

**DEPARTMENT OF THE AIR FORCE
UNITED STATES AIR FORCE TRIAL JUDICIARY**

UNITED STATES OF AMERICA v. AIR FORCE CADET (AFC) LARS P. KNUTSON CADET GROUP 2 UNITED STATES AIR FORCE ACADEMY, CO	DEFENSE MOTION TO DISMISS: UNLAWFUL COMMAND INFLUENCE, PROSECUTORIAL MISCONDUCT Date: 15 February 2019
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MOTION

Air Force Cadet (AFC) Lars P. Knutson hereby respectfully moves, pursuant to Rule for Courts-Martial (R.C.M.) 905, 907, and relevant case law, this Honorable Court to dismiss all charges and specifications with prejudice. Such relief should be granted due to egregious unlawful command influence and prosecutorial misconduct as set forth below. The Defense respectfully requests an Article 39(a) hearing with the opportunity to call witnesses and argue this motion.

SUMMARY

Simply put, unlawful command influence (UCI) occurs when authority puts its thumb on the scale of justice. UCI is the improper use, or perception of use, of superior authority to interfere with the court-martial process. *See Gilligan & Lederer, Court-Martial Procedure* § 18-28.00 (4th ed. 2015); *accord* Art. 37, Uniform Code of Military Justice (UCMJ). Indisputably, UCI is “the mortal enemy of military justice.” *United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986); *United States v. Gore*, 60 M.J. 178 (C.A.A.F. 2004); *United States v. Douglas*, 68 M.J. 349 (C.A.A.F. 2010); *United States v. Salyer*, 72 M.J. 415 (C.A.A.F. 2013).

Similarly, the duty of the prosecutor is to seek justice, not merely to convict. ABA Standard 3-1.2. A prosecutor must neither avoid pursuit of evidence nor attempt to change testimony because he believes it may damage the prosecution’s case or aid the accused. ABA Standard 3-3.11c.

Here, in *Knutson*, the first hazing court-martial in the history of the United State Air Force Academy (USAFA), both UCI and Prosecutorial Misconduct have subverted the judicial process. While it is styled as a case about hazing, it instead is a case about a rush to judgment and a systemic abuse of power and authority. The malfeasance here is pervasive, with tentacles stretching even to Pentagon offices of the Secretary of the Air Force (SECAF), The Honorable Heather Wilson.

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Phi K S—which stands for Pull, Kick, Swim—is an informal group that has been a time-honored USAFA swim team tradition stretching back some 30 years. Phi K S’s existence was designed

to engender esprit de corps, team building, and create cohesiveness among cadet swimmers. USAFA cadets and alumni have always been publicly proud to be part of this group. Swim team members wore Phi K S t-shirts, drank out of Phi K S water bottles, put Phi K S stickers on their cars, and even spoiled Phi K S tattoos. Likewise, USAFA alumni-current Air Force Officers-proudly displayed their connection with the Phi K S community. See, for example, this photograph of active duty fighter pilot Captain Cody Deacon, USAFA '12, in his F-22:



A 30 year tradition of Phi K S has been a voluntary team-bonding exercise, called "the Chunker," during which the freshman members of the team are initiated. The event has existed in various iterations over the last three decades, but has consistently featured eating followed by exercise.

In the Summer of 2017, ACCUSER entered the Academy as a member of the Class of 2021 and a recruited member of the swim team. Soon after arriving, then-Cadet ACCUSER struggled academically and to find his place on the swim team. Even so, he wanted to be part of "Phi-K-S" and also voluntarily participated in "the Chunker" on 29 September 2017. When then-Cadet ACCUSER's lack of success academically and within his own team became apparent to even himself, he decided not to leave without getting revenge. Based on what he had seen with the lacrosse team,¹ he knew what to do. With the help of his lawyer mother, he carefully constructed a narrative that portrayed him as the victim of a secret society who so demoralized him that he had no choice but to separate from the Academy.

On 14 December 2017, then-Cadet ACCUSER sent this letter directly to the USAFA Superintendent, Lieutenant General Jay Silveria, and the USAFA Commandant, Brigadier General Kristin Goodwin. ACCUSER got the desired result. The Air Force sprang into self-protection mode with little regard for the truth of the matter.

¹ In 2017, the USAFA men's *lacrosse* team rocked the Air Force after allegations of dmng abuse and hazing became public. Upon information and belief, members of the USAFA lacrosse team were alleged to engage in a practice of slamming certain team members' penises in a dictionary if they committed certain infractions. The allegations and investigation was common knowledge within the Cadet Wing. Though USAFA managed to keep a lid on the exact allegation, the academy was scandalized in the national press.

As will be set forth in detail below, the initial allegations by ACCUSER against AFC Knutson were largely debunked and the reality of what happened at the 2017 Chunker event was significantly more benign. In fact, in a 3 January 2018 email, Superintendent Lt Gen Jay Silveria admitted that the alleged hazing “does not appear to be as severe as the men’s lacrosse team but we want to continue to make it clear that we take all hazing serious.” The email was sent to (1) SECAF; (2) General David L. Goldfein, the Chief of Staff of the Air Force (CSAF); and (3) the Commandant.

Lt Gen Silveria realized that ACCUSER’s allegations, following hard on the heels of the lacrosse team scandal, could only further tarnish the Academy’s reputation. So sometime in 2018,

Lt Gen Silveria banned Phi K S from existence. Further, the Air Force needed to make a public statement and needed a “fall guy” in order to send a message. The Superintendent explained in his 3 January 2018 email that he intended “to take advantage of the momentum . . . [w]hile attention is on the topic” due to the lacrosse scandal. What has followed was a systematic unlawful coercion and manipulation of the investigation and prosecution of AFC Lars Knutson at all levels of leadership at USAFA and the Air Force itself.

In conjunction with the Air Force Office of Special Investigation (AFOSI), the Superintendent, Commandant, Vice Commandant Col Scott Campbell, and the Trial Counsel, Capt Susan Bet-Sayad, have made a concerted, joint effort to ensure they have a “fall guy” even if it means the sacrifice of constitutional safeguards, professional ethical rules, statutory mandates, Air Force regulations, and AFC Knutson’s right to a fair trial.

Superintendent Lt Gen Silveria, the General Court-Martial Convening Authority, admits that he and USAFA have already concluded—ahead of trial—and publicly declared that the swim team has a hazing culture.² Given the clear directive from Academy leadership, AFOSI investigators got to work “creating a case.” The investigators, the prosecution, and all levels of Academy leadership alternately referred to the 4th class (Class of 2021) cadet participants in “the Chunker” as victims and criminals and then threatened them with federal convictions and jail time. The position that leadership and investigators took had nothing to do with justice or the forthrightness of the Swim Team 4th classmen, but was a function of whether the 4th classmen would allow words to be put in their mouths to support the overarching goal of a conviction. The particulars will be detailed in the pages below; however, the following examples highlight the extensiveness of the UCI and Prosecutorial Misconduct at issue in this case:

- In January 2018, when AFOSI couldn’t get a freshman cadet to alter his statements in an interview, the AFOSI agent confronted him about a secret, homosexual relationship in which he was involved;

² Significantly, Lt Gen Silveria admits that the traditions of Phi K S have been around and are now simply outdated; he, however, fails to acknowledge the findings of the independent review USAFA commissioned which found among widespread confusion among cadets as to the differences between team building and hazing largely due to a parallel and “deliberate series of pedagogy and curriculum” within the academy itself. The review recommended that USAFA leadership discuss and clarify this confusion with cadets. Instead, USAFA decided to simply make an example.

- In January 2018, the majority of the 4th class swim team members, average age 18, were simultaneously pulled out of classes and summoned to AFOSI. There, they were left in an empty room for several hours. Then, Commandant Brig Gen Goodwin, the Special Court-Martial Convening Authority, came and made a speech designed to get the freshmen to present themselves as victims and to influence their statements of witnesses in this case;³
- In January 2018, after a freshman cadet consistently and honestly answered repetitive questions from AFOSI, the interviewing agent mocked him asking if he thought he should get a gold star. The agent invoked the authority of the Commandant and Superintendent, saying why do you think “she took the time out of her day to come here and talk to you. You’re a smart kid. So...do you think that it’s important? Do you think the Superintendent has been briefed?” When that threat didn’t work, he said, “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”;
- In January 2018, after another freshman cadet answered AFOSI questions but not with the “facts” that the agent was hoping for, the agent invokes the entire Air Force chain-of-command as the reason the cadet should say what the agent wants him to say. The agent claims “OSI doesn’t normally work this stuff.” He says they do only on 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 [SECAF] did that?” The investigator also tells the 4th classman that “probably after we talk to you, the Chief of Staff of the Air Force will probably call down” and asks if the freshman “sees the direct line here” from Chief of Staff.
- In January 2018, another freshman cadet is accused of lying early on in the AFOSI interview. The agent tells him, “You’re not very good at lying. You’re not very good at deception.” A false official statement carries with it a possible five year sentence, so the 4th class cadet asks if he can have a lawyer. The agent tells him he’s merely a witness, so “you don’t get a lawyer.”⁴ Then in the same breath, the agent says “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?”
- In January 2018, after another freshman cadet repeatedly told an AFOSI agent his memory of events, the agent said that if one more word comes out of his mouth that is untruthful, there is “nothing I can do for you,” and somebody else can make the decision about whether he stays at the USAFA;

³ Reportedly, the Commandant read off a script. Defense has requested the script, but have not received it.

⁴ Notably, an AFOSI agent later asks this cadet “how would your parents feel if you were sent to Leavenworth for 5 years for lying to federal agents?” or words to that effect.

- The majority of freshman class swim team cadets were interrogated by AFOSI in January 2018. Months later, on or about June 2018, almost all of them received Letters of Reprimand for their statements to AFOSI. Then a few months later, in August or September 2018, the Superintendent, *in an effort in concert with the Staff Judge Advocate (SJA) office to get the swim team members to change their testimony*, issued the Letters of Immunity, officially declaring that the 4th class members of the team were victims.⁵
- In September 2018, Capt Bet-Sayad, Assistant Trial Counsel, called a swim team member to her office and tried to get him to change the answers that he had given to AFOSI. The cadet had an attorney and asked for his attorney. Capt Bet-Sayad told him “you don’t need an attorney.”⁶ Yet when the cadet continued to answer the Assistant Trial Counsel’s questions as he recalled the events, Capt Bet-Sayad threatened him with words to the effect of “we can move this meeting to the Superintendent’s office,” “I’ll take you to the Superintendent to have you disenrolled,” and “he will sign your disenrollment orders.”⁷ Though he made it clear that “I told AFOSI the truth,” the Assistant Trial Counsel “made it clear that if I didn’t change my answers, I would be punished for it.” She then “provided specific names” and eventually wrote, herself, two statements and tried to coerce the cadet into signing them. He refused.⁸
- According to multiple cadets, the Assistant Trial Counsel had a “narrative” and tried to get cadets to adhere to it by asking them to put specific names or details in their sworn statements that they were not confident about. She, even, sometimes gave cadets her notes to rely on in writing their statement or took and presumably discarded unsigned statements from cadets when the draft statements were not sufficient for her and asked them to start over. In at least two other cases, the Assistant Trial Counsel drafted statements for cadets and asked them to sign it later. In several cases, the alleged victims interviewed by the Assistant Trial Counsel reported to Defense that they did not remember saying what is in their sworn statement or they were asked to be far more certain in their statement than they were comfortable honestly stating.
- After making repeated statements to AFOSI and the SJA’s office, another member of the swim team (and witness in this case) was summoned to a meeting with the Commandant and 10-15 members of his chain of command. There, he was flatly told by Brig Gen Goodwin that his participation in Phi K S was “bullying,” that “people lied” during the investigation, and asked rhetorically how his actions aligned with the core values of the USAFA.

These actions and others like them clearly raise the spectre of UCI and Prosecutorial Misconduct. When several freshmen swim team members—alleged victims—and their families

⁵ These Letters of Immunity’s did nothing to reverse, rescind, or otherwise obviate the LORs. Nor did USAFA take any of the actions that usually accompany the care that leadership ensure that victims receive.

⁶ Several 4th class cadets were denied counsel when they asked for counsel; even in cases where defense counsel had already been retained or assigned.

⁷ This threat of moving the meeting to the Superintendent’s office was common thread throughout many of the interviews that Defense has conducted for this case.

⁸ Notably, the unsigned statements have never been provided to the Defense and appear to have been permanently destroyed.

raised concerns with Academy leadership regarding the manner in which the interrogations had been carried out by AFOSI and the SJA's office, their concerns were summarily dismissed. To the Defense's knowledge, no AFOSI investigator has been punished in connection with this case, nor has the Assistant Trial Counsel—who remains on the case to this day.

At the end of an over 12-month process, the Superintendent again sent another email to SECAF and CSAF, which captures USAFA's general lack of self-awareness regarding UCI and Prosecutorial Misconduct. In this email, Lt Gen Silveria complains that a defense counsel tried to "intimidate" him. He utterly fails to recognize, however that the alleged victims – his cadets – in this case have been through a year of officially sanctioned harassment, intimidation, and coercion. Lt Gen Silveria's investigators, prosecutors, and commanders all scurried to fall into line and guarantee a conviction at the expense of basic constitutional rights and human decency.

AFC Knutson has no chance of a fair trial. The misconduct here is far too egregious and widespread to have been the uncoordinated actions of rogue actors. Instead, it was the result of a systematic campaign to set an example of AFC Knutson, regardless of the costs. Article 37 was designed precisely to combat the sort of manipulation and coercion present in this case. "[A]n intolerable strain" will be placed upon the public's perception of the military justice system if the charges and specifications against AFC Knutson are not dismissed with prejudice. If the charges go forward, without question "an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding."

FACTS

1. On 14 December 2017, an Air Force Office of Special Investigation (AFOSI) investigation into the United States Air Force Academy (USAFA) Men's Swim Team arose after then-freshman cadet ACCUSER sent a letter directly to Lieutenant General Jay Silveria, the USAFA Superintendent and General Court-Martial Convening Authority (GCMCA). *Attachment 1*, pg. 5, 69-77. AFC ACCUSER copied Brigadier General Kristin Goodwin, the USAFA Commandant and Special Court-Martial Convening Authority (SPCMCA). *Id.* ACCUSER was struggling academically and ultimately left USAFA after his first semester. *Id.*

Case Disposition

2. On 5 September 2018, the Commandant withheld initial disposition authority from any lower commander for the allegations against AFC Knutson. *Attachment 2*. She directed that any charges be forwarded to her for initial disposition. *Id.* On 6 September 2018, Col Scott C. Campbell, the Vice Commandant, preferred one charge and specification in violation of Article 81, UCMJ, one charge and specification in violation of Article 92, UCMJ and one charge and specification in violation of Article 134, UCMJ against AFC Knutson. *Attachment 3*. The Assistant Trial Counsel, Capt Susan Bet-Sayad, administered the oath and signed the Charge Sheet in this case. *Id.*

3. That same day, 6 September 2018, Lt Col James Gherdovich, Commander of the Cadet Group 2, signed a first indorsement memorandum to the Commandant forwarding the charges preferred against AFC Knutson to the Commandant. *Attachment 4*.

4. On 12 September 2018, the Commandant directed a preliminary hearing under Article 32, UCMJ. *Id.* On 19 September 2019, the USAFA Legal Office (USAFA/JA) provided the preliminary evidence in this case, including 11 immunized statements from members of the USAFA Men's Swim Team prior to the Article 32 hearing. *Attachment 5.* On 30 October 2018, AFC Knutson waived his Article 32 Preliminary Hearing. *Attachment 6.*
5. On 8 November 2018, the Commandant forwarded the charges to the Superintendent with a recommendation for trial by general court-martial. The same day, the USAFA Staff Judge Advocate, Colonel Thomas A. Rodgers, Jr., provided pretrial advice to the Superintendent. *Attachment 7.*
6. On 8 November 2018, the case was referred to trial by general court-martial. *Attachment 3.* The Staff Judge Advocate signed the Charge Sheet for the Superintendent. On 9 November 2018, the Assistant Trial Counsel caused the charges to be served on AFC Knutson. *Id.*
7. The case is currently docketed for the week of 11 March 2019. *Attachment 8.*
8. As a result of the charges, AFC Knutson faces 6 years confinement, total forfeiture of all pay and allowance, and a dismissal (equivalent to a Dishonorable Discharge). He would also face recoupment of the cost of his education at the USAFA, which would likely total into the several hundreds of thousands of dollars.

Initial Communications Regarding Investigation

9. On 28 December 2017, emails show that the Superintendent and Major General Sami D. Said, Inspector General of the USAF (SAF/IG)⁹, communicated about the investigation. In the email he stated:

Sami, I understand that you are about to let the Chief know about the swimming hazing investigation. Please do me a favor and mention that the Det at USAFA and my staff have been in close coordination and this was a request approved through the Comm and AD, (I'd like to emphasize great teamwork and coordination by the Det and my staff) Also mention that you and I will stay closely connected.

Attachment 9.

10. On 2 January 2018, AFC ACCUSER filed a congressional complaint with the Office of United States Representative Ron DeSantis. *Attachment 10.* On 3 January 2018, the Office of United States Representative DeSantis sent a congressional inquiry to Major General Steven Basham, the Director of Legislative Liaison for the Air Force. *Attachment 11.* At some time on or before 12 January 2018, the mother of ACCUSER sent an email to the Commandant that closed with:

I welcome speaking to you at your earliest convenience. The remainder of my afternoon is clear, if you just let me know what time is good to contact you. I will

⁹ AFOSI is a field operating agency under the administrative guidance and oversight of The Inspector General of the Air Force (SAF/IG). See AFI 71-101V, para 2.1.

forward our State Representative, Ron DeSantis, with this letter. His office has been instrumental in providing support and guidance to [ACCUSER]. ***We need to all work together as a team on changing the culture of this very important American Institution.*** [ACCUSER] can continue to provide his assistance in this matter from here to both your offices and the office of Ron DeSantis.

Attachment 12 (emphasis added).

11. On 3 January 2018, the Superintendent sent an email to SECAF and CSAF. *Attachment 13*. Copied on this email was the Commandant. *Id.* In this email, the Superintendent stated, *inter alia*:

This week we are initiating an investigation into potential hazing on the USAFA men's swimming team. It does not appear to be as severe as the men's Lacrosse team but we want to continue to make it clear that we take all hazing serious. ***While attention is on the topic I would like to take advantage of the momentum.*** OSI will begin the investigation this week into the team and the coaches. We will let you know right away if this leads to suspensions or any media attention.

Id. (emphasis added)

12. On 2 February 2019, the Superintendent sent an email to SECAF and CSAF (copying others) stating:

Madam Secretary and Chief;

With apologies for the weekend emails, I wanted to update you on the men's swim team discipline cases.

This week we disenrolled the first of seven Cadet discipline cases we are considering. He is a Cadet First Class, so the consequences are severe. This has been a very slow process due in large part to the attorney retained by one of the cases going to a court-martial. This attorney is the same one that represented Kelly Flynn in her case against the AF years ago--we think his stature may have led others [to] rethink their approach.

This attorney has tried to intimidate me by talking about how all of the details of the misconduct will get out in the press and embarrass the Academy. He also thinks the punishment across the team members, varying from normal Cadet discipline actions to court-martial, was inconsistent and the trial would bring that out. We have clearly and publically acknowledged the hazing culture on the team which is why we investigated the team and asked an outside entity to review the department. Additionally, the details of the misconduct have been out in the press already. The variance in punishments were from a thorough investigation of each Cadet's action.

His defense centers around the idea that the culture was so bad that he was driven to this behavior--he has a psychologist that will testify to make this case. It is an odd defense to

say that he lacked the moral courage to stop the misconduct, so we should make him an officer.

After this week's disenrollment, we have 6 others. Three are being considered for disenrollment and three are facing a court-martial. The three going to court are facing charges related to obstruction of justice. We believe they assembled the team and orchestrated the lies they should tell.

Finally, the defense attorneys have subpoenaed emails of USAFA leadership on the subject, some of which are my correspondence to you and others on the air staff. My JA is reviewing those with Gen Rockwell. This will be months in the making, but with the first disenrollment this week I wanted you to be aware how the case was proceeding.

VR, Jay

Attachment 14.

Nature of Allegations

13. What originally began as an investigation into serious allegations made by ACCUSER of hazing and sexual misconduct (including kidnapping, indecent viewing, stripping naked, urinating in food, firearms in lockers, a secret society, mandatory fining) and assault by AFC Knutson and others was soon only learned to be exaggerated allegations. *Attachment 1*, pg 70-78. Instead, witnesses unanimously describe what happened at "the Chunker" as voluntary and consistent with practices that had been carried on within the swim team for 30 years under either the active watch or passive toleration of coaches and officers. *Id.*, pg 5. No one was hurt or injured. No one was forced to participate or do anything they didn't want to do. Further, multiple eye-witnesses contradicted ACCUSER'S's account that AFC Knutson had assaulted him and grabbed him by the throat. Instead, witnesses confirmed that ACCUSER had made an offensive joke about AFC Knutson's sister being shot and killed in what the swim team thought was a real-world active shooter incident at the Academy. *Id.*, pg 7.

14. In his 12 December 2017 letter to the Superintendent, ACCUSER states:

So, I decided to gather evidence and deliver it to my superiors who I perceived as having good moral judgment and USAFA's best interest at heart. I believe their dedication and professionalism are second to none. I realize the coaches were completely unaware of this behavior, and again, I have the utmost respect and admiration for Coach Rob Clayton and Coach Anthony Boettcher. I only wish I would have brought it to their attention earlier.

Attachment 15, pg 7.

15. In his 12 January 2018 email to the Commandant, AFC ACCUSER stated among other things:

In regards to the coaches participation and knowledge of the swim team (Phi K S) fraternity and its behavior, after going through all of the evidence, I do believe that the coaches have

significant or even full knowledge about what occurs.... Additionally, within ear shot of Coach Rob, there were numerous occasions where freshman and upperclassmen spoke about the hazing (called the “chunker”) and fining system. My High School Coach, who was an Olympian Swimmer, told me over winter break that coaches are all aware of what goes on with their team and that coach Rob had to know.

Attachment 16.

Highly Unusual Aspects of this Case

16. AFC Lars Knutson is the first cadet in the history of the USAFA to ever be court-martialed for charges involving “hazing,” or more specifically, “negligently failing to refrain from activities that constitute hazing.”

17. AFOSI Investigation. AFOSI pulled out all the stops on this investigation. Surprising and concerning actions include:

- a. In early January 2018, seeking authorization to have two freshmen wear a wire or listening device to intercept conversations with other swimmers (*Attachment 17, 18*);
- b. Bringing numerous Special Agents on short notice in from numerous other Air Force bases to assist in the investigation (*Expected Testimony of SAF/IG*);
- c. Seeking authorization to install a covert camera and closed circuit television inside the swim team room to secretly capture swim team meetings (*Attachment 19*);
- d. Requesting (and obtaining from an attorney in the USAFA legal office) probable cause determinations¹⁰ to submit the deoxyribonucleic acid (DNA) of several cadets to the Combined DNA Index System (CODIS) for offenses (including sex related offenses) that do not appear to qualify under the applicable regulation for inclusion (*Attachments 20, 21*);
- e. Interrogating alleged victims for several hours;¹¹ and
- f. Denying multiple cadets the opportunity to speak with an attorney when they were suspected of crimes and requested an attorney in interviews (*Attachments 22, 23*).¹²

¹⁰ DoD Instruction 5505.14, *Deoxyribonucleic Acid (DNA) Collection Requirements for Criminal Investigations, Law Enforcement, Corrections, and Commanders* (22 Dec 18, IC 1 9 Mar 17), requires AFOSI to submit to the United States Army Criminal Investigation Laboratory (USACIL) for inclusion in CODIS a DNA sample for a military member investigated by a military law enforcement organization AFTER a determination is made that there is probable cause to believe the member committed an offense listed in Enclosure 3 of that Instruction. Enclosure 3 does not appear to list Article 120c, UCMJ (indecent exposure) as a qualifying offense. Inclusion of DNA in CODIS, especially for a sex related offense, can have serious repercussions on a member’s life and future employment opportunities.

¹¹ See Article 6b(a)(8), UCMJ, which provides: “A crime victim has the following right[]: The right to be treated with fairness and with respect for the victim’s dignity and privacy.”

¹² See U.S. Const. amend. V., Article 31, UCMJ, and *Edwards v. Arizona*, 451 U.S. 477 (1981).

18. Comparison to Lacrosse Investigation. The Superintendent, when he first framed the investigation into the USAFA's Men's Swim team for SECAF, CSAF, the Commandant, and others stated:

This week we are initiating an investigation into potential hazing on the USAFA men's swimming team. It does not appear to be as severe as the men's Lacrosse team but we want to continue to make it clear that we take all hazing serious. While attention is on the topic I would like to take advantage of the momentum. OSI will begin the investigation this week into the team and the coaches.

Attachment 13. Although the Prosecutor has denied our discovery requests on this matter, it is the Defense's understanding and belief that the hazing incidents involving members of the Lacrosse team were, in fact, far worse and, in some cases, sexual in nature. *Attachment 24.* Further, multiple members of the Lacrosse team coaching staff and leadership were formally disciplined. *Attachment 14.* It is the Defense's understanding and belief that no member of the USAFA Men's Swim Team coaching staff was disciplined, though discovery requests have been denied that would permit the Defense to determine this.

19. Media Attention.

- a. On 6 June 2018, the Air Force Times published an article regarding allegations of hazing on the USAFA Men's Swim and Lacrosse Team. *Attachment 25.* With respect to the Swim Team, the Superintendent stated the following or was attributed as saying:

An investigation' "found enough evidence ... that we're going to take action against some swimmers."

...

As for the swim team, Silveria said the swim team investigation has just finished and is now being reviewed by Commandant of Cadets Brig. Gen. Kristin Goodwin. Goodwin will decide what actions to take, Silveria said, or will push other decisions up to his level in the case of more severe punishments.

...

Silveria said that he took swift action to stop swimmers from representing the academy when the investigation was launched. "I actually stopped some of those swimmers in the middle of a swim meet, and took them away from the swim meet, because that's what our values represent," Silveria said. "It's a privilege to wear Air Force on your jersey or your swim cap. As a result of this investigation, Silveria has banned an unofficial men's swim team organization called Phi-K-S, which he said was part of the misconduct that took place.

“As we got through this investigation, it became clear to me that that was part of this, that was part of the conduct of the swim team, that they were somehow using that as a reason for how, why they were conducting themselves [in that way],” Silveria said. “And so I banned that here at the academy, banned it from the swim team.”

When asked if he was afraid there is something rotten with the athletic culture in the school, Silveria said that he is prepared to act if the review finds more problems.

“I’m not afraid, because whatever we find, I’m ready to take action,” Silveria said.

- b. On 14 September 2018 – 8 days after preferral in this case – the Gazette ran an article regarding the alleged hazing of AFC Knutson. *Attachment 26*. The Gazette is based in Colorado Springs, CO, the location of USAFA. It is unclear how or why the Gazette received a summary of the AFOSI investigation.¹³ The article included:
 - 1) AFC Knutson’s name and picture;
 - 2) Exaggerated details about the allegations based on presumably a summary of the AFOSI investigation that was obtained by the paper. *See generally Attachment 1*.
 - 3) A quote from the Superintendent: “Times have changed, and some of these rituals hang on that are completely, ridiculously inappropriate,” Silveria said.
- c. The article was picked up and run on The AirForceTimes.com website (*Attachment 27*); KKTU 11 News (also based on Colorado Springs) (*Attachment 28*); and Task & Purpose (*Attachment 29*); and many other outlets.
- d. On 14 January 2019, the Gazette ran another article regarding the findings of the Collegiate Sports Associates on the USAFA Athletic Department. *Attachment 30*. In that article, the charges pending against AFC Knutson (not by name) were referenced, as well as portions of a public statement made by the Superintendent about the report, including that he “pledged that the school will continue its work to stamp out misconduct in sports.” *Id.*
- e. On 16 January 2019, another story was run in the Gazette referencing the charges against AFC Knutson (though not by name). *Attachment 31*.

¹³ *See generally* AFI 51-201, paragraph 13.5, *Section 13E—Extrajudicial Statements and Release of Information*; AFI 51-201, paragraph 13.5 (“Information may not be disseminated if it could reasonably be expected to interfere with law enforcement proceedings or deprive a person of a right to a fair trial or an impartial adjudication in a criminal proceeding”); paragraph 13.6.6 (“Extrajudicial statements relating to the following matters ordinarily have a substantial likelihood of prejudicing a criminal proceeding and should not be made: 13.6.6.3. Opinions regarding the accused’s guilt or innocence; ... 13.6.6.4. Opinions regarding the merits of the case or the merits of the evidence; ... 13.6.6.6. Statements concerning the identity, expected testimony, disciplinary or criminal records, or credibility of prospective witnesses; ... 13.6.6.9. Information that trial counsel knows or has reason to know would be inadmissible as evidence in a trial.”).

- f. Reports and articles regarding the allegations of hazing against AFC Knutson have been run in ESPN (*Attachment 32*); theDenverChannel.com (*Attachment 33*); the Coloradoan (*Attachment 34*); the Denver Post (*Attachment 35*); the Colorado Independent (*Attachment 36*); and many other locations online.

20. Independent Consultant Review. As promised to the Air Force Times, in the late summer of 2018, the Superintendent of the USAFA ordered an independent review of the entire USAFA Athletics Department by Collegiate Sports Associates (CSA). *Attachment 37*. To the Defense’s knowledge, this is the first such independent review of the Athletics Department regarding hazing ever performed.

- a. The introduction to CSA’s report makes clear the purpose of the review: “The Athletics Department review was prompted by recent incidents involving Cadet-athlete misconduct within two varsity teams that were highly publicized and resulted in consequences for Cadet-athletes and staff. CSA was asked to identify areas that could be negatively impacting the athletics and work environment within the department and make recommendations on strengthening the overall operations (particularly as facilitators of Cadet-athlete growth) and enhance the developmental climate for Cadet-athletes.” *Id.* 38, pg. 8.
- b. The project began on 1 August 2018 and did not complete until 2 November 2018. *Id.*, pg 8. During this time, the CSA team facilitated 63 meetings involving 158 people at USAFA. *Id.* The final report gained media attention.
- c. The CSA report recognized the context of, and opportunities for, the USAFA to address the culture:
 - 1) Coaches and Support Staff. “The role of coaches in the lives of Cadet-athletes is substantial and cannot be overstated. They are often the Cadet-athletes’ first point of contact and sales-person for the Academy during recruiting. Cadet-athletes will see their coaches 6 days a week through four years. Coaches have expectations for their Cadet-athletes’ behavior in every aspect of their lives and serve as surrogate parents. It cannot be sufficiently overstated that coaches have tremendous influence on Cadet-athletes. Yet, coaches also control playing time, a very important aspect of Cadet-athletes’ lives, resulting in a power relationship that can prohibit complete openness. For this reason, those who often have the pulse of a program are the individuals with diluted power relationships who regularly support Cadet-athletes....” *Id.*, pg 12.
 - 2) Traditions and Off-Campus Activities. “What once may have been acceptable ‘initiation’ behavior has evolved over time to be inappropriate or hazing. Often these activities are built into the lore of a program and passed-on from each class by upper-class cadets who had recently gone through the same ritual.... National dialogue has prompted an examination of hazing definitions as many activities once treated as normal behavior are now carefully scrutinized. Certainly, activities to create team building can be permitted. Is requiring freshmen to load/unload the bus hazing or ‘paying-their-dues?’ Does having freshmen sing their high school fight song exceed

the threshold of harassment or is it a tool to build relationships by showcasing personalities? Many of the Cadet-athletes identified a lack of clarity on what constitutes hazing.... There was also confusion in many interviews regarding acceptable and unacceptable use of power and differences between team building and hazing.” *Id.*, 12-13.

- 3) Clearly Defined Behaviors. “Consistent in the interviews with Cadet-athletes was confusion regarding acceptable and unacceptable behaviors. In the same way that coaches often physically and psychologically breakdown the individual and build-up as a team, the military experience parallels this deliberate series of pedagogy and curriculum. Even within a presentation by the Commandant to the Athletics Department during CSA’s campus visit was a video showing random discipline (‘start over’) issued during basic training as she joined the cadets. The academies are unique in this regard as student-athletes at universities do not encounter this breakdown in both athletics and on the general campus. CSA appreciates the need for the academies to create our nation’s leaders by these methods, although it can create confusion about as to whether the conduct crosses the line from legitimate individual and team building to abuse, such as was reported about the hazing incidents.

...

Cadet-athletes should be given explicit examples of appropriate and inappropriate behavior (particularly in regard to hazing) when those behaviors can be specifically identified. Ideally, case studies using contemporary instances can be especially meaningful. Opportunities for Cadet-athlete questions and discussion to examine each situation and clarify confusion should be provided to ensure full understanding. Finally, opportunities for reporting (ideally proactively) within or outside the chain-of-command should be included in these repeated examples, programs and meetings.” *Id.*, pg 23.

- 4) “Rather than having a coach or administrator make isolated decisions on responding to serious Cadet-athlete concerns, such as misconduct, CSA supports Athletics managing human relations issues as much in the collective as practicable. Air Force understands the need to maintain a consistent, fair and collaborative approach in responding to violations of rules, regulations, and policies. Collaborative decision-making is, by its nature, more reasonable and defensible than if one individual decides. It also demonstrates Air Force’s good faith due diligence and thoughtfulness in reaching decisions.” *Id.* pg 27.
- 5) Often, legacy initiation activities handed down from class-to-class evolve into unacceptable behavior. What was once acceptable behavior has evolved into inappropriate conduct yet still encouraged by alums as rights-of-passage rituals. A deliberate investigation into historical practices should be made to determine whether any inappropriate rituals still exist. Interviews should be conducted with alums, former coaches, former support staff as well as current Cadet-athletes would expose any traditions that still linger. *Id.* pg 28.

21. Chief, Senior Trial Counsel. On 21 Dec 2018, the Chief and most senior Trial Counsel in the USAF detailed himself to this case. *Attachment 38*.

Witness Interviews by Assistant Trial Counsel (Prosecutor)

22. 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.*

23. 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.

24. 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.*

25. 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 knows” and “I can’t remembers.” *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.*

26. 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.*

27. 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.*

28. 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.

29. 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.*

30. VV.#9 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. VV 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.*

31. 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.*

32. 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. *Id.*

33. 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.

Discovery Issues

34. The Assistant Trial Counsel in this case referenced cadet LORs in several of her interviews with the alleged victims in the case, as discussed above. In at least one case, the Assistant Trial Counsel told an alleged victim “I wrote your LOR.” *Attachment 66*.

35. On 20 November 2018, the Defense submitted its first Discovery Request. *Attachment 73*. In this discovery request, the Defense asked for all statements of the cadets related to the allegations against our clients, and specifically for all administrative paperwork, Letters of Reprimand (LORs), and rebuttals thereto.

36. On 20 December 2018, one month later, the Government responded to the Defense’s First Discovery Request. *Attachment 74*. In this response, the Government denied several requests pending a proffer of relevance, necessity, and materiality, or simply stated they were unaware if the items exist. *Id.* In addition, the Government stated in this response, that they would provide several other items at a later point. *Id.* On 23 December 2018, Defense submitted a Supplemental Response to the First Discovery Request in order to provide further justification for the request. *Attachment 75*.

37. On 3 January 2019, Defense raised the issue of the outstanding discovery request with Trial Counsel and Assistant Trial Counsel for inclusion in the Joint Status Update. On 17 January 2019, Defense raised the issue of outstanding discovery with Assistant Trial Counsel for inclusion in the Joint Status Update. On 17 January 2019, the Defense submitted a Second Discovery Request. This request was responded to on 8 February 2019, nearly three weeks later.

38. On 24 January 2019, the Defense spoke to Trial Counsel about the status of discovery. During this phone call the Defense raised the issue of outstanding discovery and specifically that statements were believed to exist that were made by alleged victims and alleged co-conspirators. In addition, it was discussed that the Defense’s supplemental discovery request dated 23 December 2018 was still unanswered. Trial Counsel indicated they were working the issues and would respond shortly. On 24 January 2019, a Joint Status Update was provided to the Court reflecting the Defense’s concern with discovery and its impact on the ability to file certain motions.

39. On 31 January 2019, over one month after the original request, the Government provided a response to the Defense’s Supplemental Response to the First Discovery Request. In this response, the Government denied several items the Defense has previously asked this Court to compel.

40. On 5 February 2019, the Military Judge emailed Trial Counsel asking “Is it accurate that there are statements of the alleged victims that have not yet been provided to the defense?” *Attachment 76*. On 6 February 2019, Senior Trial Counsel emailed the parties “I will sync up with the defense counsel today to find out what is believed to be missing and get that issue resolved soonest.” *Attachment 77*.

41. On 7 February 19, Assistant Trial Counsel emailed the Court indicating that some of the requested rebuttal statements were on their way to Defense and that other statements still needed to be compiled. *Attachment 78*. Between 6 and 7 February 2019, the Defense received

approximately a dozen written statements of alleged victims and co-conspirators that directly related to the allegations conspiracy to haze, hazing, and obstruction of justice. Many of them contained details and in many regards exculpatory information regarding the truthfulness of alleged victims in their statements to AFOSI and some mention the coercion of the investigators and the Assistant Trial Counsel.

BURDEN

42. Pursuant to RCM 905(c), the Defense bears the burden of persuasion for this motion as it pertains to the defective referral and prosecutorial misconduct, and the requirement for proof on any factual issue by a preponderance of the evidence.

43. For the issue of UCI, while “[t]he defense has the initial burden of producing sufficient evidence to raise unlawful command influence.” *United States v. Ayala*, 43 M.J. 296, 299 (1995). Once the issue is raised, “the appearance or existence of unlawful command influence creates a rebuttable presumption of prejudice.” *United States v. Wallace*, 39 M.J. 284, 286 (C.M.A. 1994).

44. “Once the issue of unlawful command influence is raised, the Government must prove beyond a reasonable doubt: (1) that the predicate facts do not exist; or (2) that the facts do not constitute unlawful command influence; or (3) that the unlawful command influence will not prejudice the proceedings or did not affect the findings and sentence.” *United States v. Biagase*, 50 M.J. 143, 151 (C.A.A.F. 1999).

LAW

Unlawful Command Influence

45. Unlawful Command Influence (UCI) is “the mortal enemy of military justice.” *United States v. Kitts*, 23 M.J. 105, 107 (C.M.A. 1986). Likewise, the Court of Appeals of the Armed Forces (C.A.A.F.) is “committed to preventing interference from non-command sources. [They] take this responsibility seriously, for its fulfillment “is fundamental to fostering public confidence in the actual and apparent fairness of our system of justice.” *United States v. Barry*, 78 M.J. 70, 76 (C.A.A.F. 2018) (quoting *Harvey*, 64 M.J. at 17 (C.A.A.F. 2006)). Further, the mere appearance of unlawful command influence may be “as devastating to the military justice system as the actual manipulation of any given trial.” *United States v. Allen*, 33 M.J. 209, 212 (C.M.A. 1991).

46. Article 37, UCMJ states: “No person subject to [the UCMJ] may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts.” *See also* R.C.M. 104.

Who Can Commit Unlawful Command Influence

47. Pursuant to Article 2(a)(1), UCMJ, all “[m]embers of a regular component of the armed forces” are persons subject to the UCMJ. 10 U.S.C. § 802(a)(1) (2012). In *Barry*, C.A.A.F. held

that “a plain reading of Article 2 and Article 37 together makes clear that a DJAG, just *like any other military member*, is capable of committing unlawful influence. 78 M.J. at 76.

48. C.A.A.F. has found that attempts to influence witness testimony can be unlawful command influence, including an SJA attempting to influence testimony of a government witness at an Article 32 hearing. *United States v. Argo*, 46 M.J. 454, 457 (C.A.A.F. 1997).

49. C.A.A.F. has held that “more generalized allegations of unlawful influence” should be evaluated under the same test as claims of unlawful command authority “by those in command or those acting with the mantle of command authority.” *Berry*, 78 M.J. at 76-77.

Forms of Unlawful Command Influence

50. Generally, two overall forms of UCI can arise in the military justice system: *actual* UCI and the *appearance* of UCI.

- a. Actual unlawful influence “occur[s] when there is an improper manipulation of the criminal justice process which negatively affects the fair handling and/or disposition of a case.” *United States v. Boyce*, 76 M.J. 242, 247 (C.A.A.F. 2017).
- b. “The appearance of unlawful command influence will exist where an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding. *United States v. Lewis*, 63 M.J. 405, 415 (C.A.A.F. 2006). The appearance of UCI is actionable because “the appearance of unlawful command influence is as devastating to the military justice system as the actual manipulation of any given trial.” *Id.* The objective test for the appearance of unlawful command influence is similar to the tests applied in reviewing questions of implied bias as it regards panel members. *Id.*

51. Whenever an accused wishes to assert a claim of the appearance of unlawful command influence, they “initially must show some evidence that unlawful command influence occurred...the quantum of evidence necessary to raise unlawful command influence is the same as that required to submit a factual issue to the trier of fact (i.e., “some evidence”). *See United States v. Salyer*, 72 M.J. 415, 423 (C.A.A.F. 2013). Once the issue is raised, the Government must then persuade the military judge, beyond a reasonable doubt, that there was no unlawful command influence or that the unlawful command influence did not affect the proceedings. If the Government does not meet that burden, the government may next seek to prove beyond a reasonable doubt that the unlawful command influence did not place “an intolerable strain” upon the public’s perception of the military justice system and that “an objective, disinterested observer, fully informed of all the facts and circumstances, would not harbor a significant doubt about the fairness of the proceeding.” *Id.* at 423.

52. The exercise of command influence tends to deprive servicemembers of their constitutional rights. If directed against prospective defense witnesses, it transgresses the accused’s right to have access to favorable evidence. U.S. Const. amend. VI; Art. 46, UCMJ, 10 U.S.C. § 846. *United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986). C.A.A.F. in *Thomas* has stated, “In

view of this high standard, if an accused properly raises the issue that his ability to secure favorable evidence has been impaired, the Government obviously bears a heavy burden in establishing that defense access to witnesses (character or otherwise) was not impeded by command influence to the extent that it affected the results of trial. Indeed, appellate defense counsel might well argue that the Government can never overcome this heavy burden because there will always be a possibility that a witness might have been available who could have tipped the scales in the defense's behalf." *Id.* at 396.

53. In *United States v Rodriguez*, the accused's commanding officer created the appearance of unlawful command influence in a drug case where he accused other senior members of the command of being disloyal and condoning drug use when they asked him to change his mind on discharging another drug offender. 16 M.J. 740 (A.F.C.M.R. 1983). On appeal, the accused argued the commander's actions "stifled his ability to prepare for trial" and his intimidation had a "chilling effect" on the entire proceeding. *Id.* Though the trial judge fashioned several remedies, the court held "the appearance of evil in [this] courtroom and our desire to foster public confidence in the military justice system require[s] that we set aside the accused's conviction." *Id.* at 743.

54. In *United States v. Levite*, the accused was entitled to have his conviction set aside where government failed to show beyond reasonable doubt that command's attempts to influence his court-martial failed. 25 M.J. 334, 334 (C.M.A. 1987). In this case, the Trial Counsel informed the first sergeant of the accused's unit of what members were going to testify on the accused's behalf. *Id.* at 336. The accused's commander then asked the Trial Counsel if he could show the prospective witnesses derogatory information on the accused, and the Trial Counsel responded that the commander was permitted to show it but that he could not order the witnesses to view it. *Id.* The commander subsequently ordered the witnesses to the orderly room where he asked them to view the information so "they would be current in their testimony." *Id.* One of these prospective witnesses testified in findings and sentencing, and another two testified in sentencing only. *Id.* Another prospective witness decided not to testify in person. *Id.* "The remainder of the defense witnesses all testified under the glare of the commander and his minions." *Id.* at 340. Ultimately, the court held "the command influence exercised in this case was as pervasive as it was pernicious. Every effort was made by the command to ensure that the court-martial convicted and punished appellant in accord with its will. Concern for the commands of the Constitution, the Code, and the President was nonexistent. Upon discovery of this fraud on the court, insufficient effort was expended to root out its cause and nullify its effect." *Id.*

55. In *United States v. Boyce*, C.A.A.F. set aside a servicemember's convictions of rape and assault rape because SECAF and CSAF engaged in conduct that constituted an appearance of unlawful command influence. 76 M.J. at 250. In this case, a GCMCA who had taken politically unpopular decisions on previous courts-martial was told by CSAF that he either had to resign or be fired days before the GCMCA referred the appellant's case to court-martial. *Id.* at 245-246. C.A.A.F. determined the trial judge's determination that the GCMCA was "bombproof" because he was retiring and "no longer had anything to gain or lose when it came to his Air Force career" was not supported by the facts. *Id.* Instead, C.A.A.F. found "in light of the attendant circumstances in this case, if anything, [the GCMCA] would have been more acutely aware than other GCMCAs about how closely his referral decisions were being scrutinized by his superiors

and about the potential personal consequences of ‘ignoring political pressure’ when making those referral decisions.” *Id.* at 251. C.A.A.F. found “the Government did not meet its burden of proving beyond a reasonable doubt that the conduct of SECAF and/or CSAF did not place an intolerable strain upon the public’s perception of the military justice system. To the contrary, we deem the totality of the circumstances in this case to be particularly troubling and egregious. As such, we conclude that an objective, disinterested observer with knowledge of all the facts would harbor a significant doubt about the fairness of the court-martial proceedings.” *Id.* at 252.

Case Disposition

56. R.C.M. 306, Initial Disposition (2016). This Rule provides in pertinent part:

(a) *Who may dispose of offenses.* Each commander has discretion to dispose of offenses by members of that command. Ordinarily the immediate commander of a person accused or suspected of committing an offense triable by court-martial initially determines how to dispose of that offense. A superior commander may withhold the authority to dispose of offenses in individual cases, types of cases, or generally. A superior commander may not limit the discretion of a subordinate commander to act on cases over which authority has not been withheld.

57. R.C.M. 401. Forwarding and disposition of charges in general. This Rule provides in pertinent part:

(a) *Who may dispose of charges.* Only persons authorized to convene courts-martial or to administer nonjudicial punishment under Article 15 may dispose of charges. A superior competent authority may withhold the authority of a subordinate to dispose of charges in individual cases, types of cases, or generally.

58. R.C.M. 406. Pretrial Advice. This Rule provides in pertinent part:

(a) *In general.* Before any charge may be referred for trial by a general court-martial, it shall be referred to the staff judge advocate of the convening authority for consideration and advice.

(b) *Contents.* The advice of the staff judge advocate shall include a written and signed statement which sets forth that person’s:

(1) Conclusion with respect to whether each specification alleges an offense under the code;

(2) Conclusion with respect to whether the allegation of each offense is warranted by the evidence indicated in the report of preliminary hearing (if there is such a report);

(3) Conclusion with respect to whether a court-martial would have jurisdiction over the accused and the offense; and

(4) Recommendation of the action to be taken by the convening authority.

The *Discussion* section to this Rule states:

The staff judge advocate is personally responsible for the pretrial advice and must make an independent and informed appraisal of the charges and evidence in order to render the advice. Another person may prepare the advice, but the staff judge advocate is, unless disqualified, responsible for it and must sign it personally. Grounds for disqualification in a case include previous action in that case as preliminary hearing officer, military judge, trial counsel, defense counsel, or member.

The advice need not set forth the underlying analysis or rationale for its conclusions. Ordinarily, the charge sheet, forwarding letter, endorsements, and report of investigation are forwarded with the pretrial advice. In addition, the pretrial advice should include when appropriate: A brief summary of the evidence; discussion of significant aggravating, extenuating, or mitigating factors; any recommendations for disposition of the case by commanders or others who have forwarded the charges; and the recommendation of the Article 32 preliminary hearing officer. However, there is no legal requirement to include such information, and failure to do so is not error.

Whatever matters are included in the advice, whether or not they are required, should be accurate. Information which is incorrect or so incomplete as to be misleading may result in a determination that the advice is defective, necessitating appropriate relief. See R.C.M. 905(b)(1); 906(b)(3).

59. R.C.M 601. Referral, provides in pertinent part:

(a) In general. Referral is the order of a convening authority that charges against an accused will be tried by a specified court-martial.

...

(c) *Disqualification.* An accuser may not refer charges to a general or special court-martial.

(d) *When charges may be referred.*

(1) *Basis for referral.* If the convening authority finds or is advised by a judge advocate that there are reasonable grounds to believe that an offense triable by a court-martial has been committed and that the accused committed it, and that the specification alleges an offense, the convening authority may refer it. The finding may be based on hearsay in whole or in part. The convening authority or judge advocate may consider information from any source and shall not be limited to the information reviewed by any previous authority, but a case may not be referred to a general court-martial except in compliance with subsection (d)(2) of this rule. The convening authority or judge advocate shall not be required before charges are referred to resolve legal issues, including objections to evidence, which may arise at trial.

(2) *General courts-martial.* The convening authority may not refer a specification under a charge to a general court-martial unless—(A) There has been substantial compliance with the preliminary hearing requirements of R.C.M. 405; and (B) The convening authority

has received the advice of the staff judge advocate required under R.C.M. 406. These requirements may be waived by the accused.

Prosecutorial Misconduct

60. 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).

61. 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).

62. In assessing prejudice, C.A.A.F. “looks at the cumulative impact of any prosecutorial misconduct on the accused’s substantial rights and the fairness and integrity of his trial. *Id.*

63. If prosecutorial misconduct is found, this court will examine the record as a whole to determine whether the accused was prejudiced by the misconduct. *Fletcher*, 62 M.J. at 179 (“As [a] proper objection was made at the trial level, we will review those comments for prejudicial error.”). In making that determination, courts weigh three factors when evaluating the impact of prosecutorial misconduct on a trial: (1) the severity of the misconduct; (2) the measures adopted to cure the misconduct; and (3) the weight of the evidence supporting the conviction. *Id.* at 184; see *United States v. Rodriguez–Rivera*, 63 M.J. 372, 378 (C.A.A.F.2006).

64. Prosecutorial misconduct does not in itself mandate dismissal of charges in every case where it has occurred. *United States v. Meek*, 44 M.J. 1, 5 (C.A.A.F. 1996). Instead, the trial court must consider the legal norm violated by the prosecutor and determine if the violation actually impacted on a substantial right of an accused (*i.e.*, prejudice). *Id.* “Dismissal is not appropriate where an error can be rendered harmless by an alternative remedy. Conversely, dismissal is appropriate when an accused would be prejudiced or no useful purpose would be served by continuing the proceedings.” *United States v. Bowser*, 73 M.J. 889, 898 (A.F.C.C.A. 2014), *aff’d*, 2015 CAAF LEXIS 765 (C.A.A.F. Mar. 25, 2015)(citations omitted).

65. A military judge may dismiss a case due to government misconduct. *See, e.g., United States v. Fulton*, 55 M.J. 88, 89 (C.A.A.F. 2001) (grounds for dismissal enumerated under R.C.M. 907(b) is “illustrative, not exhaustive”); *see also* Manual For Courts-Martial (2014), *Analysis for R.C.M. 907(b)* (“This subsection lists common grounds for motions to dismiss.”) Dismissals can be appropriate when evidence was obtained in violation of due process. Dismissals can be an appropriate remedy even in instances that do not involve issues of an evidentiary nature, for example, in cases of illegal pretrial punishment. *See, e.g., Fulton*, 55 M.J. at 89 (“where no other remedy is appropriate, a military judge may, in the interest of justice, dismiss charges because of unlawful pretrial punishment”). “[T]he military judge receives broad deference in matters of trial management and choice of remedy,” to include dismissals. *Bowser*, 73 M.J. at 903.

66. C.A.A.F. has stated that “[s]everal legal norms are violated when a trial counsel attempts to or unlawfully dissuades a defense witness from testifying at a court-martial.” *Meek*, 44 M.J. at 5; *see also Webb v. Texas*, 409 U.S. 95, 98 (1972) (holding that the defendant’s due process rights were violated when the trial judge singled out the only defense witness and indicated to that witness that he expected the witness to lie and would personally ensure that the witness was prosecuted for perjury and thereby “effectively drove that witness off the stand”); *United States v. Vavages*, 151 F.3d 1185, 1189 (9th Cir. 1998) (concluding that although perjury warnings are not improper per se, it may be prosecutorial misconduct if “the prosecutor or trial judge employs coercive or intimidating language or tactics that substantially interfere with a defense witness’ decision whether to testify”); *United States v. Heller*, 830 F.2d 150, 153-54 (11th Cir. 1987) (concluding that when a government agent intentionally threatened and attempted to scare a defense witness concerning his testimony on behalf of the defendant, the defendant had “been deprived of an important defense witness by substantial interference on the part of the government” and was therefore entitled to a new trial). In *Meek*, C.A.A.F. noted “such conduct towards a defense witness, if done with the requisite intent, can be both a military and civilian criminal offense,” Article 134, UCMJ, and such “conduct by a trial counsel clearly constitutes a gross ethical violation.” *Id.* at 6.

67. In *United States v. Edmond*, the prosecutor did more “than simply give a perjury warning” to a likely defense witness. 63 M.J. at 349. The prosecutor told the witness, “I know that that is a lie I am going to make sure that the S.A.U.S.A. [Special Assistant United States Attorney] sits in and listens to you testify to that and then basically admonish you -- not admonish you, but let him know what the potential repercussions would be for committing perjury.” *Id.* The witness was also informed “of the consequences of perjury based upon our information and belief” that the “witness was not going to be truthful” and that “the government would seek justice....” *Id.* C.A.A.F. overturned a post-trial hearing judge’s determination that this warning by the prosecutor was not to influence was clearly erroneous and that the trial counsel’s actions substantially interfered with the witnesses decision whether to testify. *Id.*

Discovery and Prosecutorial Misconduct

68. In *Brady v. Maryland*, 373 U.S. 83 (1963), the Supreme Court held “that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of

the prosecution.” When assessing materiality in the scenario where a prosecution witness has given “perjured testimony and . . . the prosecution knew, or should have known, of the perjury.” There “a conviction [so] obtained . . . is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.” *United States v. Agurs*, 427 U.S. 97, 103 (1976). As *Agurs* explained, this “strict standard of materiality” is applied “not just because . . . prosecutorial misconduct” in involved but, more important, because of “corruption of the truth-seeking function of the trial process.” *Id.* at 104; *see also Giglio v. United States*, 405 U.S. 150 (1972).

69. When assessing materiality where “a pretrial [defense] request for” a specific item of exculpatory evidence or information and failure or refusal of the prosecutor to grant the request, an appellate court must determine whether “the suppressed evidence might have affected the outcome of the trial.” 427 U.S. at 104; *See also United States v. Eshalomi*, 23 M.J. 12, 21-22 (C.M.A. 1986).

70. Where the defense makes a specific discovery request and the government fails to disclose that evidence, or where there is prosecutorial misconduct, C.A.A.F. has held that their standard of review for failure to disclose is harmless beyond a reasonable doubt. *United States v. Roberts*, 59 M.J. 323, 327 (C.A.A.F. 2004).

71. In *United States v. Claxton*, C.A.A.F. labeled as “gross governmental misconduct” the failure to disclose to the defense that witnesses against the accused were confidential information (CIs) for AFOSI. 76 M.J. 356, 361 (C.A.A.F. 2017). The Court notes “[i]t is unclear from the record whether the trial counsel were aware of [the CI’s] status, but it was their ‘duty to learn of any favorable evidence known to the others acting on the government’s behalf..., including the police’ and disclose it to the defense.” *Id.* (internal quotations omitted). The Court found “no evidence of record that the trial counsel made any attempt to inquire as to the status of Government witnesses as required by the defense discovery request.” Further, the Court found additional concern with the fact that other responsible judge advocates, including the staff judge advocate and the chief of justice, knew of the CI’s status “either did not inform the trial counsel or, if they did, did not ensure that the trial counsel performed their duties under *Brady*.” The Court went on to state: “[i]n any event, it is profoundly disturbing that officers of the court would engage in such conduct.... As Justice Sutherland wrote, in the classic statement of prosecutorial responsibility:

The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Id. (quoting *Berger*, 295 U.S. at 88).

Air Force Rules of Professional Conduct (AFRPC)

72. Rule 3.3. Candor Toward the Tribunal.

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter that the lawyer reasonably believes is false.

....

73. Rule 3.4. Fairness to Opposing Party and Counsel. A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

....

74. Rule 4.1. Truthfulness in Statements to Others. In the course of representing a client, a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

75. Rule 4.2. Communication with Person Represented By Counsel. In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or court order.

76. Rule 4.4. Respect for Rights of Third Persons.

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

77. Rule 8.4. Misconduct. It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate these Rules, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;
- (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate these *Rules* or other law; or
- (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

Air Force Standards for Criminal Justice (AFSCJ)

78. Standard 3-1.2, The Function of the Prosecutor.

- (b) The prosecutor is both an administrator of justice and an advocate. The prosecutor must exercise sound discretion in the performance of his or her function.
- (c) [Modified] As a trial counsel, the prosecutor represents both the United States and the interests of justice. The duty of the prosecutor is to seek justice, not merely to convict.
- (d) [Modified] It is the duty of the prosecutor to know and be guided by the standards of conduct applicable to military counsel by the Uniform Code of Military Justice (UCMJ); Manual for Courts-Martial (MCM); AFI 51-201, Administration of Military Justice; and the Air Force Rules of Professional Conduct (AFRPC or "Rule(s)").

79. Standard 3-3.2(b), Relations with Victims and Prospective Witnesses. A trial counsel should advise a witness who is to be interviewed of his or her rights against self-incrimination and the right to counsel whenever the law so requires. It is also proper for a trial counsel to advise a witness whenever the trial counsel knows or has reason to believe that the witness may be the subject of a criminal prosecution. However, a trial counsel should not so advise a witness for the purpose of influencing the witness in favor of or against testifying. The Discussion section of this rule states:

Prosecutors generally should advise the prospective witness of his or her Article 31, UCMJ, rights. In these situations, Article 31(b) warnings are warranted based on the prosecutor's relationship to the witness, *United States v. Duga*, 10 M.J. 206, 210 (C.M.A. 1981), ("because of military rank, duty, or other similar relationship, there might be subtle pressure on a subject to respond to an inquiry"); and on the purpose of the questioning, *United States v. Loukas*, 29 M.J. 385, 387 (C.M.A. 1990) (inquiry must be part of a law enforcement or disciplinary investigation). A rights advisement is not required every time a military member questions another military member whom the questioner suspects of having committed an offense. The relationships of the individuals and the particular circumstances will determine the need. See Rules 4.1 to 4.4, Transactions with Persons Other than Clients.

80. Standard 3-3.11, Disclosure of Evidence by the Prosecutor.

(a) [Modified] It is unprofessional conduct for a trial counsel to intentionally fail to disclose to the defense, as soon as practicable, the existence of evidence known to the trial counsel which reasonably tends to negate the guilt of the accused as to an offense charged, or which reasonably tends to reduce the degree of guilt of the accused of an offense charged, or which reasonably tends to reduce the punishment of the accused.

(b) The trial counsel should not fail to make a reasonably diligent effort to comply with a legally proper discovery request.

(c) It is unprofessional conduct for a trial counsel intentionally to avoid pursuit of evidence because he or she believes it will damage the prosecution's case or aid the accused.

81. Standard 11-2.1, Prosecutorial Disclosure.

(a) The trial counsel should, within a specified and reasonable time prior to trial, disclose to the defense the following information and material and permit inspection, copying, testing, and photographing of disclosed documents or tangible objects:

(i) All written and all oral statements of the accused or co-accused that are within the possession or control of the prosecution and that relate to the subject matter of the offense charged, and any documents relating to the acquisition of such statements.

(ii) The names and addresses of all persons known to the prosecution to have information concerning the offense charged, together with all written statements of any such person that are within the possession or control of the prosecution and that relate to the subject matter of the offense charged. The prosecution should also identify the persons it intends to call as witnesses at trial.

(iii) The relationship, if any, between the prosecution and any witness it intends to call at trial, including the nature and circumstances of any agreement, understanding or representation between the prosecution and the witness that constitutes an inducement for the cooperation or testimony of the witness.

...

(vi) [Modified] Any record of prior criminal convictions, pending charges, or probationary status of the accused or any co-accused.

...

(viii) Any material or information within the prosecutor's possession or control which tends to negate the guilt of the accused as to the offense charged or which would tend to reduce the punishment of the accused.

American Bar Association (ABA)

82. ABA Standard 3-1.2.

(a) The prosecutor is an administrator of justice, a zealous advocate, and an officer of the court. The prosecutor's office should exercise sound discretion and independent judgment in the performance of the prosecution function.

- (b) The primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict. The prosecutor serves the public interest and should act with integrity and balanced judgment to increase public safety both by pursuing appropriate criminal charges of appropriate severity, and by exercising discretion to not pursue criminal charges in appropriate circumstances. The prosecutor should seek to protect the innocent and convict the guilty, consider the interest of victims and witnesses, and respect the constitutional and legal rights of all persons, including suspects and defendants.
- (c) The prosecutor should know and abide by the standards of professional conduct as expressed in applicable law and ethical codes and opinions in the applicable jurisdiction. The prosecutor should avoid an appearance of impropriety in performing the prosecution function. ...

83. ABA Standard 3-3.11(c). A prosecutor should not intentionally avoid pursuit of evidence because he or she believes it will damage the prosecution's case or aid the accused.

Air Force Policies and Regulations on Treatment of Alleged Victims

84. Air Force Instruction 90-6001, *Sexual Assault Prevention and Response (SAPR) Program* (21 May 2015, I.C. 1), provides extensive directives regarding the reporting, treatment, and rights of alleged victims of sexual assaults, including the right to consult with counsel. *See generally* Paragraph 2.5.5. It also states in pertinent part: The Air Force is committed to ensuring sexual assault victims are protected, treated with dignity and respect, and provided support, advocacy, and care. Para 3.1.

85. Air Force Instruction 51-201, *Administration of Military Justice* (8 Dec 17), provides extensive guidelines designed to protect witnesses and alleged victims. *See* Chapter 11. This includes the right for alleged victims to confer with counsel. *See* Para 11.11.1.

86. Air Force Instruction 51-504, *Legal Assistance, Notary, and Preventative Law* (27 Oct 2003)¹⁴, states:

5.1.1. The Air Force provides legal assistance and representation in the military justice process to eligible victims of sexually-related offenses. The program, through its SVCs, delivers victim-centered advice and advocacy through comprehensive, independent representation to sexual assault victims worldwide, assists them in obtaining support and recovery resources, and promotes greater confidence in the military justice process and the United States Air Force.

5.2.2. States that “sexually-related offense” includes alleged violations of Article 120c.

¹⁴This AFI was superseded by AFI 51-304, *Legal Assistance, Notary, and Preventative Law* (22 August 2018), but was in place at the time of the custodial interrogations of the alleged victims by AFOSI.

ARGUMENT

87. In actuality and appearance, AFC Lars Knuston stands no chance of a fair trial. Maintaining this prosecution will not only violate Article 37, UCMJ on its face, but it will devastate public confidence in the fairness of this proceeding and the military justice system as a whole. Tunnel vision and group-think at USAFA have systematically undermined the fairness of this court-martial. While the Superintendent complains to SECAF and CSAF that a civilian defense counsel has tried to “intimidate him,” *Attachment 14*, his cadets are actually being coerced, bullied, intimidated, and having their lives torn apart. Meanwhile, his prosecutor is breaking multiple professional ethical rules. Investigators at his Academy are violating statutory mandates such as Article 31 and 37, UCMJ, as well as constitutionally protected rights. Multiple commanders and investigators in the process are simply ignoring Air Force policies and regulations, including those designed to protect witnesses and victims. Multiple witnesses—the alleged victims in this case—have been force-fed, manipulated, and beat down over the course of 12 months by generals, Special Agents, commanders, and the Trial Counsel in this case. The Government’s hell-bent pursuit of a fall-guy disguised as a public statement against hazing in this case has unlawfully manipulated the criminal justice system and so subverted the truth-seeking function of this court-martial, that the only appropriate remedy is dismissal of all charges and specifications with prejudice.

Actual Unlawful Command Influence by SPCMCA and Other Commanders

88. The Commandant clearly committed unlawful command influence and used her rank and position to tip the scales of justice against AFC Knutson in at least two specific ways. These violations of Article 37, UCMJ came after she received emails from her direct commander, the Superintendent, to CSAF and SECAF stating: “we want to continue to make it clear that we take all hazing serious. While attention is on the topic I would like to take advantage of the momentum. OSI will begin the investigation this week into the team and the coaches.” *Attachment 13*. Other email correspondence between the Superintendent and SAF/IG also shows close coordination between AFOSI and USAFA leadership.

89. First, the Commandant committed unlawful command influence on 18 January 18 at the very beginning of this investigation when she personally visited the AFOSI detachment at USAFA to make a speech to a majority of the alleged victims and multiple named witnesses in this case. At the time of her speech, AFOSI and the Commandant had an allegation from AFC ACCUSER that these freshmen were: 1) the victims of very serious hazing that was sexual in nature (possibly including misconduct qualifying as sexual assault); and that 2) they had been directed or ordered by the upperclassmen on the Swim Team to lie to OSI. The first allegation by AFC ACCUSER has since been completely discredited. There are significant questions as to the veracity of the second allegation and it ignores the fact that by 18 Jan 2018, the upperclassmen had specifically told the entire team to tell the truth and be completely honest in any AFOSI interview.

90. Rather than let AFOSI investigators impartially seek the truth of what happened and treat alleged victims with dignity and respect, the Commandant inserted herself directly into the investigation in a way that subverted the truth and prejudiced AFC Knutson and every other member of the Men’s Swim Team. Som#9ne – presumably with the Commandant’s full

knowledge and blessing – coordinated an effort to have the commanders of these freshmen swimmers pull them from their normal activities and order them to AFOSI so she could address them before they were questioned. She then made a speech about integrity and truthfulness that was specifically designed to influence the statements of witnesses in this case. Whatever her words, the psychological effect of a general officer visiting AFOSI to speak with these freshmen cannot be understated. The dissonance of her message was striking and remains confusing and troubling to the cadets to this day. These students were thought (falsely) to be the victims of very serious sexual related hazing. Instead of being treated like victims or even normal human beings, the Commandant spoke to them with the intent to “scare” and “intimidate” them. *Attachments 59, 70.* The general impression these young freshmen took from this was: “If you lie, I’m kicking you out;” “Fuck your upperclassmen” because they put you in a terrible position, so you should “rat them out;” she “thought we were all guilty;” “you are going to get in trouble” and the “impression was my leadership was very pissed off.” *Attachments 56, 64, 70.* AFOSI investigators then used and specifically referenced the Commandant’s presence and statements in their subsequent interviews with these cadets, as discussed below.

91. Second, the Commandant committed unlawful command influence when in January 2019 she met with more than one named, and recently immunized, witness in this case regarding their possible disenrollment from the USAFA. At the time of this meeting, the Commandant knew that there was a court-martial pending against AFC Knutson because she had forwarded the charges to the Superintendent, though her knowledge and intent is irrelevant. As a general officer, she told several probable government witnesses that what happened was hazing and thereby irrefutably tainted their testimony.

92. Additionally, most of the cadets named on the Government’s witness list – other than AFC ACCUSER – have received some sort of punishment for their alleged lying to AFOSI or other misconduct. While AFC ACCUSER received preferential treatment,¹⁵ the freshmen swimmers who the Academy has labeled victims had been through the exact same thing as AFC ACCUSER. Yet rather than pursuing justice, USAFA treated this as a matter of public perception, buying off on AFC ’ACCUSER’s story wholesale without question and without even having bothered to conduct an honest investigation. From the start, USAFA leadership and investigators wanted AFC ’ACCUSER’s claims to be substantiated, and then relentlessly pushed for those facts throughout the investigation.

93. Meanwhile, the other freshmen and alleged victims were subjected to startling custodial interrogations, where AFOSI agents coerced and bullied them to confirm the narrative they needed told. Then, they were punished for “lying” or “being vague.” In many cases, this punishment involved probation, extra work, exponentially more stress in an environment designed to inflict stress, and mandatory counseling sessions with mentors to help them overcome their alleged deficiencies or wrongdoing. Though many of them dispute they ever did anything wrong or lied, some plainly admit they have been accused of lying so many times and been so confused by being simultaneously labeled victims and criminals, that they don’t even know what truth is anymore. *Attachment 73.* Many of these helpless, young cadets have had their lives and futures turned upside down by the injustices and unfair treatment in this case. One cadet reported having a secret homosexual relationship used as leverage by investigators. It

¹⁵ Consider, for instance, AFC ACCUSER was provided a Special Victims’ Counsel. The rest of the alleged victims – who also appear entitled to SVCs – were denied their constitutional right to counsel in custodial interrogations.

is no wonder that in some Defense interviews, cadets were very nearly in tears explaining what had happened and some disclosed serious mental health issues due to their treatment by this process. The unlawful command influence has corrupted this process and the witnesses, the only appropriate remedy is dismissal with prejudice.

Actual Unlawful Command Influence by Investigators

94. Article 37, UCMJ and *United States v. Barry* make clear that any person subject to the UCMJ may not attempt to coerce or unlawfully manipulate the court-martial process. The evidence shows that AFOSI at all levels – including up to the Inspector General of the Air Force – worked very closely with commanders in this case, including improperly hosting the Commandant on the morning of 18 Jan 2018 before several of the cadet interviews. On that morning, the AFOSI recorded interviews make clear the Special Agents specifically attempted to – and did – coerce numerous witnesses in this case by repeatedly threatening freshmen and specifically referring to commanders all the way up to CSAF and SECAF in their interrogations. In most cases, these young college-aged freshmen were simultaneously told they were “victims,” all while being called liars, treated like criminals, and having their careers dangled over their heads. As discussed above, these freshmen cadets consistently describe their interviews as coercive and suggestive and one has described it as the worst day of his life. Several described it as worse than the alleged hazing that took place at the “Chunker” event.

95. The following is a brief sampling of concerning statements from the recorded interviews:

- a. An OSI investigator tells#9: “Like General Goodwin is trying to reiterate to you guys, if you’re not up front and forward, that’s what’s going to be a career killer.” *Attachment 67*, at 43:28 of file VTS_01_1.
- b. An OSI investigator asks Cadet #2 what he thinks the Chief of Staff of the Air Force or the Secretary of the Air Force would recommend for somebody “who wasn’t been truthful in an investigation like this.” *Attachment 40*, 01:37 in file VTS_01_2.
- c. An OSI investigator tells Cadet #2 that the upperclassmen on the USAFA swim team put him in a bad position, “because they told [him] to come down here and say certain things” to OSI. The investigator explained that som#9ne who cares about him would not do that— knowing that he might have to spend five years in prison or be kicked out of the Academy. *Id.*, at 02:38 in file VTS_01_2.
- d. An OSI investigator says to Cadet #2 that he will “either get kicked out of here or . . . get charged. One way or the other.” He said he was “not trying to threaten [CADET Cadet #2],” but was “just being honest.” *Id.*, at 09:07 in file VTS_01_2
- e. An OSI investigator tells Cadet #2: “You don’t have a choice of whether you do [the Chunker] or not.” The investigator reiterates that the Chunker was not consensual. Cadet #2 disagrees, says he could have left and would still have been on the team. States that “[i]t was definitely expressed that if you aren’t comfortable with something, just stop.” *Id.*, at 17:40 in file VTS_01_2

- f. An OSI investigator explains to Cadet #2 that there is a federal criminal investigation, and that “probably after we talk to you, the Chief of Staff of the Air Force will probably call down.” *Id.*, at 30:00 in file VTS_01_02
- g. An OSI investigator states that “OSI doesn’t normally work this stuff,” and that it is a rare occasion when someone at the Chief of Staff level, or three-star level, or Secretary of the Air Force level asks them to investigate something. He then asks: “Why do you think she did that?” *Id.*, 35:05 in file VTS_01_02
- h. An OSI investigator asks Cadet #2 if somebody has threatened to expose his relationship “with somebody here” at the Academy. The investigator asks if that is affecting what Cadet #2 is telling OSI, and he says it is not. *Id.*, at 03:30 in file VTS_01_3.
- i. An OSI investigator asks DK what his life would look like if he was kicked out of the USAFA for not being truthful. *DK Interview*, at 07:58 of file VTS_01_2
- j. An OSI investigator asks DK what a criminal charge would look like for him, and Cadet DK says it would be “catastrophic.” *Id.*, at 08:45 to 11:15 of file VTS_01_2
- k. An OSI investigator tells DK that, if one more word comes out of his mouth that is untruthful, there is “nothing I can do for you,” and somebody else can make the decision about whether he stays at the USAFA. *Id.*, at 13:50 of file VTS_01_2

96. The Agents also unlawfully manipulated the military justice system by denying young freshmen their right to counsel, failing to read them their Article 31 rights when they accused them of lying and other misconduct, and then relentlessly conducting what could only be considered custodial interrogations in violation of their statutory and Constitutional rights. For example, when CADET #6 is asked if he can have a lawyer, the OSI investigator says “as a witness, you don’t get a lawyer.” He adds that, “[a]s a witness in the military, you don’t get a lawyer, okay? Because you’re obligated to cooperate with investigations, right?” (*Attachment 22*, 27:28) in file VTS_01_1. This tunnel vision of the Commandant and Special Agent results in them also violating Air Force Policy granting them the right to seek counsel. *See generally* AFI 51-201 (8 Dec 17), para 11.11.1.

Actual Unlawful Command Influence and Prosecutorial Misconduct by Assistant Trial Counsel

97. The Assistant Trial Counsel in this case committed actual unlawful command influence by both coercing witnesses and unlawfully manipulating the court-martial process. Like the AFOSI Special Agents, Capt Bet-Sayad, repeatedly coerced the alleged victims and named witnesses against AFC Knutson. As a senior ranking officer, she was “aggressive” and threatened them with jail time, prosecution, or disenrollment. In many cases she would make comments like “we can move this meeting to the Superintendent’s office,” or “I’ll take you to the Superintendent to have you disenrolled,” and “he will sign your disenrollment orders,” or words to that effect. According to multiple cadets, she had a “narrative” and she wanted the cadets to adhere to it by asking cadets to put specific names or details in their sworn statements they were not confident

about. Cadets reported to Defense counsel that she sometimes gave cadets her notes to rely on in writing their statement or took and presumably discarded unsigned statements from cadets when the draft statements were not sufficient for her and asked them to start over. In at least two other cases, the Assistant Trial Counsel drafted statements for cadets and asked them to sign it later. In several cases, the alleged victims interviewed by the Assistant Trial Counsel reported to Defense that they did not remember saying what is in their sworn statement or they were asked to be far more certain in their statement than they were comfortable honestly stating.

98. The Assistant Trial Counsel in this case also unlawfully manipulated this court-martial by violating professional ethical obligations to contact represented parties through counsel. She then took the highly-concerning step of advising several cadets that they did not need their defense counsel present. The Assistant Trial Counsel had to know these cadets were represented because in some cases they asked to speak to the ADC, and in one case she told a cadet “I wrote your LOR.” She then took unconscionable steps to coerce, threaten, and bully junior ranking personnel to write statements that fit her “narrative.” She threatened them with her superior position of authority, “put words in their mouth,” and forced them to write statements that did not accurately reflect their memory. She then provided those statements to Defense prior to the Article 32 hearing and in reliance therein, AFC Knutson waived his right to a hearing. The charges were subsequently referred to trial in reliance on her wrongfully obtained statements. She then noted the immunized statements she obtained under coercion in her Military Rule of Evidence 304(d) notice to the Defense for use at AFC Knutson’s court-martial. Her actions are shocking, have subverted justice, and denied AFC Knutson his right to a fair trial.

Unlawful Command Influence by Superintendent

99. The Defense is alleging the Superintendent of the USAFA committed actual UCI when he copied his subordinate, the Commandant, on the 3 January 2019 email to SECAF and CSAF, when he made various public statements regarding the investigation, and when he commissioned an independent review of the USAFA Athletic Department during the time dispositions were being made in the cases of the alleged co-conspirators in this case.

100. In his 3 January 2019 email, in which he copied the Commandant, the Superintendent told SECAF and CSAF: “[W]e want to continue to make it clear that we take all hazing serious. While attention is on the topic I would like to take advantage of the momentum. OSI will begin the investigation this week into the team and the coaches.” The result of this email on the Commandants and AFOSI is clear. They jump to action and initiate a series of unlawful acts, as discussed above. The Superintendent had made his displeasure and priority known: stamp out hazing. The subsequent actions of the Commandant and AFOSI agents demonstrate that the Superintendent corrupted the independent decision-making authority of those below him and caused numerous actors to coerce and manipulate the military justice process. The Superintendent’s public comments and independent review have also firmly cemented in the mind of USAFA leadership, active duty members, civilian staff, and cadets exactly where he stands. Action needs to be taken.

Apparent Unlawful Command Influence

101. Even if the Court finds no actual UCI, the entire case is saturated with coercion, manipulation, and a systematic attempt to protect the reputation of USAFA and its leaders. The apparent UCI in this case is significantly worse than in *Boyce*, where the GCMCA who had taken politically unpopular decisions on previous courts-martial was told by CSAF that he either had to resign or be fired days before the GCMCA referred the appellant's case to court-martial. 76 M.J. at 245-246. In the case against AFC Knutson, the Superintendent sent an email to SECAF and CSAF demonstrating the intent and purpose to make a strong public statement about hazing at the Academy. He has also taken strong public positions in the media and in commissioning an independent consultant review since this allegations were raised by the complaining witness in this case. The Superintendent's 3 January 2019 email came on the same day that a Congressional complaint was filed by the complaining witness in the case, and within two weeks of the complaining witness' mother personally emailing and calling the Commandant to assist her son all while discussing the Congressional complaint. Not long after, the Commandant goes at AFOSI to admonish – or in the perception of some, to threaten – the young freshmen cadets prior to their coercive custodial interrogations without counsel. All subsequent unethical and unconscionable actions discussed above, flow from the Superintendent and Commandant's actions in actuality and appearance.

102. The serious doubts of fairness in this court-martial are also worse than *Levite*. In *Levite*, the UCI was committed by a Major who showed derogatory information to prospective witnesses and there was perception that the witnesses would have to testify under the glare of their commander. 334 C.M.A. at 336. In AFC Knutson's case, general officers have directly told government witnesses how they interpret facts at issue in the court-martial. General officers have made strong public statements, hid complaints from the parents of the alleged victims, and enabled investigators and Assistant Trial Counsel to break laws and ethical rules. The UCI in this case is even more "pervasive" and "pernicious" as in *Levite*.

103. The pursuit of public validation, is plain to a disinterested, outside observer. It is obvious that the Superintendent and Commandant consider everyone else to expendable, including AFC Knutson, all the other swimmers, and the alleged victims in this case. Commanders (at all levels), lawyers, and investigators in this case are hell-bent on proving they take seriously the dignity and respect of cadets. However, they've treated alleged victims as criminals, appear to have falsified evidence, and made pawns out of young cadets who have: 1) legitimately done nothing wrong or 2) only conducting harmless traditions that their coaches and teammates have done for decades before them. Plain to any outside, objective observer is that the Superintendent, the Commandant, the prosecutor, and AFOSI agent lost sight of justice and the important checks and balances the military system requires. Instead, they have woven a "narrative" where, in pursuit of public validation and the appeasement of command and political pressure, it is permissible to violate Constitutional protections, the U.C.M.J., and the professional ethical rules guarding the truth-seeking function of a court. The Court should not tolerate this court-martial and must dismiss the charges and specifications with prejudice.

RELIEF REQUESTED

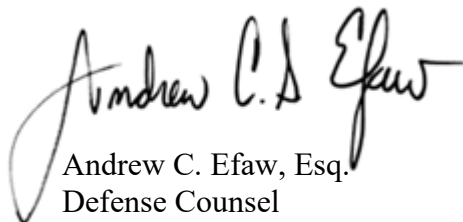
104. WHEREFORE, the Defense respectfully requests that this Honorable Court dismiss all charges and specifications against AFC Knutson with prejudice on the grounds that actual and

apparent unlawful command influence, as well as prosecutorial misconduct, have so tainted this case, that such an action is the only appropriate remedy. If this Honorable Court does not find dismissal with prejudice to be the appropriate remedy, the Defense respectfully asks for the following remedies: Ordering this case transferred to the authority of another GCMCA; ordering of a new Article 32 Preliminary Hearing and referral to cure the prejudice for waiver of that hearing; ordering the disqualification of the Assistant Trial Counsel; ordering suppression of all statements obtained by the Assistant Trial Counsel and the testimony of all freshmen swimmers and alleged victims; or other appropriate relief to cure the unlawful command influence and prosecutorial misconduct as this court deems appropriate.

105. The Defense requests the opportunity to present additional evidence and argument on this matter at an Article 39(a) session.

106. The Defense requests the Government produce the following witnesses for this Article 39(a): The Secretary of the Air Force; The Chief of Staff of the Air Force; Lt Gen Jay Silveria; Lt Gen Sami Said; Brig Gen Kristin Goodwin; Col Scott Campbell; all named witnesses on the Government Witness List, including all freshman swimmers at the time of the Chunker, including AFC ACCUSER; the AOCs and Group AOCs of all freshmen witnesses on the Government's witness list; Cadet #11; Cadet #10; Lt Col Gherdovich; Coach Robert Clayton, Mr. Jim Knowlton, Mr. George Nelson, Coach Eric Seremet; Capt Susan Bet-Sayad; Col Thomas Rodgers, Jr.; Ms. Sharon Serra; Col Kathleen Harrington; Lt Col Anthony Salvatore; SA Michael Evans, SA Stephen Klukovich; SA Steven Torres; all (as yet unidentified) AFOSI investigators, officers, or members of the Commandant's staff who attended her January 2018 speech to the alleged victims; all (as yet unidentified) members of the USAFA legal office who attended the conference call with the alleged victims' parents and Vice Commandant in Summer 2018 regarding the January 2018 OSI interviews; and the alleged victims' parents who attended the conference call with the Vice Commandant in Summer 2018 regarding the January 2018 AFOSI interviews (including, but not limited to, CADET #7's Parents, #9's Parents, and #9's parents).

Respectfully submitted this 15th day of February, 2019.



Andrew C. Efaw, Esq.
Defense Counsel

81 Attachments:

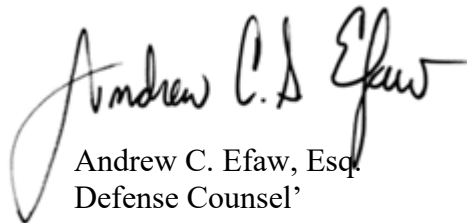
1. Report of Investigation, 7 Mar 18 (260 pgs)
2. Withhold of Initial Disposition Authority, 5 Sep 18 (1 pg)
3. Charge Sheet, 9 Nov 18 (3 pgs)
4. 1st Indorsement Memo, 6 Sep 18 (1 pg)
5. Email From USAFA/JA, 19 Sep 18 (2 pgs)
6. Article 32 Waiver, 30 Oct 18 (1 pg)
7. Pretrial Advice, 8 Nov 18 (2 pgs)

8. Scheduling Order, 14 Dec 18 (3 pgs)
9. GCMCA and SAF/IG Emails, 28 Dec 17 (1 pg)
10. ACCUSER Congressional, 2 Jan 18 (13 pgs)
11. Letter from US Rep DeSantis Office to SAF/LL, 3 Jan 18 (1 pg)
12. Email from Sharon Serra to Commandant, 12 Jan 18 (2 pgs)
13. Superintendent Email to SECAF, 3 Jan 18 (1 pgs)
14. Superintendent Email to SECAF, 2 Feb 19 (2 pgs)
- 15 Letter from ACCUSER to Superintendent, 12 Dec 18 (8 pgs)
16. ACCUSER Email to Commandant, 12 Jan 18 (2 pg)
17. AFOSI Form 52, 11 Jan 18 (6 pgs)
18. AFOSI Form 52, 8 Jan 18 (6 pgs)
19. Affidavit in Support of Search Authority, 8 Jan 18 (3 pgs)
20. AFOSI FORM 115 – ,Cadet 14 Mar 18 (2 pgs)
21. AFOSI FORM 115 – Cadet, undated, (2pgs)
22. CADET #6 AFOSI Recorded Interview
23. #8 AFOSI Recorded Interview
24. Lt Col Salvatore MFR, 15 Feb 19 (1 pg)
25. Air Force Times Article, 6 Jun 18 (11 pgs)
26. Gazette Article, 14 Sep 18 (5 pgs)
27. AirForceTimes.com, 14 Sep 18 (6 pgs)
28. KKTV 11 News, 7 Sep 18 (2 pgs)
29. Task and Purpose, 15 Sep 18 (7 pgs)
30. Gazette Article, 14 Jan 19 (4 pgs)
31. Gazette Article, 16 Jan 19 (4 pgs)
32. ESPN Article, 26 Apr 18 (1pg)
33. TheDenverChannel Article, 26 Apr 18 (8 pgs)
34. Coloradoan Article, 26 Apr 18 (1 pg)
35. Denver Post, 14 Sep 18 (2 pgs)
36. Colorado Independent, 14 Sep 18 (3 pgs)
37. Collegiate Sports Associates Report, Aug-Oct 18 (49 pgs)
38. Detailing of Lt Col Mason, 21 Dec 18 (1 pg)
39. Cadet #2 Paralegal Interview MFR, 9 Feb 19 (2 pgs)
40. Cadet #2 AFOSI Recorded Interview (1 pg)
41. Cadet #2 ADC Email, 11 Feb 19
(1 pg) 42. CADET Cadet #2 1168, 5
Sep 18 (3 pgs)
43. Cadet #2 Interview MFR, 9 Feb 18 (2 pgs)
44. CADET #3 Interview MFR, 10 Feb 19 (2 pgs)
45. CADET #3 LOR Rebuttal, 9 Jul 18 (3 pgs)
46. CADET #3 ADC Email, 4 Feb 19 (2 pgs)
47. CADET #3 Sworn Statement, 5 Sep 18 (4 pgs)
48. CADET #4 Interview MFR, 9 Feb 19 (1 pg)
49. CADET #4 AFOSI Recorded Interview (1 pg)
50. CADET #4 Sworn Statement, 17 Jan 18 (2 pgs)
51. CADET #4 LOR Rebuttal, 27 Jun 18 (2pgs)
52. CADET #5 Interview MFR, 10 Feb 19 (2 pgs)
53. CADET #6 Interview MFR, 11 Feb 19 (2pgs)

54. CADET #6 AFOSI Recorded Interview (1 pg)
55. CADET #6 LOR Rebuttal, 5 Jul 18 (7 pgs)
56. CADET #6 Statement, undated (1 pg)
57. CADET #7 Interview MFR, 10 Feb 19 (1 pg)
58. CADET #7 JA MFR he wrote, 6 Sep 2018 (3 pgs)
59. CADET #7 Interview MFR, 22 Oct 18 (1 pg)
60. #8 Interview MFR, 25 Oct 19 (2 pgs)
61. #8 ADC MFR, 13 Feb 19 (2 pgs)
62. #8 Rebuttal to LOR, 5 Jul 18 (7 pgs)
63. #9 Interview MFR, 12 Feb 19 (1 pg)
64. #9 Interview MFR, 25 Oct 18 (2 pgs)
65. #9 MFR titled "2nd Worst Day of My Life.doc", undated, 1 pg
66. VV Interview MFR, 12 Feb 19 (1 pg)
67. VV AFOSI Recorded Interview (1 pg)
68. #10 LOR Rebuttal, 3 Jul 18 (3 pgs)
69. #10 Interview MFR, 12 Feb 19 (1 pg)
70. #11 Interview MFR, 12 Feb (1 pg)
71. Email from Cadet #11 ADC, 4 Feb 19 (1 pg)
72. #11 LOR Rebuttal, 12 Jul 18 (18 pgs)
73. Defense First Discovery Request, 20 Nov 18 (13 pgs)
74. Government Response, 20 Dec 18 (18 pgs)
75. Defense Supplemental, 23 Dec 18 (12 pgs)
76. Military Judge Email, 14 Feb 19 (1 pg)
77. STC Email, 6 Feb 19 (1 pg)
78. #9 AFOSI Recorded Interview (1 pg)
79. RD AFOSI Recorded Interview (1 pg)
80. CADET #3 AFOSI Recorded Interview (1 pg)
81. KB AFOSI Recorded Interview (1 pg)

CERTIFICATE OF SERVICE

I certify that on 15 February 2019, I caused a true copy of this Motion to Dismiss to be served (via the case's e-file site) to the Military Judge, Trial Counsel, and the Court Reporter.


Andrew C. Efaw, Esq.
Defense Counsel'