

MILITARY ADMINISTRATIVE HEARINGS



AKA "Welcome to the Jungle"

JASON WAREHAM

The reluctant administrative

- Marine Corps Judge Advocate
- “Longest continuously serving M
- Separated in 2021 as Lieutenant
- Currently Of Counsel at Allen V
- Biggest Takeaway:

Federal Administration



wrong).

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LAW SCHOOL

WHAT IS THE ESSENCE OF MILITARY ADMINISTRATIVE HEARINGS?



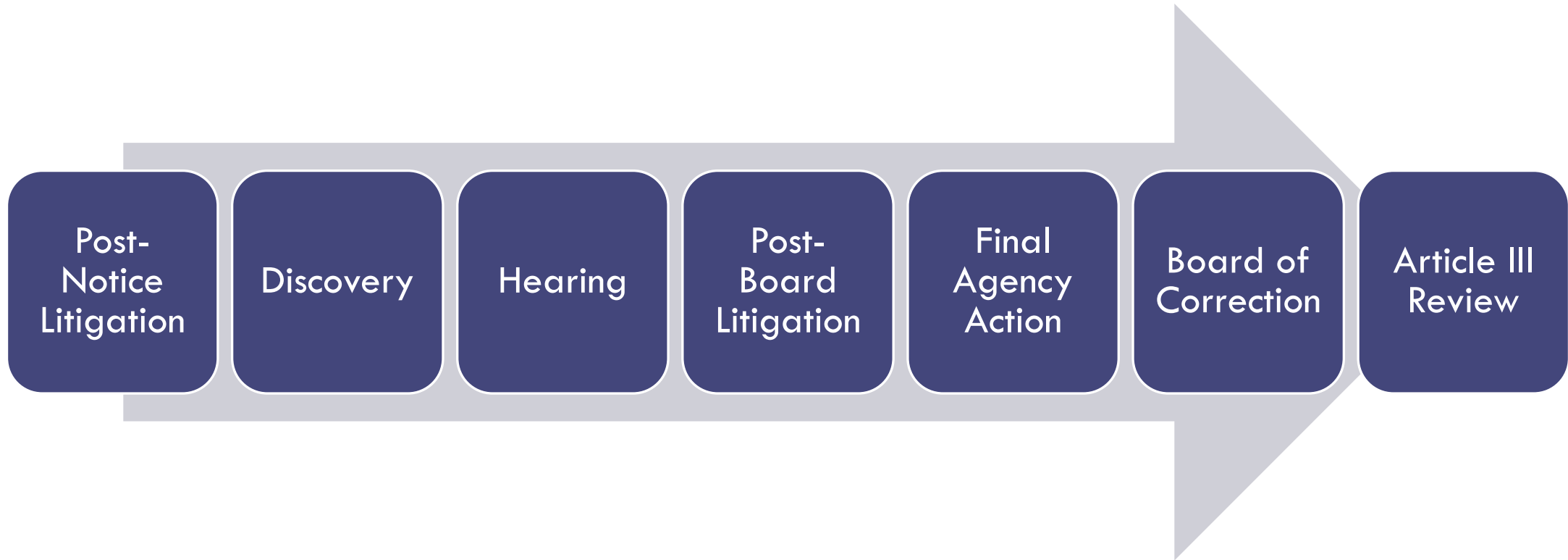
FEDERAL ADMINISTRATIVE AUTHORITY

It all starts somewhere.



JUDICIAL REVIEW OF AGENCY HEARINGS

ABA/P = Always be Advocating / Preserving.



JUDICIAL REVIEW OF AGENCY HEARINGS

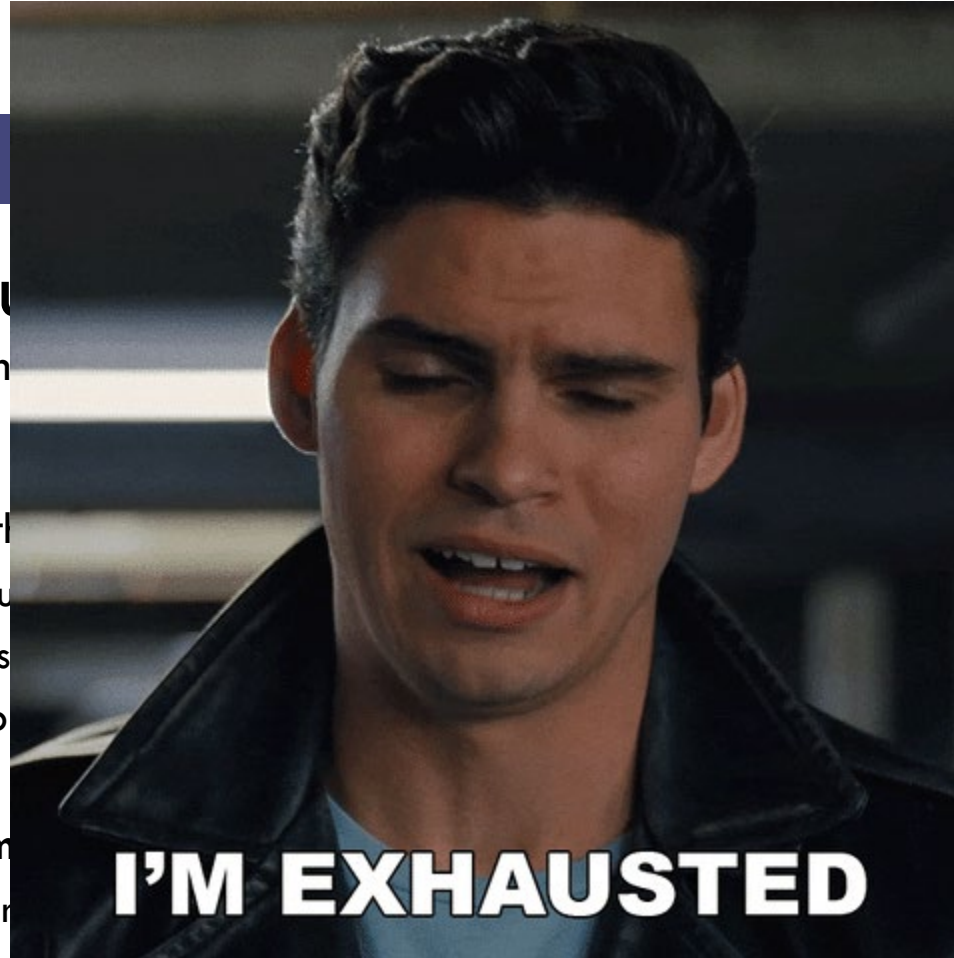
ABA/P = Always be Advocating / Preserving.



BASICS OF JUDICIAL

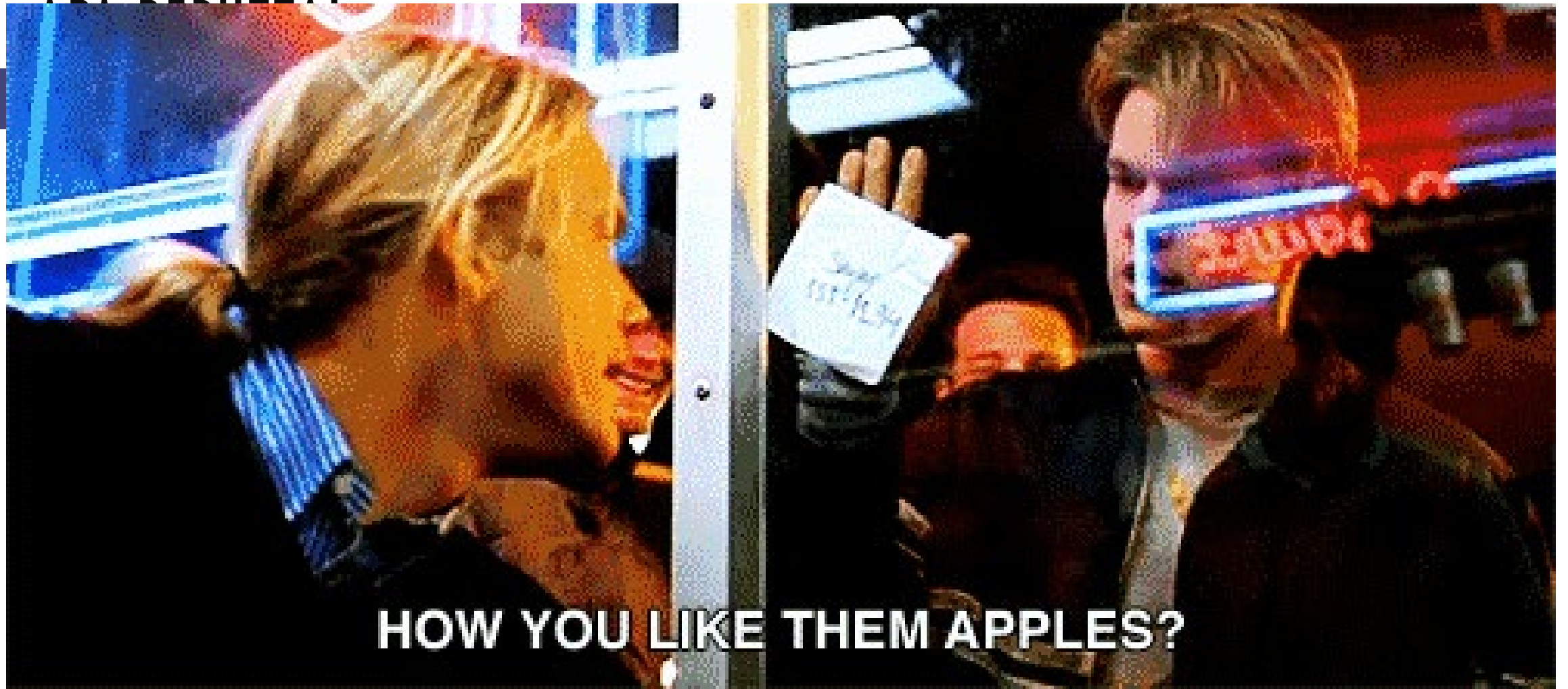
The Military is in Denial

- **Right to Judicial Review (5 U.S.C. § 701)**
 - Allows judicial review of agency actions
- **Scope of Review (5 U.S.C. § 702)**
 - Courts may set aside actions that are:
 - Arbitrary, capricious, or an abuse of discretion
 - Contrary to constitutional rights
 - Procedurally deficient or unsupported by substantial evidence
- **Finality & Exhaustion of Remedies (5 U.S.C. § 704)**
 - Only final agency actions are reviewable
 - Must exhaust administrative remedies before seeking judicial review.



...d to agency discretion.

It's APA Business



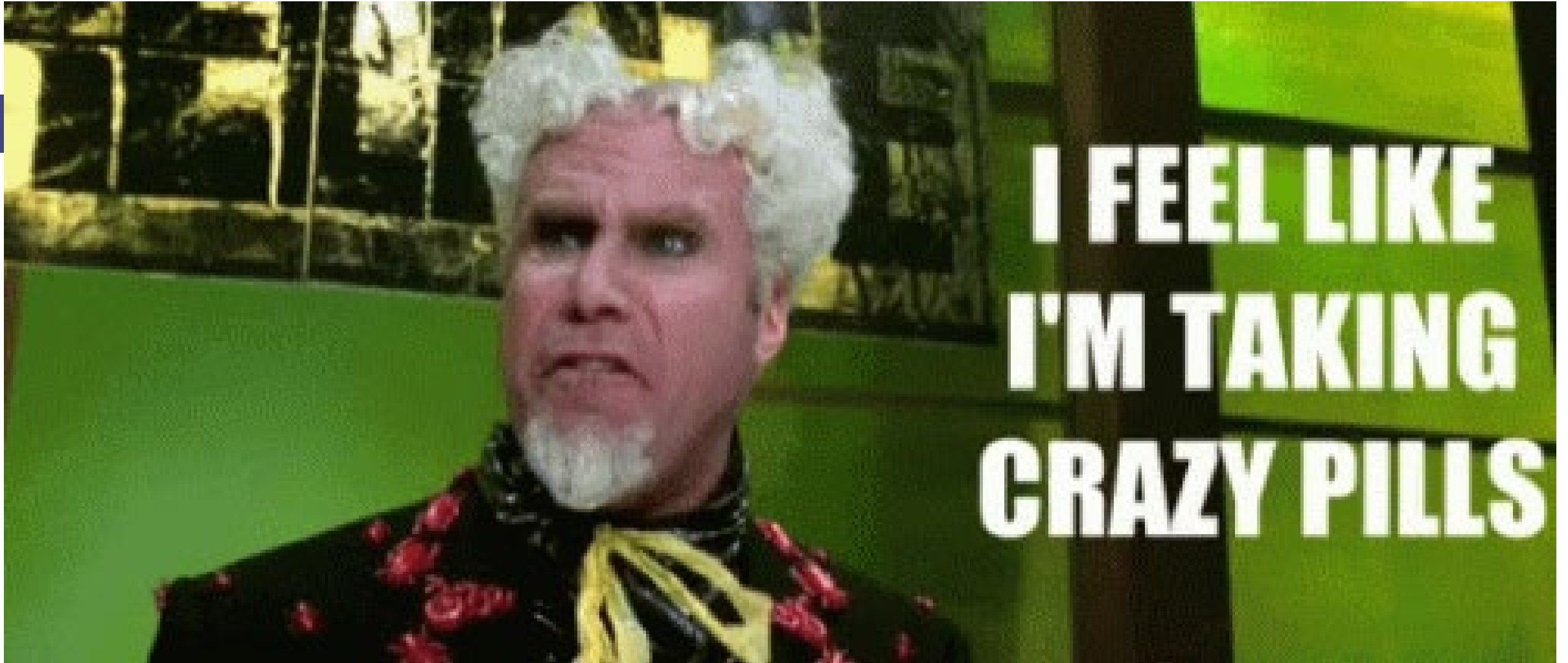
CASE STUDY

Start at the

- Marine Corps
- Deployed to
- Critical pub
- Sends an e
- Happens to
- All hell bre
- Sent to a B
- Separated
- Takes it up



16).



Any issues not raised before the DCF are waived.

CASE STUDY: CAPT

“It’s not about truth Brad



2. LODI Investigation and Fact Rebuttal. In discussing the LODI findings and timeline, Ms. Mullen conveyed significant concerns with some of the facts presented—as a medical professional herself, she refuted medical terms of art used in the LODI: specifically that cardiomegaly was called a “contributing factor”, when it should have been called a “contributing condition”. We explained that the particular verbiage was pulled directly from the Armed Forces Medical Examiner’s autopsy report. Ms. Mullen also refuted the timeline of when SN Mullen received oxygen, noting that she has reports he was on oxygen as early as the Wednesday of Hell Week, and if there were signs of crackling lungs and degraded saturation that early, his death would have been preventable had medical intervened and pulled him from training. Throughout the discussion, Ms. Mullen provided numerous claims of BUD/S instructors not following protocols and subsequently risking the health and safety of candidates. Almost all of these claims were either not corroborated by the LODI’s findings or simply outside of the LODI’s scope.

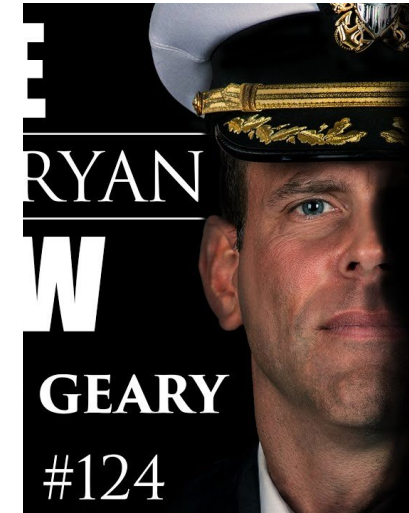
3. Leadership & Medical Accountability. The most common theme throughout the discussion was the desire for NSW and medical personnel accountability for any findings of neglect or wrongdoing, noting that any medical professional could find fault in the care provided by simply reading the LODI findings. It was explained that in addition to the command and LODI, BUMED is conducting an independent Quality Assurance Review (QAR) specific to medical care, expected to conclude in early 2023. Accountability actions to date were also explained, as well as the potential that additional measures could be taken once the command investigation is completed.

4. Actions Already Taken at NSW. During the briefing, Ms. Mullen, Rep. Smith and the team were satisfied that several actions had already been taken to improve training, medical support and accountability at NSW Basic Training Command (BTC) that came to light after SN Mullen’s death. While there is an expectation that more helpful change will come, they were pleased to hear positive results from the changes already implemented.

5. Additional Concerns. Alarmed by some of the LODI facts, on behalf of Ms. Mullen, Ms. Noonan (Rep Smith Chief of Staff) voiced concern with House Armed Services Committee members being briefed on the investigation findings at the same time as her, noting that they have a “rosy” picture of the investigation without all of the facts. She desired an avenue for Navy to go back to Congress and correct as necessary. Toward the end of the discussion, Ms. Mullen was provided a copy of the planned press release and requested that the Navy put in writing that SN Mullen’s death was not attributed to Performance Enhancing Drug (PED) use to clear his name, explaining that she has received several direct and hostile messages about her son, his “cheating” through BUDs, and slandering his name over something that has been found to be untrue.

Due Outs:

1. Adjust press release to make a clearer statement about the role of PEDS ([Complete at this link](#))
2. Provide the right opportunity to ensure the facts offered by Ms. Mullen are considered in the Command Investigation



Releases Seaman Kyle Mullen Line of Duty Investigation

CASE STUDY

“It’s not about the man, it’s about the mission.”

- Denied BUMS
- Request for investigation
 - “I feel I can’t go back to work until I know what happened.”
 - In an Email to the Commanding Officer
- Current sitting on CAPT General’s report
- It has taken 18 months to get to this point
- No PEDs tested
- NCIS RETURNED TO PROSECUTOR
 - Months later

12 October 2022

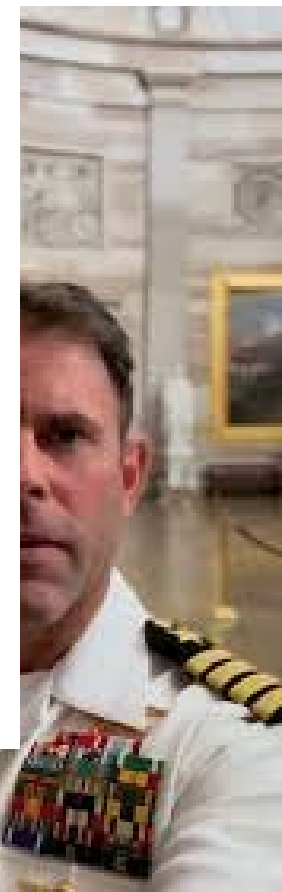
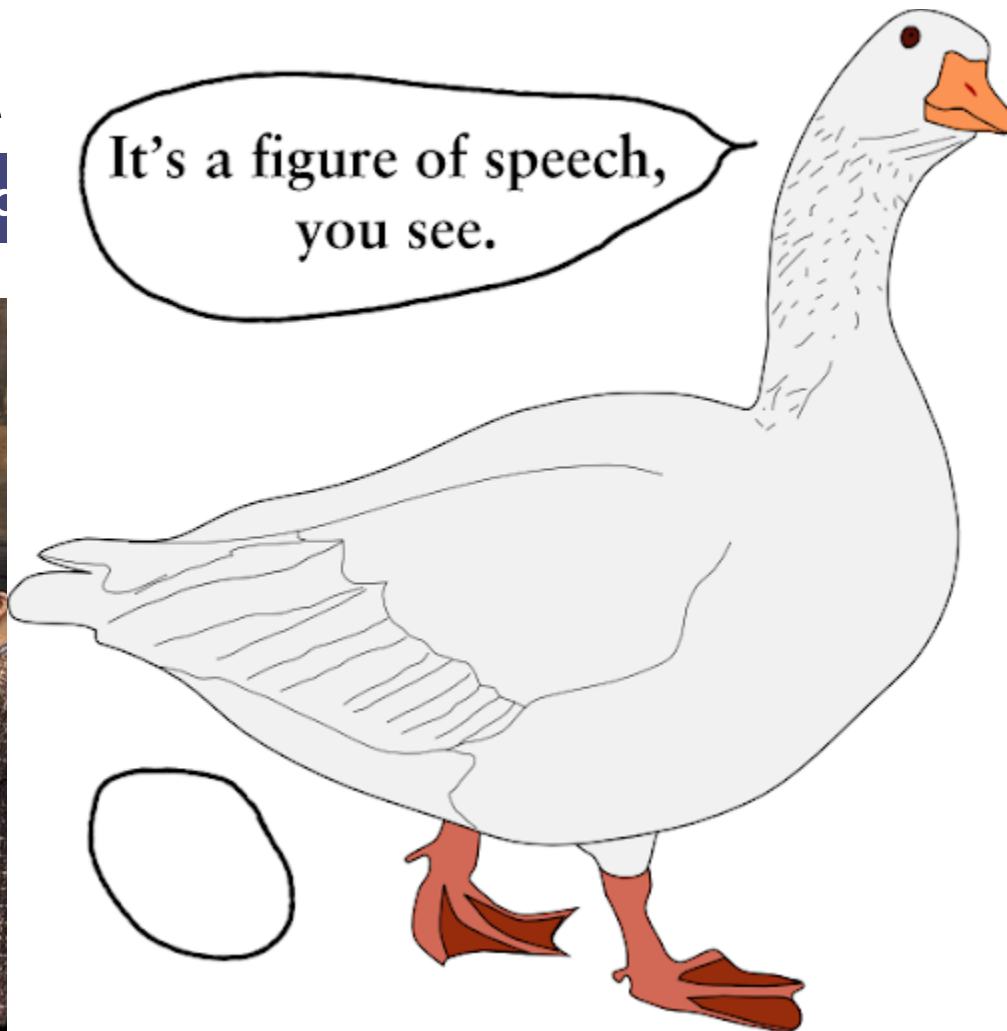
CORONADO, California - Naval Special Warfare Command released the Line of Duty investigation today into the death of Seaman Kyle Mullen, a Navy SEAL candidate who died Feb. 4, 2022, immediately after completing “Hell Week,” during Basic Underwater Demolition/SEAL (BUD/S) training.

Based on the results of the investigation, NSWC concluded the death of Mullen was in the line of duty, not due to his own misconduct. According to the Armed Forces Medical Examiner’s autopsy report, Mullen died of acute pneumonia with cardiomegaly as a contributing factor in the hours after successfully completing Hell Week and Performance Enhancing Drugs were not a contributing cause of Mullen’s death.



CASE STUDY: CAPTA

CAPT Geary Goes to Work



LESSONS LEARNED AND BEST PRACTICES

Don't Say I Didn't Warn You

- Brezler:
 - Simultaneous FOIA/PA Request of your Discovery Request
 - Relevant withheld discovery was found post BOI and demonstrated prejudice.
 - File simultaneous FOIA/PA action if no response in 20 days.
 - Think out of the box for witnesses and evidence.
 - E.g., Get General (Chief of White House Staff) Kelly to call out the Commandant.
- Yefsky:
 - Preserve, Preserve, Preserve, Litigation Hold
 - “Paper Boards” are for the Government
 - although ask me about Due Process and Hearsay
 - Object to everything – DOJ’s Position: Despite regulation, must be raised at BOI or waived.
 - Do it again in the Letter of Deficiency
 - Demand the audio and a verbatim transcript.

BEST LESSON: DISCOVERY PRACTICE

This is civil litigation.

- Real Civil Discovery Request
 - Definitions
 - Include clear definitions (e.g., "document," "communication," "person") and instructions (e.g., format for production, manner of indexing) to avoid ambiguity in interpretation.
 - Specify how electronically stored information (ESI) should be produced, especially regarding metadata.
 - Easy definition: The term 'records' includes all recorded information, regardless of form or characteristics, created, received, and maintained by an organization, agency, or individual in connection with the transaction of business, as defined under 44 U.S.C. § 3301. This definition includes, but is not limited to, documents, correspondence, notes, emails, text messages, memoranda, reports, recordings, and any other data, whether in electronic or hard copy format, that are necessary for the accurate and complete documentation of activities and decisions.
 - Demands for privilege or withholding logs.
 - Litigation Hold – Every Time
 - Contemporaneous FOIA / PA Request (Include a Litigation Hold as Well)

BEST LESSON: DISCOVERY PRACTICE

This is civil litigation.

- Real Civil Discovery Request
 - Make it look like things Art. III judges see:

NAVY REGION SOUTHWEST
BOARD OF INQUIRY

UNITED STATES NAVY,	§	
	§	
<i>Through Commander,</i>	§	
<i>Navy Region Southwest</i>	§	
<i>Convening Authority</i>	§	RESPONDENT'S FIRST
	§	DISCOVERY REQUEST
v.	§	
	§	
CAPTAIN BRAD GEARY, USN	§	
	§	
<i>Respondent.</i>	§	

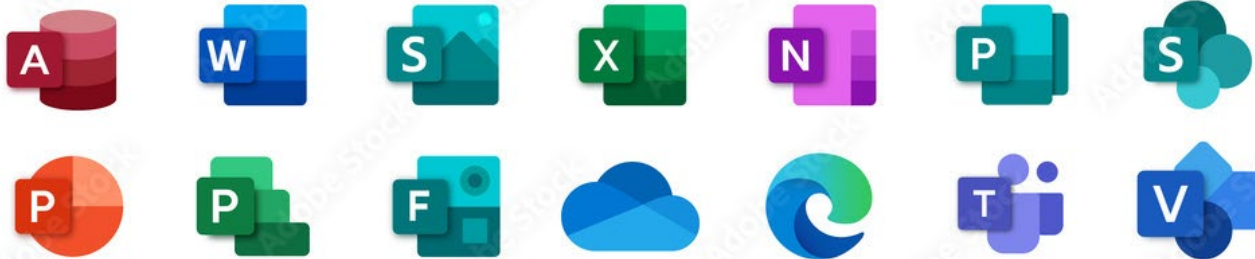
RESPONDENT'S FIRST SET OF DISCOVERY REQUESTS

Respondent, Captain Brad Geary, USN, by and through his attorneys, Jason Wareham, R. Davis Younts, Tim Parlatore, and LCDR Mark A. Jessup, JAGC, USN, hereby submit the following discovery requests to the Convening Authority pursuant to SECNAVINST 1920.6D, and pursuant to the Due Process Clause of Amend. V to the U.S. Constitution, to be responded to within fifteen (15) days of service:

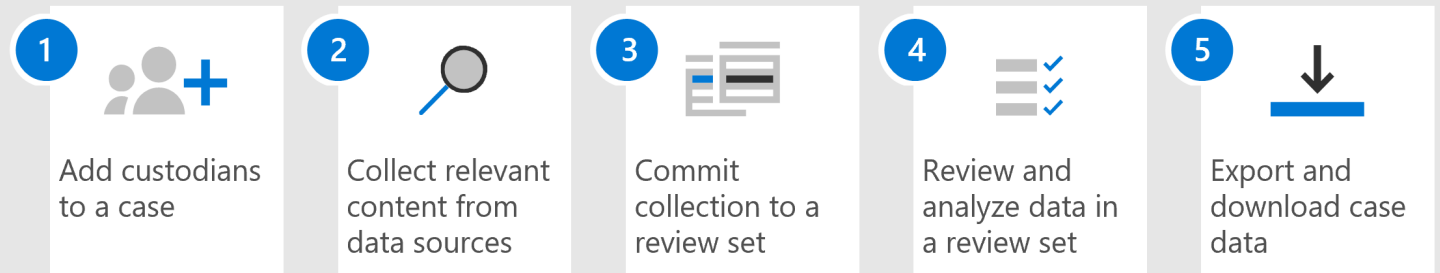
BEST LESSON: DISCOVERY PRACTICE

This is civil litigation.

- What's the best improvement relevant to discovery in the military in the last 3 years?



Advanced eDiscovery workflow



BEST LESSON: DISCOVERY PRACTICE CHEAT CODE

Work smarter not harder.

- The Number One best tool for discovery request creation?



BEST LESSON: DISCOVERY PRACTICE CHEAT CODE

Work smarter not harder.

- Demo Prompt:
 - “Draft an exhaustive discovery request for a 1920.6D Navy Board of Inquiry (BOI), including definitions (with NARA's definition of records under 44 U.S.C. § 3301), a request for electronically stored information (ESI) from the M365 Government Cloud (emails, Teams, OneDrive, metadata), a privilege log request per FRCP 26(b)(5), a litigation hold request, sources of authority (SECNAVINST 1920.6D, U.S. Navy regulations), and specific instructions for native file formats, metadata retention, Bates-stamping, and supplemental discovery. Await administrative charges and fact summaries for tailored requests before production.”

LESSON

Don't So

- Geary
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- /
- P
- Don't
- STAY



LESSONS LEARNED AND BEST PRACTICES

Don't Say I Didn't Warn You

- Geary:
 - Simultaneous fronts.
 - Expect nothing of Congress
 - But if you go:
 - Have a “Champion Representative”
 - Create a Joint Letter they can easily sign on.
 - Craft an “Elevator Pitch” to deliver door-to-door to staffers as fast as possible
 - Master the “Walk and Talk”
 - Realize that everyone there is just trying to keep their jobs – make it a popularity contest.
 - Don't shotgun press: breath, aim and fire.
 - STAY TUNED!!



#1 PROBLEM I SEE WHEN DEALING WITH ADMIN BOARDS

Bet you can't guess.

#1 PROBLEM I SEE WHEN DEALING WITH ADMIN BOARDS

Bet you can't guess.



INSTEAD, BE:

No Rules = Max Advocacy



QUESTIONS:

Don't Leave Me Hanging

