you’re obligated to cooperate with investigations, right? Now, if you think you’ve committed a crime, well that might be a different story. And I’ll be honest with you, you know, if a truthful answer to a question would put you in some type of jeopardy, you didn’t tell me that. ‘Cause I understand right now you are a victim. Okay? You could easily make yourself a suspect by continuing to do what you’re doing. Right now, I’m not interested in charging you with anything. I don’t want to do that to you. I truly don’t. But you could work yourself into some trouble, is what I’m saying. And I don’t want you to do that. What I’d really like you to do is think about the things we talked about, okay?” CADET #6: “Yes sir.”</p>
Cont.	<p>Investigator says: “And just tell us the truth because you’re hiding a lot of stuff and, you know, you’re not providing truthful information. Some things, maybe you are, maybe you are. Maybe I’ve got it wrong. You know, maybe I’ve got it wrong. Maybe that is it, I don’t know. Do you want to start over?” CADET #6: “Can we start where I was before? ‘Cause everything out there, that’s actually how it happened.”</p>

29:10	CADET #6 repeats twice that someone told him that if he did not want to be present for the “chunker” event that he could leave, verifies that this is “100% true”
30:30	Interviewer says he knows CADET #6 was coached. CADET #6 responds that he can absolutely verify that he was told he had the option to opt in or out of initiation (at any time) at the Olive Garden.
30:55	CADET #6 says he was not told by anyone to say that the initiation event was optional. (Meaning he was not coached to make this claim.)
35:30	CADET #6 says he was told to tell investigators that the “chunker” event was team bonding, “Which I thought it was.”
35:59	CADET #6 never took his pants down and did not hear anyone asking him to take his pants down.
36:11	CADET #6 never heard any reference to “oral sex” during the Chunker.
36:45	CADET #6 again states that they were told they could opt out of “chunker” at any time.
VTS_01_2_13:20	CADET #6 states again that the upperclassmen emphasized that “chunker” was consensual, but that he was not told to testify to that during the interrogation.
14:00	CADET #6 repeats that he did not pull his pants down, and he was not told to testify to that at the interrogation.
14:30	CADET #6 repeats again that he was told before the evening began and after the Olive Garden that everyone could pull out of the event at any time.
15:45	MH was the one who told them it was consensual.
16:30	CADET #6 says he doesn’t remember hearing any references to oral sex, or anything remotely close to that. Says maybe he heard a reference as a joke but he can’t remember, but anyway he knew that wasn’t going to happen because his tem wouldn’t force oral sex.

- b. On 25 June 2018, CADET #6 received an LOR for his role in the alleged hazing and obstruction of justice and received a defense counsel. *Attachment 55*. In his rebuttal, dated 5 July 2018, he states:

From the start of my interview with AFOSI agents, my interrogators asked me questions like, “how would your parents feel if you were sent to Leavenworth for 5 years for lying to federal agents?” or words to that effect. I felt threatened and asked if I could have a lawyer. They turned my request down and reminded me that I was a “victim.” Despite being an actual victim of a previous hazing (e.g., being required to go through certain mandatory rituals with the swim team), I was being interrogated as if I were a perpetrator of a serious crime.

...

I did not provide answers to the AFOSI agents that were deliberately vague as an attempt to obstruct justice. Any responses that were perceived as unclear or deliberately vague were not intentional. The interrogation tactics the AFOSI agents used on me during my interview presented me with stress that affected my ability to recall exact details and respond clearly, giving the perception that I was intentionally being vague to hide information.

The stresses the agents put on me made a huge impact on my grades, athletic performance, and mental health. I had never experienced anything like that before and had trouble sleeping or focusing for the next few weeks. I enrolled in the United States Air Force Academy because I want to serve my country, help the Air Force men's swim team win a conference championship, and make my family proud.

Attachment 55.

c. In September 2018, CADET #6 was interviewed by the Assistant Trial Counsel in this case and she obtained a sworn statement from him. *Attachment 56.* The Assistant Trial Counsel told him "you don't need an ADC," and he didn't remember his rights being read to him. *Attachment 53.* When he would answer question with "I don't remember" the Assistant Trial Counsel would "shake her head disapprovingly" and "smirk" at him. *Id.* She mentioned getting him in more trouble or he could be expelled, and made him "pin a name" on each statement, even when he was not sure and couldn't remember who said what. *Id.* He thought the Assistant Trial Counsel was trying to boss him around. *Id.* CADET #6 expressed that the statement that he ultimately signed was typed up by the Assistant Trial Counsel or an assistant and he did not write it. He signed it, but "it does not accurately reflect my memory." *Id.* CADET #6 does not feel like his statement was voluntary and there was "coercion" involved. *Id.*

8. Cadet #7. Cadet #7 was a freshman, or C-4, at the time of the Chunker and the alleged hazing and obstruction of justice.

a. CADET #7 was interviewed by AFOSI on or about 17 January 2018 after being ordered there by his commander. Prior to the interview, he remembers the Commandant being present and giving a speech to the 8 or so cadets gathered there. She gave a speech about being honest and having to tell the truth. *Attachment 57.* CADET #7 stated he was "very nervous" and "very disappointed in the tone from the Commandant" because "she thought we were all guilty." *Id.* Even though he was an alleged victim, her tone was very much "you are going to get in trouble" and the "impression was my leadership was very pissed off." *Id.*

b. CADET #7 was granted testimonial immunity and had an interview with the Assistant Trial Counsel in this case, Capt Bet-Sayad, in September 2018. Cadet CADET #7 was so troubled by the interview that he wrote an MFR at the time to document the experience. *Attachment*

58. He writes:

1. The purpose of this MFR is to document the experience I had while being investigated at the USAFA Headquarters JA office. This document has no intention of revealing any specific questions asked or any information that was given. Its sole purpose is to document the approach to interviewing me as well as the way I was treated as a cadet and human being. The contents of this MFR are my opinion based upon my recent experiences. For the record, I was interviewed by Captain Bet-Sayad. The witness for my testimony was I believe Captain Hall.

...

3. Ethical Responsibilities

a. As a lawyer, particularly in this instance a Judge Advocate in the United States Air Force, it is paramount to pursue the truth and nothing but the truth. That is a core competency of not just life, but law. During my investigation with JA, I did not feel as if the lawyer attempted to pursue the facts in an unbiased manner. In fact, during my interview, it was noted that the acts that occurred that led to me becoming a victim were personal to her. Furthermore, as an accused liar I felt as if I was no longer in a questioning to get to the truth. Rather, a questioning to somehow change my status from victim to criminal. I was told to give my phone and that they would like to look through it. I was informed that if I give consent they are allowed to go through my phone. Yet, I was reminded that if I have nothing to hide I shouldn't have any reservation giving them my phone to look through. I felt coerced to give my phone. No respect given for my personal privacy. I also think it is important to keep personal opinions and bias out of an investigation; however, I felt as if this matter was personal rather than legal.

4. Professionalism

a. Before my interview had even started I had continually been reminded that the only reason I did not get an LOR for my actions during the OSI interview was because I was less vague and more forthcoming than my classmates. I was constantly reminded, regardless of trying to defend myself and claim that I had no intent of lying or deceiving, that I was in fact guilty of doing so. After I brought up that I thought it was inappropriate and unprofessional to accuse me of things that had not been found to be true, I was ridiculed for what I was a part of. I was not treated as a victim; rather I was treated as a component of the problem. In short, as I gave respect to the officer handling the investigation, I was not given the same respect in return. I did not feel as if I was in a professional environment. Furthermore, the JAG officer remarked that she spent so much of her time reviewing the Office of Special Investigation Interviews in a manner that discerned she was annoyed with the case.

5. Misuse of Authority

a. Although I asked if I would be able to seek council, I was denied council. It did not seem to matter that I was signing a formal document with a written testimony that was intended to be voluntary, as I said during the oath. In no way did I try and deceive, however I was coerced to speculate. I was constantly reminded that my

rights were not infringed upon; however I felt as if I was misinformed and not represented at all. In my opinion, I was subject to a very unfair interview.

b. During my interview, there was another JA present in order to witness the interview. I believe she was their [sic] to ensure fair treatment and just questioning. However, for a moment, she was forced to leave the courtroom to assist another person who had just finished their interview. This had happened before and it was established that we were to cease questioning and wait for her to return. However, this time was different. I was asked a question without her present in the room. I asked the questioning JAG if we should wait for her to be in the room to ask a question and give an appropriate response, yet she stated that it didn't matter and she didn't care about that at the moment. I do not see how this is not a violation of some type of ethical boundary, nor to [sic] I believe it is right to carry out such an action.

6. Dignity and Respect

a. During my interview, I was talked at, not with. I was not being asked questions in a respectful manner. In addition, when I was told that I was not loyal to the United States Air Force and made out to feel as if I am a disgrace, I attempted to defend myself. I explained that my grandfather flew in the Army Air Forces and wore the same prop and wings that I proudly wear to this day. I take extreme pride in where I am and what I have the privilege [sic] of doing. I know my grandfather, the ball turret gunner in the B-17 Flying Fortress with 32 combat missions in the European Theater, would feel the same. During the interview I did not feel respected or in the slightest bit represented, nor did I feel as if my family heritage was respected. I felt attacked and most importantly degraded.

7. I would like to reiterate that in no way have I tried to reveal the specific questions or answers that I was presented with or given. The sole purpose of this MFR is to document my thoughts on how I was treated improperly and without dignity and respect. I have done my best to do the right thing, and I have never attempted to deceive or lie. I have been the victim, yet felt like a criminal because of instances such as this. The way I was treated by JA was not in keeping with the traditions of the Air Force, nor was it respectful to the basic rights of a human being; particularly, a citizen of the United States of America.

Attachment 58.

c. During a Defense interview, CADET #7 stated the Assistant Trial Counsel was trying to get him to say "they told me to lie" to AFOSI investigators. *Attachments 57, 59.* CADET #7 could not remember exactly who said what during meetings with the swim team, but he put in his statement who he "thought might have said it." *Id.*

9. Cadet AF. CADET #8 was a freshman, or C-4, at the time of the alleged hazing and obstruction of justice.

a. On 17 January 2018, CADET #8 was interviewed by AFOSI investigators. *Attachment 1*, pg 31. On that morning, he remembers the Commandant giving a speech. He stated it felt like an

“intimidation strategy, her body language said we were all guilty.” *Attachment 70*. CADET #8 remembers asking for a lawyer during the AFOSI interview, but was told “you don’t need one because you are a victim.” *Id.* He also stated the OSI agents would ask vague questions and then would get mad when he gave a vague answer. OSI made it seem like he was lying when he would answer with “I don’t remember or I didn’t see that happen.” *Id.* He said OSI was asking ridiculous questions and very specific questions. It seemed to CADET #8 as if ACCUSER blew everything out of proportion and OSI was just using that as the basis for their investigation. *Id.*

- b. On 27 June 2018, CADET #8 received an LOR for his role in the alleged obstruction of justice, and he obtained a defense counsel. *Attachment 62*. In his response, CADET #8 maintains that he did not intentionally lie or omit information when he was questioned by AFOSI investigators in January 2018, and that he has always “been honest and forthright.” *Attachment 62*. CADET #8 states that AFOSI investigators told him during his interview that he “was a victim and therefore was not entitled to an Attorney.” *Id.* CADET #8 specifically asked AFOSI investigators for an attorney, but they denied him one. *Id.* He states that the investigators never read him his Article 31 rights, despite the fact that they accused him of “lying, intentionally avoiding details, and even threatened [him] with jail time when [he] provided [his] responses.” *Id.* Later, CADET #8 writes: “I told them complete truth from my perspective,” and “had a clear conscience when I left the room” with AFOSI investigators. *Id.* He asks: “Why should I be punished for this?” and adds: “If I am a victim, why was I treated so poorly by AFOSI agents, and now becoming reprimanded for telling things from my account?” *Id.*
- c. CADET #8 was granted testimonial immunity and had an interview with the Assistant Trial Counsel in this case as well as his AOC in September 2018. He was represented by counsel at the time Capt Andrew Trejo. *Attachment 60, 61*. At the start of the interview, CADET #8 asked if he could speak to his ADC. *Id.* The Assistant Trial Counsel said he did not need to contact his attorney because he had immunity. *Id.* CADET #8 was not able, nor given the opportunity to speak with any legal counsel prior to his interview by the Assistant Trial Counsel. *Id.* CADET #8 was asked to make a written statement; once the prosecutors looked at his statement, they asked him to re-write it because it did not suit their needs. *Id.* CADET #8 was left with the feeling that, if he did not say what the Assistant Trial Counsels wanted, he would be in more trouble. *Id.*
- d. During the interview with the Defense, CADET #8 stated the Assistant Trial Counsel threatened to kick him out of the Academy if he was not completely forthcoming. *Attachment 60*. Cadet CADET #8 tried to explain that there was a team discussion about being vague with AFOSI, but the Assistant Trial Counsel kept pressing and saying it was MH and Lars Knutson leading the meeting and saying everything. *Id.* The Assistant Trial Counsel and another captain said they wanted to get the freshmen members of the swim team “on the same page.” *Id.* He also said that the AFOSI Interview was much worse than the Chunker.

- e. As part of CADET #8's LOR rebuttal (*Attachment 62*), his parents also submitted a letter raising various concerns about the manner in which the AFOSI interrogations were conducted. Among other things, Cadet #8's parents commented as follows:

We are submitting this letter in support of a rebuttal submission that our son is making in response to punishments that have proposed to be imposed upon him, in connection with that incident, notwithstanding that there is no dispute that he was in fact amongst the group of Freshman swimmers who were the *victims* of that incident.

We are writing this letter for the purpose of raising important considerations that we believe mitigate against the imposition of the proposed punishments, not the least of which are fundamental issues of fairness and due process.

...

As nearly as we can understand, the basis for this proposed punishment arises from our son's responses to investigators during questioning which occurred some months after the incident. The specific allegations are apparently recounted in a Letter of Reprimand, which we have not seen, but understand charges these freshman with being "'vague' in their responses during their questioning by the Officer of Special Investigations."

...

Second, is the fact that the questioning of the Freshman swimmers occurred nearly a full four months after the incident. There is no need here to cite the innumerable studies that demonstrate how incidents from months before impact memory and the confidence and ability of a witness to recount events accurately and fully. Cadets certainly understand that they should respond truthfully to questions put to them by Academy authorities, but they also understand that serving as witness to "facts" not fully recalled, or being suggested by investigators as part of a narrative can be just as harmful for the search for the truth.

...

Third, are the circumstances of the questioning that occurred and the backgrounds of the Freshman swimmers who were questioned. It is apparently the case that without advance notice, our son and the others were interrogated, in isolation, for hours on end, by a team of trained members of the Office of Special Investigations. They were not counseled or advised with respect to the scope, nature and interrogation process they would be subjected to. As victims of the hazing and witnesses who were being called upon to recount the incident, they were alone, confused, and intimidated. There was no one in the room to advocate for them; no one ensuring that understood what was occurring; no one advising them of the nature of questioning they were going to be subjected to; no one to temper that aggressive questioning of their interrogators. As a matter of fact, our son recognized that he was in a situation that

was more of an Interrogation rather than a questioning of facts and asked to have a lawyer. At that point, he was told the situation did not warrant having a lawyer. Yet, now our son, along with the other Freshman swimmers (now C3Cs), find themselves receiving a LOR.

In such circumstances, stress, isolation and confusion will wreak havoc on anyone's ability to respond fully, accurately and coherently. This is not just the view of concerned parents, but well documented in scientific literature and research. It is beyond dispute that the effects of stress on memory include interference with a person's capacity to encode memory and the ability to retrieve information. (Kuhlmann, S.; Piel. M.; Wolf, O.T. (2005). "Impaired Memory Retrieval after Psychosocial Stress in Healthy Young Men". *Journal of Neuroscience*. 25 (11): 2977-2982.)

Perhaps just as significantly, the impacts of isolation, confusion at being thrust into a totally unfamiliar adversarial process, and the lack of a supporting presence during extended questioning can lead to uncertainty about how to respond, whether to embrace hearsay and speculation, and whether one is being asked to speak from his own personal knowledge and recollection, or to adopt a narrative being offered by others. The uncertainty of how to respond in such circumstances is a direct function of the stress and isolation an individual is experiencing. From the perspective of our son and, as we understand from other parents of Freshman swimmers, the questioning was anything but an "interview" of a witness, but instead an ordeal grounded in interrogation tactics that left them feeling more bullied than the hazing to which they were subjected. Our son's, nor any of the other swimmers, well-being that we were promised by the Associate Director of Athletics, George J Nelson Jr., was obviously not followed through in these interrogations.

While of course, investigators must be thorough and persistent in their investigation, concepts of fairness and due process compel the conclusion that the victims of an offense should be questioned as such, and not as if they are perpetrators of the offense. Those same principles are now acknowledged in the law and accepted practice as the best means to seek the truth from witnesses, and particularly victims, through transparency of the process, willful cooperation and trust. Intimidation should have no place in that endeavor.

...

Finally, all of the above begs the question of "Who are the Freshman swimmers?" For starters, we know they are not professional witnesses. In fact, like every other Cadet at the Academy, they are there because they have never crossed the line; never engaged in or been accused of serious wrongdoing. For each of them - only a few months out of high school - this was a one of a kind, first time situation and experience. Nothing had prepared them for the questioning they experienced, nor did the Academy prepare or counsel them in advance. Our son, like the others, felt that he was on his own in a situation he could not have been expected to anticipate or

understand. Furthermore, my son had to endure further stress and disappointment when he (along with two other Freshman swimmers) was cut from the swim team by Rob Clayton only a few days after going through Recognition. Again, one of the recruiting papers my son received, dated October 27, 2016 stated that the swim staff was “highly motivated and dedicated to each swimmer’s athletic, academic, and personal development”. That doesn’t seem to be the case since he was cut from the team. He wasn’t given the opportunity to develop his athletic capabilities for which he was recruited. There seems to be a recurring theme of what is stated is going to happen (our son’s well-being looked after, dedication to my son’s athletic performance) and what actually occurs (receiving an LOR, being cut from the swim team).

...

We have come to know the young men on the swim team well over the last year. Anyone who’s not a swimmer, or been close to swimmers, simply can’t appreciate the dedication and hard work these young men exhibit to bring honor to the Academy. No other sport demands so much. But they are not simply athletes. They are well represented on the Superintendent’s list and even as Academic All American honorees.

...

In sum, these young Cadets, new to Academy, fresh out of high school, thrust into a stressful and unfamiliar environment of allegations, investigations, isolation and interrogation were more likely guilty of uncertainly, confusion and imprecise memory than willful obstruction of an investigation. As a parent, it is difficult to believe that the Academy would push the limits of punishment with respect to any new Cadet in such circumstances. Moreover, it is also worth considering the potential ramifications of punishing the victims of hazing in such circumstances.

Hidden in such approach is the likelihood that Cadets in the future will remain silent and avoid coming forward because they fear that doing so will somehow ultimately result in punishment being visited upon them, despite being the object of the prohibited conduct. Nor to the outside world will punishment of victims lend itself to easy explanations. Let us conclude by saying that our son came to the Air Force Academy because he loves his country and believes in the principles of service, excellence and integrity that the Academy represents. He considers his fellow cadets and the members of his swim team his brothers-in-arms without whom he would not have made it successfully through his first year. It is simply not in his nature or experience to intend any injury to them or disrespect to the Academy. As parents we appreciate the opportunity to share our views and place our trust in your commitment to seeking an appropriate and just balance between discipline and fairness.

Attachment 62.

10. CADET #9. #9 was a freshman, C-4, at the time of the alleged hazing and obstruction of justice.

- a. #9 was interviewed by AFOSI investigators in January 2018. *Attachment 63*. He was not read his Article 31 rights. *Id.* AFOSI investigators told him he was not allowed to have legal representation “because [he] was a victim,” but was then told by the OSI investigators that they would inform the Commandant, and he would receive administrative punishment if he lied. *Id.*
- b. #9 reported to Defense that he was interviewed by Assistant Trial Counsel Capt Bet-Sayad in September 2018. *Id.* Capt Bet-Sayad kept “asking for specific details and names,” but #9 said he “didn’t know” to a lot of her questions—which “did not go over well.” *Attachment 64*. The interview “became very hostile at that point.” *Id.* Capt Bet-Sayad threatened to “march [#9] to the Superintendent’s office,” give him “paperwork (probation),” or “disenrollment.” *Id.* From #9’s perspective, Capt Bet-Sayad “was putting words in [his] mouth.” *Id.* The Assistant Trial Counsel “told [#9] what to include” in his statement. *Id.*
- c. #9 was so troubled by his interview that he immediately went and wrote down some of the more concerning things he had been told by the Assistant Trial Counsel. *Attachment 65*. Provided to the Defense on 5 February 2019, the document file name is “2nd second worst day of my life.” In it he states the following:

The dark haired female captain coerced me into giving names. Would not stop asking the same question when I did not know a specific detail

“You are making a very bad choice.” When asked a question and answer given was “I don’t know. Or I honestly don’t know.”

“I wrote all your LORs. I know you lied”

“You are lying to me right now. Don’t lie to me right now.”

“Who’s your AOC? Maj. Hatt? I’ll talk to him after this.”

“I will write your letter of disenrollment after this if you keep lying to me.”

Post interview

Was told to add names to a section of my statement before swearing.

- d. #9 said he found out about Phi K S at the beginning of the swim season. *Attachment 64*. #9 stated he viewed the Chunker as a positive, “it was fun, it brought the team together.” *Id.* He stated the Chunker was a more positive experience than his interview with Capt Bet-Sayad. *Id.*

11. Cadet.# was a freshman, or C-4, at the time of the alleged hazing and obstruction of justice.

- a. He was interviewed by AFOSI in early January and remembers Brig Gen Goodwin being there to speak to them. *Attachment 66*. She remembers she was there to tell them it was

“their duty to tell the truth.” *Id.* Afterwards, he was interviewed by AFOSI. *Id.* In his recorded interview (*Attachment 67*), the following takes place:

40:43	#9 states he’s being “100% truthful.”
43:28	The AFOSI investigator states: “Like General Goodwin is trying to reiterate to you guys, if you’re not up front about everything, that’s what’s going to be a career killer.”
50:21	AFOSI investigator: “That is why the general talked about core values. Your integrity is at stake.”
1:23:45	AFOSI investigator asks how many times#9 has sat down with General Goodwin since he started at the USAFA. He states: “She took the time out of her day to come here and talk to you. You’re a smart kid. <i>So...do you think that it’s important? Do you think the superintendent has been briefed?</i> ”
1:25:40	“Do you think that the superintendent... Do you think that the commandant... is gonna somehow believe that they’re going to give you a gold star because you held true to your teammates? We’re asking you questions for the truth, and you’re not telling me the truth.”
1:28:00	“When the JAG, and the commandant, and the superintendent of the AFA sees that you lied in [your statement], you’re done.” “When the leadership and the JAG makes that decision on your life and your career and you have to explain to your parents and everyone back at home why you’re back at home, they’ll know.”

- b. Cadet # was interviewed by the Assistant Trial Counsel in this case, Capt Bet-Sayad, in September 2018. *Attachment 66*. He was not represented by counsel. *Id.* During the interview, the Assistant Trial Counsel told#9 that she wrote his Letter of Reprimand and “could do a lot more” to him. *Id.* Capt Bet-Sayad alluded or threatened to bring him to the Superintendent if he didn’t cooperate. *Id.* He was never read his Article 31 rights. *Id.*#9 stated that the Assistant Trial Counsel “put words in [his] mouth regarding the nudity of [certain cadets]” during the 2017 Chunker. *Id.*#9 stated that there has been “so many variations” of the story from investigators and prosecutors and he’s been accused of lying so much that he “do[es] not know what is true anymore.” *Id.*

12. Cadet #10. Cadet #10 was a junior, or C-3, at the time of the alleged hazing and obstruction of justice.

- a. In July 2018, Cadet #10 received an LOR for his role in the alleged hazing. *Attachment 68*. In his response, he states in part:

First, it is important to recognize there was never any malicious intent or intent to cause harm or embarrassment through this event. In fact, it was completely the opposite. Prior to the event, our team captain gave an introduction speech where he told the freshman they were about to complete a team tradition that has been around for 30 years and has served an important role on our team because it made us grow

closer and built more trust within our team. He told them that none of their morals would be questioned and that if they felt at any point in the event that didn't want to complete it, they could leave and there would be no questions asked.

Second... I did help with the purchasing of the food for the freshmen to later eat. Nothing that was purchased was dangerous in any way. The characterization of the food as "unappetizing" is completely subjective and ambiguous.

...

Fourth, with regard to the allegation that freshmen were required to "take off their pants and underwear while the upperclassmen threatened the freshmen with oral and anal sex," **this allegation is not accurate. No one was told to take off their "underwear."** I was under the impression that none of the freshman would be told to take their pants off at the event and it was a surprise to me when they were told to. **This lasted no more than three seconds because it was immediately stopped by our team captain.** Also, there was never any threat to anal or oral sex at this time.

[Regarding an allegation against him,] his event was months ago-likely making it hard for someone to remember small details such as this one; which leads me to think that if a freshman was under the immense stress of an OSI interrogation, it would be easy to mention my name. Additionally, I was questioned about this in my OSI interview and I never told the interrogation party that I did indeed say this, but I told them verbatim "I may have" to move on with questioning because they were trying put words in my mouth and would not stop questioning me about it no matter how many times I denied it. **During the interrogation it seemed as if they were brain washing me to think that I said it** and after I left the interrogation I put immense thought into if I had made an illusion [of] oral sex at the event and came to the conclusion that I did not.

...

I realize that I made mistakes and have already learned my lesson from this lengthy investigation that I will not make those mistakes again. These mistakes do not define who I am as a person; I believe that they were a result of poor team culture and how I was very susceptible to influence over my freshman year. I have already made a change to counter these mistakes by improving team culture while I was still on the team; we created new traditions for our inappropriate ones and had multiple meetings discussing an alternate event that could take place of the "Chunker" and serve the same purpose but not be in the dark.

...

Additionally, I am currently searching for a senior mentor to help me through my remaining time at USAFA and hold me accountable to my goals. If given the opportunity I would be more than happy to brief a squadron or sports team on hazing and why it is not tolerated at USAFA.

- b. Cadet #10 was interviewed by Defense on 6 February 2019. *Attachment 69*. He stated that he has a defense counsel. *Id.* A few weeks prior, he was told to report to a meeting in January 2019 with the Commandant and about 15-20 people from his chain of command. *Id.* At the meeting, the Commandant confronted Cadet #10, telling him that “what [he] did was bullying,” and asked him if he realized that “people lied” during the investigation into the allegations of hazing and obstruction of justice. *Id.* The Commandant asked Cadet #10 how his actions “align[ed] with [the] core values” of the USAFA. *Id.*

13. Cadet #11. Cadet #11 was a Cadet First Class (C-1) or senior at the time of the Chunker and alleged obstruction of justice.

- a. Cadet #11 retained a defense counsel after he received and LOR for his alleged actions resulting from the Swim Team investigation, which guaranteed his right to counsel. *Attachments 70, 71, 72*. In his rebuttal, he states the “allegations against [him] are almost entirely untrue.” *Id.* He goes on to say:

Because I am quite certain of what happened that night, and what I did and did not do, and what I saw and heard, and because I value my honor and integrity as a cadet, officer candidate, and a man, I am at a loss to explain how entirely untrue allegations made their way into the letter of reprimand. It’s possible I was confused with a classmate named Garrett or others, but whoever accused me of these things was either confused, mistaken, or lying. I cannot put it more plainly than that.

- b. On or about 29 January 2019, the Assistant Trial Counsel in this case interviewed Cadet #11 under grant of immunity without contacting his attorney. *Attachment 70, 71*. In this meeting the Prosecutor was “very aggressive,” and when he would answer a question “to the best of his recollection,” she would say “Are you sure that is the answer you want to give?” She would then mention his disenrollment proceedings and remind him of the fact that he would be graduating soon when he answered questions. *Id.*
- c. In January of 2019, Cadet #11 also had a meeting with the Commandant regarding his retention at the USAFA. *Id.* During this interview with the Commandant, the Commandant told him that what happened at the Chunker was “hazing.” *Id.* His attorney was not contacted prior to this meeting.
- d. *Id.*

14. Defense was provided the sworn statements obtained by the Assistant Trial

Counsel, as discussed above on or about 19 Sept 2018. *Attachment 5*. In reliance in large part on these sworn statements obtained by the Assistant Trial Counsel, AFC Knutson waived his Article 32, UCMJ, Preliminary Hearing on 30 October 2018. The Defense was not provided the rebuttal statements to the letters of reprimand and counseling described above until 6 or 7 February 2019, which is discussed below.