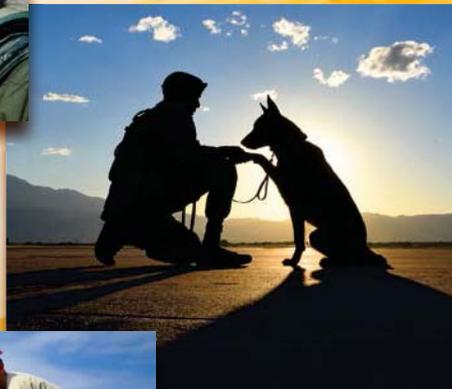


THE MILITARY COMMANDER AND THE LAW



5

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INSTALLATION JURISDICTION

Installation jurisdiction refers to the type of legal authority exercised by the Air Force over an installation. There are four main types of jurisdiction (arranged from greatest Air Force authority to least): (1) exclusive federal jurisdiction; (2) concurrent federal jurisdiction; (3) partial federal jurisdiction; and (4) proprietary jurisdiction. Depending on your installation, more than one type of jurisdiction may apply. Always check with your staff judge advocate to verify the type of jurisdiction existing on your installation.

Title

- Title in relation to a military installation is virtually the same as in a private real estate transaction. Title simply means legal ownership—the legal right to the use and possession of a designated piece of property.
- In most cases, the Air Force has title to the property on which its installations are located. However, some installations sit on leased property or have portions of the base sitting on leased property.
- The installation civil engineer maintains the deed or lease to the installation. Questions concerning title to the installation's real property should be referred to the servicing staff judge advocate.

Jurisdiction

- The concept of jurisdiction is separate and distinct from that of title
- Jurisdiction includes the right to legislate (i.e., implement laws, rules, and regulations) and to enforce those laws. Having title does not necessarily include legislative jurisdiction.

Sources of Legislative Jurisdiction

- Article I, Section 8, Clause 17, of the United States Constitution confers upon Congress the power to exercise legislative jurisdiction over federal property. The government can acquire the right to exercise legislative jurisdiction in three ways.
 - Purchase and Consent: The federal government purchases the property, and the state legislature consents to giving the federal government jurisdiction
 - Cession: After the federal government acquires title to property, the state may cede jurisdiction, in whole or in part, to the federal government. The federal government can later retrocede jurisdiction back to the state. 10 U.S.C. § 2683.

Prior to 1940, it was presumed that jurisdiction was ceded at the time the government acquired the property. Since 1940, however, there must be an affirmative acceptance of jurisdiction before the federal government will have legislative jurisdiction. 40 U.S.C. § 3112. Check the deed to determine when the federal government acquired the property.

- Reservation: At the time the federal government ceded property to establish a state, particularly in the western United States, it reserved some of the land as federal property. In these cases, the federal government retained legislative jurisdiction over the property it reserved. Again, check the deed.

Types of Legislative Jurisdiction

- The inquiry does not stop with determining if the federal government has legislative jurisdiction. It is also necessary to determine what type of jurisdiction it has. There are four types of legislative jurisdiction.
 - Exclusive Jurisdiction: As the term implies, this type of jurisdiction gives the federal government sole authority to legislate. Unless exclusive jurisdiction was reserved at the time land was granted to the state, it is necessary to go back to the state for exclusive jurisdiction. The state may have elected to reserve some authority, e.g., authority to serve civil and criminal process on the property. If the state failed to reserve such authority, it is waived. For some years now, it has been federal policy not to acquire exclusive jurisdiction. While at first blush this may seem odd, there are legitimate reasons for the policy. For instance, state and local authorities may be better able to deal with particular situations than the federal government, e.g., child welfare services, domestic relations matters, etc.
 - Concurrent Jurisdiction: Both the state and federal governments retain all their legislative authority. In the event of conflict, the federal government prevails under the Supremacy Clause of the Constitution. U.S. Const. Art. VI, cl. 2.
 - Partial Jurisdiction: Both the state and federal government have some legislative authority, but neither one has absolute power. For instance, the state may have reserved the authority to impose and collect taxes, or it may have ceded only criminal jurisdiction over the property. Again, federal supremacy applies in the event of a conflict.

- Proprietary Jurisdiction: In this case, the United States is like any other party who has only a possessory interest in the property it occupies. The United States is simply a tenant with virtually no legislative authority. The federal government maintains immunity and supremacy for inherently governmental functions. The only federal laws that apply are those that do not rely upon federal jurisdiction, e.g., espionage, bank robbery, tax fraud, counterfeiting, etc. However, the installation commander can still exclude civilians from the area pursuant to the commander's inherent authority.

REFERENCES

U.S. Const. Art. I, § 8, cl. 17

U.S. Const. Art. VI, cl. 2

10 U.S.C. § 2683

40 U.S.C. § 3112

Greer v. Spock, 424 U.S. 828 (1976)

AFI 32-9001, *Acquisition of Real Property* (27 July 1994)

FEDERAL MAGISTRATE PROGRAM

The federal magistrate program provides a means of enforcing discipline on base with respect to civilian criminal misconduct. The availability of the program depends on the location and jurisdiction of the base, the type and locale of the offense, and the status of the offender.

How Magistrate Court Works

- Federal magistrate court is an alternative to prosecution in federal district court. Magistrate court generally provides a more expeditious and cost-effective forum than district court for minor civilian criminal misconduct.
- Military members on Title 10 orders should **NOT** be prosecuted for criminal offenses in U.S. magistrate court
- Prosecution in magistrate court requires the consent of the defendant
- United States magistrate judges normally try misdemeanor offenses (offenses for which the authorized penalty does not exceed 1 year of imprisonment)
- Air Force judge advocates, when designated by the United States Attorney for the area of the base to act as Special Assistant United States Attorneys (SAUSAs), may prosecute cases in magistrate court
 - Prosecution by Air Force judge advocates in U.S. District Court is permissible with MAJCOM Staff Judge Advocate approval
- Where an installation magistrate court program is established, the installation commander should execute a memorandum of understanding (MOU) with the U.S. Attorney covering responsibilities and procedures for trials in U.S. magistrate court

Federal Magistrate Program Jurisdiction

- Criminal actions committed by civilians on a military installation may be handled in federal court, contingent upon the jurisdictional status of the installation and whether the crime in question violated state or federal law
 - Federal Statutes Without Territorial Jurisdiction Requirements: Prosecuted in federal court regardless of the installations jurisdictional status, e.g., counterfeiting, espionage, sabotage, bribery of federal officers

- Federal Statutes With Territorial Jurisdiction Requirements: May be prosecuted in federal court if the installation where the crime occurs has appropriate jurisdiction, e.g., exclusive or, in most cases, concurrent jurisdiction
 - If the federal government has only proprietary jurisdiction, federal statutes that rely on territorial jurisdiction may not be enforced in federal court. Such offenses may be prosecuted only in state court.
 - If the federal government has exclusive jurisdiction, the state may not prosecute offenses committed on the installation. Federal courts provide the only remedy.
- State Statutes: Generally, state law crimes will be prosecuted in state court, however, most state law violations can be handled in federal court under the Assimilative Crimes Act, 18 U.S.C. § 13
 - Makes violating a state statute on an installation with exclusive jurisdiction a federal offense and allows prosecution of state-only crimes
 - This is available where the conduct does not otherwise violate a federal statute
- State vehicular and pedestrian traffic laws are expressly adopted and made applicable on military installations having concurrent or exclusive federal jurisdiction under the provisions of 18 U.S.C. § 13. In those states where violations of traffic laws are not considered criminal offenses and cannot be assimilated, DoDD 5525.4 adopts the vehicular and traffic laws of such states and makes these laws applicable to military installations having concurrent or exclusive federal jurisdiction.

REFERENCES

18 U.S.C. § 13

32 C.F.R. § 634.25

DoDD 5525.4, *Enforcement of the State Traffic Laws on DoD Installations* (2 November 1981), incorporating Change 1, 31 October 1986

AFI 36-703, *Civilian Conduct and Responsibility* (18 February 2014)

AFI 51-905, *Use of Magistrate Judges for Trial of Misdemeanors Committed by Civilians* (30 September 2014)

COURT-MARTIAL JURISDICTION UNDER THE UCMJ

The UCMJ applies at all times and at all places to active duty military members, as well as to reservists in activated status and national guardsmen in "Title 10" federal status. Court-martial jurisdiction rests upon two primary considerations: (1) commission of an offense under the UCMJ; and (2) military status of the person who committed the offense at the time the offense was committed.

Types of Jurisdiction

- Military Offenses RCM 201(d)(1): Courts-martial have exclusive power to hear and decide "purely military offenses"
- Nonmilitary Offenses RCM 201(d)(2): Crimes that violate both the UCMJ and local criminal law may be tried by a court-martial, a civilian court, or both
 - Double Jeopardy for court-martial and federal court prosecution of same misconduct
 - A military member may **NOT** be tried for the same misconduct by both a court-martial and another federal court because that would constitute "double jeopardy" because the same sovereign (i.e., the federal government) would be prosecuting the accused twice for the same misconduct
 - No Double Jeopardy for court-martial and state/foreign court prosecution of same misconduct
 - A military member **MAY** be tried for the same misconduct by both a court-martial and state court. However, if a military member was tried by a state court and jeopardy attached, regardless of the outcome, as a matter of policy, SecAF approval is required before proceeding with a court-martial. AFI 51-201, *Administration of Military Justice*, para. 2.6.3. If the case was dismissed before jeopardy attached, SecAF approval is not necessary.
 - Host nation treaties and status of forces agreements (SOFAs) govern exercise of jurisdiction over military members overseas

Jurisdiction Over the Offense (RCM 203)

- Courts-martial may try any offense under the UCMJ, and in general courts-martial, the law of war
- Jurisdiction in a court-martial is based **solely** on the accused's status as a person subject to the UCMJ, and not the "service-connection" of the charged offense

Jurisdiction Over the Person (RCM 202)

- General Rule: UCMJ, Article 3(a) authorizes court-martial jurisdiction in all cases in which the service member was subject to the UCMJ at the time of the offense and is subject to the UCMJ at the time of trial. Article 2 of the UCMJ lists classes of persons who are subject to the UCMJ.
- Fraudulent Enlistment: UCMJ, Article 2(c) provides that, notwithstanding any other provision of law, a person serving with the armed forces is subject to the UCMJ until such person's active duty service has been terminated in accordance with law or regulations promulgated by the SecAF if the person:
 - Submitted voluntarily to military authority;
 - Met the mental competence and minimum age qualifications at the time of voluntary submission to military authority;
 - Received military pay or allowances; and
 - Performed military duties

Air Force Reserve

- Articles 2(a)(1) and 2(a)(3), UCMJ, extend court-martial jurisdiction over reservists whenever they are in Title 10 status (meaning that they are on inactive duty training (IDT), active duty (AD), or annual tour (AT)). See also RCM 202 and 204(b)(1) and AFI 51-201, para. 2.9, *Jurisdiction over Air Force Reserve and Air National Guard Members*.
- Article 2(d), UCMJ, authorizes a member of the reserve to be ordered to active duty for nonjudicial punishment, Article 32 investigation, and trial by court-martial
 - The Air Force has placed certain restrictions on involuntary recall of reserve members

- An Air Force Reserve member may be ordered to active duty by an active component general court-martial convening authority. AFI 51-201, para. 2.9.4.
- An Air Force Reserve member recalled to active duty for court-martial may not be sentenced to confinement, or be required to serve a punishment consisting of any restrictions on liberty during the recall period of service, without approval of SecAF. The staff judge advocate (SJA) will coordinate approval, as needed, to recall an Air Force Reserve member for court-martial when the sentence may include confinement. AFI 51-201, para. 2.9.5.
- Do not involuntarily recall Air Force Reserve members to active duty solely for nonjudicial punishment or summary court-martial, although major command commanders or equivalents may grant waivers to this restriction in appropriate cases. AFI 51-201, para. 2.9.3.
- When determining whether the commander has UCMJ jurisdiction over the member, the commander must determine two facts: (1) military status at time of the offense and (2) military status as of the time of court-martial
 - Military Status at Time of Offense: Was the member in military status at the time he or she committed the alleged misconduct? If not, then no UCMJ jurisdiction exists.
 - A member in active status (e.g., special tour, annual tour) is subject to the UCMJ from the beginning to the end of the tour, 24 hours a day
 - Generally, a member performing IDT or a unit training assembly (UTA) is subject to the UCMJ from the beginning to the end of the duty day, e.g., 0730 – 1630
 - Even if no UCMJ jurisdiction exists, commanders always have jurisdiction to perform administrative actions and can hold members accountable by using a variety of adverse administrative actions such as letters of counseling, admonishment, reprimand, etc.
 - Military Status at the Time of Court-Martial/NJP: Will the member be in military status at the time the commander will impose punishment?
 - Commanders can always ask whether the member will voluntarily submit to UCMJ jurisdiction by extending his/her tour or IDT/UTA

- Commanders can wait until the member's next scheduled training to impose Article 15 punishment
- If the member is under orders, the commander can involuntarily extend the member to impose Article 15 punishment **before** the orders expire
- If the member is performing an IDT or a UTA, the member cannot be extended because there are no orders to extend

Air National Guard (ANG)

- A member of the ANG is subject to court-martial jurisdiction only when in federal service. UCMJ Art. 2(a)(3), 10 U.S.C. §§ 12301, 12401.
 - ANG members serve in one of two federally funded duty capacities:
 - State Duty Status: Referred to as "Title 32" status
 - Federal Duty Status: Referred to as "Title 10" status
 - When ANG members are performing state duty (state active duty or Title 32) they are subject to their state codes of military justice
 - It is very important to coordinate with your local SJA when addressing ANG military justice matters to ensure jurisdiction over that person

Retirees

- Court-martial jurisdiction continues over retired Regular Air Force personnel entitled to military pay. UCMJ Art. 2(a)(4), (5).
- Retired members should not be court-martialed unless their conduct clearly links them with the military or is adverse to a significant military interest of the United States
- Commanders should not prefer charges without SecAF approval unless the statute of limitations (UCMJ Art. 43) is about to run out. The SJA will coordinate approval, as needed, to recall a retired member for court-martial.

Termination of Jurisdiction

- General Rule: A valid discharge terminates jurisdiction. There must be:
 - Delivery of a valid discharge certificate;
 - A final accounting of pay; and
 - Completion of the clearing process required by appropriate service instructions
- Exceptions: UCMJ Art. 3
 - The member was subject to the UCMJ at the time of the offense and is subject to the UCMJ at the time of trial
 - A fraudulently obtained discharge does not terminate military jurisdiction
 - An Air Force Reserve member is not, by virtue of the termination of a period of active duty or inactive-duty training, "shielded" from jurisdiction for an offense committed during such period of active duty or inactive-duty training

Statute of Limitations (UCMJ Art. 43)

- General Rule – Nonjudicial Punishment: Imposition of NJP within 2 years of offense
- General Rule – Court-Martial: Preferral of charges within 5 years of offense
- Exception: There is no statute of limitation for a person charged with murder, rape, sexual assault, rape or sexual assault of a child, and any other offense punishable by death

REFERENCES

U.S. Const. amend. V
UCMJ Arts. 2, 3, and 43
10 U.S.C. § 12301, 12401
Solorio v. United States, 483 U.S. 435 (1987)
Rules for Courts-Martial 201-204 (2015)
AFI 36-3209, *Separation Procedures for Air Force National Guard and Air Force Reserve Members* (14 April 2005), incorporating through change 3 (20 September 2011)
AFI 51-201, *Administration of Military Justice* (6 June 2013), including AFI51-201_AFGM2016-01, 3 August 2016

A COMMANDER'S GUIDE TO THE AFOSI

The Air Force Office of Special Investigations (AFOSI) provides specialized investigations and services to protect Air Force and DoD personnel, operations, and interests. AFOSI is the designated Military Criminal Investigation Organization (MCIO) for the Air Force. Select AFOSI agents are also members of the Special Victim Investigation and Prosecution (SVIP) capability, in accordance with DoD policy.

Organization

- Removed from command channels as an independent, centralized organization to ensure unbiased investigations
- Accountable to the Secretary of the Air Force (SecAF) and organized under the oversight of SAF/IG, but has independent statutory and regulatory authority to conduct criminal investigations and counterintelligence activities
- Missions include investigating allegations of criminal activity and fraud, as well as counterintelligence and specialized investigative activities, counter-drug activities, protective service operations, and integrated force protection

Requesting AFOSI Investigative Service

- Any Air Force commander responsible for security, discipline, or law enforcement may request investigative support
 - Investigations initiated on authority of AFOSI/CC, as delegated to subordinate AFOSI commanders and special agents in charge
- Only SecAF may direct AFOSI to delay, suspend or terminate an investigation, unless the investigation is conducted at the request of DoD/IG
- AFOSI briefs Air Force commanders on the progress of investigations affecting their command as necessary
- Coordination with AFOSI and the staff judge advocate (SJA) is required prior to commanders reassigning a person subject to an AFOSI investigation or ordering/permitting a commander directed inquiry/investigation when there is ongoing AFOSI investigation

- AFOSI investigative responsibilities
 - Generally, AFOSI will only investigate major offenses
 - Initiates investigation into **ALL** allegations of sexual assault that occur within its jurisdiction, regardless of the severity of the allegation
 - Minor offenses are normally handled by Security Forces, Office of Investigations (SFOI)
 - Coordination between AFOSI and SFOI is required to make best use of investigative resources, taking into consideration technical expertise, investigative capability, and available manpower

Mutual Support Agreements

- Command Role:
 - AFOSI requests, and the appropriate commander or magistrate issues, search and seizure authorizations based on probable cause requirements. Include the SJA in every case involving a probable cause determination.
 - Operations Security (OPSEC) of AFOSI investigations is critical
 - Knowledge of an ongoing AFOSI investigation by unnecessary parties may jeopardize operations and compromise efforts to neutralize criminal or counterintelligence threats
 - Exposure of AFOSI sources/agents/witnesses and investigative techniques could place persons and evidence at risk
 - Restrict information to base/staff officials on a strict "need-to-know" basis
 - Crime scene protection support
 - AFOSI depends on command support and resources to protect crime scenes
 - Untrained, though well-intentioned, personnel who disturb or change the physical environment or handle objects at the crime scene can alter or destroy critical evidence

- Security Forces are usually the first responders who secure and protect the scene for AFOSI
 - Exclude witnesses, curiosity seekers, and limit to minimum number of authorized personnel necessary (e.g., medical, fire department)
 - Rank or official position alone should not justify entry
- Protection of agent's grade
 - Mission success is enhanced by concealing the rank of AFOSI special agents
 - Commanders are required to ensure special procedures exist to protect agents' personnel, medical, and other administrative records
 - Host commander may authorize permanent or temporary housing in officer's quarters
 - AFOSI personnel may wear civilian clothes while performing their duties
- Complaints against AFOSI personnel should be referred to the person's immediate commander for thorough and expeditious investigation by AFOSI, which has its own internal affairs section
- AFOSI Support to Command:
 - AFOSI developmental files
 - Preliminary inquiry initiated by AFOSI/CC or Region/CC and used to examine situation to determine if there is criminal activity warranting an investigation
 - Information systematically collected on specific types of offenses or targets, typically using confidential informants or undercover agents
 - Information analyzed to determine need for individual substantive cases
 - Child abuse/neglect
 - Assist command in family advocacy program

- All allegations of serious child abuse or neglect must be reported to AFOSI, regardless of origin of complaint (personnel of family support and child care centers, equal opportunity, medical, etc.)
- AFOSI has greater access to certain records
- AFOSI can provide fact-finding role to assist command and staff to make decisions

Special Victim Investigation and Prosecution (SVIP) Capability

- DoD policy requires each military service to maintain a SVIP capability comprised of specially trained MCIO investigators, judge advocates, paralegals, and victim/witness assistance personnel in support of victims of rape, sexual assault, child sex assault, and other crimes of serious violence
 - SVIP Process: MCIO investigators collaborate with assigned specially trained judge advocates, DoD Sexual Assault Response Coordinators (SARCs), Sexual Assault Prevention and Response Victim Advocates (SAPR VAs), Family Advocacy Program (FAP) managers, and domestic abuse victim advocates (DAVAs), as appropriate, during all stages of the investigative and military justice process for "covered offenses"
 - "Covered Offenses":
 - Unrestricted reports of adult sexual assault
 - Unrestricted reports of domestic violence involving sexual assault and/or aggravated assault with grievous bodily harm
 - Child abuse involving child sexual assault and/or aggravated assault with grievous bodily harm
- AFOSI is the MCIO for the Air Force SVIP

AFOSI's Specialized Functions

- Sole manager of USAF polygraph program
- Specially trained mental health professionals using supervised cognitive interviews or forensic hypnosis as an aid to witness or victim memory enhancement

- Provide law enforcement and counterintelligence support for USAF nuclear envoys
- Regionally located investigators serve as specialists in the investigation of cybercrime, e.g., computer network intrusions and computer media search and seizure
- Forensic Science Consultants:
 - Regionally located experts with forensic sciences masters degrees
 - May provide consultation, training, or specialized investigative techniques
- Technical Services:
 - Process and support requests to intercept wire, oral, or electronic communications for law enforcement or counterintelligence purposes
 - Technical surveillance countermeasures
 - Detection and neutralization of technical surveillance devices deployed against Air Force facilities
 - Conducts security vulnerability surveys
- Protective Services:
 - Provides threat assessments; protects designated Air Force officials; protects foreign official guests of DoD in the continental United States (CONUS)
 - Provides assessments and estimates on terrorist and foreign intelligence threats to Air Force deployments, exercises, weapons facilities, and other base facilities upon request. HQ AFOSI/JA, not the base legal office, provides legal advice for counterintelligence operations
- Security Violations:
 - AFOSI investigates all security incidents of espionage, suspected compromise of special access information, or deliberate compromise of classified information
 - Does not investigate routine security violations

AFOSI Policy Information

- Apprehension/Arrest:
 - Civilian special agents are authorized to arrest civilians under many circumstances. However, not all detachments have civilian agents. In addition, this authority will be used judiciously and only when necessary.
 - Civilian agents' authority is derived from 10 U.S.C. § 9027
 - Military agents' authority is derived from the Manual for Courts-Martial
 - Limited to individuals subject to UCMJ, not family members or nonmilitary U.S. citizens
 - Only if required by operation or emergency (security forces routinely do so at AFOSI's request)
 - Military law enforcement personnel may temporarily detain civilians suspected of on-base offenses until civilian authorities arrive
- Arming:
 - AFD 71-1 authorizes agents to carry Government issued or approved privately owned firearms (including concealed) for duties
 - AFOSI offices required to maintain at least one handgun and ammunition for each agent assigned
 - Weapons stored within AFOSI facilities or in security forces armory if the local detachment is inadequate for security purposes
- Sources and Undercover Agents:
 - Human sources of information may be overt (official) or covert (confidential)
 - AFOSI undercover agents are specially trained to perform duties

- OPSEC and safety concerns dictate identity protections
 - Investigative reports may conceal identities of sources; release of identities requires either concurrence of AFOSI detachment commander/special agent in charge or an order from a military judge
 - Threatened Airman Program is a personnel program; AFOSI provides threat validation and assessment as prelude to reassignment action

Types of AFOSI Reports

- Routinely Provided:
 - Information routinely provided to commanders and their representatives (e.g., SJA)
- Interim Case Reporting:
 - AFOSI may up-channel internal reporting of special interest cases where publicity or Congressional interest is expected
 - Informs HQ AFOSI, Air Staff, commanders, and other agencies of significant matters affecting Air Force and DoD
 - Separate and distinct from major command up-channel reporting
- Report of Investigation (ROI):
 - Provided to command officials when investigation is complete
 - Information obtained through investigation and witness interviews
 - No recommendations or suggestions on appropriate command action
- Special Reports:
 - Provided by HQ AFOSI highlighting a particular kind of investigative activity and pinpointing problems so commanders can better handle them
 - Provides description of weaknesses or susceptible areas under command to alert functional managers for possible correctional or remedial actions, e.g., fraud information reports, narcotics information reports, and narcotics briefs

- Reports requested by the Air Staff or other senior Air Force or DoD officials containing in-depth analysis of some area of concern Air Force-wide, e.g., damage to AF aircraft
- Command Reporting of Actions Taken:
 - Commanders must provide AFOSI with a report of action taken
 - Allows AFOSI to ensure command action is included in appropriate national level databases

Release of Information

- AFOSI records are “For Official Use Only” and should be treated as sensitive records covered by Privacy Act
- Safeguarding, handling, and releasing information from AFOSI reports:
 - May be released in whole or in part, only to persons who require access for official duties
 - Refer all requests for release to non-Air Force officials to the servicing AFOSI detachment
 - In the absence of a governing agreement, only HQ AFOSI may authorize release outside the Air Force; or release or deny information under Freedom of Information Act (FOIA) or Privacy Act (law enforcement records exemption)
 - SJAs must appropriately redact Report of Investigation (ROI) prior to release to defense attorneys for discovery
- Press or news inquiries for information require close coordination between public affairs, SJA, and AFOSI in all cases

REFERENCES

10 U.S.C. § 9027

Military Rules of Evidence 507 (2015)

DoDI 5505.19, *Establishment of Special Victim Investigation and Prosecution (SVIP) Capability within the Military Criminal Investigative Organizations (MCIOs)* (3 February 2015), incorporating Change 1, 4 September 2015

AFI 71-101 V1, *Criminal Investigations Program* (8 October 2015), certified current 17 December 2015

AFI 71-101 V2, *Protective Service Matters* (23 Jan 2015), certified current 17 December 2015

AFI 71-101 V3, *The Air Force Technical Surveillance Countermeasures Program* (13 May 2015), certified current 17 December 2015

AFI 71-101 V4, *Counterintelligence* (26 January 2015), certified current 17 December 2015

AFMD 39, *Air Force Office of Special Investigations* (7 May 2015)

AFPD 71-1, *Criminal Investigations and Counterintelligence* (13 November 2015)

FUNCTIONS OF THE AREA DEFENSE COUNSEL

The area defense counsel (ADC) program provides Air Force members with free, confidential, and independent legal representation. Airmen suspected of a criminal offense or facing an adverse administrative action receive legal advice from an experienced, certified judge advocate.

- The ADC represents Air Force members in the following areas:
 - Courts-martial
 - Administrative discharge actions
 - Article 32 investigations
 - Article 15 actions
 - Criminal investigations or interrogations (when a service member requests a defense counsel pursuant to the service member's right not to self-incriminate under Article 31, UCMJ)
 - Any other adverse administrative action for which legal counsel is required or authorized, including but not limited to Letters of Counseling, Admonition, or Reprimand, Unfavorable Information Files, Control Rosters, Referral Performance Reports, administrative demotions, and Flying Evaluation Boards
- All ADCs are assigned outside the local chain of command and maintain an office physically separate from the base legal office to avoid conflicts of interest or command influence
 - The ADC's responsibility is to zealously and ethically represent the client, which may include meeting with or advocating directly to commanders and unit leadership
 - Acting as legal representative for the client alone, the ADC is ethically prohibited from sharing any details of the representation of the client or any confidential client communications with third parties, unless specifically authorized to do so

- Air Force members facing any type of investigation or adverse administrative action should be promptly referred to the ADC
 - Civilians are not entitled to ADC representation
 - Resources permitting, the ADC at Air Force Reserve Command, Robins Air Force Base, Georgia will represent reservists facing administrative discharge action; reservists facing military criminal investigation or any other adverse administrative action will generally be represented by the ADC responsible for servicing that member's reserve unit
- The ADC program requires strong command and staff judge advocate (SJA) support to maintain the integrity and fairness of the military justice system
- The ADC is available, subject to workload and client confidences, to help educate the base population on the military justice system and the ADC's function

REFERENCE

AFI 36-3208, *Administrative Separation of Airmen* (9 July 2004), incorporating through Change 7, 2 July 2013, including AFI36-3208_AFGM2016-01, 24 June 2016

MILITARY MAGISTRATE PROGRAM

Military magistrates may be appointed by an installation commander who is either a special or general court-martial convening authority, or the installation commander at Air Force Reserve Command bases and stations. A military magistrate's primary duty is to determine whether probable cause exists to issue search, seizure, and/or apprehension authorizations in criminal investigations and, if so, to issue such authorizations.

- The installation commander may appoint a maximum of four officers, of "judicial temperament," to serve as military magistrates for the installation
 - Absent general court-martial convening authority (GCMCA) approval, a magistrate must be in the grade of lieutenant colonel or above
 - A magistrate may not be a chaplain, security forces member, staff judge advocate personnel, Air Force Office of Special Investigation (AFOSI) agent, or convening authority
 - Appointment must be in writing, specifying the name (not position) of the magistrate and the installation over which the magistrate has authority
 - If more than one magistrate is appointed for a single installation, each exercises concurrent authority with the other and with the installation commander
- Once appointed, magistrates are authorized to issue probable cause search, seizure, and/or apprehension authorizations based upon written or oral statements or any other evidence or information made known to the magistrate
 - Magistrates may exercise this authority concurrent with installation commander, but the availability of the installation commander is not required for the magistrate to act
 - Magistrates must be neutral and detached and remain impartial when granting search and seizure or apprehension authorization in a particular case
 - Magistrates may grant search and seizure or apprehension authority either orally or in writing, usually via AF Form 1176, *Authority to Search and Seize*, and AF IMT 3226, *Authority to Apprehend in Private Dwelling*. If conditions permit, verbal authorizations should generally be memorialized in writing as soon as practicable.

- Each installation's staff judge advocate will brief and train the magistrate on his or her duties when appointed and thereafter when appropriate, as well as provide detailed legal advice regarding each individual probable cause determination

REFERENCES

Military Rules of Evidence 315 (2015)

Military Rules of Evidence 316 (2015)

Rule for Courts-Martial 302 (2015)

AFI 51-201, *Administration of Military Justice* (6 June 2013), including AFI51-201_AFGM2016-01,
3 August 2016

AF Form 1176, *Authority to Search and Seize* (2 March 2016)

NATIONAL SECURITY CASES

Commanders contemplating disciplinary or administrative action against military members or civilian employees that could lead to discharge or removal from the Air Force must first obtain permission to proceed when the member or employee holds a special access. "Special access" includes Sensitive Compartmented Information (SCI) access, Single Integrated Operational Plan-Extremely Sensitive Information (SIOP/ESI), HQ USAF/XO special access programs, research and development (R&D) special access programs and Air Force Office of Special Investigation (AFOSI) special access. Do not take action on personnel who now hold or have held certain access within the periods specified until approval is obtained from the appropriate special access program identified in AFI 31-501, *Personnel Security Program Management*, para. 8.9.

Obtaining Permission to Proceed in Courts Martial, Administrative Discharges, and Civilian Removal Actions

- Commanders send a written request to the appropriate special access program(s) functional office for permission to proceed with further processing, including the information required by AFI 31-501, para. 8.9.1. Involve the unit security manager and the special access program manager in the collection and processing of this type of information.
- Expeditious processing of such requests must be pursued to comply with speedy trial rules in criminal cases and restrictive time requirements in civilian removal cases. Normally, no more than 15 days should elapse between the date of initiation request and the approval/denial by the Office of Primary Responsibility (OPR).
- Voluntary separation requests by officers (AFI 36-3207, *Separating Commissioned Officers*) and enlisted members (AFI 36-3208, *Administrative Separation of Airmen*) will not be handled under these procedures unless they are in lieu of adverse action
- Periodic reporting by the unit commanders should advise the parent MAJCOM and decision authority of any changes to the proposed action every 90 days until the action has been completed

Actions Permitted Pending Decision to Proceed

- Courts-martial: In general or special courts-martial, command may process the case through preferral of charges and an Article 32 preliminary hearing, if applicable, but may not refer charges without permission to proceed. These restrictions do not apply to summary courts-martial.

- Officer Discharges: The show cause authority may not initiate the discharge, issue a show cause memorandum, or otherwise require officers to show cause for retention until the appropriate action office grants authority to proceed
- Enlisted Discharges: In “notification” cases, the commander may process the action through giving the member notice of the proposed discharge, obtaining the member’s response, scheduling necessary appointments, and conducting those appointments. However, the separation authority may not approve the discharge until permission to proceed is granted. In “board hearing” cases, the commander may similarly process the action through giving the member notice of the proposed discharge, obtaining the member’s response, scheduling necessary appointments, and conducting those appointments. The convening authority may not convene the board until authority to proceed is obtained.
- Civilian Removals: Commanders must coordinate with the servicing civilian personnel flight to compose the message to forward to the appropriate Air Force OPR, seeking authority to proceed. Under no circumstances may a “notice of proposed removal” be issued until authority to proceed is obtained.

Judge Advocate Notifications in Certain National Security Cases

- Any case with potential to be a national security case must be reported immediately to AFLOA/JAJM, by the local staff judge advocate (SJA). Such cases include:
 - Aiding the Enemy (UCMJ Art. 104)
 - Spying (UCMJ Art. 106)
 - Espionage (UCMJ Art. 106a)
 - Sabotage (UCMJ Art. 108; 18 U.S.C. § 2155)
 - Subversion (UCMJ Art. 94)
 - Violations of punitive instructions, regulations, or criminal statutes concerning classified information, or U.S. foreign relations (UCMJ Art. 92)

- DoDI 5525.07 requires coordination between DoD and Department of Justice (DOJ) of the investigation and disposition of significant cases. Early reporting to AFLOA/JAJM is essential because national security cases often involve issues such as searches, seizures, immunity grants, polygraphs, etc., as well as the decision whether to prosecute and, if so, which department will prosecute. Under no circumstances should a unit commander or an SJA take action initiating the court-martial process in a case potentially involving national security issues until AFLOA/JAJM has coordinated the case with DOJ through appropriate DoD channels.

REFERENCES

Manual for Courts-Martial, United States (2012)

DoDI 5525.07, *Implementation of the Memorandum of Understanding (MOU) Between the Departments of Justice and Defense Relating to the Investigation and Prosecution of Certain Crimes* (18 June 2007)

AFI 31-501, *Personnel Security Program Management*, Chapter 8 (27 January 2005), incorporating through Change 2, 29 November 2012, including AFGM2015-1, 20 November 2015

AFI 36-3207, *Separating Commissioned Officers* (9 July 2004), incorporating through Change 6, 18 October 2011

AFI 36-3208, *Administrative Separation of Airmen* (9 July 2004), incorporating through Change 7, 2 July 2013, including AFI36-3208_AFGM2016-01, 24 June 2016

AFI 51-201, *Administration of Military Justice* (6 June 2013), including AFI51-201_AFGM2016-01, 3 August 2016

SEXUAL ASSAULT PREVENTION AND RESPONSE

Sexual assault is criminal conduct. It falls well short of the standards America expects of its men and women in uniform and civilian members. It violates Air Force Core Values. Inherent in our Core Values of Integrity First, Service Before Self, and Excellence in All We Do is respect: self-respect, mutual respect, and respect for our Air Force as an institution. Our core values and respect are the foundation of our Wingman culture; a culture in which we look out for each other and take care of each other. Incidents of sexual assault corrode the very fabric of our Wingman culture; therefore we must strive for an environment where this behavior is not tolerated and where all Airmen are respected.

- Air Force Sexual Assault Prevention and Response policy and responsibilities apply to all levels of command and all Air Force organizations and personnel, including active duty, Air Force government civilian employees, Air Force Academy, Air National Guard, and Air Force Reserve components while in federal service
- Installation commanders will implement local sexual assault prevention and response programs. The installation vice commander or equivalent may be designated as the responsible official to act for the installation commander and supervises the Installation Sexual Assault Response Coordinator.

Definition of Sexual Assault

- Sexual assault is the intentional sexual contact, characterized by use of force, threats, intimidation, abuse of authority or when the victim does not or cannot consent. It includes rape, forcible sodomy (oral or anal sex), and other unwanted sexual contact that is aggravated, abusive or wrongful (to include unwanted and inappropriate sexual contacts), or attempts to commit these acts.
- This definition is for training and educational purposes only and does not affect in any way the definition of any offenses under the UCMJ. Commanders are encouraged to consult with their staff judge advocate for complete understanding of this definition in relation to the UCMJ.

Installation Sexual Assault Prevention and Response Office

- Sexual Assault Response Coordinator (SARC)
 - The SARC serves as the single point of contact for integrating and coordinating sexual assault victim care from an initial report of sexual assault, through disposition and resolution of issues related to the victim's health and well-being

- Reporting directly to the installation vice wing commander, the SARC implements and manages the installation level sexual assault prevention and response programs
- The SARC is responsible for assisting commanders in meeting annual sexual assault prevention and response training requirements
- The SARC is responsible for ensuring a victim support system that provides a 24 hours a day/7 days a week sexual assault response capability for all victims that fall under the SAPR program within his/her designated area of responsibility
- The SARC will provide updates to the victim and commanders as appropriate and in accordance with Air Force policy
- The SARC will supervise the Sexual Assault Prevention and Response Victim Advocate (VA) and Volunteer Victim Advocates (VVA)
- Sexual Assault Prevention and Response VA and VVAs
 - Responsibilities of SAPR VAs and VVAs include providing crisis intervention, referral, and ongoing non-clinical support, including information on available options and resources to assist the victim in making informed decisions about the case. VA services will continue until the victim states support is no longer needed.
 - SAPR VAs and VVAs must possess the maturity and experience to assist in a very sensitive situation
 - SAPR VAs are GS-11 civilian employees who work full-time in the SAPR office
 - VVAs are volunteers
 - Only active duty military personnel and DoD civilian employees selected by the SARC may serve as VVAs. They cannot be assigned to the legal office, Area Defense Counsel, Investigator General (IG), Air Force Office of Special Investigations (AFOSI), Security Forces Squadron (SFS), Equal Opportunity (EO) office, or wing chaplain's office.
 - Individuals on G-series orders, first sergeants, and chief master sergeants cannot serve in this capacity
 - Medics can serve as VVAs if they do not participate in "direct patient care"

- SAPR VAs and VVAs do not provide counseling or other professional services to a victim. Appropriate agencies will provide clinical, legal, and other professional services.
- SAPR VAs and VVAs may accompany the victim, at the victim's request, during investigative interviews and medical examinations
- SARCs', SAPR VAs', and VVAs' communications with victims (of a sexual or violent offense) are privileged under Military Rule of Evidence 514 when the communication is intended to be confidential and the perpetrator is a military member. Consult the local legal office for additional exceptions to this general rule.

Commander's Response to Allegations of Sexual Assault

- Commanders notified of a sexual assault must take immediate steps to ensure the victim's physical safety, emotional security, and medical treatment needs are met, and that the AFOSI or other appropriate criminal investigative agency is notified
 - Commanders and anyone in the victim's chain of command are mandatory reporters that must report a sexual assault to AFOSI
 - Commanders and others in the victim's chain of command cannot keep a report of sexual assault restricted
 - Commanders should also refer to the section of this chapter titled "Command Response to Sexual Assault" for further details regarding their responsibility
- The appropriate commanders should determine whether temporary reassignment or relocation of the victim or subject is appropriate
- Commanders should consider whether no contact orders or Military Protective Orders (DD Form 2873) are required
- Personnel Reliability Program (PRP): A sexual assault victim certified under the PRP is eligible for both the restricted and unrestricted reporting options
 - If electing restricted reporting, the victim is required to advise a medical clinic provider of any factors that could have an adverse impact on the victim's performance, reliability, or safety while performing PRP duties. If necessary, the medical clinic will inform the commander that the person in question should be temporarily suspended from PRP status, without revealing that the person is a sexual assault victim, thus preserving the restricted report.

- Required Reports:
 - 24-HOUR NOTIFICATION: The SARC will complete and submit the 24-hour Notification for all restricted or unrestricted reports to the Installation Commander as a standalone report via an encrypted, unclassified e-mail. The Installation Commander will forward a copy to the MAJCOM SARC who will forward to the MAJCOM/CV and AF/CVS.
 - SEXUAL ASSAULT INCIDENT RESPONSE OVERSIGHT (SAIRO) REPORT: The commander is responsible for completing an eight-day incident report for all unrestricted and independent reports in which the victim or subject is a service member.
 - Normally, it will be the victim's immediate commander that will complete the SAIRO. However, when the victim is a civilian the subject's commander will complete the SAIRO.
 - The purpose of the SAIRO is to detail the actions taken or in progress to provide the necessary care and support to the victim of the assault, to ensure that allegations of sexual assault are referred to the appropriate investigatory agencies, and to provide initial notification of the serious incident to appropriate commanders. AFI 90-6001, *Sexual Assault Prevention and Response (SAPR) Program*, Fig. 3.1 and Attachment 3 provide detailed guidance and a template for the SAIRO.
 - SAIROs are not completed for sexual assault cases handled by the Family Advocacy Program
 - COMMANDERS CRITICAL INFORMATION REQUIREMENT (CCIR): The CCIR provides timely information to Air Force leadership when an allegation of sexual assault meets specific criteria
 - Criteria include: Involvement of an O-6 commander (or equivalent), potential for media attention, Congressional involvement, an overturned conviction, other factors warranting higher level command awareness
 - This is a separate report from the 24-hour notification and SAIRO Report listed above but may be accomplished at the same time
 - A CCIR is provided to the installation Command Post for submission as an OPREP-3 in accordance with AFI 10-206, *Operational Reporting*, and the current CSAF OPREP-3 Reporting Matrix, Rule 3D
 - A CCIR is not completed for restricted reports

SARP Response to Allegations of Sexual Assault

- Upon notification if the Victim desires SAPR services
 - The SAPR office will determine program eligibility using the definition listed above for education and training purposes
 - SAPR services are available to active duty service members, dependents 18 years of age and older, reservists and guardsmen and Air Force civilian employees. DoD Civilian employees (Army, Navy and Marine), their dependents 18 years of age and older, outside the continental United States (OCONUS) and contractor employees are eligible in contingency areas if they are eligible for treatment in the military treatment facility
 - SAPR services are not available for victims who are assaulted by their spouse and child victims. Due to the heightened risk of violence, those cases are handled by the Family Advocacy Program (FAP) and must be referred to FAP.
 - Victims can be referred to FAP through command or by the SARC once it is determined FAP services are the most appropriate care
 - In cases where the subject and victim are unmarried intimate partners, the case will be referred to FAP
 - However, if the victim chooses not to engage in FAP services, victim may choose SAPR services
 - The SARC, SAPR VA, or on-call VVA will meet with the victim and discuss the restricted and unrestricted reporting options
 - Unrestricted Reports: An unrestricted report of sexual assault will result in a formal investigation and must be reported to AFOSI
 - Any report of a sexual assault made through the victim's chain of command, law enforcement, and the AFOSI, or other criminal investigative service is an unrestricted report
 - The victim can also elect to make an unrestricted report

- Restricted Reports: Restricted reports will not be referred to AFOSI for investigation. A restricted report can only be made to a SARC, SAPR VA, VVA, or healthcare provider.
 - Restricted reporting is intended to give a victim additional time and increased control over the release and management of the victim's personal information, and to empower the victim to seek relevant information and support to make an informed decision about participating in the criminal process
 - Only military personnel and Air Force civilian employees may make restricted reports. Dependents and Reservists not on Title 10 orders cannot make restricted reports.
 - Restricted reports may be disclosed only under very limited circumstances, e.g., a serious or imminent threat to life.
- Independent Investigations (also referred to as third party reports): Should information about a sexual assault be disclosed to command or law enforcement from sources independent of the victim (such as a friend or witness), and an investigation into an allegation of sexual assault is initiated, that report is considered an independent investigation. An official investigation may be initiated based on that independently acquired information.
 - When the SARC or SAPR VA learns that a law enforcement official has initiated an official investigation that is based upon independently-acquired information and after consulting with the law enforcement official responsible for the investigation, the SARC or SAPR VA will notify the victim, as appropriate
 - If the victim has already made a restricted report, covered communications from the restricted report will not be released for the investigation unless the victim authorizes the disclosure in writing or another exception applies

- Assignment of a Victim Advocate (full-time or volunteer)
 - A VA may be assigned to the victim. To the extent practicable, the assigned VA will not be from the same unit as the victim.
 - The VA will provide support throughout the process. The VA will provide referral and ongoing non-clinical support to the victim.
 - Services will continue until the victim indicates services are no longer required, or the SARC makes this determination based on the victim's response to offers of assistance

Other SAPR Related Issues

- Expedited Transfers (ET)
 - An ET provides victims who file an unrestricted report of sexual assault the option of a permanent change of station (PCS) or a temporary or permanent change of assignment (PCA) to a location that will assist with the immediate and future welfare of the victim, while also allowing them to move to locations that can offer additional support to assist with healing, recovery, and rehabilitation
 - An ET is only available for active duty victims
 - Victims will only be eligible to receive one facilitated ET for an unrestricted report of sexual assault. Multiple reassignment requests for the same reported incident are only considered in exceptional circumstances.
 - Process:
 - The victim, with the assistance of the SARC, makes the request for an expedited transfer
 - The victim's commander (or equivalent) makes a recommendation to the host wing/installation commander for approval or disapproval. The victim's commander should base his or her recommendation upon all available information, especially that provided by AFOSI, and after consultation with the staff judge advocate (SJA). The victim's commander should recommend approval if he or she finds a credible report of sexual assault exists.
 - The host wing/installation commander makes a decision which, if approved, is forwarded by the victim through the virtual MPF to AFPC for transfer orders

- The process from request through host wing/installation commander's decision must take no more than 72 hours
 - If disapproved by the wing/installation commander, the victim may appeal to the first/next general officer in the chain of command. If disapproved at this level the victim may make a final appeal to the MAJCOM/CV.
- Victims in FAP cases may also request an expedited transfer. The process is the same. The SARC will facilitate the process which can be found in AFI 40-301, Family Advocacy Program.
- Subjects may be transferred in the best interest of the Air Force. This is a separate process that is initiated by a commander through the local Military Personnel Flight (MPF). Additional guidance may be found in AFI 36-2110, *Assignments*, Attachment 26.
- Case Management Group (CMG) Meetings
 - SARCs and commanders, along with AFOSI, medical, SJA, and others, meet monthly to discuss reports of sexual assault on the installation. The CMG is convened to address cohesive emotional, physical, and spiritual care of a victim in a collaborative environment. The CMG will not discuss FAP, spouse or intimate partner cases. This CMG is chaired by the host wing or vice wing commander.
 - The CMG will also discuss instances of retaliation
 - The victim's commander is a mandatory member of the CMG and he/she may not delegate the responsibility to attend the CMG. Within 72 hours after the CMG the commander will provide the victim with an update regarding the investigation, medical, legal, status of an expedited transfer request, any other request made by the victim, command proceedings regarding the sexual assault from the date the investigation was initiated until there is a final disposition of the case.
- Retaliation
 - Air Force personnel who file an unrestricted or restricted report of sexual assault will be protected from reprisal, coercion, ostracism, maltreatment, retaliation, or threat of reprisal, coercion, ostracism, maltreatment or retaliation, for filing a report
 - If a commander becomes aware of retaliation they may refer the victim to the SARC, IG, or EO to assist with resolution. If referred to the SARC he or she will inform, with victim consent, the IG and the SJA.

- In addition to protections for those who make a report to the SARC, no military member can retaliate against any alleged victim or other military member who reports a criminal offense (of any kind)
 - This provision in AFI 36-2909, *Professional and Unprofessional Relationships*, also prohibits members from maltreating or ostracizing any person who reports a criminal offense
 - A violation of this provision is considered a violation of a lawful general order or regulation, which means a violation of the AFI can be punished under UCMJ, Art. 92
- At every CMG meeting, the CMG Chair will ask the CMG members if the victim, witnesses, bystanders (who intervened), SARCs and SAPR VAs, responders, or other parties to the incident have experienced any incidents of coercion, retaliation, ostracism, maltreatment, or reprisals. If any incidents are reported, the installation commander will develop a plan to immediately address the issue. The coercion, retaliation, ostracism, maltreatment, or reprisal incident will remain on the CMG agenda for status updates, until the victim's case is closed.
- Addressing Victim Misconduct:
 - An investigation into the facts and circumstances surrounding an alleged sexual assault may develop evidence that the victim engaged in misconduct like underage drinking or other related alcohol offenses, adultery, drug abuse, fraternization or other violations of instructions, regulations, or orders
 - In accordance with the UCMJ, the Manual for Courts-Martial (MCM), and AFIs, commanders are responsible for ensuring victim misconduct is addressed in a manner that is consistent and appropriate to the circumstances
 - The disposition authority, the commander that makes the determination as to whether action should be taken and the appropriate level of action, for victim misconduct is the first O-6 Special Court-Martial Convening Authority in the chain of command
 - Commanders have the authority to determine the appropriate disposition of alleged victim misconduct, to include deferring disciplinary action until after disposition of the sexual assault case. When considering what corrective actions may be appropriate, commanders must balance the objectives of holding members accountable for their own misconduct with the intent to avoid unnecessary additional trauma to sexual assault victims and to encourage reporting of sexual

assaults, the gravity of any collateral misconduct by the victim and its impact on good order and discipline should be carefully considered in deciding what, if any, corrective action is appropriate.

- Special Victims' Counsel and/or Area Defense Counsel may be representing victims on matters of victim misconduct
- Commanders are expected to consult with their servicing staff judge advocate and use appropriate personnel actions to resolve any allegations
- Administrative separation actions involving victims of sexual assaults will be processed as required by the applicable AFI
 - When a commander proposing administrative or medical separation action was previously aware, or is made aware by the respondent or others, that the member has filed a past complaint, allegation, or charge that they were a victim of sexual assault, the proposing commander shall ensure the separation authority is aware that the discharge proceeding involves a victim of sexual assault
 - The separation authority must be provided sufficient information concerning the alleged assault and the victim's status to ensure a full and fair consideration of the victim's military service and particular situation
 - An Airman who is being recommended for an involuntary separation has the right to request the General Court-Martial Convening Authority review his or her discharge if they believe their separation was initiated in retaliation for making an unrestricted report of sexual assault with the 12 months prior to the notification of the discharge

REFERENCES

- DoD 6025.18-R, *DoD Health Information Privacy Regulation* (24 January 2003)
- DoDI 6495.02, *Sexual Assault Prevention and Response Program Procedures* (28 May 2013), incorporating Change 2, 7 July 2015
- DoDD 6495.01, *Sexual Assault Prevention and Response (SAPR) Program* (23 January 2015), incorporating Change 2, 20 January 2015
- Memorandum, Under Secretary of Defense for Personnel and Readiness, *Increased Victim Support and a Better Accounting of Sexual Assault Cases* (JTF-SAPR-002) (22 November 2004)
- AFI 10-206, *Operational Reporting* (11 June 2014), certified current, 18 March 2015, including AFI10-206_AFGM2016-01, 21 July 2016
- AFI 36-2110, *Assignments* (22 September 2009), incorporating through Change 2, 8 June 2012, including AFI36-2110_AFGM2016-01, 23 June 2016
- AFI 36-2909, *Professional and Unprofessional Relationships* (1 May 1999), including AFI36-2909_AFGM2016-01, 15 June 2016
- AFI 36-3208, *Administrative Separation of Airmen* (9 July 2014), incorporating through Change 7, 2 July 2013, including AFI36-3208_AFGM2016-01, 24 June 2016
- AFI 40-301, *Family Advocacy Program* (16 November 2015)
- AFPD 90-60, *Sexual Assault Prevention and Response (SAPR) Program*, 2 October 2014
- AFI 90-6001, *Sexual Assault Prevention and Response (SAPR) Program* (21 May 2015), incorporating Change 1, 18 March 2016
- Memorandum, *Department of the Air Force Policies and Procedures for the Prevention of and Response to Sexual Assault* (8 June 2005)

SPECIAL VICTIMS' COUNSEL PROGRAM

The Special Victims' Counsel (SVC) program was created in 2013. The SVC program was authorized in order to empower victims of sex offenses through the military legal system by allowing for a confidential, attorney-client relationship between an SVC and a qualifying victim. This relationship gives victims a voice and a choice in the legal process, and provides victims with an attorney who will advocate on the victim's behalf to protect the victim's rights throughout the legal process.

Objectives

- The objectives of the Air Force Special Victims' Counsel Program are:
 - Provide victims of assault, stalking, and other sexual misconduct with independent, attorney-client privileged representation throughout the investigation/prosecution processes
 - Empower victims by providing professional and knowledgeable counsel to enable them to express their choices
 - Provide advocacy to protect the rights afforded to victims in the military justice system

Overview

- On 28 January 2013, the Air Force implemented a Special Victims' Counsel (SVC) Program by providing qualified Judge Advocates (JAGs) to represent sexual assault victims
- The FY14 National Defense Authorization Act (NDAA) mandated the Military Services to provide Special Victims' Counsel and amended 10 U.S.C. § 1044 (adding subparagraph (e))

Eligibility for Representation

- Certain categories of victims of sexual assault, stalking, and other sexual misconduct are eligible for SVC representation
 - Air Force members (active duty and reserve/guard in Title 10 status at the time of the offense)

- Dependents of Air Force members if the perpetrator is a military member subject to the UCMJ
- DoD Civilians
- Other service members and their dependents if the perpetrator is a military member subject to the UCMJ (individuals will be referred to their respective Service SVC or Victims' Legal Counsel Programs)
- Basic Military Training and Technical Training students who are involved in an unprofessional relationship that involves physical contact of a sexual nature with faculty or staff if the incident occurs within the first 6 months of their service
- The Chief, Special Victims' Counsel Division, AFLOA/CLSV, or designee, has the final authority on determination of eligibility and may grant exceptions to policy on a case-by-case basis consistent with 10 U.S.C. §§ 1044, 1044e and 1565b

Notifying Victims of Availability of Special Services

- The first individual to make contact with the victim, such as the Sexual Assault Response Coordinator (SARC), Victim Advocate (VA), Family Advocacy representative, investigator, Victim Witness Assistance Program (VWAP) Liaison or trial counsel, is required to inform the victim of the availability of SVC services
 - SVCs are not permitted to solicit clients. Victims must request an SVC in order for services to be rendered.

Scope of Representation

- An SVC's sole role is to represent victims in a confidential, attorney-client relationship, throughout the investigation and prosecution processes
 - Military Justice Advocacy: SVCs enable victims to assert their rights under Article 6b, UCMJ
 - SVCs advocate for a victim's interests to commanders, convening authorities, staff judge advocates, prosecutors, defense counsel, and military judges; attend interviews with investigators, trial and defense counsel; attend Article 32 hearings and courts-martial, including in-court representation (such as motions to assert Article 6b, UCMJ rights, Military Rules of Evidence (MRE) 412/513/514 and other evidentiary/legal rights); assist with post-trial submissions to the convening authority; assist with transitional compensation;

advise on VWAP, and the responsibilities and support provided by the SARC and VA

- Advocacy to Air Force and DoD Agencies: SVCs assist with expedited transfer; address safety concerns (Military Protective Orders/Temporary Restraining Orders/altering working conditions); assist with access to medical/mental health care; address work-place concerns (such as retaliation or peer ostracism); and advise on military benefits
- Collateral Misconduct: SVCs may represent in conjunction with a military defense counsel or solo. Collateral misconduct is defined as victim misconduct that might be in time, place, or circumstance associate with the victims' sexual assault incident. It is often one of the most significant barriers to reporting an assault due to fear of punishment.
- Advocacy to Civilian Prosecutors and Agencies: SVCs may advise on United States civilian criminal jurisdiction and may advocate a victim's interest to civilian prosecutors or agencies. SVCs may not represent victims in civilian court.
- Legal Consultation: SVCs may consult on potential for civil litigation against parties other than DoD
- Traditional Legal Assistance: SVCs may provide traditional legal assistance or may refer victim to a local legal office to provide traditional legal assistance

Special Victims' Counsel (SVC)

- The SVC is a certified judge advocate designated by The Judge Advocate General to represent the interests of victims of sexual assault
- No SVC is assigned to the local chain of command. The SVC chain of command flows through regional SVC circuits to the Chief, Special Victims' Counsel Division, Air Force Legal Operations Agency, Joint Base Andrews.
 - The SVC's responsibility is to zealously advocate for their client, assist victims by helping them understand the investigatory and military justice process, and to advocate for the victim to command or a court-martial when necessary
 - The SVC is an advocate for the client, not an advisor for the command or the legal office. The SVC office is typically co-located with the SARC.
 - SVCs are not located at every base, rather they are assigned to represent victims within a particular region of military bases

- If an active duty military member who is the victim of a sexual assault requests an SVC, refer them to the legal office or the SARC who will coordinate representation
 - Civilians, with no affiliation to the military, are not entitled to SVC representation
 - Exceptions are civilian dependents, Reservists, or National Guard members who were serving on active duty at the time of the offense, and DoD civilians
 - SVCs generally do not represent victims in any disciplinary action. SVCs refer those clients to the ADC. However, SVCs may work with the ADC regarding collateral misconduct related to the sexual assault.

REFERENCES

UCMJ Art. 6b

10 U.S.C. § 1044e

AFI, 51-504, *Legal Assistance, Notary, and Preventive Law Programs* (27 October 2003),
incorporating through Change 3, 24 May 2012

COMMAND RESPONSE TO SEXUAL ASSAULT

The Air Force's response to sexual assault is both proactive and reactive. On both fronts the Air Force utilizes a multidisciplinary approach. On the proactive front, the Sexual Assault Prevention and Response (SAPR) office is the lead agency for prevention. Prevention addresses a number of areas such as education and establishing an appropriate Air Force climate. The SAPR office has the lead in the area of sexual assault prevention, but every Airman and every agency must play a role for prevention to work. The Air Force responds to sexual assault as an institution, but a number of specific agencies respond to individual cases depending on the facts of the case. A broad range of agencies respond to individual cases. The SAPR office or Family Advocacy is typically one of those agencies. Other agencies include the Air Force Office of Special Investigations (AFOSI), the legal office, numerous medical and mental health providers, the chaplain's office, a member's chain of command and many others. Ultimately the member's commander will also be involved. Commanders are responsible for the good order and discipline within their unit and therefore have unique responsibilities regarding their response to an allegation of sexual assault.

Command Action Unique to Sex Assault Cases

- The legal landscape in the area of sexual assault is changing very rapidly. There have been a host of legal changes in consecutive National Defense Authorizations Acts (NDAA) beginning in 2012. These NDAA changes resulted in sweeping legal changes to Federal Law (primarily in Chapter 10 of the United States Code), the UCMJ, Rules for Courts-Martial (RCM), Military Rules of Evidence (MRE) and numerous Air Force Instructions.
- With so many legal changes and more likely to come, it is imperative commanders consult with their respective Staff Judge Advocate early on in any sexually related offense. Below are several important areas all commanders must be aware of and consider when dealing with any sexual offense.
 - Authority to Investigate: AFOSI is the lead agency to investigate sexual assault allegations regardless of the severity of the offense. A commander should not make a determination about investigating a sexual offense without first consulting both AFOSI and their respective staff judge advocate (SJA).
 - Disposition Authority: RCM 306 states: "Each commander has discretion to dispose of offenses by members of that command." It also states: "A superior commander may withhold the authority to dispose of offenses in individual cases, types of cases, or generally." The Secretary of Defense did just that with regard

to certain sexual offenses. This mandate known as "Initial Disposition Authority" is reiterated in AFI 51-201, *Administration of Military Justice*. The Secretary of Defense's (SecDef) order and AFI 51-201 both state the O-6 Special Court-Martial Convening Authority is the initial disposition authority for certain sexual assault cases and all offenses arising from or relating to the same incident(s). Initial reports of a criminal offenses are often unclear. Early collaboration between the command, AFOSI, and the judge advocate (JAG) is critical to ensure this Initial Disposition Authority Policy is complied with.

- Mandatory Discharge for Perpetrator of Sexual Assault: Sexual assault and sexual assault of a child are incompatible with military service. In accordance with AFI 36-3208, *Administrative Separation of Airmen*, a member found to have committed a sexual assault or sexual assault of a child will be discharged unless the member meets all of the specified retention criteria listed in the AFI. Sexual assault for the purposes of the instruction is defined very broadly. Again, JAG consultation is essential to ensure compliance with the AFI.
- Discharging a Victim of a Sexual Assault: There are special discharge processing requirements for airmen who have made unrestricted reports of sexual assault. AFI 36-3208 provides victims the opportunity to request the General Court-Martial Convening Authority to review a discharge case if the victim made an unrestricted report of sexual assault within the 12 months prior to being notified of an involuntary discharge if that victim believed the discharge was initiated in retaliation for making the unrestricted report.
- Mandatory General Court-Martial (GCM) and Statute of Limitations: Specified sexual assault offenses referred to a court-martial are now required to be referred to a GCM. This change in the UCMJ impacts a number of sexual assault offenses. In addition, UCMJ, Art. 56 makes a punitive discharge mandatory for a conviction of the same specified offenses under Article 18. Finally, UCMJ, Art. 43 was amended and the statute of limitation was removed for certain sexual assault cases.
- Victim Consultation: Victims have a number of rights under UCMJ, Art. 6b (addressed in the section on the Victim Witness Assistance Program). In an effort to ensure victims are accorded their rights; commanders and legal offices are required to consult with victims (of all crimes) prior to taking a number of military justice related actions. The list of actions is provided in AFI 51-201, para. 7.12.12.

Addressing Victim Misconduct

- An investigation into the facts and circumstances surrounding an alleged sexual assault may develop evidence that the victim engaged in misconduct like underage drinking or other related alcohol offenses, adultery, drug abuse, fraternization, or other violations of instructions, regulations, or orders
 - In accordance with the UCMJ, the MCM, and Air Force Instructions, commanders are responsible for ensuring victim misconduct is addressed in a manner that is consistent and appropriate to the circumstances.
 - A commander's authority might be limited, based on the type of offense involved
 - Commanders are expected to consult with their servicing SJA and use appropriate personnel actions to resolve any allegations of victim misconduct
 - If not withheld by a superior authority, commanders have the authority to determine the appropriate disposition of alleged victim misconduct, to include deferring disciplinary action until after disposition of the sexual assault case
 - When considering what corrective actions may be appropriate, commanders must balance the objectives of holding members accountable for their own misconduct with the intent to avoid unnecessary additional trauma to sexual assault victims and to encourage reporting of sexual assaults
 - The gravity of any collateral misconduct by the victim and its impact on good order and discipline should be carefully considered in deciding what, if any, corrective action is appropriate

Commander Response to Allegations of Sexual Assault

- Commanders notified of a sexual assault through unrestricted reporting must take immediate steps to ensure the victim's physical safety, emotional security, and medical treatment needs are met, and that the AFOSI or appropriate criminal investigative agency is notified
- Attachment 4 to the Air Force Sexual Assault Policy is a checklist for assisting commanders in responding to allegations of sexual assault. Its primary objective is to assist commanders in safeguarding the rights of the victim and the subject, as well as addressing appropriate unit standards and interests. In all cases, commanders should seek the advice of the SJA in using the checklist before taking action.

- The appropriate commander should determine whether temporary reassignment or relocation of the victim or subject is appropriate, or possibly a permanent change of station, including humanitarian reassignment
- Commanders should consider whether no contact orders or Military Protective Orders (DD Form 2873) are required
- Sex Offender Registration: It is the policy of the DoD that any service member convicted in a general or special court-martial of any specified sexual offense must register with the appropriate authorities in the jurisdiction the service member will reside, work, or attend school upon leaving confinement (or upon conviction if not confined)
 - The specific offenses requiring a convicted member to register are listed in AFI 51-201, sec. 13L.

REFERENCES

- UCMJ Arts. 6b, 18, 43, 56, 120, 120a, 120b, and 120c
 National Defense Authorization Act for Fiscal Year 2014
 10 U.S.C. § 113 (2014)
 Rule for Courts-Martial 306 (2015)
 Memorandum, Secretary of Defense, *Withholding Initial Disposition Authority Under the Uniform Code of Military Justice in Certain Sexual Assault Cases* (20 April 2012)
 Memorandum, Under Secretary of Defense for Personnel and Readiness, *Collateral Misconduct in Sexual Assault Cases* (JTF-SAPR-001) (12 November 2004)
 DoDI 1325.07, *Administration of Military Correctional Facilities and Clemency and Parole Authority* (11 March 2013)
 AFRD 51-5, Military Legal Affairs (27 September 1993)
 AFI 31-105, *Air Force Corrections System* (15 June 2015)
 AFI 36-3208, *Administrative Separation of Airmen* (9 July 2004), incorporating through Change 7, 2 July 2013, including AFI36-3208_AFGM2016-01, 24 June 2016
 AFI 51-201, *Administration of Military Justice* (6 June 2013), including AFI51-201_AFGM2016-01, 3 August 2016
 AFI 71-101, Vol 1, *Criminal Investigations Program*, (8 October 2015), certified current 17 December 2015
 AFI 90-6001, *Sexual Assault Prevention and Response (SAPR) Program* (21 May 2015), incorporating Change 1, 18 March 2016

AIR FORCE VICTIM WITNESS ASSISTANCE PROGRAM

The Air Force Victim and Witness Assistance Program (VWAP) provides guidance for the protection and assistance of victims and witnesses, enhances their roles in the military criminal justice process, and preserves the constitutional rights of an accused. VWAP is a multidisciplinary program established at the installation level. It has three primary objectives. Those objective are first, to mitigate the physical, psychological, and financial hardships suffered by victims and witnesses of offenses investigated by U.S. Air Force authorities; second, to foster cooperation between victims, witnesses, and the military justice system; and third, to ensure best efforts are extended to protect the rights of victims and witnesses.

Overview

- The Air Force Responsible Official (the person responsible for coordinating, implementing and managing) for the Air Force VWAP is The Judge Advocate General (TJAG) of the Air Force. The Local Responsible Official (LRO) at an Air Force base is the installation commander or the Special Court-Martial Convening Authority. The LRO often delegates LRO duties to the Installation Staff Judge Advocate (SJA).
- The SJA appoints a VWAP Coordinator to implement and manage the VWAP. The VWAP Coordinator is also responsible for annual training and can serve as a Victim Liaison.
- Victim Liaison is an individual appointed by the LRO or delegate to assist a victim during the military justice process. Communications between a victim and victim liaison are **NOT** considered confidential for the purposes of Military Rule of Evidence 514.
- Each agency (Office of the Staff Judge Advocate (JA), Security Forces, Air Force Office of Special Investigations (AFOSI), Chaplain (HC) and Medical Group (MDG)) is responsible for training personnel on their responsibilities. The SJA trains commanders and first sergeants.
- Each installation should prepare an information packet modeled after figure 7.3 of AFI 51-201, *Administration of Military Justice*, and provide the packet to each victim/witness. See also DD Form 2701, *Initial Information for Victims and Witnesses of Crime*; DD Form 2702, *Court-Martial Information for Victims and Witnesses of Crime*; and DD Form 2703, *Post-Trial Information for Victims and Witnesses of Crime*.

Victim Rights

- Article 6b of the UCMJ established eight rights for crime victims. These rights can be enforced by the Court of Criminal Appeals through a Writ of Mandamus. For the purposes of Article 6b and VWAP a victim is defined as a person who suffered direct physical, emotional, or pecuniary harm as a result of the commission of an offense under the UCMJ. There is no burden of proof for these rights to apply. A victim has the right:
 - To be reasonably protected from the accused
 - To reasonable, accurate, and timely notice of specified hearings
 - Not to be excluded from any public hearing or proceeding
 - To be reasonably heard at specified hearings
 - To confer with government counsel for proceeding
 - To receive restitution as provided by law
 - To proceedings free from unreasonable delay
 - To be treated with fairness and with respect for his/her dignity and privacy

LRO Responsibilities to Crime Victims

- In addition to the proceeding victims' rights, the LRO also has specific responsibilities toward crime victims under VWAP
 - Inform eligible victims of the ability to consult with special victims' counsel and or a legal assistance attorney
 - Inform victims about sources of medical and social services
 - Inform victims of restitution or other relief to which they may be entitled
 - Assist victims in obtaining financial, legal, and other social services
 - Inform victims concerning protection against threats or harassment

- Provide victims notice of the status of investigation or court-martial, preferral of charges, acceptance of a guilty plea or announcement of findings, and the sentence imposed
- If administrative action is taken
 - LRO may reveal "appropriate administrative action was taken"
 - LRO **MAY NOT** reveal the specific action taken, e.g., Article 15 punishment, because it is not public knowledge and is protected by the Privacy Act
- Safeguard the victim's property if taken as evidence and return it as soon as possible
 - Evidence in a sexual assault case will be returned to the victim as soon as all legal, adverse action, or administrative proceedings are complete
- Consult with victims and consider their views on preferral of court-martial charges, pretrial restraint, dismissal of charges, pretrial agreements, discharge in lieu of court-martial, and scheduling of judicial proceedings. Although victims' views should be considered, nothing in the VWAP limits the responsibility and authority of officials involved in the military justice process from taking any action deemed necessary in the interest of good order and discipline and/or preventing service discrediting conduct.
- Designate a victim liaison when necessary

LRO Responsibilities to All Witnesses

- Notify authorities of threats and assist in obtaining restraining orders
- Provide a waiting area removed from and out of the sight and hearing of the accused and defense witnesses
- Assist in obtaining necessary services such as transportation, parking, child care, lodging, and court-martial translators/interpreters
- If the victim/witness requests, take reasonable steps to inform his/her employer of the reasons for the absence from work, as well as notify creditors of any serious financial strain incurred as a direct result of the offense

- Provide victims and witnesses necessary assistance in obtaining timely payment of witness fees and related costs
- In cases involving adverse actions for the abuse of dependents resulting in the separation of the military sponsor, victims may be entitled to receive compensation under the Transitional Compensation program or under the Uniform Services Former Spouses Protection Act

REFERENCES

UCMJ Art. 6b

Military Rules of Evidence 514 (2015)

DoDD 1030.01, *Victim and Witness Assistance* (13 April 2004), certified current 23 April 2007

DoDI 1030.2, *Victim and Witness Assistance Procedures* (4 June 2004)

AFI 51-201, *Administration of Military Justice* (6 June 2013), including AFI51-201_AFGM2016-01, 3 August 2016

TRANSITIONAL COMPENSATION FOR VICTIMS OF ABUSE

Federal legislation provides for transitional assistance to abused dependents of military members. The assistance provided can be an extension of benefits and/or a monetary pay for a set period of time. It is DoD policy to provide monthly transitional compensation payments and other benefits for dependents of members who are separated for dependent abuse. Applicants initiate requests for transitional compensation through the member's unit commander or Military Personnel Flight (MPF).

Eligibility for Transitional Compensation

- Dependents of members of the armed forces who have been on active duty for more than 30 days and who, after 29 November 1993, are:
 - Separated from active duty under a court-martial sentence resulting from a dependent- abuse offense
 - Administratively separated from active duty if the basis for separation includes a dependent-abuse offense
 - Sentenced to forfeiture of all pay and allowances by a court-martial which has convicted the member of dependent-abuse offense
- Dependents are ineligible to receive any transitional compensation if they remarry, cohabitate with the member, or are found to have been an active participant in the dependent abuse
- Dependent abuse includes crimes such as sexual assault, rape, sodomy, battery, murder, and manslaughter

Types of Transitional Compensation

- Monthly monetary compensation (10 U.S.C. § 1059)
- Commissary and exchange benefits (10 U.S.C. § 1059)
- Medical and dental care (10 U.S.C. § 1076)

Application Procedures

- Eligible dependents request transitional compensation by completing DD Form 2698, *Application for Transitional Compensation*
- Requests are made through the member's unit commander or through the MPF at any Air Force installation when the applicant is no longer at the installation in which the member was assigned
- Unit representative will assist the dependent with the completion of DD Form 2698
- MPF commander will coordinate the package and obtain a written legal review from the SJA. The installation commander is the approval authority.
- If approved, transitional compensation can last between 12 and 36 months, depending on the circumstances
 - For cases approved 22 September 2014 and after, the compensation period will be 36 months
 - For cases approved prior to 2 September 2014, the compensation period is between 12 and 36 months
- The monthly amount for transitional compensation is set by Congress
 - In 2009, the compensation was set at \$1154 per month, plus \$286 for each dependent child

REFERENCES

10 U.S.C. § 1059

10 U.S.C. § 1076

38 U.S.C. § 1311

DoDI 1342.24, *Transitional Compensation for Abused Dependents* (23 May 1995), incorporating Change 1, 16 January 1997

AFI 36-3024, *Transitional Compensation for Abused Dependents* (15 September 2003), incorporating Change 1, 4 December 2007, certified current 10 November 2009, including AFI36-3024_AFGM2015-01, 19 November 2015

DD Form 2698, *Application for Transitional Compensation* (January 1995)

MEDIA RELATIONS IN MILITARY JUSTICE MATTERS

The Air Force must balance three important societal interests when there is media interest in military justice proceedings: protection of the accused's right to a fair trial, the privacy rights of all persons involved in the proceedings, and the community's right to be informed of and observe criminal proceedings.

Release of information relating to criminal proceedings is subject to the Privacy Act (PA), Freedom of Information Act (FOIA), victim and witness assistance protection laws, Air Force Rules of Professional Conduct, Air Force Standards for Criminal Justice, implementing directives, security requirements, classified information laws, and judicial orders. It is critical that commanders always consult with the staff judge advocate (SJA) before releasing any information about such proceedings.

Providing Information

- AFI 51-201, *Administration of Military Justice*, sec. 13D, covers the rules for releasing information pertaining to criminal proceedings. It prohibits release of information that 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.
- The release of extrajudicial statements is a command responsibility. The convening authority (CA) responsible for the criminal proceeding makes the ultimate decision about release of extrajudicial statements relating to that criminal proceeding. Major command (or equivalent) commanders may withhold release authority from subordinate commanders.
- If a proposed extrajudicial statement is based on information contained in agency records, the office of primary responsibility for the record should also coordinate prior to release
- Rules for release of permissible extrajudicial statements are complex and vary according to the type of information to be released and its source, the type of proceeding, and the stage of the proceeding when the information is released

Extrajudicial Statements Generally

- Extrajudicial statements are oral or written statements made outside of a criminal proceeding that a reasonable person would expect to be disseminated by means of public communication

- There are valid reasons for making certain information available to the public in the form of extrajudicial statements. However, extrajudicial statements must not be used to influence the course of a criminal proceeding
- Usually, extrajudicial statements should include only factual matters and should not offer subjective observations or opinions

Prohibited Extrajudicial Statements

- Extrajudicial statements relating to the following matters ordinarily have a substantial likelihood of prejudicing a criminal proceeding and generally should not be made about:
 - The existence or contents of any confession, admission, or statement by the accused, or the accused's refusal or failure to make a statement
 - Observations about the accused's character and reputation
 - Opinions regarding the accused's guilt or innocence
 - Opinions regarding the merits of the case or the merits of the evidence
 - References to the performance of any examinations, tests or investigative procedures (e.g., fingerprints, polygraph examinations, and ballistics or laboratory tests), the accused's failure to submit to an examination or test, or the identity or nature of physical evidence
 - Statements concerning the identity, expected testimony, disciplinary or criminal records, or credibility of prospective witnesses
 - The possibility of a guilty plea or other disposition of the case other than procedural information concerning such processes
 - Information government counsel knows or has reason to know would be inadmissible as evidence in a trial
 - Before sentencing, facts regarding the accused's disciplinary or criminal record, including nonjudicial punishment, prior court-martial convictions, and other arrests, indictments, convictions, or charges. Do not release information about nonjudicial punishment or administrative actions even after sentencing, unless admitted into evidence. However, a statement that the accused has no prior criminal or disciplinary record is permitted.

Permissible Extrajudicial Statements

- When deemed necessary by command, the following extrajudicial statements may be made regardless of the stage of the proceedings, subject to the limitations stated above (substantial likelihood of prejudice and prohibitions under FOIA, PA, and/or Victim Witness Assistance Program (VWAP))
 - General information to educate or inform the public concerning military law and the military justice system
 - If the accused is a fugitive, information necessary to aid in apprehending the accused or to warn the public of possible dangers
 - Requests for assistance in obtaining evidence and information necessary to obtain evidence
 - Facts and circumstances of an accused's apprehension, including time and place
 - The identities of investigating and apprehending agencies and the length of the investigation, only if release of this information will not impede an ongoing or future investigation and the release is coordinated with the affected agencies
 - Information contained in a public record, without further comment
 - Information that protects the military justice system from matters that have a substantial likelihood of materially prejudicing the proceedings
 - Such information will be limited to that which is necessary to correct misinformation or to mitigate the substantial undue prejudicial effect of information or publicity already available to the public. This can include, but is not limited to, information that would have been available to a spectator at an open Article 32 investigation or an open session of a court-martial.
- The following extrajudicial statements may normally only be made after a CA has disposed of preferred charges by directing an Article 32 preliminary hearing or has referred the charges to court-martial, subject to the limitations stated above (substantial likelihood of prejudice and prohibitions under FOIA, PA, and/or VWAP):
 - The accused's name, unit, and assignment
 - The substance or text of charges and specifications, provided there is a statement included explaining that the charges are merely accusations and that the accused

is presumed innocent until and unless proven guilty. As necessary, redact all VWAP and PA protected data from the charges and specifications.

- The scheduling or result of any stage in the judicial process
- Date and place of trial and other proceedings, or anticipated dates, if known
- Identity and qualifications of appointed counsel
- Identities of convening and reviewing authorities
- A statement, without comment, that the accused has no prior criminal or disciplinary record or that the accused denies the charges
- The identity of the victim where the release of that information is not otherwise prohibited by law. Generally, however, do not release information identifying victims, especially the names of children or victims of sexual offenses.
- Do not volunteer the identities of the court members or the military judge in material prepared for publication. Prerequisites for release are:
 - Release authorized after the court members or military judge have been identified in the court-martial proceeding; and
 - The CA's SJA determines that release would not prejudice the accused's rights or violate the members' or military judge's privacy interests

Article 32 Hearings

- Article 32 hearings should ordinarily be open to the public
 - Access by spectators to all or part of the proceeding may be restricted or foreclosed by the CA who directed the hearing or by the preliminary hearing officer (PHO) when, in that officer's opinion, the interests of justice outweigh the public's interest in access (e.g., protecting the safety or privacy of a witness, preventing psychological harm to a child witness, or protecting classified information)
 - CAs or PHOs must conclude that no lesser methods short of closing the preliminary hearing will protect the overriding interest in the case
 - If a CA or PHO orders a hearing closed, he/she must make specific findings of fact, in writing, for the closure, which must be attached to the PHO's report

Release of Information from Records of Trial or Related Records

- Once a completed record is forwarded, AFLOA/JAJM is the disclosure authority for all records and associated documents

Reducing Tension with the Media

- Command should take positive steps to reduce tension with the media
 - Have the SJA and public affairs officer (PAO) work together to develop a coordinated press release that explains how the military justice system works and how it compares and contrasts with the civilian system
 - Advise the media up-front of the prohibition against courtroom photography, television, and audio and visual recording, and provide an alternate location, room or office for media interviews, broadcasts, etc.
 - Provide reserved seating in the courtroom for at least one pool reporter and a sketch artist
 - Air Force representatives must not encourage or assist news media in photographing or televising an accused being held or transported in custody

REFERENCES

The Freedom of Information Act, 5 U.S.C. § 552

The Privacy Act of 1974, 5 U.S.C. § 552a

Rule for Courts-Martial 405 (2015)

AFI 33-332, *Air Force Privacy and Civil Liberties Program* (12 January 2015)

AFI 35-101, *Public Affairs Responsibilities and Management* (12 January 2016)

AFI 35-104, *Media Operations* (13 July 2015)

AFI 51-201, *Administration of Military Justice* (6 June 2013), including AFI51-201_AFGM2016-01, 3 August 2016

ARREST BY CIVIL AUTHORITIES

When a commander receives notice from any source (e.g., a unit member, security forces (SF), or the Air Force Office of Special Investigations (AFOSI)) that a member of his/her command is being held by civilian authorities or is charged with a criminal offense, he/she should take prompt action.

Initial Actions Following Report of Service Member Arrest by Civilian Authorities

- The commander or a representative of the unit should contact the civilian authorities, inform them the person is a military member, and gather the following information:
 - The charge against the member
 - The facts and circumstances surrounding the charged offense; and
 - The maximum punishment the member faces
- If possible, make arrangements for the member's return to military control
 - **DO NOT** state or imply the Air Force will guarantee the member's presence at subsequent hearings
 - **DO NOT** post bond for the member or personally guarantee any action by the member (unless you are willing to accept personal responsibility and liability)

Release of Criminal Jurisdiction by Civilian Authorities to Military Authorities

- When a military member commits an offense off base in violation of both civilian (state law) and military law (which is federal law) (e.g., rape, robbery, murder) the member is subject not only to prosecution by the state, but also the military
- While prosecution by both the state and federal governments for the same offense is constitutionally permissible (separate sovereigns), Air Force policy is that if the state is prosecuting a member for an offense, the Air Force will not take UCMJ action against the member without approval of the Secretary of the Air Force (SecAF)
 - Air Force policy is to request criminal jurisdiction from applicable civilian authorities for any qualifying offenses (offenses also under military law) by service members

- The determination of which sovereign (state or federal) shall exercise jurisdiction should be made through consultation or prior agreement between appropriate Air Force and civilian authorities
- Off-base offenses committed by a military member on active duty may be tried by court-martial or civilian courts. The question of personal military jurisdiction turns on the military status of the offender at the time of the offense, not where the offense occurred.
- The court-martial convening authority will often request that the civilian authorities waive jurisdiction and permit the Air Force to prosecute the offender
- The staff judge advocate (SJA) will assist in coordinating with the local authorities
- As a general rule, military status will not be used to avoid orders of civilian courts

Delivering Military Members Stationed in the United States to Civilian Authorities:

- Requests from federal authorities for members stationed in the United States will normally be granted when a warrant has been issued
- Requests by state authorities for members located in that state will normally be granted when the state produces documents preferring charges
 - The Air Force will not transfer a member from one state to another for purposes of making them amenable to prosecution by civilian authorities. The state seeking the member must proceed through normal civilian extradition channels.
 - Commanders will respond promptly to requests from civil authorities within the United States for assistance. A commander exercising general court-martial convening authority (GCMCA) jurisdiction, or an installation commander when authorized by the officer exercising GCMCA jurisdiction, may authorize delivery of a member of his or her command to federal or state civil authorities.

Delivering Military Members Stationed Overseas to Civilian Authorities

- A GCMCA, or an installation or equivalent commander designated by the GCMCA, shall order the return of a member from an overseas assignment, at government expense, if the member is convicted or charged with a felony or other serious offense (punishable by confinement for more than 1 year), or if the offense involves taking a child out of the jurisdiction of a court or from the lawful custody of another person

- In any lesser case, the GCMCA, or an installation equivalent commander designated by the GCMCA, may order the return of the member when deemed appropriate under the facts and circumstances of each particular case, following consultation with the SJA
 - Only the Under Secretary of Defense for Personnel and Readiness (USD P&R) may deny a request for delivery of a military member to federal, state, or local civilian authorities for a felony or for taking a child out of the jurisdiction of a court or from the lawful custody of another person. The Judge Advocate General may deny requests in all other cases, or grant a delay of not more than 90 days.
- Consult with the SJA to route civilian requests for the return of a member from overseas through the Air Force Legal Operations Agency, Military Justice Division (AFLOA/JAJM), The Judge Advocate General (TJAG), and, if necessary, the USD P&R
- A GCMCA, or his or her designee, may request denial of the civilian request based on one or more of the following reasons:
 - Loss of the member from the unit would have an adverse impact on operational readiness or mission accomplishment
 - An international agreement or other overriding legal requirement precludes the member's delivery
 - Member is the subject of foreign judicial proceedings, a court-martial, or a U.S. military investigation such that the member cannot be immediately made available to civilian authorities
 - Member has demonstrated that non-compliance with the court order that is the subject of the request for delivery is legally justified, or sanctioned by supplemental court orders, equally valid court orders of other jurisdictions, good faith legal efforts to resist the original orders, or other legal reasons

Physical Restraint or Confinement Pending Delivery

- An Air Force member may be placed under physical restraint or confinement by his or her commander pending delivery to civilian authorities, provided there is a reasonable belief that the member committed the offense and a reasonable belief that restraint or confinement is necessary

Civilians Associated with the Air Force

- Commanders ordinarily do not have authority to compel civilian compliance with court orders, but will strongly encourage civilians associated with their organizations to comply with valid orders of federal and state courts, to include the use of adverse administrative actions against civilian employees and withholding of official command sponsorship for military dependents, where appropriate

Military Members in Civilian Custody or Post-Conviction

- An AF IMT 2098, *Duty Status Change*, reflecting a duty status change must be prepared and forwarded to the military personnel flight when a member is in civilian custody
- If the member is convicted of an offense which would, if tried by court-martial, subject the member to a punitive discharge, the member is subject to involuntary administrative separation from the Air Force with a less than honorable service characterization (general or under other than honorable conditions discharge)
- If the member is convicted of an offense (or one closely related to an offense under the UCMJ) that would, if tried by court-martial, subject the member to a punitive discharge and confinement for one year or more, the commander must either recommend involuntary separation or submit a request for waiver of discharge. The decision should be made promptly, as an extended period of inaction may result in a waiver of the right to process the member for separation.
 - The member's absence due to confinement in a civilian facility does not bar processing the member for separation, but an approved discharge may not be executed until the member is released and returned to the United States
 - The commander must obtain information from the civilian authorities concerning the final disposition of the case. The SJA, with the SF, or AFOSI, will assist.
 - If a member is charged with or convicted of an offense that does qualify for or warrant separation, various disciplinary actions, such as unfavorable information file (UIF), control rosters, or administrative reprimands, may still be appropriate. Consult with the SJA.

REFERENCES

UCMJ Art. 14

DoDI 5525.09, *Compliance of DoD Members, Employees, and Family Members Outside the United States with Court Orders* (10 February 2006)

DoDI 5525.11, *Criminal Jurisdiction Over Civilians Employed by or Accompanying the Armed Forces Outside the United States, Certain Service Members, and Former Service Members* (3 March 2005)

AFPD 51-10, *Making Military Personnel, Employees, and Dependents Available to Civilian Authorities* (19 October 2006), certified current 2 December 2012

AFI 36-3207, *Separating Commissioned Officers* (9 July 2004), incorporating through Change 6, 18 October 2011

AFI 36-3208, *Administrative Separation of Airmen* (9 July 2004), incorporating through Change 7, 2 July 2013, including AFI36-3208_AFGM2016-01, 24 June 2016

AFI 51-1001, *Delivery of Personnel to United States Civilian Authorities for Trial*, (28 August 2014)

AF IMT 2098, *Duty Status Change* (30 June 2003)

ADVISING SUSPECTS OF RIGHTS

At times, a commander, or any other person subject to the UCMJ, may need to question a member suspected of committing some other offense. When this arises, it is essential to follow the legal requirement of Article 31 of the UCMJ.

Overview

- It is essential that a commander understands when and how to advise a member of their Article 31 rights
 - When a commander, law enforcement, or any other person subject to the UCMJ, interrogates or requests any statement from an Airman suspected of an offense, that individual must first warn the Airman of their Article 31 rights
 - Proper rights advisement enables the government to preserve any admissions or confessions of an offense for later use as evidence for any purpose
 - Admissions or confessions made in response to a defective Article 31 rights advisement, or in the absence of a necessary Article 31 rights advisement, cannot normally be admitted as evidence at trial. Additionally, other evidence, both physical and testimonial, that may have been discovered or obtained as a result of the unadvised statements is usually inadmissible at trial.
- Advisement of rights for both military personnel and civilians is set out in the attached Advisement for Military Suspects and Advisement for Civilian Suspects located at the end of this chapter

When Article 31 Rights are Required

- When a person subject to the UCMJ, suspects someone (also subject to the UCMJ) of an offense, then starts interrogating or requests any statement from that individual, and those statements regard the offense of which the person is questioned or suspected
- When active duty members question members of the Individual Ready Reserve (IRR)
- An interrogation or request for a statement does not have to involve actual questions. Sometimes actions, if they are intended to elicit responses, are deemed to be interrogation. For example, a commander declares, "I don't know what you were thinking,

but I'm assuming the worst," while shrugging his shoulders and shaking his head. Even though the commander has not asked a question, his statement and actions could be deemed an interrogation because they were likely to elicit a response.

Who Must Provide Article 31 Rights Advisements?

- When the questioner is subject to the UCMJ and is acting in an official, law enforcement or disciplinary investigation or inquiry, or could reasonably be perceived to be acting in such capacity
- Military supervisors and commanders are presumed to be acting in a disciplinary capacity when questioning a subordinate. Supervisors and commanders are held to a high standard. When in doubt, give the rights advisement and consult with your staff judge advocate (SJA).

What Information Must the Article 31 Rights Advisement Include?

- Allegation must be specific enough so the suspect understands what offense you are questioning him/her about.
 - Legal specifications are not necessary; lay terms are sufficient
 - General nature of the offense is sufficient but should be more than just reading the Article number of which the person is suspected of violating
- Right to remain silent
- Consequences of making a statement
- Although it is not necessary that the advisement be verbatim, best practice is to read the rights directly from the AFVA 31-231, *Advisement of Rights*, which is a wallet-size card with Article 31 rights advice for military personnel on one side and Fifth Amendment/Miranda rights for civilians on the other side
- Article 31 does not include a right to counsel, although one is provided in the Constitution. The right is listed on the rights advisement card, however, and should be included when reading Article 31 rights.

Rights Advisement Must be Understood and Acknowledged by the Suspect

- Suspect Must:
 - (1) Affirmatively acknowledge understanding of the rights;
 - (2) Affirmatively waive their rights; and
 - (3) Consent to make a statement without counsel present
- Consent to make a statement cannot be obtained by coercion, threats, or any other tactics utilized for the purpose of eliciting a false confession
- Be cautious when advising an intoxicated person of his rights. If significantly under the influence of drugs or an intoxicant, the individual may be legally incapable of knowingly and voluntarily waiving his rights.
- If a suspect wavers over whether or not to assert his/her rights, best practice is to clarify whether or not the suspect will waive his/her rights and not ask any further questions until all doubt is resolved

When to Stop Questioning

- If the individual indicates a desire to remain silent, stop questioning
 - This does not mean, however, that you cannot give the individual orders or directions on other matters
- If the suspect requests counsel, stop questioning
 - Inform the SJA and get advice before re-initiating any questioning
 - No more questions can be asked until counsel is present, or there has been a sufficient break in custody to permit the accused a meaningful opportunity to consult with counsel

Re-initiation of Questioning Following an Earlier Article 31 Rights Invocation

- There are three circumstances under which questioning may be re-initiated with a suspect following an earlier Article 31 rights invocation:
 - The suspect re-initiates the questioning

- You are questioning the suspect about a different offense
- There has been a sufficient “break in custody” to permit the accused a meaningful opportunity to seek/consult with counsel
 - Rule of Thumb: 14-day break in custody is sufficient. Prior to the preferral of charges, if there is a 14-day break in custody between the initial rights invocation and the re-initiation of questioning, you are permitted to re-initiate questioning.
 - Shorter “breaks in custody” may also be permissible, so long as the accused has had a meaningful opportunity to seek/consult with counsel, in the interim
- Nonetheless, if a suspect has asserted their rights, do not speak to that individual again regarding the offense in question unless you have consulted with the SJA

Suspect Acknowledgement and Waiver of Article 31 Rights

- When possible, obtain the waiver in writing using AF IMT 1168, *Statement of Suspect*
- Have a witness present
- Try to get the statement in writing. A clearly handwritten statement by a suspect is preferred, but also consider having the suspect fill out the AF IMT 1168 electronically, if reasonable under the circumstances.
- If after electing to talk, a suspect changes their mind and decides to stop talking, **stop all questioning!**
- Prepare a memorandum for record after the session ends, including:
 - Where the session was held
 - What and when you advised the suspect
 - What the suspect said
 - What activities took place (suspect sat, stood, smoked, drank, etc.)
 - What the suspect’s attitude was (angry, contrite, cooperative, combative, etc.)
 - Duration of the session with inclusive hours

REFERENCES

UCMJ Art. 31

Maryland v. Shatzer, 559 U.S. 98 (2010)

United States v. Vaughters, 44 M.J. 377 (C.A.A.F. 1996)

United States v. Cohen, 63 M.J. 45 (C.A.A.F. 2006)

United States v. Jones, 73 M.J. 357 (C.A.A.F. 2014)

United States v. Gilbreath, 74 M.J. 1 (C.A.A.F. 2014)

Military Rules of Evidence 304 and 305 (2015)

AF Visual Aid 31-231, *Advisement of Rights* (2 May 2014)

AF IMT 1168, *Statement of Suspect/Witness/Complainant* (1 April 1998)

ATTACHMENTS

Advisement for Military Suspects

Advisement for Civilian Suspects

Advisement for Military Suspects

I am _____ (grade, if any, and name), member of the (Air Force Security Police/AFOSI). I am investigating the alleged offense(s) of _____ of which you are suspected. I advise you that under the provisions of Article 31 UCMJ, you have the right to remain silent, that is, to say nothing at all. Any statement you do make, either oral or written, may be used against you in a trial by court-martial or in other judicial, nonjudicial or administrative proceedings. You have the right to consult with a lawyer prior to any questioning and to have a lawyer present during this interview. You have the right to military counsel free of charge. In addition to military counsel, you are entitled to civilian counsel of your own choosing at your own expense. You may request a lawyer at any time during this interview. If you decide to answer questions, you may stop the questioning at any time. Do you understand your rights? Do you want a lawyer? (If the answer is yes, cease all questions at this point). Are you willing to answer questions?

Advisement for Civilian Suspects

I am _____ (grade, if any, and name), a member of the (Air Force Security Police/AFOSI). I am investigating the alleged offense(s) of _____ of which you are suspected. I advise you that under the Fifth Amendment to the Constitution you have the right to remain silent, that is, say nothing at all. Any statement you make, oral or written, may be used as evidence against you in a trial or in other judicial or administrative proceedings. You have the right to consult with a lawyer and to have a lawyer present during this interview. You may obtain a civilian lawyer of your own choosing, at your own expense. If you cannot afford a lawyer, and want one, one will be appointed for you by civilian authorities before any questioning. You may request a lawyer at any time during this interview. If you decide to answer questions, you may stop the questioning at any time. Do you understand your rights? Do you want a lawyer? (If the answer is yes, cease all questions at this point). Are you willing to answer questions?

INSPECTIONS AND SEARCHES

This discussion is only a general overview of the rules governing searches, seizures, and inspections. Because there are many legal considerations and technical aspects involved in this area, which are very fact dependent, it is necessary to seek legal advice from the legal office when questions arise.

Military law authorizes a commander to direct inspections of persons and property under his or her command and to authorize probable cause searches and seizures of persons and property under his or her command. However, a commander who authorizes a search or seizure must be neutral and detached from the case and facts. Therefore, the command functions of gathering facts and maintaining overall military discipline must remain separate from the legal decision to grant search authorization.

Most bases have centralized the search authorization role in the installation commander, who is also often the special court-martial convening authority. The installation commander has discretion to appoint, in writing, up to four military magistrates who may also authorize search and seizure (including apprehension) requests. Each magistrate must receive training provided by the staff judge advocate on search and seizure issues.

A commander should also know the difference between inspections/inventories and searches/ seizures. Understanding this distinction will help ensure crucial evidence can be introduced at trial.

Key Terms

- Searches: Examinations of a person, property, or premises, for the purpose of finding evidence for use in trial by court-martial or in other disciplinary proceedings
- Seizures: The meaningful interference with an individual's possessory interest in property
- Inspections: Examinations of a person, property, or premises for the primary purpose of determining and ensuring the security, military fitness, or good order and discipline of your command
- Inventories: Administrative actions that account for property entrusted to military control
- Apprehension: The taking of a person into custody

Searches

- A search may be authorized upon:
 - Persons subject to military law and under the commander's command
 - Persons or property situated in a place under the commander's command and control
 - Military property or property of a nonappropriated fund instrumentality (NAFI)
 - Property situated in a foreign country which is owned, used, occupied by or held in the possession of a member of your command
- A search may be authorized for the following types of evidence:
 - Contraband, e.g., drugs, unauthorized government property
 - Fruits of a crime, e.g., stolen property, money
 - Evidence of a crime, e.g., bloody stained clothing, weapon, fingerprints, bodily fluids

Probable Cause Searches

- As a general rule, probable cause must be present before a commander can legally authorize a search
 - Probable cause exists when there is a reasonable belief that the person, property, or evidence sought is located in the place or on the person to be searched
 - Probable cause may arise from your personal knowledge, hearsay, or written evidence, or both
 - The search authority will make a decision based on the "totality of the circumstances," i.e., believability of information and specific known facts
 - An anonymous telephone call, by itself, does not justify a probable cause search
 - When relying on military working dogs to establish probable cause, the search authority should be aware of the dog's successful training exercises as well as the dog's actual record of success in similar search situations

- While not legally required, when requesting the authorization for a search, a witness should swear to the information used in finding probable cause. Commanders and military magistrates are authorized to administer oaths or affirmations for these purposes.
- The search may be an oral authorization to search, based upon probable cause, when exigent circumstances exist and there is a reasonable belief that a delay in obtaining authorization would result in the removal, destruction, or concealment of the property or evidence sought

Mechanics of a Search Request

- Refer the source of information to security forces who will investigate or refer to Air Force Office of Special Investigations (AFOSI)
- Do not personally investigate
- If the commander becomes knowledgeable of information which may justify a search
 - "Freeze" the situation (i.e., control access to the area to be searched, if within the commander's control, so that the scene and potential evidence remain undisturbed)
 - Immediately notify Security Forces Office of Investigations or AFOSI
 - Note any incriminating evidence or statements
 - Coordinate facts that can be presented to the search authority to support a finding of probable cause with the legal office

Exceptions to Probable Cause Searches

- A search authorization is not required for the following searches:
 - Consent Searches:
 - Even if the search authority has authorized a search, ask for the consent from the individual whose person or property is to be searched. If a judge later rules that the search authorization was somehow improper, discovered evidence may still be admitted at trial if the individual consented to the search.
 - Consent must be voluntary

- Consent cannot result from threats, coercion, or pressure, e.g., do not tell the suspect that if they do not consent you will obtain authorization anyway. Best practice is to have a third person present.
- Mere acquiescence to a search is not sufficient to justify a consensual search. Consent must be clearly given and voluntary.
- Consent may be orally given or in writing. Written consent is preferred. When possible, use AF IMT 1364, *Consent for Search and Seizure*.
- You may request an individual to consent to a search regardless of whether there was a previously exercised the right to remain silent under UCMJ, Art. 31 or an exercised right to counsel
- The individual giving consent must have either an exclusive or joint interest in the premises or property to be searched
 - An assigned occupant of a dormitory room can consent to a search of the joint/common areas of the room
 - Only the individual who has the exclusive use of a separate closet, locker, or other part of the premises may consent to a search of those areas
 - If a suspect occupant is present and does not consent, but a co-occupant who is also present consents, then consent is not valid as to the suspect occupancy
- Border Searches:
 - Searches upon entry to, or exit from, U.S. installations, enclaves, aircraft, or vessels that are outside the United States
 - Searches of government property not issued for personal use. Property issued for personal use include: dorm rooms, lockers, and housing.
 - Searches within jails, confinement facilities, or other similar facilities
 - Searches incident to a lawful stop or apprehension
 - Other searches as deemed valid under the Constitution and case law, such as an emergency search to save life, searches of open fields or woodlands, etc.

Special Search Issues

- Computer Searches:
 - Computer users have a reasonable expectation of privacy in computer files stored on personal computers, personal cell phones, and in personal mass data storage devices
 - To search personal computer files or storage devices, one must obtain either authorization based on probable cause or consent
 - A person may have a reasonable expectation of privacy in some aspects of government computers, networks, storage devices, and e-mails. The law in this area is complex— consult your legal office in every instance.
 - Network administrators who discover evidence of misconduct on a users' account while performing network maintenance may disclose that information to law enforcement or the commander

- Searches of Privatized/Leased Housing:
 - **ON-BASE HOUSING:** The installation commander and the military magistrate probably have power to authorize searches of privatized housing located on the installation
 - **ON-BASE PRIVATIZED HOUSING:** Under the Military Housing Privatization Initiative (MHPI), the military leases land to private developers who are responsible for housing construction and upkeep. The issue centers on whether the installation commander retains sufficient control over family housing when housing is leased to a private entity—especially on bases with concurrent jurisdiction. Due to sensitive nature of the privacy rights involved, it is essential to consult with your legal office in every instance.
 - **OFF BASE HOUSING:** Normally commanders do not have sufficient control over leased housing outside the installation to allow them to authorize searches. Commanders should review the lease agreement and consult with their legal office.

Inspections

- Generally: An “inspection” is an examination of the whole or part of a unit, organization, installation, vessel, aircraft, or vehicle, including an examination conducted at entrance and exit points, conducted as an incident of command the primary purpose of which is to determine and to ensure the security, military fitness, or good order and discipline of the unit, organization, installation, vessel, aircraft, or vehicle (see Military Rule of Evidence 313)
 - Inspections are not searches. An impermissible inspection is one that is made for the primary purpose of obtaining evidence for use in trial by court-martial or in other disciplinary proceedings.
 - Inspections may be “announced” or “unannounced” and may be authorized without probable cause
 - Inspections may be conducted personally by the commander or by others at the commander’s direction
- Methods of Conducting Lawful Inspections: (1) primary purpose is something other than to gain evidence for disciplinary purposes; and (2) inspection is conducted using reasonable means
 - First, it must not be for the primary purpose of obtaining evidence for use in courts-martial or in disciplinary proceedings. Best practice is to have the commander prepare a memo for record concerning the purpose of the inspection so that they may refresh their memory when called to testify, which is often months later.
 - Second, inspections must be conducted in a “reasonable manner”
 - An inspection is “reasonable” if the scope, intensity, and manner of execution of the inspection is reasonably related to its purpose
 - For example, if the purpose of an inspection is to look for fire hazards near office electrical outlets, inspecting the contents of the desk drawers would probably be unreasonable since items located in the desk drawers would not risk an electrical fire. The inspection will have gone beyond the scope of the purpose of the inspection.

- Inspections for Weapons and Contraband: Inspections for weapons or contraband are specifically permitted while conducting a previously scheduled lawful inspection as long as the examination was not targeted toward specific individuals or employ substantially different intrusion methods and not directed immediately following a report of a specific offense within the unit, organization, or installation
 - Contraband, weapons, or other evidence of a crime that is uncovered during a proper inspection may be seized and are admissible in a court-martial
 - An inspection that turns up contraband should continue as planned. Commanders who abandon inspections upon the discovery of contraband risk creating the appearance that the inspection was a search in disguise.
 - An examination for the primary purpose of obtaining evidence for use in disciplinary proceedings is not an "inspection." It is a "search" and, if not authorized based on probable cause, is illegal.
- Examples of Lawful Inspections:
 - Air Force random urinalysis inspection program
 - Unit/Base wide "dorm sweeps" (ordered by installation/unit commander)
 - "Unit urinalysis sweep" (urinalysis testing of all or part of a unit on a pre-designated day)
 - "Operation Nighthawk" (selection of random individuals for UA entering the installation in the late evening/early morning hours of a pre-designated day)
 - Consult with your local staff judge advocate for implementation instructions for an inspection for contraband

Inventories

- Inventories may be conducted for valid administrative purposes including:
 - Furniture inventories of dormitories or dormitory rooms
 - Inventories of an absent without leave (AWOL) member's, or a deserter's, property left in a government dormitory room. Commanders should consult their servicing legal office in these cases.

- Inventories of the contents of an impounded or abandoned vehicle
- Unlawful weapons, contraband, or other evidence may be lawfully seized during a valid inventory

Unfit to Perform Duties & Blood Alcohol Tests

- A blood alcohol test (BAT) is not required under UCMJ, Art. 134 to prove a member to be incapacitated for the performance of their duties by prior wrongful indulgence in alcohol or drug use
- Voluntary BATs:
 - You may, after consultation with your local legal office, ask a member of your command who is suspected of being under influence of alcohol or drugs to voluntarily take a BAT
 - Follow procedures of local hospital/clinic laboratory
- Involuntary BATs:
 - Although commanders have authority over subordinate members within their units, BAT tests are normally directed by a military magistrate (appointed by the installation commander) through a search authorization based on probable cause
- Implied Consent for Alcohol Tests:
 - Drivers give implied consent to tests of their blood, breath, and/or urine for alcohol or drugs when driving on base
 - Invoked by security forces regulations governing driving under the influence (DUI) offenses
 - Often results in automatic adverse action for refusal to cooperate and/or loss of on base driving privileges
- Physician Authorized:
 - For medical reasons directed by an examining physician
 - Results may be used criminally

Use of Military Working Dogs in Searches and Inspections

- Military working dogs may be used at any time in common areas since there is no reasonable expectation of privacy in a common area
- Common areas include dormitory hallways, day rooms, parking lots, and duty sections
- Military working dogs may be used during inspections anywhere within the scope of the inspection, e.g., dormitory rooms, whether the occupant is present or not
- What to do when a military working dog “alerts” in a common area
 - Can immediately “search” all common areas for contraband
 - If it appears the “alert” in a common area is on contraband but in a non-common area, for example, outside a dormitory room or automobile, immediately call the search authority to obtain a search authorization before proceeding further with the search
- What to do when a drug dog “alerts” during an inspection
 - Immediately stop the inspection in the area of the dog alert, e.g., that particular dormitory room, and secure that area
 - Call the search authority and obtain a search authorization before proceeding with the inspection or a search in that particular area
 - After the search of that particular area has been completed pursuant to a search authorization, continue the inspection

REFERENCES

UCMJ Art. 31

The Military Housing Privatization Initiative, 10 U.S.C. §§ 2871-85

Military Rules of Evidence 311-317 (2015)

AFMAN 31-116, *Air Force Motor Vehicle Traffic Supervision* (18 December 2015)

AFI 31-121, *Military Working Dog Program* (17 October 2012), incorporating Change 1, 31 March 2015

AFI 31-218(I), *Motor Vehicle Traffic Supervision* (22 May 2006), certified current, 15 July 2011

AFI 51-201, *Administration of Military Justice* (6 June 2013), including AFI51-201_AFGM2016-01, 3 August 2016

AF Form 1364, *Consent for Search and Seizure* (18 April 2016)

PRELIMINARY INQUIRY INTO REPORTED OFFENSES

When a military member is accused or suspected of an offense, the member's immediate commander has primary responsibility for ensuring a preliminary inquiry is conducted and appropriate command action is taken.

Exceptions

- For crimes involving rape, sexual assault, or child sex crimes the initial disposition authority is removed from the immediate commander and placed with the Special Court-Martial Convening Authority (SPCMCA)
- A commander who is a court-martial convening authority or who grants search authority must remain neutral and detached from the cases in which they act in this capacity. Thus, they will typically not act in an investigative capacity.

Initial Investigation of Suspected Offense

- Minor Offenses: In some cases, e.g., failure to go, dereliction of duty, the commander or first sergeant may conduct the preliminary inquiry. This may involve nothing more than talking with the member's supervisor.
- Major Offenses: In more serious cases, law enforcement agents such as the Security Forces Office of Investigations (SFOI) or the Air Force Office of Special Investigations (AFOSI) will conduct the investigation and report the results to the commander for disposition of the case. When the commander receives a report of investigation (ROI) from law enforcement, the preliminary inquiry requirement is fulfilled by reviewing the ROI.

Options Available to the Commander

- Ordinarily the immediate commander of a person accused or suspected of committing an offense determines the appropriate initial disposition and should do so in a timely manner
- In any case involving a disciplinary action or a criminal offense, the commander should consult with the local legal office
- Options available to the commander include:
 - No action

- Administrative action, e.g., letter of reprimand, removal from supervisory duties, involuntary discharge, denial or reenlistment, etc.
- Nonjudicial punishment under Article 15
- Preferral of court-martial charges
 - Before preferring charges against a military member, be sure to thoroughly review the ROI and any other evidence or documentation
 - At the time of preferral of charges, the accuser is required to take an oath that he or she is familiar with facts underlying the charges. The accuser is traditionally the commander.
- Make sure you consult with the legal office on all allegations of a sexual nature. Initial Disposition Authority in those cases has been withheld effective 28 June 2012 by the Secretary of Defense.
- All allegations of a sexual nature or drug distribution must be referred to AFOSI for investigation

REFERENCES

Rules for Courts-Martial 303 and 306 (2015)

SecDef Memorandum, *Withholding Initial Disposition Authority Under the Uniform Code of Military Justice in Certain Sexual Assault Cases* (20 Apr 2012)

MILITARY JUSTICE ACTIONS AND THE INSPECTOR GENERAL

The Inspector General (IG) has authority to investigate complaints related to “discipline.” This authority is restricted particularly as it relates to actions under the UCMJ. If court-martial charges have already been preferred in a case, the IG should generally not have any direct involvement.

- Both nonjudicial punishment proceedings and courts-martial have statutory appeal provisions
- Additionally, Congress and the Air Force have provided additional administrative review mechanisms, such as the Air Force Board for Correction of Military Records (AFBCMR), Congressional Inquiries, etc.
- AFI 90-301, *Inspector General Complaints Resolution*, should not be used as authority for an IG investigations into military justice matters
- IG personnel and investigating officers must have expeditious and unrestricted access to all Air Force records, reports, investigations, audits, reviews, documents, papers, recommendations, and other materials relevant to the investigation concerned; IGs are authorized access to all documents and all other evidentiary materials needed to discharge their duties to the extent allowed by law

Role of the IG in UCMJ Matters Should Be Guided by the Following Information

- Prior to a commander’s initiation of an action under the UCMJ, the IG may conduct an investigation authorized by applicable regulations
- If misconduct is involved, refer to the provisions in AFI 90-301, para. 6.3.3 and table 3.6; and consult with the local staff judge advocate (SJA)
- If court-martial charges have been preferred in a case, the IG should generally not have any direct involvement
- If investigation of matters tangential to court-martial charges becomes necessary, the IG should consult with the SJA to ensure that the investigation does not in any way prejudice the administration of justice under the UCMJ

- If action is initiated under Article 15, UCMJ, the IG should refer to the provision of AFI 90-301, table 3.6, rule 22
 - Appeal rights under AFI 51-202, *Nonjudicial Punishment*, UCMJ, Art. 15, and Part V of the Manual for Courts-Martial (MCM) must first be exhausted
- If it is necessary to process a complaint of procedural mishandling, the investigation should be confined to the procedural aspects of the Article 15 process and should **NOT** involve:
 - Assessing the sufficiency of the evidence
 - Probing the commander's deliberative process concerning the decision to initiate action, the complainant's guilt, or the punishment imposed
- The complainant should also be referred to AFI 36-2603, *Air Force Board for Correction of Military Records*
- Additionally, the IG is responsible for investigating allegations of reprisal. Any non-judicial punishment or adverse administrative action taken against the individual who filed the reprisal complaint may be reviewed in the course of that investigation.

REFERENCES

10 USC, §§ 8014, 8020

Manual for Courts-Martial, United States, Part V (2012)

AFI 36-2603, *Air Force Board for Correction of Military Records* (5 March 2012)

AFI 51-202, *Nonjudicial Punishment* (31 March 2015)

AFI 90-301, *Inspector General Complaints Resolution* (27 August 2015)

PREPARATION, PREFERRAL, AND PROCESSING OF CHARGES

The preparation of court-martial charges involves drafting the charges and specifications. Preferral of charges in the military is the act of formally accusing a military member of a violation of the UCMJ. Processing of the charge involves forwarding the charges and specifications to a convening authority.

Preparation of Charges

- The charge states which article of the UCMJ has allegedly been violated
 - The specification is a concise statement of exactly how the article was allegedly violated
 - Since precise legal language is required, the legal office drafts charges and specifications
 - Charges are documented in Section 10, block II of the DD Form 458, *Charge Sheet*

Preferral of the Charge

- The first formal step in initiating a court-martial
- Anyone subject to the UCMJ may prefer charges against another person subject to the UCMJ
- The immediate commander of an accused is the individual who ordinarily prefers the charge
- Preferral is documented in block III of the charge sheet
- Preferral requires the “accuser,” the one preferring the charge, to take an oath that he/she is a person subject to the Code, that he/she either has personal knowledge of or has investigated the charge and specification, and that they are true to the best of his/her knowledge and belief
 - This oath is normally given by a judge advocate
 - An accuser is not required to believe a charge and specification can be proven beyond a reasonable doubt

Processing of the Charge

- Preferral does not require the presence of the accused. However, after preferral, the commander must inform the accused of the charge. Since the commander is normally the accuser, notice to the accused typically occurs at the same time as preferral by the commander reading the charge to the accused.
- The commander then forwards the charge with a transmittal indorsement to the summary court-martial convening authority (SCMCA)
- To convene a court-martial, the charge must be forwarded to a convening authority, usually the special court-martial convening authority (SPCMCA). In the Air Force, the SCMCA is usually also the SPCMCA, so this extra step of forwarding the charge from the SCMCA to the SPCMCA is not required. A judge advocate may be authorized by the SPCMCA to receipt for charges on the SPCMCA's behalf.
- The SPCMCA can dismiss the charges or return the charges to the commander for alternate disposition. If the SPCMCA determines the charges warrant a court-martial, the following actions may be taken:
 - Refer the charge to a special court-martial or summary court-martial; or
 - Appoint a preliminary hearing officer (PHO) to conduct an Article 32 preliminary hearing
 - The PHO completes and forwards the preliminary hearing report to the SPCMCA for review. If the SPCMCA believes a general court-martial is warranted, the SPCMCA forwards the preliminary hearing report along with the charges to the general court-martial convening authority (GCMCA) for review and possible referral to a general court-martial.
 - The GCMCA can refer the charges to a general court-martial and convene the court-martial, return the charges to the SPCMCA for disposition, or dismiss the charges
- Once the charge has actually been referred to trial, the appointed trial counsel will then formally serve the accused with a copy of the charges and specifications. This is documented in section 15, block IV of the charge sheet.
- Time constraints are involved in the preferral and trial of court-martial charges. An accused's right to a speedy trial and the impact of unnecessary delay can have on the effectiveness of military justice require charges be disposed of promptly.

REFERENCES

UCMJ Art. 30

Rules for Courts-Martial 306 and 307 (2015)

AFI 51-201, *Administration of Military Justice* (6 June 2013), including AFI51-201_AFGM2016-01,
3 August 2016

DD Form 458, *Charge Sheet* (May 2000)

PRETRIAL RESTRAINT AND CONFINEMENT

Pretrial restraint and pretrial confinement are tools to ensure the appearance of the accused at their upcoming court-martial and/or to prevent the commission of serious misconduct by the accused while awaiting court-martial. There are four types of pretrial restraint: (1) conditions on liberty; (2) restriction in lieu of arrest; (3) arrest; (4) pretrial confinement. Pretrial restraints are not required in every court-martial case. Before ordering any form of pretrial restraint, the commander must be convinced that probable cause establishes that: (1) a UCMJ violation was committed; (2) that the accused committed it; and (3) that the restraint imposed is required by the circumstances to either ensure the presence of the accused at court-martial, or to prevent foreseeable serious criminal misconduct by the accused while pending court-martial. Pretrial restraint/confinement is not intended to be, and should not be used as, pretrial punishment. Pretrial restraints should only be imposed in association with pending court-martial charges.

Overview

- Pretrial restraint (Rule for Courts-Martial (RCM) 304): moral or physical restraint on a person's liberty, imposed before and during disposition of court-martial level offenses
- Pretrial confinement (RCM 305): physical restraint, imposed by order of competent authority, depriving a person of freedom pending disposition of charges
 - Pretrial confinement is the most severe form of pretrial restraint
 - There is no "bail" in the military justice system, therefore placement into pretrial confinement requires a series of procedural safeguards requiring the government to ultimately demonstrate by a preponderance of the evidence (i.e., more likely than not) that pretrial confinement is necessary under the circumstances
- Selecting the appropriate form of pretrial restraint: Commanders should select the least rigorous restraint necessary to assure appearance of accused at court-martial or prevent commission of foreseeable serious misconduct pending court-martial
- Never impose any form of pretrial restraint without first consulting the local legal office
- The imposition of any form of pretrial restraint starts the speedy trial clock under RCM 707 (120 days), regardless of whether charges have been preferred

Who May Order Pretrial Restraint?

- Only an Airman's commander may impose pretrial restraint on an officer. This authority **MAY NOT** be delegated.
- Any commissioned officer may impose pretrial restraint on any enlisted person
- A commanding officer can delegate authority to order pretrial restraint of enlisted personnel under their command to non-commissioned officers (usually the first sergeant)

Pretrial Restraint Prerequisites

- Requires a reasonable belief that:
 - An offense triable by court-martial has been committed;
 - The person to be restrained committed it; and
 - Restraint is required by the circumstances
- Notice to Individual: Restrained individual must be personally notified of the nature of the offense which is the basis for the restraint and terms of the restraint
- Release from Pretrial Restraint: Except as otherwise provided by RCM 305, a person may be released from pretrial restraint by any person authorized to impose the restraint

Types of Pretrial Restraint

- The four types of pretrial restraint (from least to most severe):
 - Conditions on Liberty (RCM 304(a)(1))
 - Restriction in lieu of Arrest (RCM 304(a)(2))
 - Arrest (RCM 304(a)(3))
 - Pretrial Confinement (RCM 304(a)(4); 305)

- Conditions on Liberty: Imposed by orders directing a person to do or refrain from doing specified acts
 - May be imposed in conjunction with other forms of restraint or separately
 - Typical examples include orders to report periodically to a specified official, orders not to go to a certain place, and orders not to associate with specified persons
- Restriction in lieu of Arrest: Imposed by ordering a person to remain within specified limits
 - Normally restriction is to remain within the confines of the base
 - A restricted person shall, unless otherwise directed, perform full military duties
- Arrest: The restraint of a person, directing the person to remain within specified limits
 - An arrested person does not perform full military duties
- Pretrial Confinement: Most severe type of pretrial restraint; see requirements below

Procedures Upon Entry Into Confinement

- Placement into pretrial confinement requires additional procedural safeguards to ensure that it is both necessary and justified under the circumstances, including the following four levels of review over the course of the first week of any pretrial confinement:
 - 24-hour commander notification
 - 48-hour probable cause review by a neutral officer
 - 72-hour commander review of necessity of continued pretrial confinement
 - 7 day hearing conducted by a neutral pretrial confinement reviewing officer
- Upon placement into pretrial confinement, the person to be confined must be promptly notified of the following:
 - Nature of the offenses for which he or she is being held
 - Right to remain silent and that any statement made may be used against him/her

- Right to request assignment of military counsel; or
- Retain civilian counsel at no expense to the United States
- Procedures by which pretrial confinement will be reviewed
- UCMJ, Art. 10 requires that “immediate steps” shall be taken to try the person or to dismiss the charges and release the person (usually requiring government to bring accused to trial within 120 days)

24-Hour Notification

- If the person ordering confinement is not the confinee’s commander, then the confinee’s commander must be notified within 24 hours of the entry to confinement

48-Hour Probable Cause Determination

- Within 48 hours of entry into confinement, a neutral and detached officer must review the adequacy of probable cause to continue confinement by considering the following:
 - Nature and circumstances of the suspected offense
 - Weight of the evidence against the accused
 - Accused’s ties to the local community, including family, off-duty employment, financial resources, and length of residence
 - Accused’s character and mental condition
 - Accused’s service record
 - Accused’s record of appearance or flight from similar proceedings
 - Likelihood the accused will commit further serious misconduct if not confined
 - Effectiveness of lesser forms of restraint
- If the commander is neutral and detached and acts within 48 hours, the provision calling for a 48-hour probable cause determination will be satisfied. However, if the commander is not neutral and detached, another officer must make the 48-hour probable cause determination.

72-Hour Commander Review

- If confinement is continued, within 72 hours of entry into confinement, the confinee's commander must prepare a written memorandum justifying continued confinement
 - Continued confinement is warranted if the commander has a reasonable belief that:
 - Offense triable by court-martial has been committed
 - Prisoner committed it
 - Confinement is necessary because it is foreseeable that:
 - Prisoner will not appear at trial; or
 - Prisoner will engage in further serious criminal conduct; and
 - Less severe forms of restraint are inadequate
- It is not necessary to try lesser forms of restraint, but they **MUST** be considered in determining whether confinement is appropriate (i.e., commanders should not order someone into pretrial confinement until they have considered whether a lesser restraint would accomplish the task)
- Convenience of the unit is **NOT** a valid reason for pretrial confinement

7-Day Pretrial Confinement Review

- A reviewing officer must make written findings, within seven days of entry into confinement, whether the confinee shall be released or remain confined
- Reviewing officer must be neutral and detached
 - Pretrial confinement review officer (PCRO) may be, with limited exception, a member appointed by the convening authority;
 - A military magistrate appointed by the convening authority; or
 - A military judge, although it is unusual for a judge to conduct initial review of pretrial confinement unless it is after referral of charges

- The PCRO must review the commander's 72-hour memorandum to determine whether the requirements for pretrial confinement are met
- The PCRO shall consider matters submitted by confinee, and, unless overriding circumstances or time constraints dictate otherwise, shall allow confinee and counsel an opportunity to appear and present a statement or evidence at the hearing
- A representative of command, such as the commander, first sergeant or other person, may also appear before the hearing officer
- The review is not an adversarial proceeding; prisoner and counsel have no right to cross-examine witnesses, although this is customarily permitted
- Reviewing officer's memorandum is forwarded to convening authority who may only over-ride decision to continue pretrial confinement. Reviewing officer's decision to release may not be reversed without new evidence. Member's commander may, however, impose lesser forms of pretrial restraint.
- Prisoners usually receive day-for-day credit for pretrial confinement against any confinement adjudged by the court. Credit for unlawful pretrial confinement, including pretrial punishment, or for restriction tantamount to confinement may lead to additional credit.

No Pretrial Punishment of Pretrial Confinees

- Pretrial confinees **MAY NOT** be treated the same as sentenced prisoners, such as required to wear special uniforms for sentenced prisoners, perform punitive labor, or undergo punitive duty hours
- Whether a particular condition amounts to pretrial punishment is a matter of the intent of the official imposing the condition or of the purposes served by the condition, and whether such purposes are reasonably related to a legitimate governmental objective. However, unduly rigorous circumstances or excessive conditions may give rise to a permissive inference that a particular condition constitutes punishment.
- Pretrial punishment includes public denunciation and degradation
- Commingling pretrial and sentenced prisoners, without more, is not automatically considered pretrial punishment. Case precedent has established commingling with sentenced prisoners or non-resident aliens may lead to credit toward an adjudged sentence.

Review by Military Judge

- Once charges are referred to trial, the military judge shall review the propriety of pretrial confinement upon motion for appropriate relief made by the defense. Before referral of charges, the accused or counsel may request release from pretrial confinement or modification of other forms of restraint from the convening authority.
- The remedy for non-compliance with pretrial confinement rules (e.g., review by neutral and detached person is not made within 48 hours) or abuse of discretion can range from additional credit for each day of illegal confinement to dismissal of the charges

REFERENCES

UCMJ Arts. 10, 12, and 13

United States v. Zarbatany, 70 M.J. 169 (C.A.A.F. 2010)

United States v. Stringer, 55 M.J. 92 (C.A.A.F. 2001)

Rules for Courts-Martial 304-05, 707 (2015)

AFI 51-201, *Administration of Military Justice* (6 June 2013), including AFI51-201_AFGM2016-01,
3 August 2016

IMMUNITY

Immunity for an individual should be granted only when testimony or other information from the person is necessary for purposes of maintaining good order and discipline, and when the person has refused or is likely to refuse to testify or provide the information on the basis of the privilege against self-incrimination.

Types of Immunity

- There are two types of immunity under Rule for Courts-Martial (RCM) 704
 - Testimonial Immunity: Bars the use of the immunized person's testimony, statements, and information directly or indirectly derived from such testimony or statements against that person in a later court-martial
 - Transactional Immunity: Bars **ANY** subsequent court-martial action against the immunized person concerning the immunized transaction, regardless of the source of the evidence against that person
- Testimonial immunity is preferred because it does not prevent the government from trying the person for the criminal offense they testified about, so long as the government does not use immunized statements in any way to prosecute the person
 - Best practice is to prosecute that individual first, then obtain a grant of immunity to obtain statements or testimony to be used in the prosecution of the other case
 - If prosecution of an immunized person occurs after that person has testified or provided statements under the grant of immunity, the government must prove at the later court-martial that it has not used the person's immunized testimony or statements in any way for the prosecution of that person
- Only a general court-martial convening authority (GCMCA) may grant testimonial or transactional immunity
 - The GCMCA may grant immunity to any person subject to the UCMJ
 - The GCMCA can disapprove immunity requests for witnesses not subject to the UCMJ
 - The GCMCA can only approve immunity requests for witnesses not subject to the UCMJ with authorization from the Department of Justice (DOJ)

- If the witness is subject to federal prosecution, requests for immunity must be approved by DOJ, even if the individual is subject to the UCMJ
- In national security cases, immunity requests **MUST** be coordinated with DOJ and other interested U.S. agencies

Immunity Approval Authority (Non-National Security Cases)

	Court-Martial	U.S. Prosecution
Person Subject to UCMJ	GCMCA	DOJ
Person NOT Subject to UCMJ	GCMCA can disapprove, but may approve only with DOJ approval	DOJ

- A grant of immunity may also include an order to testify
 - Under Military Rule of Evidence 301(d), an immunized person may not refuse to testify by asserting the Fifth Amendment right against self-incrimination because, as a result of the grant of immunity, that person will not be exposed to criminal penalty
 - An immunized person may be prosecuted for failure to comply with an order to testify
 - Immunity does not bar prosecution for perjury, false swearing, or a false official statement arising as a result of any statement made by an individual while testifying under a grant of immunity
- Care is required when dealing with an accused or suspect to avoid a grant of *de facto* immunity. This occurs when a person other than the GCMCA:
 - Manifests apparent authority to grant immunity (commanders, first sergeants, and investigative agents may, by actions or words, manifest apparent authority)
 - Makes a representation that causes the accused to honestly and reasonably believe that a grant of immunity will be issued if a certain condition is fulfilled and the accused relies on the representation to his/her detriment

- Do not make promises of immunity to any witness without first obtaining immunity approval from the GCMCA
 - Promises of immunity without GCMCA approval may still be enforced by courts-martial as exercises of “*de facto*” (in fact) immunity
 - *De facto* (“in fact”) immunity will operate the same as an actual grant of immunity

REFERENCES

Military Rules of Evidence 301 (2015)

United States v. Morrissette, 70 M.J. 431 (C.A.A.F. 2011)

Rule for Courts-Martial 703 (2015)

AFI 51-201, *Administration of Military Justice* (6 June 2013), including AFI51-201_AFGM2016-01, 3 August 2016

PRETRIAL AGREEMENTS

Pretrial agreements (PTAs) are agreements between the accused and the convening authority. Generally, the accused agrees to enter a plea of guilty to one or more offenses in exchange for an upper limit on the sentence (period of confinement, type of punitive discharge, amount and/or period of forfeitures, etc.) that the convening authority will approve. The decision to accept or reject a PTA offer submitted by an accused is within the sole discretion of the convening authority that referred the case to trial. The accused is entitled to have the convening authority personally act upon the offer before trial.

Procedures: Initiation of a PTA

- Initiation: Either the government or the defense may initiate PTA negotiations. The defense however, must submit the actual written PTA offer to the staff judge advocate (SJA).
- The SJA will provide the written PTA to the convening authority with a recommendation
- Special Processing for Cases with Department of Justice (DOJ) Interest: SJA will obtain the appropriate approval from the DOJ to enter into PTA discussions or agreements in cases involving an offense of espionage, subversion, aiding the enemy, sabotage, spying, or violation of punitive rules or regulations and criminal statutes concerning classified information or the foreign relations of the United States. This includes attempt, conspiracy, and solicitation to commit any of the above offenses.
- Written PTA Required: Entire PTA must be in writing and signed by the accused, defense counsel, and the convening authority. No informal oral promises/representations are permitted.

Permissible PTA Conditions

- Rule for Courts-Martial (RCM) 705 contains restrictions for permissible PTA terms/conditions
- A promise to enter into a reasonable stipulation of fact concerning the facts and circumstances surrounding the offenses to which the accused pleads guilty
- A promise to testify as a witness in a trial of another person
- A promise to provide restitution

- A promise to conform conduct to certain conditions of probation before final action is taken by the convening authority
- A promise to waive certain procedural requirements, such as:
 - An Article 32 investigation
 - Right to a trial before court members
 - Right to a trial before military judge sitting alone
 - Opportunity to obtain the personal appearance of certain witnesses at sentencing proceedings

Withdrawal from PTA

- Before Trial: Either party may void a PTA by withdrawing from it before trial and before either party has begun to act upon the conditions of the PTA
- Convening Authority Withdrawal from PTA: Convening authority may withdraw upon any of the following conditions:
 - Any time before the accused begins performance of promises contained in the agreement
 - Upon the accused's failure to fulfill any material promise or condition of the agreement
 - When the military judge's inquiry discloses a disagreement as to a material term of the PTA
 - When the findings of guilty are set aside during the appellate review
 - If an accused has violated conditions of a PTA that involve post-trial misconduct, the convening authority may withdraw up to the time of his/her final action in the case
 - Convening authority may not withdraw from a PTA in any way that would be unfair to the accused
 - Any withdrawal must be in writing

Implementation of the PTA at Court-Martial

- At trial, the military judge will conduct a full inquiry into the specific terms of the PTA to ensure the accused fully understands both the meaning and effect of each provision of the PTA, has voluntarily entered into the PTA, and that no oral promises were made in connection with the PTA
- In a trial by military judge alone, the military judge will not examine any sentence cap portions of the PTA until after he or she has independently adjudged a sentence
- In a trial by members, the members will not be told about the PTA until the conclusion of the trial
- Accused will get the benefit of the lesser sentence, regardless of whether it was adjudged or in the PTA
 - If the sentence adjudged by the military judge or members exceeds the limits of the agreed upon sentencing cap, the convening authority may only approve the lesser sentence agreed to in the PTA
 - If the adjudged sentence is less than the sentencing cap, only the adjudged sentence may be approved

REFERENCES

Rule for Courts-Martial 705 (2015)

AFI 51-201, *Administration of Military Justice* (6 June 2013), including AFI51-201_AFGM2016-01, 3 August 2016

TRIAL FORMAT

A military accused may elect to be tried by a military judge alone or by a panel of court members (the military equivalent of a civilian jury). All panel members must be senior in rank to the accused. In either case, the trial will consist of two major portions: (1) findings (guilt/innocence determination) and, in the event of a conviction at findings, (2) sentencing.

Findings

- First part of the trial during which guilt or innocence is determined. An accused may plead guilty or not guilty
- Guilty Plea:
 - Military judge questions the accused under oath to make sure he understands the meaning and effect of their plea, and that he/she is, in fact, guilty
 - If the military judge accepts the guilty plea, the accused will then be sentenced by the military judge, or a panel of members, whichever the accused elects
 - Guilty pleas are not allowed in death penalty cases
- Not Guilty Plea:
 - FORUM CHOICE: Accused determines by what type of court martial they wish to be tried. Types of forum depend upon the accused status as officer or enlisted.
 - Enlisted Accused: An enlisted accused may elect trial by one of the following methods: (1) military judge alone; (2) officer members; (3) mixed panel of officer and enlisted members (at least one-third enlisted members included on the court-martial panel, all of whom must be senior in rank to the accused)
 - Officer Accused: (1) military judge alone; (2) officer members (all of whom must be senior in rank to the accused)
 - Trial by military judge alone is not allowed in capital cases

- Accused is presumed innocent
 - Prosecution must prove the accused's guilt beyond a reasonable doubt
 - Accused has an absolute right to remain silent and present no evidence. The accused may also choose to testify or present other evidence in his defense.
- COURT-MARTIAL PANEL VOTING – NON-CAPITAL CASES: In a trial with members, two-thirds of the members, voting by secret written ballot, must concur in any finding of guilty
- COURT MARTIAL PANEL VOTING – CAPITAL CASES: In order to sentence the accused to death in a capital case, the vote of guilty on findings must be unanimous

Sentencing

- Second part of the trial during which an appropriate punishment is determined
 - Unlike many civilian courts, sentencing normally occurs immediately following findings
 - Sentencing may be by military judge alone or a panel of members
 - In guilty plea cases, the accused may elect sentencing by either a military judge alone or by a panel of members
 - In contested cases, the accused's choice of either members or military judge for findings also applies to sentencing
 - Judge-alone sentencing is not permitted in capital cases
 - Sentencing is an adversarial process
 - Prosecution can present matters in aggravation or show lack of rehabilitation and can rebut evidence the accused presents
 - Defense can present matters in extenuation to explain the circumstances surrounding the commission of the offense and/or matters in mitigation to lessen the punishment to be adjudged by the court-martial

- As in the findings portion of trial, the accused also has an absolute right to remain silent and present no evidence during sentencing
- A crime victim of an offense of which the accused has been found guilty has the right to be reasonably heard at a sentencing hearing relating to that offense
- In sentencing by members, two-thirds must concur, voting by secret written ballot, in any sentence **EXCEPT**:
 - Sentences over 10 years: three-fourths vote required
 - Death penalty: unanimous vote required

REFERENCES

Rules for Courts-Martial 903, 910, 913, 918, 921, 1001, 1001A, 1004, and 1006 (2015)

CONFIDENTIALITY AND PRIVILEGED COMMUNICATIONS

In the military, only certain relationships are recognized as involving privileged communication and therefore have confidentiality. Because privileges run contrary to a court's truth-seeking function, they are narrowly construed. Privileges may be waived by the privilege holder. Waiver occurs when the privilege holder voluntarily discloses or consents to disclosure of any significant part of the matter or communication. Commanders must respect the privileges set forth below, absent waiver or an applicable exception to the privilege.

Communications to Clergy (Military Rule of Evidence 503)

- A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a clergyman or to a clergyman's assistant, if such communication is made as a formal act of religion or matter of conscience
- Applies to civilians and service members; "clergyman" includes a minister, priest, rabbi, chaplain, or other similar functionary of a religious organization, or an individual reasonably believed to be so by the person consulting the clergyman
- Privilege extends to the chaplain's or clergyman's staff

Attorney Client Privilege (Military Rule of Evidence 502)

- Privilege applies to all information confided to an Area Defense Counsel (ADC), Special Victims' Counsel (SVC) or legal assistance attorney during representation, except with respect to some future crimes or frauds upon the court
- Communications between a commander and staff judge advocate are privileged only when the commander is acting as an agent or official of the Air Force and the commander's interests in no way conflict with those of the Air Force
- Privilege extends to non-lawyer members of the attorney's staff, e.g., paralegals, secretaries, etc.

Physician-Patient

- The Military Rules of Evidence (MRE) generally do not recognize a physician-patient privilege
- No privilege for civilians treated in a military facility, but Privacy Act and other federal regulations protect any illegal third party disclosure

Medical Records

- Military medical records are the property of the Air Force
- Information in the health record is personal to the individual and will be properly safeguarded pursuant to the federal Healthcare Information Portability and Protection Act (HIPPA)
- Commanders or commanders' designees may access members' military medical records but only to the extent necessary to ensure mission accomplishment

Psychotherapist-Patient Privilege (Military Rule of Evidence 513 / AFI 44-172)

- A limited privilege exists between persons subject to the UCMJ and psychotherapists
 - Generally, the limited privilege protects only confidential communications which are made to a psychotherapist (or assistant) for the purpose of diagnosis or treatment of the person's mental or emotional condition in cases arising under the UCMJ
 - Exceptions include, but are not limited to: when the patient is dead; the communication is evidence of child abuse or neglect, or in a proceeding in which one spouse is charged with a crime against a child of either spouse, and when there is an allegation of such misconduct the communication contemplates future misconduct; when necessary to ensure safety and security of military personnel or property; or law or regulation imposes a duty to report the information
- Under AFI 44-172, *Mental Health*, communications between a patient and a psychotherapist (or assistant) made for purposes of facilitating diagnosis or treatment of the patient's mental or emotional condition are confidential and must be protected against unauthorized disclosure
 - A limited privilege also applies to active duty military members ordered to undergo a sanity board pursuant to Rules For Courts-Martial (RCM) 706 and MRE 302
 - A limited privilege also exists under the Limited Privilege Suicide Prevention (LPSP) Program pursuant to AFI 44-172, which applies to confidences made after notification of an investigation or of suspicion of commission of a criminal act, and placement into the LPSP program

Victim Advocate-Victim Consultations Privilege (Military Rule of Evidence 514)

- A limited privilege exists between victim advocates and victims of a sexual or violent offense
 - Generally, the limited privilege protects only confidential communications between a victim and a victim advocate in sexual and violent offenses arising under the UCMJ, made for the purpose of facilitating advice or supportive assistance to the victim
 - Exceptions include, but are not limited to: when the patient is dead; federal/state law or service regulations impose a duty to report; the communication clearly contemplated the future commission of a fraud or crime; when necessary to ensure safety and security of military personnel or property; or disclosure is constitutionally required

Drug/Alcohol Abuse Treatment Patients

- AFI 44-121, *Alcohol And Drug Abuse Prevention And Treatment (ADAPT) Program*, para. 3.7.1, grants limited protections for Air Force members who voluntarily disclose personal drug use or possession. Those protections do not include any future drug abuse.
 - Such disclosure may not be used as the basis for UCMJ action or for the characterization of service in a discharge proceeding
 - A member must disclose their drug abuse before the use is discovered or the member is placed under investigation. The member may not disclose after he is ordered to give a urine sample as part of the drug testing program in which the results are pending or have been returned as positive.
- Federal law protects confidentiality of medical records pertaining to drug and alcohol abuse

Spousal Privilege (Military Rule of Evidence 504)

- A spouse may elect not to testify against the other spouse as long as a valid marriage exists at the time they are to provide testimony
- A spouse may prevent testimony by the other spouse (or ex-spouse) regarding private communications made during the marriage even if the marriage has been dissolved at the time of testimony
- Neither privilege applies when one spouse is charged with a crime against, the person or property of the other spouse, child or children of either spouse, if the marriage is a sham as determined by state law, or if the spouses are co-conspirators in crime

Medical Quality Assurance Privilege

- 10 U.S.C. § 1102 generally restricts access to information emanating from a medical quality assurance program activity. Exception: release is authorized “[t]o an officer, employee, or contractor of the Department of Defense who has a need for such [information] to perform official duties.”
- Information must only be used for official purposes and safeguarded in accordance with the Privacy Act and other applicable laws and regulations

Family Support Center Program

- Family Support Center (FSC) staff should neither state nor imply that confidentiality exists
- Information collected from members and families must only be used for official purposes and must be safeguarded in accordance with the Privacy Act
- FSC Director will notify the appropriate authority when an Air Force member constitutes a potential danger to self, others, or could have an impact on Air Force mission

REFERENCES

The Privacy Act of 1974, 5 U.S.C. § 552a

10 U.S.C. § 1102

42 U.S.C. § 290dd-2

Mil. R. Evid. 302, 501-513

United States v. Jasper, 72 M.J. 276 (C.A.A.F. 2013)

Rule for Courts-Martial 706 (2015)

DoD 6025.18-R, *DoD Health Information Privacy Regulation* (24 January 2003)

AFI 33-332, *Air Force Privacy and Civil Liberties Program* (12 January 2015)

AFI 36-2706, *Equal Opportunity Program Military and Civilian* (5 October 2010), incorporating Change 1, 5 October 2011

AFI 36-3009, *Airmen and Family Readiness Centers* (7 May 2013), incorporating Change 2, 16 July 2014, AFI36-3009_AFGM2016-01, 18 February 2016

AFI 44-172, *Mental Health* (13 November 2015)

AFI 44-121, *Alcohol and Drug Abuse Prevention and Treatment (ADAPT) Program* (8 July 2014)

AFI 41-210, *Tricare Operations and Patient Administration Functions* (6 June 2012)

AFI 51-110, *Professional Responsibility Program* (5 August 2014), including AFI51-110_AFGM2016-01, 7 July 2016

USE OF INFORMATION IN THE PERSONAL INFORMATION FILE AND REHABILITATION TESTIMONY AT COURT-MARTIAL

Personnel records of the accused are generally admitted as evidence at any court-martial sentencing hearing so long as those records are kept in accordance with Air Force regulations. These records are important information to demonstrate a service member's duty record and have a direct bearing on the ultimate sentence imposed at court-martial. Further information about the character of the accused is provided via "rehabilitative potential testimony," which may be provided by any person with sufficient contact with the accused to form an intelligent opinion as to the accused's ability to be rehabilitated to a useful position in society following court-martial.

Information in the PIF

- Documents in a personnel information file (PIF) can be admitted into evidence by the prosecution during the sentencing phase of a court-martial contingent on the following prerequisites:
 - Clear from the face of the document that the member received a copy of the document
 - Member had an opportunity to respond to the allegations
 - Document is not over 5 years old on the date charges were referred to trial
- Document must be complete and kept in accordance with Air Force instructions
- Any response submitted by the member becomes part of the record and must be filed with the action. Otherwise, the record is incomplete and may not be admitted.

Rehabilitation Evidence

- Rule for Courts-Martial (RCM) 1001(b)(5) permits evidence of rehabilitative potential to be introduced in the sentencing phase of the trial
- "Rehabilitative potential" for RCM 1001(b)(5) purposes means "the accused's potential to be restored, through vocational, correctional, or therapeutic training or other corrective measures to a useful and constructive place in society"
 - Evidence may be in the form of opinion concerning the accused's previous performance as a service member and potential for rehabilitation

- Scope of the rehabilitation evidence must be limited to whether the accused indeed has rehabilitative potential in society, and the magnitude or quality of any such potential. An example would be "SSgt Doe has outstanding rehabilitation potential."
- Witness cannot express an opinion as to whether the accused should receive a punitive discharge or any euphemism as to the appropriateness of a particular sentence
- Opinion testimony in this area must be based on sufficient personal knowledge about the accused's character, duty performance, moral fiber, and determination to be rehabilitated, and cannot be based merely on the seriousness of the offense at issue

REFERENCES

Rule for Courts-Martial 1001(b)(2), 1001(b)(5) (2015)

AFI 51-201, *Administration of Military Justice* (6 June 2013), including AFI51-201_AFGM2016-01, 3 August 2016

POST-TRIAL MATTERS, CLEMENCY SUBMISSIONS, CONVENING AUTHORITY ACTION, AND APPEALS

Most parts of court-martial sentences do not go into effect automatically. Rather, they go into effect upon action by the convening authority. All sentences of courts-martial are subject to post-trial clemency review by the convening authority, and appellate review by applicable military authorities. In the event of a court-martial conviction and sentence, the accused has the right to submit post-trial matters to the convening authority for clemency consideration. Further appellate review of the accused's case is determined by the severity of the sentence. Finally, in the event of a court-martial conviction and sentence involving a victim, the victim is also entitled to submit post-trial matters for the convening authority's review during clemency.

Post-Trial Actions: Production of the Record of Trial and Staff Judge Advocate Recommendation

- Following a court-martial conviction, the accused is entitled to a copy of the authenticated record of trial (ROT) and the staff judge advocate's post-trial recommendation (SJAR) to the convening authority as to whether to approve the findings and sentence in the case
- After receipt of the later of these documents, the accused is allotted 10 calendar days (7 for summary courts-martial) to submit clemency matters to the convening authority for the convening authority's consideration as to whether to approve findings of guilt or to approve or disapprove all or part of the sentence
 - Accused may also request an extension of time of up to 20 days to submit clemency matters
 - Accused may also waive his/her right to submit clemency matters
- Accused Clemency Submissions: Written clemency matters submitted by an accused may include:
 - Allegations of legal errors that affect the findings or sentence
 - Portions or summaries of the record and copies of documentary evidence offered or introduced at trial
 - Matters in mitigation that were not available for consideration at trial, except as may be limited by Rule for Courts-Martial (RCM) 1107(b)(3)(C)

- Clemency recommendations by any court member, the military judge, or any other person
- Written clemency matters submitted by the accused may not include matters that relate to the character of a victim unless such matters were presented as evidence at trial and not excluded
- Victim Clemency Submissions: A crime victim of an offense tried by any court-martial shall have the right to submit a statement to the convening authority after the sentence is adjudged
 - "Crime victim" for the purposes of RCM 1105A is a person who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of an offense of which the accused was found guilty, and on which the convening authority takes action under RCM 1107
 - Statement must be in writing and signed by the victim. It may include photographs, but shall not include video, audio, or other media.
 - The crime victim may submit the statement no later than 10 days after the later of:
 - Date the victim receives an authenticated copy of the record of trial or waives the right; or
 - Date on which the staff judge advocate recommendation is served on the victim
 - For summary courts-martial, the victim has 7 days after the sentence is announced
- Trial counsel, or a summary court-martial officer, shall make reasonable efforts to inform a crime victim of the right to submit a statement and the manner in which it may be submitted
- A crime victim may waive their right to submit a statement by expressly waiving such in writing or by failing to submit a statement within the prescribed time period

Convening Authority Action

- Findings and sentence adjudged by a court-martial are not final until approved or disapproved by the convening authority, this is referred to as "action"
- Before completing action in a case, the convening authority is required to review the SJAR, the SJAR Addendum, clemency matters submitted by the accused, and matters submitted by the victim (if applicable)
- Generally speaking, during the clemency process, the convening authority has limited authority to: (1) disapprove findings of guilt (if the offense concerned did not involve a rape or sexual assault conviction, and the maximum confinement for that offense was 2 years or less); and (2) reduce or disapprove only those aspects of the sentence pertaining to confinement of 6 months or less; reductions in grade; forfeitures of pay; hard labor without confinement; restriction to limits; and reprimands
 - Fiscal Year 2014 National Defense Authorization Act limited the power of a convening authority to modify the findings and sentence of a court-martial under UCMJ, Art. 60 in certain cases. Commanders should consult their servicing legal office when considering modification.

Effective Date of Court-Martial Punishments

- Punitive Discharge: Not effective unless and until approved after appellate review
- Confinement: Effect immediately unless deferred (i.e., delay the effective date) by the convening authority
- Reduction in Grade: Effective 14 days after announcement of the sentence or convening authority action, whichever is sooner. The convening authority may also defer (i.e. delay the effective date of) the reduction in grade.
- Forfeiture of Pay and Allowances: Effective 14 days after announcement of the sentence or action by the convening authority, whichever is sooner. The convening authority may also unless defer the forfeiture of pay until action. In addition, when taking action, the convening authority may lessen the impact of "automatic" forfeitures of pay by "waiving" them for up to 6 months for the benefit of the accused's dependents.

- **AUTOMATIC FORFEITURES:** An accused automatically forfeits pay and allowances, up to the jurisdictional limits of their court-martial (general court-martial (GCM)—total forfeitures of pay and allowances; special court-martial (SPCM)—2/3 forfeitures of pay, only), during any period of confinement if the adjudged sentence includes death or a punitive discharge, or any sentence to confinement for more than 6 months
- **WAIVER OF AUTOMATIC FORFEITURES:** A convening authority may waive mandatory forfeitures but only in cases where the accused has dependents. To do so, the convening authority must also defer, suspend, mitigate or disapprove all or part of adjudged total forfeitures.
- **Hard Labor Without Confinement:** Effective 14 days after announcement of the sentence or convening authority action, whichever is sooner
- **Restriction to Limits:** Effective 14 days after announcement of the sentence or convening authority action, whichever is sooner
- **Reprimand:** Provided by the convening authority in conjunction with “action” on the case

Appellate Review

- Type of appellate review depends upon the adjudged sentence and type of court-martial
- Unless appellate review is waived by an accused, the Air Force Court of Criminal Appeals (AFCCA) automatically reviews all cases involving sentences of death, punitive discharge, or confinement of one year or more
- After review by the AFCCA, the Court of Appeals for the Armed Forces (CAAF) may elect to review any case. Review is automatic in death penalty cases and cases certified to the court for review by The Judge Advocate General of any service.
- Cases reviewed by the CAAF may be considered for review by the Supreme Court of the United States
- In cases where a punitive discharge is adjudged or mandatory, the discharge cannot be ordered executed until appellate review is completed

- Members are placed in mandatory excess leave (non-pay) status (also known as “appellate leave”) in cases where a punitive discharge is approved by the convening authority and confinement, approved by the convening authority, has been completed. When no confinement is adjudged, and a punitive discharge is approved, excess leave (“appellate leave”) should start when the convening authority takes action.
- Once appellate review is complete, the convening authority, or successor, must take additional action to execute the punitive discharge by publishing a Final Court-Martial Order, which will be drafted for the Convening Authority’s signature by the Staff Judge Advocate’s Office
- The Judge Advocate General is the review authority in general courts-martial where the sentence does not include death, punitive discharge, or confinement for one year or more. The Judge Advocate General may elect to certify any case to the AFCCA for further review.
- A judge advocate will conduct a review of all summary courts-martial and special courts-martial that do not include a punitive discharge or one year confinement (unless the accused waives appellate review)
- Appellate review is not required for cases where the accused was acquitted on all charges

REFERENCES

UCMJ Arts. 57(a), 58(b), 60, 66-69 and 76a

Rule for Courts-Martial 1101-07, 1201-05 (2015)

AFI 51-201, *Administration of Military Justice* (6 June 2013), including AFI51-201_AFGM2016-01, 3 August 2016