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Anti-War & Anti-Gitmo: Military Expression and the Dilemma of Licensed Professionals in Uniform

Michael J. Lebowitz

ANTI-WAR & ANTI-GITMO: MILITARY EXPRESSION AND THE DILEMMA OF LICENSED PROFESSIONALS IN UNIFORM

Michael J. Lebowitz[*]

Military justice is unique not only for its separate legal code, but also for its impact on licensed professionals in uniform. Physicians and lawyers are ethically bound by their licensing requirements. But put a military uniform on these professionals, and they are subject to punitive action under the respective codes of their nation's armed forces. For a uniformed professional facing a desire to speak out against war or military policy, regulations governing "military expression" can be a "career killer." This article examines the unique dilemma facing licensed professionals who are caught up in a trifecta of free-speech restrictions, personal beliefs and ethical licensing requirements. Cases originating in the United States, United Kingdom, and Guantánamo Bay highlight the legal and career ramifications affecting those who could not legally balance the military expression trifecta. This article further considers potential remedies to assist uniformed licensed professionals who experience this "crisis of conscience."

I. INTRODUCTION

Much has been made of medical professionals and lawyers who assisted in controversial post-9/11 practices such as harsh interrogations and combat operations.[1] As such, this paper instead focuses on those licensed

[*] J.D., Case Western Reserve University School of Law; B.A., Kent State University. Currently serving as a war crimes prosecutor in the Office of Military Commissions. Also

uniformed professionals who personally oppose the actions of their military employers. Some would call these doctors and lawyers "anti-war."[2] And, it is these professionals who—perhaps more than anyone else in uniform—are caught between a trifecta of licensed ethical requirements, rules limiting servicemember military expression, and their own consciences.[3] This paper analyzes the military expression rules surrounding licensed professionals in uniform, and the resulting dilemma such requirements create relating to those who wish to act on their personal beliefs.

In addition, the military commissions process at Guántanamo Bay, Cuba (GTMO) is noteworthy in this context because it serves as a sort of laboratory for legal professionals as they navigate the military expression rules.[4] In a number of instances, military prosecutors, defense attorneys, and

serving as litigation attorney and military defense counsel in private practice, handling numerous military expression cases. Previously served as chief legal assistance attorney and military defense counsel in the Virginia Army National Guard as part of the U.S. Army Judge Advocate General's Corps. Deployed to Iraq in 2005–2006 as a paratrooper with the Pathfinder Company of the 101st Airborne Division. The author would like to thank Chuck Zelnis (USMC Ret.), prosecutor, Office of Military Commissions, for his guidance and insight in preparing this article.

[1] *See, e.g.*, Michael L. Kramer & Michael N. Schmitt, *Lawyers on Horseback? Thoughts on Judge Advocates and Civil-Military Relations*, 55 UCLA L. REV. 1407, 1418 & n.58 (2008)(citing Memoranda From Air Force Deputy Judge Advocate General Major General Jack L. Rives, Navy Judge Advocate General Rear Admiral Michael F. Lohr, Army Judge Advocate General Major General Thomas J. Romig, and Staff Judge Advocate to the Commandant of the Marine Corps Brigadier General Kevin M. Sandkuhler to the General Counsel of the Air Force Mary Walker Regarding Recommendations of the Working Group to Assess the Legal, Policy, and Operational Issues Relating to Interrogation of Detainees Held by the U.S. Armed Forces in the War on Terrorism (Feb. to Mar. 2003) *in* THE TORTURE DEBATE IN AMERICA 377–91 (Karen J. Greenberg ed., 2005)).

[2] *See Anti-War Definition*, Cambridge Advanced Learner's Dictionary, http://dictionary.cambridge.org/dictionary/british/anti-war (last visited Mar. 13, 2011) (defining "anti-war" as "opposed to a particular war or to all wars").

[3] *See generally* CODE OF MEDICAL ETHICS (Am. Med. Ass'n 2010); MODEL RULES OF PROFESSIONAL CONDUCT (Am. Bar Ass'n 2010), *available at* http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html. The U.S. military's Uniform Code of Military Justice also provides a numbers of punitive charges limiting military expression. *See* 10 U.S.C. § 888 (2006) (contempt toward officials); 10 U.S.C. § 892 (2006) (failure to obey lawful orders or regulations); 10 U.S.C. § 934 (2006)(conduct that endangers military discipline or could bring the military into disrepute); *see also* Ellen Yaroshefsky, *Military Lawyering at the Edge of the Rule of Law at Guantanamo: Should Lawyers be Permitted to Violate the Law*, 36 HOFSTRA L. REV. 563, 574–79 (2007) (describing the "crisis of conscience" that compelled a military lawyer opposed to various practices at Guántanamo Bay Naval Station to smuggle classified information to a human rights organization).

[4] *See generally* Joseph Landau, *Muscular Procedure: Conditional Deference in the Executive Detention Cases*, 84 WASH. L. REV. 661, n.155 (2009) (detailing numerous examples of military attorneys at GTMO who began expressing opposition to executive branch policies); *see also* Yaroshefsky, *supra* note 3.

supposedly neutral Judge Advocates have engaged in a messy literal war of words.[5] This scripted "war" relates specifically to attacks and counter-attacks emanating from personal beliefs that are typically frowned upon under military regulations.[6] Among the carnage relating to action derived from personal belief, one experienced military attorney was sent to prison at Fort Leavenworth, Kansas, others resigned in protest, careers were stunted or ended, and others were threatened with sanctions.[7] An odd result then seemingly developed where military prosecutors found themselves constrained in their speech well beyond typical rules outside of GTMO, while military defense lawyers continued to get away with speech activity that runs counter to military regulation and practice.[8]

Part II of this paper analyzes the three elements that make up the unique dilemma and additional pressures facing those licensed professionals in uniform who experience a "crisis of conscience." Part III focuses on the veritable military expression laboratory that has developed among some uniformed attorneys participating in the detainee and military commissions process at Guántanamo Bay, Cuba. Part IV offers some remedies that can be used to assist both the licensed professionals who find themselves personally conflicted and potential whistleblowers.

II. UNDERSTANDING THE MILITARY EXPRESSION TRIFECTA

Forms of military expression limitations are applicable to most Western armed forces.[9] This is not to say that these servicemembers do not have free speech rights, as they certainly do.[10] American soldiers, sailors, marines, and airmen undoubtedly retain First Amendment rights, for example, as do U.K. troops under Article 10 of the European Convention of Hu-

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[5] *See* Landau, *supra* note 4.

[6] *Id.*

[7] *Id.*

[8] *See, e.g.*, DEP'T OF DEFENSE, REGULATION FOR TRIAL BY MILITARY COMMISSION (2007).

[9] *See generally* U.S. v. Wilcox, 66 M.J. 442 (2008) (prosecuting a soldier under Article 134 for wrongfully advocating anti-government and disloyal statements); Parker v. Levy, 417 U.S. 733 (1974) (finding a captain's conduct of urging other personnel to refuse to obey orders unprotected by the Constitution); U.S. v. Priest, 45 C.M.R. 338 (1972) (affirming the discharge of a servicemember for disloyal statements); U.S. v. Blair, 67 M.J. 566 (2008) (upholding conviction of servicemember who promoted the Ku Klux Klan); U.S. v. Ogren, 54 M.J. 481 (2001) (upholding conviction of military officer under the UCMJ who said he wanted to harm the President); *see also* U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY (2008) [hereinafter AR 600-20].

[10] *See, e.g.*, U.S. v. Brown, 45 M.J. 389, 395 (1996) (finding that both military servicemembers and civilians have the right to criticize the government and to express ideas to influence the body politic); *see also* Maj. Michael C. Friess, *A Specialized Society: Speech Offenses in the Military*, ARMY LAW., Sept. 2009, at 18 (noting that men and women in uniform are not immune to trends in public opinion, and may speak out about their beliefs).

man Rights.[11] In fact, the military expression regulations are theoretically written and interpreted equally among servicemembers.[12] Saying that, however, an additional charge of conduct unbecoming an officer and a gentleman applies specifically to commissioned officers as opposed to enlisted servicemembers.[13] This officer-specific rule is in place mostly because of the higher standard and level of leadership responsibility bestowed upon commissioned officers.[14] In addition, it should be noted that licensed professionals in uniform—to include doctors, lawyers, and chaplains—generally serve in such capacities as officers.[15] As such, licensed professionals are essentially treated under the same military expression rules as their fellow officers regardless of duty position.[16]

In terms of speech, whistleblower rules exist to assist servicemembers in providing a conduit to express their concerns to investigators.[17] For example, the Military Whistleblower Protection Act in the United States is designed to protect servicemembers from retaliation after reporting what the servicemember perceives to be wrongdoing.[18] The report does not have to be per se wrongful, as the servicemember is protected only if he or she is issuing the report out of a good faith, reasonable belief.[19] Like its federal whistleblower counterpart, the military version is very specific on items relating to whom the report can be made, timelines, and investigatory

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[11] *See Brown*, 45 M.J. at 395 (while the military servicemembers have First Amendment rights, the right to free speech is not absolute); Friess, *supra* note 10, at 19 (service members rights to free speech are less extensive than civilian rights to free speech); *see* European Convention on Human Rights, art. 10, ¶2, Apr. 11, 1952, Eur. Ct. H.R. (1998), *available at* http://conventions.coe.int/treaty/Commun/QueVoulezVous.asp?NT=005&CL=ENG.

[12] *But see supra* text accompanying note 3. While UCMJ punitive charges do not contain language differentiating among various military professions, the USC punishes commissioned officers for conduct unbecoming of an officer.

[13] *See* Sarah Rosen, *Be All That You Can Be? An Analysis of and Proposed Alternative to Military Speech Regulations*, 12 U. PA. J. CONST. L. 875, 882 (2010); *see also* U.S. v. Diaz, 69 M.J. 127, 137 (C.A.A.F. 2010) (upholding conviction for conduct unbecoming an officer under UCMJ, art. 133).

[14] *See* Parker v. Levy, 417 U.S. 733, 743 (1974) (citing Orloff v. Willoughby, 345 U.S. 83, 91 (1953) (officers hold a particular position of responsibility and command that is occasioned by the "special trust and confidence in [their] patriotism, valor, fidelity and abilities").

[15] *See, e.g.*, *infra* note 67.

[16] *See supra* text accompanying note 12.

[17] Military Whistleblower Protection Act 10 U.S.C.A § 1034 (West 2008); *but see* Verbeck v. United States, 89 Fed. Cl. 47, 61–62 (2009). Both Military Whistleblower Protection Act and federal Whistleblower Protection Act did not apply to nurse practitioner in the Public Health Services' Commissioned Corps because of statutes do not apply to commissioned officers.

[18] *See supra* text accompanying note 17.

[19] *See* Military Whistleblower Protection Act, *supra* note 17 (requiring "reasonable belief").

process.[20] Specifically, military whistleblowers can report perceived wrongdoing to any member of Congress, a commander, and investigator general.[21] Importantly, neither the media nor human rights organizations are covered.[22]

A. Military Expression Limitations

The rules and regulations pertaining to military expression generally limit the level of personal viewpoints and political activities that can be espoused under the perception of official capacity.[23] These limitations have been carved out for servicemembers specifically due to the "specialized society" of the military that places special emphasis on morale and good order and discipline.[24] It is this niche within the military mission that justifies criminal charges against soldiers who speak or act upon their personal beliefs.[25] In fact, these criminal charges differentiate military expression rules from limitations on certain activities by government employees.[26]

In the United States, both the Supreme Court and the Court of Appeals for the Armed Forces (CAAF) have consistently upheld such limitations.[27] In Europe, Article 10 (2) of the European Convention of Human Rights provides governments with the ability to regulate freedom of expression for items such as national security, protection of health or morals, and prevention of disorder or crime.[28] With respect to licensed professionals in uniform, the underlying punitive laws do not distinguish between servicemembers who do and do not require licenses to fulfill their missions.[29]

B. Personal Beliefs

All officers certainly are not mindless robots, which means that they do weigh issues of politics and military within their own minds on a daily basis.[30] Servicemembers, for example, can use their personal judgment to

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20 *See supra* text accompanying note 17 (neither statute applies to commissioned officers).

21 *See* Military Whistleblower Protection Act, *supra* note 17.

22 *Id.*

23 *See supra* note 9 and accompanying text.

24 *See supra* note 9 and accompanying text; *see also* Friess, *supra* note 10, at 18.

25 Friess, *supra* note 10, at 19.

26 5 U.S.C. § 1501 (1988) (Government employees are generally limited in engaging in certain political activities, unlike service members who are subject to punitive articles under the UCMJ. Government employees under the Hatch Act are generally subject to dismissal.).

27 *See supra* note 9 and accompanying text.

28 European Convention on Human Rights, *supra* note 11.

29 *See supra* note 3 and accompanying text.

30 *See supra* note 10 and accompanying text.

refuse to commit what they deem to be an unlawful order.[31] This personal conscience element, however, certainly does not absolve servicemembers from repercussions as most "soldiers of conscience" have been punished for "failure to obey a lawful order."[32]

Typical examples pertain to servicemembers who refuse to deploy to combat zones. These individuals often base their publicly stated beliefs on the notion that participating in what they claim to be an unlawful war effectively renders such participation unlawful.[33] Licensed professionals on occasion have joined numerous other officers and enlisted soldiers in making this argument.[34]

A good example is the case of Flight Lieutenant Malcolm Kendall-Smith, a medical doctor in the U.K. Royal Air Force.[35] In 2005, Kendall-Smith refused to serve in his medical capacity in Basra, Iraq.[36] His rationale was that to deploy would be tantamount to an "act of aggression" in a military operation that he already publicly denounced as akin to a Nazi war crime.[37] Kendall-Smith ultimately was court-martialed and jailed on charges relating to his refusal to deploy, as well as periphery charges of failure to obey a lawful order.[38] During the trial, the doctor passionately articulated his personal dilemma between the trifecta of his military duty, personal beliefs and medical profession. "I would wish to restate that I have two great

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[31] *See, e.g.*, 10 U.S.C. § 892 (2006) (penalizing only disobedience of lawfully issued orders).

[32] United States v. Diaz, 69 M.J. 127, 128–30 (2010) (charging Diaz with violating a lawful general order when he gave classified information about Guántanamo Bay detainees to an attorney working for the Center for Constitutional Rights); *See also* United States v. Huet-Vaugh, 43 M.J. 105, 107 (C.A.A.F. 1995) (Captain Huet-Vaugh's intent was "to expose what she felt was impending war crimes in the Persian Gulf and to expose that to the American people, to the Congress, to the United Nations, talk shows, et cetera, et cetera. That was her intent; that was the reason why this lady actually went AWOL."); United States v. Webster, 65 M.J. 936, 937 (A. Ct. Crim. App. 2008) (Webster, a convert to Islam, contended he "did not freely plead guilty [to a bad-conduct discharge] because the Islamic scholars he consulted prohibited him from serving in Iraq where he could kill fellow Muslims."); Alexandra Topping, *A British Soldier's Story: People Are Suffering, I couldn't Go Back,* GUARDIAN U.K., July 30, 2009, *available at* http://www.guardian.co.uk/uk/2009/jul/30/afghanistan-british-soldier-joe-glenton; *RAF Doctor Jailed Over Iraq Refusal*, GUARDIAN U.K., Apr. 13, 2006, *available at* http://www.guardian.co.uk/uk/2006/apr/13/military.iraq?INTCMP=SRCH.

[33] *See* Huet-Vaugh, 43 M.J. 105, 107 (C.A.A.F. 1995); Alexandra Topping, *A British Soldier's Story: People Are Suffering, I couldn't Go Back,* GUARDIAN U.K., July 30, 2009, *available at* http://www.guardian.co.uk/uk/2009/jul/30/afghanistan-british-soldier-joe-glenton; *RAF Doctor Jailed Over Iraq Refusal, supra* note 32.

[34] *See RAF Doctor Jailed Over Iraq Refusal*, *supra* note 32.

[35] *Jail for Iraq Refusal RAF Doctor*, BBC NEWS, Apr. 13, 2006, *available at* http://www.guardian.co.uk/uk/2006/apr/13/military.iraq?INTCMP=SRCH.

[36] *Id.*

[37] *See RAF Doctor Jailed Over Iraq Refusal*, *supra* note 32.

[38] *Id.*

loves in life, medicine and the Royal Air Force," Kendall-Smith said. "To take the decision that I did caused me great sadness, but I feel I had no other choice."[39]

In this case, Kendall-Smith was treated like most other war resisters who made their cases public.[40] The court's presiding officer informed the doctor that the court-martial panel did in fact believe he was acting on moral grounds.[41] The officer then added that Kendall-Smith displayed an "amazing arrogance" in how he proceeded to act upon his personal beliefs.[42] "Obedience of orders is at the heart of any disciplined force," the court stated.[43] "Refusal to obey orders means that the force is not a disciplined force but a disorganized rabble. Those who wear the Queen's uniform cannot pick and choose which orders they will obey. Those who seek to do so must face the serious consequences."[44]

In the United States, Terrence Lakin represents another medical doctor who publicly refused to deploy on the basis that his personal beliefs trumped duty to follow orders.[45] Faced with a deployment to Afghanistan to serve in a medical capacity, the seventeen-year veteran instead took his personal beliefs to online video sites such as YouTube, and then to the media.[46] As a so-called "birther," Lakin argued that his deployment orders were unlawful because of his belief that President Barack Obama was not Constitutionally eligible to be commander-in-chief.[47] During Lakin's court-martial, military prosecutors called the doctor out on using the deployment as a political ploy by going to great lengths to create a spectacle in order to call into question Obama's country of birth publicly.[48] Unlike Kendall-Smith who maintained his political stance, Lakin blamed previous legal counsel and became repentant by offering to deploy immediately.[49] "I don't want it to end this way," he told the court, "I want to continue to serve."[50] Lakin was jailed for six months and dismissed from the military on charges of

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39 *See Jail for Iraq Refusal RAF Doctor*, *supra* note 35.

40 *See supra* note 32.

41 *See RAF Doctor Jailed Over Iraq Refusal*, *supra* note 32.

42 *Id.*

43 *Id.*

44 *Id.*

45 *See, e.g.*, *Judge Removes 'Birther' Elements from Army Doc's Court Martial*, CNN (Sept. 3, 2010), http://www.cnn.com/2010/CRIME/09/02/birther.court.martial/index.html; *see also* Jessica Gresko, *Military Jury: Prison, Dismissal for Army Birther*, ASSOCIATED PRESS, Dec. 16, 2010, *available at* http://www.wtopnews.com/?nid=715&sid=2200202.

46 Gresko, *supra* note 45.

47 *Id.*

48 *Id.*

49 *Id.*

50 *Id.*

failure to obey a lawful order, as well as missing movement to his deployment.[51]

The precedent for war resisters is such that the legal arguments surrounding specialized professional licenses are largely irrelevant. In the 1990s, Army Reservist Yolanda Huet-Vaughn publicly cited her personal and ethical duties as a medical doctor in her public refusal to deploy in support of Operation Desert Shield. Huet-Vaughn, like Lakin and the United Kingdom's Kendall-Smith during the post-9/11 conflicts, ultimately received a similar fate as many other non-licensed servicemembers who publicly refused to deploy.

In support of her court-martial defense, Huet-Vaughn submitted evidence describing herself as a "lady of conscience" and demonstrating her legitimate personal belief that deserting her unit was necessary to avoid the perceived greater evil of participating in a war crime.[52] This "Nuremburg Defense"—as she called it—was aimed at articulating her contention that she should be exonerated for seeking to avoid obeying what she deemed to be an unlawful order.[53] However, as was the case with Lakin and the many other non-licensed servicemembers, the court deemed this defense irrelevant to the overarching charge of failure to obey a lawful order, AWOL/desertion and missing movement.[54] In Huet-Vaughn's case, the military appeals court affirmed that in order to present the Nuremberg Defense, an accused must present evidence that he or she had been individually ordered to commit acts that would be actual war crimes.[55] But, even in this case, the chief judge dissented in part on the grounds that:

> [I]t was error for the military judge to prevent Captain (CPT) Huet-Vaughn from explaining her state of mind at the time she left her unit . . . Under our case law CPT Huet-Vaughn's mental processes were relevant to determine whether she had an intent to avoid hazardous duty or shirk important service as required by Article 85, Uniform Code of Military Justice.[56]

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[51] *Id.*

[52] United States v. Huet-Vaughn, 43 M.J. 105, 107 (C.A.A.F. 1996) (stating that during opening statements defense counsel told the court "[The defendant] is a lady of conscience.").

[53] *Id*. at 110.

[54] *See id.* at 112–17.

[55] *See id.* at 114.

[56] *See id.* at 116 ("[A]n accused cannot be denied every opportunity to present evidence at the trial to negate the existence of every element of the offense charged.") (quoting United States v. Huff, 22 CMR 37, 40 (1956)); *see also* United States v. Apple, 10 C.M.R. 90, 92 (1953) (allowing defendant to introduce testimony that he did not intentionally avoid hazardous duty); *see also* United States v. McIntyre, 10 C.M.R. 57, 60 (1953) (allowing alternative evidence to prove different types of intent in a charge of intentional avoidance of hazardous

Still, the precedent was generally maintained where typical war resisters are ultimately required to base their defense solely on the underlying charges, regardless of professional license or personal belief.[57] But as we see in *United States v. Diaz*, decided in 2010, the specific charge of conduct unbecoming an officer and a gentleman was interpreted to allow evidence to state of mind relating to the circumstances of why the particular military lawyer acted in such a manner.[58]

C. Professional Ethical Requirements

The final element of the military expression trifecta pertains to the additional layer of requirements that make the licensed professional in uniform unique from other servicemembers. All officers—including doctors and lawyers—are required to take an oath prior to commissioning.[59] In the United States, this oath subscribes fealty to the Constitution and agreement to obey orders emanating from the higher ranks.[60] In the United Kingdom, most servicemembers swear an oath to the Crown, as well as to those higher-ranking officers.[61] But licensed professionals also swear a second oath. Lawyers and doctors, upon admission to their respective bar associations or boards, also typically swear oaths to their professions and consequently are governed by an accredited professional association.[62] These oaths primarily

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duty); *see also* United States v. Cline, 9 C.M.R. 41, 43 (1953) (considering defendant's testimony of an alternative motive for his actions); *see generally* United States v. Shull, 2 C.M.R. 83 (1952) (considering evidence of intents other than to avoid hazardous duty as relevant to disprove the required intent element of desertion); *see also* United States v. Kabat, 797 F.2d 580, 589 (8th Cir. 1986) (finding no error where a trial judge did not specifically instruct the jury on motive evidence admitted at trial to negate specific intent), *cert. denied*, 481 U.S. 1030, 107 S.Ct. 1958 (1987).

[57] *See* United States v. Rockwood, 48 M.J. 501, 501 (1998) (holding that a counterintelligence officer's personal interpretation of the President's command did not create a "legal duty" upon which the defendant could base an affirmative defense regarding a perceived duty to inspect the National Penitentiary of Haiti during Operation Uphold Democracy).

[58] United States v. Diaz, 69 M.J. 127, 136 ("Evidence of honorable motive may inform the factfinder's judgment as to whether conduct is unbecoming an officer.").

[59] *See* Lieutenant Colonel Kenneth Keskel, *The Oath of Office: A historical Guide to Moral Leadership*, XVI AIR & SPACE POWER J. 47, 47 (Winter 2002) (discussing the "numerous oaths" that can be found in our nation).

[60] *See id.* at 48–49 (discussing the history of oaths in relation to the Constitution and the military).

[61] *See id.* at 56, n.25 (stating that many countries, such as Great Britain, require officers to take an oath of allegiance to a king or head of state).

[62] *See, e.g.*, *Lawyers Oath*, LA. SUP. CT. COMM. ON BAR ADMISSIONS, http://www.lascba.org/lawyers_oath.asp (last visited Mar. 13, 2011); *Lawyers Oath*, STATE BAR OF MICH., http://www.michbar.org/generalinfo/lawyersoath.cfm (last visited Mar. 13, 2011); Kaji Sritharan et al., *Medical Oaths and Declarations*, 323 BRIT. MED. J. 1440, 1440 (2001), *availa-*

relate to the rigorous ethical duties of the profession. As such, doctors and lawyers are bound by the government-sanctioned ethical requirements in much the same way as the binding force of the military oath.[63] The primary difference, however, is that violation of the professional oath can result in loss of license, while violations of the military duty may lead to loss of freedom.

In Huet-Vaughn's case, she lost her freedom through the military and later was censured and fined from her medical licensing authority due to the Uniform Code of Military Justice (UCMJ) conviction.[64] In affirming the decision, the Kansas Supreme Court agreed with the licensing board that the "military conviction was a conviction for which punishment is comparable to that for a felony conviction by the State of Kansas and that plaintiff was subject to discipline under the Kansas Healing Arts Act."[65] It is important to note that both the licensing authority and the court focused on the court martial conviction as opposed to the underlying motives.[66]

Based on the dual oaths, a dilemma occasionally arises when a licensed professional in uniform realizes that he or she is personally opposed to the decision-making within the military and civilian hierarchy. This is where the licensed professional differs from other servicemembers who only wrestle with the military expression rules and their personal convictions. For example, some interpret the broad social responsibility statements contained within the Code of Ethics of the American Medical Association as a mandate to conduct social action.[67] Similar arguments were made in reference to the oath taken by medical school graduates in the former Soviet Union.[68] In fact, the medical profession is conflicted in its own right on the

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ble at http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1121898/pdf/1440.pdf/ (stating that 98 percent of American medical school graduates and nearly half of British graduates swear an oath.); Louis Lasagna, *The Hippocratic Oath: Modern Version*, NOVA, http://www.pbs.org/wgbh/nova/doctors/oath_modern.html (last visited Mar. 13, 2011).

63 *See, e.g.*, Robert Shaffer, *New Medical Oath No Cue for Critics*, FOX NEWS (Mar. 1, 2002), http://www.foxnews.com/story/0,2933,46848,00.html (discussing medicine's medical oath).

64 Huet-Vaughn v. Kan. State Bd. of Healing Arts, 978 P.2d 896 (Kan. 1999), *available at* http://www.kscourts.org/cases-and-opinions/opinions/supct/1999/19990416/80362.htm.

65 *Id.* at 897.

66 *See id*.

67 CHARLES B. STROZIER & MICHAEL FLYNN, GENOCIDE, WAR, AND HUMAN SURVIVAL 194 (1998) (arguing that the Hippocratic Oath is less inclined toward political activism than the Code of Ethics.).

68 *See id*.; *see also* Victor W. Sidel & Barry S. Levy, *Physician-Soldier: A Moral Dilemma*, *in* 1 MILITARY MEDICAL ETHICS 293–312 (2003), *available at* http://www.bordeninstitute.army.mil/published_volumes/ethicsVol1/Ethics-ch-11.pdf (arguing that being a military physician possesses inherent moral irresponsibility).

reconciliation between physicians acting under the guise of medical neutrality and physicians serving as "quasi-human rights police."[69]

The military structure often seeks to alleviate some of the concerns in an apparent effort to support medical neutrality. For example, the U.S. military prohibits its doctors from assuming positions of command.[70] French military doctors are preferably trained in special military medical schools instead of coming into the service after already receiving the vast amount of medical training.[71] The idea is that military doctors are separate from many of the daily functions of the military so that these medical officers can focus on their craft.[72]

However, as the cases of Huet-Vaughn, Kendall-Smith, and Lakin demonstrate, military physicians have acted against the physician neutral aspect of their professions based on strong personal political beliefs. Perhaps the case of a medical officer choosing action against the military based on personal political belief is best highlighted in *Parker v. Levy*.[73] In this instance, Howard Levy was an Army doctor tasked with medical duties pertaining to soldiers preparing to deploy in support of the Vietnam War.[74] Unlike the above-named contemporaries, Levy took his viewpoints straight to the servicemembers within his medical purview.[75] His activities included encouraging servicemembers to resist deployment, as well as claiming that special forces personnel were murderers and liars.[76] Levy was sentenced to three years in prison for failure to obey a lawful order and conduct unbecoming an officer and a gentleman.[77] In affirming the conviction, Chief

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69 Justin M. List, *Medical Neutrality and Political Activism:Physicians' Roles in Conflict Situations*, *in* PHYSICIANS AT WAR: THE DUAL-LOYALTIES CHALLENGE 237, 246 (Fritz Allhoff ed., 2008).

70 *See, e.g.*, U.S. DEP'T OF ARMY, REG. 40–1, COMPOSITION, MISSION, AND FUNCTIONS OF THE ARMY MEDICAL DEPARTMENT, ¶ 2–3b (1983), *available at* http://www.dtic.mil/cgi-bin/GetTRDoc?Location=U2&doc=GetTRDoc.pdf&AD=ADA403543 (medical, veterinary, and dental officers are prohibited from assignment to other duties in which medical training is not essential.); *Army Medical Specialist Corps Deployment Readiness Handbook*, ARMY MED. SPECIALIST CORPS (Dec. 1999), http://www.pdhealth.mil/downloads/Army_MSC_ Handbook.pdf; U.S. DEP'T OF ARMY, REG. 616–110, SELECTION, TRAINING, UTILIZATION, AND CAREER GUIDANCE FOR ARMY MEDICAL CORPS OFFICERS AS FLIGHT SURGEONS (1986), *available at* http://usasam.amedd.army.mil/dl/Flight%20Provider%20Refresher/References/ AR%20616-110%20FS%20selection%20training%20utilization.pdf.

71 Int'l Dual-Loyalty Working Grp., *Dual-Loyalty and Human Rights in Health Professional Practice: Proposed Guidelines and Institutional Mechanisms*, *in* PHYSICIANS AT WAR: THE DUAL-LOYALTIES CHALLENGE 15, 34 (Fritz Allhoff ed., 2008).

72 *Supra* note 63.

73 Parker v. Levy, 417 U.S. 733, 733 (1974).

74 *Id.* at 736–37.

75 *Id.*; *See also* Friess, at 20.

76 Parker, *supra* note 73, at 738–39.

77 *Id.* at 736, 738.

Justice William Rehnquist bypassed any deference to physician requirements and stated the following:

> This Court has long recognized that the military is, by necessity, a specialized society separate from civilian society. We have also recognized that the military has, again by necessity, developed laws and traditions of its own during its long history. The differences between the military and civilian communities result from the fact that "it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise.[78]

The precedent of *Levy* certainly endures, while at the same time the military structure appears to favor the medical neutral system.[79] But, the system has a different set of complexities when it comes to military lawyers.[80] Unlike military physicians, judge advocates are permitted to take command.[81] In fact, the U.S. Marine Corps typically screens its military attorneys for non-legal responsibilities. As such, Marine attorneys often hold what is referred to as 9910 billets, which essentially create secondary duty positions. The result is that many licensed attorneys in the Marine Corps will find themselves in a more traditional command role at some point in a full military career.

At the same time, however, military lawyers in both legal and non-legal positions are like every other officer in that they are required to obey lawful orders and follow the letter of the law, be it UCMJ, civilian laws or the Law of Armed Conflict.[82] This, again, is where that third element of the trifecta pertaining to licensing requirements becomes an additional layer of ethical enforcement.

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78 *Id.* at 743.

79 *See, e.g.*, *supra* note 63.

80 *See generally*, U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE (Nov. 16, 2005); U.S. DEP'T OF ARMY, REG. 27-1, LEGAL SERVICES: JUDGE ADVOCATE LEGAL SERVICE 10 (1996); U.S. DEP'T OF ARMY, REG. 27-26, LEGAL SERVICES: RULES OF PROFESSIONAL CONDUCT FOR LAWYERS 26 (1992).

81 *Id.*

82 *See, e.g.*, Martha Neil, *Marine Lawyer Cleared in Haditha Case*, ABA JOURNAL, Aug. 2009. (Marine Captain Randy Stone, serving as a battalion lawyer, was initially charged for dereliction of duty pertaining to an investigation into a notorious murder case in Iraq. Charges were ultimately dropped after a lengthy pretrial hearing. "It is clear to me that any error of omission or commission by Captain Stone does not warrant action under the Uniform Code of Military Justice," Lt. Gen James Mattis said. "I am aware of the line that separates the merely remiss from the clearly criminal, and I do not believe that any mistakes Captain Stone made with respect to the incident rise to the level of criminal behavior.").

III. MILITARY EXPRESSION AT GUÁNTANAMO BAY

When discussing the dilemma of personal political opposition among some military attorneys, perhaps the best practical context to analyze is the military commissions and detainee system that began in January 2002 at the Guántanamo Bay Naval Station. This venue contains a relatively small, specialized bar of attorneys from all branches of the military.[83] These licensed servicemembers can typically be divided into three categories—defense counsel, prosecution, and staff judge advocates tasked with detainee issues and coordination. Civilian attorneys also are frequently involved as additional participants on the criminal and habeas corpus sides.[84]

Throughout the GTMO detention facility's first decade, all three military categories demonstrated instances of uniformed attorneys blurring the lines between personal political conduct and military expression limitations.[85] Of course, it should be noted that some civilian attorneys with detainee clients have in many cases run amok with political rhetoric.[86] For example, attorney Joe McMillan stated that he took a detainee military commission case specifically because he had to "stand up and participate in an effort to reign in" former President Bush.[87] In another instance, habeas corpus attorney David Remes was reportedly forced to resign as partner at a large law firm after attempting to demonstrate his version of daily "torment" suffered by detainees by stripping down to his underpants during a press conference in Yemen.[88] But, the focus here is on the military attorneys, because it is these licensed professionals in uniform who must reconcile the trifecta of personal beliefs, military expression limitations, and bar association ethical rules.[89]

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[83] *See, e.g.*, Charles J. Dunlap, *A Tale of Two Judges: A Judge Advocate's Reflections on Judge Gonzales's Apologia*, 42 TEX. TECH L. REV. 893, n.6 (2010)(noting that judge advocates are designated by law).

[84] *Id.*

[85] *See, e.g.*, Rick Rogers, *Marine Lawyer has Sought Judicial Reform*, SAN DIEGO UNION-TRIBUNE, Aug. 18, 2008 (Marine Corp defense attorney publicly criticized the Guántanamo Bay system); Lillian Thomas, *Military Attorneys Risk Careers to Criticize Practices at Guantanamo*, PITTSBURGH POST-GAZETTE, May 10, 2009, *available at* http://www.post-gazette.com/pg/09130/968880-84.stm.

[86] Major General Charles J. Dunlap, Jr. & Major Linell A. Letendre, *Military Lawyering and Professional Independence in the War on Terror: A Response to David Luban*, 61 STAN. L. REV. 417, 435 (2008).

[87] Paul Shukovsky, *Firm's Unlikely Client: Bin Laden's Ex-Driver*, SEATTLE POST-INTELLIGENCER, May 27, 2008, at A1.

[88] Dan Slater, *David Remes, Who Dropped his Pants in Yemen, to Leave Covington*, WALL ST. J. BLOG, July 21, 2008, *available at*: http://blogs.wsj.com/law/2008/07/21/david-remes-who-dropped-his-pants-in-yemen-to-leave-covington/.

[89] *See* Thomas, *supra* note 85.

A. GTMO-Specific Factors

Like all officers, military attorneys are bound by the rules and regulations prescribed by the military and consistently upheld in court.[90] Military lawyers also are bound by layers of additional ethical regulation pertaining to their bar memberships.[91] In the case of GTMO military attorneys, these legal officers are required to represent their clients zealously, be it the detainee for defense counsel, and the government for the staff judge advocates and prosecution.[92] As such, being an activist attorney operating in support of the cause instead of the client is an additional factor to consider for uniformed lawyers having issues of conscience.[93]

In addition to the aforementioned rules and regulations, military defense counsel and prosecutors also are bound by an additional layer under the Regulations for Trial by Military Commission.[94] These regulations state, among other items, that defense counsel and prosecutors are generally permitted to speak to the media.[95] However, prosecutors must seek permission to speak to the media while the defense is provided more leeway to speak.[96] One caveat is that military defense counsel must abide by "their jurisdictions' Rules of Professional Conduct and those of the respective military

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[90] *Supra* note 3; *See also* DOD DIRECTIVE 1344.10 (prohibiting types of political speech, to include "contemptuous words against officeholders); MICHAEL J. DAVIDSON, A GUIDE TO MILITARY CRIMINAL LAW at 80 (1999)(The military considers speech to be discrediting if it has a tendency to bring the service into disrepute or which tends to lower it in public esteem.").

[91] *See, e.g.*, U.S. DEP'T OF THE ARMY, ARMY REG. 27-1, LEGAL SERVICES: JUDGE ADVOCATE LEGAL SERVICE 10 (1996); MODEL CODE OF PROF'L RESPONSIBILITY EC 7-1 (1983).

[92] *Id.*; *see also* Mazon v. Krafchick, 44 P.3d 1168, 1172 (Wash. 2006)(en banc)("[D]ecisions about how to pursue a case must be based on the client's best interests, not the attorneys'."); Dunlap et al., *supra* note 86, at 434 ("[T]he lawyer must act solely in the interest of his or her client and not necessarily in pursuit of other interests the attorney may wish to address.");Kramer et al., *supra* note 1, at 1416 (military regulations prohibit a "lawyer's personal interests" from interfering with the representation of the military attorney's client).

[93] Kramer, *supra* note 1, at 1416–17.

[94] DEP'T OF DEFENSE, *supra* note 8, at 9-1(3) ("The Chief Defense Counsel shall ensure that all personnel assigned to the Office of the Chief Defense Counsel review, and attest that they understand and will comply with, the M.C.A., the M.M.C., this Regulation and all Supplementary Regulations and Instructions issued in accordance therewith. Furthermore, the Chief Defense Counsel shall regulate the conduct of detailed defense counsel as deemed necessary, consistent with the aforementioned legal authorities as well as subordinate instructions and regulations.").

[95] *Id.* at 8-7, 9-7.

[96] *Id.* (It should be noted that civilian prosecutors typically are limited to publicly stating the facts of the case, whereas defense lawyers have more leeway due to their representation of the individual client.).

departments' Judge Advocates General."[97] Moreover, chapter 9-7 of the regulation includes "members of the civilian defense counsel pool."[98] The rules go on to state violations of professional responsibility can result in such action as reporting the lawyer to his or her bar association, court sanctions, bar from working within the military commissions system, or punitive measures under the UCMJ.[99]

Going by the military commissions regulations, practitioners at GTMO are bound by not only those particular rules, but also the ethical guidelines of their respective bar associations.[100] Perhaps more significant is that the military attorneys also are commissioned officers, and consequently are subject to the limitations on military expression. A key issue then becomes how far an attorney can go when engaging in political speech.

Certainly, one can dismiss this issue by arguing that the military lawyers should merely defend or prosecute their cases without engaging in detailed media statements. But the reality is that anything to do with the detention facility at GTMO is almost automatically politicized. This controversy over detention and military commissions' legitimacy per se make practice at GTMO different from typical military practice under the UCMJ. As such, for example, defense attorneys may seek a tactical advantage for their clients by perpetuating myths and embellishments of harsh wrongdoing at GTMO.[101] The result is that military defense attorneys have advocated for their clients while at the same time likely violated military expression limitations.[102] In other words, they became activist attorneys.

B. Trifecta Violations

A prime example is that of Major Dan Mori, who defended an Australian detainee who was eventually convicted of material support to terrorism offenses in a military commission via plea agreement.[103] In representing his detainee client, Mori appeared to violate at least two limitations of military expression.[104] In this case, Mori traveled to Australia on official orders

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97 *Id*. at 9-7.

98 *Id*.

99 *Id*. at 10-1.

100 *Id*.

101 Dunlap et al., *supra* note 86, at 437.

102 *Id*.

103 *Id*. at 436; *see also* David Luban, *Lawfare and Legal Ethics in Guantanamo*, 60 STAN. L. REV. 1981, 2000 (2008) (describing the conduct of Maj. Dan Mori).

104 Dunlap et al., *supra* note 86, at 435.

purportedly to work on his case.[105] During this trip, Mori appeared at various events while wearing his uniform.[106] At these events, Mori "delivered . . . blistering public comments" for the purpose of "pressuring the Australian government."[107] Mori's verbal attacks against the process, as well as United States and Australian officials, have been described as vociferous and vituperative by some observers.[108] Meanwhile, academics and activist civilian attorneys who openly rail against GTMO and military commissions seized on Mori's words as simple "zealous advocacy."[109] But, through an objective lens, Mori very likely violated the military expression limitations of the trifecta.[110]

First, Mori certainly used contemptuous language against various government officials. This is potentially chargeable under UCMJ, Article 88.[111] Second, Mori actively participated in a foreign political demonstration while in uniform.[112] This also is potentially chargeable through military directives prohibiting military personnel from participating in demonstrations while in foreign countries.[113] While it is reasonable to believe that Mori was advocating for his client to a good amount of success by pressuring the Australian government, Mori was conducting such advocacy in a manner that was in direct contradiction to his duties as a military officer.[114]

In that regard, legal ethics do not automatically force the attorney to choose the client over other professional duties, especially when to ignore

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105 Ellen Yaroshefsky, *Military Lawyering at the Edge of the Rule of Law at Guantanamo: Should Lawyers Be Permitted to Violate the Law?*, 36 HOFSTRA L. REV. 563, 573 (2008)(describing Maj. Mori's additional actions during his investigations in Australia).

106 *Id.*

107 Luban, *supra* note 103, at 2015–16.

108 Dunlap et al., *supra* note 86, at 436; Alexandra Lahav, *Portraits of Resistance: Lawyer Responses to Unjust Proceedings*, 57 U.C.L.A. L. REV. 725, 738 (2010).

109 *See, e.g.*, Luban, *supra* note 103, at 2015.

110 Dunlap et al., *supra* note 86, at 435 n.127, *citing* E-mail from Col. Morris Davis, Chief Prosecutor, Office of Military Comm'ns, to Judge Susan Crawford (Mar. 13, 2007, 10:25 EST), http://graphics.nytimes.com/packages/pdf/world/070313DavisEmailtoCA1.pdf [hereinafter E-mail from Col. Morris Davis]. In the e-mail, Col. Davis wrote that "DoDD 1325.6 prohibits service members from participating in demonstrations while on duty, in uniform, or in a foreign country" without any exceptions for judge advocates. *Id.* He referenced a photograph that "shows MAJ Mori at a demonstration in Adelaide, Australia, last August doing all three: in uniform (minus hat), on orders (I believe), and in a foreign country." *Id.*

111 10 U.S.C. § 888 (2006); Rosen, *supra* note 13, at 881; *id.* To date, there has only been one reported case involving prosecution for violation of article 88 of the Uniform Code of Military Justice. *See* United States v. Howe, 37 C.M.R. 429 (C.M.A. 1967).

112 Dunlap et al., *supra* note 86, at 436–37.

113 *See id.* at 436; U.S. Dep't of Defense, Directive No. 1325.6, Guidelines for Handling Dissident and Protest Activities Among Members of the Armed Forces, Enclosure 3, § 6, at 8 (Nov. 2009), *available at* http://www.dtic.mil/whs/directives/corres/pdf/132506p.pdf.

114 Dunlap et al., *supra* note 86, at 436–37.

such military duties as Mori did was to violate the law effectively.[115] This is important because attorneys are ethically required to advocate for their clients while remaining within the bounds of the law.[116] In the case of Mori, his behavior did not lead to any sort of official sanctions while Hicks made statements to the court that ultimately contradicted the myths and accusations perpetuated by his attorney in Australia.[117] However, Mori was reassigned immediately after the trial and later complained that he was passed over twice for promotion.[118]

Additional military attorneys also appeared to take advantage of the leeway afforded to defense counsel in the military commissions regulation. For example, Marine Lieutenant Colonel Colby Vokey frequently attacked the system as a "sham" while levying provocative claims through the media.[119] Meanwhile, prosecutors in the case were not able to rebut Vokey's relatively unfettered public comments effectively. "He has said a lot of things that don't stand up to facts," a Pentagon spokesman said a few years after Vokey completed his work at GTMO.[120] It also is noteworthy that Vokey reportedly coupled his rhetoric with a report under the Military Whis-

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115 *See, e.g.*, MODEL RULES OF PROFESSIONAL CONDUCT R. 1.3 cmt. 1 (1983), *available at* http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html ("A lawyer is not bound, however, to press for every advantage that might be realized for a client.").

116 *See, e.g.*, W. Bradley Wendel, *Government Lawyers, Democracy, and the Rule of Law*, 77 FORDHAM L. REV. 1333, 1348 (2009) (noting that fidelity to law is one of lawyers' fundamental obligations, along with loyalty to the client, even in litigation).

117 Dunlap et al., *supra* note 86, at 436 ("Despite all of Major Mori's vituperative statements, his client admitted his criminality to the military commission (with Major Mori at his side). In a plea bargain, Hicks recanted his allegations of abuse, and agreed that he had 'never been illegally treated' during 'the entire period of [his] detention by the United States at Guantanamo Bay, Cuba.' At the hearing Major Mori also said his client 'wants to apologize to Australia and to the United States.'").

118 Yaroshefsky, *supra* note 3, at 574. *See also* Raymond Bonner, *Detainee's Marine Lawyer Criticized*, INT'L HERALD TRIB. 3, Mar. 5, 2007 (reporting that Mori expressed concern about the viability of Hicks's defense if Mori was removed as Hicks's military attorney after he was accused of wrongdoing for his conduct in Australia). Ultimately, Mori was promoted and assigned to serve as a military judge. *See Lawyer Says His Promotion Denied for Defending Terrorism Suspect*, MARINE CORPS TIMES 24, Sept. 13, 2010 ("The Navy's court brief says Mori presented no evidence that board members had been critical of his efforts to defend terrorists and posits that board members are bound by specific instructions that bar them from discussing matters not contained in a candidate's personnel file or arising from third-party discussions.").

119 *See* Rogers, *supra* note 85.

120 *Id.*

tleblower Protection Act alleging harsh treatment at GTMO.[121] An investigation ultimately determined the allegations to be unfounded.[122]

But military defense attorneys have not been the only GTMO practitioners to publicly air grievances while in uniform. A handful of prosecutors also have resigned due to personal objections to the military commissions process.[123] For example, Army Lieutenant Colonel Darrel Vandeveld released to the Miami Herald a scathing rebuke in 2008 of how he perceived his office and the overall system to be run.[124] "I am highly concerned, to the point that I believe I can no longer serve as a prosecutor at the Commissions, about the slipshod, uncertain 'procedure' for affording defense counsel discovery."[125]

Regardless of his ethical motives, Vandeveld likely violated military regulations when he issued the unauthorized statement to the media.[126] In the end, Vandeveld's public allegations were dismissed as being from "somebody who is disappointed that his superiors did not agree with his recommendation in a case."[127]

C. Going Beyond Military Expression

Despite the blatant affronts to the military expression aspect of the trifecta, there is little question that Lieutenant Commander Matthew Diaz escalated his personal opposition against military policy to a dangerously higher level of criminality.[128] Diaz worked as a staff judge advocate for the detention operations at GTMO.[129] His duties included serving as a legal counselor for the military, which included facilitating coordination between defense, prosecution, and civilian attorneys, as well as other administrative

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121 *See Order Quiets Lawyer*, AKRON BEACON J. (Ohio), Oct. 15, 2006, A15 ("A paralegal and a military lawyer who brought forward allegations about prisoner abuse at the Guantanamo Bay detention center have been ordered not to speak with the press.").

122 *Id.*

123 *See* Thomas, *supra* note 85; Peter Finn, *Guantanamo Prosecutor Quits, Says Evidence Was Withheld*, WASH. POST, Sep. 25, 2008, at A06; Jess Bravin, *The Conscience of the Colonel*, WALL ST. J., Mar. 31, 2007, at A1.

124 Finn, *supra* note 123; Thomas, *supra* note 85.

125 Finn, *supra* note 123.

126 Dunlap et al., *supra* note 86, at 436.

127 William Glaberson, *Guantanamo Prosecutor is Quitting in Dispute Over Case*, N.Y. TIMES, Sept. 24, 2008, at A20.

128 Dunlap et al., *supra* note 86, at 434 (Diaz's own defense counsel called his client's actions "stupid, imprudent, and sneaky, if you want, about the way he sent it off . . . It was Diaz's obligation as a lawyer and an American to abide by the Constitution [even] when he felt the government did not.").

129 *See Diaz*, *supra* note 13, at 129.

and legal work pertaining to the detainees.[130] During his time at GTMO, Diaz reportedly became personally upset and agitated when U.S. Supreme Court decisions failed to compel the military to release a classified listing of all detainees.[131] Finally, Diaz opted to take the matter into his own hands. He used his security clearance to access the classified database.[132] Diaz then proceeded to copy the list of names into a Valentine's Day card.[133] In the process, his copies also included classified coding information that was ultimately deemed much more sensitive than merely the names.[134] Diaz then mailed the card to a human rights attorney at the Center for Constitutional Rights (CCR).[135] Realizing that the information contained in the card was classified, the CCR attorney turned it over to authorities.[136] After a brief investigation, Diaz was arrested and ultimately sentenced to prison.[137]

The Diaz case is important because it highlights the serious ramifications for when a military attorney feels a greater compulsion to follow his or her personal beliefs instead of the standards for ethical or lawful conduct dictated by the profession.[138] In fact, Diaz's military colleagues have added that this "crisis of conscience" could have accomplished the same result without taking the route that he took.[139] In retrospect, these colleagues suggested that Diaz should have at a minimum avoided disclosure of the codes.[140] But perhaps the better suggestion was that Diaz should have consulted with another attorney to help identify appropriate and lawful courses of action.[141] In fact, there are a few instances where military attorneys at GTMO opted to consult with legal counsel prior to engaging in questionable activity. When Army Lieutenant Colonel Jon Jackson was concerned that he was in violation of his state bar requirements by serving as merely standby counsel, he immediately (and with prodding from the judge) checked not

130 *Id.*

131 *Id.*

132 *See id.* at 6.

133 *See id.* at 7.

134 *See id.* at 6.

135 *See USMJ and Espionage*, COURT-MARTIAL.COM, http://court-martial.com/ucmj-and-espionage/ (last visited Mar. 13, 2011).

136 *See* Diaz, *supra* note 13, at 7.

137 *See id.* at 2.

138 *See* Mary Elizabeth Basile, *Loyalty Testing for Attorneys: When is it Necessary and Who Should Decide?*, 30 CARDOZO L. REV. 1843, 1879 n.196 (2009).

139 *See* Yaroshefsky, *supra* note 3, at 579.

140 *See id.*

141 *See id.*

only with his bar association, but also contacted a former GTMO military attorney who previously navigated the same issue.[142]

IV. REMEDIES

Anecdotally it is clear that licensed professionals represent only a small fragment of the overall military population who choose to act on their personal "crisis of conscience."[143] However, the fact that military physicians and lawyers do cross the line makes it a niche worthy of study. Perhaps more important is that as controversial policies continue to arise, military doctors and lawyers will always be at the forefront.[144] As such, when faced with a personal conflict, this group of professionals—or special staff—has to not only weigh responsibilities as commissioned officers, but also ethical duties associated with law and medical licenses.[145]

In the civilian world, workers are typically left with an environment tantamount to "you don't like it, then leave."[146] Even analysts with the Central Intelligence Agency can abandon their employment contracts, with the harshest penalty being federal debt collection and other civil remedies.[147] For servicemembers, however, this is quite often not an option. The reason is that most officers incur an obligatory amount of time in uniform.[148] Sig-

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142 Carol Rosenberg, *Fired Army Lawyer: I will Defend Khadr Zealously*, MIAMI HERALD, July 17, 2010, *available at* http://www.miamiherald.com/2010/07/17/1735411/fired-army-lawyer-i-will-defend.html#.

143 Kramer et al., *supra* note 1, at 1419 ("[M]ost legal controversies emerging from the global war on terrorism were . . . less about conflicts between uniformed and civilian government attorneys than between the civilians involved.").

144 *Id*. at 1416.

145 *Id*. (Military regulations provide that a judge advocate assigned to represent an individual forms an attorney-client relationship, such that neither "the lawyer's personal interests . . . nor the interests of third persons should affect loyalty to the individual client. No cogent basis exists to suggest the obligation diminishes when representing detainees. On the contrary, it would constitute professional misconduct for a judge advocate performing such duties to place interests other than his client's at the forefront. It would similarly comprise professional misconduct for those in the defense attorney's chain of command to attempt to limit his or her zealous representation.").

146 5 U.S.C. 1501 (explaining that government employees are subject to certain free speech limitations under the Hatch Act).

147 *See, e.g.*, Winthrop v. Central Intelligence Agency, U.S. Dist Ct, Alexandria (filed 2009). The author served as counsel for former CIA employee who opted to abruptly quit his post. Citing breach of contract, the CIA unsuccessfully pursued damages in the form of recuperation of moving expenses, pay, and threats of negative reporting to the credit bureaus. For more information, *see* Complaint, *id.*, *available at* http://cryptome.org/cia-screws-gw.pdf; Exhibit 2, *id*, *available at* http://cryptome.quintessenz.at/mirror/cia-screws-gw2.pdf; Jeff Stein, *Lawyers: Punish CIA Counsel for Deception*, CQ-ROLL CALL BLOG, Aug. 17, 2009, http://blogs.cqrollcall.com/spytalk/2009/08/lawyers-punish-cia-counsel-for.html.

148 *See generally* U.S. DEP'T OF ARMY, REG. 350-100, OFFICER ACTIVE DUTY SERVICE OBLIGATIONS (Aug. 10, 2009) (citing statutory service obligations).

nificantly, this obligation is directly related to servicemembers' jurisdiction under the UCMJ.[149] In short, civilians may face financial repercussions for simply leaving, but servicemembers can lose their freedom.

Certainly, this is not to suggest that doctors and lawyers are not free to leave. Once the obligations are complete, these servicemembers generally can seek to resign from the military.[150] Morris Davis, former chief prosecutor for the Office of Military Commissions, did precisely this when faced with personal disagreements with the Guántanamo Bay system.[151] But what about those who still hold service obligations?

In the context of the military commissions, there have been cases where prosecutors have made in-house requests to be removed from cases for various reasons.[152] Also, like the prosecution side, defense counsel typically volunteers to serve in the Guántanamo Bay system.[153] Of course, the public statements and technical UCMJ violations continued.

As mentioned above, military doctors and lawyers should seek counsel prior to acting on their personal concerns.[154] This includes legal and ethics advice from a knowledgeable and confidential source from both the military law side and the licensing authority.[155] While it may sound like common sense, Diaz is a good example of an otherwise competent and intelligent professional who simply acted without credible deliberation.[156] In addition, upon sentencing in the Lakin case, the doctor folded and ultimately claimed that he initially consulted with an attorney incapable of providing sound advice.[157] Although Lakin was certainly operating to gain mass exposure to his political issue, proper legal advice may have led him to act more appropriately (and legally).[158]

On a grander scale, the Military Whistleblower Protection Act outlines additional options for servicemembers to report perceived wrong-

149 *Id.*

150 *Id.*

151 Carol J. Williams, *War Court Prosecutor Quits Post*, L.A. TIMES, Oct. 6, 2007; *See also* David Zucchino, *Retired Colonel Fights Library of Congress Over Firing*, L.A. TIMES, Dec. 6, 2010 (Interestingly, Davis was ultimately fired from his follow-on civilian job at the Library of Congress after issuing op-ed pieces in various news publications where he continued to criticize the military commissions system.).

152 The nature of these instances is deemed confidential.

153 DEP'T OF DEFENSE, *supra* note 8, at ch. 9(1)(a)(12) ("The Chief Defense Counsel shall ensure that all detailed defense counsel and civilian defense counsel who are to perform duties in relation to a military commission have taken an oath to perform their duties faithfully").

154 Yaroshefsky, *supra* note 3, at 579.

155 *Id.*

156 *Id.*

157 Gresko, *supra* note 45.

158 *Id.*

doing.[159] While this will not be of much use for the politically anti-war professional such as Huet-Vaughn, the whistleblower law can be a powerful tool when it comes to specific concerns. For example, Diaz's actions stemmed from a belief that his superiors were acting in direct violation to Supreme Court decisions. He could have formulated an official and detailed complaint to not only his command, but also the investigative general and any member of Congress.[160] By going all three routes, Diaz would have created a lawful trifecta of his own to investigate his claims. Doctors also could use this as a mechanism to maintain their medical neutrality and ethical requirements by using the military's internal and statutory investigative system.[161]

Along these lines, one element of the military whistleblower law that needs to be improved relates to legal counsel. Currently, the military legal system is not designed to provide potential whistleblowers with a confidential attorney.[162] This poses as a problem because servicemembers, to include military doctors and even other lawyers, can benefit from establishing an attorney-client relationship in order to properly asses all options. Coupled with the fact that the Military Whistleblower Protection Act is very nuanced in terms of how to facilitate the process, servicemembers are at a disadvantage under the current system.[163]

Typically, servicemembers have two options when seeking legal advice. One is the trial defense services.[164] These defense counsels are provided a substantial degree of independence from the rest of the military.[165] The obvious reason is that since these lawyers serve as defense counsel, they can establish attorney-client relationships. However, the mandate for military defense attorneys is that they can generally only get involved when a servicemember is charged, under investigation, or facing some other form of adverse criminal or administrative action.[166] As a result, a potential whis-

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159 Military Whistleblower Protection Act, *supra* note 17.

160 *Id.*

161 *Id.*

162 *Id.* (failing to address the need to assign legal counsel to potential whistleblowers in the military).

163 *Id.*

164 *See, e.g.*, *U.S. Army Trial Defense Service (USATDS)*, JUDGE ADVOCATE GENERAL'S CORPS, U.S. ARMY, https://www.jagcnet.army.mil/85257372006BBDCC/(JAGCNETDocID)/HOME?OPENDOCUMENT (last visited Mar. 13, 2011); *see also JAG - Trial Defense Services: About Us*, OREGON.GOV, http://www.oregon.gov/OMD/JAG/about_us.shtml (last visited Mar.13, 2011) (presenting Trial Defense Services mission statement).

165 DEP'T OF THE ARMY, FIELD MANUAL NO. 27–100, LEGAL SUPPORT TO OPERATIONS § 2.5 (2000) *available at* http://www.globalsecurity.org/military/library/policy/army/fm/27-100/chap2.htm (discussing the independence of Trial Defense Services).

tleblower seeking confidential advice or assistance should technically be turned away.[167]

The second option is what is typically referred to as a legal assistance attorney.[168] These military lawyers are available to assist and counsel servicemembers on issues ranging from debt collection to estate planning. Due to their wide-range of counseling ability, legal assistance lawyers seem to be the obvious option for a whistleblower consultation. The problem is that legal assistance is not technically confidential. Unlike defense counsel, the mandate for legal assistance attorneys is to represent the servicemembers as lawyers for the military.[169] In other words, the client for ethical and bar purposes is the military, and not the servicemember.

The end result is typically that legal assistance lawyers will provide the statutory rundown of the whistleblower law. The servicemember will then be left to his or her own auspices to file a report with the command, member of Congress, or investigator general.[170] But compare this to federal whistleblower recommendations where it is highly suggested that civilians hire an attorney to assist. This is in part to help navigate the many pitfalls that can arise during a whistleblower investigation. While servicemembers are free to hire a civilian attorney, the unique military system is often a rough place for non-military lawyers.

To this end, it is recommended that military regulations be amended to afford legal assistance lawyers with the ability to establish attorney-client relationships with potential whistleblowers. In addition, the legal assistance lawyers also should be permitted to represent the military whistleblower for the duration of the investigation. In this manner, servicemembers will have a conduit to assist in all facets of the process when a perceived act of wrongdoing is taking place. In regard to those developing a "crisis of conscience," providing them with a confidential lawyer who can be there for the duration also could properly establish the needed relationship to prevent a servicemember from taking the personal beliefs too far. Military doctors

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166 *Trial Defense Service*, FORT IRWIN, http://www.irwin.army.mil/cmd_staff/NTCcommand/OSJA/Pages/TrialDefenseService.aspx (last visited Mar. 13, 2011) (presenting the Trial Defense Service Mandate); *see also Staff Judge Advocate*, FORT MEADE, http://www.ftmeade.army.mil/pages/sja/sja.html (last visited Mar. 13, 2011).

167 William E. Brown, *Whistleblower Protection for Military Members*, 2008 ARMY L. 58, 59 (stating that trial defense services are provided only where the "Soldier's alleged reprisal complaint is related to pending or recently completed criminal proceedings").

168 DEP'T OF THE ARMY, ARMY REGULATION NO. 27–3, LEGAL SERVICES: THE ARMY LEGAL ASSISTANCE PROGRAM (1996) *available at* http://armypubs.army.mil/epubs/pdf/R27_3.PDF.

169 *Id.*

170 *See* Brown, *supra* note 167 (But compare to legal assistance with complaints from servicemembers alleging wrongdoing against them by their commander, also known as Article 138 complaints. In Article 138 complaints, legal assistance attorneys can draft memoranda on behalf of the servicemember, but still cannot represent the servicemember.).

and lawyers can use this assistance along with professional guidance from their licensing jurisdictions, ultimately to develop an intelligent, ethical, and legal plan of action.

V. CONCLUSION

Military expression pertains to the free speech rights and actions of servicemembers. Unlike most civilians, servicemembers are subject to rules and regulations that somewhat limit how they can publicly espouse their personal views. Most of these men and women in uniform must reconcile their personal beliefs with their duties as a member of the military. This is particularly true with individuals who find themselves personally opposed to various policies or practices of their employer.

The situation revolving around these "crisis of conscience" become more complex when it relates to licensed professionals in uniform. The reason is that doctors and lawyers fall into a veritable military expression trifecta due to the added element pertaining to their ethical licensing requirements coupled with personal beliefs and military expression limitations.

There have been a number of cases in the United States and Britain where licensed military physicians opted to violate their military duties in the name of personal beliefs publicly. In the process, the doctors put their professional licenses on the line. Moreover, a significant amount of military lawyers participating in the Guántanamo Bay detainee process also have technically violated military rules governed by the UCMJ. In many ways, the political environment surrounding GTMO has created a legal scenario that perpetuates politics on the part of some participants.

The bottom line for professionals seeking to reconcile this military expression trifecta is that they should first consult with neutral counsel. From there, the professional can gage the next course of action that conforms to military rules and ethical guidelines, as well as personal conscience. The system does permit various methods for reporting potential violations, as well as means to protect ones career. To act solely on personal conscience without working through the system to remedy the issue is in many ways reckless and dangerous.