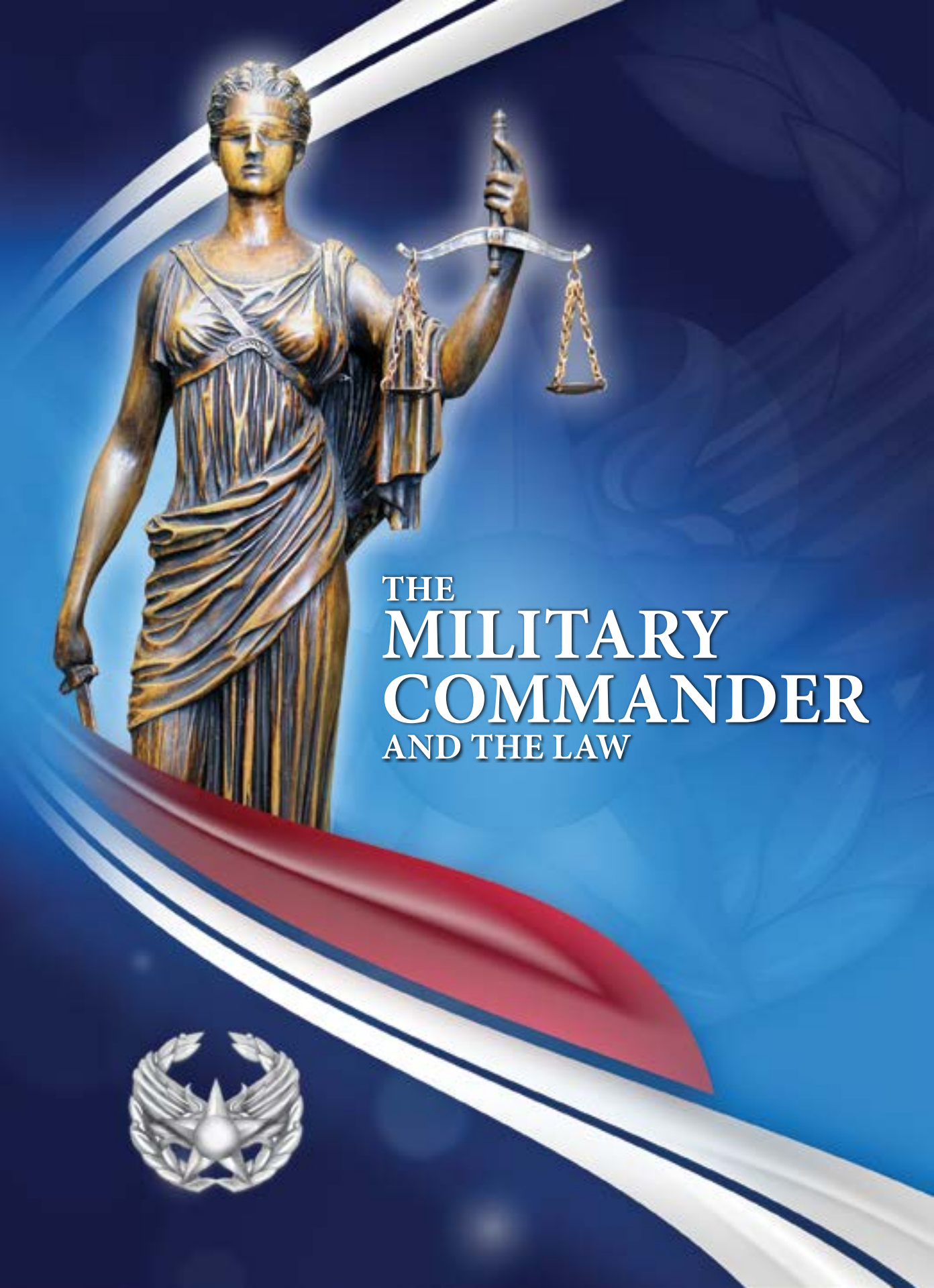


THE MILITARY COMMANDER AND THE LAW

The Military Commander and the Law is a publication of The Judge Advocate General's School. This publication is used as a deskbook for instruction at various commander courses at Air University. It also serves as a helpful reference guide for commanders in the field, providing general guidance and helping commanders to clarify issues and identify potential problem areas.

Disclaimer: As with any publication of secondary authority, this deskbook should not be used as the basis for action on specific cases. Primary authority, much of which is cited in this edition, should first be carefully reviewed. Finally, this deskbook does not serve as a substitute for advice from the staff judge advocate.

Editorial Note: This edition was edited and published during the Secretary of the Air Force's Air Force Directive Publication Reduction initiative. Therefore, many of the primary authorities cited in this edition may have been rescinded, consolidated, or superseded since publication. It is imperative that all authorities cited herein be first verified for currency on https://www.e-publishing.af.mil/.

Readers with questions or comments concerning this publication should contact the editors of *The Military Commander and the Law* at the following address:

The Judge Advocate General's School
150 Chennault Circle (Bldg 694)
Maxwell Air Force Base, Alabama 36112-6418
Comm. (334) 953-2802 or DSN 493-2802
AFLOA.AFJAGS@us.af.mil

This publication is available at: https://www.afjag.af.mil/Library/AFJAGS-Library

THE MILITARY COMMANDER AND THE LAW

Edition Fifteen ***2019***

LIEUTENANT GENERAL JEFFREY A. ROCKWELL
The Judge Advocate General of the Air Force

COLONEL BRYAN D. WATSON
Commandant, The Judge Advocate General's School

MAJOR JENNY A. LIABENOW
Editor-in-Chief

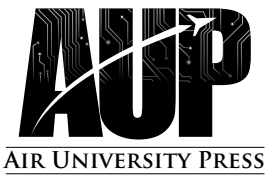
MAJOR MICAH C. MCMILLAN
MAJOR ERIC H. FRENCK
MAJOR RICHARD A. HANRAHAN
CAPTAIN JEFFREY C. CAMPBELL
Executive Editors

MS. THOMASA T. HUFFSTUTLER
Cover Design and Project Editor

SPECIAL THANKS TO

Headquarters U.S. Air Force Administrative Law Directorate (AF/JAA)
Headquarters U.S. Air Force Operations and International Law Directorate (AF/JAO)
Air Force Legal Operations Agency, Civil Law and Litigation Directorate (AFLOA/JAC)
Air Force Legal Operations Agency, Community Legal Services Directorate (AFLOA/CLS)
Air Force Legal Operations Agency, Judiciary (AFLOA/JAJ)
Air Force Legal Operations Agency, Commercial Law & Litigation Directorate (AFLOA/JAQ)
Air Force Personnel Center, Office of the Staff Judge Advocate (AFPC/JA)
24th Air Force, Office of the Staff Judge Advocate (24 AF/JA)

The Judge Advocate General's School (AFJAGS)
AFJAGS Facebook: https://www.facebook.com/AFJAGS
and
Publications: https://www.afjag.af.mil/Library/AFJAGS-Library



Air University Press
600 Chennault Circle, Bldg. 1405
Maxwell AFB, AL 36112-6026
https://www.airuniversity.af.edu/AUPress

AU Press Facebook:
https://www.facebook.com/AirUnivPress
and
Twitter: https://twitter.com/aupress

Library of Congress Cataloging-in-Publication Data

The Military Commander and the Law
Table of Contents

1

CHAPTER ONE: LEGAL ISSUES SPECIFIC TO THE COMMANDER

SOURCES OF COMMAND AUTHORITY

Article II, Section 2 of the United States Constitution provides the original source of command authority to the President as Commander-in-Chief. Military command includes two distinct components: (1) operational control (OPCON) and (2) administrative control (ADCON).

Chain of Command

- The President and Secretary of Defense (SecDef) exercise authority, direction, and control of the Air Force through two distinct chains of command
  - -- The operational branch runs from the President, through SecDef, to the commanders of combatant commands for missions and forces assigned or attached to their commands
  - -- For purposes other than operational direction of forces assigned to the combatant commands, the chain of command runs from the President, to SecDef, to the Secretary of the Air Force (SecAF), and thereafter as prescribed by SecAF in AFPD 51-5, *Administrative Law, Gifts, and Command Relationships,* and its implementing instructions. SecAF has shared administrative command and control with the combatant commander over Air Force forces assigned or attached to combatant commands.
- The chain of command within the Air Force runs from SecAF, to the major command commanders, to their subordinate commanders. SecAF exercises this command authority over Airmen through the Chief of Staff of the Air Force (CSAF).

The Concept of Command by Uniformed Military Personnel

- Concept of command carries dual functions
  - -- Legal authority over people, including power to discipline
  - -- Legal responsibility for the mission and resources
- Command devolves upon an *individual*, not a staff
  - -- A commander is an officer who occupies a position of command pursuant to orders of appointment or by assumption of command
  - -- A commander exercises control through subordinate commanders, principal assistants, and other officers to whom the commander has delegated authorities
  - -- Staff, including vice and deputy commanders, have no command functions. They assist the commander through advising, planning, researching, and investigating. Subordinate officers must issue all directives in the commander's name unless they are placed on G-series orders for the commander.
  - -- Commanders may delegate administrative duties or authorities to members of their staff and subordinate commanders as needed. However, delegating duties does not relieve the commander of the responsibility to exercise command supervision.
  - -- <u>Be mindful of the following constraints</u>:
    - --- Duties specifically imposed on commanders by federal law, such as the UCMJ, shall not be delegated to staff officers
    - --- Duties that have been designated non-delegable by a higher authority shall not be delegated
    - --- A commander should exercise sound judgment and discretion in delegating duties of clear importance

Command Authority over Active Duty Forces

- The commander's authority over active duty military members extends to conduct both on and off the installation. The commander exercises this authority by virtue of his/her status as a superior commissioned officer.
- Enlisted members take an oath upon enlistment to obey the lawful orders of their duly appointed superiors
- Articles 89, 90, 91, and 92 of the UCMJ prohibit disrespect towards, or the failure to obey, superior officers

Command Authority over Reservists

- Commanders always have administrative authority to hold reservists accountable for misconduct occurring on or off duty, irrespective of their military status when the misconduct occurred
- Commanders have UCMJ authority over reservists only when in military status

Command Authority over Civilians

- The commander has authority over his/her civilian employees
  - -- The commander can give promotions and bonuses, as well as impose sanctions
  - -- Specific AFIs in the 36-series defines this relationship (e.g., AFI 36-1004, *The Air Force Civilian Recognition Program* (29 August 2016); AFI 36-704, *Discipline and Adverse Actions of Civilian Employees* (3 July 2018))
- The commander has less authority over nonemployee civilians on base
  - -- As "mayor" of the base, the installation commander has authority to maintain order and discipline, and to protect federal resources
  - -- As a practical matter, this authority may be limited to detaining individuals for civilian law enforcement officials and barring them from the installation
  - -- The installation commander may bar civilians from the base for misconduct, but must follow certain procedural requirements, even if they are DoD ID cardholders
  - -- The commander has no authority over civilians off base

---

References

U.S. Const. Art. II, § 2
UCMJ arts. 89, 90, 91, and 92
AFPD 51-5, *Administrative Law, Gifts, and Command Relationships* (31 August 2018)
AFI 51-604, *Appointment to and Assumption of Command* (11 February 2016), including administrative changes, 29 March 2016

COMMAND SUCCESSION

An officer is vested with command in one of two ways: either by assuming command or by appointment to command. Both assumption and appointment are based on seniority and may be either temporary or permanent.

Appointment to Command

- Appointment to command occurs by an act of the President, the Secretary of the Air Force, or by his/her delegate
- An officer who is assigned to an organization, present for duty, and eligible to command may be appointed to command if they are at least equal in grade to all other eligible officers, without regard to rank within grade

Assumption of Command

- Assumption of command is authorized under federal law and Air Force regulations when command passes to the senior military officer assigned to the organization who is present for duty and eligible to command
  - -- Authority to assume command is inherent in that officer's status as the senior officer in both grade (major, lieutenant colonel, colonel) and rank (seniority within a grade)
  - -- No officer may command another officer of **higher grade** who is present for duty and otherwise eligible to command
- Assumption of command may be permanent or temporary
  - -- A temporary assumption or appointment is used when the commander being replaced is only temporarily absent or disabled
  - -- Absence or disability for only short periods does not incapacitate the commander and normally does not warrant an assumption of command by another officer
  - -- An officer can only assume command of an organization to which that officer is assigned by competent authority, except that the officer serving as the Commander, Air Force Forces (COMAFFOR) for a given contingency operation exercises command authority over those Air Force members deployed in support of that contingency

Method for Assumption or Appointment to Command

- Use written orders to announce and record command succession, unless precluded by exigencies
- Use standard memorandum format or use AF Form 35, *Announcement of Appointment to/ Assumption of Command*, to document such orders. AFI 51-604, *Appointment to and Assumption of Command,* Attach. 3, sets out detailed instructions for preparing the AF Form 35.

Resumption of Command after Temporary Absence

- There is no need to publish assumption of or appointment to command orders when the original commander resumes command after a temporary absence, so long as they are still equal or senior in grade to any other officer then present for duty, assigned to the organization, and eligible to command
- If during the permanent commander's temporary absence, another officer senior in grade to him/her, who is eligible to command, is assigned or attached to the organization, then the returning commander may not resume command unless appointed to command

Special Rules and Limitations on Command

- No commander may appoint his own successor
- There is no title or position of "acting commander;" the term is not authorized

Limitations to Command based upon Type of Personnel

- Enlisted members cannot exercise command
- Civilians cannot exercise command
  - -- Civilians may hold supervisory positions, and provide supervision to military and civilian personnel in a unit. However, civilians cannot assume "military command" or exercise command over military members within the unit. Except as limited by law, a civilian leader of a unit is authorized to perform all functions normally requiring action by the respective unit commander.
  - -- Units designated to be led by civilian directors will not have commanders, and members of the unit or subordinate units may not assume command of the unit. Thus, designations of individuals to lead the unit should be conducted in advance in the event of a director's absence.
  - -- In units with a civilian director, a competent command authority will establish procedures relating to functions that require a commander (e.g., imposition of nonjudicial punishment; initiation of administrative discharges). These functions will be accomplished either by attaching military members to a different unit led by a commander (for that limited purpose), or by elevating these functions to a command level above the unit.
- Officers assigned to HQ USAF cannot assume command of personnel, unless competent authority specifically directs
- Chaplains cannot exercise command, although they do have the authority to give lawful orders and exercise functions of operational supervision, control, and direction
- Students cannot command an Air Force school or similar organization
- Judge Advocates may only exercise command if expressly authorized by The Judge Advocate General, as the senior ranking member among a group of prisoners of war, or under emergency field conditions

Limitations of Command Based Upon Organization

- Flying Units: May only be commanded by Line of the Air Force officers with a current aeronautical rating, as defined by AFI 11-402, *Aviation and Parachutist Service, Aeronautical Ratings and Aviation Badges*. The rated officer must hold a currently effective aeronautical rating or crewmember certification, and must be qualified for aviation service in an airframe flown by the unit to be commanded.
  - -- *Exception 1*: Officers from other military departments who have USAF-equivalent crewmember ratings or certifications can command consolidated flying training organizations in accordance with appropriate interservice agreements
  - -- *Exception 2:* Certain types of organizations, such as air base wings or groups, which have multiple missions that include responsibility for controlling or directing flying activities, are considered non-flying units and may be commanded by non-rated officers

- Command of Active Duty Units by Reserve Officers: Only reserve component officers on extended active duty orders can command organizations of the regular Air Force. "Extended active duty" is defined as a period of 90 days or more during which the officer is on active duty (other than for training) orders. The COMAFFOR or delegate may authorize reserve component officers not on extended active duty to command regular Air Force units operating under the COMAFFOR's authority, though COMAFFOR may delegate this authority no lower than the commanders of aerospace expeditionary wings for expeditionary units operating under the COMAFFOR's authority.
- Command of Reserve Units by Regular Officers: Regular officers and reserve officers on extended active duty cannot command organizations of the Air Force Reserve (AFR) unless approved by HQ USAF/RE
- Medical/Healthcare Units: Only officers designated as a medical (including nurses), dental, veterinary, medical service, or biomedical sciences officer may command organizations and installations whose primary mission involves health care or the health profession
- Command of Installation: Officers quartered on an installation, but assigned to another organization not charged with operating that installation, cannot assume command of the installation by virtue of seniority

References

AFI 11-402, *Aviation and Parachutist Service, Aeronautical Ratings and Aviation Badges* (13 December 2010), certified current 5 February 2013, including AFI11-402_AFGM2018-01, 28 February 2018

AFI 51-604, *Appointment to and Assumption of Command* (11 February 2016), including administrative changes, 29 March 2016

FUNCTIONS OF THE STAFF JUDGE ADVOCATE (SJA)

The staff judge advocate delivers professional, candid, independent counsel and legal capabilities to the command and the warfighter. The staff judge advocate is the senior legal advisor at all levels of command.

Definitions

- Judge Advocate: An Air Force officer designated as such by The Judge Advocate General of the Air Force who:
  - -- Is a graduate of a law school accredited by the American Bar Association
  - -- Is a licensed attorney in at least one state or U.S. territory/commonwealth
- Staff Judge Advocate (SJA): A senior judge advocate on extended active duty, normally on the installation commander's staff
  - -- Serves as the legal advisor for the wing commander
  - -- Supervises the members of the base legal office
- Assistant Staff Judge Advocates (ASJA): Other judge advocates assigned to the SJA's office. ASJAs provide the needed legal services essential for the proper functioning of the air base. In this capacity, they may perform duties such as chief of legal assistance, chief of military justice, chief of civil law, etc.
- Area Defense Counsel (ADC): A judge advocate performing defense counsel duties at an installation. The ADC is not affiliated with the base legal office and is not rated by the base SJA or base commander.
- Special Victims' Counsel (SVC): A judge advocate providing legal assistance to and representing victims of sexual assault in administrative proceedings, interviews, non-judicial punishment, or courts-martial. The SVC is not affiliated with the base legal office or the ADC and is not rated by the base SJA or base commander.

Functional Organization of the Base Legal Office

- The legal office provides a wide range of legal services to the wing commander and the base at-large. The following is a general overview of the divisions within a typical legal office and the services they provide:
  - -- Military Justice Division: Advises commanders on discipline and military justice matters, including courts-martial and nonjudicial punishment under Article 15, UCMJ
  - -- Adverse Actions Division: Advises commanders on, and prepares documents for, administrative discharges. Provides legal guidance related to quality force management tools such as control rosters, unfavorable information files, administrative demotions, letters of reprimand, letters of admonishment, letters of counseling, and records of individual counseling.
  - -- Claims Division: Manages the processing of initial claims for and against the Air Force. Assists the Air Force Claims Service Center in processing household goods claims submitted by military members.
  - -- International and Operations Law Division: Advises commanders on international and operational law issues such as foreign criminal jurisdiction, status of forces agreements, rules of engagement and targeting as well providing law of armed conflict training and guidance

-- Civil Law Division: Administers various matters that may arise in a civil context, including, but not limited to, ethics, contract law, labor and employment law, environmental law, and general civil law. General civil law includes issues such as private organizations, use of Air Force assets, personnel issues and noncriminal investigations like reports of survey, commander-directed investigations, and line of duty determinations.

-- Legal Assistance and Preventive Law Division: Legal assistance attorneys provide advice to service members and other eligible individuals on a range of legal issues including, but not limited to, adoption, consumer law, divorce and child custody, income taxes, the Servicemembers Civil Relief Act, and wills and estate matters. This division also provides free notary services.

References

UCMJ art. 15
Servicemembers Civil Relief Act, 50 U.S.C. §§ 3901-4043
AFI 51-101, *The Air Force Judge Advocate General's Corps (AFJAGC) Operations, Accessions, and Professional Development* (29 November 2018)

PERSONAL LIABILITY OF COMMANDERS AND SUPERVISORS

Military personnel are generally immune from civil and criminal liability for decisions made and actions taken within the scope of their employment. However, they may be held personally liable, either civilly, criminally, or both, for actions deemed outside the scope of their employment (e.g., sexual harassment or commission of a federal crime), or those that clearly violate statutory or constitutional law.

Representation of Federal Employees in Civil Lawsuits

- Should you or one of your personnel be served with any summons or complaint, immediately contact your servicing staff judge advocate
  - -- Department of Justice representation is available in almost all cases if the employee was acting "within the scope of employment" and if the action was not a violation of a federal criminal statute
  - -- Time standards for requesting representation and answering the complaint are extremely critical, so act promptly
- Private insurance at your own expense may be available to protect you against civil (not criminal) liability

---

References

The Civil Service Reform Act, 5 U.S.C. § 7101
Federal Employees Liability Reform and Tort Compensation Act, 28 U.S.C. § 267
The Federal Employees Liability Reform and Tort Compensation Act, 28 U.S.C. § 2679
Clean Water Act, 33 U.S.C. §§ 1251-1387
Civil Rights Act, 42 U.S.C. § 1983
Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901 *et seq.*
Clean Air Act, 42 U.S.C. §§ 7401 *et seq.*
Department of Justice Policy, 28 C.F.R. Part 50

ARTICLE 138 COMPLAINTS

Article 138 of the UCMJ gives members of the Armed Forces who believe they have been wronged by their commanding officer the right to complain and seek redress. This right extends to regular Air Force (RegAF), Air National Guard (ANG) in Title 10 active duty status, and Air Force Reserve (AFR) while in federal service, whether on active duty orders, annual training, or inactive duty for training (IDT).

Scope of Article 138 Complaints

- Matters within the scope of Article 138 include discretionary acts or omissions by a commander that adversely affect the member personally and allegedly are:
  - -- A violation of law or regulation
  - -- Beyond the legitimate authority of that commander
  - -- Arbitrary, capricious, or an abuse of discretion
  - -- Clearly unfair, or unjust (e.g., selective application of administrative standards/actions)
  - -- Unlawful pretrial confinement
  - -- Deferral of post-trial confinement
  - -- Administrative actions taken in lieu of court-martial or nonjudicial punishment under Article 15
  - -- Vacation or suspended nonjudicial punishment actions under Article 15
- Matters beyond the scope of Article 138:
  - -- Acts or omissions not initiated, carried out, or approved by the member's commander
  - -- Submissions seeking reversal or modification of non-discretionary command actions (e.g., mandatory Unfavorable Information File (UIF) actions)
  - -- Complaints challenging a commander's decision not to provide redress or complaints against the general court-martial convening authority (GCMCA) related to the resolution of an Article 138 complaint (allegations that the commander or GCMCA failed to act or forward the complaint, however, are within the scope of Article 138)
  - -- Submissions on behalf of another person
  - -- Complaints seeking disciplinary action against another
  - -- Submissions challenging actions taken pursuant to the recommendation of a board (e.g., administrative discharge board)
- Matters within the scope of Article 138, but more appropriately addressed by alternative review processes:
  - -- Submissions requesting relief which the commander and the GCMCA lack authority to grant, such as an action requiring approval by the Secretary of the Air Force (SecAF)
  - -- Disciplinary action under the UCMJ, including nonjudicial punishment under Article 15
  - -- Challenges to any evaluation report which affects a member's military career (e.g., Officer Performance Reports, Enlisted Performance Reports, Promotion Recommendation Forms, etc.,) addressed by the Evaluation Reports and Appeals Board (ERAB)

-- Relief from an assessment for pecuniary liability (Secretary of the Air Force Remissions Board (SAFRB))

-- A suspension from flying status (Flying Evaluation Board (FEB))

Article 138 Procedures

- Member Filing Deadline: The member must the complaint within 90 days of the alleged wrong; the commander may waive the time requirement for good cause
- Burden of Persuasion: The member has the responsibility to prove one of the factors under Article 138. The commander is presumed to have acted properly.
- Staff Judge Advocate (SJA) Consultation: The commander must consult the SJA before taking action
- Evidence: The commander may consider evidence in addition to matters attached to the initial application
- Commander Initial Decision Deadline: No later than 30 days after receipt of the initial application for redress, the commander must notify the member in writing that:
  - -- A decision regarding the requested relief has been deferred to gather additional facts (such a notice shall be sent every 30 days until the fact gathering is complete);
  - -- The requested relief is granted; or
  - -- The request is wholly or partially denied, because:
    - --- The requested relief is not warranted;
    - --- The submission is outside the scope of Article 138, UCMJ;
    - --- The submission is untimely; or
    - --- There is a more appropriate channel for reviewing the complaint
- If the commander denies the requested relief because there is a more appropriate channel for review or the commander lacked authority, the commander must:
  - -- Forward the complaint and evidence to the appropriate processing office; or
  - -- Return the submission to the member and direct the member to the appropriate office;
  - -- If appropriate, inform the member of their right to file an application with the Air Force Board for Correction of Military Records
- GCMCA Review – denied complaints: If the commander wholly or partially denies the initial application for redress, the member may request review by the GCMCA within 30 days
- GCMCA Review – no commander response to complaint: If the member has received no response to the application for redress within 30 days from the date of submission, the member may request GCMCA review within 60 days from the date of the initial application
- GCMCA Review – delayed action on complaints: If the commander notified the member the application was being deferred pending additional fact gathering, the member may request GCMCA review, but must wait until 90 days after the initial application for redress

GCMCA's Responsibilities

- May investigate and/or document findings, but may not delegate the authority to act
- Will forward complaints to the subordinate commander who allegedly committed the wrong if the subordinate commander was not given the opportunity to provide redress. Any new allegations added by a member when seeking GCMCA review will be forwarded to subordinate commanders for initial review.
- Must obtain a written legal review from the servicing SJA before responding. The SJA legal review is privileged attorney work product and not releasable.
- Not later than 60 days after receipt of the formal complaint, the GCMCA must notify the member that:
  - -- A decision regarding the requested relief has been deferred for the completion of a proceeding or additional inquiry;
  - -- The requested relief is granted;
  - -- The requested relief is denied as outside the scope of Article 138, UCMJ;
  - -- The requested relief is denied as untimely; or
  - -- The requested relief is denied as there is a more appropriate channel for review
- If relief is denied because there is a more appropriate channel for review or the GCMCA lacks the authority to grant the requested relief, the GCMCA will:
  - -- Forward the complaint and evidence to the appropriate processing office; or
  - -- Return the submission to the member and direct the member to the appropriate office; and
  - -- If appropriate, inform the member of their right to file an application with the Air Force Board for Correction of Military Records
- If the GCMCA believes the requested relief should be granted and the authority to grant the relief requested resides with another GCMCA, MAJCOM, or the Secretary of the Air Force, the GCMCA should include the recommendation in the final action
- After taking final action and notifying the member, the GCMCA will send a complete copy of the file to AF/JAA, and will include the member's personal mailing address

Secretary of the Air Force (SecAF) Review

- AF/JAA exercises SecAF authority for final review of formal Article 138 complaints
- AF/JAA provides the member with written notification of the completion of the review process and any further action taken on the complaint (and, if applicable, the reasons for that action)
- AF/JAA will provide the GCMCA and servicing SJA a copy of the final decision

---

References

UCMJ art. 138
AFI 51-904, *Complaints of Wrongs Under Article 138, Uniform Code of Military Justice* (6 March 2018)
AFPD 51-5, *Administrative Law, Gifts, and Command Relationships* (31 August 2018)

UNLAWFUL COMMAND INFLUENCE (UCI)

As the military courts have often emphasized, unlawful command influence (UCI) is the mortal enemy of military justice. There are two types of unlawful command influence recognized by military courts: (1) actual UCI (i.e., actual impact on a court-martial undermining the fairness of the proceedings); (2) apparent UCI (i.e., no actual impact to fairness in the proceedings, rather the appearance of unfairness when observed by an objective member of the public). The courts have been equally quick, however, to distinguish proper command influence from UCI. The key is to understand what constitutes proper involvement by the commander, and what crosses the line into UCI.

Lawful Command Involvement in Military Justice

- Superior commanders are **NOT** prohibited from establishing and communicating policies necessary to maintain good order and discipline. They are also free to pass on their experience and advice regarding disciplinary matters without impacting the discretion of their subordinates in the matter. Examples of proper or lawful command involvement are:
  - -- Withholding a subordinate commander's authority to act in an individual case or types of cases and impose punishment oneself
  - -- Requesting a subordinate to reconsider his/her action in light of new evidence
  - -- Consulting with subordinates on judicial decisions at the subordinate's request; however, the subordinate alone must decide what action to take
  - -- "Tough talk" policy letters, talks, and briefings on issues of concern are permissible so long as they do not show an overly determined attitude or attempt to influence the finding and sentence in a particular case
  - -- Focusing on problem areas is permissible, for example: characterizing illegal drug use as a threat to combat readiness

Unlawful Command Influence

- Generally: No person subject to the UCMJ may attempt to coerce or, by any unauthorized means, influence the action of a court-martial, as it impacts an accused's right to a fair trial
- Actual UCI: The actions of someone acting with the "mantle of command" affecting the disposition of a case, and prejudicing the accused
- Apparent UCI: When the actions of someone acting with the "mantle of command" would create in the mind of an objective observer, fully informed of all the facts and circumstances, a significant doubt about the fairness of the proceeding
- Superior commanders must not make comments that would imply they expect a particular result in a given case or type of cases, such as:
  - -- *Calls for punitive discharge in an entire category of cases*: A commander states at an officers' call that all drug users must be removed from the Air Force. Potential court members for an upcoming court involving drugs are present. The inference may be that the commander expects the court to impose a punitive discharge.
  - -- *Public criticism of "light" court-martial punishments*: A commander makes comments on his displeasure at the light sentences adjudged by previous courts. The concern is future panel members may adjudge a harsher sentence than they might otherwise in order to please the commander.

-- *Discouraging witness testimony on behalf of an accused*: A commander expresses his concern about court-martial cases in which subordinate commanders preferred charges, recommended a court, and then testified during sentencing on behalf of the accused. The suggestion was that they refrain from testifying for the accused in upcoming courts. Any attempt to discourage a witness from testifying, even unintentional actions, is improper.

-- *Public comments opining on the Accused's guilt prior to trial*: A commander, speaking informally to a group of officers, jokingly says he does not care how long a particular court takes, as long as the members "hang the SOB." The impression is that he believes the accused to be guilty and expects the members to agree.

- Each commander in the chain must remain free to exercise his/her own discretion to impose discipline without inappropriate interference from a superior commander

-- The key consideration is whether a commander is taking disciplinary action based upon that commander's own personal belief that the disciplinary action is appropriate or whether the commander is merely acquiescing to direction from a superior to impose the particular discipline

-- A superior commander must not direct a subordinate commander to impose a particular punishment or take a particular action. To do so would constitute UCI because the decision was not that of the commander taking action or imposing punishment, but rather that of the superior commander.

References

UCMJ art. 37
Rules for Courts-Martial 104 (Unlawful command influence); 306 (Initial disposition) (2019)
AFI 51-201, *Administration of Military Justice* (8 December 2017)

SERVING AS A COURT MEMBER

At some time in your military career, you may be detailed to sit as a member of a court-martial. Court members serve essentially the same function in a military court-martial as jurors serve in civilian courts. For Airmen serving as court-martial members, that service becomes their primary duty until the close of the trial.

Selection

- When convening a court-martial, the convening authority personally selects the court-martial panel members. In addition to the basic eligibility requirements set forth in Article 25 of the UCMJ, the convening authority is directed to select as court members those who are ***"best qualified"*** for this duty. Factors used in court member selection include: ***age, education, training, experience, length of service***, and ***judicial temperament***.
- Prior to sitting as a member in a court-martial, court members are usually asked to complete a court member data sheet with personal and professional information. This data sheet provides the attorneys for both sides information about a court member's background and assists them in determining whether there is reason to excuse that particular member from sitting on the court.
- Once detailed to sit on a court-martial, a member must avoid allowing others to speak about upcoming cases in their presence to maintain impartiality

Excusal

- Excusal Requests Prior to Trial: Requests to be excused from court member duty should be based on good cause
  - -- Requests should be written and forwarded to the convening authority through his/her staff judge advocate (SJA)
  - -- Members detailed to a court-martial should not depart the local area on leave or on temporary duty assignment (TDY) without coordination with the SJA unless they have been properly relieved from duty
- Excusal Requests During Trial: After the court-martial is assembled, the convening authority may only excuse court members for good cause

Voir Dire

- The military judge, trial counsel, and defense counsel are all entitled to question court members to ensure impartiality. This questioning is referred to as "voir dire," and occurs prior to the court members hearing any evidence in the case.
- After voir dire, trial and defense counsel can ask the military judge to excuse any court member whose inclusion would make the trial either be or appear unfair. The military judge rules on these "challenges for cause." Each side is also allowed one "peremptory challenge" to be used at the attorneys' discretion. If the military judge grants a challenge to a court-martial panel member, that member is released from the court-martial and may return to their normal duties.

Duties at Trial – Findings

- The "findings" phase of the court-martial is the guilt/innocence phase
- If the accused pleads "not guilty," the court members receive evidence, arguments from counsel, and instructions on the law from the military judge in order to determine whether the accused is guilty or not guilty

- Court members are given an opportunity to question witnesses after the counsel have completed their questioning. Both counsel will review any question and may object to it. The military judge will rule on any objections and ultimately decide whether they will permit the question to be asked of the witness.
- The members must be convinced beyond a reasonable doubt that the evidence presented during the trial shows the accused committed the offense to find the accused "guilty." The decision of the court is called the "finding."
- The senior ranking court member is called the "president." It is the president's job to check the vote count and announce the results to the other members. The junior ranking court member collects and counts the votes during deliberations. The military judge announces the finding of the court in open court in the presence of the accused and counsel.
- Each member has an equal voice and vote in discussing and deciding a case. The influence of superiority in rank must not be employed in any manner in an attempt to control the independence of the members in the exercise of their own personal judgment. Service as a court member is not a rating factor to be considered on any member's performance report.
- Each member has a right to be free from harassment or ridicule based upon that member's participation as a court member. Court member deliberations are conducted in private, and each member takes an oath not to disclose any member's opinion or vote. Furthermore, no member may be compelled to answer questions about the deliberations unless lawfully ordered to do so by a military judge.

Duties at Trial – Sentencing

- If the accused is found "guilty," the court members will hear evidence and listen to arguments from counsel recommending a sentence, and receive instructions from the military judge on sentencing procedures. Members then deliberate and decide on an appropriate sentence. The military judge announces the sentence in open court in the presence of accused and counsel.
- If the accused pleads "guilty," but decides to be sentenced by members rather than just the judge alone, the same sentencing procedures apply as when the accused is found "guilty" by members

References

UCMJ arts. 25 and 39
Rules for Courts-Martial 501-505, 804-807, 813, 901, 911-1007 (2019)
U.S. Dep't of Army Pam. 27-9, Legal Services: *Military Judges' Benchbook* (2014) (current electronic version available at https://www.jagcnet.army.mil/ebb/index.html)

TESTIFYING AS A WITNESS

You or one of your subordinates may be called to testify at a court-martial or other administrative hearing. Under the UCMJ, both the prosecution and defense are entitled to equal access to all witnesses and evidence. No Airman should attempt to influence the testimony of a court-martial witness.

- Both the trial counsel and defense counsel may call witnesses during the findings portion of the trial to provide evidence of the offense or for a defense to the charge
- Both counsel may also call witnesses during the sentencing portion of the trial. A sentencing witness may be called to testify about a variety of things, such as the character of the accused, the impact of the offenses on the victim and unit, or relating an opinion about the accused's rehabilitative potential.
  - -- You will not be allowed to testify about your opinion as to appropriate specific sentence, including whether or not the accused should be punitively discharged from military service
  - -- When testifying about the accused's potential for rehabilitation, the witness must have knowledge of the accused as a "whole person"
- Before trial, the attorney calling you as a witness should discuss the questions he/she will ask, and questions the opposing counsel will likely ask on cross-examination. If you are going to be a witness, it is important that you allot enough time with the attorney to make sure you are properly prepared. The opposing counsel should also have the opportunity to interview you prior to testifying.
- Immediately report any attempts to influence your testimony to the staff judge advocate's office

References

UCMJ art. 46
Rule for Courts-Martial 1001 (2019)

2
CHAPTER TWO: QUALITY FORCE MANAGEMENT

ADMINISTRATIVE COUNSELINGS, ADMONISHMENTS, AND REPRIMANDS

Counselings, admonishments, and reprimands are quality force management tools available to supervisors, superiors, and commanders. These management tools are designed to improve, correct, and instruct those who depart from standards of performance, conduct, bearing, and integrity and whose actions degrade the individual and unit's mission. These tools are intended to correct rather than punish behavior. When properly used, they help maintain established Air Force standards and enhance mission accomplishment.

What Action is Appropriate

- The Basics: AFI 36-2907, *Unfavorable Information File (UIF) Program*, Chapter 4, contains guidance on administrative letters of counseling, admonishments, and reprimands. The counseling is the lowest level of administrative action. An admonishment is more severe than a counseling. A reprimand is more severe than an admonishment and carries a stronger degree of official censure.
- Primary Considerations: The decision to formally counsel, admonish, or reprimand should be based primarily on two factors:
  - -- Nature of the incident: The seriousness of the member's departure from Air Force standards should be considered before deciding what type of action to take. Counselings, admonishments, and reprimands may be administered for **ANY** departure from Air Force standards. Unlike nonjudicial punishment under Article 15 of the UCMJ, they are **NOT** limited to offenses punishable by the UCMJ.
  - -- Previous disciplinary record of the member: Counselings, admonishments, and reprimands should be used as part of a graduated pattern of discipline in response to repeated departures from standards

Issuing the Counseling, Admonishment, or Reprimand

- Who May Issue: Commanders, supervisors, and other persons in authority
- Form of the Action: May be either verbal or written. However, actions should usually be in writing to document the deviation as well as reinforce the importance of correcting the behavior. A verbal counseling may be recorded on an AF Form 174, *Record of Individual Counseling* (RIC).
- AFI 36-2907: Letters of counseling (LOCs), letters of admonishment (LOAs), and letters of reprimand (LORs) must comply with AFI 36-2907
  - -- A sample format for an LOC, LOA, or LOR along with its indorsements follows this section as an attachment
  - -- **Failure to follow the requirements for drafting and maintaining** these documents could limit the use of the documents in a subsequent proceeding, such as a court-martial or discharge proceeding

Procedures

- Standard of Proof: Investigate to determine whether the infraction occurred. While no standard of proof applies, commanders should utilize the "preponderance of the evidence" standard, i.e., that it is more likely than not that the alleged misconduct occurred. No formal rules of evidence apply.
- Draft the Letter: Prepare the letter according to the requirements of AFI 36-2907 (set forth below). The letter must state the following:
  - -- What the member did or failed to do, citing specific incidents and their dates. Since an LOC, LOA, or LOR is not limited to offenses punishable by the UCMJ, it is not always possible

to cite specific violations of the UCMJ; however, if the member has violated a UCMJ article that violation should normally be included in the language of the letter.

  - -- What improvement is expected
  - -- That further deviation may result in more severe action
  - -- That the member has three duty days to respond and provide rebuttal documents (45 calendar days for non-extended active duty (EAD) reserve or Air National Guard (ANG) members)
  - -- That all supporting documents become part of the record
  - -- That the person who initiates the LOC, LOA, or LOR has three duty days to advise the individual of their decision regarding any comments submitted by the individual (45 calendar days for non-EAD Reserve or ANG members)

- Notify the Individual:
  - -- Read the individual the letter
  - -- Have the member immediately acknowledge receipt on the original letter by filling in the date received and signing. If the member refuses to acknowledge receipt, the person who issued the letter should write on the original letter beneath the member's signature block in the acknowledgement section, "<<Rank and Name of Member>> refused to acknowledge receipt."
  - -- Give the member a copy of the letter
- Time to Respond: Provide the member with three full duty days for Regular Air Force members, 45 days for non-EAD Air Force Reserve (AFR) and ANG members. During this time, the member may wish to consult with an Area Defense Counsel. The member may respond prior to the expiration of the time to respond; however, the issuer of the letter should not pressure the member into responding prior to expiration of the allowed time.
  - -- If the member refuses to complete or sign the indorsement, the person who issued the letter should write on the original letter beneath the member's signature block, "<<Rank and Name of Member>> failed to provide matters in response to this letter within three duty days (45 days for reserve/ANG members) and refused to complete the 1st Ind," along with the issuer's signature block, signature, and the date.
- Response: If the member submits a response, advise the member of the final decision within three duty days of the submission of the response
  - -- Issuer may withdraw the action or leave the action as written. Withdrawing the action does not bar the issuer from taking alternate appropriate action e.g., withdrawing an LOR and initiating an LOA.
  - -- If using an indorsement similar to that in the attachment, the issuer of the letter should fill in the date of the indorsement, strike through the inapplicable language in parentheses, and sign the indorsement
  - -- Attach any matters the member submits in response to the original letter
- Inform Leadership: Issuer may, and generally should, inform the member's chain of command of the action. If appropriate or requested, send the letter with all indorsements, and any documents submitted by the member to the member's superiors or commander for information, action, or approval for entry in the member's Personnel Information File (PIF), UIF, or both.

- Privacy Act Requirements: Written counselings, admonishments, and reprimands are subject to the rules of access, protection, and disclosure outlined in AFI 33-332, *Air Force Privacy and Civil Liberties Program*. Therefore, all LOCs, LOAs, and LORs must contain a paragraph outlining the applicability of the Privacy Act to the document. Copies held by supervisors, commanders, and those filed in a member's UIF or PIF are subject to the same Privacy Act rules.

Record Keeping

- LOCs, LOAs, and LORs will often be placed in a PIF or UIF. The disposition rules follow:

Rules for LOC, LOA, and LOR Disposition		
Letters Issued to Enlisted	**Type of Letter**	**Disposition**
	LOC	**May** be placed in PIF or UIF
	LOA	**May** be placed in PIF or UIF
	LOR	**May** be placed in PIF or UIF
Letters Issued to Officers	**Type of Letter**	**Disposition**
	LOC	**May** be placed in UIF and **must** be placed in PIF if not placed in UIF
	LOA	**May** be placed in UIF and **must** be placed in PIF if not placed in UIF
	LOR	**Must** be placed in UIF. Initiate Officer Selection Record (OSR) determination.

- Commanders who wish to establish a UIF on optional letters (LOCs, LOAs, and LORs for enlisted members and LOCs and LOAs for officers) must notify the member on an AF Form 1058, *Unfavorable Information File Action,* before establishing a UIF. LORs issued to officers must be filed in a UIF via AF Form 1058, but the commander does not need to submit the AF Form 1058 to the officer because the officer is provided with an opportunity to refute the LOR when it is initially presented.
- Officers who receive an LOR will be subject to an Officer Selection Record (OSR) determination by the officer's senior rater. Procedures for the determination may be found in AFI 36-2608, *Military Personnel Records System*, paragraph 8.3.

Reserve/Guard Members

- Commanders, supervisors, and other persons in authority can issue administrative counselings, admonishments, and reprimands to Reserve and ANG members who commit an offense while in civilian (non-Title 10) status. Additionally, AFI 36-2907 applies to ANG personnel on Title 32 status except when otherwise directed by the state.
- When issuing an LOC, LOA, or LOR to a Reserve or ANG member, follow the procedures listed above with the following exceptions:
  - -- If the member has departed the duty area, the commander may send the letter via certified mail to the member's address or best available address, and the individual will be presumed to be in receipt of this official correspondence
  - -- Non-EAD Reservists and ANG personnel have 45 calendar days from the date of receipt of the certified letter to acknowledge the notification, intended actions, and provide pertinent information before the commander makes a final decision. In calculating the time to respond, the date of receipt is not counted. If the member mails the acknowledgment, the date of the postmark on the envelope will serve as the date of acknowledgment.
  - -- The initiator has 45 calendar days from the receipt of the certified letter or personal delivery to advise the member of his/her final decision regarding any comments submitted by the member

---

References

AFI 33-332, *Air Force Privacy and Civil Liberties Program* (12 January 2015)), incorporating Change 1, 17 November 2016, with corrective actions applied 17 November 2016
AFI 36-2608, *Military Personnel Records System* (26 October 2015), including AFI36-2608_AFGM2018-01, 5 February 2018
AFI 36-2907, *Unfavorable Information File (UIF) Program* (26 November 2014)
AFI 51-201, *Administration of Military Justice* (8 December 2017)
AF Form 174, *Record of Individual Counseling* (1 December 1986)
AF Form 1058, *Unfavorable Information File Action* (31 October 2012)

Attachment

Sample Letter of Counseling/Admonishment/Reprimand

Suggested Format for Letters of Counseling, Admonishments, and Reprimands

[Date]

MEMORANDUM FOR CAPT INHOT W. WOTTER

FROM: 123 FS/CC

SUBJECT: Letter of [Counseling][Admonishment][Reprimand]

1. Investigation has disclosed that [briefly describe what the member did and/or failed to do, citing the specific incident(s) and date(s). For this example, assume the LOR is being issued on 31 October 2018. Thus, the 1st Indorsement (Ind) is dated the same day; the 2d Ind is dated three (3) duty days later; and the 3d Ind is dated three (3) duty days after the 2d Ind. Be aware that the first indorsement that occurs on any page other than the letterhead page must include the citation line for the letter. In this example, the 1st Ind is the first indorsement to occur on a new page. The citation line for the indorsement memorandum consists of the indorsement number followed by the ORG/SYMBOL, SUBJECT, and date of the original memorandum. The citation line ends with the indorsement date: for disciplinary actions this should be the same as the letter's date.]

2. You are hereby [counseled][admonished][reprimanded]. [Briefly discuss the impact of what the member did or failed to do and what improvement is expected.] Your conduct is unacceptable and any future misconduct may result in more severe action.

3. The following information required by the **Privacy Act** is provided for your information. **AUTHORITY:** 10 U.S.C. 8013. **PURPOSE**: To obtain any comments or documents you desire to submit (*on a voluntary basis*) for consideration concerning this action. **ROUTINE USES**: Provides you an opportunity to submit comments or documents for consideration. If provided, the comments and documents you submit become a part of the action. **DISCLOSURE**: Your written acknowledgment of receipt and signature is mandatory. Any other comment or document you provide is voluntary.

4. You will acknowledge receipt and return this letter to me within three (3) workdays of your receipt of this letter. Your signature on this document is solely for receipt purposes and is not an admission of guilt. Any comments or documents you wish to be considered concerning this letter must be submitted at that time. If you submit supporting documents they will become part of the record. [Pursuant to AFI 36-2907, paragraph 2.3.1., if this letter of reprimand is upheld, it must be filed in an Unfavorable Information File (UIF).]*

HOLDEN T. LINE, Capt, USAF
Commander

*Only use for letters of reprimand issued to officers.

1st Ind to 123 FS/CC, _____ (date), Letter of [Counseling][Admonishment][Reprimand]

CAPT INHOT W. WOTTER

ACKNOWLEDGEMENT

1. I acknowledge receipt and understanding of this letter on _____ (date).

2. I understand that I have until _____ (date), which is no earlier than three (3) workdays of my receipt of this letter, to provide a response and that I must include in my response any comments or documents I wish to be considered concerning this letter.

INHOT W. WOTTER, Capt, USAF

2d Ind, 123 FS (CAPT HOLDEN T. LINE)

MEMORANDUM FOR CAPT INHOT W. WOTTER

1. Member (did) (did not) provide written matters in response to this letter.

2. I have considered all matters submitted by the member. After reviewing all of the evidence, I have determined that the member (engaged) (did not engage) in the conduct noted above and have decided (that this reprimand is the appropriate action)(that this reprimand will be withdrawn)(to downgrade this letter to a letter of _____).This document will be (filed in the member's PIF) (placed in a UIF [Note: Only a commander on G-series orders may place a document in a UIF. If the issuer is not the member's commander, the issuer can only recommend that the LOC/LOR/LOA be placed in a UIF. If the issuer is not the commander, include the following language:] I (will)(will not) recommend that your commander file this document in your UIF. [Note: LORs issued to officers must be filed in a UIF.]

3. [Include this paragraph for LORs issued to officers.] I am forwarding this Letter of Reprimand to 123 FW/CC, who will decide whether to file this LOR in your Officer Selection Record (OSR). You have three (3) duty days in which to submit written comments as to why this LOR should not be filed in your OSR. You must return the written comments to me and I will forward them to 123 FW/CC along with my recommendation.

HOLDEN T. LINE, Capt, USAF
Commander

3d Ind to 123 FS/CC, _____ (date), Letter of [Counseling][Admonishment][Reprimand]

CAPT INHOT W. WOTTER

MEMORANDUM FOR 123 FS/CC (CAPT HOLDEN T. LINE)

1. I acknowledge that on _____ (date) you advised me that you had considered the matters submitted by me in response to the above letter and informed me of your final decision regarding the same.

2. [Include this paragraph only for LORs issued to officers.] I also acknowledge that you advised me that you will be forwarding this LOR to 123 FW/CC, who will determine whether this LOR will be placed in my OSR. I understand that I have until _____ (date), which is not less than three (3) duty days from the date of my notification, to submit written comments as to why this LOR should not be filed in my OSR. I will provide any such written comments to you and understand that you will forward them to 123 FW/CC.

INHOT W. WOTTER, Capt, USAF

[Include only for LORs issued to officers.]
4th Ind, 123 FS/CC (CAPT HOLDEN T. LINE)

MEMORANDUM FOR 123 FW/CC

The officer (did) (did not) provide written comments. I am forwarding the entire package (including any written comments). I recommend that you (file) (do not file) this LOR in the officer's OSR.

HOLDEN T. LINE, Capt, USAF
Commander

UNFAVORABLE INFORMATION FILE (UIF)

The unfavorable information file (UIF) provides commanders with an official and single means of filing derogatory data concerning an Air Force member's personal conduct and duty performance. With some exceptions, the commander has discretion as to what should be placed in a UIF and what should be removed.

About the UIF

- The UIF is an official record of unfavorable information about an individual. It documents administrative, non-judicial, or judicial censures of the member's performance, responsibility, and behavior.
- The UIF is maintained by the base UIF monitor appointed by the Force Support Squadron superintendent/director
- Attachments 1 and 2, that follow this section, summarize when the establishment of a UIF is optional and when it is mandatory

Establishing a UIF

- Authority to Establish UIFs: Must be established by a commander on G-Series orders
- Contents of UIF: A UIF may only be established when some form of derogatory data is entered into it. In other words, a UIF must be populated with a record of unfavorable information or it ceases to exist. Common UIF documents include letters of reprimand (LORs), admonishment (LOAs), and counseling (LOCs); records of nonjudicial punishment under Article 15 (Art 15), UCMJ; control roster actions; documented instances of discrimination or sexual harassment; civilian convictions; and records of courts-martial.
- Documenting UIF: The UIF is generally established through the use of an AF Form 1058, *Unfavorable Information File Action*. This form notifies military members of the commander's intent to establish a UIF and provides the member with three duty days to respond (45 days for non-extended active duty (EAD) Reservists and Air National Guard (ANG) members). Some unfavorable actions (e.g., court-martial convictions) do not require the use of AF Form 1058.
- Mandatory UIF Filings: Certain unfavorable information requires mandatory filing into a UIF. Examples of actions requiring mandatory filing include conviction by a court martial and Art 15s received by officers. Actions that require mandatory reporting do not require the use of an AF Form 1058.
- Discretionary UIF Filings: Records of unfavorable information that do not require mandatory filing are included in a UIF at the discretion of the commander

Retention and Disposition

- Standard UIF Retention Time: The retention time depends on the nature of the document and the rank of the member. Removal of the document from the UIF is automatic at the end of the retention period. UIFs with no derogatory data contained within them are destroyed.
  - -- Enlisted UIF filings: 1-2 years
  - -- Officer UIF filings: 2-4 years
- Early Removal of UIF Filings: Commanders may remove documents from the UIF early by initiating action via AF Form 1058, or via memorandum
  - -- Early removal of derogatory data is **NOT AUTHORIZED** if the member is still serving punishment

-- The authority to remove documents early from the UIF is contained in the tables at the end of this section

Access and Review

- Access: Only commanders and the following individuals may view UIFs:
  - -- Member who has the UIF
  - -- First sergeants
  - -- Rating officials, when preparing to write or endorse a performance report, make a promotion recommendation, or recommend reenlistment
  - -- Senior Air Force officer or commander of an Air Force element in a joint command
  - -- Air Force element section commander in a joint command
  - -- Military Personnel Flight (MPF) personnel, Inspector General (IG) personnel, inspection team members, legal office personnel, law enforcement personnel, Military Equal Opportunity (MEO) personnel, and substance abuse counselors authorized by the commander to review the document in the course of their official Air Force duties
  - -- Program managers for Air Force Reserve programs
  - -- Legal office personnel performing a legal review on the UIF
- Review: All UIFs require periodic review to ensure continued maintenance of documents in the UIF is proper
- Mandatory UIF Reviews by Commanders:
  - -- Within 90 days of assuming or being appointed to command
  - -- Annually, with the assistance of the staff judge advocate
  - -- Whenever individuals are being considered for, among other things, promotion, reenlistment, permanent change of station, personnel reliability program duties, retraining, enlisted performance reports (EPRs), or officer performance reports (OPRs)
  - -- Whenever Reserve and ANG members are being considered for in-residence professional military education or Reserve short courses, a statutory tour or an active duty tour over 30 days, or appointment or enlistment into the Air Force Reserve

---

References

AFI 36-2608, *Military Personnel Records System* (26 October 2015), including AFI36-2608_AFGM2018-01 (5 February 2018)
AFI 36-2907, *Unfavorable Information File (UIF) Program* (26 November 2014)
AF Form 1058, *Unfavorable Information File Action* (31 October 2012)
AF Form 3070A, *Record of Nonjudicial Punishment Proceedings (AB through SSgt)* (9 April 2015)
AF Form 3070B, *Record of Nonjudicial Punishment Proceedings (TSgt through CMSgt)* (9 April 2015)
AF Form 3070C, *Record of Nonjudicial Punishment Proceedings (Officer)* (7 March 2007)

Attachments

UIF Requirements for Enlisted Personnel
UIF Requirements for Officers

UIF Requirements for Enlisted Personnel

Document	Mandatory? (see Note 1)	Use AF Form 1058?	Disposition Date	Early Removal Authority
LOC, LOA, or LOR	No	Yes	1 year from the date of the commander's UIF decision (signs section V of AF Form 1058)	Unit commander or higher
Incidents involving discrimination or sexual harassment of personnel	No	Yes		
Placement upon the control roster	Yes	Yes		
Art 15 when punishment is **NOT** suspended or does **NOT** exceed 30 days	No	No (use AF Form 3070)	1 year from the date of the commander's NJP decision (signs item 4 of AF Form 3070)	Unit commander or higher (see Note 2)
Art 15 when punishment is suspended **OR** when the punishment period is 31 days or more	Yes	No (use AF Form 3070)	2 years from the date of the commander's NJP decision (signs item 4 of AF Form 3070)	
Civilian court conviction that carries a possible sentence of confinement for 1 year or less (see Note 3)	No	Yes	1 year from the date of the commander's UIF decision (signs section V of AF Form 1058)	Unit commander or higher
Civilian court conviction that carries a possible sentence of confinement for more than 1 year (see Note 3)	Yes	No	2 years from the date the sentence was final	
Conviction adjudged by court martial	Yes	No	2 years from the date the sentence was adjudged	Wing commander or the convening authority, whichever is higher (see Note 2)

UIF Requirements for Officers

Document	Mandatory? (see Note 1)	Use AF Form 1058?	Disposition Date	Early Removal Authority
LOC or LOA	No	Yes	1 year from the date of the commander's UIF decision (signs section V of AF Form 1058)	Wing commander or their designee or issuing authority, whichever is higher
Incidents involving discrimination or sexual harassment of personnel	No	Yes		
Placement upon the control roster	Yes	Yes		
LOR	Yes	Yes (see Note 4)	2 years from the date the commander signs section V of AF Form 1058	
Art 15	Yes	No (use AF Form 3070)	2 years from the date of the commander's NJP decision (signs item 4 of AF Form 3070)	Wing commander or the imposing commander, whichever is higher (see Note 3)
Civilian court conviction that carries a possible sentence of confinement for 1 year or less (see Note 3)	No	Yes	1 year from the date of the commander's UIF decision (signs section V of AF Form 1058)	Wing commander or their designee
Civilian court conviction that carries a possible sentence of confinement for more than 1 year (see Note 3)	Yes	No	2 years from the date the sentence was final	
Conviction adjudged by court martial	Yes	No	4 years from the date the sentence was adjudged	Wing commander or the convening authority, whichever is higher (see Note 2)

Notes:

1. Commanders decide what to do with optional UIF documents. After initially deciding not to establish a UIF, commanders may elect to establish a UIF or include an earlier administrative action in a previously established UIF if the date of the action or document is within six months from the date of the action. This does not apply to individuals who have reenlisted since the date of the document.
2. Punishment must be completed prior to early removal.
3. Also includes actions tantamount to a finding of guilty. The conviction may be from a foreign or domestic court.
4. Use AF Form 1058 to enter the LOR into the UIF, but the commander does not need to submit the AF Form 1058 to the officer since the officer is provided an opportunity to respond to the LOR when it is initially presented.

CONTROL ROSTERS

A control roster is a "watch list" for individuals whose duty performance is substandard or who fail to meet or maintain Air Force standards of conduct, bearing, and integrity, on or off duty. Individuals placed on a control roster are ineligible for a permanent change of station (PCS) (except for mandatory PCS), permanent change of assignment (PCA), temporary duty assignment (TDY), or to attend formal training. Also, eligibility for promotion and reenlistment is limited. Commanders at all levels are authorized to use a control roster.

Purpose

- A control roster is a rehabilitative tool
- Control rosters assist commanders in controlling or evaluating a member's performance and provide the member an opportunity to improve that performance
- Other rehabilitative tools should be considered before placing a member on the control roster
- A single incident of substandard duty performance or an isolated breach of standards not likely to be repeated should not ordinarily be a basis for a control roster action
- Placing an individual on the control roster is not a substitute for more appropriate administrative, judicial, or nonjudicial action. Additionally, individuals are not shielded from other appropriate actions by virtue of being placed on the control roster.

Procedure

- Authority to Place Members on Control Roster:
  - -- *Enlisted*: Commanders at all levels have the authority to add enlisted members to or remove them from the control roster
  - -- *Officers*: Commanders at all levels have the authority to add officers (if the commander is senior to the officer) to a control roster, but officers can only be removed from a control roster by the wing commander or issuing authority, whichever is higher in rank
- Document control roster action on AF Form 1058, *Unfavorable Information File Action*
- Member Response to Control Roster Action:
  - -- *Active Duty*: Acknowledge receipt of the action and has **three duty days** to respond
  - -- *Non-Extended Active Duty (EAD) Reserve or Air National Guard (ANG) Members*: If on duty, acknowledge receipt of the action, and then has **three duty days** to respond. If member departs the duty area prior to these three duty days, serve via certified mail to the member's home address or best available address. Member is presumed to have received this correspondence and has **45 calendar days** to acknowledge the notification and provide pertinent information before a final decision is made.
- Duration of Control Roster:
  - -- *Active Duty*: Up to six months
  - -- *Non-EAD Reserve or ANG*: Up to 12 months
- If the member's conduct or performance does not improve during the observation period, the commander should consider whether a more severe response is required, such as initiating an administrative discharge

- Commanders may direct an Officer Performance Report (OPR) or Enlisted Performance Report (EPR) before entering or removing the person from the control roster, or both
- Unfavorable Information File (UIF) action is required if an individual is placed on the control roster
- Control roster is maintained by the UIF monitor

Consequences

- PCS/PCA reassignment is limited. For Reserve and ANG assignments, individuals remain eligible for PCS while on the control roster, though the gaining commander or Individual Mobilization Augmentee (IMA) program manager will decide if the assignment is appropriate.
- All formal training must be canceled
- Eligibility for promotions and reenlistments is limited
- Placement on the control roster requires mandatory filing in the member's UIF

References

AFI 36-2608, *Military Personnel Records System* (26 October 2015), including AFI36-2608_AFGM2018-01 (5 February 2018)
AFI 36-2907, *Unfavorable Information File (UIF) Program* (26 November 2014)
AF Form 1058, *Unfavorable Information File Action* (31 October 2012)

ADMINISTRATIVE DEMOTIONS

An administrative demotion is a quality force management tool commanders have to help ensure a quality enlisted force. Administrative demotions are intended to place Airmen at a rank commensurate with their skill level and ability. Administrative demotions are not intended to be punitive, nor should they be used as a replacement for more appropriate action under the UCMJ.

Demotion and Appellate Authorities

- Demotion Authority:
  - -- E-7 and below: Group commander (or equivalent level commander)
  - -- E-8 and E-9: MAJCOM/CC, FOA/CC, or DRU/CC (unless delegated to the CV, CS, MP, DP, or NAF/CC). For Reserve members, AFRC/CC is the demotion authority for E-8 and E-9 although this may be delegated to NAF commanders.
- Appellate Authority: Next level commander above the demotion authority

Reasons for Demotion

- Basis for a Demotion Includes:
  - -- Officer trainees or pipeline students if eliminated from training
  - -- Termination of student status of members attending TDY Air Force schools
  - -- Failure to maintain or attain the appropriate skill/grade level
  - -- Failure to fulfill Airman, NCO, or SNCO responsibilities, as defined in AFH 36-2618, *The Enlisted Force Structure*
  - -- Failure to keep fit
  - -- Failure to perform
  - -- Not participating in reserve training, per AFI 36-2254, Vol 1, *Reserve Personnel Participation* (Reserve members)
- Do not use administrative demotions when UCMJ action is better suited
- The basis for the demotion must have occurred in the current enlistment **unless** the commander does not become aware of the facts and circumstances until the subsequent enlistment
- In cases where demotion actions may be appropriate, members should be given the opportunity to overcome their deficiencies prior to the initiation of the action

Due Process

- Consult with the staff judge advocate (SJA) and Military Personnel Flight (MPF) prior to action:
  - -- SJA: Legal sufficiency review of proposed demotion
  - -- MPF: Administrative assistance in assembling and routing the demotion action
- Notify the Member: Member's commander (usually squadron commander) notifies the member in writing of (1) the intention to recommend demotion, (2) the basis for the action, (3) the demotion authority (if other than the initiating commander), (4) the recommended grade, and (5) specific reasons for the demotion and a complete summary of the supporting facts

- Member Response: The member has the right to counsel and to respond within three duty days (30 calendar days for non-extended active duty (EAD) Reserve members) orally, in writing, or both
  - -- Members eligible for retirement may apply for retirement in lieu of demotion
- Initiating Commander Decision: Following the member's response, if the commander elects to continue the proceedings, the case file is forwarded to the demotion authority for action
- Demotion Authority Action: The demotion authority fully reviews the initiating commander's recommendation, the member's response, and the member's entire military record prior to taking action
  - -- Demotion authority can do the following: (1) decline to demote the member, (2) approve the demotion recommendation, or (3) approve a greater or lesser demotion than recommended
- Appeal: The member may appeal the decision of the demotion authority. The appeal is first reviewed by the demotion authority. If the demotion authority does not grant the appeal, the appeal will be sent to the next higher commander for a decision.

"Demotable" Grades

- The following demotions are permitted:
  - -- E-2 may be demoted to E-1
  - -- E-3 may be demoted to E-2
  - -- E-4 through E-9 may be demoted to E-3; however, a demotion of three or more grades is only appropriate when no reasonable hope exists that the member will ever show the proficiency, leadership, or fitness that earned the initial promotion
- High Year Tenure (HYT) Implications from Administrative Demotions: Administrative demotions may trigger mandatory HYT separations from the service. When a member is demoted, the member assumes the HYT restrictions of that grade and will be separated within 120 days of the effective date of demotion.
  - -- Personnel with 16 or more years total active federal military service (TAFMS): "Lengthy Service Qualified;" HYT revised to the 20-year point
  - -- SMSgt and below over 20 years: HYT revised to the last day of the 6th month following demotion effective date

Restoration of Grade

- Once the demotion action is complete, the demotion authority may, if appropriate, restore the member's original grade between three months and six months after the effective date of the demotion

Demotion of Reserve Members

- Rules governing demotion of a reserve a member is similar in concept to the rules governing active duty members; however, the processing differs. See AFI 36-2502, *Airmen Promotion/ Demotion Actions*, Chapter 9, for the procedures.
- Immediate commander can, when necessary, use certified mail sent to the reserve member's address or best available address when notifying a reserve member of his/her intent to recommend demotion, and, when applicable, his/her intent to forward the demotion action to the demotion authority

- Demotion authority may also use certified mail to notify a reserve member of his/her decision to demote the member and of the member's right to appeal. Reserve members not on EAD have 30 calendar days to submit an appeal.

References

AFPD 36-25, *Military Promotion and Demotion* (2 November 2018)
AFI 36-2254, Vol 1, *Reserve Personnel Participation* (26 May 2010)
AFI 36-2502, *Enlisted Airman Promotion/Demotion Programs* (12 December 2014), incorporating through Change 2, 14 October 2016
AFH 36-2618, *The Enlisted Force Structure* (5 July 2018)

SELECTIVE REENLISTMENT

The selective reenlistment program (SRP) is designed to ensure only enlisted members who consistently demonstrate the capability and willingness to maintain high professional standards are afforded the privilege of continued military service. The program identifies members nearing the end of their current term of service and provides a process for the commander to deny reenlistment.

Standard for Denial of Reenlistment

- Commanders have total SRP selection authority (as long as no other factors barring immediate reenlistment exist)
- Commanders may non-select any Airman for SRP as long as the Airman is in his/her "SRP window"
- Commanders will not use the SRP to deny reenlistment when involuntary separation is more appropriate

Immediate Supervisor's Role

- Immediate supervisors are responsible for ensuring members meet quality standards
- Supervisors (and commanders) are notified by the Military Personnel Section (MPS) when Airmen are nearing the end of their term of enlistment and are subject to SRP consideration. The supervisor provides recommendations for selection/non-selection to the commander.
- SRP recommendations are made using AF Form 418, *Selective Reenlistment Program Consideration*

Commander's Role

- Commanders determine whether a member should be denied reenlistment
  - -- Decisions to deny reenlistment should be based on a demonstrated lack of capability and an unwillingness to maintain high professional standards. Unit commanders consider the supervisor's recommendation, the member's duty performance, and career force potential before making a decision.
  - -- The commander should also consider (1) Enlisted Performance Reports (EPRs), (2) unfavorable information from any substantiated source, (3) the Airman's willingness to comply with AF standards, and (4) the Airman's ability to meet required training and duty performance levels
  - -- Commanders shall not consider derogatory information from a previous enlistment as a basis for denial of subsequent enlistments
- Commanders may reverse their SRP decisions at any time

Member Appeals of Denial of Reenlistment

- If the supervisor recommends non-selection or the commander non-concurs with the supervisor's recommendation to allow the member to reenlist, the commander must notify the member of the specific reasons for non-selection, areas needing improvement, appeal opportunity, promotion ineligibility, and the possibility of future reconsideration and selection
- Member Notification of Intent to Appeal: The member has three calendar days to notify the commander of whether they intend to appeal the reenlistment denial (AF Form 418, Block V)
- Member Submission of Appeal: If the member decides to appeal, the member has a total of 10 calendar days to submit the appeal itself. Member submits the appeal to the MPS for processing.

-- Appellate Authorities:

--- *Group Commander:* First term Airmen and retirement eligible Airmen

--- *Wing Commander:* Second term Airmen and career Airmen with fewer than 16 years of service at the end of their current enlistment

--- *Secretary of the Air Force (SecAF)*: Airmen with more than 16 years of service but less than 20 years of service at the expiration of their current enlistment

-- Any commander in the reviewing chain may approve an Airman's appeal as it is routed to the ultimate appellate authority

- Legal Review of Reenlistment Denial Appeals: A legal review is required when a member appeals SRP decisions. It is recommended that commanders contact the servicing legal office prior to notifying a member of a non-selection decision.

Collateral Impact of Reenlistment and/or Denials

- SRP non-selection makes members ineligible for promotion and automatically cancels projected promotion line numbers
- Once a member reenlists, any misconduct taking place in the earlier enlistment generally cannot be used as a basis for an administrative discharge action

References

AFI 36-2606, *Reenlistment and Extension of Enlistment in the United States Air Force* (27 July 2017)
AF Form 418, *Selective Reenlistment Program Consideration for Airmen* (1 August 2017)

RESERVE REENLISTMENTS

The quality of the Air Force Reserve program depends on the quality of its enlisted members. Reenlistment in the Air Force Reserve is not a right; it is a privilege. Commanders have significant discretion in making reenlistment decisions. In making this determination, commanders should primarily rely upon evaluations of the member's performance during their current enlistment and supervisor recommendations.

Standard for Denial of Reenlistment

- When considering Reservist reenlistment, commanders should consider: (1) supervisor recommendations, (2) EPR ratings, (3) unfavorable information from any substantiated source, (4) compliance with AF standards, and (5) ability to meet required training and duty performance levels
- Other factors for a commander to consider include: (1) potential, (2) grade and skill-level, (3) aptitude, (4) education, (5) motivation, (6) self-improvement efforts, (7) training and participation, (8) derogatory information, (9) physical condition, (10) attitude and behavior, and (11) assumption of responsibility

Commander's Role

- Commanders are instructed to appoint an (NCO) at the 7 or 9 skill-level to serve as unit career advisor (UCA) to administer the Career Retention Program
  - -- Unit supervisors give the UCA recommendations on members being considered for reenlistment
  - -- Unit commanders consider the UCA's recommendation, the member's duty performance, and career force potential before making a decision
  - -- Unit commanders make the final decision on whether a person is eligible for reenlistment or extension
- Common Factors Precluding Reenlistment:
  - -- Unsatisfactory participation, performance, attitude, or behavior
  - -- Currently undergoing nonjudicial punishment (Article 15)
  - -- Conscientious objectors
  - -- Awaiting HQ AFRC consideration of a waiver of physical disqualification
- Even when policy does not prohibit a member from reenlisting, the commander should carefully consider whether the member meets the Air Force's quality standards

Non-Selection for Reenlistment

- Pre-Coordination: Commanders should contact the servicing legal office **PRIOR** to notifying a member of a non-selection decision
- Commander Action: The commander or supervisor completes AF Form 418, *Selective Reenlistment Program Consideration*, when not selecting a member for reenlistment and sends it to the retention program manager
- Member Notification: If the unit commander selects a member for reenlistment but later deems the member ineligible to reenlist, the commander prepares AF Form 418 and processes it as if it were an initial non-selection

- Lengthy Service Exception to Denial of Reenlistment: Except for physical disability or for cause, members may not be denied reenlistment if they have completed at least 18 but less than 20 years satisfactory service for retirement purposes

Appeals of Denial of Reenlistment

- Members who have not been selected for reenlistment have a right to appeal
  - -- Member must submit a written appeal to the Military Personnel Flight (MPF) by the next scheduled Unit Training Assemblies (UTA) or 30 days after the date he/she was notified, whichever is later
  - -- Members may appeal non-selection for reenlistment through one of two options:
    - --- *Senior Rater Appeal*: Unit members may appeal to their Senior Reserve Commander for final selection or non-selection authority
    - --- *Denial of Reenlistment Appeal Board*: Upon approval by the member's senior Reserve commander, a member may present their appeal to a three-person appeal board which will review all documentation and make a recommendation to the member's senior Reserve commander for final action
      - ---- Member's Career Enhancements Section appoints all board members
      - ---- All board members must be superior in grade to member
      - ---- At least one board member must be a field grade officer
      - ---- For enlisted appeal boards, board members must be E-7 and above
- Under either appeal option, the ultimate decision of the member's Senior Reserve Commander is final

---

References

AFI 36-2606, *Reenlistment and Extension of Enlistment in the United States Air Force* (27 July 2017)
AF Form 418, *Selective Reenlistment Program Consideration* (1 August 2017)

OFFICER AND ENLISTED EVALUATION SYSTEMS

The single most important element needed for successful mission accomplishment is performance. The officer evaluation system (OES) and the enlisted evaluation system (EES) are the Air Force's programs for evaluating and documenting performance. Commander involvement in the program is critical to developing and retaining a high-caliber force.

- The Air Force evaluation system is generally comprised of the Airman Comprehensive Assessment (ACA) (i.e., initial and mid-term rater performance feedback), Enlisted Performance Reports (EPR), Officer Performance Reports (OPR), Letters of Evaluation (LOE), and training reports
- The servicing Military Personnel Section (MPS) provides command support and guidance regarding officer and enlisted evaluations. Air Force Personnel Center (AFPC) provides training and guides on their website.
- Unit commanders encourage first-time supervisors to obtain OES/EES training within 60 days of being appointed as a rater. Additionally, the commander encourages all unit members to receive general OES/EES training on an annual basis as needed.
- Access to Evaluations: Evaluations are For Official Use Only (FOUO), subject to the Privacy Act, and exempt from public disclosure. Only persons who have a proper need to know may read the evaluations.

Airman Comprehensive Assessment

- The first step in the evaluation of any Air Force member is initial and midterm performance feedback provided to the member by their rater
  - -- Initial Feedback: Within 60 days of a change in supervision
  - -- Midterm Feedback: Halfway through the member's rating period
- ACA sessions must provide realistic feedback to improve the ratee's performance and written comments, not just marks on the form. Any behavior that may result in further administrative or punitive action should be documented in a separate document.
- The rater provides the original ACA worksheet to the ratee. The rater may keep a copy for personal reference, but the ACA worksheet will not be made part of any official personnel record nor be included in an individual's PIF, **UNLESS** the ratee introduces it first or alleges he/she did not receive required feedback or claims the sessions were inadequate.

Performance Reports – General Considerations

- OPRs and EPRs are critical in nearly every personnel decision within the Air Force. They form the basis for promotion, training, reenlistment, and other administrative decisions. A poorly managed evaluation system inadequately identifies top performers and undermines confidence in the fairness of the system.
- Performance reports should take into account any adverse administrative or punitive actions taken against the individual during the rating period
- Improperly processed evaluations may limit commanders' options when pursuing adverse administrative actions against poor performers
- Disagreements between evaluators (i.e., primary rater and senior rater) should be explained in the disagreeing rater's comments block
  - -- Preceding evaluators are first given an opportunity to change the evaluation, however, they will **NOT** change their evaluation just to satisfy a disagreeing senior evaluator

-- If, after discussion, the disagreement remains, the disagreeing evaluator marks the "non-concur" block and must provide specific comments in their block to explain each item in disagreement. An AF Form 77 may be attached when necessary as a continuation sheet to capture the specifics of the disagreement.

Performance Reports – Timing

- OPRs: Complete OPRs in accordance with timing requirements set forth in Tables 3.2 (RegAF/ANG) and 3.3 (AFR) of AFI 36-2406, *Officer and Enlisted Evaluation Systems*
- EPRs: All EPRs are subject to a "static close out date" (SCOD). This is the date that all enlisted evaluations will close out for a specific grade and is the date used to determine the final Time in Grade/Time in Service (TIG/TIS) eligible pool for senior rater stratification/endorsement and forced distribution allocations. EPRs cannot be signed before this date. The local Force Support Squadron (FSS) is the point of contact (POC) for any questions by raters.

Performance Reports – Required and Prohibited Comments

- Some specific comments or entries are required and must be included in OPRs and EPRs. These comments should be drafted as stated in the AFI. Slight deviations are allowed, but entries significantly deviating from the recommended format are unacceptable. These comments and entries include, but are not limited to:
  - -- For a referral report or training report (TR), the evaluator must specifically detail the behavior or performance that caused the report to be referred (referral reports are discussed in detail below)
  - -- Explaining any significant disagreement with a previous evaluator on a performance report
  - -- Comments relating to the ratee's behavior are mandatory on the ratee's next OPR, EPR, TR, and an officer's next promotion recommendation form (PRF), if the ratee has been convicted by court-martial
  - -- If performance feedback was not accomplished, the reason why it was not accomplished must be stated
- Certain comments are inappropriate to include in performance reports. Some of the common mistakes include, among others:
  - -- Duty history or performance outside the current reporting period, except as allowed in AFI 36-2406, paras. 1.12.3.4 and 1.12.4.1
  - -- Comments referring to Airman Comprehensive Assessment sessions, except in the "Performance Feedback Certification" block
  - -- Events that occur after the close-out date
  - -- Any action against an individual that resulted in an acquittal or failure to implement an intended personnel action. This does not necessarily bar commenting on the underlying misconduct that formed the basis for the action, but consult with the servicing staff judge advocate before doing so.
  - -- Actions taken by a member outside the normal chain of command that represent guaranteed rights of appeal, such as issues raised with the inspector general
  - -- Race, ethnic origin, gender, age, or religion of the ratee

-- Temporary or permanent disqualification under DoDM5210.42_AFMAN 13-501, *Nuclear Weapons Personnel Reliability Program* (PRP)

-- Participation in drug or alcohol abuse rehabilitation programs

-- Performance as a court-martial member

-- Punishment received as a result of an administrative or judicial action. Restrict comments to the conduct or behavior that resulted in the action.

SecAF Mandated Report of Ratee Criminal Convictions to Rater

- By order of the SecAF (per AFI 36-2406, paragraph 1.8), **ALL** Air Force members who are on active duty or in an active status in a Reserve Component, shall report (in writing) to their rater within 72 hours any conviction for a violation of a criminal law of the United States or violations of a criminal law of any other country to the member's rater (first-line military supervisor) or summary courts-martial convening authority

  -- For purposes of this policy, the term "conviction" includes a plea or finding of guilty, a plea of nolo contendere (no contest), and all other actions tantamount to a finding of guilty, including adjudication withheld, deferred prosecution, entry into adult or juvenile pretrial intervention programs, and any similar disposition of charges

  -- For purposes of this policy, a criminal law of the United States includes any military or other Federal criminal law; any State or equivalent criminal law or ordinance; and any criminal law or ordinance of any county, parish, municipality, or local subdivision of any such authority, ***other than motor vehicle violations that do not involve a court appearance***

- Active duty members shall submit reports under this policy within 72 hours of the date the conviction is announced

- Commanders and/or supervisors who have questions regarding whether a particular conviction triggers the mandated comment should consult with their staff judge advocate

Referral Reports

- Certain comments or ratings in a performance report may result in it being "referred" to the ratee for comments. An evaluator whose ratings or comments cause a report to become a referral report must give the ratee a chance to comment on the report.

- <u>Refer a Performance Report When</u>:

  -- An evaluator marks "Does Not Meet Standards" in Section III or in any performance factor in Section IX of the OPR ; marks "Met some but not all expectations" or "Do Not Retain" in any section of the EPR; or

  -- Any comments or attachments are derogatory; imply/refer to behavior incompatible with standards of personal or professional conduct, character, judgment, or integrity; and/or refer to disciplinary actions

- The procedures involved when referring an OPR or EPR are provided in AFI 36-2406, beginning with paragraph 1.10 (see AFI 36-2406, Figure 1.1, for referral memorandum)

References

DoDM5210.42_AFMAN 13-501, *Nuclear Weapons Personnel Reliability Program* (PRP) (19 September 2018)
AFI 36-2406, *Officer and Enlisted Evaluation Systems* (8 November 2016)
AF Form 77, *Letter of Evaluation* (12 February 2009)
AF Form 475, *Education/Training Report* (29 March 2017)
AF Form 707, *Officer Performance Report (Lt through Col)* (31 July 2015)
AF Form 724, *Airman Comprehensive Assessment Worksheet (2Lt through Col)* (1 July 2014)
AF Form 910, *Enlisted Performance Report (AB through TSgt)* (30 November 2015)
AF Form 911, *Enlisted Performance Report (MSgt through SMSgt)* (31 July 2015)
AF Form 912, *Enlisted Performance Report (CMSgt)* (29 May 2015)
AF Form 931, *Airman Comprehensive Assessment (ACA) Worksheet (AB through TSgt)* (28 July 2017)
AF Form 932, *Airman Comprehensive Assessment (ACA) Worksheet (MSgt through CMSgt)* (14 September 2017)

OFFICER PROMOTION PROPRIETY ACTIONS

Commanders may recommend that the Secretary of the Air Force (SecAF) take action when an officer is not qualified for promotion, should be removed from a promotion list or have the officer's promotion date delayed. In such cases, the commander presents information to SecAF for a determination. These actions are known as officer promotion propriety actions. Generally, only SecAF (or designee) may end an officer promotion delay action or approve a promotion list removal action.

Preliminary Considerations

- Promotion Propriety Actions are **NOT** intended for use as a disciplinary action
- Before initiating a promotion propriety action, the commander **MUST** determine if a ***preponderance of the evidence*** shows it is more likely than not that the officer is not mentally, physically, morally, or professionally qualified to perform the duties of a higher grade
- If an officer is not qualified to perform the duties of the next grade, the proper authority must take promotion propriety action before the effective date of promotion
- If commanders believe an officer is not qualified to perform the duties of the next grade, they should speak with the servicing staff judge advocate (SJA) to determine whether sufficient evidence exists to support a promotion proprietary action
- Before initiating a promotion propriety action to delay an officer's promotion date, consider whether there is enough time to observe the officer and make a determination that the officer is qualified to promote prior to their promotion date

Not Qualified for Promotion (NQP)

- To be eligible for promotion, all officers are obliged to meet the "exemplary conduct" standard set forth in 10 U.S.C. § 8583
- The officer's immediate commander initiates the recommendation to find the officer NQP and forwards it with appropriate coordination to the major command commander for review
- For officers meeting central selection boards, the NQP recommendation case file must arrive at HQ AFPC/DPPPO before the board convenes. This recommendation is valid for only one selection board.
- Before separating a second lieutenant found NQP, an attempt should be made to retain the officer on active duty for six months from the date promotion would have occurred (unless retention is inconsistent with good order and discipline) and give the officer an opportunity to overcome any problem and qualify for promotion
- NQP should never be used in place of discharge proceedings or other appropriate disciplinary actions

Removal from a Promotion List

- The officer's immediate commander initiates the removal action by making a recommendation to the reviewing authority (usually the wing commander). If the wing commander concurs, the recommendation and package are forwarded to AFPC through the servicing MPF. The package then goes to SecAF, who must approve any removal action.
- The immediate commander's verbal notification of removal action automatically delays the officer's promotion until SecAF makes a decision on the removal action
- If the officer is projected to promote close in time to the notification, close coordination with the servicing MPF and AFPC should also occur

- The AF Form 4363 or AF Form 4364 must state specifically why the commander believes the officer is not mentally, physically, morally, or professionally eligible to promote to the next higher grade
- The package must contain appropriate documentation that has been served on the member. Appropriate documentation includes administrative action, judicial or non-judicial punishment, reports of investigations, commander directed investigations and any other documentation that supports the recommendation.

Delaying a Promotion

- Initiating a Promotion Delay: The officer's immediate commander initiates the promotion delay by making a recommendation to the reviewing commander (usually the wing commander) before the effective date of promotion and forwards it to AFPC through the servicing MPF. If the reviewing commander does not agree that the officer's promotion should be delayed, the action is terminated and not forwarded to AFPC.
- Effective date of Promotion Delay: The promotion delay is effective when the immediate commander notifies the officer of the delay, either verbally or in writing
- Approval Authority for Promotion Delays: The reviewing commander (usually the wing commander) approves initial promotion delays up to six months. **ONLY** SecAF may grant extensions up to an additional 12 months following the initial promotion delay.
- When an officer is notified verbally, a written package should be served on the officer as soon as practicable. The package should list all the documents served on the officer and contain a thorough statement as to why the officer is not mentally, physically, morally, or professionally ready to promote to the next higher grade.
- Member's Response to Promotion Delay: The officer whose promotion is delayed may make a written response to SecAF
- Authority to Terminate Promotion Delay: Generally, **ONLY** SecAF (or designee) has authority to end a promotion delay
  - -- Notwithstanding the commander's recommendation, SecAF (or designee) may promote an officer on his/her original effective date; promote an officer with a date of rank adjustment; extend the officer's promotion delay; or remove the officer from the promotion list
  - -- A reviewing commander may terminate a delay **ONLY** when the delay was initiated to conduct an investigation or inquiry, and upon completion, there was no finding or conclusion that substantiated or partially substantiated any allegation and no disciplinary action of any kind (administrative, non-judicial, or judicial) is taken against the officer

Promotion Propriety Action Procedures

- Notification to Officer: The commander must inform the officer, verbally or in writing, of the promotion propriety action before the effective date of promotion
- Notification in Writing is Preferred: If written notification is not possible, confirm the action in writing as soon as possible
- Statement of Reasons: The action itself must contain a clear statement stating "why" the officer should be removed from the promotion list, or why the officer's promotion should be delayed, or why the promotion delay should be terminated. The recommendation **MUST** list the evidence that was served on the officer supporting the action. It must also show that the affected officer had an opportunity to review the information and respond to it if they wish.

- Officer's Response: The officer should acknowledge the action and be allowed five working days to respond. Include in the package any comment from the officer.
- AFI 36-2501, *Officer Promotions and Selective Continuation*, Table 5.1, contains procedures for processing propriety actions

Reserve and Air National Guard Officers

- Commanders of officers in the Air Force Reserves and Air National Guard initiate a promotion propriety action when there is cause to believe that the officer is not mentally, physically, morally, or professionally qualified to perform duties of the next higher grade
- An officer's wing commander or equivalent initiates the promotion propriety action

---

References

AFI 36-2501, *Officer Promotions and Selective Continuation* (16 July 2004), incorporating through Change 3, 17 August 2009

AFI 36-2504, *Officer Promotion, Continuation and Selective Early Removal in the Reserve of the Air Force* (9 January 2003), incorporating through Change 5, 19 October 2007, certified current 22 January 2010

AF Form 4363, *Record of Promotion Propriety Action* (10 June 2008)

AF Form 4364, *Record of Promotion Delay Resolution* (20 December 2010)

ENLISTED PROMOTION PROPRIETY ACTIONS

Air Force commanders are authorized to delay enlisted promotions or remove enlisted members from an approved promotion list when the commander deems it necessary in the interests of good order and discipline. Air Force promotion policy is to select individuals for promotion based on potential to serve in the next higher grade. Only the best should be promoted due to the limited vacancies in higher grades. The following tools are available to commanders when managing enlisted promotions.

Non-Recommendation for Promotion

- An enlisted member is considered ineligible for promotion when non-recommended or removed from the promotion list by the promotion authority before the effective date of promotion, commonly referred to as "***redlining***"
- Standard: Poor or declining performance trends or recent serious misconduct
- A promotion authority can non-recommend E-3s and below in monthly increments up to six months. All other ranks are non-recommended for a specific promotion cycle.
- Airmen also become ineligible for promotion under other circumstances as outlined in AFI 36-2502, *Airmen Promotion/Demotion Programs*, Table 1.1, which include, but are not limited to:
  - -- Placement on the control roster
  - -- Serving a probationary period as part of an involuntary discharge action
  - -- Under a suspended reduction in grade imposed through nonjudicial punishment under Article 15, UCMJ
  - -- Conviction by court-martial or undergoing punishment or suspended punishment imposed by a court-martial
  - -- Conviction by a civilian court (excluding minor traffic violations), undergoing punishment or suspended punishment, probation, or work release program

Withholding of Promotion

- The immediate commander has the authority to withhold a promotion for up to one year after a member's selection for the next higher grade, but before the effective date of promotion
- A higher authority (wing or equivalent level commander) must approve extensions beyond a year
- This action allows the commander to evaluate unique or unusual events so a sound promotion decision can be made. It is not intended to be used as a punishment or inducement for an Airman to conform to acceptable standards of performance.
- The reasons for withholding a promotion can be found in AFI 36-2502, Table 1.2, which include, but are not limited to, when the member is:
  - -- Awaiting a decision on an application as a conscientious objector
  - -- Under court-martial or civilian charges
  - -- Placed into the Alcohol and Drug Abuse Prevention and Treatment program (ADAPT)
  - -- Under investigation or the subject of an inquiry (formal or informal) that may result in action under the UCMJ or prosecution by civilian authorities
  - -- When requested by the member's commander based on other reasons with prior approval from the individual's wing commander

- Effect on Date of Rank: If the commander terminates the withhold action, the member receives his/her original date of rank, and the effective date is the date the commander terminates the withhold action and recommends promotion

Deferral

- A deferral is a delay in promotion for a specified period of time
- The promotion authority may defer promotion to E-5 or higher for up to three months. Members awaiting promotion to the grades of E-1 to E-4 are not subject to promotion deferral.
- Standard: A deferral action is begun to determine if the member meets acceptable behavior and performance standards for the higher grade. If there is clear evidence an NCO is not suited to take on the increased responsibilities of the higher grade, then non-recommendation is the right course of action, not deferral.
- Effect of Date of Rank: The date of rank and effective date is the first day of the month after the deferral period ends

Procedures

- When non-recommending, deferring, or withholding promotions, the commander informs the member of adverse actions before the promotion effective date. If the notification is verbal, the commander must confirm in writing within five workdays.
- The notification must include specific reasons, dates, occurrences, and duration of the action
- The notification and the Airman's acknowledgment is maintained in the Automated Records Management System (ARMS)

Reserve Enlisted Members

- Standard: If the ***preponderance of the evidence*** indicates it is more likely than not that a Reserve enlisted member does not have the qualifications to be promoted
- Documentation: Commander disapproves promotions using AF Form 224, *Recommendation and Authorization for Promotion of Airman as Reserve of the Air Force*

References

AFI 36-2502, *Enlisted Airman Promotion/Demotion Programs* (12 December 2014), incorporating through Change 2, 14 October 2016
AFI 44-121, *Alcohol and Drug Abuse Prevention and Treatment (ADAPT) Program* (18 July 2018)
AF Form 224, *Recommendation and Authorization for Promotion of Airman as Reserve of the Air Force* (22 June 2012)

3

CHAPTER THREE: NONJUDICIAL PUNISHMENT UNDER ARTICLE 15, UCMJ

NONJUDICIAL PUNISHMENT (NJP) OVERVIEW AND PROCEDURES

Nonjudicial punishment (NJP) under Article 15, UCMJ, provides commanders with an essential and prompt means of maintaining good order and discipline outside of the court-martial process. NJP is designed to promote positive behavior changes in service members without the stigma of a court-martial conviction.

Overview

- Generally, any *commander* who is a *commissioned officer* may impose NJP for minor offenses committed by members under his/her command
- NJP procedures provide quick disciplinary action for a commander while maintaining due process for the accused member

Prerequisites

- Nature of the Misconduct – Minor Offenses: Nonjudicial punishment is solely utilized for the disposition of UCMJ offenses. Generally, it should be reserved for "minor offenses" under the UCMJ.
  - *Minor Offenses*: An offense is usually **NOT** considered minor if the maximum imposable punishment at a general court-martial for that offense includes a dishonorable discharge or confinement for more than one year
  - The decision whether an offense is "minor" is a matter of discretion for the commander imposing NJP. Factors to consider for determining a "minor offense" include:
    - The nature of the offense and the circumstances surrounding its commission
    - The effect of both the misconduct and the resulting NJP on good order and discipline
    - The member's age, rank, duty assignment, record, and experience
    - The effect of NJP on the member and the member's record
- Shared Authority of Parent Unit Commander and Temporary Duty Assignment (TDY) Unit Commander to Issue NJP:
  - Member is not attached to TDY command: Home-station commander should handle the disposition of NJP
  - Member is attached to TDY command: TDY commander should confer with the member's parent organization to determine the member's background, past duty performance, and other relevant factors before initiating action
- Withholding of NJP Authority by Superior Commanders: Commanders at any echelon may withhold from any subordinate commander all or part of the authority—including the authority to impose NJP for specific types of offenses—that the subordinate would otherwise have under the UCMJ
  - Withholding of NJP authority by a superior commander should be in writing
  - Withholding of authority by a superior commander does not constitute unlawful command influence because it represents the independent exercise of command by the superior commander
- Swift Command Action Required: AFI 51-202, *Nonjudicial Punishment*, mandates that 80% of non-judicial punishment actions should be completed within 39 days from the report of the offense:

  - -- Date of "discovery" of offense to date of NJP offer: **21 days**. "Date of discovery" means the date when an investigative agency (e.g., Air Force Office of Special Investigations (OSI), Security Forces Office of Investigations (SFOI), Inspector General (IG), legal office, commander, supervisor, or first sergeant) becomes aware of the allegation and has identified a subject.
  - -- Date of NJP offer to date of NJP completion: **18 days**. This metric is further subdivided so no more than nine days pass from offer to imposition of punishment, and no more than nine days pass from punishment to staff judge advocate (SJA) review of the completed NJP.
- Statute of Limitations: Unless the member is absent without leave (AWOL) or fleeing from justice, NJP may not be imposed for offenses committed more than two years before the date of NJP punishment imposition

Procedures

- Forum Choice: For the member accused, NJP is a forum choice—meaning a commander cannot involuntarily impose NJP under Article 15 (unless the member is embarked on a naval vessel), but instead offers to adjudicate the alleged misconduct at proceedings outlined in Article 15 in lieu of doing so at a court-martial
- SJA Consultation Required: Commanders must confer with the SJA, or a designee, prior to both initiation of NJP proceedings and imposition of punishment. The military justice section of the base legal office prepares the AF Form 3070, *Record of Nonjudicial Punishment Proceedings*.
- Standard of Proof: No specific standard of proof is applicable to NJP proceedings in the Air Force
  - -- Commanders should, nonetheless, recognize that a member has the option to turn down the offer of NJP and demand trial by court-martial, where proof beyond a reasonable doubt by competent evidence is required for conviction. Commanders should consider whether such proof is available before initiating action under Article 15 and understand the consequences of offering NJP without sufficient evidence, i.e., an acquittal at court-martial.
  - -- If the evidence does not rise to the level of proof beyond a reasonable doubt, NJP action is usually not advisable. Instead, commanders should consider lesser forms of disciplinary action, e.g., Letter of Reprimand (LOR), or if warranted, administrative discharge.
- Offering NJP: Commanders initiate NJP action by serving the AF Form 3070
  - -- A member must always be informed of the identity of the commander who will actually make the findings and punishment decision before the member makes an election to accept NJP or demand court-martial
  - -- If a new commander assumes responsibility for the case after the member was offered NJP proceedings, but before findings are made, inform the member of the identity of the new commander and provide three additional duty days for the member to decide to accept the NJP proceedings or demand trial by court-martial

Accused Member's Rights

- Unless embarked on a naval vessel, an accused has the right to refuse an NJP and to demand trial by court-martial
- An accused service member served with an NJP has three duty days to in which to decide whether to "accept" NJP as the "forum" for their case
- "Accepting" NJP as the forum is **NOT** an admission of guilt. It is simply a choice by the member not to assert their right to a trial by court-martial and to instead allow the commander to determine his/her guilt, and punishment, if their commander finds him/her guilty. After accepting NJP as the forum, the member has the right to either contest or admit guilt, at their discretion.

- An accused service member has the following rights in the NJP process. When responding to the offer of NJP on the AF Form 3070, the accused member must annotate whether they exercised the following rights by initialing in the appropriate box:
  - -- Right to Counsel:
    - --- Commanders should encourage members to consult with the area defense counsel (ADC) in all cases. The AF Form 3070 directs that an appointment with an ADC be established on behalf of a member prior to the commander notifying that member of the commander's intent to impose NJP.
    - --- Typically, an ADC appointment will be arranged for the member by the First Sergeant or by legal office personnel prior to the member being notified of the offer of NJP
  - -- Review of Evidence: The accused member has the right to examine all statements and evidence the commander intends to consider in deciding guilt, and then if applicable, punishment. The legal office normally supplies the evidence to the ADC.
  - -- Presentation of Evidence: If a member decides to accept NJP, he/she is entitled to present matters in defense, mitigation, and extenuation. Members may present matters in person, in writing, or both.
    - --- *Written Matters*: Must be submitted within three duty days, unless the commander grants an extension for good cause shown
    - --- *Personal Appearance*: May be public or private. Must be requested by the member when he/she make her NJP "elections" within three duty days of the "offer" of NJP. Except under extraordinary circumstances or when the imposing commander is unavailable, a member is generally entitled to appear personally before the imposing commander and present matters in defense, mitigation, or extenuation. If the member chooses to make a personal appearance, the member also has the right to:
      - ---- Be accompanied by a spokesperson (who does not have to be a lawyer)
      - ---- Present witnesses who are reasonably available
    - --- *Public Personal Appearances*: A member may request that a personal presentation be open to the public
      - ---- The commander may open the personal appearance to the public, even though the member does not request it or agree that the appearance should be open
      - ---- "Public" NJP should neither be intended as, nor result in, the shame or humiliation of the member. For example, public NJP at a commander's call, unit training assembly, or other public gathering would be inappropriate (unless the member consents). Rather, NJP proceedings may be attended by a limited number of people in a more private setting, i.e., the commander's office.
      - ---- The individuals in attendance at NJP proceedings should normally be limited to those in the member's supervisory chain or people who can assist the commander in making a decision

Commander's Findings

- Commanders must refrain from determining or considering punishment until guilt has been determined based on all the evidence, as well as the matters submitted by the member
- After a full and fair consideration of all matters in defense, mitigation, and extenuation, the commander must first determine whether or not the member committed the offense:

-- If the commander determines the accused to be "not guilty" the NJP process is concluded

-- If the commander determines the member to be "guilty," the commander must then determine what punishment to impose

Determining a Punishment

- Commanders are required to confer with the SJA (or his/her attorney designee) before imposing punishment except where impracticable due to military exigencies. The legal office will normally input the appropriate punishment language on the AF Form 3070.
- Commanders should tailor the punishment to the offense and the member:
  -- Ordinarily, the commander should impose the least severe punishment sufficient to correct and/or rehabilitate the member
  -- For example, commanders should generally impose an unsuspended reduction in grade (e.g., "hard bust") in combination with forfeitures of pay only when the maximum exercise of NJP authority is warranted (e.g., repeat offender, most serious offenses, past rehabilitative efforts have failed, or recalcitrant offender). This general policy does not preclude such punishment where warranted in the sound exercise of judgment by the commander imposing punishment.
- If a change in commander occurs after imposition of punishment but before the appeal decision has been made, inform the member in writing of the identity the new commander and obtain acknowledgment of this change from the member

Punishment Limitations

- General Limitations: Punishment limitations based upon the commander's grade and the member's grade are summarized in AFI 51-202, Tables 3.1 and 3.2, and on page 3 of the AF Form 3070
- Specific Punishment Limitations: There are limitations on the combination of certain punishments:
  -- *Restriction to Limits and Extra Duties*: If restriction and extra duties are combined, they must run concurrently (i.e., at the same time) and must not exceed the maximum time imposable for extra duties (45 days when field grade or general officers impose punishment; 14 days when company grade officers impose punishment)
  -- *Arrest in Quarters*: For officers only, and cannot be combined with restriction
  -- *Forfeiture of Pay*: Unless the commander otherwise specifies, unsuspended forfeitures of pay take effect on the date the commander imposes punishment
  -- *Reductions in Grade*: Unless the commander otherwise specifies, unsuspended reductions in grade take effect on the date the commander imposes punishment. Suspension of a punishment takes effect on the imposition date.

Appeals

- Members are entitled to appeal nonjudicial punishment to the commander who imposed the original punishment, and then to the next superior authority in the commander's chain of command
  -- *Scope of Appeal*: The member may appeal the guilty finding, the punishment, or both
    --- A reserve member is not required to make this appeal election in Title 10 status or in person
  -- *Timeline for Appeal*: Five calendar days after accused member's notification of punishment. Commanders may grant extensions for good cause shown (written requests only).

-- *Submission of Matters*: Members must submit all evidence supporting an appeal to the commander who imposed the original punishment

- Final Appeal – Superior Commander: After considering any new matters submitted by the member, the imposing commander may deny all relief, grant partial relief, or grant all relief requested by the accused member. If the imposing commander does not grant all the requested relief, he/she must forward the appeal to the appellate authority through the servicing SJA. If the imposing commander is a section commander of a squadron, the next superior authority is the squadron commander's superior commander.

  -- *Final action on Appeal*: The appellate authority may deny all relief, grant partial relief, or grant all relief requested by the member. The appellate authority's decision is *final.*

  -- *No Stay on Previously Approved Punishments*: Punishments are not stayed during the appeal process, i.e., the punishment will run until overturned on appeal (exception: any unexecuted punishment involving restraint or extra duties will be delayed until after appeal if the member requests such a delay and the appellate authority has not already decided the case within five days)

Specific Rules Involving NJP for Reserve Service Members

- Jurisdiction over Offenses by Reservists: A reserve commander **MUST** be in Title 10 status to offer NJP and sign AF Form 3070 and the reserve member **MUST** be in Title 10 status when served the AF Form 3070

- Involuntary Recall of Reservists for Imposition of NJP: A reserve member generally cannot be involuntarily ordered to a duty status solely for purposes of initiating or completing NJP actions. However, Article 2, UCMJ, does permit a MAJCOM commander or equivalent to grant waivers in appropriate cases.

- NJP Authority – Traditional Reservists (CAT A): Air Reserve Component (ARC) unit commanders have UCMJ authority over reserve members assigned or attached to their respective units, even if the reserve member is deployed

  -- *Concurrent Authority over Traditional Reservists*: Active Duty (AD) commanders of Reserve members have concurrent UCMJ authority over all Reserve members attached to their respective units

  -- Commanders of TDY or deployed Traditional Reservist **MUST** coordinate with the reserve member's parent organization commander prior to NJP imposition

- NJP Authority – Individual Mobilization Augmentees (IMAs) (CAT B): The Readiness Group (RMG) commander has UCMJ authority over all IMA reservists attached or assigned to the RMG

  -- *Concurrent Authority over IMAs*: Active duty commanders have concurrent UCMJ authority over IMA reservists attached to their unit for reserve duty, for temporary duty, or for deployment

- Withholding of NJP Authority: Authority to issue NJP on Reserve commissioned officers is withheld from all Reserve commanders, except those who are general officers or who exercise general court-martial convening authority and their principal assistants to whom Article 15 power has been delegated

- Prompt Action Required: Commanders must take prompt action to offer NJP to Reserve service members as soon as practicable after an NJP worthy offense is discovered

  -- *Traditional Reservists*: NJP should generally be offered no later than the next Unit Training Assembly (UTA) after the offense is discovered or the investigation is completed

-- *IMA Reservists*: NJP should be offered as soon as possible following discovery of the allegation

-- Failure to meet this suggested processing goal **DOES NOT** preclude commanders from initiating NJP proceedings at a later date

- Extended Response Time for Reservists: A reserve member not in Title 10 status for at least 72 hours after being offered NJP should be required to respond at the start of the next military duty day (i.e., UTA), provided at least 72 hours have passed since the NJP was offered. A failure to respond within 30 calendar days is considered a waiver of his/her right to respond, unless an extension is granted.

- Punishment Limitations for Reservists: There are limitations on the punishment that can be imposed on Reserve members

  -- *Restrictions on Liberty*: Because a reserve member cannot be required to arrive before, or remain after, a UTA to serve NJP, arrest in quarters, restriction to base or extra duties should not be imposed unless the reserve member is expected to serve on extended active duty (EAD) or perform an annual tour (AT)

  -- *No Limitations on UTAs*: Barring a reserve member from participating in UTAs is not an authorized punishment under Article 15, UCMJ

  -- *Forfeiture of Pay:* Since Reserve members not on EAD typically work only two days of military duty per month, the forfeiture provision of the Article 15 does not carry the same disciplinary weight for Reserve members as for active duty members. If the member does not perform any duty during the stated period of the sentence, no forfeiture collection will be made.

- Appeals: Reserve members not in Title 10 status for at least five days following receipt of punishment waive their appeal rights by failing to make an election within 30 calendar days of that receipt

---

References

UCMJ art. 15
Manual for Courts-Martial, United States, pt. V (2019)
AFI 51-202, *Nonjudicial Punishment* (31 March 2015)
AF Form 3070A, *Record of Nonjudicial Punishment Proceedings (AB thru SSGT)* (9 April 2015)
AF Form 3070B, *Record of Nonjudicial Punishment Proceedings (TSGT thru CMSGT)* (9 April 2015)
AF Form 3070C, *Record of Nonjudicial Punishment Proceedings (Officer)* (7 March 2007)

SUPPLEMENTARY NONJUDICIAL PUNISHMENT (NJP) ACTIONS

Supplementary nonjudicial punishment (NJP) actions provide commanders with the flexibility to make adjustments based on the response of the NJP recipient. These supplementary actions include: (1) *Suspension*: postponement of the application of all or part of the punishment for a specific probationary period, conditioned upon good behavior; (2) *Mitigation*: lessening of punishment by quality or quantity; (3) *Remission*: cessation of the remainder of any unexecuted period of punishment; (4) *Set Aside*: full reinstatement of prior rights and privileges impacted by NJP; and (5) *Vacation*: reinstatement of previously suspended punishment in the event of misbehavior during the probationary period.

Initiating a Supplemental Action

- Supplementary NJP actions are accomplished on AF Form 3212, *Record of Supplementary Action under Article 15*, and are filed with the original NJP action
- Initiation by Member: Post-punishment relief may be requested by members (use the sample format in AFI 51-202, attch. 5)
- Initiation by Commander: Either the original commander who imposed the NJP, or a successor commander, may initiate supplemental action
- Staff Judge Advocate (SJA) Consultation Required: Consult with the SJA prior to acting upon any supplemental action

Suspension

- Definition: Suspension postpones all or part of a punishment for a specific probationary period. A suspension can be used as part of both an original or supplemental action. In original actions, the commander can suspend punishment at the time of imposition thereby holding part or all of a punishment in reserve as a motivational tool for the NJP recipient.
- Standard: Suspension is generally appropriate for a first-time offender or where there are persuasive extenuating or mitigating circumstances
- Specific Rules for Suspension:
  - -- Suspension of punishment may not exceed six months from the date of the suspension
  - -- Commanders may, at any time, suspend any part or amount of the unexecuted punishment imposed
    - --- An executed punishment of reduction in grade or forfeiture may be suspended if accomplished within four months of the punishment being imposed
    - --- When a reduction in grade is later suspended, the member's original date of rank, held before the reduction, is reinstated for the purposes of promotion. However, the date of rank for the purposes of pay is the date of the document directing the suspension. The member is not entitled to back pay.
    - --- If a member is undergoing a suspended reduction in grade, the member is ineligible for promotion, including testing and consideration if already tested. They are also ineligible to reenlist, but may be eligible for an extension of enlistment.

Mitigation

- Definition: Mitigation is a reduction in either the quantity or quality of a punishment. The general nature of the mitigated punishment should remain the same as the original punishment.
- Standard: Mitigation is appropriate when the member's subsequent good conduct merits a reduction in the punishment, or when the commander later determines the punishment imposed was disproportionate to the offense
- Specific Rules for Permissible Mitigated Punishments: With the exception of reduction in grade, only the unexecuted part or amount of the punishments can be mitigated
  - *Reductions in Grade*: A reduction in grade may be mitigated even after it has been executed
    - Reduction in grade may only be mitigated to forfeitures and may only be done up to four months after the date of execution
    - The mitigation date will become the member's date of rank for both promotion and pay purposes. The member will not be entitled to receive back pay.
  - *Restriction to Limits/Extra Duties*: Punishments involving loss of liberty, such as restriction to specified limits or extra duties may only be mitigated to less sever forms of loss of liberty
    - Loss of liberty punishments cannot be mitigated to forfeitures or reduction in grade
    - Mitigated restraints on liberty (for example mitigating correctional custody to extra duties) cannot run for a longer period than the remaining amount of punishment that was originally imposed

Remission

- Definition: Remission is the cancellation of any unexecuted portion of a punishment
- Standard: Remission is appropriate when the member's subsequent good conduct merits a reduction in the punishment, or when the commander later determines the punishment imposed was disproportionate to the offense
  - Commanders may remit punishments any time before the execution of the punishment is completed (e.g., 30 days have elapsed on 45 days of extra duty and the commander wants to end the punishment now—the commander remits the remaining 15 unexecuted days of extra duty)
  - An unsuspended reduction in rank is executed at imposition, so it can never be remitted

Set Aside

- Definition: Most sweeping form of supplemental action, permitting removal of punishments, whether executed or unexecuted. **A set aside of all punishment voids the entire NJP action**.
  - Any property, privileges, or rights, affected by the portion of the punishment set aside are restored to the member
  - Unlike suspension, mitigation, and remission, setting aside a punishment is not normally considered rehabilitative in nature and **should not** be used on a routine basis
- Standard: Commanders should exercise this discretionary authority only in the **rare and unusual** case where a question concerning the guilt of the member arises or where the best interests of the Air Force are served by clearing the member's record
  - *Time Limits*: Punishments should be set aside within a reasonable time (four months, except in unusual circumstances) after the punishment is originally imposed

Vacation

- Definition: Imposing punishment that was previously suspended either at the time the original NJP was imposed or as part of supplementary NJP relief
- Standard: Imposed if a member violates either a condition of the suspension specified in writing by the commander in the NJP or any punitive article of the UCMJ
  - -- A new serious offense may be the basis for a vacation action **AND** additional NJP action
  - -- The new offense does not have to be serious enough to warrant imposition of NJP, nor does it have to be of the same nature as the original offense
  - -- Reserve members need not be subject to the UCMJ during the commission of an offense that serves as the basis for vacating suspended punishment
- SJA Consultation Required: Commanders must consult the servicing SJA before taking action to vacate suspended punishment

Procedure for Vacation Actions

- The commander must notify and advise the member of the intended vacation action by causing the member to be served with an AF Form 366, *Record of Proceedings of Vacation of Suspended Nonjudicial Punishment*. (The reserve commander initiating the vacation action must be in Title 10 status when signing and serving the vacation action.) AF Form 366 must contain the following:
  - -- A description of the basis for the vacation, such as misconduct (new offense which the commander suspects the member has committed) or what condition of the member's suspension was violated
  - -- The fact that the commander is considering vacating the suspended punishment
  - -- The member's rights during the vacation proceedings
- The base legal office will input the language describing the offense and other pertinent information concerning the suspended punishment on the AF Form 366
- The member must receive the AF Form 366 during the period of the suspension, at which point the suspension period is stayed
- Member's Rights during Vacation Proceedings
  - -- Unlike other supplemental actions, vacation action is detrimental to the member and therefore comes with due process protections similar to NJP, namely: (1) three duty days to respond; (2) right to consult counsel; (3) right to submit written matters; (4) right to request a personal appearance before the imposing commander
    - --- *Reserve members*: A reserve member not in Title 10 status for at least 72 hours after being served the vacation action should be required to respond at the start of the next military duty day (i.e., Unit Training Assembly (UTA)), provided at least 72 hours have passed since the vacation was served. A failure to respond within 30 calendar days is considered a waiver of his/her right to respond, unless an extension is granted.
    - --- *Failure to respond*: If the member fails to respond within three duty days (30 days for a non-extended active duty (EAD) reserve member), the commander can continue by noting in item 3 of the AF Form 366 "member failed to respond." However, if the commander believes the failure to respond was out of the member's control, the commander may not proceed with the vacation proceedings without good cause.

--- *Reserve commanders*: The Reserve commander and member must both be in Title 10 status at the time the member makes his/her election and during any personal appearance made by the Reserve member

- Commander's Decision – Vacation Proceedings

  -- Following the commander's consideration of the evidence, including any matters presented by the member, the commander (who must be in Title 10 status if he/she is a Reserve commander) takes one of the following actions on the AF Form 366:

    --- Terminates the vacation proceedings because vacation of the suspended punishment is not appropriate or because the member did not violate the UCMJ or a condition of the suspension; or

    --- Finds the member did violate the UCMJ or a condition of the suspension

- Effects of Vacation Action on Suspended Reductions

  -- If a suspension of a reduction in grade is "vacated," the member's date of rank, for the purposes of promotion, will be the date the commander imposed the original punishment

    --- For the purposes of pay, however, the date of rank will be the day the suspension is vacated. The member will not be required to return any additional pay received while holding the higher rank.

References

UCMJ art. 15
Manual for Courts-Martial, United States, pt. V (2019)
AFI 51-202, *Nonjudicial Punishment* (31 March 2015)
AF Form 366, *Record of Proceedings of Vacation of Suspended Nonjudicial Punishment* (1 July 2002)
AF Form 3212, *Record of Supplementary Action under Article 15* (1 July 2002)

QUALITY FORCE MANAGEMENT EFFECTS OF NONJUDICIAL PUNISHMENT (NJP)

Commanders have a great deal of discretion concerning quality force management consequences related to nonjudicial punishment (NJP) actions. Generally speaking, there are three main possible follow-on force management ramifications of NJP action: (1) placement of the NJP in an Unfavorable Information File (UIF); (2) placement of the NJP in a Senior Non-Commissioned Officer or Officer Selection Record; (3) follow-on "referral" enlisted or officer performance reports. **The following guidance applies primarily to enlisted personnel. Please consult with the staff judge advocate (SJA) regarding the quality force management consequences of NJP actions on officers**.

Unfavorable Information File NJP Entries

- Mandatory Entries: Entry of an NJP into an UIF becomes mandatory based upon either the status of the member or the severity of the punishment imposed
  - -- *Officers*: All officer NJPs are mandatory UIF entries
  - -- *Enlisted*: UIF entry is required if any portion of the executed or suspended punishment will not be completed within 1 month (31 days or more)
    - --- Post-punishment actions to suspend a previously imposed punishment must be filed in the member's UIF, with the original NJP action, until the suspension period is completed
    - --- Actions to vacate a suspended punishment must be entered into the member's UIF
- Discretionary Entries: All other NJPs are "discretionary" UIF entries at the election of the imposing commander
- Notice: Members are entitled to notice that the action will be entered into a UIF. Such notice is included on AF Form 3070, *Record of Nonjudicial Punishment Proceedings*.
- UIF Retention Period: NJP actions entered into a UIF must remain there until all punishment is completed or remitted, including any periods of suspension
  - -- *Mandatory UIF*: If the commander takes no action to remove a mandatory UIF NJP action, it will remain in the UIF for **two years**
  - -- *Discretionary UIF*: If the commander takes no action to remove a discretionary UIF NJP action, it will remain in the UIF for **one year**
- Early Removal of NJP from UIF: The commander may remove the NJP action and related documents from the member's UIF any time **after** the punishment or suspended punishment is completed (if removal is clearly warranted), or if the Article 15 is set aside

Related Administrative Actions

- In addition to NJP, commanders may take other appropriate administrative actions, including but are not limited to:
  - -- Control roster action
  - -- Entry of the member into counseling or rehabilitation programs, such as the Alcohol and Drug Abuse Prevention and Treatment Program (ADAPT)
  - -- Enlisted Performance Report (EPR) comments concerning the member's underlying misconduct

-- Administrative discharge

-- Removal from the personnel reliability program, withholding a security clearance, or withholding access to sensitive materials; and

-- NJP may also adversely affect promotion, reenlistment, and assignment eligibility

Officer Unfavorable Information Files NJP Entries

- Any record of an NJP action for officers is a mandatory UIF entry
- An NJP is permanently retained in the officer's Master Personnel Record Group (Correspondence and Miscellaneous Group) unless set aside in its entirety, or ordered removed by the Air Force Board of Corrections for Military Records (AFBCMR)
- Retention Period: Officer NJP actions are retained in a UIF for **two years**
  - -- Early removal is only permissible after completion of all punishment. Only the wing commander or issuing authority (whomever is higher in rank) is authorized to remove an officer NJP from a UIF
- Referral OPR/PRF Consideration: Commanders should also consider whether comments should be made in the next OPR and/or promotion recommendation form (PRF). Seek the advice of the SJA for assistance in determining when comments may be appropriate.
  - -- Sex related offenses punished by NJP require a mandatory notation in the officer's next OPR and/or PRF

Officer and Senior NCO Promotion Selection Records

- Commanders imposing NJP upon officers and SNCOs must also decide whether to include the Article 15 in the member's promotion selection record
- Selection record decisions are recorded on AF Form 3070B for SNCOs and on AF Form 3070C for officers
- Reviewing Authority: The imposing commander's decision to file an NJP in a selection record is subject to review by the next senior Air Force commander, unless the General Court-Martial Convening Authority (GCMCA) imposed the punishment
- SNCO Selection Record Retention Period: **two years** or until after the member meets one SNCO evaluation board
  - -- Early removal is authorized for SNCOs only if approved by the current commander
- Officer Selection Record Retention Period: For lieutenant colonels and below, NJPs remain in the officer's selection record until after the officer meets one "in the promotion zone" (IPZ) or "above the promotion zone" (APZ) promotion board and an appeal for removal has been approved
  - -- Officers may not request early removal of the NJP from their selection record. Only the imposing authority may request early removal of an NJP from a selection record. Early is only permitted as an **exception to policy**, and should only be approved **in rare cases**.

References

UCMJ art. 15
AFI 36-2406, *Officer and Enlisted Evaluation Systems* (8 November 2016)
AFI 36-2608, *Military Personnel Records System* (26 October 2015)
AFI 36-2907, *Unfavorable Information File (UIF) Program* (26 November 2014)
AFI 44-121, *Alcohol and Drug Abuse Prevention and Treatment (ADAPT) Program* (18 July 2018)
AFI 51-202, *Nonjudicial Punishment* (31 March 2015)
AF Form 3070A, *Record of Nonjudicial Punishment Proceedings* (*AB thru SSGT*) (9 April 2015)
AF Form 3070B, *Record of Nonjudicial Punishment Proceedings* (*TSGT thru CMSGT*) (9 April 2015)
AF Form 3070C, *Record of Nonjudicial Punishment Proceedings* (*Officer*) (7 March 2007)

4

CHAPTER FOUR: ADMINISTRATIVE SEPARATION FROM THE AIR FORCE

INVOLUNTARY SEPARATION OF ENLISTED MEMBERS: GENERAL CONSIDERATIONS

Commanders and supervisors must identify enlisted members who show a likelihood for early separation and make reasonable efforts to help these members meet Air Force standards. Members who do not show potential for further service should be discharged. Commanders must consult the servicing staff judge advocate and military personnel flight before initiating the involuntary separation of a member.

General Preprocessing Considerations

- Before initiating discharge, a commander must consider all the factors that make the member subject to discharge, including:
  - -- The seriousness of circumstances that make the member subject to discharge and how the member's retention might affect military discipline, good order, and morale
  - -- Whether the circumstances that are the basis for discharge action will continue or recur
  - -- The likelihood that the member will be disruptive or an undesirable influence in present or future duty assignments
  - -- The member's ability to perform duties effectively in the present and in the future
  - -- The member's potential for advancement and leadership
  - -- An evaluation of the member's military record including, but not limited to:
    - --- Records of nonjudicial punishment
    - --- Records of counseling
    - --- Letters of reprimand or admonishment
    - --- Records of conviction by courts-martial
    - --- Records of involvement with civilian authorities
    - --- Past contributions to the Air Force
    - --- Duty assignments and EPRs
    - --- Awards, decorations, and letters of commendation
  - -- The effectiveness of preprocessing rehabilitation, when required
- A commander should **NOT** use an administrative discharge as a substitute for disciplinary action
- Generally, the acts or conditions on which the discharge is based must have occurred in the current enlistment. **The exceptions are**:
  - -- Fraudulent enlistment, erroneous enlistment, or the interest of national security
  - -- Cases in which the act or condition occurred in the immediately preceding enlistment, the commander was not aware of the facts warranting discharge until after the member reenlisted, and there was no break in service
  - -- Cases in which the member is being separated for failure in the fitness program and at least one instance of unsatisfactory performance is in the current enlistment; then instances of unsatisfactory performance in the immediately preceding enlistment may support the basis for discharge

- Prior to processing a member for discharge for parenthood, conditions that interfere with military service, entry level performance and conduct, unsatisfactory performance, and minor disciplinary infractions or a pattern of misconduct commanders must give the member an opportunity to overcome deficiencies
  - -- Efforts to rehabilitate may include, but are not limited to, counselings, reprimands, control roster action, nonjudicial punishment under Article 15 of the UCMJ, change in duty assignment, demotion, additional training, and retraining
  - -- It is extremely important to properly document rehabilitative efforts and keep copies of these documents

Special Preprocessing Considerations for Service Members with Post Traumatic Stress Disorder (PTSD) – Airmen Deployed Overseas in Support of a Contingency Operation or Airmen Who Have Been Sexually Assaulted

- PTSD Service Members: All Airmen who are separating must receive a medical examination in accordance with AFI 36-3208, *Administrative Separation of Airmen,* paras. 6.3 and 6.9.3. The medical examination must assess whether the effects of PTSD or traumatic brain injury (TBI) constitute matters in extenuation that relate to the basis for involuntary administrative separation if the Airman:
  - -- Is being administratively separated under a characterization that is not either Honorable or Under Honorable Conditions (General); and
  - -- Was deployed overseas to a contingency operation or sexually assaulted during the previous 24 months; and
  - -- Has been diagnosed by a physician, clinical psychologist, psychiatrist, licensed clinical social worker, or psychiatric advanced practice registered nurse as experiencing PTSD or TBI, or reasonably alleges the influence of PTSD or TBI based on deployed service to a contingency operation or a sexual assault that occurred during the previous 24 months; and
  - -- Is not being separated under a sentence of court-martial, or other proceeding conducted pursuant to the UCMJ
- Note: All enlisted members receiving a pre-separation medical examination in accordance with AFI 36-3208, *Administrative Separation of Airmen*, paragraph 1.30 will not be separated until the result of the medical examination has been reviewed by appropriate authorities responsible for evaluating, reviewing and approving the separation action, to include (if applicable): the initiating commander, administrative discharge board, SPCM convening authority, GCM convening authority, separation authority, Air Force Review Board, and/or Secretary of the Air Force

Special Preprocessing Considerations for Service Members Who Have Made an Unrestricted Report of a Sexual Assault

- Airmen who have made an unrestricted report of sexual assault require special processing procedures:
  - -- The commander must notify the separation authority that the member has reported being a past victim of sexual assault and include in the recommendation for discharge memorandum sufficient information concerning the alleged assault and the member's status

-- The member must be advised of the right to request review by the general court-martial convening authority (GCMCA) authority, if the Airman believes the recommendation for involuntary separation was initiated in retaliation for making the unrestricted report of sexual assault and is within one year of final disposition of his/her sexual assault allegation as of the date of notification of discharge

Characterizations of Service

- The service of a member administratively separated may be characterized as honorable, general (under honorable conditions), or under other than honorable conditions (UOTHC)
  - -- Honorable: Appropriate when the quality of the member's service generally has met Air Force standards of acceptable conduct and performance of duty, or a member's service is otherwise so meritorious that any other characterization would be inappropriate
  - -- General (under honorable conditions): Appropriate if a member's service has been honest and faithful, but significant negative aspects of the member's conduct or performance outweigh positive aspects of military record
  - -- UOTHC: Appropriate if based on a pattern of behavior or one or more acts or omissions constituting a significant departure from the conduct expected of Airmen. This characterization can be given only if the member is offered an administrative discharge board or if a discharge is unconditionally requested in lieu of trial by court-martial.
- A dishonorable discharge and a bad conduct discharge are punitive discharges and are authorized only as a result of a court-martial sentence
- If the sole basis for discharging an Airman with a UOTHC service characterization is a serious offense that resulted in conviction by a court-martial that did not adjudge a punitive discharge, then the Secretary of the Air Force (SecAF) must approve the service characterization (this includes a conviction at a summary court-martial)
- Separation without Service Characterization: Members in entry level status (the first 180 days of active military service) will ordinarily receive an "entry level separation" without service characterization

How Characterization of Service Affects Veteran's Benefits

- The U.S. Department of Veterans Affairs (VA) provides several benefits to veterans including the GI Bill, home loan benefits, disability compensation, and other benefits. More information on the availability of veteran's benefits can be found at www.benefits.va.gov.
- To become eligible for veteran's benefits, the active duty member must have been discharged or released under conditions other than dishonorable. The term "dishonorable" is broader in the context of determining VA benefit eligibility than the term as defined in Rule for Courts-Martial 1003(b)(8)(B), which relates to the punitive dishonorable discharge one can receive at a court-martial.
- In general, to qualify for VA educational benefits (e.g., GI bill) an honorable discharge is required

References

AFI 36-2905, *Fitness Program* (21 October 2013), incorporating Change 1, 27 August 2015
AFI 36-3208, *Administrative Separation of Airmen* (9 July 2004), incorporating through Change 7, 2 July 2013, including AFI36-3208_AFGM2018-01, 14 June 2018

INVOLUNTARY SEPARATION OF ENLISTED MEMBERS: REASONS FOR DISCHARGE

Specific reasons for involuntarily separating enlisted members are in Chapter 5 of AFI 36-3208, *Administrative Separation of Airmen*. Commanders must consult with the servicing staff judge advocate and military personnel flight prior to initiating the involuntary separation of a member. With a few exceptions, a commander is generally not required to initiate involuntary separation of a member just because a reason for discharge set out in AFI 36-3208 exists. The facts and circumstances are different in each case and must be considered on a case-by-case basis. An overview of the nine broad reasons for discharge follows below.

Mandatory Discharges

- A commander **MUST** initiate discharge processing or seek a waiver of the discharge if the reason for discharge is one of the following:
  - -- Fraudulent or erroneous enlistment
  - -- Civilian court conviction for an offense for which a punitive discharge and confinement for one year or more would be authorized under the UCMJ
  - -- Drug abuse
  - -- Sexual assault or sexual assault of a child
  - -- Failure in the fitness program: a commander must make a discharge or retention recommendation when a member remains in a poor fitness category for a continuous 12-month period or receives four poor fitness assessments in a 24-month period

Convenience of the Government Discharges

- Discharge is appropriate when separation would serve the best interest of the Air Force and discharge for cause is not warranted. Such separations may be based on:
  - -- Parenthood, if the member fails to meet military obligations because of parental responsibilities
  - -- Insufficient retainability for required training, if the cost of retraining for a brief period of service may not warrant retention
  - -- Medical/Psychological conditions (not rising to the level of "disabilities" severe enough to warrant medical discharge via a Medical Evaluation Board (MEB)) that interfere with military service
  - -- Mental Disorders:
    - --- Must be supported in writing by a report of evaluation by a psychiatrist or PhD-level clinical psychologist that confirms a diagnosis of a disorder contained in the current edition of the Diagnostic and Statistical Manual of Medical Disorders;
    - --- Must be documented in a report as so severe that the member's ability to function in the military environment is significantly impaired; and
    - --- Must have an adverse effect on assignment or duty performance
    - --- Special processing is required for Airmen who are currently serving or who have served in an imminent danger pay area and have been diagnosed with a personality disorder that is the basis of the discharge
      - ---- The diagnosis of a personality disorder must specifically address PTSD or other mental illness co-morbidity

---- Separation **WILL NOT** be initiated if there is a diagnosis of service-related PTSD, unless the Airman is subsequently found fit for duty under the disability evaluation system in accordance with AFI 36-3212, *Physical Evaluation for Retention, Retirement, and Separation*

---- The Air Force Surgeon General (SG) must review the diagnosis and concur with supporting documentation prior to initiation of the separation. If the SG does not concur with the diagnosis, no further action will be taken.

- Discharge for conditions that interfere with military service is not appropriate if the member's record supports discharge for another reason
- Service is characterized as entry level separation or honorable
- Before recommending discharge, commanders must be sure:
  - -- Preprocessing rehabilitation requirements in AFI 36-3208, paragraph 5.2, have been met;
  - -- They have complied with all requirements of the specific AFI paragraph authorizing discharge; and
  - -- Circumstances do not warrant discharge for another reason

Defective Enlistments

- Enlistment of Minors: A person under 17 years of age is barred by law from enlisting
- Void Enlistments: The enlistment was not a voluntary act by a sane, sober person of age; or enlistee was a deserter from another service
- Erroneous Enlistment: The Air Force should not have accepted the enlistee, but the case does not involve fraud
- Fraudulent Entry: Involved deliberate deception on the part of the enlistee
- A commander must initiate discharge or seek a waiver of discharge for erroneous enlistment or fraudulent entry
  - -- Erroneous enlistments and fraudulent entries for reasons of alienage cannot be waived
  - -- If the commander has knowledge of an erroneous enlistment or fraudulent entry and fails to act within a reasonable time, that failure to act may result in a constructive waiver of the commander's ability to discharge the member
- Authorized characterizations of service and the approval authorities are listed in AFI 36-3208, Table 5.4
- Members approved for discharge are **NOT** eligible for probation and rehabilitation (P&R)

Entry Level Performance or Conduct

- Enlisted members in entry level status should be discharged when unsatisfactory performance or conduct shows the member is not a productive member of the Air Force
- Discharge processing must start during the first 180 days of continuous active duty
- Eligibility for discharge based on entry level performance or conduct does not preclude separation for another reason
- Before processing a member for discharge for unsatisfactory entry level performance or conduct, a commander must ensure efforts to rehabilitate the member, allowing the member the opportunity to overcome deficiencies, have been made and documented

- Discharge is not formally characterized, but is described as entry level separation (ELS)
- Members approved for discharge for entry level performance or conduct are **NOT** eligible for P&R

Unsatisfactory Performance

- Members should be discharged when unsatisfactory performance or conduct shows they are not qualified for service in the Air Force
- Performance includes assigned duties, military training, bearing and behavior, as well as maintaining the high standards of personal behavior and conduct required of all military members at all times
- Unsatisfactory performance may be evidenced by any of the following:
  - -- Unsatisfactory duty performance, which may include:
    - --- Failure to properly perform assigned duties
    - --- A progressively downward trend in performance ratings
    - --- Failure to demonstrate the qualities of leadership required by the member's grade
  - -- Failure to maintain standards of dress and personal appearance, other than fitness standards, or military deportment
  - -- Failure to progress in military training required to be qualified for service with the Air Force or for the performance of primary duties
  - -- Irresponsibility in the management of personal finances
  - -- Unsanitary habits
  - -- Failure to meet fitness standards
- Before processing a member for discharge for unsatisfactory performance, a commander must ensure efforts to rehabilitate the member, allowing the member the opportunity to overcome deficiencies, have been made and documented
- Service is characterized as honorable, general, or entry level
- Members approved for discharge should be considered for P&R

Failure in Drug or Alcohol Abuse Treatment

- Members are subject to discharge for failure in drug or alcohol abuse treatment if they:
  - -- Are in a program of rehabilitation for abuse of drugs or alcohol and fail to complete the program due to inability, refusal to participate, or unwillingness to cooperate; and
  - -- Lack the potential for continued military service or need long-term treatment and are transferred to a civilian medical facility for treatment
- Service is characterized as honorable, general, or entry level
- Members approved for discharge are eligible for P&R

Misconduct Discharges

- Unacceptable conduct adversely affects military duty and may be a proper basis for discharge
- Types of misconduct include:
  - -- Minor Disciplinary Infractions (AFI 36-3208, paragraph 5.49): Consists solely of infractions during the current enlistment resulting in letters of counseling, letters of admonishment, letters of reprimand, and nonjudicial punishment actions
    - --- Before processing a member for discharge for misconduct consisting of minor disciplinary infractions, a commander must ensure efforts to rehabilitate the member, allowing the member the opportunity to overcome deficiencies, have been made and documented
    - --- Members approved for discharge are eligible for P&R
  - -- Pattern of Misconduct (AFI 36-3208, paragraph 5.50): Includes misconduct more serious than that consisting of minor disciplinary infractions such as (1) discreditable involvement with military or civilian authorities, (2) conduct prejudicial to good order and discipline, (3) failure to support dependents, or (4) dishonorable failure to pay just debts
    - --- Before processing a member for discharge for misconduct consisting of a pattern of misconduct, a commander must ensure efforts to rehabilitate the member, allowing the member the opportunity to overcome deficiencies, have been made and documented
    - --- Members approved for discharge are eligible for P&R
  - -- Civilian Conviction (AFI 36-3208, paragraph 5.51): When the member is convicted, or there is a finding that amounts to a conviction of an offense which would authorize a punitive discharge under the UCMJ, or when the sentence by civilian authorities actually includes confinement for six months or more
    - --- A commander must initiate discharge or seek a waiver of the discharge when the civilian conviction involves an offense for which a punitive discharge and confinement for one year or more would be authorized under the UCMJ
    - --- It is general policy to withhold execution of discharge until the outcome of the appeal is known or the time for appeal has passed. If the appeal results in the conviction being set aside, the Airman may not be discharged due to civilian conviction.
    - --- An Airman whose home of record is in the continental United States (CONUS) may be discharged in absentia if he/she is in civil confinement in the CONUS or has been release from confinement in the CONUS and is absent without authority
    - --- An Airman in a foreign penal institution may not be discharged until released from confinement and returned CONUS or higher authority (HQ AFPC/DP2ST) authorizes an exception
    - --- If the commander has knowledge of such a civilian conviction and fails to act within a reasonable time, that failure to act may result in a constructive waiver of the commander's ability to discharge the member
    - --- Members approved for discharge are eligible for P&R
  - -- Commission of a Serious Offense (AFI 36-3208, paragraph 5.52): Includes offenses for which a punitive discharge would be authorized under the UCMJ
    - --- Airmen are subject to discharge for misconduct based on acts of aberrant sexual behavior or acts of sexual misconduct, which include offenses such as: indecent viewing, visual recording, or broadcasting; forcible pandering; indecent exposure

--- Airmen may be discharged for misconduct based on unauthorized absence continuing for one year or more

--- Airmen are subject to discharge for misconduct based on acts that constitute unprofessional relationships between recruiters and potential recruits during the recruiting process or between students and faculty or staff in training schools or professional military education setting

--- Members approved for discharge are eligible for P&R **EXCEPT FOR** cases of noncompliance with "safe sex" order

-- Drug Abuse (AFI 36-3208, paragraph 5.54): The illegal, wrongful, or improper use, possession, sale, transfer, or introduction onto a military installation of any drug

--- This includes prescription medication, controlled substances in Schedules I-V of 21 U.S.C. § 812. It also includes steroids, and any intoxicating substance, other than alcohol that is inhaled, injected, consumed, or introduced into the body in any manner for purposes of altering mood or function.

--- Commanders must act promptly when information indicates drug abuse and initiate discharge or seek a waiver of discharge processing

--- A member found to have abused drugs will be discharged unless the member meets all seven of the retention criteria in AFI 36-3208, paragraph 5.54.4.2.1. The member has the burden of proving he/she meets all seven retention criteria.

--- Members approved for discharge are not eligible for P&R

-- Sexual Assault (AFI 36-3208, paragraph 5.55): Includes rape, sexual assault, aggravated sexual contact, abusive sexual contact, forcible sodomy, or attempts to commit these offenses. Sexual assault of a child includes rape of a child, sexual assault of a child, and sexual abuse of a child.

--- Commanders must act promptly when they have information indicating a member is subject to discharge for sexual assault or sexual assault of a child. They evaluate the specific circumstances of the offense, the member's record and potential for future service, and take prompt action to initiate discharge or seek waiver of discharge processing.

--- A member found to have committed sexual assault or sexual assault of a child will be discharged unless the member meets all six of the retention criteria in AFI 36-3208, paragraph 5.55.3.2.1. The member has the burden of proving he/she meets all six retention criteria.

--- Members approved for discharge are not eligible for P&R

- Characterization of Misconduct Discharge: Usually, the characterization for misconduct cases under AFI 36-3208, paras. 5.50, 5.51, 5.52, 5.54, and 5.55 should be under other than honorable conditions (UOTHC), but characterization may be honorable, general, or entry level separation in appropriate cases

-- The general court-martial convening authority (GCMCA), usually the numbered air force (NAF) commander, will approve separation for misconduct with a service characterization of honorable or UOTHC

Discharge in the Interest of National Security

- A member whose retention is clearly inconsistent with the interest of national security may be discharged
- Discharge may only be initiated after criteria in AFI 36-3208, paras. 5.57.1 and 5.57.2 have been met
- Discharge may be characterized as entry level, honorable, general, or UOTHC
- Members approved for discharge are not eligible for P&R

Failure in the Fitness Program

- A member who does not meet fitness standards as set out in AFI 36-2905, *Fitness Program,* may be discharged when the failure is the result of a cause in the member's control
- The required medical examination prior to discharge must document that there is not a medical condition that would preclude the member from meeting fitness program standards
- Characterization of service is restricted to honorable if failure in the program is the sole reason for discharge
- Members approved for discharge should be considered for P&R

Joint Processing

- In some cases, it may be preferable to cite two or more reasons as the basis for the discharge recommendation if the member's record justifies more than one basis for discharge
  - -- If one of the reasons cited in the letter of notification as the basis for discharge entitled the member to a board hearing, then a hearing must be conducted (unless waived by the member)
  - -- For determining service characterization, apply the guidance for the basis for discharge that allows the most latitude in characterizing the member's service

---

References

AFI 36-2905, *Fitness Program* (21 October 2013), incorporating Change 1, 27 August 2015
AFI 36-3208, *Administrative Separation of Airmen* (9 July 2004), incorporating through Change 7, 2 July 2013, including AFI36-3208_AFGM2018-01, 14 June 2018
AFI 36-3212, *Physical Evaluation for Retention, Retirement, and Separation* (2 February 2006), incorporating through Change 2, 27 November 2009

DUAL ACTION PROCESSING OF ADMINISTRATIVE AND MEDICAL DISCHARGES

"Dual action processing" refers to the simultaneous processing of an administrative and a medical discharge package. Commanders should not abandon pursuing an administrative discharge (particularly misconduct based administrative discharges) solely because a member is also undergoing processing for a medical discharge. Instead, commanders should press on with the administrative discharge while the medical discharge process is ongoing. Ultimately, if both discharges are warranted (administrative and medical), AFPC will decide which one to approve.

- Dual action processing involves referral of separation action to AFPC and is required when an Airman subject to discharge is also eligible to apply for retirement (20 years or more active service) or is eligible for disability separation or disability retirement
  - -- Service Retirement Eligibility: Airmen who are qualified for retirement may be permitted to retire in lieu of involuntary separation
    - --- Airmen who are retirement eligible must be notified at the time discharge starts of the chance to apply for retirement
  - -- Disability Separation or Retirement: When the required medical examination shows that the Airman is not qualified for worldwide duty, refer to Tables 6.13 and 6.14 of AFI 36-3208, *Administrative Separation of Airmen,* for processing guidelines
    - --- When an Airman is determined to not be worldwide qualified during a medical examination, a significant delay in the processing of the discharge is likely to occur
    - --- Additional medical evaluations and a determination as to whether the Airman qualified for disability separation or disability retirement must be made prior to the Airman being involuntarily separated
    - --- The involuntary separation may continue to process, but the discharge may not be executed until all medical evaluation boards are completed and the member is determined to be fit for duty

References

AFI 36-3208, *Administrative Separation of Airmen* (9 July 2004), incorporating through Change 7, 2 July 2013, including AFI 36-3208_AFGM2018-01, 14 June 2018

AFI 36-3212, *Physical Evaluation for Retention, Retirement, and Separation* (2 February 2006), incorporating through Change 2, 27 November 2009

PROCEDURE TO INVOLUNTARILY SEPARATE ENLISTED MEMBERS

Enlisted members may be involuntarily separated through two different processes: (1) notification procedures (applicable to E-4 and below with less than six years of service), and (2) board hearing procedures (applicable to E-5 and above, members with six or more years of service, or in any case when the commander is pursuing an Under Other Than Honorable Conditions (UOTHC) service characterization). Most cases are processed using notification procedures. Before initiating involuntary separation of a member, commanders must consult with the servicing staff judge advocate (SJA) and military personnel flight.

Preprocessing Procedures

- The type of discharge processing a member is entitled to depends upon: (1) the rank of the member; (2) years of service of the member; and (3) the characterization of service pursued by the commander concerned
- Medical Examination: Before the member may be discharged, a medical examination must document:
  - -- Any medical aspects pertaining to the reason for discharge; and
  - -- That the member is or is not medically qualified for worldwide service and separation
- Victims of Sexual Assault: If the member is a victim of sexual assault who made an unrestricted report, commanders must:
  - -- Notify the separation authority that the discharge proceeding involves a victim of sexual assault
  - -- Provide sufficient information concerning the alleged assault and respondent's status to ensure a full and fair consideration of the victim's military service and particular situation
  - -- Advise the Airman of the right to request review by the general court-martial convening authority (GCMCA) if the Airman believes the recommendation for involuntary separation was initiated in retaliation for having made the unrestricted report within the last 12 months
- Completion of Enlisted Performance Report (EPR)/Letter of Evaluation (LOE): An EPR or LOE must be generated for discharges based on parenthood, conditions that interfere with military service, unsatisfactory performance, or failure in the fitness program
  - -- The EPR must be completed if the Airman has not had an EPR closing in the 90 days before the day discharge action starts

Notification Procedures

- If there is sufficient documentation/evidence supporting a basis for discharge, the commander serves a notification memorandum on the member (AFI 36-3208, *Administrative Separation of Airmen,* Figure 6.1 or 6.2)
- After receiving the notification memorandum, the member has three duty days to prepare a response (AFI 36-3208, Figure 6.4)
- The commander considers the member's response, if any, and if the commander still recommends discharge, the commander signs a recommendation for discharge to the special court-martial convening authority (SPCMCA), who is usually the wing commander (AFI 36-3208, Figure 6.5)
- The servicing SJA prepares a legal review of the package
- SPCMCA reviews the package and the SJA's legal review

-- If the SPCMCA is also the separation authority, the SPCMCA determines:

--- (1) If there is a basis for discharge;

--- (2) If the member should be discharged;

--- (3) If the member should be discharged, how to characterize the member's service; and

--- (4) Whether to offer Probation & Rehabilitation (P&R) (if available) if the member should be discharged

-- If the SPCMCA is not the separation authority, the SPCMCA will forward the package to the GCMCA, who is usually the numbered air force (NAF) commander, with a recommendation concerning the above four questions

Board Entitlement

- A member recommended for discharge must be offered a hearing by an administrative discharge board if one of the following applies:
  - -- The member is a non-commissioned officer at the time discharge processing starts
  - -- The member has six years or more total active and inactive service, including delayed enlistment time, at the time discharge processing starts
  - -- The commander recommends a UOTHC characterization
  - -- Discharge in the interest of national security is recommended (ensure appropriate clearance to proceed)

Board Hearing Procedures

- After receiving the notification memorandum, the member has seven duty days to:
  - -- Request a board hearing or unconditionally waive his/her right to a board hearing (AFI 36-3208, Figure 6.8); or
  - -- Waive the board hearing contingent upon receiving a specific type of discharge, which is called a conditional waiver (AFI 36-3208, Figure 6.9)
- The commander considers the member's response, if any, and if the commander still recommends discharge, he/she signs a recommendation for discharge to the SPCMCA (AFI 36-3208, Figure 6.5)
- In cases where the member requests a board hearing, the SPCMCA reviews the recommendation for discharge and either sends the file back to the unit for further action (normally to withdraw the action or reinitiate the action using different grounds or evidence) or convenes a discharge board
- The administrative board convenes, considers all the evidence, and makes:
  - -- A separate finding of fact on each allegation set out in the notification memorandum. The board's finding of fact will determine whether a basis for discharge exists.
  - -- A recommendation to discharge or retain
  - -- A recommended characterization of service if the board recommends discharge
  - -- A recommendation concerning P&R (if member is eligible) if the board recommends discharge
- The servicing SJA prepares a legal review of the package and forwards the package to the SPCMCA

- The SPCMCA takes final action if referral to the GCMCA is not required or forwards the package to the GCMCA if referral to the GCMCA is required
- Lengthy Service Consideration: Members with more than 16 but less than 20 years of service are entitled to special probation consideration upon request and may not be separated before forwarding to HQ AFPC/DP2STM for review

References

AFI 36-3208, *Administrative Separation of Airmen* (9 July 2004), incorporating through Change 7, 2 July 2013, including AFI36-3208_AFGM2018-01, 14 June 2018

AFI 36-3212, *Physical Evaluation for Retention, Retirement, and Separation* (2 February 2006), incorporating through Change 2, 27 November 2009

AFI 90-6001, *Sexual Assault Prevention and Response (SAPR) Program* (21 May 2015), incorporating Change 1, 18 March 2016, including AFI 90-6001_AFGM2018-01, 11 October 2018

AFPAM 36-3210, *Procedural Guide for Enlisted Administrative Discharge Boards* (1 November 1995), incorporating through Change 3, 20 October 2011

PROBATION AND REHABILITATION (P&R) FOR ENLISTED MEMBERS

The Air Force program of probation and rehabilitation (P&R) allows the Air Force to retain a trained resource while allowing enlisted members another opportunity to complete their service honorably. P&R is a conditional suspension of an approved administrative discharge for cause. In deserving cases, it lets a member prove he/she is able to meet Air Force standards.

P&R Considerations

- Only the discharge authority can suspend the execution of a discharge for P&R
- Members who have completed at least 16 but less than 20 years of active service are entitled to special consideration upon their request and their cases are forwarded to AFPC/DP2STM for review concerning probation
- P&R is appropriate for members:
  - -- Who demonstrate a potential to serve satisfactorily
  - -- Who have the capacity to be rehabilitated for continued military service or completion of the current enlistment
  - -- Whose retention on a probationary status is consistent with the maintenance of good order and discipline

Eligibility Requirements

- Members are **NOT** eligible for P&R if the reason for discharge is one of the following:
  - -- Failure to comply with preventive medicine counseling (safe sex order) by a member with human immunodeficiency virus (HIV)
  - -- Fraudulent entry into the service
  - -- Entry level performance or conduct
  - -- In the interest of national security
  - -- Drug abuse
  - -- In lieu of trial by court-martial
  - -- Sexual assault
- Members must be considered for P&R if the reason for discharge is unsatisfactory performance or misconduct (except for reasons stated above):
  - -- The case file must show the initiating commander, board members if a hearing is involved, and separation authority considered P&R;
  - -- If the initiating commander does not recommend P&R, he/she must give the reason for not recommending P&R; and
  - -- If the initiating commander recommended P&R and the separation authority disapproved that recommendation, the separation authority must state the reason for his/her decision

P&R Procedures

- Suspending the execution of an approved discharge is contingent on successful completion of rehabilitation
  - -- The separation authority sets a specific period of rehabilitation, which is not less than six months or not more than 12 months

-- The probationary period is usually served in the current unit of assignment, but reassignment to another local unit or within the MAJCOM may be authorized if warranted by the circumstances of the case

- If the decision is made to offer a member P&R, the commander must:
  -- Give the member information about the P&R program (AFI 36-3208, *Administrative Separation of Airmen,* Figure 7.2)
  -- Counsel the member, emphasizing points listed in AFI 36-3208, paragraph 7.7.2
  -- Find out whether the member has enough retainability to complete P&R, and if not, try to get a voluntary request for extension of enlistment for the minimum time required
  -- Require members who accept P&R to sign statements of understanding and acceptance of the terms of probation
  -- Ensure the terms of probation are set out in a letter from the separation authority and countersign the letter (AFI 36-3208, Figure 7.1)
  -- Require members who refuse P&R or fail to satisfy the retention requirements to sign a statement:
    --- Acknowledging understanding of the rehabilitation privilege;
    --- Giving the date the commander counseled the member; and
    --- Acknowledging understanding of the effects of refusal to accept P&R

What Happens During P&R

- The commander is the primary judge of the member's performance
  -- Commanders are not required to set up a special rehabilitation program because the member is expected to perform duties appropriate to his/her grade, skill level, and experience
  -- An enlisted performance report (EPR) is prepared every 90 days
  -- Promotion consideration is according to AFI 36-2502, *Airman Promotion/Demotion Programs*
  -- Members are not selected for formal training while in P&R
  -- A commander usually should not place a member in P&R on the control roster, and the commander should consider removing the member from the control roster if the member is on it when placed in P&R
  -- Reenlistment consideration is according to AFI 36-2606, *Reenlistment in the United States Air Force*

Completing P&R

- If a member successfully completes P&R:
  -- The approved discharge is automatically and permanently canceled on the date the suspension expires
  -- Separation at expiration of term of service (ETS) will result in an honorable service characterization
  -- Future failure to maintain standards may be the basis for new discharge proceedings
  -- Eligibility for reenlistment will be according to AFI 36-2606 and none of the reasons for recommending discharge that existed before P&R began may be used as a basis for denial of reenlistment

Other Command Options

- Commanders have other options during P&R, including:
  - -- Canceling the probation in whole or in part where member's good conduct clearly shows goals of P&R have been met
  - -- Extending the probationary period where member has made progress but the commander is not sure rehabilitation is complete. The original probationary period and the extension together must not exceed one year, and the Airman must consent to the extension.

Terminating P&R

- If a decision is made to initiate vacation (termination) of the P&R, the commander notifies the member by a letter, which gives:
  - -- The reason for the action
  - -- The name, address, and phone number of military legal counsel (often the area defense counsel (ADC))
  - -- Instruction that the member may secure civilian counsel at his own expense
  - -- Instruction to reply within seven workdays (rebuttal or waiver of right to rebut)

References

AFI 36-2502, *Enlisted Airman Promotion/Demotion Programs* (12 December 2014), incorporating through Change 2, 14 October 2016

AFI 36-2606, *Reenlistment and Extension of Enlistment in the United States Air Force* (27 July 2017)

AFI 36-3208, *Administrative Separation of Airmen* (9 July 2004), incorporating through Change 7, 2 July 2013, including AFI36-3208_AFGM2018-01, 14 June 2018

OFFICER SEPARATIONS

Officer separations operate similarly to enlisted separations. However, certain key differences exist. Most of the differences revolve around definitions, terminology, and authorities for officer separations. Unlike enlisted separations, the Secretary of the Air Force (SecAF) is the approval authority for all "for cause" commissioned officer administrative discharges.

Definitions

- Non-probationary Officer:
  - -- Regular officer with six or more years of active commissioned service as determined by the officer's total active federal commissioned service date; or
  - -- Reserve officer with six or more years of commissioned service (inactive or active) as determined by the officer's total federal commissioned service date
- Probationary Officer:
  - -- Regular officer who has completed less than six years of active commissioned service as determined by the officer's total active federal commissioned service date; or
  - -- Reserve officer who has completed less than six years of commissioned service (inactive or active) as determined by the officer's total federal commissioned service date

Voluntary Separation

- Officers may apply for voluntary separation prior to expiration of term of service under AFI 36-3207, *Separating Commissioned Officers,* Chapter 2, for a variety of reasons, which include:
  - -- Completion of active duty service commitment (ADSC)
  - -- Hardship
  - -- Pregnancy
  - -- Conscientious objector status
  - -- Medal of Honor recipient
  - -- Other miscellaneous reasons
- Voluntary separations are subject to approval by the SecAF. The SecAF or designee may disapprove an application if, among other reasons, the officer:
  - -- Has had charges preferred or is under investigation
  - -- Remains absent without leave or absent in the hands of civil authorities
  - -- Defaulted with respect to public property or funds
  - -- Has been sentenced by a court-martial to dismissal
  - -- Is being considered for involuntary administrative discharge proceedings
  - -- Submits an application during war, when war is imminent, or during an emergency declared by the President or Congress
  - -- Has an ADSC for advanced educational assistance, government-funded education or training programs, special pay, or bonus pay (restriction applies even when the reason for separation is pregnancy)

Involuntary Separations Not "For Cause"

- Officers may be separated involuntarily under AFI 36-3207, Chapter 3, Section 3B, for various reasons that are not for cause
- Many involuntary separations are required by law, e.g., reserve officers who reach age limit, those non-selected for promotion, and officers who have reached maximum years of commissioned service or service in grade
- Other involuntary separations include loss of ecclesiastical endorsement; failure to complete or pass medical training, nursing examinations, or nursing intern programs; and officers in health care fields who do not have required licenses
- Involuntary separations that are not for cause will normally be characterized as honorable

Involuntary Separations "For Cause"

- Grounds for discharge for cause are found in AFI 36-3206, *Administrative Discharge Procedures for Commissioned Officers,* Chapter 2 (substandard performance of duty) and Chapter 3 (misconduct, moral or professional dereliction, or in the interest of national security)
- Substandard Performance of Duty:
  - -- Only an honorable or general (under honorable conditions) characterization. Includes broad categories subjecting an officer to separation:
    - --- Failure to show acceptable qualities of leadership
    - --- Failure to achieve acceptable standards of proficiency required of an officer in his/her grade
    - --- Failure to discharge duties equal to his/her grade and experience
    - --- Substandard performance of duty resulting in an unacceptable record of effectiveness
    - --- A record of marginal service over an extended time as shown by performance reports covering two or more jobs and prepared by at least two different supervisors
    - --- Mental disorders that interfere with the officer's performance of duty and do not fall within the purview of the medical disability process
    - --- Apathy or defective attitude
    - --- Failure to conform to prescribed standards of dress, physical fitness, or personal appearance. For cause separation under AFI 36-3206, Chapter 3, is appropriate if failure is deliberate.
    - --- Inability to perform duties because of family care responsibilities
    - --- Failure to maintain satisfactory progress while in an active status student officer program
  - -- Before discharging an officer under this chapter, there should be a documented history of problems and documented efforts to correct the officer's conduct
  - -- If an officer is being separated for reasons under this chapter and received education assistance, special pay, or bonus money, the officer is subject to recoupment
- Misconduct, Moral or Professional Dereliction, or in the Interest of National Security:
  - -- When officers engage in some form of misconduct, discharge under this chapter is often the most appropriate basis
  - -- Although not necessarily considered misconduct, discharges for fear of flying for rated officers fall under this chapter

-- Some other specific grounds for discharge, besides fear of flying for rated officers, include:
  --- Having human immunodeficiency virus (HIV) and not complying with lawfully ordered preventive medicine procedures (i.e., safe sex order)
  --- Failure to meet financial obligations
  --- Intentional or discreditable mismanagement of personal affairs
  --- Drug abuse, which is defined as the illegal, wrongful, or improper use, possession, sale, transfer, or introduction onto a military installation of any drug
  --- Serious or recurring misconduct punishable by civilian or military authorities
  --- Intentional neglect or intentional failure to either perform assigned duties or complete required training
  --- Misconduct resulting in the loss of professional status necessary to perform duties
  --- Intentionally misrepresenting or omitting facts concerning official matters
  --- Sexual assault or sexual assault of a child
  --- Sexual perversion, including aberrant sexual behavior, acts of sexual misconduct, or any indecent viewing, visual recording or broadcasting, forcible pandering, or indecent exposure
  --- Sexual deviation, including transvestitism, exhibitionism, voyeurism, and others as defined in the Diagnostic and Statistical Manual of Mental Disorders
  --- Professed fear of flying
  --- Retention is not clearly consistent with interests of national security
  --- Sentence by a court-martial to a period of confinement for more than six months and not sentenced to a dismissal
  --- Unprofessional relationship by person serving in special position of trust as recruiter, faculty or staff (see paragraph 3.8 for additional definitions applicable to this basis)
-- The service of officers separated under this chapter may be characterized as under other than honorable conditions (UOTHC)
-- If an officer is being separated for reasons under this chapter and received education assistance, special pay, or bonus money, the officer is subject to recoupment

Discharge Procedures

- Unit commander must evaluate the information and consult with the servicing staff judge advocate
- If appropriate, the unit commander recommends discharge to the show cause authority (SCA), who is usually the wing commander if he/she is a general officer, or the general court-martial convening authority, usually the numbered air force (NAF) commander, for wings not commanded by a general officer
- If appropriate, the SCA initiates discharge action by signing a letter to the officer notifying him/her of the discharge action
- Within 10 calendar days of receipt of the letter of notification, the officer submits evidence in response, applies for voluntary retirement (if eligible), tenders a resignation, or requests a delay to respond

- If the SCA determines no action is warranted, the action is terminated
- If the SCA determines discharge action is warranted, the type of processing that occurs depends on the officer's status and the characterization recommended
  - -- Not Board Entitled: If the officer is probationary, and the case does not involve a recommendation for a UOTHC service characterization, the SCA notifies the officer that the case will be reviewed by the Air Force Personnel Board (AFPB). The officer is not entitled to appear in front of or present witness testimony to the AFPB.
  - -- Board Entitled: If the officer is non-probationary, or the officer is probationary and a UOTHC discharge is recommended, then the SCA notifies the officer that the officer will be required to show cause for retention before a board of inquiry (BOI). The officer is entitled to appear in front of and present witness testimony to the BOI.
- Final approval authority for separations initiated under AFI 36-3206 is the SecAF

Resignations in Lieu of Further Administrative Discharge Proceedings

- When the SCA notifies an officer to show cause for retention, an officer may:
  - -- Submit a resignation; or
  - -- Submit a resignation to enlist and retire if eligible to apply for retirement in enlisted status
- These options should not be confused with resignations for the good of the service, which an officer may submit when facing a court-martial for alleged criminal conduct (AFI 36-3207, Chapter 2, Section 2C)
- Officer may be entitled to separation pay
- SecAF is the approval authority

Special Processing Procedures

- Special processing is required for officers who have made an unrestricted report of a sexual assault
  - -- An officer who receives notification of a show cause action under Chapter 2 or Chapter 3 of AFI 36-3206, and who is within one year of final disposition of his/her unrestricted sexual assault allegation as of the date of show cause notification, must be advised of the right to request review by the SCA if the officer believes the commander's recommendation for involuntary separation was initiated in retaliation for having made an unrestricted report of a sexual assault (see paragraph 4.18.5)
- Special processing is required for officers being discharge for personality disorder or other mental disorder not constituting a physical disability when that officer has served or is currently serving in an imminent danger pay area or those that have filed an unrestricted report of sexual assault (see paragraph 4.18.6)
- Pre-separation health assessments are required for officers deployed in support of a contingency operation or Airmen who have been sexually assaulted (see paragraph 4.18.7)

References

AFI 36-2905, *Fitness Program* (21 October 2013), incorporating Change 1, 27 August 2015
AFI 36-3206, *Administrative Discharge Procedures for Commissioned Officers* (9 June 2004), incorporating through Change 7, 2 July 2013, including AFI36-3206_AFGM2018-01, 14 June 2018
AFI 36-3207, *Separating Commissioned Officers* (9 July 2004), incorporating through Change 6, 18 October 2011

ADMINISTRATIVE SEPARATION OF RESERVISTS

AFI 36-3209, *Separation and Retirement Procedures for Air National Guard and Air Force Reserve Members*, applies to both officer and enlisted members of the reserve components not serving on extended active duty (EAD) with the Regular Air Force. See Tables 2.1 and 3.1 for lists of permissible reasons for officer and enlisted separations.

General Considerations

- Processing of reservist discharge actions varies depending on whether the member is a Category A (CAT A) or Category B (CAT B) reservist
- CAT A (Reserve Unit):
  - The member's unit commander initiates the discharge action by presenting the evidence to the Military Personnel Squadron (MPS). The MPS then prepares the letter of notification (LON). The LON must include all attachments (Privacy Act statement, statement of reasons and characterization of service being recommended, acknowledgement of receipt, selection of rights, return envelopes, and supporting documents). It must also contain the following additional information, if applicable:
    - Request for administrative discharge board hearing, waiver of administrative discharge board hearing, and administrative discharge board action information
    - Application for transfer to the Retired Reserve
    - Recoupment of educational assistance, special pay, or incentives
    - Voluntary extension of enlistment election
  - If the commander does not want the member to continue participating on active duty, a separate No Pay/No Points letter should be provided to the member or contained in the LON
  - The MPS presents the LON and attachments to the servicing staff judge advocate (SJA) for a legal sufficiency review
  - Once the LON is approved for legal sufficiency, the unit commander serves, in person if possible, the LON on the member. The member signs the acknowledgement receipt. The commander gives the member a copy of the entire package, but retains the original documents. If the member is not board entitled, the member has 15 days to present any rebuttal evidence.
    - If the member is not served in person, the LON should be sent via registered or certified mail, return receipt requested. The last option is to send the LON by first class mail if other attempts are unsuccessful.
    - If notification attempts are not successful, determine whether there is another address available. If the member's address has changed, it must be updated in the Military Personnel Data System (MilPDS).
  - If board entitled, the member's request for a board hearing must be received by the unit commander (or servicing MPS, if this is how the unit has set up the return of document if the unit commander is a Traditional Reservist) within 15 calendar days (30 days if in civil confinement), or the right to a board hearing is waived

-- For enlisted members who are not board entitled, do not have lengthy service consideration, are not retirement eligible, or those who waived their board (affirmatively or because they failed to return the Request for Board Hearing); the unit commander reviews any documentation submitted to confirm his/her determination that the discharge should proceed

--- This is then sent to the servicing SJA for another legal review

--- Finally, it is submitted to the wing commander or equivalent for determination of whether the member should be discharged

-- For all officer or enlisted members who are entitled to and do not waive a board, have lengthy service consideration, or are retirement eligible, the unit commander reviews any documentation submitted to confirm his/her determination that the discharge should proceed

--- This is then sent to the servicing SJA for another legal review and forwarded to the wing commander, or equivalent, for forwarding to HQ AFRC for further processing

--- HQ AFRC will convene the board and then process it to the discharge authority

- CAT B Individual Mobilization Augmentees (IMAs):

-- IMA discharges are processed through the Readiness Management Group (RMG). The RMG is the Air Force Reserve Command's agency responsible for shared administrative control (ADCON) of IMAs.

-- Program Managers (PM) are a part of the RMG staff and are located at each MAJCOM, Joint Command, or Defense Agency. The PM with administrative oversight responsibility for the IMA initiates the discharge process by forwarding the discharge recommendation to the RMG/CC for action.

-- The RMG/CC forwards the file to HQ AFRC/DPML for processing to AFRC/CC or AFRC/CV, the discharge authorities for CAT B reservists

-- HQ AFRC/DPML notifies the member of the discharge recommendation by certified mail and gives the member 15 days to respond

-- HQ AFRC/JA reviews the case file and determines if it is sufficiently documented to support the basis for discharge

-- If the case file lacks such documentation, HQ AFRC will ask the unit to get the supporting documentation

- Board Entitlements: The following reservists are entitled to present their cases before an administrative discharge board:

-- *Enlisted*: If the recommended characterization of service is UOTHC, if the member is a non-commissioned officer, or if the member has 6 or more years of satisfactory service for retirement

-- *Officers*: A non-probationary officer who has completed six or more years of service as a commissioned officer in any of the armed forces (as determined from the total federal commissioned service date); or a probationary officer who has completed fewer than six years of service as a commissioned officer in any of the armed forces (as determined from the total federal commissioned service date) when the recommended characterization of service contained in the letter of notification is UOTHC

References

DoDI 1332.30, *Commissioned Officer Administrative Separations* (11 May 2018)
AFI 36-3206, *Administrative Discharge Procedures for Commissioned Officers* (9 June 2004), incorporating through Change 7, 2 July 2013, including AFI36-3206_AFGM2018-01, 14 June 2018
AFI 36-3208, *Administrative Separation of Airmen* (9 July 2004), incorporating through Change 7, 2 July 2013, including AFI36-3208_AFGM2018-01, 14 June 2018
AFI 36-3209, *Separation and Retirement Procedures for Air National Guard and Air Force Reserve Members* (14 April 2005), incorporating through Change 3, 20 September 2011

5
CHAPTER FIVE: CRIMINAL AND MILITARY JUSTICE

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.

-- 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* (28 September 2017)

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 federal district court for minor civilian criminal misconduct.
- Military members on Title 10 orders should **NOT** be prosecuted for criminal offenses in federal magistrate court
- Prosecution in federal magistrate court requires the consent of the defendant
- Federal magistrate judges normally try misdemeanor offenses (offenses for which the authorized penalty does not exceed one 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 federal magistrate court
- 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 federal 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
    - --- The Assimilative Crimes Act makes violating a state statute on an installation with exclusive jurisdiction a federal offense and allows prosecution of state 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 through Change 2, 29 June 2018
AFI 36-703, *Civilian Conduct and Responsibility* (30 August 2018)
AFI 51-206, *Use of Magistrate Judges for Trial of Misdemeanors Committed by Civilians* (31 August 2018)

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**:** Courts-martial have exclusive power to hear and decide "purely military offenses"
- Nonmilitary Offenses**:** 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. 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

- 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

Jurisdiction Over the Person

- General Rule**:** Article 3(a), UCMJ, 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.

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))
- 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

-- 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 at the time of court-martial

Air National Guard (ANG)

- A member of the ANG is subject to court-martial jurisdiction only when in federal service
  - -- 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
- 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 against retired members without SecAF approval unless the statute of limitations 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:
  - -- 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

- General Rule – Nonjudicial Punishment (NJP): Imposition of NJP within two years of offense
- General Rule – Court-Martial: Preferral of charges within five years of offense
- Exception: There is no statute of limitation for a person charged with absence without leave or missing movement in time of war, murder, rape, sexual assault, rape or sexual assault of a child, or 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 (2019)
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* (8 December 2017)

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

- AFOSI is removed from command channels and functions as an independent, centralized organization to ensure unbiased investigations
- AFOSI 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
- 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
  - -- Coordination between AFOSI and Security Forces Office of Investigations (SFOI) is required to make best use of investigative resources, taking into consideration technical expertise, investigative capability, and available manpower
  - -- Generally, AFOSI will only investigate major offenses
  - -- Minor offenses are usually handled by SFOI
  - -- AFOSI initiates investigation into **ALL** allegations of sexual assault that occur within its jurisdiction, regardless of the severity of the allegation

Mutual Support Agreements

- Command Role:
  - -- AFOSI requests, and the appropriate commander or magistrate (if designated) 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

- <u>AFOSI Support to Command</u>**:**

-- 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

AFOSI 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

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 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:
  - -- AFPD 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
- 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 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)
- 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 Rule of Evidence 507 (2019)

DoDI 5505.19, *Establishment of Special Victim Investigation and Prosecution (SVIP) Capability within the Military Criminal Investigative Organizations (MCIOs)* (3 February 2015), incorporating through Change 2, 23 March 2017

AFI 71-101 V1, *Criminal Investigations Program* (8 October 2015), certified current 7 December 2015

AFI 71-101 V2, *Protective Service Matters* (23 January 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 CI* (13 November 2015)

FUNCTIONS OF THE AREA DEFENSE COUNSEL (ADC)

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 preliminary hearings
  - -- Nonjudicial punishment (NJP) actions under Article 15, UCMJ
  - -- 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, Admonishment, or Reprimand, Unfavorable Information Files, Control Rosters, referral performance reports, administrative demotions, administrative discharge actions, 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 51-201, *Administration of Military Justice* (8 December 2017)

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, including: the SAPR office, Family Advocacy, 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 (SJA) 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 SJA.

  -- Disposition Authority: By order of the Secretary of Defense (SecDef), effective 28 June 2012, 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). Early collaboration between the command, AFOSI, and the SJA is critical to ensure commanders are in compliance with the SecDef's initial disposition authority policy.

  -- Mandatory Recommendation for 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 recommended for discharge unless the member meets all of the specified retention criterial listed in the AFI. Sexual assault for the purposes of the administrative separation instruction is defined very broadly. Again, SJA 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-Marital 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 and the 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. A punitive discharge is

now mandatory for a conviction of certain sexual offenses. There is no longer a statute of limitations for certain sexual assault cases.

-- Victim Consultation: Victims have a number of rights under Article 6b, UCMJ (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.

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 an expedited transfer or 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 DoDI 1325.07, Appendix 4 to Enclosure 2. However, it is important to note that sex offender registration requirements vary by state and may be triggered by offenses not listed in Enclosure 2.

References

UCMJ arts. 6b, 18, 43, 56, 120, 120a, 120b, and 120c
10 U.S.C. § 113
Rule for Courts-Martial 306 (2019)
Memorandum, Secretary of Defense, *Withholding Initial Disposition Authority Under the Uniform Code of Military Justice in Certain Sexual Assault Cases* (20 April 2012)
DoDI 1325.07, *Administration of Military Correctional Facilities and Clemency and Parole Authority* (11 March 2013), incorporating through Change 3, 10 April 2018
AFI 31-105, *Air Force Corrections System* (15 June 2015), including AFI 31-105_AFGM2018-01, 26 April 2018
AFI 36-3208, *Administrative Separation of Airmen* (9 July 2004), incorporating through Change 7, 2 July 2013, including AFI36-3208_AFGM2018-01, 14 June 2018
AFI 51-201, *Administration of Military Justice* (8 December 2017)
AFI 71-101, Vol 1, *Criminal Investigations Program*, (8 October 2015), certified current 7 December 2017
AFI 90-6001, *Sexual Assault Prevention and Response (SAPR) Program* (21 May 2015), incorporating Change 1, 18 March 2016, including AFI90-6001_AFGM2018-01, 11 October 2018

SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR)

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 (SAPR) 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 SAPR 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 (SARC).

Definition of Sexual Assault

- Sexual assault is intentional sexual contact, characterized by use of force, threats, intimidation, or abuse of authority or when the victim does not or cannot consent. The term includes a broad category of sexual offenses, consisting of the following specific UCMJ offenses: rape, sexual assault, aggravated sexual contact, abusive sexual contact, forcible sodomy (forced oral or anal sex), 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 SAPR 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
  - -- The installation SARCs can be a civilian or military member
  - -- Reporting directly to the installation or host wing commander, the SARC implements and manages the installation level SAPR 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/seven 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. Civilian (appropriated fund) VVAs must be in the grade of GS-7 or higher. Military VVAs must be in the grade of E-4 or higher and at least 21 years of age for enlisted members and in the grade of O-2 for officers; however, officers in the grade of O-1 that were prior enlisted are eligible to become VVAs.
      - Due to the potential for conflicts of interest, members in certain positions or of certain career fields are ineligible to serve as a SARC, SAPR VA or VVA. Areas include commanders, first sergeants, Chief Master Sergeants, personnel assigned to the legal office, Area Defense Counsel, Inspector General (IG), Air Force Office of Special Investigations (AFOSI), Security Forces Squadron (SFS), Equal Opportunity (EO) office, wing chaplain's office, health care providers, emergency medical technicians and firefighters.
  - 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
- Communications between victims (of a sexual or violent offense) and SARCs, SAPR VAs, and VVAs are privileged under Military Rule of Evidence 514 in cases arising under the UCMJ if the communication is made for the purpose of facilitating advice or assistance to the alleged victim. Consult the local legal office for additional exceptions to this general rule.

SAPR Response to Allegations of Sexual Assault

- Upon notification if the victim desires SAPR services
  - The SAPR office will determine program eligibility
    - The following individuals (generally) are eligible for both restricted and unrestricted reporting options: active duty members and their dependents 18 and older, and Air Reserve Component (ARC) members in Title 10 status at the time of the assault
    - The following non-military individuals are only eligible for the unrestricted reporting option: DoD civilian employees' dependents 18 years of age and older when stationed or performing duties OCONUS, and U.S. citizen DoD contractor personnel when authorized to accompany the Armed Forces in a contingency operation OCONUS and their employees who are U.S. citizens
    - DoD civilian employees CONUS and OCONUS will have both reporting options of restricted and unrestricted reporting. DoD civilians will have access to the full SAPR services that are offered to service members, but this does not include additional

medical entitlements or legal services to which they are not already authorized by law or policy.

--- SAPR services are not provided for victims who are assaulted by their spouse, same-sex domestic partner, or unmarried intimate partner, or military dependents who are 17 years old or younger. 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 channels 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

---- If the victim chooses not to engage in FAP services, the victim may choose SAPR services, but the Case Management Group must be informed of the safety risks with the victim and ensure a safety plan is coordinated by the SARC with the victim

-- 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 must be reported to AFOSI and will result in a formal investigation

---- 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 (which includes FAP).

---- 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

---- 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 who have made an unrestricted report through either the SAPR program or the FAP

-- Upon receiving a request for ET, the installation or host wing commander can consider potential transfer of the alleged offender instead of the victim if appropriate. Alleged offender reassignments are handled in accordance with 10 U.S.C. 674 and AFI 36-2110, *Total Force Assignments*; transfers for offenders are not in the duties and responsibilities of the SARC or SAPR VA.

-- Victims are 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.

-- 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*.

-- 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/her recommendation upon all available information, especially that provided by AFOSI, and after consultation with the staff judge advocate (SJA).

--- The installation or host wing commander shall establish a presumption in favor of transferring a victim following a credible report of sexual assault. The installation or host wing commander makes a decision which, if approved, is forwarded by the victim through the virtual MPF to AFPC for transfer orders.

--- The installation or host wing commander must make a decision no more than 72 hours from the request

--- 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.

- 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 convene for reports of sexual assault perpetrated by someone other than a spouse or intimate partner cases. The CMG is chaired by the host wing or vice wing commander. Unrestricted reports will be considered by the entire CMG, while restricted reports will be considered by a very limited number of specified CMG members.
  - 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, and command proceedings regarding the sexual assault from the date the investigation was initiated until there is a final disposition of the case.
  - The CMG will form a High-Risk Response Team (HRRT) for victims who are assessed through a safety assessment. An HHRT is established immediately in each case and must report findings to the installation commander within 24 hours of being activated.
- 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 the same as a result of reporting a sexual assault
  - Air Force personnel who are bystanders/witnesses and/or first responders to unrestricted or restricted reports of sexual assaults are also protected from retaliation pursuant to the DoD Retaliation Prevention and Response Strategy
  - 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 such as 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
  - 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 assault

--- 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 the discharge action if they believe their separation was initiated in retaliation for making an unrestricted report of sexual assault within 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 through Change 3, 24 May 2017

DoDD 6495.01, *Sexual Assault Prevention and Response (SAPR) Program* (23 January 2012), incorporating through Change 3, 11 April 2017

Memorandum, Under Secretary of Defense for Personnel and Readiness, *Request for an Air Force Permanent Exception to Department of Defense Directive 6494.01, "Sexual Assault Prevention and Response (SAPR) Program" for Civilian Employees,* 12 January 2017

AFI 36-2110, *Total Force Assignments* (5 October 2018)

AFI 36-3208, *Administrative Separation of Airmen* (9 July 2014), incorporating through Change 7, 2 July 2013, including AFI36-3208_AFGM2018-01, 14 June 2018

AFI 40-301, *Family Advocacy Program* (16 November 2015), incorporating Change 1, 12 October 2017

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, including AFI90-6001_AFGM2018-01, 11 October 2018

SPECIAL VICTIMS' COUNSEL (SVC) PROGRAM

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 SVC Program are to:
  - -- Provide victims of sexually-related offenses with independent and privileged legal representation with respect to issues arising from or related to the sexually-related offenses, to include investigation and prosecution of those offenses
  - -- Empower victims by providing professional and knowledgeable counsel to enable them to express their choices
  - -- Provide advocacy to protect the rights afforded to victims

Overview

- On 28 January 2013, the Air Force implemented a Special Victims' Counsel (SVC) Program by providing qualified judge advocates to represent sexual assault victims
- The FY14 National Defense Authorization Act (NDAA) and 10 U.S.C. §1044e mandated all the Military Services to designate Special Victims' Counsel
- The Special Victims' Counsel Division now includes Special Victims' Counsel and Special Victims' Paralegals at approximate 48 locations around the world; installations without a local SVC office are assigned to specific SVC offices for services

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, USAFA cadets, and reserve/guard)
  - -- Dependents of Air Force members, retirees, and DoD Civilians, if the perpetrator is a military member subject to the UCMJ
  - -- Other service members and their dependents if the perpetrator is a military member subject to the UCMJ (individuals may 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 six months of their service
- The Chief, Special Victims' Counsel Division, AFLOA/CLSV, or designee, may authorize SVC services to otherwise ineligible victims on a case-by-case basis (known as an "extraordinary circumstances request"). Denial of services may only be directed by AFLOA/CC. Eligibility for services is outlined in 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 the law and applicable regulations
    - --- 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 victims accused of misconduct in conjunction with a military defense counsel or alone. Collateral misconduct is defined as victim misconduct that might be in time, place, or circumstance associated with the victim's sexual assault incident (for example, a victim drinking underage at the time of the offense). The fear of punishment for collateral misconduct is often one of the most significant barriers to reporting an assault.
  - -- 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
  - -- Legal Assistance: SVCs may provide legal assistance or may refer victims to a local legal office to provide traditional legal assistance

Special Victims' Counsel (SVC) Qualifications

- The SVC is a certified judge advocate designated by The Judge Advocate General to represent the interests of victims of sexually related offenses
- 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 as the SVC determines appropriate

-- The SVC is an advocate for the client, not an advisor for the command or the legal office

- If a victim of a sexual assault requests an SVC, refer them to the SARC or legal office who will coordinate a request for representation

---

References

UCMJ art. 6b
10 U.S.C. §§ 1044 and 1044e
10 U.S.C. § 1565b
AFI 51-304, *Legal Assistance, Notary, Preventive Law, and Tax Programs* (22 August 2018)

AIR FORCE VICTIM WITNESS ASSISTANCE PROGRAM (VWAP)

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: (1) to mitigate the physical, psychological, and financial hardships suffered by victims and witnesses of offenses investigated by U.S. Air Force authorities; (2) to foster cooperation between victims, witnesses, and the military justice system; and (3) 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.
- A 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.
- Agencies (Office of the Staff Judge Advocate, Security Forces, Air Force Office of Special Investigations, Sexual Assault Response Coordinator, Family Advocacy Program, Airman and Family Readiness Center, Chaplain's Office, commanders, and first sergeant) work together to develop local training to ensure compliance with VWAP. Annually all agencies involved in VWAP are responsible for training personnel assigned to their respective agencies on their responsibilities with the program. The SJA trains commanders and first sergeants.
- Each installation should prepare a victim information packet and the same local agencies listed above should be involved in its preparation. A model packet can be found online through the AFLOA/JAJM virtual Military Justice Deskbook. Consult with the legal office for a copy of this document if one doesn't exist at the installation. Each identified victim or witness should be provided the information packet. 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*; DD Form 2703, *Post-Trial Information for Victims and Witnesses of Crime*; DD Form 2704, *Victim/Witness Certification and Election Concerning Prisoner Status*; and DD Form 2705, *Notification to Victim/Witness of Prisoner Status*.

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 and a victim shall be identified at the earliest opportunity after the detection of a crime. 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, installations have a number of specific responsibilities toward crime victims under VWAP. These responsibilities are delivered by the LRO, law enforcement, commanders, the staff judge advocate, confinement facilities, Airman and Family Readiness Center, and Sexual Assault Prevention and Response Programs as applicable. These responsibilities center on providing victims and witnesses with services and information. Some of the most significant responsibilities include:

  -- Inform eligible victims of the ability to consult with special victims' counsel 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 to the victim "appropriate administrative action was taken"

    --- LRO should consult with SJA prior to revealing to the victim the specific action taken, i.e., Article 15 punishment and/or administrative discharge, to ensure the release is not inconsistent with 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 and military protective 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 Rule of Evidence 514 (2019)
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* (8 December 2017)

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 payment 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 a 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
- A 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 up to 36 months, depending on the circumstances
- The monthly amount for transitional compensation is set by Congress (38 U.S.C. § 1311)
  - -- 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* (24 January 2018)
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*, 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 preliminary hearing 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 (2019)
AFI 33-332, *Air Force Privacy and Civil Liberties Program* (12 January 2015), incorporating Change 1, 17 November 2016, with corrective actions applied 17 November 2016
AFI 35-101, *Public Affairs Responsibilities and Management* (12 January 2016)
AFI 35-104, *Media Operations* (22 May 2017)
AFI 51-201, *Administration of Military Justice* (8 December 2017)

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 his/her Article 31 rights
  - -- When a commander, law enforcement, or any other person with discipline authority, and is subject to the UCMJ, interrogates or requests any statement from an Airman suspected of an offense, that individual must first warn the Airman of his/her 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.

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?

- The allegation that is to be the subject of the questioning. The allegation stated 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 UCMJ article number of which the person is suspected of violating (e.g., advising someone that they are suspected of committing "sexual assault" is more specific than stating they are suspected of violating "Article 120 of the UCMJ")

- Right to remain silent
- Consequences of making a statement
- Although it is not necessary that the advisement be verbatim, the 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 (also attached at the end of this section)
- Article 31 does not include a right to counsel, although one is provided in the Constitution. The right to counsel 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, the 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.

- 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 Form 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 Form 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
Military Rules of Evidence 304 and 305 (2019)
AF Visual Aid 31-231, *Advisement of Rights* (2 May 2014) (attached below)
AF Form 1168, *Statement of Suspect/Witness/Complainant* (1 April 1998)

Advisement for Military Suspects

I am _____ (grade, if any, and name), member of the (Air Force Security Forces/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 Forces/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/her command and to authorize probable cause searches and seizures of persons and property under his/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.

A commander should also know the difference between inspections/inventories (not requiring probable cause; usually authorized by individual commanders; intended for non-prosecutorial reasons) and searches/seizures (requiring probable cause intended to obtain evidence for disciplinary reasons). 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 judge advocates 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 (SFOI) or AFOSI

-- Note any incriminating evidence or statements

-- Coordinate 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 (i.e., do not tell the suspect that if they do not consent you will obtain search 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 Form 1364, *Consent for Search and Seizure*.

--- 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) 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.

-- (2) 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 employing 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 predesignated 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 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 the 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 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 (2019)
AFMAN 31-116, *Air Force Motor Vehicle Traffic Supervision* (18 December 2015), incorporating Change 1, 22 June 2017
AFI 31-121, *Military Working Dog Program* (2 May 2018)
AFI 31-218(I), *Motor Vehicle Traffic Supervision* (22 May 2006), certified current 15 July 2011, including AFI31-218_AFGM2016-01 (4 October 2016)
AFI 51-201, *Administration of Military Justice* (8 December 2017)
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. All allegations of a sexual nature or drug distribution must be referred to AFOSI for investigation 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 of reenlistment, etc.
  - -- Nonjudicial punishment under Article 15
  - -- Preferral of court-martial charges
    - --- At the time of preferral of charges, the accuser is required to take an oath that he/she is familiar with facts underlying the charges

---

References

Rules for Courts-Martial 303 and 306 (2019)
SecDef Memorandum, *Withholding Initial Disposition Authority Under the Uniform Code of Military Justice in Certain Sexual Assault Cases* (20 April 2012)

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 on the DD Form 458, *Charge Sheet*

Preferral of the Charges

- The first formal step in initiating a court-martial
- Anyone subject to the UCMJ may prefer charges against another person subject to the UCMJ, though the immediate commander of an accused is the individual who ordinarily prefers charges
- 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 Charges

- 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.
- 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 preferred 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
- Time constraints are involved in the processing of court-martial charges. An accused's right to a speedy trial and the impact that 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 (2019)
AFI 51-201, *Administration of Military Justice* (8 December 2017)
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: moral or physical restraint on a person's liberty, imposed before and during disposition of court-martial level offenses
- Pretrial Confinement: 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
- 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 legal office
- The imposition of pretrial restraint in the form of restriction in lieu of arrest, arrest, or pretrial confinement 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 Rule for Court-Martial (RCM) 305, a person may be released from pretrial restraint by any person authorized to impose the restraint

Types of Pretrial Restraint

- There are four types of pretrial restraint (listed from least to most severe):
- 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/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 retain civilian counsel at no expense to the United States
  - -- Procedures by which pretrial confinement will be reviewed
- Article 10, UCMJ requires that "immediate steps" 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 by the 72-hour Commander Review discussed below. 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 or suicide prevenrtion of the accused are **NOT** valid reasons 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 override 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

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
Rules for Courts-Martial 304, 305, 707 (2019)
AFI 51-201, *Administration of Military Justice* (8 December 2017)

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

- Findings is the 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/she understands the meaning and effect of his/her 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's 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
  - The accused is presumed innocent of all charges
    - 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, three-fourths of the members, voting by secret written ballot, must concur in any finding of guilty
  - *Court Martial Panel Voting – Capital Case*s: 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
    - If an accused elects trial before military judge alone for findings, then the accused will be sentenced by the military judge

--- If an accused elects trial before members, then at sentencing the accused can choose: (1) to have the same panel of members adjudge the sentence; or (2) elect to have the sentence determined by the military judge alone

-- 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, three-fourths must concur, voting by secret written ballot, in any sentence, except that a unanimous vote is required when the sentence includes death

Reference

Rules for Courts-Martial 903, 910, 913, 918, 921, 1001, 1001A, 1004, and 1006 (2019)

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

- 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

- 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

- A limited privilege exists between patients 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; when the psychotherapist believes that a patient's mental or emotional condition makes the patient a danger to any person, including the

patient; 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

- 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 or between the victim and Department of Defense Safe Helpline staff, for victims of sexual or violent offenses in a case 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*, 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

Marital Privilege

- 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
Military Rules of Evidence 302, 501-514 (2019)
Rule for Courts-Martial 706 (2019)
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), incorporating Change 1, 17 November 2015, with corrective actions applied 17 November 2016
AFI 36-2706, *Equal Opportunity Program Military and Civilian* (5 October 2010), incorporating Change 1, 5 October 2011, AFGM2017-01, reissued 1 February 2018
AFI 36-3009, *Airmen and Family Readiness Centers* (30 August 2018)
AFI 44-121, *Alcohol and Drug Abuse Prevention and Treatment (ADAPT) Program* (18 July 2018)
AFI 44-172, *Mental Health* (13 November 2015)
AFI 41-210, *Tricare Operations and Patient Administration Functions* (6 June 2012), including AFI 41-210_AFGM2018-01, 27 September 2018
AFI 51-110, *Professional Responsibility Program* (5 August 2014), including AFI51-110_AFGM2018-01, 15 May 2018

POST-TRIAL MATTERS

Most parts of court-martial sentences do not go into effect automatically. 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.

Statement of Trial Results and Submissions by the Accused and Victim

- Following a court-martial the military judge shall prepare and sign a Statement of Trial Results (STR). This should take place on the day the sentence in the case is announced. The STR summarizes the findings and sentence of the case and is provided to the accused's immediate commander, the convening authority and in cases of confinement, the confinement facility. The accused, defense counsel, and victims(s) will also receive the STR.
- Within 10 calendar days (seven calendar days for summary courts-martial) of the sentence being announced the accused and victim(s) in a case have an opportunity 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 and victim(s) may also request an extension of time of up to 20 days to submit clemency matters
  - -- Accused and victim(s) may also waive his/her right to submit clemency matters
- Trial counsel 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
- The Accused may submit any clemency matters that may reasonably tend to inform the convening authority's exercise of discretion under the clemency rules. The matters must be in writing but cannot include matters that relate to the character of a crime victim unless they were admitted as evidence at trial.
- The victim may submit any clemency matters that may reasonably tend to inform the convening authority's exercise of discretion under the clemency rules. The matters must be in writing, but cannot include matters that relate to the character of the accused unless they were admitted as evidence at trial. The crime victim is entitled to only one opportunity to submit matters to the convening authority.
  - -- In a case where a crime victim submits matters, the accused shall be given five days from the receipt of those matters to submit any matters in rebuttal. The issues are limited to those raised in the crime victim's submissions.

Convening Authority Action

- After the court-martial is over, the convening authority has limited authority to take "action" on the findings or sentence. Generally speaking, the convening authority may take "action" by: (1) disapproving findings of guilt (unless the offense concerned did not involve a rape or sexual assault conviction, and the maximum confinement for that offense was two years or less, didn't include a punitive discharge and the term of confinement was six months or less); and (2) reducing, disapproving, or suspending a sentence except under certain circumstances.
- The convening authority is required consult with the staff judge advocate or legal advisor before taking action on the findings and/or sentence of a court-martial. The convening authority must also review matters timely submitted by the accused and victim(s) (if applicable) and may

consider other matters (to include the STR, evidence introduced at the court-martial, etc.) prior to taking action.

- After considering such matters, the convening authority may take no action on the findings and sentence. If no action is taken, the convening authority's staff judge advocate (SJA) or legal advisor shall notify the military judge that no action was taken.
- In general and special courts-martial, after the convening authority action or notification that no action was taken, the military judge will complete an "Entry of Judgment" which terminates the trial proceedings and initiates the appellate process. The "Entry of Judgment" reflects the result of the court-martial as modified by any post-trial action, rulings, or orders.

Effective Date of Court-Martial Punishments

- General and Special Courts-Martial
  - -- Generally, the sentence takes effect when the judgment is entered into the record by military judge (Entry of Judgment)
- Summary Courts-Martial
  - -- Takes effect when the convening authority takes action
- Exceptions in General and Special Courts-Martial
  - -- Punitive Discharge: Not effective unless and until approved after appellate review
  - -- Confinement: Effect immediately unless deferred (i.e., delay the effective date); deferment ends when the military judge enters judgment into the record (Entry of Judgment)
  - -- Reduction in Grade: Effective 14 days after announcement of the sentence or the date on which the sentence is approved by the convening authority (SCM only) unless deferred
  - -- Forfeiture of Pay and Allowances: Effective 14 days after announcement of the sentence or the date on which the sentence is approved by the convening authority (SCM only)
    - --- *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 six months
    - --- *Waiver of Automatic Forfeitures*: In addition, when taking action, the convening authority may lessen the impact of "automatic" forfeitures of pay by "waiving" them for up to six months. A convening authority may waive mandatory forfeitures but only in cases where the accused has dependents. The waived forfeitures are for the benefit of the accused's dependents and are paid directly to the dependents.
- Restriction and Hard Labor Without Confinement: Effective upon Entry of Judgment and executed concurrently

References

UCMJ arts. 57, 58a, 58b, 60, 60a, 60b, 60c
Rules for Courts-Martial 1101-1114 (2019)
AFI 51-201, *Administration of Military Justice* (8 December 2017)

6
CHAPTER SIX: PERSONNEL ISSUES – GENERALLY

TOTAL FORCE: AIR RESERVE COMPONENT (ARC)

Regular Air Force (RegAF), Air National Guard (ANG), and Air Force Reserve (AFR) Airmen work together as a team in air, space, and cyberspace worldwide. Together, the AFR and ANG make up the Air Reserve Component (ARC). The ARC's mission is to provide combat ready forces to the Air Force whenever needed.

ARC Personnel Categories

- Ready Reserve: Includes the Selected Reserve and Individual Ready Reserve who are available to be involuntarily ordered to active duty in time of war or national emergency, pursuant to 10 U.S.C. §§ 12301 and 12302
  - -- *Selected Reserve*: Those units and individuals within the Ready Reserve approved by the Joint Chiefs of Staff as so essential to initial wartime missions that they have priority over all other reserves. It includes traditional reservists, individual mobilization augmentees (IMA), active guard reservists (AGR), and military technicians.
  - -- *Individual Ready Reserve (IRR)*: Individuals who have had training and previous experience in the Regular component or the Selected Reserve and still have a military service obligation
  - -- Includes all ANG (including inactive National Guard (ING))
- Active Guard Reserve (AGR): Reservists on full-time active duty (AD) for the purpose of organizing, administering, recruiting, instructing or training Reserve Component units, or performing duties prescribed in 10 U.S.C. § 12310. (Note: AGRs do not usually mobilize, they are the steady force that stays to organize, administer, recruit, instruct or train others.)
- Standby Reserve: Pool of trained individuals (other than those in the Ready Reserve or Retired Reserve) who could be ordered to active duty only in time of war or national emergency
- Retired Reserve: Reservists who have at least 20 years of service and are either waiting to turn 60 years of age to collect retirement pay (nicknamed a "Gray Area" retiree) or are over age 60 and receiving retirement pay
- Regular Active Duty Retired: May be ordered to active duty by the Secretary of the Air Force (SecAF) if deemed necessary for the national defense

Air Force Reserve (AFR)

- AFR is an integrated Total Force partner in every Air Force core mission, providing combat-ready forces to fly, fight, and win. In addition to the categories (above), participating reservists hold a duty status.
- Types of Reserve Personnel Duty Status:
  - -- *Air Reserve Technician (ART)*: Members are full-time federal civil service employees of an Air Force reserve unit and serve in dual roles as both civilians and Reserve Airmen
  - -- *Traditional Reservist (CAT A)*: Assigned to stand-alone reserve units
    - --- Required to perform 14 days of annual training (AT) and 24 days during unit training assemblies (UTAs) in inactive duty training (IDT) status (each UTA day counts for two IDTs, for a total 48 IDTs required)
  - -- *Individual Mobilization Augmentees (IMAs) (CAT B)*: Attached to and augment active component and government agency missions and are rated by active component or government agency supervisors
    - --- Required to perform 12 days of IDT per year (two IDT periods per day for a total of 24 IDTs) and 12-14 days of AT, in a Title 10, active duty status per year

--- IMAs may volunteer for additional active duty orders or be mobilized to fill Air Force mission requirements

-- *Participating Individual Ready Reservist (PIRRs)*: Participate for points only that are applied toward retirement

Air National Guard (ANG)

- ANG members have a dual-role based on the Militia Clause of U.S. Constitution, Article 1, Section 8

  -- Federal Role (Title 10): Mission is to maintain well-trained, well-equipped units available for prompt mobilization under Title 10 of the United States Code during war and national emergencies

  -- State Role (Title 32): Mission is to provide trained, organized and disciplined units and individuals to protect life, property, and preserve peace, order and public safety within the state or territory by providing emergency relief support, search and rescue, support to civil defense authorities and counterdrug operations

  -- There are also National Guard technicians or military technicians (MTs) who are federal civilian employees occupying technician positions. They must be members of both state ANG and federal civil service.

- ANG Required Training: 24 days of IDTs (two IDTs per day for a total of 48 IDTs) and 15 days of active duty service per year

Administrative and Disciplinary Action

- Air Force Reservists:

  -- Reservists are subject to the UCMJ in active duty and inactive duty training status

  -- Address questions of alleged misconduct or administrative actions to include separation and/or demotion involving IMAs to their respective active duty staff judge advocate (SJA) and the HQ RIO legal advisor located at HQ ARPC/JA, who advises the Individual Reservist's (IR) HQ RIO Detachment Commander and the RIO/CC. The Active Duty Commander and HQ RIO Detachment Commander share administrative control (ADCON) over the IR.

  -- Address questions about alleged misconduct involving Traditional Reservists and ARTs to their reserve unit's SJA who coordinates with their respective NAF/JA and HQ AFRC/JA

  -- If deployed, look to member's activation orders for guidance

- Air National Guard Members:

  -- Misconduct of ANG members is governed by the member's status at the time of the action. ANG personnel are only subject to the UCMJ when "in federal service" Article 2(a)(3), UCMJ.

  -- Activation orders show if member is in Title 10 or Title 32 status and where assigned for administrative control/operational control

  -- If in Title 10 status, contact local SJA, who will coordinate with the 201 MSS/JA at DSN 612-8614

  -- If in Title 32 status, contact local SJA, who will coordinate with the member's home unit SJA (unless orders direct otherwise)

  -- If a Military Technician, contact local SJA, who will coordinate through member's home unit (if in military status) or the applicable State Human Resources Office (if in civilian status)

References

U.S. Const. Art. 1, § 8
UCMJ art. 2(a)(3)
Reserve Officer Personnel Management Act, 10 U.S.C. §§ 10141-10154
Reserve Forces Revitalization Act of 1996, 10 U.S.C. §§ 10215-10218
Reserve Forces Act of 1955, 10 U.S.C. §§ 12301 *et seq.*
DoDI 1215.06, *Uniform Reserve, Training, and Retirement Categories for the Reserve Components* (11 March 2014), incorporating Change 1, 19 May 2015
AFI 36-3209, *Separation and Retirement Procedures for Air National Guard and Air Force Reserve Members* (14 April 2005), incorporating through Change 3, 20 September 2011

ACTIVE GUARD AND RESERVE CURTAILMENTS

The Air Force Reserve (AFR) Active Guard and Reserve (AGR) Program is established by Department of Defense policy and implemented in AFI 36-2132, Vol. 2, *Active Guard/Reserve (AGR) Program*. The AGR career program provides an AGR with career opportunities for promotion, career progression, retention, education, and professional development. This program may lead to an active duty retirement after attaining the required years of federal service.

- Initial entry into the AGR program is by individual application for selection assignment. As of 9 February 2018, initial assignment length is three years, however some assignments may be shorter.
- An AGR is accepted into the career program when (1) accepted by an AGR review board, (2) orders enable the AGR to exceed the 6-year probationary period as an AGR, or (3) the AGR reaches sanctuary, as established in AFI 36-2131, *Administration of Sanctuary in the Air Reserve Component*
- A voluntary release from an AGR tour is referred to as a curtailment
  - -- AGRs may request a curtailment of an AGR tour based on position realignment, personal hardship, retirement or other valid reasons
  - -- AGRs submit a curtailment request through the chain of command to arrive at ARPC/DPAAG (O-5 and below) or AF/REG (O-G) at least 120 days prior to and no more than 365 days before the requested date of separation (DOS)
  - -- Curtailment requests for the purpose of retirement must be received by ARPC/DPAAG (O-5 and below) or AF/REG (O-G) no later than 60 days prior to the requested permissive temporary duty assignment (TDY)/terminal leave start date but not less than 120 days before the retirement date
- Involuntary Curtailment: Commanders considering involuntary curtailment should use all quality force management tools available prior to initiating an involuntary curtailment
  - -- Depending on the nature of the involuntary curtailment, commanders should consider discharge in lieu of involuntary curtailment
  - -- Commanders should consult with ARPC/DPAAG (O-5 and below) or AF/REG (O-G) and their servicing legal office to determine if an involuntary curtailment is appropriate

References

DoDI 1205.18, *Full-Time Support (FTS) to the Reserve Components* (12 May 2014)
AFI 36-2131, *Administration of Sanctuary in the Air Force Reserve Components* (27 July 2011)
AFI 36-2132, Volume 2, *Active Guard/Reserve (AGR) Program* (20 March 2012), incorporating Change 1, 10 February 2014, including AFI36-2132_AFGM2018-01, 9 February 2018

REASSIGNMENT TO THE INDIVIDUAL READY RESERVE (IRR)

The Individual Ready Reserve (IRR) is a manpower pool consisting of individuals who have had some training and who have served previously in the active component or in the Selected Reserve. Members may voluntarily participate in training for retirement points and promotion, in accordance with AFI 36-2254, Vol. 1, *Reserve Personnel Participation*. Transfers to the IRR may be voluntary or involuntary.

Voluntary Reassignment to the IRR

- Members who no longer desire to actively participate in the Air Force Reserve may request to be reassigned to the IRR
- Commanders **MUST** deny "voluntary" requests for reassignment to the IRR when discharge is more appropriate
- Application: Members request reassignment to the IRR by submitting AF Form 1288, *Application for Ready Reserve Assignment* or a personal letter to the wing commander or equivalent (unit reserve program) or to the Readiness Integration Organization (RIO) detachment commander for the Individual Mobalization Augmentee (IMA) program
  - -- As part of the completion of AF Form 1288, members must certify that they either have or have not received an Unfavorable Information File (UIF) within the last two years (enlisted) or five years (officers). If the member has had a UIF during this period, the last five OPRs/EPRs must accompany the assignment request.
- Approval Authority:
  - -- Wing commander or equivalent (unit program) or the RIO detachment commander (IMA program) is the approval authority for voluntary requests
  - -- In the unit reserve program, any commander in the chain of command may disapprove a request for reassignment
  - -- In the IMA program, the RIO detachment commander may disapprove a request for reassignment
  - -- Approved IRR reassignment requests must have an effective date not earlier than six months from the date the request is submitted. The wing commander or equivalent (unit program) or ARPC/DPR (IMA program) may waive the 6-month requirement.

Involuntary Reassignment to the IRR

- Involuntary reassignment to the IRR from the Ready Reserve for cause is generally inappropriate
  - -- Use involuntary reassignment only as a last resort
  - -- Initiate involuntary reassignment for cause or derogatory reasons only after all appropriate disciplinary and/or administrative actions have been taken and documented
  - -- Consider exceptions to these policies on a case-by-case basis
- Involuntary reassignment is not a substitute for discharge. If administrative discharge is warranted, process in accordance with AFI 36-3209*, Separation and Retirement Procedures for Air National Guard and Air Force Reserve Members*.
- Appropriate Situations: Some potential situations where involuntary reassignment may be appropriate include (but are not limited to):

-- *Unexcused Absences*: In the unit reserve program, if a member has nine or more unexcused absences from Unit Training Assemblies (UTAs) in a 12-month period, commanders should reassign the member to the IRR (if not discharging the member)

-- *Repeated Fitness Failures*: Members who fail to meet minimum fitness standards for reasons other than documented disability may be discharged in accordance with the standards laid out in AFI 36-2905, *Fitness Program*

-- *Health Assessment Non-compliance*: Failure to comply with requirement for reserve component periodic health assessment

-- *Whereabouts Unknown*: Member not immediately available but not missing in action

- Evaluation: Unit commander (or RIO detachment commander) will examine and evaluate any information received that indicates a member should be considered for involuntary reassignment

- Memorandum of Notification: If a commander determines grounds exist to warrant initiation of involuntary reassignment action, a memorandum of notification (MON) is sent to the member in accordance with AFI 36-2115, *Assignments within the Reserve Component*. A sample MON is provided in the AFI at Attachment 5, and includes a list of information which must be provided to the member.

  -- Personally Deliver: When feasible, the MON should be personally delivered to the member

    --- Delivering official must obtain a written acknowledgement of receipt, and a sample is provided at AFI 36-2115, Attachment 6

    --- If member refuses to acknowledge receipt, the delivery official makes an annotation to that effect on the receipt, including the date and time of delivery of the notification. The receipt should be kept in the case file.

  -- Certified Mail: When personal delivery is not feasible, the unit should send the MON by certified mail, return receipt requested, to the member's last known address

    --- If attempts to deliver the MON by certified mail are unsuccessful, send the MON by first class mail using the format at AFI 36-2115, Attachment 7

    --- If the member resides outside the United States, an equivalent form of notice may be used

  -- Undelivered: If postal service returns the MON without indicating a more current address, file the returned envelope in the case file and request verification of last permanent mailing address from the postmaster using the format at AFI 36-2115, Attachment 8

    --- If an address correction is received, send the MON to the member at that address

    --- If all attempts to deliver the MON by certified and first class mail are unsuccessful, complete the Affidavit of Service by Mail at AFI 36-2115, Attachment 9

  -- Review:

    --- *Member*: Member must be allowed 15 calendar days after receipt of the MON to consult with legal counsel and submit statements or documents on his/her behalf. If the member fails to submit statements or documents during this time period, the case may proceed based on the information available, without further notice to the member.

    --- *Commander*: The commander reviews any matters submitted by the member and determines whether to continue involuntary reassignment action

-- Determination:

--- If the commander elects to continue the involuntary reassignment action, the case file must be processed through the servicing staff judge advocate and chain of command to the approval authority

--- The approval authority reviews the case to determine whether the facts are properly substantiated. The approval authority then approves or denies the reassignment and notifies the member.

- It is in the best interest of both the Air Force and the member to process the case as expeditiously as possible. Commanders should monitor the process to ensure cases are processed without undue delay.

References

AFI 36-2115, *Assignments within the Reserve Components* (8 April 2005), certified current 2 May 2008

AFI 36-2254, Volume 1, *Reserve Personnel Participation* (26 May 2010)

AFI 36-3209, *Separation and Retirement Procedures for Air National Guard and Air Force Reserve Members* (14 April 2005), incorporating through Change 3, 20 September 2011

AF Form 1288, *Application for Ready Reserve Assignment* (3 August 2004)

DEBARMENT

Installation commanders have broad authority to control activities on their installations, including the authority to remove or exclude any person whose presence on the installation is unauthorized or disrupts good order and discipline. This authority enables a commander to fulfill his/her responsibilities to protect personnel and property, to maintain good order and discipline, and to ensure the successful, uninterrupted performance of the DoD mission. The terms debarment, barment, and barred are often used interchangeably to mean that an individual is no longer permitted access to a specific DoD installation.

Commander's Responsibilities and Options

- An installation commander's decision to remove or exclude a person from the installation is subject to judicial review
  - -- However, the decision is given substantial deference and will not be overturned unless proven to be arbitrary or capricious
  - -- An illegal debarment could subject a commander to personal civil liability in a lawsuit
- An installation commander **MAY NOT** delegate the authority to debar an individual from an installation to a subordinate

Who is Subject to Debarment?

- Members of the armed forces are not normally debarred. Service members being involuntarily separated may, in conjunction with their discharge, be debarred for good cause.
- Civilians may be debarred from a military installation
- Dependent family members and retirees may be debarred from an installation, but they must be granted access to the installation to receive any medical or dental care they are entitled (statutory right under 10 U.S.C. §§ 1074, 1076)
  - -- Medical and dental care is subject to the availability of space, facilities, and the capabilities of the medical and dental staff
  - -- Care may not be permitted to interfere with the primary mission of those facilities
- Civilian employees may be debarred, but they should be removed from federal service before being debarred
  - -- Otherwise, the employee may still be entitled to collect a salary
  - -- Check with the Civilian Personnel Office to determine if the local collective bargaining agreement, should one exist, contains additional due process requirements
- Salespersons and businesses may be debarred for misconduct. Misconduct may lead to debarment of a single agent or an entire firm.
- Contractors may be debarred for misconduct. Contractor employees with security clearances are not entitled to greater protection from debarment.
- Possession, distribution, or use of drugs is commonly used as a good cause for debarment, while exceeding weight standards, would not be good cause

Procedural Requirements

- A person who is debarred from an installation should be notified, in writing, that he/she is prohibited from entering the installation. The notification (called a "debarment letter") should state the reason for and period of the debarment. It should also include an exception for access to medical or dental care, if the person subject to debarment is entitled to such care.

- The debarment is for the specific installation and does not prohibit access to other military installations not subject to the control of the issuing Installation Commander
- Determining the debarment period is a matter of discretion
  - -- Commanders should consider the individual, the reason for the proposed debarment, and the need for good order, discipline, and security. The bottom line is what is reasonable given all the circumstances.
  - -- Length of the debarment period should be stated in the debarment letter. The commander may debar an individual for a specific length of time or, in appropriate cases, the debarment may be for an indefinite period of time.
- Individual can ask the installation commander to lift the debarment at any time, regardless of whether the debarment is for a set period or indefinite
- A copy of the debarment letter should be hand-delivered to the individual or sent by certified mail to ensure a record of receipt
- An individual who enters an installation after receiving notice of debarment from the installation commander is subject to federal criminal prosecution under *Entering Military Naval or Coast Guard Property*, 18 U.S.C. § 1382. Maximum penalty for violation of the law is six months confinement and a $500 fine.

References

10 U.S.C. § 1074, 1076
18 U.S.C. § 1382
50 U.S.C. § 797
32 C.F.R. § 809a (2015)
DoDI 5200.08, *Security of DoD Installations and Resources and the DoD Physical Security Review Board (PSRB)* (10 December 2005), incorporating through Change 3, 20 November 2015
DTM 09-012, *Interim Policy Guidance for DoD Physical Access Control* (8 December 2009), incorporating through Change 7, 17 April 2017
AFMAN 31-113, *Installation Perimeter Access Control* (FOUO) (2 February 2015), incorporating Change 1, 27 July 2015

DRIVING PRIVILEGES

Driving on a military installation, whether in a government motor vehicle (GMV) or a privately owned vehicle (POV) is a privilege granted by the installation commander or designee. This authority may be delegated to the vice commander, mission support group commander, or other appropriate official not occupying a law enforcement, investigative, or other position raising the appearance of a conflict of interest.

Operating a POV on the Installation

- A person must do the following in order to drive on an Air Force installation:
  - -- Lawfully be licensed to operate motor vehicles in appropriate classifications and not under suspension or revocation in any state or host country
  - -- Comply with all laws and regulations governing motor vehicle operations on base
  - -- Comply with installation vehicle registration requirements
  - -- Possess, while operating a motor vehicle, and produce on request the following:
    - --- Proof of ownership or state registration, if required by state of host nation;
    - --- A valid state driver's license (or host nation/status of forces agreement (SOFA) license);
    - --- A valid vehicle safety inspection sticker, if required by state or host nation;
    - --- Documents that establish identification and status of cargo and vehicle occupants, when appropriate;
    - --- Proof of valid insurance; and
    - --- Operators of GOVs must have proof of authorization to operate the vehicle

Implied Consent

- When operating a motor vehicle on a military installation, a driver gives implied consent in a number of areas:
  - -- Consent to test for the presence of alcohol or drugs in their blood, on their breath, and in their urine, provided there is a lawful stop, apprehension, or citation for any impaired driving offense committed while driving or in physical control of a motor vehicle on a military installation
  - -- Consent to the removal and temporary impoundment of their POVs if it is (1) illegally parked; (2) interfering with military operations; (3) creating a safety hazard; (4) disabled by accident or incident; (5) abandoned; or (6) left unattended in a restricted or controlled access area

Suspension

- Installation commander can administratively suspend or revoke installation driving privileges
  - -- A suspension of up to six months may be appropriate if a driver continually violates installation parking standards, or habitually receives other non-moving vehicle violations
  - -- Installation commander is authorized to suspend installation driving privileges pending resolution of an intoxicated driving incident under any of the following circumstances:
    - --- Refusal to take or complete a lawfully requested chemical test for the presence of alcohol or other drugs in the driver's system

--- Operating a motor vehicle on or off the installation with blood alcohol content (BAC) or breath alcohol content (BRAC) of 0.08 percent by volume or higher, or in excess of the applicable BAC or BRAC level in the local civilian jurisdiction, whichever is applicable

--- Receipt of an arrest report or other official document reasonably showing an intoxicated driving incident occurred within a reasonable time period

Revocation

- Installation commander will immediately revoke driving privileges for a period of not less than one year in any of the following circumstances:
  -- Person is lawfully apprehended for intoxicated driving and refuses to submit to or complete tests to measure blood alcohol or drug content
  -- Conviction, nonjudicial punishment, or a military or civilian administrative action resulting in the suspension or revocation of a driver's license for intoxicated driving
  -- Installation commander determines an immediate revocation is required to preserve public safety or the good order and discipline of military personnel

Procedures

- A point system is used on-base to provide a uniform administrative device to supervise traffic offenses impartially. Points are assessed for violations of motor vehicle traffic regulations for on-base and off-base traffic offenses. Certain procedural guidelines apply before an individual's driving privilege may be suspended or revoked.
  -- Individual has the right to a hearing before a designated hearing officer. Individual must be notified of his/her right to a hearing, but it is only held if the individual requests it within the prescribed time period.
  -- A suspension for a driving while intoxicated offense may be effective immediately if based on reliable evidence. Such evidence can include witness statements, a military or civilian police report, chemical test results, refusal to complete chemical testing, video tapes, written statements, field sobriety test results, or other evidence.
- Civilian offenders may be prosecuted in federal magistrate court for on-base traffic offenses. However, jurisdiction is dependent upon the installation where the offense occurred.

References

AFMAN 31-116, *Air Force Motor Vehicle Traffic Supervision* (18 December 2015), incorporating Change 1, 22 June 2017
AFI 31-101, *Integrated Defense* (FOUO) (5 July 2017)
AFI 31-218, *Motor Vehicle Traffic Supervision* (22 May 2006), certified current 14 July 2017

ARMY AND AIR FORCE EXCHANGE SERVICE (AAFES) AND COMMISSARY BENEFITS

Although DoD directives and service regulations govern exchange and commissary benefits, commanders may exercise some discretion in granting, suspending, or revoking privileges.

Exchange

- Army and Air Force Exchange Service (AAFES): The establishment of an exchange is authorized by the Departments of the Army and the Air Force at each installation where extended active duty military personnel are present and assigned for duty
- An exchange may be established at other locations, such as state-operated National Guard installations or Reserve Training Centers, provided it is cost-effective

Exchange Privileges

- Unlimited exchange privileges extend to all uniformed, retired, and other personnel (such as Medal of Honor recipients) and their dependents
- Unlimited exchange privileges extend for two years to involuntarily separated service members under other than adverse conditions
- Unlimited exchange privileges may be extended to government departments or agencies outside the DoD when:
  - -- Local commander determines the desired supplies or services cannot be conveniently obtained elsewhere, and
  - -- Supplies or services can be furnished without unduly impairing the service to exchange patrons
- Limited exchange privileges extend to some government civilian employees and to others, such as members of foreign military services visiting a military installation
- In non-foreign areas outside the Continental United States, e.g., Alaska, Hawaii, and Puerto Rico, the responsible commander may extend limited or unlimited privileges to other personnel or organizations if it is in the best interest of the mission of the command concerned
- Exceptions involving patron privileges are based on alleviating personal hardships and may only be granted by the Secretary of the department concerned upon request by the installation commander through command channels

Abuse of Exchange Privileges

- Exchange patrons are prohibited from abusing privileges, including:
  - -- Purchasing items for the purposes of resale, transfer, or exchange to unauthorized persons
  - -- Using exchange merchandise or services in the conduct of any activity for the production of income
  - -- Theft, intentional or repeated presentation of dishonored checks, and other indebtedness

Commander Actions when Abuse of Exchange Privileges Occurs

- When an abuse of privileges occurs, the commander will take prompt disciplinary and other appropriate action, such as revocation or suspension of exchange privileges
  - -- Commanders may revoke exchange privileges for any period deemed appropriate, except the minimum period of revocation is six months for shoplifting, employee pilferage, and intentional presentation of dishonored checks
  - -- Individual concerned will be provided notice of the charges and the opportunity to offer rebutting evidence
  - -- On appeal, the commander who revoked the privileges, or the next higher commander, may reinstate exchange privileges for cogent and compelling reasons

Commissary Privileges

- The DoD operates commissaries as an integral element of the military pay and benefits system and as an institutional element to foster the sense of community among military personnel and their families. The intent of patronage is to provide an income effect benefit through savings on food and household items necessary to subsist and maintain the household of the military family.
- Authorized Patrons:
  - -- Several classes of individuals are authorized commissary privileges by regulation, including: active duty and their dependent family members, retired personnel and their dependent family members, reservists, and others
  - -- At overseas locations, military commanders or Secretaries of military departments may extend commissary privileges to certain individuals and groups of individuals, provided it is without detriment to the ability to fulfill the military mission
- Restrictions on Purchases:
  - -- Authorized personnel may not sell or give away commissary purchases to individuals or groups not entitled to commissary privileges
  - -- Personnel are prohibited from using commissary purchases to support a private business
  - -- Sanctions for violating restrictions on purchases range from temporary suspension or permanent revocation of commissary privileges to appropriate action under regulation, UCMJ, or federal or state law

Appointing Agents for Authorized Users

- An installation commander is authorized to extend exchange and commissary privileges to the agent of an authorized user. Appointment typically occurs when the authorized user is unable to exercise their privileges on their own behalf.

References

DoDI 1330.17, *DoD Commissary Program* (18 June 2014), incorporating through Change 2, September 14, 2018
AFI 34-211(I), *Army and Air Force Exchange Service Operations* (11 July 2017)

SUBSTANCE ABUSE

Air Force Drug Use Policy

- Military personnel are expected to refrain from drug abuse and maintain standards of behavior, performance, and discipline consistent with the UCMJ, public law, and Air Force policy
- Illegal use of drugs by Air Force members is a serious breach of discipline that is incompatible with Air Force standards. This misconduct places the member's continued service in jeopardy and could lead to action resulting in a punitive discharge or an administrative discharge under other than honorable conditions.

Air Force Alcohol Abuse Policy

- The Air Force recognizes that alcohol misuse negatively affects public behavior, duty performance, and physical and mental health
- The Air Force provides comprehensive clinical assistance to eligible beneficiaries seeking help for alcohol abuse problems

Unit Commanders and Supervisor Responsibilities

- Observe and document the performance and conduct of subordinates and direct immediate supervisors to do the same
- Evaluate potential or identified abusers through the evaluation process of AFI 44-121, *Alcohol and Drug Abuse Prevention and Treatment (ADAPT) Program*
- Provide appropriate incentives to encourage members to seek help for problems with drugs or alcohol without fear of negative consequences
- Commander is responsible for and has control of all personnel, administrative, and disciplinary actions pertaining to members involved in the Air Force ADAPT program
- Command involvement is critical to a comprehensive treatment program, as well as during aftercare and follow-up services. The commander shall also provide command authority to implement the treatment plan when the member does not voluntarily comply.

Abuser Identification (Military Members)

- Self-Identification (Drug Abuse): Military members who voluntarily disclose prior drug use or possession are granted limited protections. Such disclosure may not be used against the member in UCMJ actions or in characterizing an administrative discharge as long as he/she:
  - -- Is seeking treatment and voluntarily discloses evidence of personal drug use or possession to the unit commander, first sergeant, substance use/misuse evaluator or a military medical professional; and
  - -- Has not previously been apprehended for drug involvement, placed under investigation for drug abuse, ordered to give a urine sample as part of the drug-testing program in which the which the results are still pending or have been returned as positive, advised of a recommendation for administrative separation for drug abuse, or has entered treatment for drug abuse
  - -- The limited protection available for self-identification does not apply to disciplinary or other action based on independently derived evidence (other than the results of a commander-directed drug test), including evidence of continued drug abuse after the member initially entered a treatment program

- Self-Identification (Alcohol Abuse): Air Force members with alcohol abuse problems are encouraged to seek assistance from their commander, first sergeant, a military medical professional, or mental health professional
  - -- Self-identification is reserved for members who are not currently under investigation or pending action as a result of an alcohol related misconduct
  - -- Self-identified members who enter the ADAPT assessment process will be held to the same standards as others entering substance abuse and misuse education, counseling and treatment programs. However, if the member is not diagnosed with a substance use disorder, the member's chain of command will not be notified.
- Commander Referral: A unit commander will refer all service members for assessment when substance use or misuse is suspected to be a contributing factor in any misconduct, e.g., driving under the influence (DUI)/driving while intoxicated (DWI), public intoxication, drunk and disorderly, spouse/child abuse and maltreatment, underage drinking, positive drug test, or when notified by medical personnel pursuant to AFI 44-121
  - -- Commanders should also refer a member for assessment when drugs or alcohol are thought to be a contributing factor in any incident, such as deteriorating duty performance, excessive tardiness, absenteeism, misconduct, or unacceptable social behavior
  - -- Commanders who fail to comply with this requirement place members at increased risk for developing severe substance problems and jeopardize the mission
- Incident to Medical Care: Medical personnel must notify a member's unit commander and the ADAPT program manager when a member is observed, identified, or suspected to be under the influence of drugs or alcohol, receives treatment for any injury or illness that may be the result of substance abuse or is suspected of abusing substances
- Random Drug Testing: Positive drug test results mandate a substance abuse evaluation
- Probable Cause Searches: Commanders who receive information of a positive drug test conducted pursuant to a probable cause search must refer the member for a substance abuse assessment
- Inspections: Commanders may order inspections (to include urinalysis) of his/her unit, in whole or in part, pursuant to Military Rule of Evidence (MRE) 313 so long as the primary purpose is to determine and to ensure the security, military fitness, or good order and discipline of the unit
  - -- Positive drug test results mandate a substance abuse evaluation

Substance Abuse Assessment

- The ADAPT program attempts to identify and provide assistance to military members with drug problems, but the focus of the ADAPT program is prevention and clinical treatment
  - -- ADAPT staff members evaluate all members suspected of drug or alcohol abuse in order to help the commander understand the extent of the substance abuse problem and to determine the patient's need for treatment and the level of care required
  - -- Except in cases of self-identification, personal information provided by the member in response to assessment questions **MAY** be used against the member in a court-martial or considered for characterizing service in an administrative discharge

- Before the assessment, the patient is advised of the ADAPT program's nature, the limits on confidentiality, the Privacy Act, and the Health Insurance Portability and Accountability Act (HIPAA), the responsibilities of the ADAPT staff, the purpose, access and disposition of mental health records and the potential consequences of refusing assessment, preventive counseling and/or treatment
- Upon completion of the assessment, the information gathered will form the basis for patient diagnosis, treatment planning, and delivery of substance abuse services. Assessment results for individuals who are charged with DUI or DWI will be provided to the patient's commander.
- Information is presented to the Treatment Team (TT) so that the TT may develop and guide the clinical course of treatment. The TT decides the proper course of action and treatment plan for the client after examining all the facts presented.
- TT is comprised of:
  - -- Commander and/or first sergeant. These individuals must be involved at program entry, termination and any time there are significant treatment difficulties with the patient.
  - -- Patient's immediate supervisor
  - -- ADAPT program manager
  - -- Certified substance abuse counselor
  - -- Mental health provider currently involved in patient care
  - -- The patient, unless deemed clinically inappropriate

Management of Drug and Alcohol Abusers

- Tools available to the unit commander to manage drug abusers include:
  - -- Nonjudicial punishment under Article 15, UCMJ
  - -- Court-martial
  - -- Line of Duty (LOD) determinations
  - -- Action involving security clearance, access to classified information, or access to restricted areas
  - -- Suspension from Personnel Reliability Program
  - -- Duty assignment review to determine if member should continue in current duties
  - -- Unfavorable Information File (UIF) or control roster action based on drug related misconduct or substandard duty performance
  - -- Administrative separation for documented failure to meet standards (members who fail the ADAPT program due to refusal to cooperate may be separated)
  - -- Administrative demotion, withholding of promotion, and denial of reenlistment

Administrative Discharge for Drug Abuse

- Drug abuse is incompatible with military serve and all Airmen who abused drugs, even once, are subject to discharge for misconduct
  - -- Drug abuse is defined in AFI 36-3208 as the illegal, wrongful, or improper use, possession, sale, transfer, or introduction onto a military installation of any drug. This includes:
    - --- Improper use of prescription medication

--- Any controlled substance in schedules I, II, III, IV, and V of 21 U.S.C. § 812

--- Any intoxicating substance, other than alcohol, introduced into the body in any manner for purposes of altering mood or function

-- Evidence obtained through urinalysis or from the member in connection with initial entry in rehabilitation and treatment may be used to establish a basis for discharge

-- Generally, a member found to have abused drugs will be discharged unless the member meets **ALL SEVEN** of the following criteria:

--- Drug abuse is a departure from the member's usual and customary behavior

--- Drug abuse occurred as the result of drug experimentation

--- Drug abuse does not involve recurring incidents, other than drug experimentation

--- Member does not desire to engage in or intend to engage in drug abuse in the future

--- Drug abuse under all the circumstances is not likely to recur

--- Member's continued presence in the Air Force is consistent with the interest of the Air Force in maintaining good order and discipline

--- Drug abuse did not involve drug distribution

- It is the member's burden to prove retention is warranted under these limited criteria
- Similar retention criteria does not exist for officers

Civilian Employees (Drug Abuse)

- The Air Force Civilian Drug Testing Program is designed to achieve a drug-free workplace, consistent with Executive Order 12564 and 5 U.S.C. § 7301
- Similar to military members, civilian employees who self-identify for illicit drug use are provided a "safe haven" from disciplinary action if they:
  -- Voluntarily identify themselves as a user of illicit drugs prior to being notified of the requirement to provide a specimen for testing or being identified through other means (e.g., drug testing, investigation)
  -- Obtain and cooperate with appropriate counseling or rehabilitation
  -- Agree to and sign a last chance or statement of agreement
  -- Thereafter refrain from illicit drug use
- Commanders and supervisors must be alert to behaviors that could indicate a substance abuse problem and advise employees they may voluntarily seek assessment and treatment referral services
- Commanders should consult with the Civilian Personnel Section and/or the legal office if they suspect a civilian employee's poor performance, discipline or conduct may be caused by drug abuse

Civilian Employees (Alcohol Abuse)

- Under the Rehabilitation Act, alcohol abuse may be considered a disability that entitles an employee to special considerations. Be sure to consult with the staff judge advocate (SJA) and Civilian Personnel Section if such issues arise.

Legal Aspects of Alcohol Related Issues

- Drunk Driving: Operation of a motor vehicle while under the influence of alcohol or driving while intoxicated, on or off the installation, is a serious offense and is incompatible with Air Force standards
  - -- Military members who commit this offense are subject to punitive action under the UCMJ
  - -- Civilian employees apprehended for DUI on exclusive or concurrent federal jurisdiction installations are subject to prosecution in U.S. Magistrate Court
  - -- A DUI conviction, in either state or federal court, will subject the individual to revocation of on-base driving privileges
- Minimum Drinking Age: The minimum age for purchasing, possessing, or consuming alcoholic beverages on Air Force installations will be consistent with the law of the state, territory, possession, or foreign country in which the installation is located. Adults may only furnish alcohol to minors in accordance with applicable state law.
  - -- When an entire unit marks a unique or non-routine military occasion on a military installation, the minimum drinking age for military attendees at a particular unit gathering may be lowered. However, the minimum drinking age must be 18 or above.
  - -- Military personnel 18 years old or older may purchase, serve, sell, possess, and consume alcoholic beverages outside the United States, its territories, and possession unless a higher drinking-age requirement exists in accordance with local laws (e.g., the drinking age in Canada is 19, the drinking age in Japan is 20)
- Private organizations may not sell or serve alcoholic beverages on Air Force installations, subject to narrow exceptions found in AFI 34-219 for private organization personnel assisting at Morale Welfare & Recreation functions for a fee

---

References

UCMJ art. 15
5 U.S.C. § 7301
Controlled Substance Act, 21 U.S.C. § 812
Rehabilitation Act of 1973, 29 U.S.C. §§ 701 *et seq.*
Executive Order 12564, *Drug-Free Federal Workplace* (1989)
Military Rule of Evidence 313 (2019)
DoD Manual 5210.42, AFMAN 13-501, *Nuclear Weapons Personnel Reliability Program (PRP)* (19 September 2018)
AFI 34-219, *Alcoholic Beverage Program* (30 September 2016)
AFI 36-2907, *Unfavorable Information File (UIF) Program* (26 November 2014)
AFI 36-2910, *Line of Duty (LOD) Determination, Medical Continuation (MEDCON) and Incapacitation (INCAP) Pay* (8 October 2015)
AFI 36-3206, *Administrative Discharge Procedures for Commissioned Officers* (2 June 2017), including AFI 36-3206_AFGM2018-01 (14 June 2018)
AFI 36-3208, *Administrative Separation of Airmen* (8 June 2017), including AFI36-3208_AFGM2018-01 (14 June 2018)
AFI 44-121, *Alcohol and Drug Abuse Prevention and Treatment (ADAPT) Program* (18 July 2018)

PRIVATE ORGANIZATIONS (PO)

Definition

- A private organization (PO) is a self-sustaining special interest group, set up by individuals acting exclusively outside the scope of any official position they may have in the Air Force or federal government, to include civilians, contractors, Air Reserve and Air National Guard members
- POs are **NOT** any of the following:
  - -- Federal entities, and should not be treated as such
  - -- Nonappropriated fund instrumentalities (NAFIs), nor are they entitled to the sovereign immunities and privileges given to NAFIs or the Air Force
  - -- "For us, by us" (FUBU) fundraising entities
    - --- FUBU organizations are composed primarily of DoD employees and their dependents when fundraising among their own members for the benefit of welfare funds for their own members/dependents (this includes most Morale, Welfare and Recreation programs, regardless of funding sources, as well as unit unofficial activities)
  - -- Unofficial unit-affiliated activities (e.g. coffee funds, water funds, sunshine funds), unless current assets exceed a monthly average of $1,000 over a 3-month period
    - --- Unofficial unit activities' fundraising efforts are considered FUBU fundraising efforts within the meaning of JER Section 3-210
    - --- Unofficial unit activities may temporarily exceed the asset limit ($1,000) for a time period not to exceed six months; if the substantial majority (more than 75%) of assets will be expended on an upcoming large unit event such as a holiday party, military ball, etc.
    - --- The $1,000 average monthly limit may be increased by $100 for every 50 unit members over 300 members, to a maximum of $5,000 monthly average
  - -- Organizations considered POs by AFI (these are governed by DoD directives and instructions): scouting organizations operating on USAF military installations; military relief societies; banks or credit unions; support provided under Innovative Readiness Training; American National Red Cross; United Seaman's Service; and United Service Organizations

Establishing a Private Organization

- A PO must submit a written constitution, bylaws, or other documents through the Force Support Resource Management/Resource Flight Chief, Force Support Squadron Commander, and Staff Judge Advocate for consideration by the Installation Commander
- POs must be approved in writing by the installation commander or designee when he/she determines a PO will make a positive contribution to the quality of life of base personnel
  - -- Authorization may be withdrawn if the PO prejudices or discredits the U.S. government, conflicts with government activities, or for any other reason or just cause
- A PO must resubmit certification every two years or when there is a change in the purpose, function, or membership eligibility of the PO, whichever comes first and must be reviewed by the installation Staff Judge Advocate

Operating Rules

- Installation Commanders provide limited supervision of POs. They authorize and withdraw PO authorization to operate on the installation and ensure compliance with requirements. They do not control/dictate internal activities or structure of the PO.
- POs must prevent the appearance of an official sanction or support by the DoD
  - -- POs may not use the seals, logos, or insignia of the DoD, any DoD component, Air Force unit, or Air Force or DoD installation on organizational letterhead, correspondence, titles, or with organization programs, locations, or activities
  - -- POs operating on an Air Force installation may use the name or abbreviation of the DoD, Air Force unit, or installation in the PO name if the status of the PO is apparent and unambiguous and there is no appearance of official sanction or support by the DoD, provided that:
    - --- POs receive written approval from the Installation Commander before using the name or abbreviation;
    - --- The name or abbreviation does not mislead members of the public to assume a PO is an organizational unit of the Air Force; and
    - --- POs promptly display the following disclaimer on all print and electronic media mentioning the PO: "THIS IS A PRIVATE ORGANIZATION. IT IS NOT A PART OF THE DEPARTMENT OF DEFENSE OR ANY OF ITS COMPONENTS AND IT HAS NO GOVERNMENT STATUS"
- Service members may not perform activities for a PO while in an official duty status
- POs must be self-sustaining, primarily through dues, contributions, service charges, fees, or special assessments of their members
- POs must use budgets and financial statements
- Force support squadron commander or director monitors and advises all POs and directs the resource management flight chief to keep a file on each PO
- Resource management flight chief reviews each PO annually to make sure financial statements, documents, records and procedures are in order
- POs with certain levels of gross annual revenue must undergo audits and financial reviews at the PO's own expenses:
  - -- POs with gross revenues of $250,000 or more must have an annual audit done by a certified public accountant (CPA) or Certified Government Financial Manager in an overseas location when the Resource Management Flight Chief documents a CPA is not available
  - -- POs with gross revenues of at least $100,000 but less than $250,000 must have an annual financial review conducted by an accountant (CPA not required)
  - -- POs with gross revenues of less than $100,000 but more than $5,000 are not required to conduct independent audits or financial reviews, but must prepare an annual financial statement for review by the Force Support Resource Manager/Resource Management Flight Chief NLT 20 days following the end of the PO's fiscal year
- POs will not engage in activities that duplicate or compete with activities of AAFES or the Services NAFIs

- POs are prohibited from conducting games of chance, lotteries, or other gambling activities, except in very limited circumstances such as certain types of raffles (for further guidance on raffles see AFI 34-223, *Private Organization(PO) Program*, paragraph 10.20 and the JER)
- The Installation Commander or designee approves PO continuous thrift shop sales operations and occasional on-installation events for fundraising purposes
  - -- Occasional fundraising is defined as not more than 3 per calendar quarter
    - --- The length of a fundraising event is fact dependent. For example, a community theatre performance might only last a single evening; while a bake sale might last three days over a holiday weekend.
- POs will not sell or serve alcoholic beverages on Air Force installations with very limited exceptions (see AFI 34-223, *Private Organization (PO) Program*, paragraph 10.14 for further guidance)
- POs must have liability insurance unless waived by the Installation Commander or the Mission Support Group Commander (if delegated the authority)
  - -- Insurance should be required unless the PO's activities are negligible in risk
  - -- PO members are jointly and severally personally liable for the obligations of the PO
  - -- A waiver of insurance will not protect the PO or its members from valid claims or successful lawsuits
- POs desiring tax-exempt status must file an application with the IRS and state taxing authority
- POs may not directly solicit cash donations for their organization on base
- Installation legal offices should not provide legal advice to prospective and currently recognized POs
  - -- However, legal advisors may assist POs by identifying guidance or compliance information such as formation, certification and recertification, annual financial reports and fiscal controls, dissolution, and other provisions
- POs may not unlawfully discriminate in hiring practices or membership policies on the basis of age (over 40 years old), race, religion, color, national origin, disability, ethnic group, or gender (including pregnancy, gender identity and sexual orientation)
- Religiously oriented POs may be authorized on installations if:
  - -- Requests by similar organizations are also approved
  - -- Authorization is for non-exclusive use of government facilities
  - -- No sign or insignia or other organizational identification is placed on or inside government facilities except when the organization's activities are in progress
  - -- Membership is not restricted to members of the religion involved
  - -- Installation staff chaplain coordinates on the request

Logistical Support to Private Organizations

- The use of government equipment and systems for other than official purposes is extremely limited
- Government communication systems (e.g. weekly upcoming events e-mail from the Public Affairs Office) may be used to inform Airmen of PO events of possible interest to the unit and its families
  - -- However, official communication systems should not be used to advertise PO fundraiser and membership events, unless the primary purpose of the communication is for something other than the PO's effort such as to inform Airmen of a local event of possible interest
- POs must furnish their own equipment, supplies, and other materials with limited exceptions
- Logistical support to POs may be permitted if the Installation Commander determines the request meets the following test under JER 3-211:
  - -- Does not interfere with performance of official duties or detract from readiness
  - -- Community relations or other public affairs purposes are served by the support
  - -- It is appropriate to associate DoD with the event
  - -- Event is of interest and benefits the local community or DoD
  - -- Base is able and willing to provide comparable support to other similar events
  - -- Support is not restricted by other statutes
  - -- There is no admission fee beyond reasonable costs
- POs in overseas areas may be able to request additional logistical support. Always consult the Staff Judge Advocate for such requests.

References

DoD 5500.07-R, *Joint Ethics Regulation (JER)*, (30 August 1993), incorporating through Change 7, 17 November 2011
AFI 34-219, *Alcoholic Beverage Program* (30 September 2016)
AFI 34-223, *Private Organization (PO) Program* (13 December 2018)
AFI 36-3101, *Fundraising* (9 October 2018)

POLITICAL ACTIVITIES, FREE SPEECH, DEMONSTRATIONS, OPEN HOUSES, EXTREMIST ACTIVITY, AND HATE GROUPS

Commander Responsibilities

- Commanders have the inherent authority and responsibility to execute the mission, protect resources, and maintain good order and discipline. This authority and responsibility includes placing lawful restrictions upon participation by Air Force members in certain dissident and protest activities, including demonstrations.
- Commanders balance this inherent command responsibility with individual Air Force members' constitutional right of free expression. Commanders preserve Air Force members' right of free expression consistent to the maximum extent possible, consistent with good order, discipline and national security.
- To properly balance these interests, commanders must exercise prudent judgment and consult with their staff judge advocate (SJA). In appropriate cases, commanders may find it advisable to confer with higher authority before initiating action to restrict manifestations of dissent.

Writing for Publications

- Air Force members may not distribute or post any unofficial printed or written material within any Air Force installation without permission of the installation commander
- Air Force members may not write for unofficial publications during duty hours

Extremist Activity and Hate Groups

- Military personnel must reject participation in organizations that advocate or espouse supremacist, extremist, or criminal gang doctrine, ideology or causes, including those that advance, encourage, or advocate illegal causes; attempt to create illegal discrimination based on race, color, gender (including sexual orientation), religion, national origin or ethnic group; advocate the use of force or violence; or otherwise engage in an effort to deprive individuals of their civil rights
  - -- Members who actively participate in such groups or activities are subject to adverse administrative and disciplinary action, including separation and punishment under the UCMJ
    - --- Active participation includes publicly demonstrating, rallying, recruiting and training members, organizing or leading such organizations, knowingly wearing gang colors or clothing; having tattoos or body markings associated with such gang organizations, or otherwise engaging in activities in relation to such organizations or in furtherance of the objectives of such organization that the commander concerned finds to be detrimental to good order, discipline, or mission accomplishment, is incompatible with military service and prohibited
    - --- Mere membership in these groups is not prohibited; however, membership must be considered in evaluating or assigning members, particularly supervisory positions
- One tool for identifying whether a particular organization is a recognized criminal gang is the FBI's National Gang Threat Assessment. Assessments are found at https://vault.fbi.gov/national-gang-threat-assessment. This assessment is periodically updated, so users should verify that they are accessing the FBI's most recent report. However, this publication may be supplemented, with Air Force Office of Special Investigations (AFOSI) input, at any level, to locally augment the list of recognized criminal gangs.

Controlling or Prohibiting Demonstrations and Protests

- Commanders may also take measures to control or prevent demonstrations and protest activities within the installation

-- Demonstrations or related activities on an Air Force installation may be prohibited if:

--- They interfere with mission accomplishment, or

--- They present a clear danger to loyalty, discipline, or morale of service members

-- No one may enter a military installation for any purpose prohibited by law or regulation, or reenter an installation after having been barred by order of the installation commander

-- Air Force members are prohibited from participating in demonstrations when they are on duty, when they are in a foreign country, when they are in uniform, when their activities constitute a breach of law and order, or when violence is likely to result. Members who violate this prohibition are subject to disciplinary action under Article 92, UCMJ.

Political Activities by Members of the Air Force

- Air Force members may register to vote and express a personal opinion on political candidates and issues, but not as a representative of the Armed Forces
- For a list of prohibited and permitted political activities, see AFI 51-508, *Political Activities, Free Speech and Freedom of Assembly of Air Force Personnel*, paragraphs 2.3 and 2.4

Open House Requirements and Responsibilities

- An open house where the general public is invited onto the installation does not, in and of itself, cause the installation to lose its status as "closed" for the purposes of limiting political or ideological speech. "Closed" means not a public forum for protests or demonstrations, or other ideological expression.
  -- Open houses are for local community relations. Commanders retain the authority to prevent political or ideological speech or demonstrations on the installation during an open house.
  -- Commanders can prevent or stop political or ideological speech because such speech creates a danger to loyalty, good order, and discipline
    --- Commanders need not wait until loyalty, good order or discipline are actually negatively affected before preventing or stopping the speech
    --- Speech that presents such a danger can be prevented at the outset because it presents such a danger
  -- If a person or group attempts to engage in political or ideological expression or demonstrations on an installation, the commander should escort the offending party or parties off the installation and issue a barment letter, the violation of which can subject the offender to criminal penalties
  -- An installation loses its status as "closed" for the purposes of preventing political or ideological speech or demonstrations **ONLY IF** the commander allows political or ideological speech or demonstrations to occur or by abandoning control over the installation or parts of it
- Installation commanders should be careful about whom they invite onto the installation and what they allow those people to do. It is important to work closely with the SJA to plan open houses so that potential problems can be prevented and to solve free speech issues should they arise.

References

DoDD 1344.10, *Political Activities by Members of the Armed Forces* (19 February 2008)
AFI 51-508, *Political Activities, Free Speech and Freedom of Assembly of Air Force Personnel* (12 October 2018)
AFI 51-904, *Complaints of Wrongs under Article 138, Uniform Code of Military Justice* (6 March 2018)

RELIGIOUS ISSUES IN THE AIR FORCE

Issues involving religion have an inherent potential to generate media, advocacy group, and political attention quickly. Resolution of religious issues, such as accommodation requests, religious speech or practices in a duty context, and potential religious endorsement, is always highly fact and situation dependent and seldom amenable to simple, bright line, "one-size-fits-all" rules. It is essential that commanders consult their staff chaplains and staff judge advocates (SJAs) when religious issues arise.

Constitutional Basis

- First Amendment: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof…."
  - -- *Establishment Clause*: Essentially requires (in appearance and reality) the government not exercise a preference for one religion over another, or religion over non-religion
  - -- *Free Exercise Clause*: Constitutional protection for religious speech and practices (but does **NOT** absolutely protect all religious expression under all circumstances)
  - -- Consult your SJA for analytical standards/tests for governmental restrictions on religious expression based upon most current statutes, regulations and case law

Religious Expression Authorities

- Religious expression in the Air Force is governed primarily by the Free Exercise Clause, the Religious Freedom Restoration Act (RFRA), and DoDI 1300.17, *Accommodation of Religious Practices within the Military Services*; provisions of AFI 1-1, *Air Force Standards*, also apply
- RFRA provides broad protection for religious liberty and ensures the government shall not substantially burden a person's exercise of religion unless the burden is:
  - -- (1) In furtherance of a compelling governmental interest, and
  - -- (2) Is the least restrictive means of furthering that compelling governmental interest

General Principles for Leaders

- Per AFI 1-1, *Air Force Standards*, paragraph 2.12, leaders at all levels must balance constitutional protections for free exercise of religion with the constitutional prohibition against governmental establishment of religion
- Commanders must ensure their words and actions cannot reasonably be construed to be officially endorsing or disapproving of, or extending preferential treatment for any faith, belief, or absence of belief
  - -- Commanders must be sensitive to the potential for real-world military implications when religion and official business intersect. Context is critical and commanders should exercise caution before engaging in activities in the military setting that would leave a reasonable observer with the impression that the commander is endorsing, sponsoring, or inhibiting religion.
  - -- Not all members of the command will share the commander's beliefs; they may feel alienated or marginalized when their commander espouses a particular religious belief or preference for one religion
  - -- Some may question whether they will be viewed with impartiality or with disfavor if they do not agree with their new commander's religious views

Religious Expression in the Workplace

- Airmen may permissibly engage in voluntary discussions of religion, even if conducted in uniform, to the same extent that they may engage in comparable private expression about subjects not related to religious issues, where it is clear that the discussions are personal, not official, and they are free from coercion or appearance of coercion
- An Airman may share his/her faith or invite another co-worker to attend his/her place of worship as long the Airman respects the views and requests of the co-worker
- Restrictions on such expression must be based on generally applicable, content-neutral factors, such as whether the expression would disrupt mission accomplishment or would have an adverse impact on good order and discipline. Additionally, restrictions on religious-related expression are appropriate if the member's expression can reasonably be attributed to the Air Force, thus constituting an impermissible endorsement.
- When religious expression is directed towards other Airmen, the speaker must refrain from such expression when an Airman asks that it stop or otherwise demonstrates that it is unwelcome
- Leaders should be mindful that subordinates could perceive their religious expression as coercive, even if it is not intended as such. Consequently, supervisors must not use their authority to require or discourage religious expression among subordinates.

Prayer

- As a general rule, prayer constitutes protected religious expression. However, in official circumstances, or when superior/subordinate relationships are involved, superiors must be sensitive to the potential that personal religious expressions may appear official or coercive.
- Public prayer must not endorse, or appear to endorse, religion
  - -- It may not be part of routine official business, e.g., staff meetings
  - -- If a chaplain is asked to pray at an official event, the choice of prayer is in the discretion of the chaplain as long as the prayer does not state or imply any Air Force endorsement of a specific religion
- Mutual respect and common sense should serve as a guide, including consideration of unusual circumstances, such as a recent death, imminent danger, etc.
- Leaders should avoid leading prayers at official functions. Any prayers should be led by a chaplain, if possible, or another Airman.
- Religious content/prayer is acceptable as an exercise of free exercise in ceremonies that are primarily personal to the honoree, such as retirements. If a commander is the presiding official for the event, the commander could ask to have the "emcee" announce that the religious content/prayer is at the request of the honoree.
  - -- All such requests should be coordinated with the commander well in advance of the ceremony. The commander retains responsibility for ensuring that the proposed religious content does not violate Air Force instructions or regulations.
- Attendance at National Prayer Breakfast activities in uniform is neither prohibited nor encouraged (i.e., it is left to attendee's discretion)

Religious Displays

- Displays of religious articles are permissible in government offices where it is clear that the articles are personal and are not used to promote a specific religious belief to office members
- Supervisors may restrict all posters regardless of content, or posters of a certain size, in private work areas, or require that such posters be displayed facing the employee, and not on common walls. However, a supervisor is not permitted to specifically single out religious posters (e.g., the Ten Commandments) for either negative or preferential treatment compared to other posters.
- Context is critical: while the Ten Commandments may be permissible in the employee's cubicle, religious displays have the potential to send a message of endorsement of particular religious beliefs
- Commanders and others in leadership positions must be sensitive to the nature, extent, and circumstances of their religious displays

Official Communications

- Chaplains, at all levels of command, are encouraged to work with Public Affairs (PA) to generate communication plans for the dissemination of information for chapel-sponsored religious services, activities or events
- As part of this communication plan, PA will recommend appropriate internal and external communications channels
  - -- Traditional forms of PA communication tools, which include advertisement in base newspapers, base social media pages, base webpages, and wing stand-up, may be used to disseminate information on religious services, activities, and events
  - -- Distribution of information about chapel-sponsored services, activities or events, should be consistent with the tools commanders use to inform Airmen and their families about other command programs or events (e.g., MWR, A&FRC, SAPR, etc.)
- Commanders at all levels, who are considering personally disseminating information about chapel-sponsored religious services, activities or events, should balance constitutional protections for their own free exercise of religion, including individual expressions of religious beliefs, and the constitutional prohibition against governmental establishment of religion. Commanders should ensure their words and actions cannot reasonably be construed to be officially endorsing or disapproving of, or extending preferential treatment for any faith, belief, or absence of belief.
  - -- For example, a commander may disseminate the installation chapel's schedule of events for the month and encourage attendance at events/activities that are open to all Airmen (and their dependents), of all faith groups and belief systems
  - -- However, a commander may not endorse or encourage attendance at an activity/event that is limited to members of a single faith, especially if the commander is also a member of that faith
- In official government correspondence, including e-mail messages, the Air Force determines what is appropriate for inclusion
- Supervisors may restrict the inclusion of extraneous information (including religious or other messages) that have no relationship to Air Force business, so long as the restriction prohibits religious (or anti-religious) extraneous messages in the same manner as it restricts all other types of extraneous language

Accommodation of Religious Practices

- The Air Force places a high value on the rights of Air Force members to observe the tenets of their respective religions or to observe no religion at all
- Pursuant to DoDI 1300.17, *Accommodation of Religious Practices within the Military Services*, unless the request would have an adverse impact on readiness, unit cohesion, good order and discipline, health, or safety, the Air Force will approve an individual request for accommodation of a religious practice
- Commanders and supervisors must fairly consider requests for religious accommodation. Airmen requesting accommodation will continue to comply with directives, instructions and lawful orders from which they are requesting accommodation unless and until the request is approved.
- Requests for religious accommodations must be assessed on a case-by-case basis, considering the unique facts, requiring consultation with your servicing SJA and chaplain

Religious Apparel

- 10 U.S.C. § 774, permits wear of religious apparel in uniform unless, as determined pursuant to service regulation, the apparel would interfere with performance of duty or is not neat and conservative
  - -- "Religious apparel" is defined as apparel worn as part of the doctrinal or traditional observances of a religious faith practiced by an Airman
- Religious Apparel During Worship Services by Chaplains: Does not require a religious accommodation request, and may be worn in uniform while Airmen are present at a worship service, rite, or other ritual distinct to a faith or denominational group
- Religious Apparel (Not Visible or Otherwise Apparent): Does not require a religious accommodation request, and may be worn in uniform, provided it does not interfere with the performance of the member's military duties or the proper wearing of any authorized article of the uniform
  - -- Commanders may, for operational or safety reasons, limit the wear of religious apparel that is not visible or otherwise apparent
- Religious Apparel (Visible or Apparent): For religious apparel that is visible or apparent, Airmen may request a waiver of AFI 36-2903, *Dress and Personal Appearance of Air Force Personnel*, to permit wear of neat and conservative religious apparel
- Religious Apparel on Uniform: Items may not be temporarily or permanently affixed to any authorized uniform article. With the exception of chaplain function badges, religious apparel visible or otherwise apparent will not be worn during parades, ceremonial details, ceremonial functions, or in official photos.
- Considerations: Commanders should take the following into account when considering requests for uniform and dress and appearance-related religious accommodation:
  - -- Team identity
  - -- Unit cohesion
  - -- Subordination of self to military service
  - -- Public access to the location
  - -- Operations
  - -- Safety

- Minimally Conspicuous Headgear: Installation Commanders may approve requests for wear of religious head coverings indoors that are minimally conspicuous and may approve the wear of religious head coverings outdoors if concealed under military headgear
  - -- "Minimally conspicuous" means that the religious headgear is neat and conservative, is plain and dark blue or black, and would not, in the commander's judgment, draw the focus of an observers' attention from the uniform as a whole
- Non-standard Grooming and Personal Appearance: Some religious beliefs require members to maintain grooming standards, religious tattoos/body art, and/or personal appearance modifications that conflict with Air Force dress and personal appearance standards
  - -- During tours of less than 30 days, Air Force Reserve (AFR) and Air National Guard (ANG) chaplains not on extended active duty may request a beard waiver for religious observance when consistent with their faith

Advocacy from Interest Groups Might Sound Authoritative, but it's Still Just Advocacy

- Interest group advocates (including lawyers) seeking a particular resolution of a religious issue of which they have become aware might call you directly, advising you that the law "requires" you to adopt their position. If this happens, here are some suggestions based on experience:
  - -- Avoid sounding sympathetic or agreeable to their pronouncements
  - -- Threats of adverse publicity or litigation are to be expected; just tell the caller that you'll let public affairs (PA) and/or your SJA know
  - -- Do not take unilateral action (i.e., action without first consulting your SJA and/or PA) to do what the caller is requesting or demanding!
  - -- Thank the caller for bringing the matter to your attention. Do not make any promises or statements indicating you or anyone else will investigate the matter, or take some action within a specific time frame. Following the call, notify your SJA, chaplain, and or PA.
  - -- If you believe a follow-up response is appropriate, it is preferable to disengage yourself and notify your SJA, chaplain, and PA

References

U.S. Const. Amend. 1
10 U.S.C. § 774
The Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. §§ 2000bb *et seq.*
DoDI 1300.17, *Accommodation of Religious Practices within the Military Services* (10 February 2009), incorporating Change 1, 22 January 2014
DoDI 5500.7-R, *Joint Ethics Regulation* (JER) (30 Aug 1993), incorporating through Change 7, 17 November 2011
AFI 1-1, *Air Force Standards* (7 August 2012) incorporating Change 1, 12 November 2014
AFI 35-113, *Command Information* (30 July 2018)
AFI 36-2903, *Dress and Personal Appearance of Air Force Personnel* (18 July 2011), incorporating through Change 4, 28 May 2015, including AFI36-2903_AFGM2018-03, 28 September 2018

SOCIAL MEDIA AND ELECTRONIC COMMUNICATION

Social media includes, but is not limited to, weblogs, message boards, video sharing, and other media sharing sites. The rules for use of social media can be divided into two categories: official use (use by the Air Force to conduct official Air Force duties) and personal use. In its official capacity, it is a tool that allows the Air Force to conduct outreach with the general public, as well as for Airmen—military and civilian—to interact personally with friends, family, the media, elected officials, and strangers. The rules for social media use within the DoD are frequently updated. Consult your staff judge advocate (SJA) for the latest standard. Social media tools have become a staple of modern life and most Airmen have one or more personal social media accounts.

Official Use

- Official use of social media must comply with all DoD and Air Force guidance as outlined in AFI 35-107, *Public Web and Social Communications*, Chapter 4
- Any official use of social media must be approved by Air Force Public Affairs (PA) and follow policies established by SAF/PA (http://www.defense.gov/socialmedia/education-and-training.aspx)
  - -- Official Air Force social media presences must be registered at www.af.mil/AFSites/SocialMediaSites.aspx and https://usdigitalregistry.digitalgov.gov. Closed social media sites will not be accepted in the registry.
  - -- Federal-compatible Terms of Service agreements may modify or remove problematic clauses in standard TOS agreements, and allow federal employees to legally use these tools. Before deciding to use a social media tool (e.g., Facebook, Instagram, Twitter), organizations should seek the advice of the Air Force Social Media team for an updated list of federal-compatible services.
  - -- Air Force official social media sites may not contain any non-public information or link to any site that contains non-public information
  - -- All Air Force official social media sites must link back to an official .mil page
  - -- Official Air Force social media will not link to offensive or unrelated commercial material
  - -- No surveys may be conducted via official social media without prior approval
  - -- All Air Force official social media sites must contain disclaimers, comment policies, and privacy policies. Contact your local PA office for sample disclaimers and comment policies.
  - -- Comments received on Air Force official social media sites must be moderated for topic and language (as outlined in the comment policies)
  - -- All Air Force official social media posts and comments received must be maintained in accordance with Air Force records retention guidelines

Personal Use

- Generally, the Air Force views personal websites and blogs positively, and it respects the right of Airmen to use them as a medium of self-expression, including religious expression, even if their status as Airmen is apparent
- Social media, and electronic communication generally, encourages informal, sometimes intimate, and at times adversarial interactions. Military members and civilian employees must remember that, generally, actions prohibited in person are not otherwise condoned or tolerated through social media or electronic communication.

- **Existing standards of professionalism apply to social media and electronic communication**. This includes the guidance from AFI 36-2909, *Professional and Unprofessional Relationship*, which applies to military members on and off duty; DoDI 1304.33, *Protecting Against Inappropriate Relations During Recruiting and Entry Level Training*, which applies to military and civilian recruiters and trainers on and off duty; and AFI 36-703, *Civilian Conduct and Responsibility*, which applies to civilians.
- **Existing standards of mutual respect apply to social media and electronic communication**. The United States Government, the Department of Defense, and the Air Force will neither condone nor tolerate unlawful discrimination of any kind. The guidance found in AFI 36-2706, *Equal Opportunity Program, Military and Civilian*, applies to electronic communication and social media interactions, on and off duty for military members. It also applies for civilians while on duty, and off duty only when the interaction constitutes misconduct and impedes the efficiency of the service.
- **Creating, distributing or broadcasting private intimate images without consent can have serious consequences**. Creating, distributing, and broadcasting images of a person's private areas without his/her consent may constitute a violation of the UCMJ for military members, and may also violate state and other federal laws.
- All Airmen must use their best judgment, remembering that *everyone is always accountable for what they say*
- **Unique Characteristics**. Social media and electronic communications have several unique characteristics
  - -- Under some circumstances, social media interactions or electronic communications may be akin to having a conversation in a public place
  - -- Anonymity, or the appearance of anonymity, is sometimes present in electronic communications and social media. A military member or civilian employee is responsible for interaction with others online based on what they know, and on what they reasonably should know, about the identity of the persons with whom they interact.
- **Freedom of Speech.** While military members enjoy the right to free speech protected by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections. Some speech is generally not protected by the First Amendment, e.g., obscenity, dangerous speech, true threats, defamation, fighting words, and child pornography.
  - -- Given the different character of the military community and mission, speech that interferes with or prevents the orderly accomplishment of the mission or presents a clear danger to loyalty, discipline, mission, or morale of the troops may be restricted under some circumstances. The Air Force has a compelling interest in preventing the advent and spread of hate groups within the service; in guarding against illegal discrimination; in fostering a military that is politics-neutral and disciplined; and in recruiting and sustaining an all-volunteer force of sufficient strength and quality to provide for the nation's security and to sustain that security over time.
  - -- Speech activities conducted through social media and electronic communication, under certain circumstances, can prejudice good order and discipline, bring discredit upon the armed forces, or both. For example, broadcasting or distributing sexually-explicit or intimate images of others without their consent is not only inconsistent with our core values and culture of dignity and respect, but its impact on victims can be devastating. Online activities such as distributing extremist or racist materials to unit members, or urging military members to refuse to obey lawful orders, degrade unit cohesion and military readiness on

both the individual and unit levels. This type of behavior directed at others within a military organization is detrimental to morale, destroys trust, demonstrates disrespect for the chain of command, and impairs military effectiveness.

-- Such online behavior may also discredit the Air Force because members of the general public that view posts offensive to a reasonable person may find the Air Force a disreputable institution, or one deserving less than full public esteem and respect, or that such actions are acceptable in the Air Force. Activity which may be viewed as racist, undisciplined, or untrustworthy, can negatively affect the civilian community's tolerance and support of essential military missions, as well as impact recruiting and retention efforts.

- Military members are viewed, even if through social media or electronic communications, as representatives of the United States. Accordingly, military members are prohibited from discussing protected national security, official use, and personal information to which they may be privy as a member of the Air Force and Department of Defense except as permitted by law.

- **Use of Government Position**. Under the Standards of Ethical Conduct for Employees of the Executive Branch, government employees may not use their government position, title, or any authority associated with their public office in a manner that a member of the public could reasonably believe implies that the Air Force or DoD sanctions or endorses the employee's personal activities or views. Whether or not an employee's social media presence creates the impermissible appearance of Air Force or DoD sanction or endorsement will be evaluated considering the totality of the circumstances.

  -- To avoid the appearance of government sanction or endorsement, employees should not:

    --- Use their official title or official photos on personal accounts unless it is one of several non-Air Force biographical details (e.g., also include civilian employment and educational background) and the Air Force affiliation is not given more prominence (e.g., different font or image size) than other biographical details

    --- State that they are acting on behalf of the Air Force or DoD

    --- Refer to their position, military experience, or connection to the Air Force or DoD as support for the employee's statements

    --- Prominently display Air Force or DoD images, seals, or pictures in uniform (e.g., profile photo)

    --- Refer to Air Force employment, title, or position in areas other than those designated for biographical information

    --- To assist in avoiding the appearance of government sanction or endorsement, employees may include a prominent disclaimer that the views expressed are the personal views of the employee and do not represent the official views of the Air Force or DoD

    --- Airmen (military members and civilian employees) cannot use their service affiliation for fundraising purposes on personal social media accounts except for Office of Personnel Management approved fundraisers such as the Combined Federal Campaign and the Air Force Association

- **Use of Government Computers**. Airmen may use government devices to access social media sites under the limited personal use exception when it does not interfere with their official duties; however that use must be approved by their supervisor and cannot otherwise interfere with their official duties (see AFI 17-130, *Air Force Cybersecurity Program Management*).

- **Political Communication**. Airmen, in their personal capacity, may engage in political discussions through social media, but may not engage in political discussions that include non-public information or the intricacies of the Air Force or the DoD
  - -- Airmen must be careful that personal opinions and activities are not directly, or by implication, represented as those of the Air Force
  - -- If, when expressing a personal political opinion, personnel are identified by a social media site as DoD employees (for example, the "work and education" section on a Facebook profile lists "United States Air Force"), the posting must clearly and prominently state that the views expressed are those of the individual only and not of the DoD or the Air force
  - -- Active duty military members and certain restricted civilian employees are prohibited from participating in partisan political activity. Consult AFI 51-508, for more detailed discussion.

References

The National Defense Authorization Act for Fiscal Year 2013, 41 U.S.C. 4712(e)
5 U.S.C. § 7323
Pickering v. Bd. of Educ., 391 U.S. 563 (1968)
5 C.F.R 734.208, *Participation in Fundraising*
5 C.F.R. 2635.702-705, *Misuses of Position*
5 C.F.R. 2635.807, *Teaching, Speaking, and Writing*
5 C.F.R. 2635.808, *Fundraising Activities*
DoDD 1344.10, *Political Activities of the Armed Forces on Active Duty* (19 February 2008)
Hatch Act Guidance on Social Media, Office of Special Counsel Memorandum (February 2018)
AFI 1-1, *Air Force Standards* (7 August 2012), incorporating Change 1, 12 November 2014
AFI 17-130, *Air Force Cybersecurity Program Management* (31 August 2015), certified current 16 February 2016, including AFI17-130_AFGM2018-01, 19 March 2018
AFI 35-107, *Public Web and Social Communication* (15 March 2017)
AFI 35-113, *Command Information* (30 July 2018)
AFI 51-508, *Political Activities, Free Speech and Freedom of Assembly of Air Force Personnel*, 12 October 2018

FREEDOM OF INFORMATION ACT (FOIA)

The Freedom of Information Act (FOIA) is a disclosure statute that permits access to information maintained by government agencies. The basic goals of the FOIA are to ensure an informed citizenry, to serve as a check against corruption, and to help hold the government accountable. The Act applies to the DoD, Department of the Air Force, and other federal executive agencies. Enacted in 1966, FOIA generally provides a right of access to federal executive agency information, except records (or portions) that are protected from disclosure by one of the FOIA exemptions provided in the statute.

FOIA Exemptions

- There are nine FOIA exemptions. Seven of the exemptions are most applicable to requests for Air Force records:
  - -- Classified information (e.g., confidential, secret, top secret). "For Official Use Only" is not a security classification.
  - -- Matters relating solely to the internal personnel rules and practices of the agency
  - -- Information exempted by another statute (e.g., drug rehabilitation information, or information protected by the Privacy Act)
  - -- Trade secrets or commercial or financial information submitted on a privileged or confidential basis (e.g., bid contract proposals)
  - -- Inter or intra-agency documents normally privileged in the civil court context (e.g., attorney work-product and pre-decisional policy discussions)
  - -- Information in personnel, medical, and similar files which, if disclosed to the requester, would result in a clearly unwarranted invasion of personal privacy
    - --- Some examples of personal information which are releasable because there is no unwarranted invasion of personal privacy are: name, rank, date of rank, gross pay, present and past duty assignments, future assignments which have been finalized, office/organizational address, and duty phone number. However, the names and addresses (postal and/or e-mail) of DoD military and civilian personnel in sensitive units, routinely deployable units, or assigned in foreign territories are normally not releasable.
    - --- Information not normally releasable as an unwarranted invasion of personal privacy includes home addresses, home phone numbers, and social security numbers
  - -- Records created for law enforcement purposes (e.g., information that would disclose the identity of confidential informants)

FOIA Requests

- When a FOIA request is received immediately submit the request to the base FOIA office for processing. By law, the agency must respond to the requester within 20 working days of receiving a perfected FOIA request.
- The FOIA request can be made by "any person," which has been broadly defined to include foreign citizens and governments, corporations, and state governments. To comply with the rules, the request must:
  - -- Be in writing (includes requests sent by facsimile, or electronically)
  - -- Explicitly or implicitly invoke the FOIA

-- Reasonably describe the desired record

-- Give assurances to pay any required fees or explain why a waiver is appropriate

FOIA Processing

- The office of primary responsibility (OPR) (not the FOIA office or the servicing staff judge advocate (SJA)) is responsible for conducting an initial review of the responsive records and making proposed redactions based on the exemptions in the FOIA discussed above
- After initial review, forward to the SJA for comment
  - -- If the SJA recommends approval, local release authority can approve request and release information
  - -- If the SJA recommends denial, then a legal review is attached and the case is forwarded immediately to the initial denial authority (IDA), typically the MAJCOM commander or designee
- The IDA takes appropriate action. If records are denied, wholly or in part, the IDA tells requester the reason for the denial and the appeal procedure to follow. The IDA must issue its decision within 20 working days of receipt of the request by the base FOIA office.
- Appeals are taken to SAF/GCA for resolution after being reassessed by the MAJCOM FOIA office
- Requester may file suit in federal district court to compel the release of the requested information if the appeal results in denial
- Agencies are not required to create, compile, or obtain records not already in their possession to comply with a FOIA request. However, as a matter of DoD policy they are required to make reasonable efforts to extract data from existing records to comply with a FOIA request, so long as such an extraction is within the agency's normal business practices; or, if not a normal business practice, would not be unduly burdensome.
- Honoring form or format requests: In making any record available to a person, the agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format. Agencies are required to make reasonable efforts to maintain their records in forms or formats that are reproducible and have an affirmative duty to search for records in electronic form or format (e.g., in e-mails).
- Multi-track processing is authorized if the number of pending requests or complexity of a request precludes response within the statutory 20-working day limit. All tracks operate on a first-in, first-out system. If the base FOIA office determines a request is not eligible for its fastest track, it must give the requester the opportunity to limit the scope of the request.
  - -- Simple Requests: Ones that clearly identify the requested records, have few responsive records, deal with only one installation and, generally, one OPR, and do not involve Privacy Act, classified, or deliberative process materials
  - -- Complex Requests: Ones that include massive responsive records, cause significant impact on units, require coordination from multiple offices, or include material that is classified or privileged, or originated from a non-government source
  - -- Expedited Track: Agencies are required to promulgate regulations providing for expedited processing of requests for records if the requester demonstrates a "compelling need." Agencies must notify expedited processing requesters whether the request has been granted within 10 calendar days.

--- A "compelling need" means failure to receive the records in an expedited manner reasonably poses an imminent threat to the life or physical safety of an individual

--- Denial of a request for expedited processing, whether initially or on appeal, is subject to judicial review

--- Agencies may process "urgently needed" material in the expedited track after "compelling need" requests have been fulfilled

Electronic FOIA Library Rooms

- Air Force FOIA offices must establish an electronic FOIA Library website and make frequently requested records (records typically requested three or more times per quarter) available through links in the Library website. The HQ FOIA office has a main FOIA Library reading room link at http://www.foia.af.mil/Library/.

- Certain records, such as policy statements, created on or after 1 November 1996, must be made available electronically in a public reading room within one year of creation

---

References

Freedom of Information Act, 5 U.S.C. § 552
Privacy Act, 5 U.S.C. § 552a
DoDD 5400.07*, DoD Freedom of Information Act (FOIA) Program* (2 January 2008), certified current 2 January 2015
DoDM 5400.07_AFMAN 33-302, *Freedom of Information Act Program* (27 April 2017)

PRIVACY ACT (PA)

The Privacy Act (PA) is designed to accomplish several purposes. Primarily, it limits the government's ability to collect information about an individual to those instances authorized by law or executive order and necessary for government business. The PA also authorizes individuals to access records maintained on them by the government and to correct factual errors in those records. The PA only governs activities of the federal executive branch of government.

Basic Structure of PA Systems

- Every PA system of PA records must be listed in the Federal Register before information may be collected from an individual
- A system of records contains information on individuals that is retrieved by the individual's name or personal identifier, such as a social security number. All systems of records must have a PA warning on them.
  - -- System of records developers and managers must perform privacy impact assessments before creating a PA system of records or modifying information contained in a system of records
  - -- Do not place PA information in areas where individuals without an official need to know will have access (including office shared drives on computer systems)
  - -- Personal notes maintained by a supervisor as memory aids at her own initiative are not considered a system of records, even if maintained by name or personal identifier, unless the records are required by command policy or regulation, or other action is taken by the individual indicating it is considered to be used for official purposes by other individuals
- Contractors who maintain systems of records for a federal agency are bound by the PA
- Before being required to provide information for a system of records, an individual must be given the opportunity to read the privacy act statement (PAS) for the system of records
  - -- PAS appears in the Federal Register listing for the system of records and can be posted as a sign or printed and handed to the individual
  - -- PAS may also be verbally told to the individual
  - -- PAS includes the authority for collecting the information, whether disclosure is voluntary or mandatory, routine uses of the information, and the consequences of not providing the information, if any

Disclosure Procedures

- <u>To the Individual Subject of the Record</u>:
  - -- Subjects of PA records and their designated representatives may request copies of their records
    - --- Individuals do not need to state a reason for requesting access
    - --- System managers must verify the requester's identity
  - -- Requesters must describe the records they are seeking—"all records on me" is not sufficient—system managers may ask for clarification
  - -- Requesters **MAY NOT** use government resources to create or send a personal request for records
  - -- If records will be released, the system manager must notify the sender within 10 workdays and provide access to the record within 30 workdays of receiving the request. The system manager may take up to 20 workdays to determine whether release is authorized if he notifies the requester of the reason for the delay within 10 workdays.

-- The requester may have to pay fees if the record exceeds 100 copied paper pages, but no fees are charged for electronic copies

- To Third Parties:
  -- The PA normally requires written consent from the subject of the record before releasing information unless a PA exception applies, of which there are twelve
  -- Exceptions allowing disclosure to third parties without subject consent:
    --- To any DoD employee with an official need to know to accomplish their DoD duties
    --- Disclosure is required by the Freedom of Information Act (FOIA). Consult your servicing staff judge advocate (SJA) and Freedom of Information Act (FOIA) office before providing information subject to the PA.
    --- To agencies outside DoD, if consistent with the routine uses listed in the Federal Register's system of records notice
    --- To the Bureau of the Census
    --- Compilations of statistical data where individual data is not identifiable
    --- To the National Archives and Records Administration for permanent storage
    --- To a federal, state, or local agency for civil or criminal law enforcement action
    --- To an individual or agency requiring the information for compelling health or safety reasons
    --- To Congress
    --- To the Comptroller General
    --- To a court of competent jurisdiction in response to a court order from a judge
    --- To a consumer reporting agency, if allowed by system of records notice

Denials

- For a PA record to be denied to the individual whose record it is (a first party), it must be covered by a PA "exemption." PA exemptions usually apply to records created for a law enforcement purpose, such as investigative records and background security check records.
- Only that information in the record covered by the exemption may be denied
- Segregate non-exempt documents and release them
- Third-party information contained in the record may also be redacted depending on the nature of the information and its relevance to the first party's information; always contact your servicing SJA for guidance on releasing third party information in a PA record to the individual whom the PA record pertains
- System managers send recommendations for denials to their servicing SJA and PA office for review within five days of receiving the request
- PA records denied in whole or in part to a first party requester under the PA are also processed under the FOIA to allow for the maximum release of information to the first party requester
- Commonly encountered limits on release to first party requesters for their own PA record are:
  -- Information collected in anticipation of civil litigation or created as attorney work product
  -- Information compiled for a law enforcement purpose

-- Medical records which have been reviewed by a doctor before release, and the doctor determines disclosing the records could cause mental harm or hardship to the requester. In such cases, the medical records may be released to a physician/medical provider of the patient's choosing; ask the requester for the name of a physician to whom the records can be sent. Include a letter to that physician with the records explaining the reviewing doctor's basis for not disclosing the records directly to the requester. Consult AFI 41-210, *Tricare Operations and Patient Administration Functions*, and DoD 6025.18-R, *DoD Health Information Privacy Regulation*, for additional guidance regarding the release of medical records.

Special Handling Requirements

- Medical Records of Minors:
  - -- Normally a parent or legal guardian may have access to their minor child's medical records; however, several exceptions may apply, wherein a parent is not legally permitted to view their child's medical records:
    - --- Confidentiality of the minor: If overseas and the minor is between ages 15 and 17, do not release a minor's medical records to the minor's parents or legal guardians without court order or consent from the minor, **IF** regulation or statute provides for confidentiality of the records and the minor has asked for confidentiality
    - --- Within the territorial United States, state laws may limit parental access to medical records of their children, based on age, type of medical care, or other factors such as allegations of abuse against the parent. Consult with your servicing SJA for state specific requirements.
- Handling PA Records:
  - -- When transmitting PA material using e-mail, the sender must include a warning that the e-mail contains PA material and is for official use only (FOUO) at the beginning of the message and include "FOUO" at the beginning of the subject line
  - -- Do not place PA material on Internet sites accessible by individuals without an official need to know the information

Violations

- Individuals to whom the PA record pertains (first party requesters) may file suit in civil court to gain access to PA materials and correct errors in those materials. The court may award attorney's fees, court costs, and damages.
- Individuals may be criminally prosecuted for willful, unauthorized disclosures of PA information or maintenance of an unauthorized system of records both by civilian authorities and under the UCMJ

References

Privacy Act of 1974, 5 U.S.C. § 552a
DoD 5400.11-R, *DoD Privacy Program* (14 May 2007)
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)), incorporating Change 1, 17 November 2016, with corrective actions applied 17 November 2016
AFI 41-210, *Tricare Operations and Patient Administration Functions* (6 June 2012), including AFI41-210_AFGM2018-01, 27 September 2018

DELIVERY OF MILITARY PERSONNEL, EMPLOYEES, AND FAMILY MEMBERS TO CIVILIAN AUTHORITIES FOR TRIAL

Congress requires the Armed Services to have uniform regulations for delivering military members accused of a crime to U.S. civil authorities. DoD regulations requires cooperation with federal and state officials who request assistance to enforce court orders pertaining to the witness testimony or in court appearance of a military member, employee, or family member stationed overseas. Air Force policy further extends this cooperation to military members stationed within the United States.

Adherence to Court Orders to Testify

- Air Force members, civilian employees, and family members are expected to comply with orders issued by a federal or state court of competent jurisdiction unless non-compliance is legally justified. Members and employees who persist in non-compliance are subject to adverse administrative action, including separation for cause.
- Air Force officials will ensure that members, employees, and family members do not use assignments or officially sponsored residences outside the United States to avoid complying with valid court orders. Failure of a family member located outside the United States to comply with a court order may be the basis for withdrawal of command sponsorship from the family member.

Initial Actions Following Report of Service Member Arrest by Civilian 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
- 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

Procedure: Delivery of Military Personnel Located Outside the United States

- When federal, state, or local authorities request delivery of an Air Force member who is stationed outside the United States and who is convicted of, or charged with, a felony or who is sought for the unlawful taking of a child, he/she will normally be expeditiously returned to the United States for delivery to the requesting authorities. The office of primary responsibility (OPR) for this process is AFLOA/JAJM.

  -- "Outside the United States" is defined as an area other than one of the 50 states, the District of Columbia, American Samoa, Guam, Northern Mariana Islands, Puerto Rico, the United States Virgin Islands, or any commonwealth, territory, possession, or insular are of the United States

  -- A felony is a criminal offense punishable by incarceration for more than one year, regardless of the sentence actually imposed

  -- Requests for delivery of military members to civilian authorities must be accompanied by a warrant or a representation by a federal marshal or agent that such a warrant has been issued

  -- Before taking action to return a member under these circumstances, the member must be afforded an opportunity to show legitimate cause for non-compliance

  -- A general court-martial convening authority (GCMCA), or an installation or equivalent commander if designated by the GCMCA, may order a military member to return expeditiously, at government expense, to an appropriate port of entry in the United States if the member has been convicted of, or charged with, a felony, has been held in contempt, or who is sought for the unlawful taking of a child

  -- The Judge Advocate General (TJAG) may direct return for less serious offenses when deemed appropriate under the facts and circumstances of a particular case

  -- Return is not required if the controversy can be resolved without returning the member to the United States

  -- If approved, the member receives permanent change of station (PCS) orders from the Air Force Personnel Center (AFPC) with an assignment to an installation as close to the requesting jurisdiction as possible

  -- Requesting authorities will be notified of member's new assignment, port of entry, and estimated time of arrival

  -- On or before delivery, the commander authorizing the delivery will provide the military member an Instruction Letter in substantially the form set out in Attachment 2, AFI 51-205

  - -- On or before delivery, the requesting authority must execute an Acknowledgement and Agreement in substantially the form set out in Attachment 3, AFI 51-205
- A request for return of a member to the United States by civilian authorities may be denied if any of the following exist:
  - -- Member's return would have an adverse impact on operational readiness or mission requirements
  - -- An international agreement precludes the member's return
  - -- Member is subject to foreign judicial or court-martial proceedings or a military department investigation
  - -- Member shows satisfactory evidence of legal efforts to resist the request or other legitimate causes for non-compliance
  - -- Other unusual facts or circumstances warrant a denial
- Commanders send recommendations for denial through their legal office to AFLOA/JAJM, SAF/GC, and SAF/MI. The Under Secretary of Defense for Personnel and Readiness (USD/P&R) is the denial authority.
- Requests must be processed expeditiously. A delay of up to 90 days may be granted by TJAG if any of the following apply:
  - -- Efforts are in progress to resolve the controversy without the member's return
  - -- Additional time is required to permit the member to provide satisfactory evidence of legal efforts to resist the request or show legitimate cause for non-compliance
  - -- Additional time is needed to determine the mission impact of the member's loss or impact on any international agreement, foreign judicial proceeding or ongoing military department investigation or court-martial
  - -- Other unusual facts or circumstances warrant delay

Procedure: Delivery of Military Personnel Located Within the United States

- Requests for, and delivery of, military personnel located within the United States generally follow the same procedures outlined above for the return of members overseas
- However, a GCMCA may not authorize the transfer of a member from one state to another until the proper extradition proceedings are complete. If state or local civilian authorities request the delivery of a military member located in another state, the requesting authorities must follow normal extradition procedures.

Physical Restraint or Confinement Pending Delivery

- An Air Force member may be placed under physical restraint or confinement by his/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 Form 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 (i.e. (1) "general" or (2) "under other than honorable conditions" (UOTHC) 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)

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, 2July 2013, including AFI36-3208_AFGM2018-01, 14 June 2018

AFI 51-205, *Delivery of Personnel to United States Civilian Authorities for Trial and Criminal Jurisdiction Over Civilians and Dependents Overseas* (10 September 2018)

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

CITIZENSHIP FOR MILITARY MEMBERS

The Immigration and Nationality Act (INA) provides naturalization options for military members and certain veterans of the U.S. military. Aliens who are serving or have served in the U.S. military may pursue naturalization through peacetime military service (10 U.S.C. § 1439(a)), through military service during a period of hostilities (10 U.S.C. §1440(a)) or naturalization may be pursued posthumously for members who served during a designated period of hostilities (10 U.S.C. § 1440-1).

Naturalization through Peacetime Service

- A member who has served honorably in the U.S. armed forces at any time may be eligible to apply for naturalization under Section 328 of the INA (10 U.S.C. § 1439(a)). The military community refers to this as "peacetime naturalization."
- In general, an applicant for naturalization based peacetime service must:
  - -- Be age 18 or older
  - -- Have served honorably in the U.S. armed forces for at least one year and, if separated from the U.S. armed forces, have been separated honorably
  - -- Be a permanent resident at the time of examination on the naturalization application
  - -- Be able to read, write, and speak basic English
  - -- Demonstrate knowledge of U.S. history and government (civics)
  - -- Have been a person of good moral character during all relevant periods under the law
  - -- Have an attachment to the principles of the U.S. Constitution and be well disposed to the good order and happiness of the United States during all relevant periods under the law
  - -- Have continuously resided in the United States for at least five years and have been physically present in the United States for at least 30 months out of the five years immediately preceding the filing date of the application, **UNLESS** the applicant has filed an application while still in the service or within six months of separation. In the latter case, the applicant is not required to meet these residence and physical presence requirements.

Naturalization through Qualifying Service During Periods of Hostilities

- Members of the U.S. armed forces who serve honorably for any period of time (even one day) during specifically designated periods of hostilities are eligible for naturalization under Section 329 of the INA (10 U.S.C. § 1440)
- In general, an applicant for naturalization based service during a period of hostilities must:
  - -- Have served honorably in active duty status, or as a member of the Selected Reserve of the Ready Reserve, for any amount of time during a designated period of hostilities and, if separated from the U.S. armed forces, have been separated honorably
  - -- Have been lawfully admitted as a permanent resident at any time after enlistment or induction, **OR** have been physically present in the United States or certain territories at the time of enlistment or induction (regardless of whether the applicant was admitted as a permanent resident)
  - -- Be able to read, write, and speak basic English
  - -- Demonstrate knowledge of U.S. history and government (civics)

  - -- Have been a person of good moral character during all relevant periods under the law
  - -- Have an attachment to the principles of the U.S. Constitution and be well disposed to the good order and happiness of the United States during all relevant periods under the law
- There is no minimum age requirement for an applicant under this section. The designated periods of hostilities are:
  - -- April 6, 1917 to November 11, 1918
  - -- September 1, 1939 to December 31, 1946
  - -- June 25, 1950 to July 1, 1955
  - -- February 28, 1961 to October 15, 1978
  - -- August 2, 1990 to April 11, 1991
  - -- September 11, 2001 until the present
- Current designated period of hostilities starting on September 11, 2001, will terminate when the President issues an Executive Order terminating the period

Posthumous Citizenship for Military Members

- Members who served honorably in the U.S. armed forces and who died as a result of injury or disease incurred while serving in an active duty status during specified periods of military hostilities, as listed above, may be eligible for posthumous citizenship under section 329A of the INA (10 U.S.C. § 1440-1)
- Form N-644, *Application for Posthumous Citizenship*, must be filed on behalf of the deceased service member within two years of his/her death. If approved, a Certificate of Citizenship will be issued in the name of the deceased veteran establishing posthumously that he/she was a U.S. citizen on the date of his/her death.

Application Processing

- Service members must apply for naturalization through the U.S. Citizenship and Immigration Services (USCIS). Service members are not charged filing or biometrics fees associated with the naturalization process.
- Every military installation should have a designated point of contact to assist members with Form N-400, *Naturalization Application* and Form N-426, *Request for Certification of Military or Naval Services*
- Once the packet is complete, it should be sent to the specialized military naturalization unit at the USCIS Nebraska Service Center for expedited processing

---

References

Immigration and Nationality Act (INA), 8 U.S.C. §§ 1101 *et seq.*
8 U.S.C. §§ 1439(a), 1440
N-400, *Naturalization Application*
N-426, *Request for Certification of Military or Naval Services*
DoDI 5500.14, *Naturalization of Aliens Serving in the Armed Forces of the United States and of Alien Spouses and/or Alien Adopted Children of Military and Civilian Personnel Ordered Overseas*, 4 January 2006

7

CHAPTER SEVEN: PERSONNEL ISSUES – MILITARY MEMBERS

THE AIR FORCE URINALYSIS PROGRAM

The purpose of the Air Force urinalysis program is to assist commanders in ensuring their troops are mission ready by deterring Air Force members from using illegal drugs and other illicit substances.

Objectives

- Identifying individuals who use and abuse illegal drugs and other illicit substances
- Providing a basis for action, adverse or otherwise, against a member based on a positive test result
- Enhance mission readiness and foster a drug free environment through a comprehensive program of education, prevention, deterrence and community outreach in support of the President's National Drug Control Strategy

Procedures

- Close command coordination with legal, law enforcement, and other agencies is required for an effective urinalysis program
  - -- Carefully controlled and standardized collection, storage, and shipment procedures, supported by a legally defensible chain of custody, are required by directive and instruction to ensure the integrity of the program
  - -- If proper procedures are not followed, then use of urinalysis test results in UCMJ or administrative actions may be limited or, in some cases, prohibited

Air Force Drug Testing Laboratory (AFDTL)

- With the exception of urine samples tested for steroids and other nonstandard drugs of abuse, nearly all Air Force member urine samples are tested at the Air Force Drug Testing Laboratory (AFDTL), Joint Base San Antonio-Lackland, Texas. Some member samples are tested at the Forensic Toxicology Drug Testing Laboratory at Tripler Army Medical Center, Hawaii, due to geographic proximity.
- The AFDTL can test for the presence of cocaine, amphetamine/methamphetamine, marijuana, designer or analog amphetamines (to include MDMA (Ecstasy), MDA and MDEA), 6-MAM (heroin metabolite), opiates (codeine, morphine, hydrocodone, hydromorphone), benzodiazepines, opioids (oxycodone, oxymorphone), and synthetic cannabinoids (e.g., "Spice")
- The AFDTL uses a DoD prescribed combination of analytic techniques to determine whether or not samples are positive for various drugs
  - -- Each sample must undergo at least two tests before it may be considered positive: (1) screen and (2) confirmation
  - -- Screen Test: Conducted primarily using immunoassay testing, with occasional directed screen testing done using liquid chromatography/tandem mass spectrometry (LC-MS/MS)
  - -- Confirmation Test: Gas chromatography/mass spectrometry (GC/MS) or LC-MS/MS is used for all confirmation testing
  - -- The DoD prescribes a minimum level beyond which a test is reported as positive
    - --- Only samples that test positive above the DoD minimum level on every test are reported as positive
    - --- Samples not testing positive on any screen test or on the confirmation test are discarded

Urinalysis Testing

In addition to unit administered random drug testing, there are five common situations that may require urinalysis testing, consent, probable cause, commander directed, inspection, and medical care. Each of these has its own legal considerations for when it can be taken and how it can be used so consult with the staff judge advocate (SJA) before determining which situation to use.

- Consent:
  - -- Prior to a probable cause or commander directed urinalysis test, the member should first be asked if he/she will consent to a urinalysis test
  - -- When practicable, consent should be given in writing, using an AF Form 1364
  - -- You are not required to give Article 31, UCMJ, rights prior to asking for consent. However, evidence that a member was read these rights may be used to help demonstrate that consent was truly voluntary.
  - -- Always coordinate with the SJA before collecting urine through consent
  - -- Results may be used for UCMJ or administrative actions, including adverse characterization of administrative discharges
- Probable Cause:
  - -- To have probable cause there must be a reasonable belief illegal drugs, or drug metabolites, will be present in the individual's urine
  - -- Requires a search and seizure authorization from a military magistrate or a neutral and detached commander with authority over the person being searched to seize a urine specimen
  - -- Always coordinate with the SJA prior to obtaining a urine sample through a probable cause search
  - -- Results may be used for UCMJ or administrative actions, including adverse characterization of administrative discharges
- Commander Directed:
  - -- Appropriate where the member displays strange, bizarre, or unlawful behavior or where the commander suspects or has reason to believe drugs may be present, but probable cause does not exist
  - -- Drug rehabilitation testing is commander directed
  - -- Results obtained through commander directed testing can be used as a basis for administrative discharge action (honorable discharge only) or to support administrative actions such as letters of reprimand and promotion propriety actions
  - -- Commander directed test results **CANNOT** be used to take UCMJ action, such as court-martial or Article 15, or to adversely characterize administrative discharges
- Inspection:
  - -- Urine specimens may be ordered and collected as part of an inspection under Military Rule of Evidence 313(b)
  - -- Primary purpose of an inspection is to determine and ensure the security, military fitness, or good order and discipline of the unit. This may include an inspection to determine whether the command is functioning properly, if proper standards of readiness are maintained, and if personnel are present, fit, and ready for duty.

-- Sometimes called a "unit sweep," an entire unit or a part of the unit may be inspected, or an individual may be directed to participate in a base-wide random selection process

-- Individual members **MAY NOT** be singled out for inspection (especially as a means to work around a lack of consent or probable cause)

-- **DO NOT** use an inspection when you suspect a specific individual of drug abuse. Consult the SJA for more appropriate options.

-- Coordinate inspections with the installation Drug Demand Reduction Program Manager (DDRPM). Do not announce the inspection in advance to those being inspected.

-- Inspection testing is the best deterrent available against drug abuse

-- Results may be used for UCMJ or administrative actions, including adverse characterization of administrative discharges

- Medical Care:

-- A urine specimen collected as part of a patient's medical treatment, including a routine physical, may be subjected to urinalysis drug testing

-- Results may be used for UCMJ or administrative actions, including adverse characterization of administrative discharges

Positive Results

- Upon receipt of a positive test report, regardless of type of test, **immediately** contact the SJA
- Upon notification of a positive urinalysis test, AFOSI or SFS will schedule an interview with the service member. Do not advise the service member in advance of the interview or positive test result.

Actions Authorized by Positive Drug Test Results

AFI 90-507, Table 7.1

Basis for Test	Affects Discharge Characterization	Administrative Actions (See Note 1)
Inspection – Military Rule of Evidence (Military Rules of Evidence) 313 (see Note 2)	Yes	Yes
Voluntary Consent – Military Rules of Evidence 314(e)	Yes	Yes
Probable Cause – Military Rules of Evidence 315, 316 (see Note 3)	Yes	Yes
Commander Directed (see Note 4)	No	Yes
Self-Identification, Initial Testing (see Note 5)	No	Yes
Valid Medical Purpose – Military Rules of Evidence 312(f) (see Note 6)	Yes	Yes

Notes:

1. Administrative actions include, but are not limited to, letters of admonishment, counseling and reprimand, denial of re-enlistment, removal from PRP, removal from duties involving firearms, removal from flying status or sensitive duties, suspension of security clearance, and removal of restricted area badges. If there are any questions regarding actions authorized for positive drug test results, consult the local servicing staff judge advocate.
2. Inspections under Military Rules of Evidence 313(b) include those under the installation's random urinalysis drug testing program and unit sweeps.
3. Probable cause tests are authorized searches and seizures ordered by a military magistrate or commander (see Military Rules of Evidence 315 and 316).
4. Absent probable cause, commander directed results may not be used for disciplinary action under the UCMJ or to characterize service under administrative separation. Exception: Commander directed results may be offered for impeachment purposes or in rebuttal when a member first introduces evidence to infer or support a claim of non-use of drugs.
5. Members may not be disciplined under the UCMJ when they legitimately self-identify for drug abuse and enter the Alcohol and Drug Abuse Prevention and Treatment (ADAPT) Program. In the interests of safety and security, commanders may initiate non-adverse administrative actions such as removal from flying status or, PRP, or terminating restricted area badges, etc. Individuals in the ADAPT Program may also be disciplined under the UCMJ when independent evidence of drug use is obtained.
6. Specimens from an exam for a valid medical purpose may be used for any lawful purpose.

References

Military Rules of Evidence 312-316 (2019)
DoDI 1010.01, *Military Personnel Drug Abuse Testing Program* (13 September 2012)
DoDI 1010.16, *Technical Procedures for the Military Personnel Drug Abuse Testing Program (MPDATP)*(10 October 2012)
AFI 36-3208, *Administrative Separation of Airmen* (9 July 2004), incorporating through Change 7 (2 July 2013), including AFI36-3208_AFGM2018-01, 14 June 2018
AFI 44-121, *Alcohol and Drug Abuse Prevention and Treatment (ADAPT) Program* (18 July 2018)
AFI 90-507, *Military Drug Demand Reduction Program* (22 September 2014), certified current 18 December 2015
AF Form 1364, *Consent for Search and Seizure* (18 April 2016)

URINALYSIS CHECKLIST FOR UNIT COMMANDERS

Note: This checklist is intended to alert commanders to important urinalysis inspection issues. It is not a complete checklist, nor is it intended to replace or supersede any local or higher headquarters checklist(s) or guidance pertaining to urinalysis inspections.

Generally

- Do you brief the consequences of drug abuse at commander's calls? Do you consult the staff judge advocate (SJA) before you do so? Do you invite a judge advocate to speak?
- Do you ensure that all military members, regardless of rank or status, are subject to inspection testing?
- Do you restrict knowledge of unit or random inspections only to those individuals with a "need-to-know"?

Personnel

- Are tests coordinated with the Drug Demand Reduction Program Manager (DDRPM) or Drug Testing Program Administrative Manager (DTPAM)?
- Do you coordinate all inspections and searches (e.g., unit sweeps, consent, probable cause, and commander directed testing) with the SJA?
- Have you chosen credible people to serve as trusted agent and urinalysis observers in the program in accordance with AFI 90-507, *Military Drug Demand Reduction Program*?
  - -- Is the trusted agent someone of unquestionable integrity and trustworthiness?
  - -- Have you reviewed the personnel information files (PIFs) of the trusted agent and observers and determined they have no Unfavorable Information File (UIF), history of conviction by prior courts-martial or civilian court (within the previous five years), Article 15s, Letter of Reprimands (LORs), or similar administrative action for misconduct involving dishonesty, fraud, or drug abuse?
  - -- Have you ensured no trusted agent or observer has any pending criminal action, either UCMJ or otherwise, or any administrative action pertaining to drug abuse, dishonesty, fraud or other integrity offenses?
  - -- Do all observers have more than six months remaining time in service until either separation or retirement from active duty (one year from separation or transfer from active participation status for Air Force Reserve Component (AFRC) and Air National Guard (ANG))?
  - -- Have you ensured that the trusted agent and observers have no medical or mental health conditions that could prevent them from performing observer duties?
  - -- Are the observers either commissioned officers or non-commissioned officers (NCOs)? If a senior airman are selected, have you obtained the concurrence of the SJA?
  - -- Are there enough observers, both male and female, to accommodate the number of individuals being tested? Have arrangements been made for additional observers to meet unexpected requirements?
  - -- Have you ensured that no observer is assigned to work in any legal office?

Notifications

- Do you personally sign the written order to each member directing each inspection?
  - -- If not, are you personally aware of the identity of each member who has been randomly selected before a pre-signed letter (by you) is issued to the member by the trusted agent?
- Do you notify members no sooner than two hours prior to collection time?
  - -- Do you require each member to properly acknowledge (date, time and member signature), in writing, receipt of the order?
  - -- If a member refuses to acknowledge receipt of the order, does the person serving the order document the member's refusal?
- Do you ensure copies of such orders are maintained within the unit?
- Do you ensure that all members selected for testing report to the collection site within the designated collection time on the written order?
- Do you make sure shift workers or personnel on scheduled "days off" report for testing on their next duty day?

Other Considerations

- Do you make sure members who are unavailable for testing due to leave, pass, temporary duty assignment (TDY), quarters, flying status, crew-rest, missile duty, or non-duty status are tested upon return of the member to duty? Do you coordinate this with the DDRPM?
- Do you seek advice and assistance from the SJA regarding members who fail or refuse to provide a sample?
- Do you immediately contact the SJA for advice and assistance regarding all positive test results?

Reference

AFI 90-507, *Military Drug Demand Reduction Program* (22 September 2014), certified current 18 December 2015

FRATERNIZATION AND UNPROFESSIONAL RELATIONSHIPS

AFI 36-2909, *Professional and Unprofessional Relationships*, sets out a detailed discussion of Air Force policy concerning fraternization and unprofessional relationships. An unprofessional relationship can also be considered retaliation under the AFI.

Overview

- Professional relationships are essential to the effective operation of all organizations. The nature of the military mission requires absolute confidence in command and an unhesitating adherence to orders that may result in inconvenience, hardships, or, at times, injury or death.
- Personal relationships become matters of official concern when they adversely affect or have the reasonable potential to adversely affect the Air Force by eroding morale, good order, discipline, respect for authority, unit cohesion, or mission accomplishment

Unprofessional Relationships

- Unprofessional relationships, whether pursued on or off duty, are those relationships that detract from the authority of superiors or result in, or reasonably create the appearance of, favoritism, misuse of office or position, or the abandonment of organizational goals for personal interests
- Unprofessional relationships can exist between officers, between enlisted members, between officers and enlisted members, and between military personnel and civilian employees or contractor personnel
- Certain kinds of personal relationships present a high risk of becoming unprofessional
  - -- Familiar relationships in which one member exercises supervisory or command authority over another member
  - -- Shared living accommodations, vacations, transportation, or off-duty interests on a frequent or recurring basis in the absence of any official purpose or organizational benefit
- Tailored rules for unprofessional relationships exist in the recruiting, training, and education environments. These rules draw very specific lines for types of activities a trainer and trainee or a recruiter and a recruit can participate in, locations where they may not be at the same times, and limitations on personal interaction.
  - -- Additionally, Article 93a, UCMJ prohibits certain sexual activities (any "sexual act" or "sexual contact" as defined by Article 120, UCMJ) with military recruits or trainees by persons in positions of special trust. Consent to the sexual act or sexual contact by the recruit or trainee is not a defense.
- All military members share responsibility for maintaining professional relationships, but the senior member in a personal relationship bears primary responsibility

Fraternization

- Fraternization is a unique form of unprofessional relationship. It exists when a relationship between an officer and an enlisted member puts the enlisted member on terms of military equality with the officer that prejudices good order and discipline or brings discredit upon the armed forces.
- The following officer conduct is specifically prohibited by AFI 36-2909, and may be prosecuted under UCMJ, Articles 92, 133, and/or 134, with reasonable accommodation of married members or members related by blood or marriage:
  - -- Officers will not gamble with enlisted members

-- Officers will not lend money to, borrow money from, or otherwise become indebted to enlisted members

--- An exception exists for infrequent, non-interest-bearing loans of small amounts to meet exigent circumstances (e.g., an individual who forgets his/her wallet or purse and can't pay for lunch at a unit function)

-- Officers will not engage in sexual relations with or date enlisted members

--- In dealing with officer/enlisted marriages, the evidence should first be assessed. When evidence of fraternization exists, the fact that an officer and enlisted member subsequently marry does not preclude appropriate command action based on the prior fraternization.

-- Officers will not share living accommodations with enlisted members except when reasonably required by military operations

-- Officers will not engage, on a personal basis, in business enterprises with enlisted members, or solicit or make solicited sales to enlisted members, except as permitted by DoD 5500.07-R, *Joint Ethics Regulation* (JER)

Retaliation

- Retaliation is considered an unprofessional relationship under AFI 36-2909, *Professional and Unprofessional Relationships*. AFI 36-2909 establishes command, supervisory and personal responsibilities in prohibiting retaliation against an alleged victim or other member of the Armed Forces for reporting a criminal offense. (See the "Retaliation" section for further information.)

-- The term retaliation includes retaliation, ostracism, and maltreatment. (See the "Retaliation" section for the definitions of each term.)

-- Retaliation against individuals who report criminal offenses is unlawful and erodes good order, discipline, respect for authority, unit cohesion and ultimately mission accomplishment

-- It is the responsibility of commanders and supervisors at all levels to ensure compliance

-- Generally, the policy applies to all active duty members and to members of the United States Air Force Reserve (AFR) and Air National Guard (ANG)

-- Military members shall not retaliate against an alleged victim or other military member who reports a criminal offense.

Command and Supervisory Responsibilities

- A commander or supervisor must take corrective action if a relationship is prohibited by AFI 36-2909 and/or is causing a degradation of morale, good order, discipline, or unit cohesion. Failure to take corrective action may lead to punishment of the commander or supervisor.

-- Action should normally be the least severe necessary to terminate the unprofessional aspects of the relationship

-- Counseling is often an effective first step in curtailing unprofessional relationships. However, the full spectrum of administrative actions should be considered.

--- More serious cases may warrant nonjudicial punishment

--- Referral of charges to a court-martial is only appropriate in aggravated cases

-- An order to cease the relationship, or the offensive portion of the relationship, can and should be given. Any order should be in writing, if possible.

-- Officers or enlisted members who violate orders are subject to UCMJ action

References

UCMJ, arts. 92, 93a, 132, 133, and 134
DoDI 1304.33, *Protecting Against Inappropriate Relations during Recruiting and Entry Level Training* (28 January 2015), incorporating Change 1, 5 April 2017
DoD 5500.07-R, *Joint Ethics Regulation* (JER)
AFI 36-2909, *Professional and Unprofessional Relationships* (27 April 2018)

HAZING

DoD policy recognizes the adverse effects hazing can have on morale, operational readiness, and mission accomplishment. Hazing is prohibited and should never be tolerated.

Definitions

- Hazing is a form of harassment that includes conduct through which service members or DoD employees (without a proper military or other governmental purpose but with a connection to military service) physically or psychologically injures or creates a risk of physical or psychological injury to service members for the purpose of: initiation into, admission into, affiliation with, change in status or position within, or a condition for continued membership in any military or DoD civilian organization. Hazing can be conducted through the use of electronic devices or communications, and by other means including social media, as well as in person.
- Hazing is evaluated by a reasonable person standard and includes, but is not limited to, the following when performed without a proper military or other governmental purpose:
  - -- Any form of initiation or congratulatory act that involves physically striking another in any manner or threatening to do the same, and/or pressing any object into another person's skin, regardless of whether it pierces the skin, such as "pinning" or "tacking on" of rank insignia, aviator wings, jump wings, divers insignia, badges, medals, or any other object. (Note: AF legal guidance on this issue interprets the DoD definitions as not intended to prohibit the traditional "tacking on" portion of the enlisted promotion ceremony where well-wishers tap the cloth rank insignia on the promotees' sleeves as a congratulatory gesture during the promotion. Local commanders may provide more restrictive guidance on this issue, in consultation with guidance from their SJA.)
  - -- Oral or written berating of another for the purpose of belittling or humiliating;
  - -- Encouraging another person to engage in illegal, harmful, or dangerous acts;
  - -- Playing abusive or malicious tricks;
  - -- Branding, handcuffing, duct taping, tattooing, shaving, greasing, or painting another person;
  - -- Subjecting another person to excessive or abusive use of water;
  - -- Forcing another person to consume food, alcohol, drugs, or any other substance; and
  - -- Soliciting, coercing, or knowingly permitting another person to solicit or coerce acts of hazing
- A military member or DoD civilian employee may still be responsible for an act of hazing even if there was actual or implied consent from the victim and regardless of the grade/rank, status, or Service of the victim
- Hazing does not include properly-directed command activities that serve a legitimate purpose or the requisite training activities required to prepare for such activities (e.g., administrative corrective measures, extra military instruction, or command-authorized physical training)
- Hazing is prohibited in all cases, including off duty or in unofficial celebrations and unit functions

Command Action

- Commanders and senior NCOs must promptly and thoroughly investigate all allegations of hazing and take appropriate action if a hazing allegation is substantiated
- A commander's options begin with counseling and reprimands and extend to court-martial for serious cases that involve assault, aggravated assault, maltreatment of subordinates, etc.
- Commanders must evaluate all activities that appear to be an initiation or "rite of passage" to ensure that the dignity and respect of all members are maintained

Punitive Regulations and the Uniform Code of Military Justice

- Although the Secretary of Defense has authorized all services to incorporate this policy into a punitive regulation, the Air Force does not have such a regulation and there are no plans to incorporate the policy into such a regulation; however, the Air Force may pursue disciplinary action under the UCMJ for dereliction of duty or for the underlying misconduct, such as assault, battery, maltreatment of subordinates, etc.

References

AFI 1-1, *Air Force Standards* (7 August 2012), incorporating Change 1, 12 November 2014
DoDI 1020.03 *Harassment Prevention and Response in the Armed Forces* (8 February 2018)

FINANCIAL RESPONSIBILITY, BAD CHECKS, & BANKRUPTCY

Air Force members are expected to timely and properly satisfy financial obligations. Failure to do so can result in administrative or disciplinary action and/or their debt being paid involuntarily by official Air Force channels.

Commander's Responsibilities

- In cases of financial irresponsibility, the commander shall:
  - -- Review and assess the basis of any allegation of financial irresponsibility and attempt to respond within 15 days if possible. Complainants should be provided attachments 2 and 3 of AFI 36-2906, *Personal Financial Responsibility*, which address involuntary allotments of a member's pay, if appropriate.
  - -- Advise military member and complainant that the Air Force has no authority to arbitrate disputed cases of nonsupport or personal indebtedness. Do **NOT** provide information to the complainant regarding administrative or disciplinary action contemplated or taken against the member.
  - -- Refer members with demonstrated financial irresponsibility to the appropriate base agency for assistance (normally the Airmen and Family Readiness Center as well legal assistance at the installation legal office)
  - -- Consider whether administrative or disciplinary action is appropriate for continuing financial irresponsibility. Consider the action with the appropriate base agencies (e.g., staff judge advocate (SJA), military personnel flight (MPF), inspector general (IG).)

Financial Support to Dependents

- AFI 36-2906, *Personal Financial Responsibility*, was republished on 30 July 2018. The revision removed the prior ambiguous requirement for military members to provide "adequate support" to their dependents absent a court order or agreement. Instead, Chapter 4 of the revised AFI includes a pro-rata share requirement and provides more guidance on when support is to be provided and conditions for providing support. When using the pro-rata share in Figure 1.1, the "Total Number of Supported Family Members" does not include the military member in the denominator. Additionally, the non-locality basic allowance for housing-with dependent rate will always be used for the calculation.
  - -- The Air Force can terminate or recoup the Basic Allowance for Housing (BAH) with dependent rate allowances for those failing to provide adequate financial support to family members
  - -- Members who falsify support documentation subject themselves to disciplinary or administrative action

Child Support and Alimony Payments

- State courts or state agencies with authority over dependent children can order child support payments. A complainant can either provide a garnishment order to Defense Finance and Accounting Service (DFAS) and receive a portion of the payment directly, or may secure a statutory allotment. Complainants who are DoD beneficiaries may consult the legal office for legal assistance.
- Commanders should ensure their military member involved in these processes has access to a legal assistance attorney if they are not already represented by a civilian attorney

Third Party Allotments

- A third party can secure an involuntary allotment from a military member to satisfy a final judgment from a court. The Air Force has no authority to resolve disputed claims or to require members to pay a private debt without a civil judgment.
  - -- If a complainant attempts to serve the Air Force with documents, they should be referred to DFAS. When a request for involuntary allotment is received, DFAS notifies the member and the member's commander.
  - -- Notification includes the DD Form 2654, *Involuntary Allotment Notice and Processing*, and explains that the allotment will be established against the member's pay if a response is not received within 90 calendar days from the original date of mailing
    - --- If the member is unavailable to respond, then the member's commander may grant a reasonable extension of time. The commander must notify DFAS and should provide appropriate documentation supporting the determination to allow for the extension.
    - --- In the absence of any additional correspondence from the commander, the allotment application may be processed within 15 calendar days after a response was due
  - -- If the member is available, then within five days of receipt of the notification, the commander will notify the member of the application, provide the member with a copy of the entire application package received from DFAS and counsel the member on how to complete the DD Form 2654, *Involuntary Allotment Notice and Processing*
  - -- If the military member consents to the allotment, the commander completes the DD Form 2654 and returns the completed form to DFAS
  - -- If the allotment is contested, the member must fully explain and support the reasons contesting the allotment. A list of reasons to contest an allotment is found in DoD 7000.14-R, *Department of Defense Financial Management Regulation*, Volume 7A, Chapter 41, paragraph 410506.B.1.
  - -- If the military member fails to respond within the time allowed, the commander notes the failure to respond and notifies DFAS
  - -- If a member asserts an "exigencies of military duty" defense to the allotment the commander should contact the servicing legal office for further guidance

Bad Checks

- When a military member writes a check that fails to clear for payment, it may be necessary to take administrative or disciplinary action to correct the behavior. Consult with the legal office to determine if administrative or disciplinary action is appropriate.
- For a first or relatively minor incident, counseling the member about Air Force policy and referral to the Personal Financial Management Program may be an appropriate first step
- Repeated cases of dishonored checks, or a single instance involving a large amount of money, may be the basis for administrative action, such as a letter of reprimand (LOR), Unfavorable Information File (UIF), control roster, administrative separation, and/or involuntary deductions by DFAS for personal indebtedness to the federal government

- Writing bad checks may constitute a violation of Article 123a, UCMJ if the member:
  - -- Either wrote a check for the purpose of obtaining anything of value with intent to defraud, or wrote a check to pay a past due obligation or other purpose, with intent to deceive; and
  - -- Delivered the check knowing at the time that he/she had not or would not have sufficient funds in, or credit with the bank for the payment of that check
  - -- Evidence of intent to defraud or deceive and knowledge of insufficient funds can be shown by proof of notice of a dishonored check from the holder and failure to make payment within five days after such notice
- Writing bad checks may also constitute a violation of Article 134, UCMJ if the member:
  - -- Dishonorably failed to maintain funds **AFTER** the check was made and delivered
  - -- Proof of intent to defraud or the accused's knowledge of insufficient funds to cover the check when written is not required; bad faith or gross indifference is sufficient
- A civilian judgement based on dishonored check may be the basis for an involuntary allotment of pay

Bankruptcy

- Filing for bankruptcy protection in federal court is a statutory right of all citizens and does not provide a basis for adverse action. However, filing for bankruptcy may affect a member's eligibility for a security clearance. Service members may consult with the Airman and Family Readiness Center as well as the installation legal office for limited assistance with personal bankruptcy.

References

UCMJ arts. 123a and 134
Protection Against Discriminatory Treatment, 11 U.S.C. § 525
Servicemembers Civil Relief Act, 50 U.S.C. §§ 3901-4043
DoD 7000.14-R, *Department of Defense Financial Management Regulation* (January 2017)
DoDI 1344.09, *Indebtedness of Military Personnel* (8 December 2008)
DD Form 2654, *Involuntary Allotment Application* (December 1999)
AFI 36-2906, *Personal Financial Responsibility* (30 July 2018)
AFI 65-601, V1, *Financial Management* (1 August 2012), incorporating Change 1, 29 July 2015

CIVILIAN JURY SERVICE BY MILITARY MEMBERS

When an Air Force member **on active duty** receives a summons to state or local jury duty, the member should inform his/her immediate commander. For the purpose of jury service, "active duty" includes full-time duty in the active military service, full-time training, annual training, active duty for training, and attending a service school while on active military service.

Exemption from Jury Service

- Categorical Exemption: All general officers, commanders, operating forces (forces whose primary missions are participating in and supporting combat), personnel in training, and personnel stationed outside the United States are categorically exempt from serving on a state or local jury
- General Exemption (Not Categorical): For all other personnel, the commander determines whether jury duty would unreasonably interfere with military duties or adversely affect the readiness of a unit, command or activity

Procedures

- If the member is categorically exempt, the immediate commander or designee notifies the issuing state or local official by written notice (complying with the format in AFI 51-301, *Civil Litigation,* paragraph 2.8.3.4)
- If the member is generally (but not categorically) exempt, the immediate commander decides whether jury duty would unreasonably interfere with military duties or adversely affect the readiness of a unit, command or activity
  - -- If jury duty would not unreasonably interfere with military duties or adversely affect the readiness of a unit, command or activity, the member must perform jury duty
  - -- If the immediate commander decides jury duty would unreasonably interfere with military duties or adversely affect the readiness of a unit, command or activity, the immediate commander requests approval of the exemption from the Special Court Martial Convening Authority (SPCMCA); the SPCMCA may then decide whether:
    - --- Exemption is inappropriate and instruct the member to comply with the jury summons, **OR** exemption is appropriate, and direct the immediate commander to send a written notice of exemption to the issuing state or local official complying with AFI 51-301, paragraph 2.8.3.4. The SPCMCA's determination is final.
  - -- Time spent by military members on jury duty service should not be charged against them as leave, nor should pay or entitlements be deducted for the period of jury service

Fees and Reimbursement

- Military members are not entitled to keep any fees for jury service; those fees should be made payable to the U.S. Treasury and turned in at the local finance office
- Military members may receive and keep reimbursement from the state or local jury authority for expenses incurred in the performance of jury duty, such as transportation costs or parking fees

---

References

10 U.S.C. § 982
DoDI 5525.08, *Service by Members of the Armed Forces on State and Local Juries* (3 January 2007)
AFI 51-301, *Civil Litigation* (2 October 2018)

HUMAN IMMUNODEFICIENCY VIRUS (HIV)

Medical Background

- HIV is a viral disease involving the breakdown of the body's immune system, while Acquired Immune Deficiency Syndrome (AIDS) is an advanced stage of HIV infection, where there is evidence of immune deficiency by illness or laboratory traits; medical experts believe the nonsexual, person-to-person contact that occurs among co-workers within the workplace does **NOT** pose a risk for transmitting the virus

HIV and Military Members

- The Air Force tests all members for antibodies to HIV, medically evaluates all infected members, and educates members on means of prevention. All applicants for the Air Force are screened for the HIV infection. Applicants infected with HIV are ineligible to join the Air Force, with no waiver authorized. All active duty and Air Reserve Component (ARC) personnel are screened for HIV infection every two years, preferably during their Preventive Health Assessment; additionally, ARC personnel must have a current HIV test within two years of the date called to active duty for 30 days or more.

- An active duty member testing positive for HIV is referred to San Antonio Military Medical Center (SAMMC) at Joint Base San Antonio for medical evaluation and to determine status for continued military service. HIV-infected active duty members retained on active duty must be medically evaluated annually and are assigned within the continental United States, Alaska, Hawaii or Puerto Rico; they shall not be assigned to outside the continental United States (OCONUS) mobility positions. HIV-infected members on flying status must be placed on duty not involving flying (DNIF) status pending medical evaluation. Waivers are considered using normal procedures established for chronic diseases.

Limitations on Use of Information

- Air Force policy strictly safeguards results of positive HIV testing; in accordance with DoDI 6485.01, *Human Immunodeficiency Virus (HIV) in Military Service Members*, the privacy of a service member with laboratory evidence of HIV infection is protected consistent with the Health Insurance Portability and Accountability Act (HIPAA) and the Privacy Act. Very limited release within the Air Force is permitted on a "need-to-know" basis only (e.g., unit commanders should not inform First Sergeants and/or supervisors unless a determination is made that those individuals truly need to know).

- Laboratory test results confirming HIV infection may not be used as an independent basis for any administrative or disciplinary action, including punitive action under the UCMJ; further, information obtained by the Department of Defense (DoD) as a result of an epidemiological assessment (EA) interview **MAY NOT** be used to support any adverse personnel action against the member. ("Adverse personnel actions" includes court-martial, nonjudicial punishment, line of duty determination, demotion, involuntary separation for other than medical reasons, denial of promotion or reenlistment, administrative or punitive reduction in grade, and unfavorable entry in a personnel record; "nonadverse personnel actions" in which limits on use of epidemiological assessment results do not apply include: reassignment, disqualification (temporary or permanent) from the Personnel Reliability Program (PRP), denial; suspension; or revocation of security clearance, suspension or termination of access to classified information, transfer between Reserve components, removal (temporary or permanent) from flight status or other duties requiring high degree of stability or alertness, and removal of Air Force Specialty Code (AFSC)—however, these nonadverse actions **CANNOT** be accompanied by unfavorable entries in service member's records (other than an accurate entry concerning the action)).

Order to Follow Preventive Medicine Requirements

- An "Order to Follow Preventive Medicine Requirements" is issued to all HIV-positive active duty and ARC personnel; the health care provider will notify the member that he/she has tested positive and explain the significance of the result. After the member is informed, the member's unit commander will be notified expeditiously. For active duty members, the unit commander issues the order to follow preventive medicine requirements; for unit assigned reservists, the order is issued after the immediate commander determines the member will be retained in the Selected Reserve. The order should be signed and dated by the commander and member. The order is given in the presence of a credentialed healthcare provider, who can answer the member's questions. If the member refuses to sign, the commander should annotate in the acknowledgement section. The unit commander is responsible for confidentially safeguarding the order: upon reassignment, the unit commander forwards the order in a sealed envelope to the gaining commander marked "TO BE OPENED BY ADDRESSEE ONLY" and upon the individual's separation from the Air Force, the order is destroyed.
- A service member who knows he/she is HIV positive, but nevertheless engages in sexual intercourse can be punished under the UCMJ for:
  - -- Engaging in unprotected sexual intercourse with another without the individual's knowledge of HIV status
  - -- Violating an Order to Follow Preventative Medicine Requirements
  - -- Failing to warn a sexual partner about their HIV status, despite wearing a condom (merely taking "safe sex" precautions won't remove the duty to warn)

AIDS and Air Force Civilian Employees

- The Air Force does not test Air Force civilian employees for HIV, except for those civilian employees (appropriated or nonappropriated) selected for assignment overseas who will be screened for HIV infection pursuant to host nation requirements. Civilian employees are also tested for occupational exposures (e.g., civilian medical providers).
- AIDS is a disability under federal civil rights laws, and these laws prohibit discrimination on the basis of physical or mental disability. Under these laws, disabled employees could recover back pay, compensatory damages, attorney fees, costs, and expert fees against employers who unlawfully discriminate against them or fail to provide reasonable accommodation.

References

DoDI 6485.01, *Human Immunodeficiency Virus (HIV) in Military Service Members* (7 June 2013)

DoDD 6485.02E, *DoD Human Immunodeficiency Virus (HIV)/Acquired Immune Deficiency Syndrome (AIDS) Prevention Program (DHAPP) to Support Foreign Militaries* (6 December 2013), incorporating Change 1, 1 June 2018

AFI 44-102, *Medical Care Management* (17 March 2015), including AFI44-102_AFGM2018-02, 20 February 2018

AFI 44-178, *Human Immunodeficiency Virus Program* (4 March 2014), certified current 28 June 2016

ANTHRAX IMMUNIZATIONS

AFI 48-110_IP, *Immunizations and Chemoprophylaxis for the Prevention of Infectious Diseases*, sets forth general requirements and procedures for the immunization program. Commanders are responsible for ensuring that all military and nonmilitary personnel under their jurisdiction receive all required immunizations. However, anthrax immunization policies are controlled by the Defense Health Agency Immunization Healthcare Branch (DHA-IHB).

Background

- Anthrax is a serious infectious disease caused by the bacterium *Bacillus anthracis*. Individuals are infected when spores from the bacteria are inhaled, ingested, or enter the body through a break in the skin. Proteins produced by anthrax spores cause tissue damage, shock and death. Inhaled anthrax is fatal in up to 90 percent of cases even with antibiotic therapy. Immunization consists of an initial dose, followed by four additional doses given at 4 weeks, six months, 12 months, and 18 months; thereafter a booster dose should be administered every 12 months to those who remain at risk.
- On 15 December 2005, after reviewing extensive scientific evidence and carefully considering comments from the public, the FDA determined that Anthrax Vaccine Adsorbed (AVA) was an appropriately licensed vaccine for the prevention of anthrax infection
- On 12 October 2006, the Deputy Secretary of Defense directed resumption of a mandatory Anthrax Vaccine Immunization Program (AVIP) for military and civilian personnel in higher risk areas or with special mission roles

Mandatory Immunization

- On 12 November 2015, the Deputy Secretary of Defense issued clarifying guidance for anthrax immunizations. The mandatory requirements are based on information from Combatant Commands. For purposes of the mandatory requirements, "Department of Defense personnel" includes all military service members of the Regular or Reserve Components (including the National Guard) but only emergency-essential and non-combat-essential, or equivalent, Department of Defense (DoD) civilian employees. DoD contractor personnel includes only those contractor personnel performing services that support mission-essential functions.
- Under current guidance, the only mandatory requirements for anthrax vaccinations are as follows:
  - -- DoD personnel and DoD contractor personnel assigned to or deploying to the U.S. Central Command area of responsibility for 15 consecutive days or longer
  - -- DoD personnel and DoD contractor personnel assigned to or deploying to the Korean peninsula for 15 consecutive days or longer, to include forward-deployed naval forces
  - -- DoD personnel and DoD contractor personnel with designated rapid response or support missions in the U.S. Central Command area of responsibility or the Korean peninsula ***as required by the supported command***
  - -- DoD personnel and DoD contractor personnel performing duties or services that support the Chemical, Biological, Radiological and Nuclear Response Enterprise

- Voluntary anthrax vaccinations will be available for those who already started the vaccine series but are no longer deployed to a higher threat area or no longer assigned designated special mission roles. Voluntary anthrax vaccinations will be offered to all other DoD civilian employees and DoD contractor personnel not covered by the mandatory requirements listed above when assigned or deployed to the U.S. Central Command area of responsibility or the Korean peninsula, as well as to family members accompanying DoD personnel to the U.S. Central Command area of responsibility or the Korean peninsula.

Enforcement

- Requirement for military members to take the anthrax vaccine is a lawful order. If a member indicates they will refuse or has refused the vaccine, determine why member is reluctant, provide member with appropriate education, and refer them to the appropriate subject matter expert as necessary (concerns about vaccine safety should be referred to the supporting medical organization; concerns about the threat should be addressed by intelligence personnel). If the member is still reluctant after additional education, send the member to the area defense counsel (ADC) for an explanation of the potential consequences of their refusal.
  - -- Following appropriate counseling, commanders should again order the individual to take the vaccine. If the member continues to refuse, consult with the staff judge advocate for appropriate action.

References

Memorandum, Deputy Secretary of Defense, *Clarifying Guidance for Smallpox and Anthrax Vaccine Immunization Programs* (12 November 2015)

Department of the Air Force, *Plan for Implementing the Anthrax Vaccine Immunization Program (AVIP)* (18 January 2007)

AFI 48-110_IP, *Immunizations and Chemoprophylaxis for the Prevention of Infectious Diseases* (7 October 2013), certified current 16 February 2018

Defense Health Agency Immunization Healthcare Branch website on Anthrax, www.health.mil/anthrax

COMMANDER-DIRECTED MENTAL HEALTH EVALUATIONS

Purpose

Commanders or supervisors who have concerns that a member under their command or supervision may be suffering from a mental health problem which may affect the member's ability to carry out the mission, may direct that member to the mental health clinic for a mental health evaluation (i.e., a Commander-Directed Evaluation or CDE). Commanders and supervisors may make informal, non-mandatory, recommendations for service members to seek care from a Mental Health Provider when circumstances do not require a CDE based on safety or mission concerns.

- DoDI 6490.04, *Mental Health Evaluations of Members of the Military Services*, establishes policy on the uses of, and procedures for, CDEs
- AFI 44-172, *Mental Health*, also provides guidance on mental health issues, including CDEs; it also establishes the Limited Privilege Suicide Prevention (LPSP) Program (for members facing potential disciplinary action who may be at risk of suicide) and provides guidance on the Psychotherapist-Patient Privilege under Military Rule of Evidence 513 and other rules/policies governing confidentiality of mental health records

Commander/Supervisor Responsibilities

- The responsibility for determining whether or not to refer a service member for a CDE rests with the commander or supervisor; a supervisor is a commissioned officer in or out of a member's official chain of command, or a civilian employee in a grade level comparable to a commissioned officer, who:
  - -- Exercises supervisory authority over a service member owing to the member's current or temporary duty assignment, **AND** is authorized due to the impracticality of involving an actual commanding officer in the member's chain of command to direct an MHE
- Commanders or supervisors may order a CDE for a variety of concerns, including fitness for duty, occupational requirements, safety concerns, significant changes in performance or behavioral changes that may be attributable to possible mental status changes
- When possible, mental health providers will assist the commander or supervisor in determining whether or not to direct a CDE
- Non-emergent CDEs: When the commander or supervisor determines a non-emergency CDE is required, they must advise the member there is no stigma associated with seeking mental health services, refer the member to a mental health provider, with name and contact information, and tell the member the date, time and place of the scheduled CDE
- Emergent CDEs: A commander or supervisor shall refer a member for an emergency CDE as soon as practicable when:
  - -- The member, by actions or words, such as actual, attempted or threatened violence, intends or is likely to cause serious injury to himself or others;
  - -- The facts and circumstances indicate the member's intent to cause such injury is likely; or
  - -- The commander or supervisor believes the member may be suffering from a severe mental disorder

Involuntary Inpatient Admissions

- A member will be involuntarily admitted to a military treatment facility for inpatient evaluation and/or treatment only when a qualified provider determines the member has, or likely has, a severe mental disorder or poses imminent or potential danger to self or others and outpatient treatment is not appropriate. The member must be admitted by a psychiatrist, or when a psychiatrist is not available, a physician or other mental health provider (MHP) with admitting privileges. A qualified reviewing official (normally a neutral and detached MHP) must review the admission within 72 hours to determine whether continued involuntary hospitalization is clinically appropriate.
- Members involuntarily admitted for treatment are afforded the following rights:
  - -- To be notified of the purpose and nature of the review and the right to legal representation during the review by a judge advocate or an attorney of the member's choosing at the member's expense
  - -- To contact a friend, relative, chaplain, attorney, or anyone else the member wishes to as soon as the member's condition permits after admission to the hospital
- In the case of referral for an involuntary admission to a civilian facility, the process established under state law as applicable to the civilian facility will be followed; in a foreign country, applicable host nation laws will be followed

Command Notification

- In general, healthcare providers are required to follow a presumption that they are not to notify a service member's commander when the service member obtains mental health care or substance abuse education services; however, healthcare providers are required to notify the commander when certain criteria are met, including:
  - -- Member presents a serious risk of harm to self, others, or to a specific military operational mission;
  - -- Member is in the Personal Reliability Program (PRP);
  - -- Member is admitted or discharged from inpatient mental health care or substance abuse treatment;
  - -- Member is experiencing an acute mental health condition that impairs their ability to perform assigned duties;
  - -- Member has entered into or is being discharged from a formal outpatient or inpatient substance abuse treatment program; or
  - -- Services are obtained as a result of a CDE
- In making a disclosure, healthcare providers are required to release only the minimum amount of information necessary to satisfy the purpose of the disclosure

Prohibited Practices

- The commander or supervisor may not refer a member for a CDE as a reprisal for making a protected communication, nor may they restrict the member from lawfully communicating with his/her attorney, the Inspector General (IG), or other authority about the referral. Either act by the commander could constitute a violation of Article 92, UCMJ, and result in disciplinary action.

- CDEs should not be confused with referrals under AFI 44-121, *Alcohol and Drug Abuse Prevention and Treatment (ADAPT) Program*, AFI 40-301, *Family Advocacy Program*, or those referrals made pursuant to a ruling from a military judge concerning the administration of a sanity board

References

UCMJ art. 92
Military Rule of Evidence 513 (2019)
Rule for Courts-Martial 706 (2019)
DoDI 6490.04, *Mental Health Evaluations of Members of the Military Services* (4 March 2013)
DoDI 6490.08, *Command Notification Requirements to Dispel Stigma in Providing Mental Health Care to Service Members* (17 August 2011)
AFI 44-172, *Mental Health* (13 November 2015)

LIMITED PRIVILEGE SUICIDE PREVENTION (LPSP) PROGRAM

Purpose

- Commanders who have concerns that a member under their command and who is facing disciplinary action may be at risk of suicide can refer that member to the mental health clinic for a mental health evaluation (MHE). Under limited circumstances, information revealed during such consultations may be kept confidential between the patient and the mental health provider under the Limited Privilege Suicide Prevention (LPSP) program.
  - -- The objective of the LPSP program is to identify and treat members who, because of the stress of impending action under the Uniform Code of Military Justice (UCMJ), pose a genuine risk of suicide, by providing limited confidentiality in their discussions with a mental health provider (MHP)
  - -- AFI 44-172, *Mental Health*, is the governing instruction for the program, and provides guidance for commanders who wish to make a referral for a MHE and/or have the member considered for placement in the LPSP program
  - -- The LPSP program operates in conjunction with the guidance on commander directed MHEs/CDEs as well as the psychotherapist-patient privilege under Military Rule of Evidence (MRE) 513

Eligibility and Procedures

- Eligible Members: The LPSP program applies to military members who have been officially notified (written or oral) they are under investigation or suspected of violating the UCMJ
- Initiation: After official notification, if any individual involved in the processing of the disciplinary action has a good faith belief the member being disciplined may present a risk of suicide, the individual shall communicate that concern to the member's immediate commander along with a recommendation for a MHE and possible placement in the LPSP program
  - -- Based on the information provided and after consultation with MHP, the commander may refer the member for a MHE; the procedures and rights associated with MHEs under AFI 44-172 apply to such a referral
  - -- The MHP conducting the evaluation determines if the member poses a risk of suicide and, if so, initiates treatment. The MHP explains the LPSP protections to the member, and places the member into the LPSP program.
- Duration: The limited protections offered by the LPSP program last only so long as the MHP believes there is a continuing risk of suicide; the MHP must notify the commander when the member no longer poses a risk of suicide. The limited protections offered under the program cease at that time. However, matters disclosed while the member was in the LPSP program remain protected.

Limited Protection

- Members in the LPSP program are granted limited protection with respect to information revealed in, or generated by, their clinical relationship with MHPs. Any such information may not be used in any existing or future UCMJ action or when weighing the characterization of the member's service in an administrative separation. However, the limited protection **does not apply to**:
  - -- The use of the information as evidence for impeachment or rebuttal purposes in any proceeding in which information generated by and during the LPSP relationship was first introduced by the member concerned

-- Disciplinary or other action based on independently derived evidence

-- Any information gathered by the MHP or other provider prior to placement in the program or after release from the program (except for later created summaries/documents which pertain to treatment under the LPSP program)

References

Military Rule of Evidence 513 (2019)
DoDI 6490.04, *Mental Health Evaluations of Members of the Military Services* (4 March 2013)
AFI 44-172, *Mental Health* (13 November 2015)
AFI 51-201, *Administration of Military Justice* (8 December 2017)

HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT (HIPAA)

HIPAA generally protects private health information from disclosure, and permits disclosure only under specific circumstances. Such information is typically referred to as PHI, or protected health information.

Introduction

- The DoD has implemented the HIPAA Privacy Rule through DoD 6025.18-R, *DoD Health Information Privacy Regulation*, and the HIPAA Security Rule in DoDI 8580.02, *Security of Individually Identifiable Health Information in DoD Health Care Programs*
- HIPAA's Privacy Rule applies to organizations that meet the definition of "covered entities." Covered entities include healthcare providers and healthcare facilities, such as medical treatment facilities (MTFs).
  - -- Commanders (aside from those assigned to the MTF) are generally not considered "covered entities" under HIPAA—although medical information they receive from the covered entity is subject to the Privacy Act
- Improper release of HIPAA-protected information can result in administrative or criminal disciplinary actions, to include prosecution under the UCMJ for military members
  - -- Certain records that might be considered quasi-medical are not subject to HIPAA; for example, the DoD drug testing program is not subject to HIPAA. DoD 6025.18-R, paragraph C2.2 contains a comprehensive list of health-related records and activities in the DoD to which HIPAA does not apply.

Permissible Disclosures

- Under HIPAA, even without the individual's authorization, an MTF may still disclose information for certain purposes—the most relevant of which are summarized below. (Note that most of these purposes have additional specific requirements that must be met prior to disclosure of PHI, as outlined in Chapter 7 of DoD 6025.18-R.)
  - -- As required by law (includes requirements in Air Force and DoD Regulations but not regulations lower than service-level)
  - -- To avert serious threats to health or safety
  - -- For "specialized governmental functions." This provision allows certain disclosures of the PHI of Armed Forces personnel for "activities deemed necessary" by appropriate military command authorities to assure the proper execution of the military mission (see further discussion below). This provision also permits, among other things, disclosure of PHI to DoD or other Federal officials as described in Section C7.11 of DoD 6025.18-R.
  - -- For judicial and administrative proceedings
  - -- For law enforcement purposes (which includes AFOSI, SF, and judge advocates when acting as prosecutors)
  - -- For issues related to victims of abuse, neglect or domestic violence
  - -- For issues related to inmates in correctional institutions or in custody
  - -- For health oversight activities
- Accounting of Disclosures: Most of these disclosures are accountable, which means the MTF must document who received the information, when, and for what purpose and provide the information upon the patient's request

- Minimum Necessary Standard: When HIPAA allows disclosure of information, MTFs are required to provide only the minimum amount of information necessary to satisfy the intended purpose of the disclosure (similar to the "need to know" requirement for classified information)

Commanders' Access to Information

- Under the "specialized government functions" rule described above, commanders can access PHI of Armed Forces personnel (this does not include dependents or civilian employees) for activities deemed necessary to assure the proper execution of the military mission. This rule generally permits disclosures for fitness for duty purposes.
  - -- For example, commanders may need PHI related to readiness (vaccination status; profile status; etc.). Commanders may also require information related to medical conditions impacting members' abilities to perform their duties (profile information; etc.). Commanders may even need PHI to verify the whereabouts of subordinates.
- However, under the "minimum necessary" standard stated above, any release of PHI must be limited in scope to what the commander actually needs to accomplish his/her mission:
  - -- For example, if a member has a foot injury that precludes prolonged standing, the MTF may disclose PHI to the commander related to the foot injury because it impacts the type of day-to-day duties that the member can be assigned (i.e., it impacts mission accomplishment). The MTF would not necessarily disclose the member's dental records, mammograms, or other medical information unrelated to the foot injury, though, because that PHI may exceed the minimum necessary.
- There is no "blanket rule" concerning release of PHI to commanders. In each case, the nature and extent of PHI released must be determined by evaluating the commander's need and applying the minimum necessary standard.
- Only commanders and their designees can access PHI under these rules. AFI 41-200 provides that a commander's designee includes deputy/vice commander and first sergeant. If the commander wishes to designate any other individual as an authorized recipient of PHI, the commander must do so in writing.
- A commander's access to information may be further limited by DoD policy such as confidentiality for sexual assault victims, DoD policies on reducing the stigma of mental health treatment, or other applicable policy

---

References

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

DoDI 6025.18, *Privacy of Individually Identifiable Health Information in DoD Health Care Programs* (2 December 2009)

DoDI 8580.02, *Security of Individually Identifiable Health Information in DoD Health Care Programs* (12 August 2015)

AFI 41-200, *Health Insurance Portability and Accountability Act (HIPAA)* (25 July 2017)

AFI 41-210, *Tricare Operations and Patient Administration Functions* (6 June 2012), including AFGM2017-01, 23 June 2017

DD Form 2870, *Authorization for Disclosure of Medical or Dental Information* (December 2003)

PERSONNEL RELIABILITY PROGRAM (PRP)

The Personnel Reliability Program (PRP) is designed to ensure the highest possible standards of individual reliability in personnel performing duties associated with nuclear weapons systems and critical components. PRP is a critical link in nuclear surety by determining the fitness for duty of individuals subject to PRP.

Responsibilities

- Wing commanders are responsible for the wing PRP. They serve as the reviewing official for all permanent decertification case files started by subordinate units. They also ensure base PRP meetings are conducted quarterly at the wing level.
- Group and unit commanders who control or have access to nuclear weapons, weapon systems, or critical components, and perform the actual PRP certification are certifying officials (COs) who certify and initiate decertification for their personnel. They may delegate this duty to a deputy or assistant. Certifying officials and their delegates must be certified in a PRP category equal to, or higher than, the personnel they are certifying.
- Individuals in the PRP are subject to continuous evaluation of their reliability and are responsible for complying with the intent of PRP while away from their duty station (leave, TDY, etc.). Responsibility for ensuring continuous eligibility rests with each individual involved with PRP. Individuals in the PRP must monitor their own reliability. They must also notify the CO immediately of any potentially disqualifying information (PDI), either their own or that of co-workers.

Categories of PRP Positions

- Critical Position: Initial certification for critical positions must have Top Secret eligibility, completed within the last five years and favorably adjudicated. These positions generally involve individuals assigned nuclear duties where they have access and technical knowledge, or can either directly or indirectly cause the launch or use of a nuclear weapon.
- Controlled Position: Initial certification for a controlled position must have Secret eligibility or a higher investigation that was completed within the last five years and favorably adjudicated. These positions generally involve individuals assigned nuclear duties who have access but no technical knowledge, control access into areas containing nuclear weapons but do not have access or technical knowledge, or are armed and assigned duties to protect or guard nuclear weapons.

PRP Certification Requirements

- Individuals selected and certified for the PRP must meet the following minimum criteria at all times:
  - -- Dependable, mentally alert, and technically proficient commensurate with their respective duty requirements
  - -- Flexible in adjusting to changes in the working environment, including the ability to work in adverse emergency situations
  - -- Good social adjustment, emotional stability, personal integrity, sound judgment and allegiance to the United States
- Have a positive attitude towards nuclear weapons duty
  - -- Medical evaluation by health professionals specifically trained for PRP patients
  - -- PRP certification requires an in detail review of a members personnel file

-- Every candidate is personally interviewed by the CO

-- Every candidate must demonstrate potential for technical proficiency commensurate with nuclear weapon position requirements

Potential Disqualifying Information (PDI)

- Any of the following traits or conduct is PDI:
  -- Personal conduct involving questionable judgment
  -- Emotional, mental, and personality disorders
  -- Negative financial habits or circumstances
  -- Criminal conduct
  -- Substance or drug misuse and drug incidents
  -- Alcohol use, disorder and alcohol-related incidents
  -- Sexual harassment or assault
  -- Security violations
  -- Misuse of information technology systems

Certifications

- Formal: Validates an individual has been screened, evaluated, and meets the standards for assignment to PRP duties
- Interim: Limits access when an individual is placed in PRP and does not currently possess the required security investigation for formal certification but does have a security investigation adequate for interim clearance
- Administrative: Granted when an individual does not currently hold a formal or interim certificate for PRP duties and is identified for an assignment to a PRP position

Removal from PRP

- Members may be removed from PRP duties through suspension or decertification
- Suspension:
  -- Suspension is used to immediately remove an individual from PRP related duties, initially up to three months, without starting decertification action. The CO may extend the suspension to one year, in three-month increments.
  -- After one year, if the reasons or conditions for suspension still exist and impact reliability, the individual will be decertified
  -- The CO makes the final decision and can return an individual to PRP duties at any point during the suspension timeframe
  -- A CO who is suspended may perform PRP administrative functions
- Mandatory Decertification or Disqualification:
  -- Any of the following conditions will result in decertification or disqualification for a PRP position:
    --- The individual is diagnosed as alcohol-dependent and subsequently fails required aftercare program or fails to participate in the prescribed rehabilitation program or treatment

--- The individual is involved in trafficking, cultivation, processing, manufacture, or sale of any controlled drug

--- The individual has ever used a drug that could cause flashbacks

--- The individual is diagnosed with a severe substance use disorder

--- Loss of confidence by the certifying official in the reliability of the individual

--- The individual's security clearance eligibility has been revoked

-- Within 15 workdays of the decertification, the CO will advise the individual in writing of the reasons for decertification and of the requirement for review by the reviewing official

-- A decertification or disqualification may be reinstated provided there is documented evidence that clearly demonstrates the disqualifying reason no longer exists and the individual concerned is otherwise qualified

References

DoD Manual 5210.42, *Nuclear Weapons Personnel Reliability Program* (13 January 2015), incorporating through Change 2, 23 March 2017

DoD Manual 5210.42_AFMAN 13-501, *Nuclear Weapons Personnel Reliability Program (PRP)* (19 September 2018)

AFI 91-101, *Air Force Nuclear Weapons Surety Program* (15 August 2014), incorporating through Change 3, 27 April 2016

LAUTENBERG AMENDMENT

The 1996 Domestic Violence Amendment to the Gun Control Act (referred to as the Lautenberg Amendment) makes it a federal offense for anyone convicted of a misdemeanor crime of domestic violence to ship, transport, possess, or receive firearms or ammunition. The Department of Defense (DoD) policy for implementing this law to military personnel and DoD civilian personnel is found in DoDI 6400.06, *Domestic Abuse Involving DoD Military and Certain Affiliated Personnel*.

Definition of Crime of Domestic Violence

- An offense that has as its factual basis the use or attempted use of physical force, or threatened use of a deadly weapon committed by:
  - -- A current or former spouse of the victim
  - -- A parent or guardian of the victim
  - -- Someone who has a child in common with the victim
  - -- Someone who is cohabitating with the victim or who has cohabitated with the victim as a spouse, parent or guardian
  - -- Someone similarly situated as a spouse, parent, or guardian (such as a girlfriend/boyfriend relationship)
- The title of the crime does not have to be "domestic violence" if the underlying facts fit within the DoD definition

Qualifying Convictions

- Any state or federal conviction (including under the UCMJ via general or special court-martial) for a crime of domestic violence (misdemeanor or felony), or an action qualifying as a conviction, prohibits the possession of a firearm under the Lautenberg Amendment
- Charges that are reduced or negotiated to a crime not entitled "domestic violence" may still qualify, if the factual basis fits within the DoD definition
- To qualify as a "conviction", the person convicted must have been represented by an attorney or affirmatively waived such right
- The following **DO NOT** qualify as a conviction:
  - -- Convictions that are expunged or set aside
  - -- Convictions that are pardoned
  - -- Summary court-martial convictions
  - -- Non-judicial punishment
  - -- Deferred prosecutions or similar alternate dispositions in civilian courts
  - -- Local staff judge advocates (SJA) will assist commanders in determining if there is a qualifying conviction
  - -- The DoD does not construe the amendment to apply to major military weapons systems, or "crew served" weapons and ammunition (including aircraft)

Air Force Implementation

- Commanders take appropriate measures to ensure government-owned firearms or ammunition are not issued to anyone they have cause to believe has a qualifying conviction

- Commanders are responsible for ensuring all military are briefed periodically on the Gun Control Act, Lautenberg Amendment, and its consequences, and Air Force members must complete a DD Form 2760, *Qualification to Possess Firearms or Ammunition*
  - -- Annually for all personnel who work with or are required to qualify on government-issued firearm, destructive device, or ammunition (Arming Group A)
  - -- For all other personnel, upon deployment preparation and/or training time prior to deployment or upon permanent change of station (PCS), permanent change of duty assignment (PCA), or temporary duty or responsibilities requiring use of or access to a government-issued firearm, destructive device, or ammunition (Arming Group B)
- Air Force members will also complete a DD Form 2760 prior to any weapons training
- Notices regarding the Lautenberg Amendment must be posted at all facilities where government firearms are stored, issued, disposed of, or transported
- Upon discovery of a qualifying conviction, commanders will:
  - -- Immediately retrieve and deny further access to any government-issued firearms, destructive device, or ammunition, including those available from Morale, Welfare, and Recreation facilities (e.g., skeet/trap)
  - -- Consult their servicing SJA office for guidance on final release/disposition of privately owned weapons/ammunition stored in government armory
- Members who possess a qualifying conviction are ineligible for all weapons training. They may be subject to discharge for the underlying act of domestic violence, the underlying conviction, or the loss of AFSC, but not simply because he/she is unable to possess a firearm. Further, they may be cross-flowed or retrained into an Air Force Specialty Code (AFSC) not requiring firearms.

Criminal Data Submission and Indexing Requirements

- For domestic violence investigations or qualifying convictions, Defense Criminal Investigators and other DoD Law Enforcement agents have very specific criminal history reporting requirements. This may include the collection and submission of fingerprint and DNA samples.
- Commanders, depending on the type of investigation (including commander-directed investigations), have a responsibility to ensure appropriate samples are taken from an accused member. Commanders should consult their servicing law enforcement and SJA office for guidance on criminal data submission requirements.
- As highlighted by the unfortunate circumstances of the 2017 Sutherland Springs (Texas) church shooting involving a former Airman convicted of offenses that would have disqualified him from possession of firearms under the Lautenberg Amendment, the commander's servicing legal office is required to send the following documents to the Air Force Indexing Cell and the local AFOSI and S2I detachments that investigated the offenses, as soon as possible, in order to enable indexing of criminal offenders as required by federal law:
  - -- Charge sheets in cases referred to general courts-martial;
  - -- All report of result of trial memoranda;
  - -- All court-martial orders; and
  - -- All completed non-judicial punishment actions involving unlawful use, possession, distribution, introduction, diversion, or manufacture of a controlled substance

References

18 U.S.C. §§ 921-22
DoDI 5505.11, *Fingerprint Card and Final Disposition Report Submission Requirements*, (21 July 2014), incorporating through Change 2, 30 March 2017
DoDI 5505.14, *Deoxyribonucleic Acid (DNA) Collection Requirements for Criminal Investigations, Law Enforcement, Corrections, and Commanders* (22 December 2015), incorporating Change 1, 9 March 2017
DoDI 6400.06, *Domestic Abuse Involving DoD Military and Certain Affiliated Personnel* (21 August 2007), incorporating through Change 4, 26 May 2017
DD Form 2760, *Qualification to Possess Firearms or Ammunition* (December 2002)
AFI 31-117, *Arming and Use of Force by Air Force Personnel* (2 February 2016)

CONSCIENTIOUS OBJECTION (CO) TO MILITARY SERVICE

Although military service is an obligation of citizenship (i.e., via draft), Congress recognized early that certain individuals and groups hold convictions against the use of force in any form.

General Policies

- A conscientious objector (CO) is a person who is opposed to participation in war ***in any form***, or the bearing of arms, based on a firm, fixed and sincere belief as a result of religious training or similar belief system. Moral or ethical beliefs, even if not characterized by the holder as "religious," may provide sufficient grounds for CO status.
- The objection to war must be all-inclusive, not to specific wars or conflicts
- COs are classified as either Class 1-0 (a person who sincerely objects to participation in war in any form), or as Class 1-A-0 (a person who sincerely objects to participation as a combatant in war in any form, but whose convictions will permit him/her to serve in noncombatant status)
- Administrative discharge by the Secretary of the Air Force (SecAF) prior to completion of term of service is discretionary based on the facts of each case
- Applicants for CO status who are awaiting disposition of their case should be assigned to duties that conflict as little as possible with their beliefs; applicants must comply with the normal requirements of military service and perform duties they are assigned—to include active duty or transfer orders in effect at the time of the application or subsequently issued

Application Procedures

- Applicants have the burden of proof to show they meet CO status, and must establish, by clear and convincing evidence (i.e., more than a mere preponderance of the evidence):
  - -- They oppose participation in war in any form or the bearing of arms
  - -- Their belief is honest, sincere, and deeply held
  - -- Their belief is by virtue of religious training or other belief system akin to religion
  - -- The nature or basis of their claim falls under the definition of conscientious objection in AFI 36-3204 *Procedures for Applying as a Conscientious Objector*, Attachment 1
- The applicant submits the application to the servicing Military Personnel Section (MPS)/Career Development Element, or to the immediate commander if the applicant is in the USAFR or ANG and is not serving on extended active duty; see AFI 36-3204, Attachment 2 for information that should be included
- The MPS notifies the unit commander, reviews the personnel records of the applicant for pertinent information, and counsels the member about the effect of a CO determination on VA entitlements. MPS also schedules a chaplain and psychiatrist interview.
  - -- A chaplain personally interviews the applicant to determine sincerity and depth of conviction against war, and must submit a written report detailing conclusions, but does not make any recommendation concerning the application
  - -- An appropriately credentialed mental health professional interviews the applicant to determine the presence of any mental disorder warranting medical or administrative disposition. Again, no recommendation on the application is made.
- For active duty and USAFR Non-Extended Active Duty (EAD) members, the Special Court-Martial Convening Authority (SPCMA) appoints a judge advocate as an Investigating Officer (IO) to interview the applicant under oath, assemble all the relevant material and interview

other witnesses; for ANG Non-EAD members, the wing or group commander exercising control over the servicing ANG/MPS appoints the IO. Duties for the IO are set forth in AFI 36-3204.

- Guidelines for approving or disapproving applications are found in Chapter 5 of AFI 36-3204; generally, the reviewing authorities must find:
  - -- The applicant's moral and ethical beliefs oppose participation in war in any form and that the applicant holds these beliefs with the strength of traditional religious convictions;
  - -- Conscientious objection must be the primary controlling factor in the applicant's life; and
  - -- A primary factor is the sincerity with which the applicant holds this belief. In evaluating applications, carefully examine and weigh the conduct of applicants, in particular their outward manifestation of their beliefs along with the applicant's thinking and lifestyle in its totality, past and present.
- The commander who appoints the IO makes a recommendation before forwarding the file up the chain of command. SAFPC makes the decision regarding CO status for officer applicants. For enlisted personnel, the final decision authority is AFPC/DP2ST (active duty enlisted Airmen), NGB/CF(ANG Airmen), AFRC/CV(Reserve Unit Program – Cat A), or ARPC (Reserve IR Program – IMA and PIRR); SAF/MIB is the disapproval authority for all enlisted members.
- Members determined to be COs (1-O or 1-A-O where further service is not desired by the Air Force) will be processed for administrative discharge according to the applicable AFI, for convenience of the government as the basis for separation

References

DoDI 1300.06, *Conscientious Objectors* (12 July 2017)
AFI 36-3204, *Procedures for Applying as a Conscientious Objector* (6 April 2017)

FITNESS PROGRAM

The goal of the Air Force Fitness Program is to motivate all members to participate in a year-round physical conditioning program that emphasizes total fitness, to include proper aerobic conditioning, muscular fitness training, and healthy eating. An active lifestyle will increase productivity, optimize health, and decrease absenteeism while maintaining a higher level of readiness. Commanders and supervisors must incorporate fitness into the Air Force culture establishing an environment for members to maintain physical fitness and health to meet expeditionary mission requirements. The Fitness Assessment (FA) provides commanders with a tool to assist in the determination of overall fitness of their military personnel. Commander-driven physical fitness training is the backbone of the Air Force Fitness Program and an integral part of mission requirements. The program promotes aerobic and muscular fitness, flexibility, and optimal body composition of each member in the unit.

Unit/Squadron Commander's Duties

- The unit/squadron commander's duties are listed at paragraph 2.25 of AFI 36-2905, *Fitness Program*, and include, but are not limited to, the following:
  - -- Executing and enforcing the unit's fitness program and ensuring appropriate administrative action is taken in cases of non-compliance
  - -- Implementing and maintaining a unit/squadron physical training (PT) program, in accordance with applicable guidelines. (While not mandatory, commanders are encouraged to provide written guidance to Airmen describing fitness expectations.) Commanders are authorized to implement unofficial/practice Fitness Assessments.
  - -- Encouraging members to participate in physical training of up to 90 minutes 3-5 times weekly; consistent with mission requirements, commanders are encouraged to schedule or authorize Airmen time to participate in fitness training during the duty day
  - -- Appoint, in writing, individuals to conduct fitness assessments in support of the Fitness Assessment Cell (FAC), appoint Physical Training Leaders (PTLs) if unit PT is implemented, and appoint a Unit Fitness Program Manager (UFPM)

Physical Fitness Standards

- Members will receive a composite score of 0 to 100 based on component scores for aerobic fitness (60 points max), body composition (20 points max), push-ups (10 points max), and sit-ups (10 points max)
- The following fitness levels are determined by a member's composite score:
  - -- Excellent: All component minimums met and member scores at/above 90. Airmen in this category will test at least annually (12 months from prior Excellent score).
  - -- Good: All component minimums met and member scores 75 to 89.99. Airmen in this category shall test every six months (twice a year).
  - -- Unsatisfactory: One or more component minimum not met, and/or member scores less than 75 total points. Airmen who fail to attain a passing FA score must retest within 90 days (retesting is not recommended for a minimum of 42 days to allow sufficient time for reconditioning).
    - --- Note, if an Airman fails the abdominal circumference measurement but takes and passes the other three components with a score of at least 75 points of the remaining 80 points, the FAC will administer the DoD prescribed body mass index (BMI) screen. If the Airman passes the BMI screen, then he/she has passed the body composition component of the fitness assessment.

- Commanders may grant exemptions from the various components of the FA in accordance with AFI 36-2905. Airmen with exemptions prohibiting them from performing one or more components of the FA will be assessed on the remaining components.
- Airmen with pregnancies lasting 20 weeks or more are exempt from FA for 12 months after discharge from the hospital upon completion of pregnancy (delivery, miscarriage, etc.). The Airman must test by the last day of the 12th month. Pregnancy-related exemptions apply to the FA and do not automatically exempt the Airman from participating in an approved physical fitness program.

Administrative and Personnel Actions

- Members are expected to comply with Air Force fitness standards at all times. When members fail to comply with those standards (receive an unsatisfactory FA score), they render themselves potentially subject to adverse action. Commanders should consult with their servicing staff judge advocate before taking such action.
- Prohibited Actions:
  - -- Commanders may not impose nonjudicial punishment solely for failing to achieve a satisfactory fitness score
  - -- While units may perform unofficial practice tests for diagnostic purposes, commanders will refrain from taking adverse action based solely on the results of these tests
  - -- A member is not subject to adverse personnel action for inability to take the FA if the member is on a 365-day FA exemption that has been validated by the military treatment facility
- Authorized Actions: AFI 36-2905, Attachment 14 at Table A14.1 and A14.2 contains guidance on mandatory and optional administrative and personnel actions for members failing to meet fitness standards on one or more FAs, with options covering the full range of administrative tools for progressive discipline. Selected guidance includes:
  - -- Unit commanders will consider adverse administrative action upon a member's unsatisfactory fitness score on an official FA. If adverse administrative action is not taken in response to an unsatisfactory fitness score on an official FA, unit commanders will document in the member's fitness case file as to why no action is being taken; the lack of such commander documentation does not discount the testing failure as a basis in support of administrative discharge action.
  - -- As appropriate, unit commanders will document and take corrective action for members' unexcused failures to participate in the fitness program such as failing to accomplish a scheduled FA, failing to attend a scheduled fitness appointment, failing to complete mandatory educational intervention or failing to maintain the required documentation of exercise while on the fitness improvement program
  - -- Enlisted Airmen failing to have a current/passing FA score at the Promotion Eligibility Cut-Off Date are ineligible for promotion. Likewise, commanders should consider delaying the promotion of officers failing to have a current/passing FA at the Projected Date of Promotion.
  - -- It is within a commander's discretion to document within an EPR/OPR a referral for a non-current/failing FA at the evaluation close-out date, or EPR Static Close-Out Date

-- Unit commanders **MUST** make a discharge or retention recommendation to the separation authority (enlisted Airmen), show cause authority (officers), or appropriate discharge authority for Air Force Reserve and Air National Guard members when an individual remains in the Unsatisfactory fitness category for a continuous 12-month period or receives four unsatisfactory FA scores in a 24-month period. However, prior to initiation of discharge action, a military medical provider must have ruled out medical conditions precluding the member from achieving a passing score.

Failing to Present a Professional Military Image

- Commanders must ensure members present a professional military image while they are in uniform. As such and in accord with AFI 36-2905, paragraph 10.2, commanders may require individuals who do not present a professional military appearance (regardless of overall fitness assessment composite score) to enter the Fitness Improvement Program (FIP) and/or otherwise schedule individuals for fitness education/intervention.

Reference

AFI 36-2905, *Fitness Program* (21 October 2013), incorporating Change 1, 27 August 2015

THE AIR RESERVE COMPONENT (ARC) FITNESS PROGRAM

The goal of the ARC Fitness Program is to motivate all members to participate in a year-round physical conditioning program that emphasizes total fitness, to include proper aerobic conditioning, strength/flexibility training, and healthy eating.

Unit/Squadron Commander's Duties

- The unit/squadron commander's duties include, but are not limited to, the following:
  - Determine frequency of physical training (PT) programs during unit training assemblies (UTA) and annual tour (AT) duty-time, based on mission requirements
  - Encourage Air Reserve Technician (ART) and Air National Guard (ANG) Full-Time Technicians to participate in duty-time PT according to ARC policy for civilian employees and develop plans for their participation
  - May authorize points and pay to accomplish mandatory fitness improvement programs (FIP) and to receive counseling from health promotion staff. This does not include authorization of points or pay for the sole purpose of performing a fitness assessment (FA).
  - Execute and enforce the unit's fitness program
  - Ensure appropriate administrative action is taken in cases of non-compliance
  - Implement and maintain a unit/squadron PT program, in accordance with applicable guidelines
  - Encourage members to participate in PT of up to 90 minutes three to five times weekly
    - Air Reserve Component (ARC) caveat: The commander can only encourage participation in off-duty PT but the member cannot be put into status if they are: traditional reservists (TRs), Air Reserve Technicians (ARTs), and similar status, to accomplish participation in off-duty PT
    - It is ultimately the member's responsibility to stay fit on their own time

Physical Fitness Standard

- Members will receive a composite score on a 0 to 100 scale based on the following maximum component scores:
  - 60 points for aerobic fitness assessment
  - 20 points for body composition
  - 10 points for push-ups
  - 10 points for sit-ups
- The following fitness levels are determined by a member's composite score:
  - Excellent: (90 or above) and all component minimums met
  - Satisfactory: (75 to 89.99) and all component minimums met
  - Unsatisfactory: (under 75) and/or one or more component minimums not met
- Members will usually complete their fitness testing according to the following timelines:
  - Excellent Score: Members must test within 12 months
  - Satisfactory Score: Members are mandated to complete an official FA, at a minimum, twice a year

-- Unsatisfactory Score: Members must retest within 90 days (180 days for ANG (Title 32)). Retesting is not recommended during the first 42 days after an unsatisfactory test.

--- Commanders **MAY** direct unofficial practice tests but the member must be in status (ARC caveat)

--- ARC Active Guard/Reserve (AGR) members must participate in a unit FIP and start FIP (if co-located, otherwise online) within 10 days of the failed FA

--- Non-AGR ARC (AFR and ANG) must accomplish FIP within 60 days of Unsatisfactory FA

--- Members in the Unsatisfactory fitness category will remain in the FIP until they achieve a Satisfactory or Excellent FA score

- ARC members who commute from a lower altitude to perform duty at their assigned/attached unit at a location where the altitude is ≥ 5250 feet may perform FA with an Air Force unit at or near their home altitude with commander's approval

-- The Unit Fitness Program Manager (UFPM) at the unit of assessment will forward a copy of FA results to ARC member's assigned/attached UFPM for Air Force Fitness Management System (AFFMS) II update and tracking purposes

-- This variation is only for ARC members who are not afforded the 42-day acclimatization period at the assessment site

- ARC medical unit providers will advise members to consult their Personal Care Provider (PCP) to recommend specific PT appropriate for medical condition or may refer the member to the FIP if available

-- MTFs can provide space available evaluation as required for eligible ARC members

-- To obtain an exemption based on evaluation and recommendation of PCP, the member must provide the ARC medical unit with medical documentation to include diagnosis, treatment, prognosis, and the period and type of physical limitations or restrictions

-- Individual Reservists (IR) may be referred by the military treatment facility (MTF) to their PCP

Administrative and Personnel Actions

- Members are expected to be in compliance with Air Force fitness standards at all times. When members fail to comply with those standards (receive an Unsatisfactory FA score), they render themselves potentially subject to adverse action. Commanders should consult with their servicing staff judge advocate before taking such action.

- Prohibited Actions:

-- Commanders may not impose nonjudicial punishment (Article 15) solely for failing to achieve a satisfactory fitness score

-- A member is not subject to adverse personnel action for inability to take the FA if the member is on a 365-day (per permanent) FA exemption

-- While units may perform unofficial practice tests for diagnostic purposes, commanders will refrain from taking adverse action based solely on the results of these tests

- Unit commanders will consider adverse administrative action upon a member's unsatisfactory fitness score on an official FA

-- If adverse administrative action is not taken in response to an unsatisfactory fitness score on an official FA, unit commanders will document, in the member's fitness case file, as to why no action is being taken

-- The unit commander must make a discharge or retention recommendation to the appropriate discharge authority once a member receives four unsatisfactory FA scores in a 24-month period

--- A decision to retain the member does not remove or discount previous FA Unsatisfactory assessments

- As appropriate, unit commanders will document and take corrective action for members' unexcused failures to participate in the FIP such as failing to accomplish a scheduled FA, failing to attend a scheduled fitness appointment, or failing to complete mandatory educational intervention

- ARC members can be involuntarily reassigned to non-participating status for unsatisfactory progress in the PT program according to AFI 36-2115, *Assignments within the Reserve Components*

References

AFI 36-2905, *Fitness Program* (21 October 2013), incorporating Change 1, 27 August 2015
AFI 36-3206, *Administrative Discharge Procedures for Commissioned Officers* (9 June 2004), incorporating through Change 7, 2 July 2013, including AFI36-3206_AFGM2018-01,14 June 2018
AFI 36-3208, *Administrative Separation of Airmen* (9 July 2004), incorporating through Change 7, 2 July 2013, including AFI36-3208_AFGM2018-01, 14 June 2018
AFI 36-3209, *Separation and Retirement Procedures for Air National Guard and Air Force Reserve Members* (14 April 2005), incorporating through Change 3, 20 September 2011

UNAUTHORIZED ABSENCE

Most forms of unauthorized absence, from simply being late for work (failure to go) to an extended absence without leave, are punishable under Article 86, UCMJ. Airmen who intend to abandon their military duties permanently are deserters and are subject to prosecution under Article 85, UCMJ. Aside from disciplinary actions, there are certain requirements and considerations a unit must satisfy when handling cases involving an unauthorized absence.

- When an unauthorized absence is discovered, it is important to note the date and time
  - -- *Failure To Go*: An absence of less than 24 hours is classified as a failure to go, for administrative purposes
  - -- *Absence Without Leav*e: When the absence continues longer than 24 hours and less than 30 days, the member's unit must change the member's administrative status to absence without leave (AWOL)
  - -- *Deserte*r: On the 31st day of continuous absence, the member's unit must change the member's administrative status to deserter
  - -- Taking these administrative steps **WILL NOT,** standing alone, prove that the member has committed an unauthorized absence
  - -- The administrative steps will affect pay and allowances and put the service member's name in a database civilian law enforcement can access during routine stops
  - -- *Duty Status Whereabouts Unknown*: Regardless of the reason for the absence, if the commander's initial investigation reveals any indication that the absence results from an involuntary casualty rather than desertion or unauthorized absence, a status of Duty Status Whereabouts Unknown (DUSTWUN) may be appropriate. Consult AFI 36-3002, *Casualty Services*, the Military Personnel Flight (MPF) and the servicing staff judge advocate (SJA) for advice in such cases.

Commander Responsibilities:

- Under AFI 36-2911, *Desertion and Unauthorized Absence*, Chapter 2 and Table 2.1, if the member reasonably appears to be absent without authority, the commander must:
  - -- Immediate Actions:
    - --- Contact the MPF and inform them of the member's status
    - --- Consult with the servicing SJA to determine if the member meets any of the criteria under AFI 36-2911, paragraph 1.4.2. If so, **immediately** change the member's status to "deserter."
      - ---- Criteria include duty or travel restrictions, access to top secret or other qualifying classified documents, request for asylum or residence in a foreign country, uncompleted action for a previous AWOL, escaped prisoner, wanted for a serious UCMJ violation, or evidence of intent to remain away permanently
    - --- Evaluate the case to determine whether AFI 36-3002, *Casualty Services*, applies
    - --- Notify Security Forces (SF) if necessary
  - -- After 24 Hours of Absence: Prepare an AF Form 2098, *Duty Status Change*, changing the absentee's status to either AWOL or deserter as appropriate, and forward it to the MPF, with a copy to the local Finance Office. Consult your SJA.

-- On the 3rd Day of Absence: Prepare and forward a 72-hour inquiry (in accordance with AFI 36-2911, paragraph 2.3.2) to SF and MPF and re-evaluate whether AFI 36-3002 applies

--- If the member is administratively classified as a deserter, the commander prepares, signs and distributes the DD Form 553, *Deserter/Absentee Wanted by the Armed Forces*, and changes the member's duty status within 24 hours of the decision to place the member in deserter status

-- On the 10th Day of Absence: Prepare and forward letters to the next of kin and allotment payees, and provide copies of these letters to MPF

-- On the 31st Day of Absence:

--- Ensure processing of DD Form 553 (MPF will assist in preparation) and decide (with SF and MPF help) to whom DD Form 553 should be sent

--- Initiate AF Form 2098 changing status from AWOL to deserter

--- Notify MPF of the member's continued absence; retrieve dependent ID cards as required by AFI 36-3026_IP Volume 1, *Identification Cards for Members of the Uniformed Services, Their Eligible Family Members, and Other Eligible Personnel*, Table 8.3 when member is placed in deserter status. Dependents lose medical benefits and shopping privileges in accordance with this AFI, Table 9.2.

--- Consult with SJA about filing court-martial charges

--- Prepare 31st day status report in accordance with AFI 36-2911, paragraph 2.6

-- On the 60th Day of Absence: Notify SF and MPF of the member's continued absence, obtain updated input from SF and prepare and forward the 60-day status report in accordance with AFI 36-2911, paragraph 2.3.4

-- On the 180th Day of Absence: Personnel Data Systems program automatically drops absentee from the unit rolls. Commander notifies SF of status change and consults with SJA concerning other options and/or requirements.

- Military law enforcement personnel and commissioned, warrant, petty, and non-commissioned officers may apprehend absentees and deserters. Civil officers authorized to arrest offenders under federal and state laws may arrest a deserter and deliver the offender into the custody of the Armed Forces. These civil officers may also arrest absentees at the request of military and federal authorities.

- United States authorities may apprehend absentees and deserters in foreign countries only when an international agreement with the country authorizes it or under an agreement with proper local authorities that does not violate an existing international agreement. Always consult the SJA in these cases.

References

AFI 36-2911, *Desertion and Unauthorized Absence* (14 October 2016)
AFI 36-3002, *Casualty Services* (20 June 2017)
AFI 36-3026_IP Volume 1, *Identification Cards for Members of the Uniformed Services, Their Eligible Family Members, and Other Eligible Personnel* (4 August 2017)
AFI 51-201, *Administration of Military Justice* (8 December 2017)
DD Form 553, *Deserter/Absentee Wanted by the Armed Forces* (March 2015)
AF Form 2098, *Duty Status Change* (30 June 2003)

UNAUTHORIZED ABSENCE FOR AN AIR RESERVE COMPONENT (ARC) MEMBER

Unauthorized absences for ARC members are handled very similarly as unauthorized absences for Active Duty (AD) members. There are a few distinctions in processing requirements.

General Policies

- When an Extended Active Duty (EAD) order calls an ARC member to active duty (AD), the AD unit, to which the member is temporarily assigned, processes the absence only after coordination with the member's reserve unit
- An ARC member, voluntarily or involuntarily, called or recalled to AD or active duty for training (ADT) who fails to report is an absentee if strong evidence exists that the member received the orders (Title 10 orders)

Reporting Unauthorized Absences

- The unit to which the member is attached for AD must coordinate with the home unit before processing the Absence without Leave (AWOL)/deserter action
  - -- If Special Activities Branch (AFPC/DPSOA) or Headquarters USAF Academy, Cadet Accessions (HQ USAFA/DPYQD) ordered the member to EAD, contact the appropriate office within one duty day to determine if substantial proof of delivery of orders exists before taking any unauthorized absence action
  - -- The unit of assignment completes appropriate actions outlined in AFI 36-2911, *Desertion and Unauthorized Absence*, Chapter 2
  - -- Include the Military Personnel Division, Air National Guard, ANG/DPP, 1411 Jefferson Davis Highway, Arlington, Virginia 22202-3231 (for ANGUS members) and the Personnel Employment Branch, Air Force Reserve Command, HQ AFRC/DPMF, 155 Richard Ray Blvd, Robins Air Force Base, Georgia 31098-1635 (for USAFR members) on the distribution of all reports and DD Form 553, *Deserter/Absentee Wanted by the Armed Forces*, when classifying a member ordered to AD or ADT as a deserter
  - -- If questions arise, contact AFPC/DPWCM (DSN 665-3727 or 1-800-531-5501)
- The commander of the disposition unit takes the actions outlined in Chapter 4 of AFI 36-2911
  - -- Include ANG/DPP and HQ AFRC/DPMF as information addresses on the DD Form 616, *Report of Return of Absentee*

Disposition

- Disposition, once the member has been returned to military control, is covered by AFI 36-2911, Chapter 4 and Table 4.1
- When a Guard or reserve member ordered to ADT returns to military control, actions outlined in Chapter 4 apply
- The detaining unit sends an e-mail notifying the return of a deserter to military control to ANG/DPP and AFPC/DPWCM
  - -- The detaining unit gives the member a non-chargeable transportation request if no escort is used

References

AFI 36-2911, *Desertion and Unauthorized Absence* (14 October 2016)
AFI 36-3002, *Casualty Services* (20 June 2017)
AFI 36-3026_IP Volume 1, *Identification Cards for Members of the Uniformed Services, Their Eligible Family Members, and Other Eligible Personnel* (4 August 2017)
AFI 51-201, *Administration of Military Justice* (8 December 2017)
DD Form 553, *Deserter/Absentee Wanted by the Armed Forces* (March 2015)
DD Form 616, *Report of Return of Absentee* (December 1999)

LINE OF DUTY (LOD) DETERMINATIONS

A Line of Duty (LOD) determination is a finding made after an investigation into the circumstances of a member's injury, illness, disease, or death. The finding determines: (1) whether or not the illness, injury or disease existed prior to service (EPTS) and if so, whether an EPTS condition was aggravated by military service; (2) whether or not the illness, injury, disease or death occurred while the member was absent without authority; and (3) whether or not the illness, injury, disease or death was due to the member's misconduct. On the basis of the LOD determination, the member or their next of kin may be entitled to benefits administered by the Air Force, or exposed to liabilities.

Use of the LOD Determination

- An LOD determination may impact the following:
  - -- Disability, retirement and severance pay
  - -- Forfeiture of pay
  - -- Extension of enlistment
  - -- Veteran benefits
  - -- Survivor Benefit Plan
  - -- Medical benefits and incapacitation pay for members of the Air Reserve Component (ARC)
  - -- Basic Educational Assistance Death Benefit

Limits on Use of an LOD Determination

- An LOD determination shall not be used as a basis for disciplinary actions
- An active duty member cannot be denied medical treatment based on an LOD determination. Further, an LOD determination does not authorize recoupment of the cost of medical care from the member.

When an LOD Determination is Required

- A LOD determination must be initiated, whether the member is hospitalized or not, when the following occurs:
  - -- Death of a member: An AF Form 348, *Line of Duty Determination*, must be completed in every case involving the death of a member in any duty status, to include travel to and from a duty station
  - -- A RegAF member is unable to perform military duties for more than 24 hours due to an injury
  - -- An injury involving likelihood of a permanent disability
  - -- An injury or disease involving the abuse of alcohol or other drugs
  - -- A self-inflicted injury
  - -- An injury or disease possibly incurred during a period of unauthorized absence
  - -- An injury or disease possibly incurred during a course of conduct for which charges have been preferred under the UCMJ

-- For ARC, in addition to the situations listed above, an LOD determination must be made when:

--- The member incurs or aggravates an illness, injury or disease, or receives any medical treatment while serving in any duty status, regardless of the member's ability to perform military duties

--- The member dies, or incurs, or aggravates an illness, injury or disease while traveling directly to or from the place at which duty is performed

--- The member dies, or incurs, or aggravates an illness, injury or disease while remaining overnight immediately before or between successive periods of inactive duty training (IDT), at or in the vicinity of the site of the IDT, if the site is outside reasonable commuting distance from the member's residence

Possible LOD Determinations

- In Line of Duty (ILOD): A determination of ILOD is made when the illness, injury, disease or death was not due to the member's misconduct and was incurred when the member was present for duty or absent with authority when the illness, injury or disease was service aggravated

  -- An illness, injury, disease or death sustained by a member in any duty status is presumed to be ILOD. This presumption may be rebutted when evidence shows the member was not in the line of duty (NILOD).

- Not in Line of Duty (NILOD) – Not Due To Member's Misconduct:

  -- A determination of NILOD-Not Due to Member's Misconduct is made when a formal investigation determines the member's illness, injury, disease or death occurred while the member was absent without authority

  -- A determination of NILOD-Not Due to Member's Misconduct is also made when an investigation determines, by clear and unmistakable evidence, the member's illness, injury, disease or underlying condition causing the misconduct existed prior to the member's entry into military service with any branch or component of the Armed Forces or between periods of such service, and was not service aggravated

- NILOD – Due to Member's Misconduct: This determination is made following a formal investigation that determines the member's illness, injury, disease or death was proximately caused by the member's misconduct. If the member's illness, injury or disease occurred prior to service, in a non-duty status, or while the member was absent without authority and was proximately caused by the member's misconduct, the case should be finalized as NILOD-Due to Member's Misconduct.

Standard of Proof for LOD Determinations

- Except when otherwise noted in AFI 36-2910, *Line of Duty (LOD) Determination, Medical Continuation (MEDCON), and Incapacitation (INCAP) Pay*, the standard of evidentiary proof used in making an LOD determination is a **preponderance of the evidence**. A preponderance of the evidence is defined as the greater weight of credible evidence.

- When determining whether a preponderance of evidence exists, all available evidence must be considered, including:

  -- Direct evidence based on actual knowledge or observation of witnesses

-- Indirect evidence, such as facts or statements from which reasonable inferences, deductions and conclusions may be drawn to establish an unobserved fact, knowledge or state of mind

-- Accepted medical principles, based on fundamental deductions, consistent with medical facts that are so reasonable and logical as to create a virtual certainty that they are correct

- Preponderance of evidence is not determined by the number of witnesses or exhibits, but by all the evidence and evaluating factors such as a witness' behavior, opportunity for knowledge, information possessed, ability to recall, as well as related events and relationship to the matter being considered. In other words, a fact-finder may choose to believe a single credible witness over several witnesses the fact-finder does not find credible.

Types of Processing for LOD Determinations

- Administrative LOD:

  -- When a military medical provider sees a member under any of the below circumstances, he/she makes an administrative determination that the member's condition is ILOD. This determination is final and no further action is required.

    --- As a hostile casualty (other than death)

    --- As a passenger in a common carrier or military aircraft

    --- The injury, illness or disease clearly did not involve misconduct, abuse of drugs or alcohol or self-injurious behavior

    --- The injury or illness is simple, such as a sprain, contusion or minor fracture, and is not likely to result in permanent disability

    --- For ARC, the medical provider may make an administrative determination to document a minor condition as ILOD if there is no likelihood of permanent disability, hospitalization or requirement for continuing medical treatment

- Informal LOD:

  -- When an administrative determination is not appropriate, the commander investigates the circumstances of the case to determine if the member's illness, injury, disease or death occurred while the member was absent without authority, is due to the member's own misconduct or EPTS

- Formal LOD:

  -- Made by higher authorities based upon a thorough investigation conducted by a specially appointed Investigating Officer (IO)

  -- Required to support a determination of NILOD unless the condition EPTS and was not service aggravated

  -- The immediate commander may also recommend a Formal LOD determination when the member's illness, injury, disease or death occurred:

    --- Under strange or doubtful circumstances

    --- Under circumstances the commander believes should be fully investigated

  -- DoD Form 261, *Report of Investigation Line of Duty and Misconduct Cases*, is used in all formal LOD investigations

LOD Determination Processing for Sexual Assault Cases

- A member who has incurred an injury, illness or disease as a result of sexual assault while performing active duty service or inactive duty training must have his/her LOD processed in accordance with DoDI 6495.02, *Sexual Assault Prevention and Response (SAPR) Program Procedures*
- The LOD determination process will vary depending on whether the member elects unrestricted or restricted reporting

LOD Determinations for Specific Situations

- See AFI 36-2910, Attachment 2 for guidance on common LOD situations

---

References

DoDI 6495.02, *Sexual Assault Prevention and Response (SAPR) Program Procedures* (28 March 2013), incorporating Change 3, 24 May 2017

AFI 36-2910, *Line of Duty (LOD) Determination, Medical Continuation (MEDCON), and Incapacitation (INCAP) Pay* (8 October 2015)

DoD Form 261, *Report of Investigation Line of Duty and Misconduct Cases* (October 1995)

AF Form 348, *Line of Duty Determination* (14 September 2015)

DISABILITY EVALUATION SYSTEM (DES)

Note: Several systematic changes to the Disability Evaluation System are scheduled for implementation in late 2018 and 2019. Consult your staff judge advocate to ensure the most up-to-date and correct information on this process.

Commanders must constantly balance their concern for mission accomplishment with their concern for service members' health and safety. Challenges can arise when service members develop injuries, illnesses, and/or physical disabilities/limitations that impact their ability to perform their duties and/or to deploy. To resolve these cases, the DoD has developed the Disability Evaluation System (DES).

The purpose of the DES is to maintain a fit and vital force. To achieve that end, disability law allows the Secretary of the Air Force (SecAF) to remove from active duty those who can no longer perform the duties of their office, grade, rank or rating and ensure fair compensation to members whose military careers are cut short due to service-incurred or service-aggravated medical conditions.

Profiles and Duty Limitations

- Service members may develop health problems that degrade their ability to perform military duties. In such cases, healthcare providers should communicate appropriate medical recommendations regarding fitness for duty and/or duty limitations to commanders so commanders are able to determine the optimum, yet safe, utilization of members in their charge.
- Healthcare providers should promptly notify commanders when a service member's health and/or ability to accomplish the mission is at risk due to health problems. AF Form 469, *Duty Limiting Condition Report*, is used to accomplish this task. AF Form 469 includes, among other things, information concerning the health care provider's recommendations regarding specific duty limitations for service members.
  - -- Because commanders are ultimately responsible for their personnel, profiles must be timely, accurate, and unambiguous to help commanders make the best decisions for their personnel and their mission
  - -- When a healthcare provider determines that a service member's physical condition warrants a profile, one copy of AF Form 469 should be given to the service member when he/she leaves the medical treatment facility and another copy must be sent to the individual's unit commander
  - -- Because commanders must know the fitness for duty status of their members, the Health Insurance Portability and Accountability Act (HIPAA) allows for disclosures of health information to commanders in limited circumstances including fitness for duty determinations
    - --- Information pertaining to fitness for duty may be released to commanders even without the service member's authorization. However, when the patient has not authorized the release, the release must be properly tracked by medical personnel.
- The mere presence of a physical defect or condition does not qualify a member for disability retirement or discharge
  - -- Disability evaluation begins only when examination, treatment, hospitalization, or substandard performance results in referral to a Medical Evaluation Board (MEB) by a military healthcare provider after a determination that the members' condition is potentially unfitting

Conflict Resolution

- Commanders may consult with the medical unit's Senior Profiling Officer (SPO) to maximize use of personnel with Duty Limiting Conditions (DLCs). An assessment based on operational risk to personnel assigned to a unit is critical to maintaining unit readiness at the highest degree possible.
  - -- In some situations, a commander may disagree with a health care provider regarding a service member's profile and/or recommended duty limitations or mobility restrictions (MR)
- A commander who non-concurs with a MR must contact the MTF/SGP within seven duty days of receipt of the mobility restricting AF Form 469 (no contact from the commander will be considered concurrence)
- If the MTF/SGP and unit commander disagree, the Airman can be placed on mobility status with the concurrence of the commander's next reporting official (normally the Airman's group commander)
- If the second level commander non-concurs as well, the final commander acting on AF Form 469 issues a completed copy to the Airman after the MTF/SGP notifies Medical Standards Management Element (MSME) of the action and MSME generates a new AF Form 469
  - -- The new AF Form 469 will still reflect the MR and initial assignment availability code (AAC) but will include a statement indicating the Airman's squadron/group commander non-concurred and the Airman will be considered available for mobility/deployment
  - -- A specified deployment may have medical requirements determined by the combatant commander (COCOM). Thus, while a commander may place an individual on mobility regardless of medical recommendations, the gaining COCOM may decline to accept the Airman for deployment.
    - --- For a defined deployment, the medical treatment facility (MTF) will coordinate through its MAJCOM to the gaining COCOM regarding waiver of defined medical requirements
- Permanent MRs (i.e., Assignment Limitation Code-C (ALC-C)) may only be determined by AFPC/DP2NP or ARC SGP. These mobility limitations will be displayed on AF Form 469 permanently at the bottom of the physical limitations/restrictions portion and once assigned, will not be changed, removed, or overridden by any local DLC or profile action (additional restrictions may be added as appropriate).
  - -- Only waiver authorities as described in AFI 41-210 may authorize deployment for individuals placed on ALC restrictions. Unit commanders may not non-concur with MRs directed by DPANM or ARC SGP (i.e., ALCs).

Airmen's Rights

- The law requires government legal representation for all Airmen in the DES and for any subsequent appeals to SecAF
- The right to representation begins upon an Airmen's receipt of results from the informal physical evaluation board (IPEB)
- These rights ensure no member may be retired or separated for physical disability without a full and fair hearing, and the award of fair compensation to those whose military careers are cut short due to a disability incurred during or permanently aggravated by military service

Office of Airmen's Counsel

- The Office of Airmen's Counsel (OAC) is comprised of active duty, reserve, and national guard judge advocates, civilian attorneys, and paralegals
- The OAC's mission is to represent Airmen throughout DES processing. The OAC staff can answer questions concerning the member's legal rights during the DES process.
- An Airman who is pending a MEB or Physical Evaluation Board (PEB) may contact the OAC by telephone or e-mail for consultation concerning the member's rights and elections at any stage of the process and should do so as early as possible
  - -- At initial stages, OAC Disability Counsel can provide general information to assist Airmen in understanding their rights and responsibilities
  - -- As Airmen progress through the system, OAC Disability Counsel can provide more specific advice aimed at developing strategy to reach desired outcomes
  - -- OAC Disability Counsel provide representation at the Formal Physical Evaluation Board (FPEB), assistance with appeal of FPEB results, and appeals of Veterans Affairs (VA) ratings for conditions determined unfitting by the Air Force
- The OAC staff reports directly to an independent chain of command in order to allow for zealous advocacy on behalf of the individual Airmen undergoing DES processing, within ethical boundaries
- To contact the OAC telephonically, call DSN 665-0739; commercial 210-565-0739
- The OAC e-mail address is: afloaja.disabilitycounsel@us.af.mil

DES Stages

- The MEB is the first step for assessing members whose retention is questionable due to health concerns/reasons
  - -- The MEB consists of three physicians appointed by the MTF/CC to determine whether the member has any medical issues that could make the member unfit for continued military service. In all mental health cases, one of the three physicians must be a psychiatrist.
  - -- The MEB may result in either the member's Return to Duty (with or without an Assignment Limitation Code "C") or referral to the IPEB
- The IPEB consists of three board members and adjudicates cases based on a records-only review
  - -- The service member's immediate commander must provide a statement describing the impact of the medical condition upon the member's ability to perform his/her normal military duties and deploy. In most cases, the commander's letter is accorded great weight by the IPEB.
- Airmen have the right to appeal the results of the IPEB to the FPEB and must make their appeal elections within 10 days of receiving the IPEB results
- The FPEB consists of three board members: one physician and two personnel officers, one of whom serves as Board president. The formal hearing convenes in a closed door session with only the board members, the Airman whose case is under appeal, and his/her assigned counsel.
  - -- The Airman may elect to present witnesses to testify on his/her behalf. Witnesses may appear in person, telephonically, or via video-teleconference.

-- At an Airman's request, the FPEB is another area where a commander may play a persuasive role in the Airman's disability processing. While an Airman may not be forced to submit derogatory information, a commander in support of a member may provide testimony or statements in support of the member's goal.

- The IPEB and FPEB may recommend the following:
  -- Return to duty (with or without assignment limiting code)
  -- Separation/retirement (with or without severance pay)

Relationship to Line of Duty Determinations

- DES procedures should not be confused with Line of Duty (LOD) determinations
- Whereas DES procedures are used to determine whether health problems limit a service member's ability to perform his/her duties (and, ultimately, to remain in the Air Force), an LOD determination is an administrative tool for determining a service member's duty status at the time an injury, illness, disability or death is incurred
- An LOD determination may impact the member's entitlement to benefits administered by the Air Force, or Department of Veterans Affairs
- In many cases, LOD and DES procedures are warranted
  -- For example, if a service member sustains a serious neck injury during an off-duty sporting event, a LOD determination may be required to determine whether the service member was in the line of duty at the time of the injury (the results will impact the service member's benefits and/or obligations). Similarly, a profile may be required restricting the service member from deploying and/or participating in the physical fitness program (PEB/MEB may be warranted as well).
- LODs play a significant role in the DES process for Air Reserve Component members

Dual Processing and Special Cases

- Commanders must inform the Physical Evaluation Board Liaison Officer (PEBLO) of any pending administrative or unfavorable action arising before or during the member's integrated disability evaluation system (IDES) process
- Disability cases on members with an unfit finding who are also pending administrative action, or who apply for non-disability retirement or discharge in lieu of court-martial action are processed as dual-action
  -- SAFPC makes the final disposition. If SAFPC does not accept the retirement or discharge in lieu of court-martial action, the court-martial will proceed.
  -- If the sentence does not result in punitive discharge, then the disability case can be processed
  -- Administrative action continues in any disability case that results in a fit determination
- Members who are in military confinement are not eligible for processing until sentence is completed and they are placed in a returned to duty status
- HQ AFPC/DPFD and the PEBLO stop processing a case when a member is absent without leave (AWOL), in deserter status, or in the hands of civil authorities and do not resume processing until the member returns to military control and HQ AFPC/DPFD determines the member is eligible for disability processing

References

DoDI 1332.18, *Disability Evaluation System* (5 August 2014), incorporating Change 1, 17 May 2018
AFI 10-203, *Duty Limiting Conditions* (20 November 2014)
AFI 36-2910, *Line of Duty (LOD) Determination, Medical Continuation (MEDCON), and Incapacitation (INCAP) Pay* (8 October 2015)
AFI 36-3212, *Physical Evaluation for Retention, Retirement, and Separation* (2 February 2006), incorporating through Change 2, 27 November 2009
AFI 41-210, *Tricare Operations and Patient Administration Functions* (6 June 2012), including AFI41-210_AFGM 2018-01, 27 September 2018
AFI 48-123, *Medical Examinations and Standards* (5 November 2013), including AFI48-123_AFGM2018-02, 28 January 2018
AF Form 469, *Duty Limiting Condition Report* (25 October 2007)

OFFICER GRADE DETERMINATIONS (OGD)

While the grade at which an officer retires after serving at least twenty years is normally the highest grade held, federal law permits the Secretary of the Air Force to retire both active and reserve officers in a lower grade if their service has not been "satisfactory." This authority has been delegated to the Director, Air Force Review Boards Agency for those in the grade of Colonel and below. In those cases where an officer's conduct or record raises questions as to the quality of his/her service in a particular grade, an officer grade determination (OGD) is required.

Process

- When an officer applies for retirement, any commander in the officer's chain may initiate an OGD if there is evidence the officer's service in their current grade has been less than satisfactory
  - -- In making the "satisfactorily held" determination, consider the nature and length of the officer's improper conduct, the impact the conduct had on military effectiveness, the quality and length of the officer's service in each grade at issue, past cases involving similar conduct, and the recommendations of the officer's command chain. A single incident of misconduct can render service in a grade unsatisfactory despite a substantial period of otherwise exemplary service.
- A commander **MUST** submit an OGD through the MAJCOM if the officer has:
  - -- Applied for retirement in lieu of judicial or administrative separation
  - -- A conviction by court-martial
  - -- A conviction by a civilian court for misconduct which did (or would) result in a mandatory comment and referral in the member's next OPR, training report, or Performance Recommendation Form, in accordance with AFI 36-2406
  - -- Been the subject of any substantiated adverse finding from an officially documented investigation, proceeding, or inquiry (except minor traffic infractions)
    - --- Such cases include, but are not limited to, nonjudicial punishment, reprimand, or admonishment within four years of the requested effective date of retirement
- A commander **MAY** submit an OGD through the MAJCOM in other cases if he/she believes an OGD is appropriate
- At the time an officer applies for retirement, the commander will review the officer's record to determine if any of the above conditions exist. If, based on that review, one of the conditions is met, the commander initiates an OGD.
  - -- The commander must notify the officer the OGD is being initiated and why
  - -- The officer is given 10 calendar days to respond
- The commander will make a recommendation regarding the officer's retirement grade. That recommendation must accompany the retirement application as it is forwarded to the MPF.
- For retirement in lieu of administrative or punitive action, the officer is considered on notice that he/she is subject to an OGD based on that administrative or punitive action. The officer's commander is not required to separately notify the officer of the OGD unless the commander intends to add or consider evidence that was not already provided to the officer during the underlying administrative or punitive action.

- OGD packages, including matters and documents submitted by the member, are forwarded through command channels to AFPC, which sends the case file to the Secretary of the Air Force Personnel Council for decision
- OGD packages for General Officers require SecAF resolution, with or without referral to a formal OGD Board. Contact AF/JAA for guidance in General Officer cases.
- Any questions concerning officer misconduct, reporting requirements, or the appropriate administrative or judicial response to misconduct should be addressed through the servicing staff judge advocate or MPF

References

10 U.S.C. § 1370
10 U.S.C. § 12771
AFI 36-2023, *The Secretary of the Air Force Personnel Council (SAFPC)* (3 April 2018)
AFI 36-3203, *Service Retirements* (18 September 2015), incorporating Change 1, 30 August 2017

TATTOOS/BRANDS, BODY PIERCING, AND BODY ALTERATION

Dress and personal appearance regulations (AFI 36-2903, *Dress and Personal Appearance of Air Force Personnel*) govern the use of tattoos, body piercing, and body alterations. Failure to abide by these instructions may subject Airmen to prosecution for violation of a lawful general regulation under Article 92 of the Uniform Code of Military Justice. Additionally, commanders retain authority to be more restrictive for covering tattoos, body ornaments and personal grooming based on legal, moral, safety, sanitary, or foreign country cultural reasons.

Tattoos, Brands, or Body Markings

- A tattoo is defined as a picture, design, or marking made on the skin or other areas of the body by staining it with an indelible dye, or by any other method, including pictures, designs, or markings only detectable or visible under certain conditions (such as ultraviolet or invisible ink tattoos). A brand is defined as a picture, design, or other marking that is burned into the skin or other areas of the body. Body markings are pictures, designs, or other markings as a result of using means other than burning to permanently scar or mark the skin. Commanders will use the provisions in AFI 36-2903 in determining the acceptability of tattoos, brands, and body markings displayed by members in uniform.
- Authorized: Tattoos, brands, or markings are authorized on the chest, back, arms, legs, and a ring tattoo on one finger on one hand (a single band no more than 3/8 of an inch wide, below the knuckle and above finger joint). Note that Airmen who were previously authorized to have such hand tattoos prior to 9 January 2017 are "grandfathered" in under the old policy standards.
  - -- Authorized hand, arm, and leg tattoos can be exposed/visible in uniform
  - -- Chest and back tattoos will not be visible through any uniform, or visible while wearing an open collar uniform
  - -- Cosmetic tattooing (for men or women), when directed by qualified medical personnel to correct a medical condition, and for women if done to apply permanent facial makeup in accordance with dress and appearance standards, is permitted
- Unauthorized: Tattoos/brands/body markings anywhere on the body that are indecent, commonly associated with gangs or extremist/supremacist organizations, or that advocate sexual, racial, ethnic, or religious discrimination are prohibited in and out of uniform. Tattoos/brands/body markings with unauthorized content that are prejudicial to good order and discipline or the content is of a nature that tends to bring discredit upon the Air Force are prohibited both in and out of uniform. Likewise, other than the aforementioned exceptions (above), tattoos/brands/body markings are prohibited on Airmen's hands, head, neck (anything visible above the t-shirt neckline), face, tongue, lips, or scalp. Airmen may not simply cover up tattoos, brands, and/or body markings with bandages or make-up in order to comply with this policy—they must instead comply with the removal/alteration policy.

Tattoo Removal/Alteration Policy

- Members who have or receive unauthorized content tattoos, brands, and body markings are required to initiate tattoo, brand, and body marking removal and alteration. At the commander's discretion, members may be seen on a space and resource available basis, in a Department of Defense (DoD) medical treatment facility for voluntary tattoo, brand, and body marking removal. When DoD resources are not available, members may have the tattoo or brand removed or altered at their own expense outside of DoD medical treatment facilities. Permissive TDY is not authorized for this purpose; therefore, travel is at member's expense.

- Members who fail to remove or alter unauthorized tattoos/brands/body markings in a timely manner will be subject to appropriate quality force management actions. The requirement to comply with AF guidance is not negated by an inability to obtain removal at government expense; the member's is ultimately responsible for complying with AF guidance, while supervisors and commanders are charged with enforcing standards via appropriate actions.

Body Piercing

- Earrings: Male Airmen are not authorized to wear earrings while in uniform or in civilian attire for official duty, but are authorized to wear earrings in civilian attire while off duty on a military installation. Female Airmen may wear small (not exceeding 6 mm in diameter) conservative (moderate, being within reasonable limits; not excessive or extreme) round or square white diamond, gold, white pearl, or silver earrings as a set with any uniform combination. If member has multiple holes, only one set of earrings are authorized to be worn in uniform and will be worn in the lower earlobes. Earrings will match and fit tightly without extending below the earlobe unless the piece extending is the connecting band on clip earrings.
- On official duty in uniform or civilian attire (on or off a military installation): With the exception of earrings for females (see above), all members are prohibited from attaching, affixing, or displaying objects, articles, jewelry or ornamentation to or through the ear, nose, tongue, eye brows, lips, or any exposed body part (includes visible through clothing)
- Off duty in civilian attire, on a military installation: With the exception of earrings for women (see above) and areas in/around military family and privatized housing, all Air Force members are prohibited from attaching, affixing and/or displaying objects, articles, jewelry or ornamentation to and/or through the ear, nose, tongue, eye brows, lips, or any exposed body part (includes visible through clothing)

Body Alteration/Modification

- Members are prohibited from altering or modifying their bodies if the alteration is intentional and results in a visible, physical effect that disfigures, deforms or otherwise detracts from a professional military image
- Examples include, but are not limited to, tongue splitting or forking; tooth filing; and acquiring visible, disfiguring skin implants, and gouging (piercing holes large enough to permit light to shine through)

Reference

AFI 36-2903, *Dress and Personal Appearance of Air Force Personnel* (18 July 2011), incorporating through Change 4, 28 May 2015, including AFI36-2903_AFGM2018-03, 28 September 2018

RETALIATION

Retaliation is generally defined as doing something bad to someone who has hurt you or another or treated you or another badly; to repay or get revenge. It has several distinct applications in the military context. Retaliation is a criminal act under Article 132 of the Uniform Code of Military Justice (UCMJ). This UCMJ article punishes official adverse actions taken against someone because they contacted a Member of Congress or the Inspector General (IG), or they made a protected communication. Since retaliation is conduct that detracts from good order and discipline, it is also considered an unprofessional relationship under AFI 36-2909, *Professional and Unprofessional relationships*. (See Fraternization and Unprofessional Relationships for further information.)

The AFI defines retaliation as an overarching term which includes maltreatment and ostracism. This definition covers both official actions taken against someone and also actions taken by peers. A violation of the AFI can be considered a violation of a general order. Finally, reprisal is a distinct form of retaliation. It is defined in the same way as retaliation in Article 132, UCMJ. Reprisal and restriction are terms of art that are addressed in AFI 90-301, *Inspector General Complaints Resolution*.

This section will cover UCMJ retaliation. There are separate sections on unprofessional relationships and reprisal. Since retaliation can take a number of forms, these additional sections should be referred to in order to gain a complete understanding of this area of misconduct.

Other crimes can also potentially cover retaliatory conduct. Some examples of these offenses include cruelty and maltreatment, Article 93, extortion, Article 127, and obstruction of justice, Article 131b.

Overview

- Article 132, UCMJ – Retaliation. Retaliation is considered the abuse of otherwise lawful military authority "for the purpose of" making certain lawful communications. This article makes it a criminal offense for any military member to wrongfully take or threaten to take an adverse personnel action against or to wrongfully withhold or threaten to withhold a favorable personnel action from a person who either reported or planned to report a criminal offense or made or planned to make a protected communication. This language is closely aligned with the definitions found in AFI 90-301, *Inspector General Complaints Resolution*. There are two actions that are considered criminal under this article. First, a person can be punished for "retaliating" against another person for reporting/making or planning to report/make a crime or protected communication. Second, a person can be punished for "discouraging" another person for the same actions.
- There are two types of communications protected under this UCMJ provision
  - -- A lawful communication to a Member of Congress or an Inspector General
  - -- A communication to a covered individual complaining of or disclosing a violation of law or regulation (i.e., a crime) including sexual harassment or unlawful discrimination or to report gross mismanagement, gross waste of funds, an abuse of authority or a substantial and specific danger to public health or safety
    - --- The list of individuals who can receive a covered communication are listed in 10 U.S.C. § 1034. AFI 90-301 has a similar list, but there are some differences. The individuals include a Member of Congress, an Inspector General, a member of a Department of Defense audit, inspection, investigation, or law enforcement organization, any person or organization in the chain of command, a court-marital proceeding, or any other person or organization designated pursuant to regulations for such communications.

- A personnel action is any action taken on a service member that affects or has the potential to affect that person's current position or career
  - -- Example of actions include promotion, disciplinary or other corrective action, transfer or reassignment, performance evaluations, decisions concerning pay, benefits, awards or training, relief and removal, separation, discharge, referral for mental health evaluations, and any other personnel action defined by law
    - --- Examples of other laws include 5 U.S.C. § 2302 which includes in the definition of a prohibited personnel practice as any other significant change in duties, responsibilities, or working conditions
    - --- DODD 7050.06 also defines a personnel action as a significant change in duties and responsibilities but adds that is "inconsistent with the Service member's grade"
- For all cases involving retaliation, including reprisal and restriction, contact IG and JA. IG is the agency with primary authority to handle complaints of reprisal and restriction. The fact that retaliation is an offense covered by the UCMJ doesn't impact IG's authority and responsibility in this area.

Definitions

- The term retaliation includes retaliation, ostracism, and maltreatment
  - -- Retaliation: Taking or threatening to take an adverse personnel action, withholding or threatening to withhold a favorable personnel action, or conducting a retaliatory investigation with respect to a military member because the member reported a criminal offense (investigated by IG only)
  - -- Ostracism: Excluding from social acceptance, privilege, or friendship with the intent to discourage reporting a criminal offense or discouraging due administration of justice (investigated by command)
  - -- Maltreatment: Treatment by peers or other persons viewed objectively that is abusive or otherwise unnecessary for any lawful purpose to discourage reporting a criminal offense or the due administration of justice that results in physical or mental harm or suffering or reasonably could have caused physical or mental harm or suffering (investigated by command)

Actions in Response to Retaliation

- A commander or supervisor must take appropriate action if it is reasonable to believe retaliation has occurred. At a minimum, the member or members suspected of engaging in retaliation will be ordered to cease from engaging in any further retaliation.
- As soon as practicable, the alleged victim, or other military member who is believed to have been retaliated against, will be informed that command is aware of the suspected act or acts of retaliation, and that the alleged offenders have been ordered to cease from engaging in any further retaliation
- The individual retaliated against will be advised to report any further acts of retaliation
- Military members, including Reserve members on active duty or inactive duty for training and ANG members in Federal service, who violate the specific prohibitions contained in paragraph 11 of this instruction can be prosecuted under either Article 92 or Article 134 of the UCMJ, or both, as well as any other applicable Article of the UCMJ, as appropriate
- Military members who have questions as to application or interpretation of policy should consult their commander and commanders are "highly encouraged" to consult their staff judge advocates or serving legal offices for assistance in interpretation

References

UCMJ art. 132
DoDD 7050.06, *Military Whistleblower Protection* (17 April 2015)
AFI 36-2909, *Professional and Unprofessional Relationships* (28 April 2018)
AFI 90-301, *Inspector General Complaints Resolution* (28 December 2018)
AFPD 90-3, *Inspector General – The Complaints Resolution Program* (9 June 2016)

NO CONTACT ORDER (NCO)

Commanders may issue "no contact orders" (NCOs) to personnel under their command when the commander deems it reasonably necessary in order to protect third parties from physical harm (most frequently spousal, intimate partner, or child abuse) or to prevent a UCMJ violation. NCOs issued for the purposes of preventing spousal/child/or intimate partner abuse are known as "military protective orders" (MPOs) and should be completed on a DD Form 2873, *Military Protective Order*.

Under certain circumstances, commanders shall issue and monitor compliance with an MPO when necessary to safeguard a victim, quell a disturbance, and maintain good order and discipline while a victim has time to pursue a protective order through a civilian court, or to support an existing Civilian Protective Order. When possible, commanders should consult with their staff judge advocate (SJA) before issuing NCOs or MPOs.

Definition

- NCOs are similar to civilian temporary restraining orders. They are orders directed to military personnel, prohibiting them from having communication or physical contact with a particular person or persons.

Authority to Issue No Contact Orders

- May be issued by the commander of the person concerned
- Standard: Reasonably necessary to ensure the safety and security of persons within their command or to protect other individuals from persons within the command

Purpose

- The lawful purpose of a NCO is to protect others and prevent misconduct punishable by the UCMJ
  - -- Protect: Most often used to protect victims of domestic violence, child abuse, or crime victims from contact with the accused pending court-martial
  - -- Prevent: Often used to prevent future UCMJ misconduct such as unprofessional relationships (in violation of AFI 36-2909, *Professional and Unprofessional Relationships*) or fraternization (Article 134, UCMJ)

Scope of No Contact Orders

- NCOs must be tailored to meet the specific needs of an individual victim
- NCOs may limit communication and physical interactions between a military member over whom the commander exercises authority and a third party. Limitations may include, but are not limited to:
  - -- Direction to refrain from contacting, harassing, or touching certain named persons
  - -- Direction to remain away from specific areas, such as home, schools, and public facilities
  - -- Direction to do, or refrain from doing, certain acts or activities
- NCOs **MAY NOT** preclude the defense counsel of a member from contacting a potential witness as part of counsel's investigation in a pending case

Duration
- NCOs should state the term length, be limited in duration, and may be renewed as circumstances warrant

Form of No Contact Orders
- NCOs should be in writing with receipt confirmed in writing by the recipient
  - -- Oral NCOs should only be issued under exigent circumstances
  - -- Oral NCOs should be placed in writing as soon as possible after issuance
- Commanders should use DD Form 2873 when issuing a NCO to prevent potential spousal, intimate partner, or child abuse

Relationship of Military Protective Orders to Civilian Restraining Orders
- Military Protective Orders (MPO) can be issued in conjunction with, or in addition to Civilian Protective Orders (CPO) issued by civilian courts. They each have their own independent source of authority.
- Civilian court issued restraining orders dealing with domestic violence incidents have the same force and effect on a military installation as such order has within the jurisdiction of the court that issued such order
- The terms of an MPO should not contradict the terms of a CPO
- A commander may issue an MPO with terms that are more restrictive than those in the CPO to which the member is subject
- Violations of CPOs are enforceable in the civilian court which issued the order
  - -- If the civilian court takes no action to punish violations of the order, the military could pursue administrative or disciplinary action. Before doing so, **ALWAYS** consult your SJA.

Enforceability
- Depending upon the circumstances, violation of an MPO is enforceable via Article 90, UCMJ – Willfully Disobeying a Superior Commissioned Officer; or Article 92, UCMJ – Failure to Obey Order or Regulation

---

References
10 U.S.C. § 1561a(a)
DoDI 6400.06, *Domestic Abuse Involving DoD Military and Certain Affiliated Personnel* (21 August 2007), incorporating through Change 4, 26 May 2017
DD Form 2873, *Military Protective Order* (July 2004)

Attachment
Template No Contact Order

TEMPLATE NO CONTACT ORDER

(Date)

MEMORANDUM FOR XXXXXXX

FROM: [Squadron]/CC

SUBJECT: No Contact Order

1. Order. It has come to my attention that you are under investigation for violations of the Uniform Code of Military Justice (UCMJ) Article ###, [Article Name]. To ensure the good order and discipline of this unit, you are hereby ordered:

Not to have *any contact* with [RANK/FULL NAME]. "Any contact" means just that—physical, verbal, telephonic, text message, e-mail, social media, etc. Additionally, you are ordered not to use another person to contact [RANK/FULL NAME] on your behalf. This order is not intended to prevent any counsel who may represent you in the future from preparing a defense, however, you are not to use any counsel as a means of contacting [RANK/FULL NAME] for personal communications on your behalf.

You are further ordered not to come within 100 feet of [RANK/FULL NAME] unless required by military duties and previously approved by me. Should you inadvertently encounter [RANK/FULL NAME] at any other location, you will immediately distance yourself by 100 feet and report the inadvertent contact to your immediate supervisor.

2. Duration of Order. This order will remain in effect until _____, unless this order is otherwise modified, extended or rescinded by me.

3. Relief from/Questions about Order. If you feel you need relief from this order at any time or if you have any questions regarding its provisions, call _____ at _____ (DP) _____, (HP) _____, (Cell/Pager #). If you are unable to reach _____, you may contact me at my office or through the Command Post at _____.

4. Consequences of Violating Order. Take note that violations of this order may result in adverse administrative action or punishment under the UCMJ, to include trial by court-martial.

5. Receipt/Understanding of Order. Acknowledge receipt and understanding below.

I.M. JUSTICE, Lt Col, USAF
Commander

1st Ind to [Squadron]/CC, _____ (date), No Contact Order

MEMORANDUM FOR [Squadron]/CC

I understand and acknowledge receipt of this order on _____.

XXXXX, [rank], USAF

8

CHAPTER EIGHT: PERSONNEL ISSUES – FAMILY AND NEXT OF KIN

CHILD ABUSE, CHILD NEGLECT, AND SPOUSAL ABUSE

It is Air Force policy to prevent or minimize the impact of child abuse, child neglect, and spousal abuse and their associated problems. To further this policy, the Air Force attempts to identify abuse and neglect, document such cases, assess the situation, and assist the family. Commanders should take administrative or judicial action in appropriate cases.

The Family Advocacy Program (FAP) is responsible for implementing this policy. The FAP enhances Air Force readiness by promoting family and community health and resilience. The FAP consists of prevention services, maltreatment intervention, and research and evaluation.

Reporting Maltreatment

- Notice of suspected abuse cases come from many sources: security forces blotter, commanders, co-workers, medical care providers, childcare providers, anonymous tips, etc.
- All Air Force personnel, military or civilian, have a duty to report all incidents of suspected family maltreatment to the FAP. The identity of the person making the notification is kept confidential and is not released to the family allegedly involved.
- Report suspected cases to the FAP and military law enforcement
- Adult victims of domestic abuse have two reporting options:
  - -- *Unrestricted Reporting*: Allows the victim to report an incident using the chain of command, law enforcement or AFOSI, and family advocacy for clinical intervention. Victims who choose to pursue an official command or criminal investigation of an incident should use these reporting channels.
  - -- *Restricted Reporting*: Allows the victim, who is eligible to receive military medical care, the option of reporting an incident of domestic abuse to specified individuals for the purpose of receiving medical care and other services without initiating the investigative process or notification to the victim's or alleged offender's commander

The Family Advocacy Committee

- The ultimate responsibility to implement the FAP rests with the installation commander. The medical treatment facility (MTF) commander is responsible for each of the three FAP components and chairs the family advocacy committee (FAC).
- Members of the FAC normally include: installation commander (or designee), MTF commander, the family advocacy officer (FAO), family advocacy outreach manager, Airmen and Family Readiness director, staff judge advocate (SJA) (or designee), security forces commander (or designee) (SFS), AFOSI detachment commander (or designee), chaplain, command chief master sergeant (CCC), Department of Defense Education Activity (DoDEA) representative, and representatives of local child protection agencies (optional)

Family Advocacy Officer

- The FAO manages the installation FAP and is a clinical social worker
- The FAO coordinates the central registry board (CRB) and chairs the clinical case staffing (CCS), outreach management prevention council (OPMC), child sexual maltreatment response team (CSMRT), high risk for violence response team (HRVRT), and the new parent support program (NPSP) case-staffing

The Central Registry Board

- The CRB is a multidisciplinary team that makes administrative determinations for suspected family maltreatment, to include which incidents require entry into the Air Force Central Registry database
- CRB meets at the call of the FAO, normally monthly. Membership is determined by the FAC, but should include: the chair (Installation Vice Commander), a judge advocate (JA), CCC, SFS, AFOSI, FAO, and other relevant agencies.
- Duties of the CRB Include:
  - -- Make incident status determinations (ISDs) on each allegation of maltreatment within 60 days of referral
  - -- Ensure involved adult family members, adult victims, and adult offenders receive notification of CRB ISDs
  - -- CRB discussions are confidential
- The unit commander of any member whose case will be discussed at the CRB should attend the CRB meeting for their member

Child Sexual Maltreatment Response Team

- Membership includes the FAO, AFOSI representative, legal office representative, and other members appointed by the unit commander and approved by the FAC
- Goal of the team is to minimize risk and trauma to the victim and family and ensure coordinated decision making and case management
- The team is activated by the FAO immediately upon receipt of child sexual abuse allegations. The team coordinates a course of action by determining how organizations will proceed in making notifications, conducting interviews, scheduling medical exams, arranging for safety of the victim and family members, and conducting psychosocial assessments.

High Risk For Violence Response Team

- Members include the FAO, FAP clinician working with the family, sponsor's squadron commander, JA, security forces representative, mental health clinic provider, AFOSI, victim advocate, and other agencies as appropriate
- The team is activated when there is a threat of immediate and serious harm to family members, unmarried intimate partners or FAP staff. The team addresses safety issues, risk factors, and develops and implements a management and tracking mechanism for high-risk individuals.

Child Neglect and Abandonment

- Most Air Force installations will have several cases each year of alleged child abuse or neglect through parental abandonment (i.e., leaving children alone in military family housing without adult supervision)
- Some installations have addressed this issue by having the FAC draft guidelines to assist parents in assessing whether a child is mature enough to be left unattended
- The FAC only *proposes* guidelines. Situations must be evaluated individually.

Reference

AFI 40-301, *Family Advocacy Program* (16 November 2015), incorporating Change 1, 12 October 2017

CHILD CUSTODY AND THE MILITARY

Child custody laws vary from state to state, but generally employ a "best interest of the child" standard. Courts will usually look at many factors in determining the child's best interests; rarely will one single variable be determinative. Military members who are faced with child custody disputes may be emotional and under substantial stress. They will likely need assistance in navigating state laws and court proceedings. In particular, they should know that both state and federal laws have been enacted to protect a service member's custodial interests. Furthermore, they should understand that absences dictated by military service will not be a sole factor in withholding custody.

State Jurisdiction

- The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), which has been enacted by nearly all states and U.S. territories, limits jurisdiction in child custody cases to one state—the "home state." The only state that has not adopted the UCCJEA is Massachusetts. Puerto Rico has also not adopted the Act.
  - -- The "home state" is defined as the state where the child has lived for 6 consecutive months (or since birth if the child is less than six months old) prior to the commencement of the custody proceedings
  - -- If the child has not lived in one state for at least six consecutive months, then jurisdiction lies with the state that has (1) "significant connections" with the child and at least one parent; **AND** (2) "substantial evidence concerning the child's care, protection, training and personal relationships." If more than one state meets this criteria then the states must agree on the state that will assume jurisdiction.
    - --- Continuing Exclusive Jurisdiction: The state that makes the initial custody determination will maintain jurisdiction for modifications. If another state later has more "significant connections" with the child, the original state may relinquish jurisdiction.
    - --- Emergency Jurisdiction: A court in a state other than the "home state" may assume temporary jurisdiction when a child is (1) present in the state; and (2) has been abandoned or subjected to or threatened with mistreatment or abuse
    - --- Enforcement of Final Custody Orders: Prosecutors and law enforcement in any state, not just the "home state," may utilize civil proceedings to enforce a custody order

Best Interest of the Child Standard

- Courts will usually make custody decisions based primarily on the child's and not the parents' best interest. Factors the court may consider include, but are not limited to, the:
  - -- Degree of emotional attachment of the child to each parent
  - -- Child's age, gender, and mental/emotional/social development
  - -- Child's preference (for children ages 12-14 in most states)
  - -- Child's comfort in his/her home, school, and community
  - -- Involvement of each parent
  - -- Physical, emotional, social, and financial stability of each parent
  - -- Willingness of each parent to cooperate with the other
  - -- History of domestic violence or child abuse

Deployment as a Factor in Determining Custody Arrangements

- A recent review of military child custody cases failed to reveal any instances where custody was determined solely based on the issue of deployment or the threat of deployment. Several laws were enacted that help ensure this remains the case:
  - -- Forty-eight states have such laws, including 10 that have adopted the Uniform Law Commission's Deployed Parents' Visitation and Custody Act
  - -- The Servicemembers Civil Relief Act (SCRA) was also recently amended to limit a state court's consideration of a member's deployment as the sole factor in determining the best interest of the child, though it does not create a federal right of action
- The effects of deployment are often considered by the courts as one of the factors in determining the best interest of the child

Mobility as a Factor in Determining Custody Arrangements

- The impact that a change to a child's environment (e.g., frequent PCS moves) has on a child's well-being is also likely to be considered by individual judges and guardians ad litem in determining the best interest of the child
- Although each child will handle these disruptions differently and will need to be considered on an individual basis, a recent study concluded that frequent military moves do not typically have a negative impact on a child's overall well-being
- Commanders should encourage members to take advantage of the many resources available to support military families, to include: child development centers, outdoor recreation and recreational sports leagues, religious services, Airman and Family Readiness Centers, military treatment facilities, and other base activities
  - -- Members may be able to point to the unique sub-culture and community support that can be found in the military when presenting their interests in a child custody proceeding
  - -- Members should also establish and keep current an effective Family Care Plan

Child Support

- Child support issues also fall under state law and are determined by state courts
  - -- Military members who are going through a divorce or custody determination should document the support believed to be provided
- Each military service has regulations to require members to provide support to their dependents
  - -- AFI 36-2906, *Personal Financial Responsibility*, paragraph 4.1, provides that military members will provide financial support to a spouse or child or any other relative for which the member receives additional allowances for support
    - --- Military members must comply with state court orders to provide support
    - --- Commanders may use a pro-rata share equation to calculate the support required for a service member's dependents

---- AFI 36-2906, Figure 1.1, contains the pro-rata share formula for determining the financial support required of service members; the formula uses Non-Locality Basic Allowance for Housing with Dependent Rate (also known as BAH II-WITH)

$$\text{Pro-rata share} = \frac{1}{\text{Total number of supported family members}} \times \text{Applicable Non-Locality Basic Allowance for Housing – with Dependent Rate}$$

---- Note: the number of supported family members does **NOT** include the service member

---- AFI 36-2906, paragraph 4.1.1, applies to all members regardless of the type of BAH received; however, there are several exceptions in paragraph 4.1.2

References

Servicemembers Civil Relief Act, 50 U.S.C. §§ 3938 *et seq.*
Uniform Child Custody Jurisdiction and Enforcement Act (citation varies by state)
AFI 36-2906, *Personal Financial Responsibility* (30 July 2018)

FAMILY MEMBER MISCONDUCT

Installation commanders are often called upon to resolve difficult problems arising from family member misconduct. The installation commander is responsible for maintaining good order and discipline and protecting Air Force resources, yet has little authority when it comes to punishing civilians in general, and family members in particular. Nonetheless, there are certain actions available to address family member misconduct.

Commander Responsibilities and Options

- Administrative Actions:
  - *Suspend or revoke privileges*
    - Driving suspension may be mandatory in certain circumstances (e.g., drunk driving)
    - Base Exchange (BX)/Commissary
    - Morale, Welfare, and Recreation (MWR) facilities
    - Commercial solicitation
  - *Terminate military family housing*
    - Requires 30-days written notice
    - Air Force pays for the move, but partial dislocation allowance is not payable
  - *Debarment*
    - 18 U.S.C. § 1382 makes it a crime to enter the installation after previously being debarred
    - Debarment should be in writing, setting forth the specific reasons for debarment. Debarment may be indefinite, but set time limits are recommended.
    - Must still provide access to medical treatment if authorized and available
- Criminal Actions:
  - Criminal actions depend upon the jurisdiction of the base
  - If the base is under exclusive federal jurisdiction, family members may be prosecuted in federal magistrate court. This is a federal prosecution and potential conviction. One of the attorneys in the staff judge advocate's (SJA) office has likely been appointed as a Special Assistant U.S. Attorney to handle these prosecutions.
  - If the base has concurrent jurisdiction, either federal court or state court may be the proper forum for prosecuting family members. Several states are very possessive of their jurisdiction over juveniles. Refer this issue to your SJA. Some bases have negotiated memoranda of understanding with state juvenile authorities to determine prosecution of such cases.
  - If the base has only proprietary jurisdiction, the state retains the authority to prosecute family member misconduct (involving only state crimes) occurring on the installation. Any family member misconduct should be referred to the local authorities for prosecution.
  - Some installations have established programs for handling juvenile misconduct. Often called Juvenile Correction Boards, these boards consider juvenile cases and recommend to the commander how to handle the matter.

- Early Return of Dependents (ERD) (OCONUS):
  -- Joint Travel Regulation (JTR) table 5-20 provides for ERD when a command sponsored dependent of a member stationed in foreign country becomes involved in an incident that
    --- Is embarrassing to the U.S.; or
    --- Is prejudicial to the command's order, morale, and discipline
  -- JTR table 5-22 provides for Permanent Dependent Travel (PDT) when the member's spouse or the parent of a dependent child may request relocation for personal safety if:
    --- Member has committed a dependent abuse offense against a member's dependent;
    --- A safety plan and counseling have been provided to the dependent;
    --- Dependent's safety is at risk; and
    --- Dependent relocation is advisable

References

18 U.S.C. § 1382
Joint Travel Regulations, 1 May 2018
DoDI 6055.04, *DoD Traffic Safety Program* (20 April 2009), incorporating through Change 4, 31 August 2018
AFI 31-218(I), *Motor Vehicle Traffic Supervision* (22 May 2006), including AFI31-218(I)_AFGM2016-01, 4 October 2016
AFI 32-6001, *Family Housing Management* (21 August 2006), including AFI32-6001_AFGM2018-01, 25 September 2018
AFI 36-3026(IP), *Identification Cards for Members of the Uniformed Services, Their Eligible Family Members, and Other Eligible Personnel* (4 August 2017)
AFI 51-206, *Use of Magistrate Judges for Trial of Misdemeanors Committed by Civilians* (31 August 2018)

REMOVAL FROM BASE HOUSING

The Air Force prefers that military personnel retain their assigned family housing for the duration of their tour at the installation unless there are reasons that justify termination.

Termination from Base Housing

- Military personnel may be required to terminate occupancy of family housing when:
  - -- The conduct or behavior of the member or dependent family member is contrary to accepted standards or is adverse to military discipline
  - -- The member or dependent family members are responsible for willful, malicious, or negligent abuse or destruction of property
  - -- The member fails to comply with the Air Force family child care program
- Cases involving early termination must be fully documented and should be retained on file for a minimum of one year
- An involuntary move from military family housing is at government expense; however, partial dislocation allowance is not payable
- Commanders are authorized to terminate housing for the above reasons with 30-days written notice to the member (required notice upon PCS/retirement is 40 days). Basic due process probably requires allowing the member the right to respond (orally or in writing) before the commander makes his/her decision.

Reference

AFI 32-6001, *Family Housing Management* (21 August 2006), including AFGM2018-01, 25 September 2018

AIR FORCE CHILD AND YOUTH PROGRAM (CYP)

Installation commanders are required to mandate appropriate facilities, funding, and manpower to operate the child and youth programs (CYPs) on their installation. They must also ensure installation agencies support CYP oversight and technical assistance requirements including actions needed for personnel background checks. The goal of the CYP is to assist DoD personnel in balancing duty and family life obligations by providing family services for youths from birth to 18 years of age. These services take the form of child development centers (CDC), family child care (FCC) homes, school age care (SAC), and youth programs.

Eligibility

- CYP services are available to youths whose sponsor qualifies as:
  - -- Active duty military and Coast Guard members
  - -- DoD civilian employee
  - -- Air National Guard or Reserve member on active duty orders or inactive duty training status
  - -- Surviving spouses, and *loco parentis* guardians of youths that would otherwise be eligible
  - -- Wounded Warriors who are medically retired are authorized to use AF child care programs until their dependent child reaches the age of 12 provided their spouse is in a full-time employed/student status (if applicable)
  - -- DoD contractors with specific contractual eligibility
  - -- In the case of unmarried, legally separated parents with joint custody or divorced parents with joint custody, children/youth are eligible for child care only when they reside with the eligible sponsor at least 25 percent of the time in a month
- CYP services may be available to those who do not qualify for the above categories on a case-by-case and space-available basis
  - -- Space-available patrons must make way when space is needed for the above listed groups

CYP Child Care Options

- CDC: Provides care to children from six weeks to five years of age within an on-base facility
- SAC: Provides care to children from five through 12 years of age within an on-base facility (sometimes housed in the CDC facility)
- FCC: Provides care to children from two weeks to 12 years of age in private, FCC certified and regulated home-care facilities
  - -- All on-installation childcare is subject to regulation by AFI 34-144, *Child and Youth Programs*, and must be certified by the installation MSG commander
  - -- Uncertified, regular (more than 10 hours per week), on-installation childcare will be investigated by the installation FCC Coordinator, accompanied by the Force Support Squadron (FSS) Commander or designee. An unannounced visit will be made to individuals living in government owned housing or privatized housing. The individual will be provided a written request to complete the certification procedures and cease providing care until they become certified. Security Forces will be contacted if there are suspected violations of law.

Certification of FCC Homes

- Valid for 12 months
- Must comply with most restrictive of State/local or AF requirements
- Inspected for fire, safety, first aid, liability insurance and criminal background checks

---

Reference

AFI 34-144, *Child and Youth Programs* (2 March 2016), including AFI34-144_AFGM2018-02, 27 September 2018

SUMMARY COURT OFFICER (SCO)

For deceased active duty Air Force members (and other entitled individuals), the Air Force collects, safeguards, and promptly disposes of their personal property and personal effects. The installation commander appoints a summary court officer (SCO) to perform these duties in accordance with AFI 34-511, *Disposition of Personal Property and Effects*. For deceased DoD civilians, see AFI 34-511, paragraph 4.4, and AFI 36-809, *Civilian Survivor Assistance*.

Definitions

- Personal Effects: Any personal item, organizational clothing, or equipment physically located on or with the remains. Some examples of personal effects include eyeglasses, jewelry, wallets, insignia, and clothing.
- Personal Property: All of the other personal possessions of the decedent. Some examples of personal property include household goods, mail, personal papers, and privately owned vehicles. Personal property does not include real property except for any debts associated with real property.

Prioritized List of Recipients to Receive Personal Property and Personal Effects

- Surviving spouse or person designated by spouse
- Children in descending order of age. If the recipient is a minor, forward the property as instructed by the minor's surviving parent, guardian or adopting parent.
- Parents in descending order of age. If parents divorced or legally separated while the deceased was a minor, then the recipient is the custodial parent. In a shared custody arrangement the custodial parent is the one who had physical custody at the time the deceased reached age of majority or entered the military at that time.
- Siblings in descending order of age
- Next of kin of the deceased
- A beneficiary named in the will of the deceased

Handling and Disposing

- Personal Effects:
  - -- Mortuary officer (MO) inventories, cleans, and secures the personal effects
  - -- SCO collects and returns any organizational clothing and individual equipment to the member's squadron commander
  - -- Once the MO ensures the authorized recipient has been officially notified of the death, the MO asks the authorized recipient to provide instructions for disposing of the personal effects
  - -- MO may only destroy personal effects after receiving written authorization by the authorized recipient

- Personal Property – the SCO:
  - -- Obtains property disposition instructions and the name and contact information of the authorized recipient from the MO
  - -- Corresponds with the authorized recipient
  - -- Places at least two death announcements in the base bulletin and/or newspaper asking anyone with a claim for or against the estate to step forward
  - -- Inventories all property on DD Form 1076, *Record of Personal Effects of Deceased Personnel*
  - -- Promptly gathers the uniform/clothes needed for burial and gives to the MO
  - -- Removes any questionable (having no sentimental value or are unfit to be forwarded to surviving family members) items and determines the disposition of this property based on criteria in AFI 34-511, paragraph 3.2.4
  - -- Properly disposes of military ID cards, documents, mail, and personal papers
  - -- Properly disposes of funds and negotiable instruments
  - -- Provide completed DD Form 139, *Pay Adjustment and Authorization*, with bills for member's debts to the US Government within two weeks of the date of death to local Financial Services Office to be included in the Case Management System case for DFAS to compute final pay
  - -- Completes and signs a DD Form 1351-2, *Travel Voucher or Subvoucher*, if the deceased member was on temporary duty (TDY) or en route to a PCS and submits the voucher with the member's orders
  - -- Properly ships and stores items
  - -- When an authorized recipient is not found the SCO will collect from local debtors and pay local creditors. Personal property not claimed within 30 days will be sold (with the exception of medals, insignia, stocks, and bonds) and profits will be used to pay any remaining local debts. Unused cash will be turned in to the local Comptroller Squadron.
  - -- Closes the summary court file
- The legal office provides guidance to the SCO on disposition of personal property and reviews the summary court file for legal sufficiency

For Missing, Detained, and Captured Persons

- MO secures and holds the property for 30 days or until the member's status is changed from missing to detained or captured
- If either (1) the missing member's status is changed to detained or captured, or (2) there is no change in status after 30 days, then the property is released to the SCO
- If the missing member returns, the property is released to the member
- SCO secures, inventories, and disposes of the property to those authorized to receive it in the event of the member's death

References

10 U.S.C. § 2575
10 U.S.C. § 9712
DoDD 1300.22, *Mortuary Affairs Policy* (30 October 2015)
AFI 34-501, *Mortuary Affairs Program* (18 August 2015)
AFI 34-511, *Disposition of Personal Property and Effects* (21 April 2016)
AFI 36-809, *Civilian Survivor Assistance* (15 April 2015)
AFI 36-3002, *Casualty Services* (20 June 2017)
DD Form 1076, *Record of Personal Effects of Believed to Be Deceased* (August 2015)

9
CHAPTER NINE: LEGAL ASSISTANCE

OVERVIEW OF LEGAL ASSISTANCE PROGRAM

The armed services may, in accordance with 10 U.S.C. § 1044, provide legal assistance to eligible beneficiaries concerning personal, civil legal problems. The Air Force's Legal Assistance Program is governed by AFI 51-304, *Legal Assistance, Notary, Preventive Law, and Tax Programs*, which directs local staff judge advocates (SJAs) to make every effort to satisfy all legal assistance needs, within the scope of the program and contingent on available resources and expertise. A priority is given to solving mobilization/deployment related legal issues—that is, a member's legal issues, regardless of the subject, that could negatively affect command readiness.

Eligibility for Legal Assistance

- The following individuals are eligible for legal assistance services:
  - -- Active duty members, including reservists and guardsmen on federal active duty under Title 10 of the U.S. Code, and their dependents who are entitled to an ID card
  - -- Air Reserve component members performing Active Guard/Reserve (AGR) tours
  - -- Members of reserve components (not otherwise covered) following release from active duty under a call or order to active duty for more than 30 days for a period of time equal to twice the length of order to active duty. Dependents entitled to an ID card are eligible during the same time period.
  - -- Officers of the commissioned corps of the Public Health Service who are on active duty
  - -- Retirees and their dependents entitled to an ID card. This includes members receiving retired pay as a result of retirement due to permanent disability or placement on the temporary disability retired list.
    - --- Note: "Gray Area" reservists are not entitled to legal assistance (i.e., those who have retired, but are not yet entitled to retired pay under 10 U.S.C. § 12731)
  - -- Civilian employees stationed outside the United States and its territories and their family members who are entitled to an ID card and reside with them outside the continental United States (OCONUS)
  - -- Reservists and National Guard not on Title 10 status, but subject to federal mobilization in an inactive status, are eligible for only mobility/deployment related legal assistance
  - -- DoD civilian employees and contractors deploying to or in a theater of operations for contingencies or emergencies shall be furnished assistance with wills and powers of attorney in accordance with DoDI 1400.32, *DoD Civilian Work Force Contingency and Emergency Planning Guidelines and Procedures*
  - -- DoD civilian employees assigned OCONUS and their dependents
  - -- Foreign military personnel may be provided legal assistance in limited circumstances for specific matters
  - -- Matters relating to the settlement of estates of service members who die on active duty or as a result of an injury or disability that resulted in retirement from active duty; or to the primary next of kin
  - -- SJAs may authorize legal assistance to persons not specifically identified above as an eligible beneficiary (e.g., demobilized ARC members, ROTC Cadets, etc.)

Legal Assistance Services Provided

- The following legal topics may be addressed as resources and expertise permit:
  - -- Wills, living wills, powers of attorney, and notary services
  - -- Adoptions
  - -- Domestic relations
  - -- Servicemembers Civil Relief Act (SCRA) and veterans' reemployment rights issues
  - -- Casualty affairs
  - -- Dependent care issues, including family care plans
  - -- Financial responsibilities
  - -- Landlord-tenant and lease issues, including privatized housing
  - -- Consumer affairs
  - -- Immigration/citizenship issues
  - -- Tax assistance
  - -- Victims of crime
  - -- Other issues deemed connected with personal, civil legal affairs by The Judge Advocate General (TJAG), the MAJCOM SJA, the NAF SJA, the base SJA, or the commander
- Referral: Due to the scope and limitations of the program, as well as the particular needs of the client, the legal office may refer clients to other resources, such as a civilian attorney (through the local bar referral service), the area defense counsel, chaplain, equal opportunity (EO) counselor, military personnel flight, family advocacy, the family support center, or available free or "pro bono" legal services

Preventive Law

- Each base will have a program to educate members on legal issues, with a focus on educating members on preparing for mobilization, seeking timely legal advice, the consequences of signing legal documents, and maintaining vigilance to identify and avoid legal scams
- Education programs are designed to allow Airmen to focus on mission requirements and reduce the time and resources needed to correct legal problems that occur

Matters Specifically Outside the Scope of the Program

- The following are specifically outside the scope of legal assistance:
  - -- Business or commercial enterprises, except in relation to the SCRA
  - -- Criminal issues
  - -- Standards of ethical conduct issues
  - -- Law of armed conflict issues
  - -- Official matters in which the Air Force has an interest, e.g., reports of survey
  - -- Legal issues raised on behalf of another person
  - -- Private organizations
  - -- Representation in a civilian court or administrative proceeding

-- Drafting or reviewing real estate sales or closing documents, separation agreements, divorce decrees, or *inter vivos* trusts unless the SJA determines an individual attorney within the office has the expertise to do so

Attorney-Client Relationship

- Legal assistance establishes an attorney-client relationship and, as such, any information or documents received from or relating to a client are considered privileged and confidential
  - -- Privileged information may be released only with the client's express permission, pursuant to a court order, or as otherwise permitted by the Air Force Rules of Professional Responsibility
  - -- Disclosure may not be lawfully ordered by any superior military authority
  - -- This confidentiality extends to confirming if a legal assistance appointment did or did not occur
- If a commander is contacted by a legal assistance attorney on behalf of a client, e.g., regarding a member's failure to provide financial support to family members, the commander should understand the attorney is representing the interests of that particular client
  - -- The commander should contact the SJA, who represents the interests of the Air Force, for advice concerning the matter

References

Servicemembers Civil Relief Act, 50 U.S.C. §§ 3901 *et seq.*
10 U.S.C. §§ 1044, 1044e
10 U.S.C. § 12731
DoDI 1400.32, *DoD Civilian Work Force Contingency and Emergency Planning Guidelines and Procedures* (24 April 1995)
AFI 51-304, *Legal Assistance, Notary, Preventive Law, and Tax Programs* (22 August 2018)

NOTARIES

Many important documents are required by law to be notarized. Notarization demonstrates that a person with notary authority—that is, a notary public—confirmed the identity of the person signing the document and witnessed the signature. It can also confirm, if required, that the person made an oath as part of executing the document. Notary services are available to eligible personnel, under Title 10 of the U.S. Code, as part of the military legal assistance program.

Eligibility for Air Force Notary Service

- Personnel eligible for military notary services are:
  - -- Members of the armed forces
  - -- Other persons eligible for legal assistance under 10 U.S.C. § 1044 or other regulations of the DoD, to include AFI 51-304, *Legal Assistance, Notary, Preventive Law, and Tax Programs*
  - -- Persons serving with, employed by, or accompanying the armed forces outside the United States, Puerto Rico, Guam, and the Virgin Islands
  - -- Other persons subject to the UCMJ outside the United States

Persons with Notary Authority

- Under 10 U.S.C. § 1044a and AFI 51-304, the following individuals have the general powers of a notary public and of a consul of the United States in the performance of all notary acts:
  - -- Judge advocates on active duty
  - -- Reserve judge advocates at all times, not just when in a duty status
  - -- Civilian attorneys serving as legal assistance attorneys; although other civilian employees may be designated to serve as a notary public, 10 U.S.C. § 1044a does not cover such designations and these employees must be qualified under state law
  - -- Other civilian employees (i.e., paralegals) must qualify as a notary under state laws
  - -- Adjutants, assistant adjutants, and personnel adjutants, including reserve members when not in a duty status
  - -- Enlisted paralegals on active duty or those reserve component members performing inactive duty training, who have received proper training
  - -- Commissioned officers or master sergeant and above stationed at geographically separated units (GSUs) or remote locations where no judge advocate or paralegal notary is assigned, and who have been designated in writing by the GSU's servicing general court-martial convening authority's staff judge advocate and received proper training

Special Rules for Certain Military Instruments

- 10 U.S.C. §§ 1044b, 1044c, and 1044d provide for the execution of military powers of attorney, military advance medical directives (commonly referred to as a "living will"), and military testamentary instruments (commonly referred to as a "will"). These documents:
  - -- Are exempt from any requirement of form, formality, or recording that is required under the laws of a state
    - --- Military powers of attorney and advance medical directives, but not wills, are also exempt from any state requirements of substance

-- Shall be given the same legal effect as powers of attorney, living wills, and wills prepared and executed in accordance with the laws of the state concerned. Military advance medical directives are not enforceable in states that otherwise do not recognize living wills.

- All other documents, notarized under the authority of 10 U.S.C. § 1044a, are subject to state law as to form, substance, formality or recording

Notary Procedures and Guidelines

- Personnel signing documents as a notary public under 10 U.S.C. § 1044a must:
  - -- Specify date, location, title, and office
  - -- Use an inked stamp or a raised seal that contains a cite to 10 U.S.C. § 1044a and the identifiers "U.S. Air Force" and "Judge Advocate"
  - -- Verify the identity of each person whose signature is to be notarized, with a military ID card
  - -- Administer an oath, in accordance with the rules of AFI 51-304 and Title 10 for any "sworn" document
  - -- Maintain a personal notary log as proof of each notarial act performed, to include each signer's name and signature, type of document, date, and location. These logs will be maintained according to AFI 51-304 and/or applicable state law.
- Personnel signing documents as a notary under 10 U.S.C. § 1044a must **NOT**:
  - -- Notarize incomplete documents (to include accepting previously signed signatures as genuine on the word of a third party)
  - -- Accept any fee for the performance of a notarial act
  - -- Certify a document as a "true and accurate copy" unless they are the custodian of the original. To certify a document as a "true and accurate copy" is to verify the document's authenticity and carries specific legal effect that only the creator or the custodian of the original document can provide. However, the client's needs can usually be met with a notarized signed statement from the member stating that the document is true and accurate. The notary is merely notarizing the signed attestation of the client and thus not certifying the document.

References

10 U.S.C. §§ 1044, 1044a-d
AFI 51-304, *Legal Assistance, Notary, Preventive Law, and Tax Programs* (22 August 2018)

WILLS AND POWERS OF ATTORNEY

Wills and powers of attorney (POAs) are useful legal documents for members to manage their personal and financial affairs. A will is an instrument by which a person, known as a "testator," makes a disposition of his property to take effect after his death. A POA is a document by which a person conveys to another person the authority to handle specified affairs. Commanders should emphasize the importance of preparing wills and POAs, especially prior to deployment.

Wills

- Though it must be a free and voluntary act by the service member, **ALL** Airmen should be encouraged to make a will
- Even if a testator has little property, settling affairs with a will is often easier for the family. For instance, many states have "family probate" laws that allow a spouse to probate a valid will without a lawyer and with minimal expense.
- A will is particularly important for the following:
  - -- Personnel with minor children
    - --- The court will generally follow the designation of a guardian for the children in a will, which often prevents indecision and family disputes about who will care for orphaned children
    - --- Personnel with special needs children require expert estate planning advice to ensure the children are properly cared for and do not get removed from government programs
  - -- Personnel with extensive or certain valuable property. On a case-by-case basis, it may be advisable for members with extensive, valuable property to seek outside counsel for a more extensive will.
  - -- Personnel in a subsequent marriage or with blended families where either spouse comes to the marriage with children from a prior relationship
- State law dictates the requirements for making a valid will; these laws vary widely from state to state. For this reason, members should seek the services of the base legal office and avoid "do-it-yourself" wills. In some cases, the member may even be referred to an outside expert. The legal office is prohibited from executing "fill-in-the-blank" wills (e.g., LegalZoom products, etc.).
- If a member dies without a will, his property will be distributed according to state law
  - -- Under most state laws, property will only pass to blood relatives and not to in-laws or stepchildren
  - -- Property is generally transferred in the following order of precedence: surviving spouse, children, parents, and then siblings
  - -- Some states divide property between the surviving spouse and children, and some states allow minor children to receive property
  - -- Normally, a state will only receive the property if there are no surviving relatives
  - -- Members, rather than state law, can determine what happens to their estate by creating a valid will
- A will remains in effect until changed or revoked by the testator

- Certain life events may impact provisions in a testator's will, such that it would be advisable to amend the will. A testator should review his will periodically and consider updating it, especially with:
  - -- The birth or death of any person affected by the will
  - -- The marriage or divorce of the testator
  - -- A substantial change in the testator's estate

Powers of Attorney

- A POA is a document that allows someone else to act as your legal agent, or "attorney-in-fact." These documents are available at all base legal offices and can be particularly important for mobilizing personnel.
- POAs are only useful, though, if third parties, e.g., banks and businesses, are willing to accept the authority granted therein; third parties may or may not accept a POA at their discretion. Therefore, it is usually best to tailor the POA to the given situation.
- In order to perform the requested actions, the attorney-in-fact will hold the original, executed POA, which inherently creates some risk of abuse. Personnel should carefully choose the person to whom they grant authority.
- To revoke a POA before its expiration, personnel may retrieve the original document and destroy it, or execute a revocation of POA and give a copy to any person that might deal with the person who has the original POA. There are several types of POAs, as described below:
  - -- <u>General POA</u>:
    - --- Gives comprehensive authority over virtually all legal and some non-legal affairs. Basically, the attorney-in-fact can do any and all things the grantor could do.
    - --- Because the authority granted is so expansive, this type of POA should only be used if a special POA will not suffice and if the agent is *completely trustworthy*
    - --- A person with a general POA, who is not trustworthy, has the ability to cause serious financial or legal problems for the grantor
    - --- Many banks and realtors will not accept a general POA for the purchase or sale of real estate and instead require a special POA containing the legal description of the property and the actions authorized
  - -- <u>Special POA</u>:
    - --- Grants limited authority to accomplish specific transactions, such as buying/selling real estate or a car, usually for a limited time period
  - -- <u>Durable POA</u>:
    - --- Takes effect upon, or is still effective notwithstanding, a person's medical incapacity and designates another person to make decisions on behalf of the incapacitated person
    - --- A general or special POA may be made "durable" with appropriate language
    - --- Allows the attorney-in-fact to make decisions and manage the affairs for the incapacitated person for the duration of the incapacity
    - --- The authority may extend to decisions for medical purposes, including a decision regarding terminating or limiting medical care in appropriate cases

--- Generally eliminates the need for a court to establish a guardian and conservator for the incapacitated person

Military POAs and Wills

- 10 U.S.C. §§ 1044b, 1044c, and 1044d, respectively, provide for the execution of military POAs, military advance medical directives, known as "living wills," and military testamentary instruments or "wills." These documents, though executed by the military, will be given the same legal effect as documents prepared and executed in accordance with the laws of the state concerned. These military documents:
  -- Are exempt from any requirement of form, formality, or recording that is required under the laws of a state
  -- Military living wills are not enforceable in states that do not recognize living wills

---

References

10 U.S.C. §§ 1044b-d

DoDD 1350.4, *Legal Assistance Matters* (28 April 2001), incorporating Change 1, 13 June 2001, certified current 1 December 2003

AFI 51-304, *Legal Assistance, Notary, Preventive Law, and Tax Programs* (22 August 2018)

TAX ASSISTANCE PROGRAM

Air Force Tax Assistance programs are command programs designed, in compliance with Internal Revenue Service (IRS) Standards of Conduct, to provide free tax assistance and filing services to eligible beneficiaries. Resourced and managed properly, a healthy program will enhance morale and help beneficiaries address some of the unique income tax aspects associated with military service. The size and scope of each program may vary from base to base, depending on mission requirements, geographical location, availability of resources, and the unique needs of the local community.

Scope

- The installation commander, in consultation with the staff judge advocate (SJA), has the flexibility to decide, based on the needs of the installation and available resources, which of the following programs is best, including a "hybrid" approach. This also includes the option not to have an installation tax program, if circumstances warrant.
  - -- Traditional On-Base Tax Assistance Program:
    - --- These "full service" programs are supervised by the SJA and staffed by legal office personnel, as well as base volunteers, under the IRS' Volunteer Income Tax Assistance (VITA) program
    - --- Tax assistance personnel are trained by and use the IRS' electronic filing resources
    - --- Tax Assistance programs are separate and distinct from the Legal Assistance program; attorney-client privilege does not apply to the preparation of income tax returns
  - -- Self-Service Kiosks:
    - --- If resources are limited, a smaller team of volunteers can be trained to assist personnel in filing their taxes with the Military One Source website at available kiosks
  - -- Referrals to Other Free Tax Preparation Services:
    - --- Without endorsing any one non-federal service, the base legal office will take the lead in publicizing off-base and electronic tax assistance options, such as the IRS Free File Alliance

Decisional Factors

- When deciding which program to support—or not to host a tax program—commanders and their SJAs should consider the following factors which may impact the availability of the program, such as:
  - -- Competing mission requirements
  - -- Availability of local volunteer support
  - -- Availability of IRS software and training support
  - -- The negative impacts to program continuity (e.g., loss of future IRS support, loss of future volunteer support, loss of institutional knowledge) should the installation want to continue the program at a later date
  - -- Budgetary constraints
  - -- Impact on base morale
  - -- Demand for tax services

-- Availability of free online filing services and other nearby VITA programs accessible for all beneficiaries

-- Availability of other professional filing services near the installation

-- Additionally, commanders and SJAs for commands serving in a host or supporting role on joint bases are advised to review support agreements for any provisions regarding the tax program

Eligible Beneficiaries

- Eligible beneficiaries are include active duty service members and their dependents and retirees and their dependents. SJAs can further limit eligible beneficiaries for the tax program (e.g., personnel E-6 and below). Lastly, SJAs should authorize tax services for victims of crimes, consistent with the availability of resources.

- SJAs may also extend services, as resources allow, to federal civilian employees. Federal civilian employees must adhere to applicable rules concerning use and allotting of their time when they seek tax assistance services.

References

10 U.S.C. § 1044
AFI 51-304, *Legal Assistance, Notary, Preventive Law, and Tax Programs* (22 August 2018)

10

CHAPTER TEN: CIVIL LAW RIGHTS AND PROTECTIONS OF MILITARY PERSONNEL

EQUAL OPPORTUNITY (EO) AND TREATMENT

The federal government has enacted many statutes to ensure equal opportunity (EO). Almost all of these statutes apply exclusively to civilian employees as victims; they do not cover military members as victims. However, the DoD and Air Force anti-discriminatory policies protect both military members and civilian employees through a bifurcated system. The primary difference in this bifurcated system is that military members are limited to presenting their complaints to forums within the executive department. Civilian employees, on the other hand, have the right to file a complaint before an independent federal court after exhausting administrative remedies within the executive department.

- The following are key EO statutes:
  - -- Title VII of the Civil Rights Act of 1964
  - -- Equal Employment Opportunity Act of 1972
  - -- The Rehabilitation Act of 1973
  - -- The 1978 Amendments to the Age Discrimination in Employment Act
  - -- The Civil Rights Act of 1991

Air Force Policy

- Air Force policy is to conduct its affairs free from unlawful, arbitrary discrimination or sexual harassment, and to provide equal opportunity and treatment irrespective of race, color, religion, national origin, or sex (to include sexual orientation)
- Commanders are required to immediately conduct an investigation when an employee makes a report of discrimination based on sexual harassment. This applies equally to both military members and civilians.
- Commanders must take appropriate administrative or disciplinary action to eliminate or neutralize discrimination and its effects

Air Force Equal Opportunity Program

- AFI 36-2706, *Equal Opportunity Program Military and Civilian*, Chapter 3, sets out the Air Force Military Equal Opportunity program for processing both informal and formal discrimination complaints made by military members
  - -- Military members are limited to presenting administrative complaints of discrimination, which when substantiated are addressed through command action; they cannot bring a civil action against the government for employment discrimination and they cannot receive any kind of monetary damages normally available for civilians in the same situation
  - -- Air Force policy is clear: "Zero tolerance" of any kind of unlawful discrimination against military members on the basis of race, color, religion, national origin or sex (including pregnancy, gender identity, and sexual orientation)
  - -- Discrimination can be generally defined as any action that unlawfully or unjustly results in unequal treatment on the basis of race, color, religion, national origin or sex, and the distinctions are not supported by legal or rational considerations
  - -- Such discrimination includes, but is not limited to:
    - --- Insults, printed materials, visual materials, signs, symbols, posters, or insignias that infer negative statements pertaining to protected status (e.g., race, religion)

--- Personal discrimination to bar or deprive a person of a right or benefit

--- Sexual harassment

--- Institutional practices that deprive a person or group of a right or benefit

-- The military equal opportunity (MEO) office is the office of primary responsibility (OPR) for the Air Force EO program and handles almost all informal and formal complaints of discrimination brought by military members

Unit Commander's Responsibilities

- Inform unit members of the right to file EO complaints without fear of reprisal
- Posts within the unit, as well as, endorses and communicates through commander's calls/briefings, the Installation Commander's and Secretary of the Air Force's policy memos on unlawful discrimination and sexual harassment
- Inform unit members that appropriate disciplinary and corrective action will be taken if unlawful discrimination or reprisal is substantiated
- At a minimum, provide MEO the demographics of participants and action taken on all EO allegations investigated within the unit
- Investigate allegations of unlawful discrimination or sexual harassment when the complainant has elected not to file with the MEO office
  -- Appoint an EO specialist to serve as a subject matter expert (SME) and be consulted on any report per AFI 36-2706, paragraph 1.23.14
- Take action to end unlawful discrimination or sexual harassment when a formal MEO complaint/incident is substantiated
- Enforce EO policy in a fair, impartial, and prompt manner
- Ensure rating and evaluating officials evaluate compliance with EO directives and document repeated or serious violations
- Inform alleged offender(s) they are the subject of a formal MEO complaint, ensure they are cautioned against taking reprisal or other retaliatory actions, and ensure they are briefed on the outcome of the MEO case when it is closed and advise on their right to appeal
- Accomplish unit climate assessments surveys within 120 days after assumption of command and every 12 months after the completion of previous assessments for units of 50 or more personnel

Complaint Processing Procedures

- MEO serves as the focal point for complaints of discrimination brought by military members, but the nature of the complaint will determine which agency conducts the investigation
  -- Military EO complaints against senior officials, consisting of officers in the grade of O-7 select and above, Air National Guard colonels with a certificate of eligibility, and members of the senior executive service, must be immediately referred to SAF/IGS
    --- EO must notify the installation commander and local IG when there is a military EO complaint against an officer in the grade of O-6, an officer who has been selected for O-6, or a civil service employee in the grade of GS-15, and the installation commander must notify MAJCOM/IGQ and SAF/IGQ of such complaints

- Complaints involving criminal activity such as assault, rape, or child abuse must be immediately referred to the Air Force Office of Special Investigations (AFOSI) or Security Forces Squadron. In cases of sexual assault, the EO specialist will also notify the Sexual Assault Response Coordinator (SARC).
- Complainants may elect to use informal complaint process, which may include alternate dispute resolution (ADR)
  - -- When MEO investigates a complaint of discrimination, it is called a complaint clarification and the allegation is documented on AF Form 1587-1, *Military Equal Opportunity Formal Complaint Summary*
  - -- Base-level MEO personnel conduct clarifications of formal complaints
    - --- The purpose of clarification is to determine whether a formal complaint is supported by a preponderance of the credible evidence (more likely than not)
    - --- If a clarification results in a determination that an alleged violation has occurred, the case **MUST** be forwarded through the servicing staff judge advocate (SJA) to the offender's and the complainant's commander for appropriate action
  - -- Both the complainant and the subject of a formal EO complaint may appeal the findings upon completion of complaint clarification
  - -- All appeals must be in writing
  - -- There is no right to a personal hearing
  - -- Commanders are not required to withhold command action pending an appeal
  - -- Installation commanders, MAJCOM/CVs, and SAF/MRB are authorized to decide appeals of formal complaints of discrimination in MEO cases
    - --- First level of appeal is to the lowest level of command authorized to decide the appeal, usually the installation commander
    - --- The appellate authorities may sustain or overrule any finding rendered below or remand the matter for further fact finding
    - --- SAF/MRB is the final review and appeal level for findings of formal complaints of unlawful discrimination
- Findings rendered pursuant to command action under the UCMJ are not subject to appeal through MEO channels

Performance Evaluation Reports

- Rating and reviewing officials **MUST** consider membership in groups espousing supremacist causes or advocating unlawful discrimination in evaluating and assigning military members
- While mere membership in such groups is not prohibited, members who join groups espousing supremacist causes or advocating unlawful discrimination may not be suited to hold supervisory or other responsible positions if their personal views would be in conflict with Equal Opportunity and Treatment Program (EOT) guidelines they are required to support
- Rating and reviewing officials must document serious or repeated deviations from DoD and Air Force directives prohibiting discrimination

Reprisal/Whistleblower

- Air Force members are protected from reprisal for making, preparing, or attempting to make, a complaint of unlawful discrimination or sexual harassment to EO personnel, an IG or a member of the IG's investigative staff, members of Congress or a member of their staff, DoD law enforcement organizations, or any other person or organization in the member's chain of command designated pursuant to AFI 90-301 or other established administrative procedures to receive such communications
- Reprisal complaints are referred by EO to the installation IG

References

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*
EEO Act of 1972, Pub. L. 92-261, as amended 42 U.S.C. §§ 2000e *et seq.*
The Rehabilitation Act of 1973, 9 U.S.C. §§ 701 *et seq.*
1978 Amendments to the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq.*
The Civil Rights Act of 1991, Pub. L. 102-166, as amended 42 U.S.C. § 2000e
AFI 36-2706, *Equal Opportunity Program Military and Civilian* (5 October 2010), incorporating Change 1, 5 October 2011, including AFI36-2706_AFGM2017-01, reissued 1 February 2018
AFI 90-301, *Inspector General Complaints Resolution* (28 December 2018)

PROHIBITION ON SEXUAL HARASSMENT

- The Air Force defines sexual harassment as a form of sex discrimination that involves unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when:
  - -- Submission of such conduct is made either explicitly or implicitly a term or condition of a person's job, pay, or career
  - -- Submission to or rejection of such conduct by a person is used as a basis for career or employment decisions affecting that person
  - -- Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creates an intimidating, hostile, or offensive working environment
- Workplace conduct may be actionable as "hostile work environment" harassment even if it does not result in concrete psychological harm to the victim; rather, it need only be so severe or pervasive that a reasonable person would perceive, and the victim does perceive, the work environment as hostile or offensive. "Workplace" is an expansive term in the military context and may include conduct on or off duty, 24 hours a day.
- Any person in a supervisory or command position who uses or condones any form of sexual behavior to control, influence, or affect the career, pay, or job of a military member or civilian employee is engaging in sexual harassment
- Any military member or civilian employee who makes deliberate or repeated unwelcome verbal comments, gestures, or physical contact of a sexual nature in the workplace is also engaging in sexual harassment
- Any form of unwelcome sexual advance against employees of either gender may constitute unlawful sexual harassment

Types of Sexual Harassment

- Judicial decisions have recognized two basic kinds of sexual harassment, both of which are reflected in the Air Force's definition:
  - -- *Quid pro quo* (meaning "this for that")
  - -- Hostile work environment

Quid Pro Quo Sexual Harassment

- Sexual harassment occurs when an employee suffers or is threatened with some kind of employment injury for refusing to grant sexual favors, or is promised some sort of tangible job benefit in exchange for sexual favors
  - -- Generally, it involves a supervisor/subordinate relationship where the victim is told to submit to sexual requests or be fired, demoted, or denied a promotion, an award, training opportunity, objective appraisal, etc.
  - -- A single incident may be enough to qualify as *quid pro quo* sexual harassment
  - -- A threat to take action that changes a victim's employment situation in exchange for sexual favors without an actual job benefit or detriment is sufficient to constitute *quid pro quo* sexual harassment under Air Force regulations

Hostile Work Environment Sexual Harassment

- Occurs when a supervisor, co-worker, or someone else with whom the victim comes in contact on the job creates an abusive work environment or interferes with the employee's work performance through words, actions, or conduct that is perceived as sexual in nature
  - -- Some examples include:
    - --- Discussing sexual activities
    - --- Unnecessary touching
    - --- Commenting on physical attributes
    - --- Displaying sexually suggestive pictures or pornography
    - --- Using demeaning or inappropriate terms, such as "babe"
    - --- Using unseemly or profane gestures
    - --- Granting job favors to those who participate in consensual sexual activity
    - --- Using sexually crude, profane, or offensive language
  - -- A single act, if severe enough, may support a cause of action for hostile work environment sexual harassment
  - -- The nature, severity, frequency, and duration of the conduct are some factors the courts consider when evaluating whether certain conduct constitutes sexual harassment
  - -- How severe or pervasive the harassment must be to constitute sexual harassment depends upon the specific facts
    - --- Conduct that constitutes harassment in one situation may not in another; however, the commander who demands professional, civil conduct from members of the organization will prevent most of the problems that arise in this area
    - --- An isolated epithet does not usually support a cause of action for hostile work environment discrimination
      - ---- That does not mean that commanders are in any way restricted from taking disciplinary action based upon a single incident
      - ---- In fact, commanders are required to act to stop sexual harassment no matter how minor the conduct may be
    - --- Because the legal boundaries involved in this type of sexual harassment are unclear, supervisors and subordinates alike should avoid **any** sexual conduct in the workplace or any behavior that is in any way demeaning to members of the opposite or same sex
    - --- All complaints, regardless of whether they appear to meet the legal test of hostile work environment sexual harassment, should be quickly investigated and appropriate action taken to stop offensive conduct
    - --- Hostile work environment sexual harassment is the most difficult type to recognize, and the particular facts of each situation determine whether offensive conduct has crossed the line from simply inappropriate behavior to sexual harassment

- Under Title VII of the Civil Rights Act of 1964, civilian victims may sue the Air Force for monetary damages for sexual harassment in either form
  - -- An employer (e.g., the Air Force) will almost always have no defense in a case of sexual harassment if the facts show conduct that resulted in an actual tangible employment action (firing, demotion, etc.)
  - -- Provided no tangible employment action occurred, an employer (e.g., the Air Force) may be able to establish a defense to either *limit* or *avoid* liability if the employer has a formal, published policy against sexual harassment; provides training to its employees and supervisors about sexual harassment (and how to stop it); has a grievance and complaint system in place; and takes prompt effective corrective action to remedy a complaint of sexual harassment
- Command attention to sexual harassment must include the following actions:
  - -- Publish clearly the Air Force's policy on sexual harassment, i.e., zero tolerance
  - -- Ensure that civilian employee/military member avenues of communication and complaint are well publicized throughout the unit
  - -- Provide appropriate training on sexual harassment
  - -- Act quickly to investigate all complaints of sexual harassment in a fair and impartial manner
  - -- Seek advice from the EO office, the staff judge advocate (SJA), and the civilian personnel office, as appropriate, before taking action against offenders

Commander's Inquiry – Military or Civilian Complainant

- A complainant (either military or civilian) may elect the commander's inquiry and/or the MEO process for military complainant/equal employment opportunity (EEO) process for civilian complainant
- The process is dual-tracked in that the commander's inquiry, if elected by the complainant, is conducted even if the MEO/EEO process has not been completed
- When the commander receives a complaint, 10 U.S.C. § 1561 requires several actions (commanders should consult the local SJA office for assistance). **Within 72 hours** after receipt of the complaint, the commander must:
  - -- Forward the complaint or a detailed description of the allegation to the general court-martial convening authority (GCMCA)
  - -- Begin the investigation
  - -- Advise the complainant of the beginning of the investigation and provide victim support resources available, on and off-base, and any appeal rights
- The commander is responsible for ensuring the investigation is completed no later than 14 days after it was commenced
- The commander shall also submit a report on the progress made in completing the investigation to the GCMCA within 20 days after the investigation began and every 14 days thereafter until the investigation is completed, and upon completion of the investigation, then submit a final report on the results of the investigation, including any action taken as a result of the investigation
- The complainant is entitled to notification of the completion of the investigation along with a copy of the final investigative report. The commander shall also notify the complainant of any appeal rights.

- The commander must submit the report of investigation to the local SJA office for review of legal sufficiency

Complaint Processing – Military Complainant

- The EO office is the office of primary responsibility (OPR) for the Air Force EO program and has primary responsibility for the maintenance of the program and for handling complaints of sexual harassment
  - -- If a complaint (formal or informal) is filed with the EO office, it will be handled by the EO officer and the alleged occurrence of harassment will be called an EO incident
  - -- Generally, a formal complaint filed by a military member will generate an investigation by EO personnel called a clarification
  - -- The clarification is designed to determine the facts and cause of the EO incident, assess the severity of the incident and the effect on morale and good order and discipline, and develop recommendations concerning the classification of the incident and appropriate corrective action
    - --- A clarification will include witness interviews, taking statements, reviewing records and documents, and will ultimately conclude with a report by an investigating officer
    - --- The standard of proof used in a clarification is a preponderance of the credible evidence (i.e., more likely than not)
    - --- At the conclusion of the investigation, the EO incident will be either unsubstantiated or substantiated and therefore a recommendation will be made
    - --- Strict time standards exist for completion of the clarification
  - -- If the EO incident is substantiated, a legal review is required before the report is forwarded to the concerned commander for appropriate action
  - -- The complaint process allows for an appeal of the findings of the clarification of formal complaints of sexual harassment
- MEO will not investigate a complaint that involves criminal conduct
  - -- Criminal conduct will be handled by the base law enforcement community
- MEO will not investigate a complaint filed by a civil service employee, but rather will document the complaint and refer it to EEO regardless of the status of the alleged offender

Complaint Processing – Civilian Employee Complainant

- The EEO counselor is the OPR for complaints of sexual harassment brought by civilian employees
- Pre-Complaint: After a complainant has made initial contact with the EEO Office, an EEO counselor will advise the complainant of certain rights and obligations, place all allegations in the pre-complaint process regardless of merit or timeliness, and attempt to resolve the situation between the parties. The EEO counselor has 30 days to complete this process (60 days upon agreement by the complainant).
- If the EEO counselor is unable to resolve the situation during pre-complaint processing, the complainant is advised that he/she may file a formal complaint of discrimination

- Formal Complaint: The EEO counselor will, among other things, advise the complainant of further rights
  - -- During this time, the complaint is evaluated by civilian personnel and the legal office for soundness and possible settlement
  - -- The Installation EEO Manager requests a complaint investigator from the investigations and resolutions division (IRD) within 30 days of the date the formal complaint was filed
  - -- IRD will investigate the complaint and send a copy of the report of investigation and complaint file to the Installation EEO Manager, Air Force Civilian Appellate Review Office (AFCARO), and the complainant or complainant's designated representative
  - -- The complainant must then elect whether an Equal Employment Opportunity Commission (EEOC) hearing is desired or whether he/she prefers the Air Force to issue a final decision
  - -- The complainant and the commander can meet and discuss possible resolution of the complaint during the period of time the complainant is deciding which route to pursue
  - -- The complainant has 30 days from receipt of the report of investigation to request an EEOC hearing
- After the formal complaint process, it is possible for the complainant to make various appeals and eventually file suit in federal court; consult the legal office for further information

Command Options to Address Substantiated Complaints of Sexual Harassment

- Commanders who find military personnel to have engaged in sexual harassment have the usual disciplinary and administrative options, including counseling, admonishment, reprimand, nonjudicial punishment, administrative discharge, and court-martial
- Commanders who find civilian personnel to have engaged in sexual harassment should normally focus any disciplinary action on the offensive act or acts involved (e.g., unwelcome touching, offensive comments) rather than alleging sexual harassment, and may deal with the misconduct pursuant to AFI 36-704, *Discipline and Adverse Actions of Civilian Employees*

References

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*
The Civil Rights Act of 1991, Pub. L. 102-166, as amended 42 U.S.C. § 2000e 10 U.S.C. § 1561
29 C.F.R. Part 1614
DoDD 1350.2, *Department of Defense Military Equal Opportunity (MEO) Program* (18 August 1995), certified current 21 November 2003, incorporating through Change 2, 8 June 2015
DoDI 1020.03, *Harassment Prevention and Response in the Armed Forces* (8 February 2018)
AFI 36-701, *Labor Management Relations* (6 April 2017)
AFI 36-704, *Discipline and Adverse Actions of Civilian Employees* (3 July 2018)
AFI 36-2706, *Equal Opportunity Program Military and Civilian* (5 October 2010), incorporating Change 1, 5 October 2011, including AFI36-2706_AFGM2017-01, reissued 1 February 2018
AFI 90-301, *Inspector General Complaints Resolution* (28 December 2018)

THE INSPECTOR GENERAL (IG) COMPLAINTS RESOLUTION PROCESS

Overview

The inspector general (IG) is the "eyes and ears" of the commander. The IG complaints resolution program is a leadership tool to resolve problems affecting the Air Force mission promptly and objectively.

- The IG will encourage complainants to try to resolve their problem(s) at the lowest level first—this usually means the chain of command
- The IG has authority to process a variety of complaints related to violations of law, policy, procedures or regulations, abuse of authority, etc.
- **ONLY** the IG has the authority to process certain types of allegations for military members: reprisal and restriction; if there is no evidence of reprisal and/or restriction, the IG will analyze for abuse of authority
- The IG **MAY NOT** be used for:
  - -- Matters normally addressed through other channels unless there is evidence those channels mishandled the matter or process
  - -- Matters listed in AFI 90-301, *Inspector General Complaints Resolution*, Table 3.7 (e.g., civilian reprisal complaints, Article 138, UCMJ, correction of military records, etc.)

IG Investigations

- IG investigations are distinct from other investigations, such as commander directed investigations (CDIs)
- An investigating officer (IO) investigates pursuant to AFI 90-301 when properly authorized, in writing, by the appropriate appointing authority
- A complaint analysis may result in a referral, including referral to a commander to consider a CDI, a dismissal, or a recommendation to investigate
- The standard of proof to substantiate an allegation during an IG investigation is a preponderance of the evidence (meaning more likely than not that the events occurred)

Reprisal ("Whistleblower" Protection) Complaints

- Reprisal is a violation of federal law, 10 U.S.C. § 1034, and may result in disciplinary action under the UCMJ or applicable civilian directives or instructions
- Reprisal occurs when a responsible management official (RMO) takes (or threatens to take) an unfavorable personnel action (UPA) or withholds (or threatens to withhold) a favorable personnel action on a military member for making or preparing, or being perceived as making or preparing to make, a protected communication
  - -- RMOs include three categories: (1) those who influenced/recommended the action; (2) those who took the action; and (3) those who approved/reviewed/endorsed the action
  - -- Personnel actions include actions that affect **OR** have the potential to affect a military member's current position or career (e.g., promotion, disciplinary/corrective action, reassignment, performance report, a significant change in duties not commensurate with the member's grade)

-- There are three types of protected communications:

--- (1) Any lawful communication to a member of Congress or an IG

---- An unlawful communication is a communication that itself constitutes misconduct, a violation of the UCMJ, or a violation of other criminal statute (e.g., knowingly false statements, unauthorized disclosures of information, threatening statements)

--- (2) A communication of information reasonably believed to evidence a violation of law or regulation when made to any of the following (list is not all-inclusive):

---- A member of Congress or a member of their staff; IG or member of the IG's staff; personnel assigned to DoD audit, inspection, investigation, law enforcement, EO, safety, sexual assault prevention and response designees, or family advocacy organizations; any person in the member's chain of command; Chief Master Sergeant of the Air Force, command chiefs, or first sergeants; courts-martial proceeding

--- (3) Testifying, or participating or assisting in an investigation/proceeding under (1) or (2) above, or filing, causing to be filed, participating or assisting in a reprisal and/or restriction action

-- *Examples of Protected Communications*: A major tells his commander about what the major reasonably thinks is a threat to flight safety; a senior airman tells her civilian director about what the senior airman reasonably believes to be sexual harassment by her immediate supervisor against an airman basic

- If the IO determines reprisal did not occur, the IO must conduct an analysis to determine if an abuse of authority occurred

-- Abuse of authority is an arbitrary and capricious exercise of power that adversely affects any person **OR** results in personal gain or advantage to the abuser

-- "Arbitrary and capricious" is defined as the absence of a rational connection between the facts found and the choice made, constituting a clear error of judgment

- All reprisal investigations undergo IG and legal reviews at the major command (or Joint Force Headquarters), Secretary of the Air Force (SecAF), and DoD levels

- DoD IG renders final review/approval

Restriction Complaints

- 10 U.S.C. § 1034 and AFI 90-301 also state that no person may restrict a military member from communicating with a member of Congress or an IG as long as the communication is lawful

-- An unlawful communication is a communication that itself constitutes misconduct, a violation of the UCMJ, or a violation of other applicable criminal statutes (e.g., knowingly false statements, unauthorized disclosure of information, threatening statements)

-- Example of restriction: Commander says, "You will bring any problems you have to me before going outside the chain of command"

- Restriction is a violation of federal law, 10 U.S.C. § 1034, and may result in disciplinary action under the UCMJ (e.g., violation of Article 92 for not following the applicable Air Force Instruction) or applicable civilian directives or instructions

- If the IO determines restriction did not occur, the IO must conduct an analysis to determine if an abuse of authority occurred

- All restriction investigations undergo IG and legal reviews at the major command (or Joint Force Headquarters), SecAF, and DoD levels
- DoD IG renders final review/approval

Commander Notification Requirements for Investigations Involving Officers

- IGs at all levels must collect, document, and notify SAF/IG of investigations opened by commanders (CDIs) on **ANY officer** (2d Lt through Col) and the issuance of stand-alone adverse action, such as LOCs, LOAs, LORs, or Article 15s, to field grade officers (installation IGs collect CDIs at the base level, MAJCOM IGs collect CDIs at the MAJCOM level, etc.)
  - -- AFI 90-301, Table 7.1 highlights other investigations and the documents required by SAF/IGQ in order for the IG to close a case involving adverse information
- Commanders, directors and civilian leaders will:
  - -- Notify the local IG at the start of **ANY investigation** when **ANY officer** (or GS-15 or equivalent) is named as a subject
  - -- Notify the local IG at the conclusion of **ANY investigation** when **ANY officer** (or GS-15 or equivalent) was named as a subject **whether substantiated or not**
  - -- Notify the local IG when a **field grade officer** (or GS-15 or equivalent) is administered adverse command action such as LOCs, LOAs, LORs, or Article 15s for any reason, with or without an investigation
- Commanders and civilians leading an organization designated as a unit in accordance with AFI 38-101, at all levels, including joint commands, will immediately notify SAF/IGS of any allegations (criminal, administrative, or otherwise), any adverse information, or any potentially adverse information involving senior officials and provide an information copy to the servicing wing IG office

Special Processing Requirements

- Reprisal and restriction complaints have unique reporting requirements as set forth in AFI 90-301 and only the IG may investigate such allegations
- Only SAF/IGS (unless otherwise specified in AFI 90-301) will conduct investigations into non-criminal allegations against senior officials, including complaints alleging violations of Military Equal Opportunity (MEO) policy by a senior official. However, SAF/IGS does not investigate civilian EO/sexual harassment allegations against senior officials. Those matters will be worked within appropriate EO channels.
  - -- A senior official is any active duty, retired, Reserve, or National Guard military officer in grades O-7 and above, and any officer selected for promotion to O-7 whose name is on the O-7 promotion board report forwarded to the Military Department Secretary (including Air National Guard colonels selected by a General Officer Federal Recognition Board for a Certificate of Eligibility (COE)); any current or former member of the Senior Executive Service; any current or former DoD civilian employee whose position is deemed equivalent to that of a member of the Senior Executive Service (e.g., Defense Intelligence Senior Executive Service, Senior Level employee, and nonappropriated fund senior executive); and any current or former Presidential appointee

Confidentiality

- Communications made to the IG are **NOT** privileged or confidential
- However, disclosure of these communications, and the identity of the communicant, will be strictly limited to an official need-to-know

Bottom Line

- The potential for an IG complaint should never dissuade a commander from taking timely and appropriate corrective and preventive actions for legitimate reasons
- Commanders should coordinate with the staff judge advocates for effective legal guidance on these issues

---

References

5 U.S.C. § 2302
10 U.S.C. § 1034
10 U.S.C. § 1587
10 U.S.C. § 2409
DoDD 7050.06, *Military Whistleblower Protection* (17April 2015)
DoD Inspector General, *Guide to Investigating Military Whistleblower Reprisal and Restriction Complaints* (29 June 2015)
AFI 90-301, *Inspector General Complaints Resolution* (28 December 2018)
AFPD 90-3, *Inspector General – The Complaints Resolution Program* (9 June 2016)
SAF/IG website: http://www.af.mil/InspectorGeneralComplaints.aspx

SERVICEMEMBERS CIVIL RELIEF ACT (SCRA)

SCRA provides a wide range of protections for military members whose duties might interfere with certain civil obligations and proceedings. The Act (previously called the Soldiers and Sailors Civil Relief Act) was enacted in 1940. In 2003, the Act was revised to be called the Servicemembers Civil Relief Act. It is regularly amended by Congress with the goal of allowing military members to focus on the military mission first.

- The Act applies to active duty members in civil matters, **NOT** criminal matters
- SCRA generally covers the time period on active duty, however some provisions apply to pre-service obligations (e.g., vehicle leases entered into prior to entry on active duty) and some provisions apply to a period following active service; some provisions also apply to dependents

Most Common and Relevant Provisions

- Eviction: The SCRA prohibits eviction of a service member and dependents from rented housing, without a court order, where the rent (as of 2018) does not exceed $3,716.73 per month. This amount is adjusted every February using a cost-of-living formula found in the Act and posted in the Federal Register. A court may delay eviction proceedings for up to three months, unless, in the opinion of the court, the ability of the tenant to pay the agreed rent is not materially affected by the tenant's military service.
- Storage Liens: A person holding a lien on a service member's property or effects may not foreclose or enforce any lien on the property or effects without a court order during any period of military service and for 90 days thereafter
- Landlord-Tenant Lease Termination: A military member may unilaterally cancel a landlord-tenant (residential) lease, without fees, if they receive orders (permanent change of station (PCS), which includes separation/retirement orders, or deployment for more than 90 days). To terminate a residential lease, the military member must submit a written notice and a copy of his/her military orders, or a letter from a commanding officer, by hand delivery, United States Postal Service (USPS) return receipt requested, or private carrier to the landlord or landlord's agent.
- Vehicle Lease Termination:
  - -- A military member may cancel a **pre-service** lease for a motor vehicle if they receive orders bringing them onto active duty
  - -- A military member may cancel **any** motor vehicle lease (pre-service or signed during service) for deployment orders for more than 180 days, or PCS orders to a location outside of the continental United States (CONUS), or PCS orders from Alaska or Hawaii to any location outside of those states
  - -- Early termination fees are prohibited
- Installment Contracts: A service member who enters into an installment contract (such as, for a vehicle) before entering active duty is protected if either a deposit or at least one installment payment has been paid before entering military service. The creditor cannot exercise rights of rescission, termination, or repossession without a court order.
- Cellular Phones: A cellular phone service contract may be terminated or suspended if the service member receives military orders or relocates for a period of not less than 90 days to a location that does not support the contract. This includes deployment or temporary duty assignment (TDY) orders for 90 days or longer and PCS orders. Cancellation or suspension is without penalties or extra fees, and the service provider must refund any payments that were made in advance for services that were not provided.

- Maximum Rates of Interest: The interest rate on a member's **pre-service** consumer debt or mortgage obligation must be capped at six percent, including most fees, unless the creditor shows that the ability of the service member to pay interest above six percent is not materially affected by reason of their military service. This relief applies during the entire period of active duty service, plus one year after duty, and must be applied retroactively if not requested at the outset of military service. The following types of financial obligations, among others, are currently eligible for the six percent SCRA interest rate benefit: credit cards; automobile, ATV, boat and other vehicle loans; mortgages; home equity loans; and student loans.
- Stay of Proceedings: Courts have the discretion to delay a civil court proceeding when the requirements of military service prevent the member from either asserting or protecting a legal right. The courts will look to whether military service **materially affected** the service member's ability to take or defend an action in court. If the service member submits communication to the court showing: (1) how military requirements materially affect the ability to appear, (2) the date when the service member will be available to appear, and (3) communication from the commanding officer stating that the duty prevents appearance and leave is not authorized; the court must grant a stay of at least 90 days.
- Default Judgments: Before a court can enter a default judgment (for failure to respond to a lawsuit or failure to appear at trial) against a military member, the person suing the member must provide the court with an affidavit stating the defendant is not in the military. If the defendant is in the military, the court will appoint an attorney to represent the defendant's interests (usually by seeking a delay of proceedings). If a default judgment is entered against a service member, the judgment may be reopened if the member makes an application within 90 days after leaving active duty, shows he was prejudiced, and shows he had a legal defense.
- Insurance:
  - *Life Insurance*: A service member's private life insurance policy is protected against lapse, termination, or forfeiture for nonpayment of premiums for a period of military service plus two years. The insured or beneficiary must apply to the Veterans' Administration (VA) for protection.
  - *Professional Liability Insurance*: Malpractice insurance must "freeze" when the member enters military service and then resume (exactly where it left off) after release from military service
  - *Health Insurance*: Pre-service health insurance plans must be reinstated upon termination or release from active duty, if the member applies within 120 days. Coverage will not be subject to any new exclusions or waiting periods that were not included in the original coverage, as long as the condition was not determined by the VA to be a disability incurred during or aggravated by military service.
- Taxation: A service member's state of legal residence may tax military income. A member does not lose legal residence solely because of a transfer pursuant to military orders. For example, if a member is a Virginia resident and is moved to a base in California, the member does not lose Virginia residency nor will he be subject to pay California state income tax on his military pay. Also, a non-resident service member's pay may not be used to "lift" a spouse's pay into a higher tax bracket (the so-called "Kansas rule").
- Military Spouses Residency Relief Act (MSRRA): In 2009, Congress substantially changed the legal framework regarding spouse residency for tax purposes. The MSRRA revised the SCRA to provide that military spouses do not lose nor acquire a residence for tax purposes solely because of a military move. Furthermore, while only military income is protected from non-resident income tax for the service member, the MSRRA exempts all income for the non-resident spouse. In order to receive this protection, the statute's language requires that the spouse's residence be the same as the service member, although some states do not appear to be enforcing this requirement.

- Pre-Service Mortgages: Significant protections exist against foreclosure regarding mortgages obtained before a service member was called to active duty service. If foreclosure is initiated during active duty service, or within one year following active service, foreclosure can only be obtained with a court order and the court should stay the proceedings or adjust the obligation if the ability to pay is materially affected by service.
- Adverse Actions: Creditors and insurers may not use a service member's exercise of rights under the SCRA as the sole basis for taking an adverse action (e.g., denial of credit, refusal of insurance) against the service member
- Child Custody: Based on a 2015 amendment, a state court is prohibited from considering a service member's deployment as the sole factor in determining the best interests of the child, though this provision does not create a federal right of action

---

References

Servicemembers Civil Relief Act, 50 U.S.C. §§ 3901– 4043
Military Spouses Residency Relief Act, Pub. L. 111-97

UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT (USERRA)

USERRA encourages non-career military service by minimizing civilian employment problems resulting from such service. USERRA prohibits discrimination and acts of reprisal against members who serve in the uniformed services.

Overview

- An employer including any government or private entity, regardless of size, may not deny a person initial employment, promotion, or any benefit of employment because the person performed or is obliged to perform service in a uniformed service
  - -- Uniformed services means the Air Force, Army, Navy, Coast Guard, Marine Corps, the commissioned corps of the Public Health Service, Army National Guard, and the Air National Guard
  - -- Service in the uniformed services means performing duty on a voluntary or involuntary basis in a uniformed service. It includes active duty, active and inactive duty for training, initial active duty for training, full-time National Guard duty, and a period for which a person is absent from a position of employment for the purpose of an examination to determine the fitness of the person to perform any such duty. Uniform service includes non-military services such as the National Disaster Medical System and the Commissioned Corps of the Public Health Service.

Eligibility Criteria

- To have reemployment rights following a period of uniformed service, a person must meet all of the following eligibility criteria:
  - -- Must have held a civilian job, which may include temporary jobs
  - -- Must have given advance notice to the employer that they were leaving the job for service in a uniformed service, unless such notice is impossible or unreasonable
  - -- The period of service does not exceed five years
    - --- The period of service is cumulative as long as the person is employed by or seeking reemployment with the same employer. A person starting a new job with a new employer receives a new five-year entitlement. For purposes of federal employment, the entire federal government is considered the employer, not any one individual agency.
    - --- Some categories of military service do not count toward the five-year limit such as most periodic and special Reserve and National Guard training, most service in time of war or emergency, and involuntary extensions on active duty
  - -- Must have been released from service under honorable conditions
  - -- Must have reported back to the civilian job in a timely manner or have submitted a timely application for reemployment

Period of Military Employment	1-30 Days	31-180 Days	More than 180 Days
Application Requirements	Report next scheduled work period–after sufficient time to allow safe transportation from military training site to the person's place of residence, plus 8 hours	Apply within 14 days following completion of service	Apply within 90 days following completion of service

Entitlements

- People who meet the eligibility criteria under USERRA have seven basic entitlements:
  - -- Prompt reinstatement
  - -- Accrued seniority, as if the person had been continuously employed
    - --- This is the "escalator principle," meaning the returning veteran does not step back on the seniority escalator at the point he stepped off, but at the point he would have occupied had he kept his position continuously during his military service
    - --- The "status" the person would have attained if continuously employed includes, for example, location, opportunity to work during the day instead of at night, and the opportunity to work in a department or at such times when there are better opportunities to earn commissions or to be promoted
  - -- Immediate reinstatement of civilian health insurance coverage, if the member does not elect to continue it during service
  - -- Other non-seniority benefits, as if the person had been on a furlough or leave of absence, such as holiday pay or bonuses
  - -- Training or retraining and other accommodations
    - --- USERRA requires an employer to make reasonable efforts to qualify the returning person for work, including training on new equipment or methods
    - --- An employer must also make a reasonable effort to accommodate a returning disabled service member otherwise entitled to reemployment
    - --- A returning service member may have rights under USERRA based on a service related disability that is not permanent. A service member who incurs a temporary disability may be entitled to interim reemployment in an alternate position provided he/she is qualified for the position and the disability will not affect his/her ability to perform the job. If no such alternate position exists, the disabled service member would be entitled to reinstatement under a "sick leave" or "light duty" status until he/she completely recovers.
      - ---- If disability is such that it cannot be accommodated and disqualifies the person from their pre-service job, the employer is required to reemploy the person in some other position which is most similar to the position to which they are otherwise entitled in terms of seniority, status, and pay

-- A person reemployed by an employer shall not be discharged, except for cause:

--- Within one year from being reemployed, if continuous service in the uniformed services was more than 180 days

--- Within 180 days from being reemployed, if continuous service was 31-180 days

--- No special protection exists for service of 30 days or less

-- Prohibition of discrimination or reprisal

--- An employer cannot deny initial employment, reemployment, retention, promotion, or any benefit of employment because of a person's service or application to serve in the uniformed services

--- An employer also may not take adverse employment action against a person because they either take enforcement action under USERRA, testify or assist in an USERRA investigation, or exercise any right under USERRA

Assistance and Enforcement

- The Veterans' Employment and Training Service (VETS) within the United States Department of Labor will assist persons claiming rights under USERRA, including persons claiming rights with respect to the federal government as a civilian employer, 1-866-487-2365, www.dol.gov/vets/

- The office of Employer Support for the Guard and Reserve (ESGR) will also assist service members in enforcing USERRA, 1-800-336-4590, Option 1

References

Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. §§ 4301–4335

32 C.F.R. Part 104

20 C.F.R. Part 1002

DoDI 1205.12, *Civilian Employment and Reemployment Rights for Service Members, Former Service Members and Applicants of the Uniformed Services* (24 February 2016), incorporating Change 1, 20 May 2016

Memorandum from the Assistant Secretary of the Air Force, *Civilian Reemployment Protections for Air Force Military Personnel*, 25 October 2011

UNIFORMED SERVICES FORMER SPOUSES' PROTECTION ACT (USFSPA)

In 1982, Congress passed the USFSPA to provide certain benefits to the former spouses of military members. Generally, the USFSPA allows courts to treat military retired pay as property subject to division in a divorce and provides certain additional benefits to former spouses.

What USFSPA Does

- Under USFSPA:
  - -- State courts are allowed to divide disposable military retired pay between the member and spouse **IF** the state court desires
  - -- Former spouses, in some circumstances, are able to receive a portion of the member's retired pay directly from the government
  - -- Some former spouses are entitled to care at military medical facilities and access to military exchanges and commissaries
  - -- Former spouses may be beneficiaries under the survivor benefit plan (SBP)
  - -- Some victims of spousal or child abuse are also eligible for benefits

What USFSPA Does Not Do

- USFSPA does **NOT**:
  - -- Require courts to divide military retired pay
  - -- Establish a formula or award a predetermined share of military retired pay to former spouses
  - -- Place a ceiling on the percentage of disposable retired pay that may be awarded to a former spouse
  - -- Require an overlap of military service and marriage as a prerequisite to division of military retired pay as property

Division of Retired Pay

- If a court apportions retired pay between member and spouse, only "disposable retired pay" (DRP) may be divided
  - -- DRP is defined as the member's monthly retired pay minus certain deductions, such as income tax withholdings, survivor benefit plan premiums, and, if the member is entitled to disability pay, the product of the member's monthly retired pay multiplied by the percentage of his disability (provided the disability rating is less than 50 percent)
- Compensation not included in DRP, including disability compensation, is not subject to division by state courts
- Amounts paid directly to a former spouse from the government cannot exceed 50 percent of member's DRP

Additional Retired Pay Considerations

- Concurrent Retirement and Disability Pay (CRDP):
  - -- CRDP is Veterans Affairs (VA) disability paid to the member in addition to full retirement pay

-- Members with 20 years of qualifying military service and a VA disability rating of at least 50% may apply for CRDP

-- CRDP can also be divisible with a former spouse under a military pension division order

- Combat-Related Special Compensation (CRSC):

-- CRSC is disability compensation, not retired pay. As a result, it is not divisible with a former spouse.

-- CRSC rates are based on the VA tables and increase with the number of retiree's dependents

-- A retiree cannot collect CRSC and CRDP at the same time; Defense Finance and Accounting Service (DFAS) makes the decision which is more beneficial to service member (highest net cash flow), regardless of whether there is a distribution to former spouse

Survivor's Benefit Plan (SBP)

- A state court can order the service member to designate the former spouse as SBP beneficiary

- Deemed election situation can occur if the member does not provide an agreement or court order to DFAS; the member could be deemed to have done so **IF** the spouse applies within one year of the court order

Jurisdiction under USFSPA

- USFSPA precludes a court from treating retired pay as the property of the member and their spouse unless the court has jurisdiction over the member based upon either:

-- The member's residence, other than because of military assignment;

-- The member's domicile; or

-- The member's consent to the court's jurisdiction

Direct Payment of Retired Pay

- Direct payment of retired pay may be made to a former spouse from the military pay centers if:

-- There is a court order or a property settlement that has been ordered, ratified or approved by the court

-- The final order specifically provides that payment is to be made from disposable retired pay and is for either:

--- Child support

--- Alimony

--- Division of retired pay as property, if:

---- The former spouse was married to the member for 10 years or more, during which the member performed 10 years or more of creditable service, and

---- The order expresses payment as a fixed dollar amount or percentage of disposable retired pay. If the parties were divorced prior to the member's retirement, the court order can express the award as an acceptable formula or hypothetical retired pay award.

- Direct payments terminate upon the earliest of three events:
  - -- Terms of court order satisfied
  - -- Death of the retired member
  - -- Death of the former spouse

Procedure to Request Direct Payment

- The former spouse must send the designated agent of the member's uniformed service (for Air Force members, DFAS-CL) the following items:
  - -- A signed DD Form 2293, *Application for Former Spouse Payments from Retired Pay*; and
  - -- A copy of the court order and other accompanying documents that provide for payment of child support, alimony, or division of property. Any accompanying documents must be certified by an official of the issuing court.
- Notification to DFAS can be by regular mail, e-mail, fax or certified mail
- No later than 30 days after effective service, DFAS shall send written notice to the affected member at the last known address
- DFAS may reject any request for direct pay that does not satisfy the statutory requirements
- If the member responds to the notification, DFAS will consider the response and will not honor the court order whenever it is shown to be defective, modified, superseded, or set aside
- No later than 90 days after effective service or after the member becomes entitled to retired pay, DFAS shall make payment to the former spouse and inform him/her of the amount to be paid. If the court order will not be honored, an explanation shall be sent as to why the court order was not honored.

Domestic Abuse Cases

- Allows the former spouse to collect his/her portion of retirement pay (and other benefits) even though the service member does not retire because of adverse action based on domestic abuse
- Requirements:
  - -- Court order for portion of disposable retired pay as property settlement
  - -- Member eligible by years of service for retirement but loses right to retire due to misconduct involving dependent abuse
  - -- Person with court order is either victim of abuse or parent of the child who was the victim of the abuse
- Benefits:
  - -- Retirement pay determined by amount member would have received if retired
  - -- Other benefits: Base Exchange (BX), Commissary, medical and dental, legal assistance
- Procedures:
  - -- DFAS treats just like any other direct payment request
  - -- Must still meet 10 year test (10/10 spouse)

Reserve and National Guard Retirement

- Typically deferral of payment until 60 years old needs to be considered in divorce situations
- Early Retirement:
  - Reserve retired pay age may be reduced below age 60 by three months for each aggregate of 90 days active duty performed in support of a contingency during the same fiscal year
  - The age for retired pay cannot be reduced below the age of 50
  - Most active duty time qualifies, including training, operational support duties and school tours, provided such active duty is performed under the authority of 10 U.S.C. § 12301(d)

Eligibility for Military Benefits

- 20/20/20 Spouse:
  - An unremarried former spouse receives medical, commissary, BX, and theater privileges under morale, welfare, and recreation (MWR) if qualified as a 20/20/20 spouse:
    - He/she was married to the military member for at least 20 years at the time of the divorce, dissolution or annulment
    - The military member has performed at least 20 years of service that is creditable in determining eligibility for retired pay (the member does not have to actually be retired from active duty); and
    - The former spouse was married to the member during at least 20 years of member's retirement-creditable service
- 20/20/15 Spouse:
  - An unremarried former spouse may be eligible for limited medical benefits (but not BX or Commissary privileges) if qualified as a 20/20/15 spouse:
    - He/she was married to the military member for at least 20 years at the time of the divorce, dissolution or annulment
    - The military member has performed at least 20 years of service that is creditable in determining eligibility for retired pay (the member does not have to actually be retired from active duty); and
    - The former spouse was married to the member during at least 15 years of member's retirement-creditable service
- Restoration of Benefits:
  - Qualifying former spouses who have remarried may receive a restoration of some benefits upon the termination of that marriage by divorce or death. Medical benefits, however, are lost forever upon remarriage, unless the marriage is annulled.

References

Uniformed Services Former Spouses' Protection Act, 10 U.S.C. § 1408
10 U.S.C. §§ 1072, 1076, 1086a, 1413a, and 1414
10 U.S.C. § 12301(d)
32 C.F.R. Part 63.6
AFI 36-3026_IP, Volume 1, *Identification Cards for Members of the Uniformed Services, Their Family Members, and Other Eligible Personnel* (4 August 2017)
DD Form 2293, *Application for Former Spouse Payments from Retired Pay* (April 2018)

ENSURING THE FAIR HANDLING OF DEBT COMPLAINTS AGAINST SERVICE MEMBERS

Service members have the same legal rights under state and federal law as civilian consumers. It is important for commanders to understand that both law and Department of Defense (DoD) policy make a distinction between dealing with third parties who are "creditors" whom the debt originated with, and "debt collectors" who are in the business of collecting debts for another person or business.

- The Fair Debt Collection Practices Act (FDCPA) is a federal law that regulates how debts may be collected. The FDCPA regulates debt collection agencies and attorneys and does not apply to original creditors. A creditor is defined as a person or entity to whom or which a debtor owes money. Most major creditors, particularly credit card companies, have adopted collection policies that do not violate federal law. Original creditors are also regulated by state laws which may closely follow the FDCPA.
  - -- Debt collectors are in the business of collecting debts that are owed to creditors. This includes individuals, collection agencies, lawyers who collect debts on a regular basis, and companies that buy delinquent debts and then try to collect them. Debt collectors are strictly limited in how they conduct their activities, under both under the FDCPA and state law. Therefore, if a debt collector's conduct violates the FDCPA, as noted in the following sections, it may also violate applicable state law.
- Specific procedures for commanders to address cases alleging personal financial indebtedness are outlined in AFI 36-2906, *Personal Financial Responsibility*

Debt Collector Communications with the Chain of Command

- The purposes of the FDCPA are to: (1) eliminate abusive debt collection practices; (2) ensure that those collectors who refrain from using abusive debt collection practices are not competitively disadvantaged; and (3) to promote consistent state action to protect consumers against debt collection abuses
- Accordingly, debt collectors are generally **prohibited** from contacting third parties—including commanders and first sergeants—without a court order or the debtor's prior consent given directly to the debt collector. This is because the debt collector should be dealing directly with the service member/debtor. There are two limited exceptions to this rule:
  - -- First, a creditor or debt collector can call and ask for the member's contact information, but they are not permitted to identify themselves as someone calling regarding a debt
  - -- Second, if the member has given them written permission after the debt was created
- Under these exceptions, debt collectors may only contact the command section and then only once. Absent these circumstances, a debt collector should not be contacting the command section.
- Furthermore, under DoD policy, the chain of command's assistance in indebtedness matters shall not be extended to any creditors:
  - -- Who have not made a bona fide effort to collect the debt directly from the member;
  - -- Whose claims are patently false and misleading; or
  - -- Whose claims are obviously exorbitant

Debt Collector Communications with the Service Member/Debtor

- A debt collector is allowed to directly contact and communicate with a debtor, but the FDCPA limits where, when, and how these communications may occur. The FDCPA requires a debt collector to furnish a debtor with written notice of the debt within five days after first communicating with him/her.
  - -- The notice must identify the debt, the creditor, and how the debtor can require the debt collector to verify the debt (if the debtor believes payment has already been made or the amount of the debt is incorrect)
- If the debtor chooses to dispute the existence or amount of the debt, he/she must do so within 30 days of receiving this notice. Once a debt is disputed, the debt collector must stop communicating with debtor until the debt is verified and a copy of that verification is mailed to the debtor.
  - -- A debtor who refuses to pay a debt should make those intentions known to the debt collector in writing
  - -- Once the debt collector has written notification that the debtor does not plan to pay the debt, he/she should cease communications with the debtor. The debt is not forgotten, however, and a debt collector can still file a lawsuit to recover the amount that is owed. A debt collector may still communicate with a debtor for the limited purpose of notifying him/her of plans to pursue a lawsuit.

Prohibited Debt Collector Communications

- The FDCPA prevents debt collectors from a number of illegal actions:
  - -- Harassing the alleged debtor or others
    - --- Includes threats of violence, use of obscene language, repeated or continuous phone calls, and threats to contact third parties
  - -- Debt collectors cannot contact the alleged debtor at unusual hours, such as before 0800 or after 2100
  - -- Failure to send the required notice
    - --- When a debt collector first contacts the alleged debtor, they must notify him/her within five days of (1) the amount of the debt, (2) name of the original creditor, (3) the right to dispute the debt, (4) the right to obtain validation of the debt, and (5) the right to obtain the name and address of the original creditor
  - -- Continuing to contact the consumer after receiving a notice from the consumer to cease all communication
    - --- If you notify a debt collector in writing to cease all further contact with you, their failure to honor this demand is a violation of FDCPA
  - -- Revealing the debt to third parties
    - --- Third-party contacts are generally unauthorized, which includes the chain of command
  - -- Calling the consumer's place of employment
  - -- Threatening dire consequences if the consumer fails to pay
    - --- Some debt collectors may falsely threaten lawsuit or other action that they do not intend to take. Others falsely threaten arrest or the seizure of property.

--- Some debt collectors may threaten an action they are not authorized to pursue, such as revoking a security clearance or obtaining a demotion

--- Creditors can obtain a judgment against the debtor for the debt they owe, but the creditor must first notify the debtor of the court action

Remedies for Affected Service Members

- If a debt collector has violated the law, the debtor has the right to sue the collector in state or federal court within one year of the date the law was violated
- Any problems in dealing with debt collectors should be reported immediately to the base legal office. Additionally, service members may contact the Consumer Financial Protection Bureau, the state Attorney General's Office, and the Federal Trade Commission for further assistance.
- Service members have the right to dispute a debt listed on their credit report, and to request a free copy of their credit report, in accordance with the Fair Credit Reporting Act
- Service members should consult with a legal assistance attorney before making payments to a debt collector and to find out more about their rights under applicable law

---

References

Fair Debt Collection Practices Act, 15 U.S.C. § 1692, as amended by Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. 111-203 § 1089
Fair Credit Reporting Act, 15 U.S.C. §§ 1681 *et seq.*
DoDI 1344.09, *Indebtedness of Military Personnel* (December 8, 2008)
AFI 36-2906, *Personal Financial Responsibility* (30 July 2018)

11
CHAPTER ELEVEN: CIVIL LAW ISSUES

NATIONAL DEFENSE AREA (NDA)

Air Force commanders are charged with responsibility for protecting Department of Defense (DoD) resources under their control. That responsibility is not limited to resources located on federal lands under DoD jurisdiction, but applies to such resources wherever they are located. For the most part, commanders rely on federal, state, and local civil authorities to protect off installation assets.

- It may be necessary—as a tool of last resort—to establish a National Defense Area (NDA), thereby enabling direct military protection of *"covered property"* when that property is at unacceptable risk *"in an emergency situation"* (e.g., the crash of a Protection Level (PL) 1, 2 or 3 aircraft or asset or classified information) within the U.S. (including its territories, possessions and tribal lands)
- If the DoD covered property is on non-military but still federal lands, secure and coordinate with the other U.S. Government agency (OGA), as there is no legal impediment to establishing an NDA on federal lands to authorize the exclusion of even the federal land-owning agency
- In foreign territories, protection and defense will be dictated by host-nation agreements (e.g., status of forces (SOFA) or other agreement) or through ad hoc mutual cooperation

Authority – DoD Policy to Protect People and Property

- The authority of a DoD commander to take reasonably necessary and lawful measures to maintain law and order and to *protect installation personnel and property* extends to temporarily established NDAs, in *emergency situations*, includes the removal from, or the denial of access to, an installation or site of individuals who threaten the orderly administration of the installation or site
- Commanders at all levels have the responsibility and authority to enforce appropriate security measures to ensure the protection of DoD property and personnel assigned, attached, or subject to their control
  - -- The DoD incident commander (IC) must establish and declare an NDA in any accident in which DoD does not have exclusive jurisdiction of the area containing a nuclear weapon and related classified components or materials. The DoD IC will typically be the installation commander responsible for the property.

Federal Penalty for Violating Security Regulations that Protect "Covered Property"

- It is a misdemeanor crime to violate security regulations or orders relating to DoD or NASA "covered property"

Derivative Authority to Establish an NDA

- DoD authority to establish an NDA is not limited in geographic scope within the United States
  - -- NDAs are restricted to nuclear weapons, classified information, assets vital to national security, and inherently dangerous property

Enforcement

- Normally, civil law enforcement authorities should enforce exclusion against non-DoD personnel, whether or not an NDA has been declared
- If civil law enforcement authorities are unavailable, unable or unwilling to act, DoD personnel may use that amount of force necessary—consistent with the rules for the use of force (RUF) applicable to the protection level (PL) of the property or information—to deny access to property and to the boundaries of a lawfully-declared NDA

- Military personnel may remove NDA trespassers from the property or detain them—without fear of violating the Posse Comitatus Act (PCA) until they can be transferred to civil authorities. Military action to detain civilian trespassers is limited to the NDA.
- Even without establishing an NDA, military personnel retain the right to exercise a "command presence" and may use force to the degree necessary to protect not only themselves and one-another, but also property
  -- Unless they pose an immediate threat to life or possess military property, pursuit of fleeing civilian offenders by military authorities beyond the immediate NDA area should be left to the responsibility of civil law enforcement authorities

Definitions/Policy

- Commanders Must Protect People and Property: DoD commanders **MUST** *take reasonably necessary and lawful measures* to maintain law and order and to protect installation personnel and property including, *in emergency situations, such as accident sites* involving Federal equipment or personnel, by establishing an NDA
- NDA: An area established on non-federal lands located within the United States or its possessions or territories for the purpose of safeguarding classified defense information or protecting DoD equipment and/or materiel. Establishment of an NDA temporarily places such non-federal lands under the effective control of DoD and results only from an emergency event. The senior DoD representative at the scene will define the boundary, mark it with a physical barrier, and post warning signs. The landowner's consent and cooperation will be obtained whenever possible; however, military necessity will dictate the final decision regarding location, shape, and size of the NDA.
- Where Can an NDA be Established:
  -- Within the United States, its territories, or possessions
  -- If outside the United States: Protection and defense of U.S. property off-installation will be dictated by host-nation agreements (e.g., status of forces (SOFA) or other agreement) or through ad hoc mutual cooperation in the absence of an agreement
  -- If on non-military federal lands: Coordinate with the other U.S. Government agency (OGA or the Bureau of Indian Affairs, for tribal lands) but do not delay an equivalent military response to adequately secure the site if federal civil authorities cannot adequately do so
- What is Covered Property:
  -- Covered property is defined at 50 U.S.C. § 797(a)(4)(c) to mean "aircraft, airports, airport facilities, vessels, harbors, ports, piers, water-front facilities, bases, forts, posts, laboratories, stations, vehicles, equipment, explosives, or other property or places"
  -- Limited by SECDEF to "emergency situations, such as accident sites involving Federal equipment or personnel on official business"
  -- Further limited by SECAF to a PL 1, 2 or 3 resource; or in situations where aircraft are sent to civilian airports and unforeseen, inadequate or uncontrollable civilian security concerns create an emergency; or "other unplanned emergencies"
    --- Commanders must use exceptional judgment and should consult early with the staff judge advocate, especially in the latter two, less defined, situations

- Which Commanders:
  - -- DoD policy does not clearly restrict which commanders have authority to establish an NDA; and imposes an obligation on all commanders to protect property under their control. Installation commanders have primacy for property assigned to their installation.
  - -- On-scene commander (OSC) or other senior DoD official should immediately secure the site and, ideally, seek approval from the installation commander (or designated incident commander) responsible for the asset or information before officially declaring an NDA and posting signage
    - --- The responsible commander does not need to be physically present to establish an NDA. For example, a subordinate commander to whom responsibility for protecting the property has been entrusted (e.g., convoy commander, in the case of missile transfer) may establish the NDA when time is of the essence.
    - --- A written order authorizing creation of the NDA should follow
- What is an Emergency:
  - -- SECDEF has limited establishing an NDA solely to "emergency situations." Historically, this means an off-installation U.S. crash site involving PL 1, 2 or 3 aircraft.
  - -- Accidents are just one example, however, and should not be considered exhaustive for purposes of emergency situations warranting establishment of an NDA
    - --- Not all accidents—even those involving particularly sensitive equipment or information, such as PL 1, 2 or 3 resources—will necessarily warrant an NDA, particularly when civil assistance is adequate
    - --- Aircraft or other diversions or breakdowns of even highly sensitive (but nonnuclear weapon) property will not constitute an emergency unless there is some specific and articulable additional basis to believe the property is at unacceptable risk that is adequately mitigated solely through seizure of land

Consent as the Means of First Resort

- Whether or not an NDA is to be established at the site of an NDA-qualifying emergency or lesser activity, *landowner consent and military accommodation of the landowner's concerns* will be important to reduce the uncertainty of inflated claims and public perception or media scrutiny. Even absent landowner consent, military necessity and capacity to control the site ultimately drives the location, size, and shape of an NDA. Consult installation SJA early.

Marking and Public Notice

- The on-scene commander (OSC) or senior DoD official is responsible for adequately marking the NDA as required by AFI 31-101 paragraph 5.7.3
- Use a temporary barrier, such as tape or rope or wire, to mark and clearly define the boundary of the area. Post Air Force Visual Aid (AFVA) 31-102 at all entry control points.
- The supporting judge advocate should evaluate whether or not it is necessary to request higher headquarters publish notice in the local newspaper and in the Federal Register

Airspace Considerations

- If it is necessary to establish an NDA, consider whether airspace restrictions are also necessary, especially given the proliferation of small unmanned aircraft systems (sUAS) with cameras or other sensing/payload capabilities. If airspace restrictions are deemed necessary, commanders may request the Federal Aviation Administration (FAA) impose a Temporary Flight Restriction (TFR).
- The FAA may impose TFRs for a number of reasons, to include reasons of national security at the request of a military command. Report TFR violations to FAA for enforcement.

Media and Public Relations

- As with any crash or other noteworthy incident, public affairs (PA) should be briefed immediately following the establishment of an NDA. Command post up-channels information.
- Cover, shield, or protect sensitive property from both ground-based and overhead view
- Incident commanders or the senior representative should be sensitive to interests of the media, and should limit photography only as much as necessary to protect classified information. It may be sufficient to simply limit photography to those angles or distances, which would not result in exposure of classified information; or to shield sensitive or classified assets from view using camouflage netting, curtains, tarps, etc.
- Media representatives should be briefed on appropriate disclosable information during a nuclear accident or incident and the procedures to be followed, such as escort requirements. If the off-base site is designated as an NDA, support news media representatives, to the extent feasible, as would occur on a military installation.
- If an NDA has been Established: Military authorities may use reasonable force to prevent all photography by anyone within the NDA and seize film or video equipment. If photography is done from outside the NDA, civilian authorities should handle the matter; but if civil authorities are unwilling or unable to assist, the commander concerned should contact the managing editor or director of the news agency employing the photographer, request return of the film suspected of containing classified information, and explain that failure to return the film may constitute a violation of federal law.

References

U.S. Const. Art. VI, cl. 2 (Supremacy) and Amend. V, cl. 4 (Takings)
5 U.S.C. §§ 51 *et seq.*
18 U.S.C. § 796 and Executive Order 10104, issued Feb. 1, 1950 (15 F.R. 59)
18 U.S.C. § 1382
50 U.S.C. § 797
14 C.F.R. Part 91, §§ 91.137 – 91.145, 99.3 & 99.7
U.S. v. Aarons, 310 F.2d 341 (2d Cir. 1962)
CJCSI 3121.01B at Encl. L, *Standing Rules for the Use of Force* (13 June 2005)
DODI 5200.08, *Security of DoD Installations and Resources and the DoD Physical Security Review Board (PSRB)* (10 Dec 2005), incorporating through Change 3, 20 November 2015
DoDM 3150.08, *Nuclear Weapon Accident Response Procedures (NARP)* (22 August 2013)
DoDM S-5210.41, *Nuclear Weapon Security Manual* at volumes 2 & 3 (11 August 2016) and its Air Force supplement, AFMAN 31-108 (27 January 2017) (SIPrNet)
AFI 31-101, *Integrated Defense*, (8 Oct 2009), incorporating through Change 3, 3 February 2016, including AFGM 2016-01, 19 September 2016
AFI 31-117, *Arming and Use of Force by Air Force Personnel* (2 February 2016), including AFGM 2016-01, 30 June 2016
AFI 10-2501, *Air Force Emergency Management (EM) Program Planning and Operations* (19 April 2016)
AFI 35-101, *Public Affairs Responsibilities and Management* (12 January 2016), including AFI 10-2501_AFGM2017-02, 2 August 2017
AFI 35-104, *Media Operations* (22 May 2017)
AFI 51-501, *Tort Claims* (13 September 2016), including AFI 51-501_AFGM2018-01, 13 March 2018
AFVA 31-102, *Restricted Area Sign-National Defense* (14 July 1995), certified current 27 February 2014
EUCOM Instruction 6801.01A, *Nuclear Surety Management for the Weapons Storage and Security System* (9 December 2015) (SIPrNet)
FAA Advisory Circular (AC) No. 91-63D, *Temporary Flight Restrictions* (9 December 2015)

POSSE COMITATUS

The Posse Comitatus Act

Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a *posse comitatus* or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.

Punishment for Violations

- Possible sanctions for violating the Posse Comitatus Act:
  - -- Fine and/or two years imprisonment
  - -- Suppression of evidence illegally obtained
    - --- Court may let the accused go free
    - --- So far, the courts have been reluctant to grant this remedy. Some courts have warned, however, that repeated violations of the Posse Comitatus Act could lead to application of the exclusionary rule in some cases.

What Posse Comitatus Prohibits

- Prohibitions: The armed services are precluded by law from enforcing, or assisting local law enforcement officials in enforcing, civilian laws—except as authorized by the Constitution or act of Congress
  - -- By its terms, the Act applies only to the Army and Air Force
  - -- The Navy and Marine Corps follow the Act by Department of Defense (DoD) Policy pursuant to DoD Instruction 3025.21 (policy enacted pursuant to Congressional direction)
  - -- The Act applies to the Reserves and to the National Guard while in a Title 10 federal status (i.e., as Army or Air National Guard of the United States), but not to the National Guard while in a Title 32 state status (i.e., organize, train and equip under the Governor's control) or on state active duty status, under the Governor's control at the state's expense
  - -- The Act **DOES NOT** apply to the Coast Guard
- Does not apply to off-duty conduct, unless induced, required, or ordered by military officials
  - -- Subject to authorization of off-duty employment and consistent with AFI 31-118, active duty service members may accept a position as a reserve peace/police officer and lawfully perform law enforcement duties under the direction and control of their civilian law enforcement agency employer
  - -- Similarly, members of the Armed Forces may undertake immediate response actions of their own accord when reasonably necessary to preserve life or protect property
- The act does not apply to civilian employees, unless acting under the direct command and control of a federal military officer

Exceptions to Posse Comitatus

- Statutory Exceptions: By its terms, the Act does not preclude support "expressly authorized by the Constitution or Act of Congress." Congress has enacted a number of statutory provisions falling into this category.

- Several statutes authorize the military to engage in actions that would otherwise violate the Posse Comitatus Act:
  - -- 10 U.S.C. § 371:
    - --- Allows the military to provide to local law enforcement officials any law enforcement information collected "during the normal course of military training or operations"
    - --- Requires the military to consider the needs of local law enforcement when planning training missions (may not be used as a subterfuge to collect intelligence or otherwise participate in an investigation)
    - --- Mandates disclosure of information relevant to drug operations unless doing so would threaten national security
  - -- 10 U.S.C. § 372:
    - --- Allows the military to loan any equipment, base facility, or research facility to local law enforcement, although the military may charge for its use (see 10 U.S.C. § 377) and it must not interfere with the military mission
    - --- Loan of "arms, ammunition, tactical-automotive equipment, vessels and aircraft" requires proper coordination
  - -- 10 U.S.C. § 373:
    - --- Makes military personnel available to train federal, state, and local civilian law enforcement officials on operation and maintenance of equipment properly loaned under 10 U.S.C. § 372, and to provide expert advice to such officials
  - -- 10 U.S.C. § 374:
    - --- Allows the Secretary of Defense to make military personnel available to operate and maintain loaned equipment under 10 U.S.C. § 372
- The military is still prohibited from enforcing civilian laws. The military may not participate in a search, seizure, arrest, or similar activity in support of local law enforcement unless participation in such activity is otherwise authorized by law (10 U.S.C. § 375).
  - -- The military may execute the civilian laws on an installation for a military purpose
  - -- Even on an installation, the military "detains" civilians before turning them over to civil authorities. The military does not arrest or apprehend civilians. This is a **CRITICAL** distinction.
- The military may engage in *humanitarian acts* such as looking for a lost child or rescuing civilians from a destroyed building
  - -- The courts will closely examine humanitarian acts to ensure the military is not engaging in a subterfuge to disguise a Posse Comitatus Act violation (for example, the military may search for a missing child or conduct rescue/recovery operations for persons in a destroyed building)

References

10 U.S.C. §§ 371-375
The Posse Comitatus Act, 18 U.S.C. § 1385
DoDI 3025.21, *Defense Support of Civilian Law Enforcement Agencies* (27 February 2013)
AFI 10-801, *Defense Support of Civil Authorities* (23 December 2015)
AFI 31-118, *Security Forces Standards and Procedures* (5 March 2014), incorporating Change 1, 2 December 2015, including AFI31-118_AFGM2017-01, 21 December 2017

AIR FORCE SAFETY AND ACCIDENT INVESTIGATIONS

AFI 91-204, *Safety Investigations and Hazard Reporting*, and AFI 51-503, *Aerospace and Ground Accident Investigations*, are the two principal instructions covering Air Force investigations of accidents involving aircraft, missiles, or nuclear resources. Additionally, AFI 51-503 covers investigations of accidents occurring on land and on water, not involving aircraft, missiles, or other aerospace assets. Safety investigations, conducted by a safety investigation board (SIB), determine cause(s) to prevent future mishaps.

The deliberations, opinions, recommendations, and conclusions of safety investigators and any evidence from witnesses and contractors given under a promise of confidentiality are in Parts II or III of the safety mishap report and are privileged and not releasable outside safety channels.

Aircraft accident investigations, conducted by an accident investigation board (AIB), and ground accident investigations, conducted by a ground accident investigation board (GAIB), provide publicly-releasable reports (which include the non-privileged evidence gathered by the preceding safety investigation) and preserve evidence for litigation, claims, disciplinary action and adverse administrative action.

Providing an alternate source of non-privileged information for use outside safety and operational channels protects the integrity of the safety privilege.

Safety Investigations

- A SIB is composed of a board of officers or a single investigating officer, depending on the mishap
  - -- **NOT** for disciplinary actions, line-of-duty determinations, flying evaluation boards, litigation, claims, or assessing pecuniary liability (for or against the government)
  - -- Witnesses are not sworn
  - -- SIB may offer a promise of confidentiality to witnesses or contractors if necessary and authorized
  - -- Privileged information in a safety report is barred from use in claims and litigation for or against the United States, even if it favors the Air Force
  - -- In *United States v. Weber Aircraft Corp.*, 465 U.S. 792 (1984), the Supreme Court upheld the privileged information in safety reports

Potential Problems with Safety Investigations

- Misunderstanding: Misunderstanding the purpose and permissible or appropriate use of information gathered by safety investigators
- Interface with Accident Investigators:
  - -- Part I of the safety report consists of non-privileged factual information and is releasable to the accident investigators
  - -- The safety investigation has priority over the accident investigation on wreckage, witnesses, and documents
- Talking to the Next of Kin (NOK) of Mishap Victims:
  - -- Relatives normally speak with the family assistance representative appointed by the commander
  - -- Do not discuss mishap responsibility, legal liability, classified information, or cause factors. The AIB president or GAIB president will brief the AIB or GAIB report to NOK and answer questions at that time.

-- Provide non-privileged information only

-- *Use caution and sensitivity*: Only provide information that has been approved for release

- Requests for Information:

-- Determine whether the requester is asking for the SIB report, a GAIB, or AIB report

-- For SIB reports, the disclosure authority is the Commander, Air Force Safety Center. The office of primary responsibility (OPR) is HQ AFSEC/JA.

-- For AIB and GAIB reports, direct requests to the staff judge advocate (SJA) of the convening authority responsible for initiating the investigation

- Appearance of Improper Use: Avoid creating the appearance of improper use of privileged safety information for disciplinary actions, flying evaluation boards, etc.

-- Imperative that commanders have "clean hands"

-- Document where you got the information to take action (non-privileged source(s))

- Criminal Misconduct: Safety investigations and potential courts-martial

-- Obtaining a conviction may be extremely difficult if a safety investigation precedes the court-martial. The defense may request information that is privileged, resulting in potential litigation over its release.

-- If substantial evidence of criminal misconduct is present and the mishap cause is readily apparent, the convening authority may delay the SIB and proceed with a legal/law enforcement investigation

Accident Investigations

- Accident investigations pursuant to AFI 51-503 are required in all Class A accidents except Class A accidents in which remotely piloted subscale aircraft and aerial targets are destroyed or in cases resulting only in damage to government property and the aircraft is not destroyed

-- Class A accidents include:

--- Cases where an injury or occupational illness results in a fatality or permanent total disability

--- Cases where an Air Force aerospace asset is destroyed

--- Cases where the total cost of damages to the government or other property is $2,000,000 or more

- In addition, the following types of accidents require an accident investigation:

-- Cases with a probability of high public interest

-- Mishaps when claims and litigation are anticipated for or against the government or a government contractor as a result of the mishap

-- Mishaps causing significant civilian property damage

- Accident investigations otherwise not required may be convened at the convening authority's discretion for any occurrence considered an "accident" or "mishap"

Accident Investigation Responsibilities:

- Convening Authority: The MAJCOM commander who convened or would have convened the preceding safety investigation under AFI 91-204, delegable to the major command vice commander
  - -- Convenes investigation
  - -- Ensures appropriate condolence letters are sent to NOK. Also, sends letter to the NOK of deceased and seriously injured personnel explaining process and status of ongoing investigations and of any planned NOK briefings.
  - -- Funds costs associated with conducting the accident investigation
  - -- Determines what accident information may be released to the public prior to completion of the AIB Report
  - -- Approves the AIB report and public affairs office (PA) notification and release plan
  - -- High-interest mishaps (defined in paragraph 7.3 of AFI 51-503) must be coordinated and staffed by the convening authority's SJA through AFLOA/JACC and AF/JA for review by the SecAF and the CSAF
- Installation Commander:
  - -- Appoints a host installation liaison officer to assist the AIB in obtaining accommodations and administrative support, as well as facilitating witness interviews
  - -- Provides in-house facility, communications, supply, photography, and billeting support for the AIB
  - -- Removes and stores wreckage from the mishap site at the direction of the convening authority until AFLOA/JACC releases it from legal hold
  - -- Assists the convening authority with initial cleanup of the mishap site
  - -- GAIB reports do not usually contain a statement of opinion, unless specifically authorized in advance by AFLOA/JACC
    - --- Unlike AIBs, opinions of GAIB board presidents are not statutorily protected and may affect the United States in litigation
    - --- A well-documented, thorough GAIB report should allow facts to speak for themselves in most instances

References

United States v. Weber Aircraft Corp., 465 U.S. 792 (1984)
AFI 51-503, *Aerospace and Ground Accident Investigations* (14 April 2015), including AFI 51-503_AFGM2018-01, 12 March 2018
AFI 91-204, *Safety Investigation and Hazard Reporting* (27 April 2018)

ADMINISTRATIVE INQUIRIES AND INVESTIGATIONS

Commanders may be involved in or supervise several different types of investigative procedures. Reprisal against an individual for making a complaint is prohibited under 10 U.S.C. § 1034.

Inherent Authority to Investigate

- All commanders possess inherent authority to investigate matters or incidents under their jurisdiction. This authority is incident to command.
- Air Force policy is that inquiries and investigations will be conducted by the echelon of command capable of conducting a complete, impartial, and unbiased investigation. However, commanders shall not investigate allegations concerning reprisal or restriction.
- When a specific regulation does not apply, the investigation is conducted under the commander's inherent authority
  - -- AFI 90-301, *Inspector General Complaints*, provides guidance (e.g., procedures, format) on how to conduct a commander directed investigation or inquiry but AFI 90-301 **SHOULD NOT** be cited as the authority for the investigation or inquiry

Investigations Governed by Air Force Instructions

- AFI 90-301 provides guidance for investigations and inquiries
  - -- Only the Inspector General's Office (IGs) may investigate allegations concerning reprisal and restriction
  - -- IG directed inquiries and investigations are privileged documents. The IG controls release of these documents in accordance with Freedom of Information Act (FOIA) and Privacy Act (PA) requirements.
- Other administrative investigations and inquiries, such as flying evaluation boards, aircraft mishap, ground accidents, reports of survey, line of duty determinations, etc., are governed by specific regulations

Investigation Procedures

- Often conducted by a single investigating officer (IO) who is equal or senior in grade to the subject(s); and who gathers all necessary evidence (facts, documents, witness testimony) to help the appointing authority make an informed decision
- Generally, the standard of proof for administrative investigations and inquiries is by the preponderance of the evidence
- If the matter is more properly in the domain of Security Forces or the Air Force Office of Special Investigations (AFOSI) (suspected criminal activity, etc.), have them conduct the investigation
- Always consult with the servicing staff judge advocate (SJA) before directing any inquiry or investigation
- The Chief of Staff of the Air Force Hand-Off Policy requires a person-to-person hand-off of all subjects, suspects, and distraught witnesses following investigative interviews. The individual's commander or designee must be physically present immediately following the interview to receive the hand-off, and this hand-off must be documented at the end of the testimony.

- Inquiry vs. Investigation:
  - -- *Inquiry*: Determination of facts on matters not usually complex or serious; inquiries may be handled through routine channels, and reports may be summarized
  - -- *Investigation*: Appropriate for serious, complex matters requiring a determination of extensive facts. Investigations conducted under the commander's inherent authority should include a written report. Normally, exhibits and sworn witness testimony support the facts that are determined.

Witnesses

- Must be advised of the nature of the investigation and, if applicable, their right to counsel
- Military members and Department of Defense (DoD) civilian employees have a duty to testify but may refuse to answer questions that are self-incriminating (by invoking Article 31, UCMJ or Fifth Amendment rights)
- *Weingarten Rights* for civilian employees may apply (see Chapter 15, Civilian Personnel and Federal Labor Law, for more information)
- IOs have no authority to grant express promises of confidentiality to subjects, suspects, complainants, or witnesses

---

References

Freedom of Information Act, 5 U.S.C. § 552
Privacy Act, 5 U.S.C. § 552a
10 U.S.C. § 1034
NLRB v. Weingarten, 420 U.S. 251 (1975)
AFI 31-115, *Security Forces Investigations Program* (10 November 2014)
AFI 33-332, *Air Force Privacy and Civil Liberties Program* (12 January 2015), incorporating Change 1, 17 November 2016
AFI 71-101, V-1, *Criminal Investigations Program* (8 October 2015), certified current 7 December 2017
AFI 71-101, V-2, *Protective Service Matters* (23 January 2015), certified current 17 December 2015
AFI 90-301, *Inspector General Complaints Resolution* (28 December 2018)

FLYING EVALUATION BOARD (FEB)

Aircrew members have an obligation to maintain professional standards. When performance of rated duty becomes suspect, a flying evaluation board (FEB) may be convened. This applies to rated officers, Career Enlisted Aviators (CEAs), and non-rated officer, enlisted aircrew members and civilian government employees only. FEBs are administrative, fact-finding proceedings conducted to ensure information relevant to an aircrew member's aviation and professional qualification is reviewed and discussed in a fair and impartial manner. The proceedings are not adversarial and are closed to the public. FEBs are not a substitute for disciplinary or other administrative action.

Reasons to Convene a Flying Evaluation Board

- Suspension or disqualification from aviation service for more than eight years
- Lack of proficiency (unless enrolled in a formal flying training program)
- Failure to meet training standards while enrolled in a U.S. Air Force formal flying training course
- Lack of judgment in performing rated duties
- Failure to meet ground/flying training or annual physical exam requirements
- Intentional violation of aviation instructions or procedures
- Aircrew member exhibits habits, traits of character, or personality characteristics that make it undesirable to continue using the aircrew member in flying duties

Composition of a Flying Evaluation Board

- A flying unit commander (wing or comparable level) normally convenes an FEB
- Three rated voting members, qualified for aviation service in an active aviation service code (ASC) and senior in rank to the respondent, will be appointed and will constitute a quorum
  - -- Voting members should be in the same aircrew specialty (e.g., pilot, navigator, or flight engineer) as the respondent
  - -- To the greatest extent possible, at least one voting member should have the same primary duty AFSC as the respondent
- A recorder prepares the case by presenting the evidence and examining the witnesses in a non-adversarial manner
- The senior board member is a voting member and final authority regarding conduct at the board
- Do not appoint the convening authority as a member of the board. A judge advocate may advise the recorder but shall not be appointed as an assistant recorder.
- Do not appoint enlisted members to FEBs convened for officers, or officers to FEBs convened for enlisted members
- One additional aircrew member is appointed to act as a nonvoting recorder
- A judge advocate may be appointed as a nonvoting legal advisor to advise on procedural matters and ensure a fair hearing. If appointed, the judge advocate may not be present during board sessions.
- A flight surgeon may be appointed as a nonvoting member when a medical problem may be a significant contributing factor

Flying Evaluation Board Procedures and Guidelines

- Notify the respondent in writing
  - -- Notification letter contains the reasons for the FEB, when and where the board will meet, witnesses to be called, and rights of the respondent. State the basis for convening the board and all allegations.
  - -- The respondent must reply within 48 hours (two duty days)
  - -- Normally, convene the board within 30 days after the convening authority appoints the board
- Respondent may submit a request for voluntary disqualification from aviation service in lieu of the FEB (a.k.a. VILO) within five workdays of receiving the FEB notification letter. FEB action is suspended until the MAJCOM acts on the VILO request.
- Respondent may also request a waiver of FEB to return to previously qualified aircraft if enrolled in flying training
  - -- An FEB waiver is considered an FEB action and requires the same coordination and approval as an FEB
  - -- FEB waiver process is not an appropriate means to disqualify a member
  - -- Convening authority will submit or forward waiver requests through command channels only when convinced the reviewing authorities would recommend the member remain qualified in the aircraft and/or crew position in which he/she was previously qualified
  - -- If there is any doubt regarding potential for continued aviation service, direct an FEB
  - -- Forward FEB waiver requests through command channels to the MAJCOM commander for final approval

Rights of the Respondent at a Flying Evaluation Board

- Assigned military counsel of his/her own choosing (if available) or civilian counsel (at respondent's expense)
- Informed in writing of the specific reasons for convening the board
- Review all evidence and documents to be submitted to the board by the recorder (before convening the board)
- Challenge voting members for cause
- Cross-examine witnesses called by the board, call witnesses and present evidence (recorder arranges for military witnesses)
  - -- Although civilian witnesses may appear, an FEB cannot compel their attendance. Consult with the servicing staff judge advocate (SJA) as to the procedures to request the presence of civilian Department of Defense (DoD) employees.
- Testify personally and submit a written brief (respondent may not be compelled to testify)

Rules of Evidence

- A FEB is not bound by formal rules of evidence prescribed for courts-martial; however, observing these rules promotes orderly procedures and a thorough investigation
- The decision about the authenticity of documents rests with the senior board member

Findings and Recommendations

- Made in closed session (voting members only)
- Each finding must be supported by a preponderance of the evidence
- Findings must specifically include comment on each allegation or point in question
- Recommendations must be consistent with the findings and generally only address qualification for aviation service (i.e., remain qualified or be disqualified)
  - -- If the officer holds more than one aviation qualification, the FEB must make a recommendation as to both qualifications
  - -- If the FEB recommends disqualification, it may also recommend whether the officer should be prohibited from wearing the associated aviation badge
- A minority report is appropriate if there is a disagreement among the voting members

Review Process

- The convening authority's SJA reviews for legal sufficiency; review is limited to sufficiency of the evidence and compliance with procedural requirements
- The convening authority adds comments and recommendations, but must explain any recommendations that are contrary to those of the FEB
- The convening authority or higher reviewer may reconvene the FEB or order a new board
- The MAJCOM commander makes the final determination in all FEB cases convened at the MAJCOM level or lower

Reference

AFI 11-402, *Aviation and Parachutist Service, Aeronautical Ratings and Badges* (13 December 2010), certified current 5 February 2013, including AFI11-402_AFGM2018-01 (28 February 2018)

COMMERCIAL ACTIVITIES

Department of Defense Commercial Sponsorship Program

- Commercial sponsorship is a DoD program that allows commercial enterprises to provide support to morale, welfare, or recreation (MWR) programs in exchange for promotional recognition and access to the Air Force market for a limited period of time. Such sponsorship helps finance enhancements for MWR elements of Services events, activities, and programs.
- There must be one or more bona fide MWR program events for sponsorship to apply
- Membership drives over extended periods can be treated as events for sponsor support and recognition purposes; however, sponsor displays can only be authorized at specific events during the drive
- MWR events appropriate for commercial sponsorship do not include normal day-to-day MWR management and overhead
- Only a Services MWR program may utilize commercial sponsorship
  - -- Other Air Force organizations, private organizations, or unofficial activities are neither authorized to use commercial sponsorship to offset program or activity expenses, nor partner with an MWR program to gain access to sponsorship benefits
- Installation commanders control the commercial sponsorship program at base level and approve/disapprove sponsorships worth $5,000 or less (or other values as delegated by the major command)
  - -- Installation commanders may delegate approval authority of sponsorships and donations valued up to $5,000 to the MSG/CC or FSS/CC or director

Unsolicited Commercial Sponsorship

- Unsolicited commercial sponsorship must be entirely initiated by the prospective sponsors or their representatives
- FSS activities may generate sponsor awareness and interest by publishing brochures and leaflets, placing ads in newspapers and magazines, or issuing public affairs-like news releases about the existence and availability of the program. They may also send nonspecific letters as follow-ups to general advertisements.
- Air Force personnel may not provide information about specific needs of the Services MWR program to "encourage" offers of unsolicited sponsorship
- The prospective company and the Air Force will enter into a commercial sponsorship agreement (see AFI 34-108, *Commercial Sponsorship and Sale of Advertising*, Attachment 2)

Solicited Commercial Sponsorship

- Commercial sponsorship "refers to the act of a civilian enterprise providing support to help finance or provide enhancements for MWR elements of Services activities, events, and programs in exchange for promotional consideration and access to the Air Force market for a limited period of time"
- The solicited commercial sponsorship program is the only authorized process for soliciting support for FSS activities, events, or programs defined as MWR
  - -- Other sections of FSS as well as other Air Force organizations, units, private organizations, or unofficial activities or organizations are not authorized to use commercial sponsorship nor may they partner with an MWR program to gain access to sponsorship benefits

- The prospective company and the Air Force will enter into a commercial sponsorship agreement (see AFI 34-108, Attachment 2)
- Per AFI 34-108, solicitations are part of the procurement process, and must be done competitively and sent to the maximum number of potential sponsors in a specific product category (except alcohol related companies or defense contractors) after an initial solicitation announcement has been made
  - -- The solicitation should inform the maximum number of potential sponsors, announced in one or more of the following: Fed Biz Opps, local newspapers, Chamber of Commerce newsletters, or other appropriate business community publications
  - -- Sponsorship may not be solicited from alcohol companies, or military systems divisions of defense contractors
    - --- However, unsolicited sponsorship from them may be accepted when approved at the discretion of the commanding authority (i.e., the commanding authority at the installation would be the installation commander)
    - --- Alcohol company/manufacturer sponsors must also provide a "responsible use" campaign logo/message to be included in all promotional materials and in banner form at the event site

On-Base Commercial Solicitation

- On-base solicitation is a privilege, not a right, granted at the discretion of the installation commander. Personal commercial solicitation on an installation will be permitted only if the following requirements are met:
  - -- The solicitor is duly licensed under applicable laws
  - -- The installation commander permits it
  - -- A specific appointment has been made with the individual concerned and conducted in family quarters or other areas designated by the installation commander

Sponsor Recognition

- All sponsor recognition must be tied to an MWR activity, event, or program
  - -- Post-event recognition will be limited to "Thank you for your support" in ads, monthly publications, websites, etc.
  - -- Recognition for sponsors at places, times, unrelated to the activity, event, or program is prohibited
- Sponsorship recognition is limited to the sponsor's name, logo, and/or a brief slogan. Materials may be displayed in appropriate FSS facilities. Materials may also be displayed in AAFES, Defense Commissary Agency (DeCA), and other appropriate on-installation locations with the approval and coordination of AAFES, DeCA, or other appropriate officials.
  - -- The display time for such materials is determined by the length of the event, program, or activity, the value of sponsorship, and the judgment of the entities
- Sponsors may provide event posters and banners identifying the sponsor or its products or services. While all commercial sponsorship signs, banners, etc., must contain disclaimers, normal concession type stands and distribution equipment used by the commercial sponsor do not need disclaimers when they identify the sponsor or its products (e.g., "Brand X Cola") on the dispenser for cola products.

- Housing occupants may operate limited business enterprises while living in base housing limited to the sale of products, minor repair service on small items, limited manufacturing of items or tutoring
  - -- Members must request permission in writing to conduct the commercial activity from the housing office
  - -- Occupants must meet local government licensing requirements, agreements, and host country business practices before requesting approval to operate a private business

Prohibited On-Base Commercial Solicitation

- Certain solicitation practices are prohibited on military bases, including, but not limited to:
  - -- Soliciting personnel who are on-duty
  - -- Soliciting any kind of mass audience, e.g., commanders call or guard mount
  - -- Soliciting in housing areas without an appointment
  - -- Soliciting door-to-door
  - -- Implying DoD sponsorship or sanction
  - -- Soliciting members junior in grade
  - -- Procuring or supplying roster listings of DoD personnel
  - -- Use of official ID cards by active duty members, retirees, or reservists to gain access for soliciting

Games of Chance

- Bingo and Monte Carlo (Las Vegas) events are controlled by the Air Force Club Program. However, games of chance must not otherwise violate local civilian laws.
- Cash prizes may be awarded for bingo, per AFI 34-272, *Air Force Club Program*, paragraph 3.17. Play in bingo programs should be limited to eligible patrons, their family members, and guests.
- Only non-monetary prizes may be awarded for Monte Carlo events, per AFI 34-272, paragraph 3.18. Play in Monte Carlo events should be limited to club members and their adult family members, members of other clubs exercising reciprocal privileges and their adult family members, and adult guests.
  - -- Once a participant purchases a money substitute for a Monte Carlo event, no reimbursement can be made for any unused portion, and money substitutes may not be used to buy resale items, including food and beverages

Raffles

- Occasional and infrequent raffles must be approved in advance by the installation commander, with the staff judge advocate's advice. Raffles must not otherwise violate local civilian laws.

References

DoDI 1000.15, *Procedures and Support for Non-Federal Entities Authorized to Operate on DoD Installations* (24 October 2008)
DoDI 1344.07, *Personal Commercial Solicitation on DoD Installations* (30 March 2006)
DoD 5500.7-R, *Joint Ethics Regulation* (30 August 1993), incorporating through Change 7, 17 November 2011
AFI 32-6001, *Family Housing Management* (21 August 2006), incorporating through Change 5, 3 September 2015, with corrective actions applied 31 May 2016, including AFI32-6001_AFGM2018-01, 25 September 2018
AFI 34-101, *Air Force Morale, Welfare, and Recreation (MWR) Programs and Use Eligibility* (24 July 2018)
AFI 34-108, *Commercial Sponsorship and Sale of Advertising* (21 August 2018)
AFI 34-219, *Alcoholic Beverage Program* (30 September 2016)
AFI 34-223, *Private Organizations Program* (13 December 2018)
AFI 34-272, *Air Force Club Program* (1 November 2018)
AFI 36-3101, *Fundraising* (9 October 2018)

RAFFLES

Generally, raffles and other forms of gambling are prohibited on government property or while on official duty, per DoDI 5500.07-R, *Joint Ethics Regulation (JER)*, section 2-302. This includes the Pentagon, Navy Annex, or General Services Administration (GSA) leased or owned buildings under 32 C.F.R. 234.16 and 41 C.F.R. 102-74.395.

- Officially recognized private organizations, as defined in AFI 34-223, *Private Organization Program,* may engage in raffles if they meet the requirements outlined below and in the AFI
  - -- Unit unofficial activities are not authorized to conduct raffles
- The installation commander may authorize occasional events for fund-raising purposes
  - -- The approval may be delegated to the mission support group commander or the force support squadron commander or director
  - -- "Occasional" is defined as not more than three per calendar quarter, per AFI 34-223
- <u>All Private Organization Raffles Must</u>:
  - -- Not duplicate or compete with activities of the Army and Air Force Exchange Service (AAFES) or Service Nonappropriated Funds Instrumentalities (NAFIs)
  - -- Not directly solicit funds for their organization on base
  - -- Not be co-sponsored by the U.S. Air Force
  - -- Cannot use the Department of Defense (DoD) Moral, Welfare, Recreation (MWR) commercial sponsorship program
  - -- Not give the appearance of installation endorsement or special treatment to the donors/givers involved
  - -- Be held to support the private organization's routine operations or for the direct benefit of DoD personnel or their family members
  - -- Be reviewed by the staff judge advocate (SJA)
  - -- Comply with the law of the city, county, state, or country in which the installation is located and comply with any applicable requirements of such laws
  - -- Cannot be for purely social, recreational, or entertainment purposes that benefit only individual private organization members and/or their families
  - -- Must identify the purpose of the funds raised and the intended use of the proceeds
  - -- Must not be officially endorsed or supported except as permitted by JER sections 3-210 and 3-211
  - -- Not be conducted in the workplace or in uniform
  - -- Not be conducted by military members or civilian employees on duty time
  - -- Not be conducted on the Pentagon reservation
  - -- If on the installation, not be conducted strictly for a monetary prize
  - -- Cannot raffle off alcoholic beverages except during off base events and then only if in compliance with state and local laws

- Raffles are not permitted as part of the Combined Federal Campaign
- Raffles may be utilized for the benefit of the Air Force Assistance Fund (AFAF) if 100% of the proceeds are donated to AFAF

References

32 C.F.R. § 234.16

41 C.F.R. § 102-74.395

DoD 5500.7-R, *Joint Ethics Regulation* (30 August 1993), incorporating through Change 7, 17 November 2011

DoD Standards of Conduct Office Advisory No. 10-06, *2010 Combined Federal Campaign* (9 September 2010)

AFI 34-223, *Private Organizations Program* (13 December 2018)

OFF-LIMITS ESTABLISHMENTS

The establishment of off-limits areas is a function of command. It may be used by installation commanders to help maintain discipline, health, morale, safety, and welfare of service members. Off-limits action is also intended to prevent service members from being exposed to or victimized by crime-conducive conditions. Armed Forces Disciplinary Control Boards (AFDCBs) advise and make recommendations to commanders on matters including establishment of off-limits areas.

Armed Forces Disciplinary Control Boards

- AFDCBs are established under the provisions of Air Force Joint Instruction (AFJI) 31-213, *Armed Forces Disciplinary Control Boards and Off-Installation Liaison and Operations*
  - -- AFDCBs may be local or regional; boards must meet quarterly
  - -- AFDCBs may recommend the installation commander place a civilian establishment or area off-limits to military members
  - -- The AFDCB is usually composed of a president and voting members, appointed by the commander, and representatives from various base functional areas, such as law enforcement, legal counsel, equal opportunity, public affairs, chaplains, consumer affairs, and medical, health, or environmental protection
- To place an establishment off-limits, the AFDCB normally must:
  - -- Notify the proprietor of the offending establishment, in writing, of the alleged condition or situation requiring corrective action
  - -- Specify in the notice a reasonable time for the condition or situation to be corrected
  - -- Provide the proprietor the opportunity to present any relevant information to the board
- If the AFDCB recommends an establishment be placed off-limits, the installation commander makes the final decision
  - -- A decision to place an establishment off-limits may be appealed to the next higher commander after exhausting any local appeal rights
  - -- The establishment remains off-limits until the decision is overturned or the commander determines adequate corrective action has been taken

Emergency Situations

- In emergency situations, commanders may declare establishments or areas temporarily off-limits to personnel of their respective commands. Follow-up action must be taken by AFDCBs as a first priority.

Commander Disciplinary Options

- Members who enter off-limits areas or establishments are subject to UCMJ action
  - -- Family members of service members and others associated with the Service or installation should be made aware of off-limits restrictions
- Do not post off limits signs or notices in the United States on private property
- In areas outside of the continental United States, off-limits and other AFDCB procedures must be consistent with existing status of forces agreements

---

Reference

AFJI 31-213, *Armed Forces Disciplinary Control Boards and Off-Installation Liaison and Operations* (27 July 2006), certified current 5 July 2018 (restricted access)

UNOFFICIAL ACTIVITIES/SQUADRON SNACK BARS

- Unit social funds, coffee/flower funds, booster clubs, and similarly named unit-controlled unofficial activities are acceptable when determined to be an unofficial activity with limited assets
  - -- Assets may not exceed a monthly average of $1,000 over a 3-month period. Unofficial activities may temporarily exceed these limits if the substantial majority (>75%) of its raised funds are to be expended within a six-month time period on a unit social event (e.g., holiday party).
  - -- The $1,000 average monthly limit may be increased by $100 for every 50 unit members over 300 members, to a maximum of $5,000 monthly average
  - -- When assets exceed the above figure, the unofficial activity must either become a private organization, discontinue its operations, or reduce its assets below the asset threshold
  - -- Unofficial activities will:
    - --- Maintain a two-person accountability system for all cash transactions; and
    - --- Submit a basic annual financial report to the unit commander detailing income and expenditures throughout the year
- Installation and unit commanders must carefully review the status of all such unofficial activities operating on their installation and ensure their compliance with all applicable rules and regulations
- No such fund can duplicate or compete with an installation nonappropriated fund revenue-generating activity
- Unofficial activities may not engage in frequent or continuous resale activities
  - -- Unit commanders must make a tactical decision whether or not to transition their unofficial activities to installation-recognized private organizations (POs)
    - --- POs are subject to lawsuits and installation commanders may require private organizations to purchase liability insurance in an amount adequate to cover potential liability arising from their activities. In addition, individual members of the unit/squadron could incur personal liability if not insured. Furthermore, POs events, generally, may not advertise through official communication systems (like those of unofficial activities may). However, unlike unofficial activities, POs have much broader latitude to raise funds, both on and off base.
  - -- Unofficial activities must comply with all federal, state, and local laws governing such activities, including federal tax laws
- Unofficial activities may not sell alcoholic beverages, solicit funds, operate amusement or slot machines, or conduct games of chance, lotteries, raffles, or other gambling-type activities

References

DoD 5500.07-R, *Joint Ethics Regulation* (30 August 1993), incorporating through Change 7, 17 November 2011
AFI 34-223, *Private Organizations Program* (13 December 2018)
AFI 36-3101, *Fundraising within the Air Force* (9 October 2018)

ACCEPTANCE OF VOLUNTEER SERVICES

Officers and employees of the federal government may not accept voluntary services exceeding that authorized by law except in emergencies involving the safety of human life or the protection of property.

- Acceptance of gratuitous services (when the provider agrees in writing and in advance to waive any right to compensation) is permissible
- Acceptance of gratuitous services may pose other issues, such as conflicts of interest, liability for damages or injuries both to and by the provider, or the illegal augmentation of another appropriation
- Government employees may not waive their rights to statutory entitlements. This issue may arise in connection with civilian employees and uncompensated overtime.
- Seek a staff judge advocate opinion any time free services are offered, unless you know they are specifically authorized by law

Types of Permissible Volunteer Service

- Military Services are specifically authorized by law to accept certain voluntary services, including medical, dental, legal, religious, family support, library, and morale, welfare, and recreation (MWR) services
- Volunteers providing services under authorized programs are considered federal employees only for purposes of compensation for work-related injuries, tort claims for damages or loss, maintenance of records, and conflicts of interest
  - -- The volunteer must have been acting within the scope of the accepted services
  - -- The volunteer will most likely be entitled to Department of Justice representation should he/she be named in an action filed under the Federal Tort Claims Act (FTCA)
  - -- A volunteer may not hold policy-making positions, supervise paid employees or military personnel, or perform inherently governmental functions, such as determining entitlements to benefits, authorizing expenditures of government funds, or deciding rights and responsibilities of any party under government requirements
  - -- Volunteers may be used to assist and augment the regularly funded workforce, but may not be used to displace paid employees or in lieu of filing authorized paid personnel positions
- Volunteers may be provided training related to their duties
- Volunteers may be provided official e-mail access using the Volunteer Logical Access Credential (VOLAC) program
- Volunteers may be provided access to Personally Protected Information (PII) if it is required for their duties and they are given proper training
- Properly licensed volunteers may use government vehicles (GOVs) if required for their duties
- Volunteers may be reimbursed for minor miscellaneous expenses they incur in the course of their duties
- Volunteers may use child care services in the installation Child Development Center (CDC) (space permitting) during the period of their duties
- All volunteers should sign the DD Form 2793, *Volunteer Agreement for Appropriated Activities or Nonappropriated Fund Instrumentalities*

- Federal agencies are specifically authorized by law to accept voluntary services provided by student interns as part of an established educational program
- Military services are statutorily authorized to accept services of Red Cross volunteers
- By a memorandum of understanding between the DoD and the Red Cross, Red Cross volunteers are generally considered government employees for purposes of the protections of the FTCA when acting in the scope of the services accepted by the DoD
  - -- Volunteers accepted per 10 U.S.C. § 1588 are also generally considered government employees for purposes of the protections of the FTCA when acting in the scope of the services accepted by the DoD

References

10 U.S.C. § 1588
31 U.S.C. § 1342
Federal Tort Claims Act, 28 U.S.C. § 1346(b)
DoDD 1000.26E, *Support for Non-Federal Entities Authorized to Operate on DoD Installations* (2 February 2007)
DoDI 1100.21, *Voluntary Services in the Department of Defense* (11 March 2002), incorporating Change 1, 26 December 2002
AFI 51-502, *Personnel and Carrier Recovery Claims* (5 August 2016)
Memorandum of Understanding between the United States Department of Defense and the American Red Cross (March 2009) and http://download.militaryonesource.mil/12038/MOS/MWR/PR000613-09REDXMOU.pdf
DD Form 2793, *Volunteer Agreement for Appropriated Activities or Nonappropriated Fund Instrumentalities* (1 March 2018)

12
CHAPTER TWELVE: THE AIR FORCE CLAIMS PROGRAM

PERSONAL PROPERTY CLAIMS

The Military Personnel and Civilian Employees Claims Act, also known as the Personnel Claims Act (PCA), is a gratuitous payment statute. It does not provide insurance coverage and is not designed to make the United States a total insurer of the personal property of claimants. Payment does not depend on tort liability or government fault. Congress instead determined to lessen the hardships of military life by providing prompt and fair payment for certain types of property loss or damage, especially those caused by frequent moves. The Air Force aims, within approved guidelines, to compensate active duty members and civilian employees for property loss or damage to the maximum extent possible.

Introduction

- The Air Force Claims Service Center (CSC), located at Wright-Patterson Air Force Base, Ohio, centrally adjudicates all personnel claims
- Under the PCA, the Air Force may settle and pay claims for loss and damage of members' personal property when such loss or damage is "incident to service"
- Not all property claims are covered
- Covered claims generally fall into three categories:
  - -- Household goods (HHG) claims
  - -- Vehicle shipment (POV) claims
  - -- Other tangible personal property claims

Requirements under the Statute

- The loss or damage must be incident to the member's service
- The loss or damage cannot be recoverable through private insurance (limited exceptions apply)
- The claim must be substantiated
- The Air Force must determine that the member's possession of the property was "reasonable or useful" under the circumstances
- The loss or damage must not have resulted from negligence of the claimant
  - -- Other than household goods claims paid under the full replacement value program described below, maximum payment is $40,000, unless the claim arises from emergency evacuations or extraordinary circumstances in which cases the maximum payment is $100,000

Processing Guidelines

- Full Replacement Value (FRV) Program:
  - -- FRV applies to household goods shipments picked up on or after 1 October 2007. Under this program, members may first claim full replacement value for damaged or lost household goods directly with the carrier.
  - -- If a member cannot reach an acceptable settlement with the carrier on certain items, the member can file a claim with the CSC for the disputed items only. Standard depreciation rules will apply. The CSC will assert an FRV claim against the carrier, and if recovery is successful, will pass it on to the member.
  - -- If a member has a significant loss under FRV, they should be aware that the carrier's maximum liability is $50,000 or $4.00 times the net weight of the shipment. In other words, if

the member's shipment weighs 10,000 pounds the carrier's maximum liability is $40,000. The CSC can pay an additional $40,000 at depreciated value.

- FRV Program Filing Deadlines (from date of delivery):
  - -- The claimant files the "Notice of Loss/Damage After Delivery" in the Defense Personal Property System (DPS) Claims Module within 75 days, placing the carrier on notice that additional loss or damage has been detected after delivery
  - -- This time limit may be extended for certain causes such as the member being on temporary duty (TDY) or hospitalized. The CSC will evaluate the cause and extend the deadline as appropriate.
  - -- The claimant must file a claim directly with the carrier within nine months. If the claimant fails to file during this time, they may file the claim with the carrier or the CSC within two years, but standard depreciation rules will then apply.
- Defense Personal Property System (DPS):
  - -- The DPS system phased in for household goods moves between November 2008 and summer 2011. Under this program, members file a claim in the DPS Claims Module.
  - -- A claimant will file a "Loss/Damage Report After Delivery" within 75 days (this takes the place of the DD Form 1840R) online within the DPS claims module. If the member cannot file the "Loss/Damage Report After Delivery" due to computer or other technical issues, the member should contact the CSC for guidance.
  - -- Similar to FRV, the claimant must file a claim against the carrier in DPS within nine months. If the claimant is dissatisfied with the carrier's offer, he/she can transfer the items/file the claim with the CSC.
- Statute of Limitations and Other Important Time Periods:
  - -- A claim for a sum certain must be presented by the member (or authorized agent with a power of attorney) within two years from the incident date or date of delivery in accordance with the PCA. FRV is only available if filed within nine months.
  - -- The two year statute may be extended, for good cause, during time of war. The CSC will determine whether good cause exists to extend the timeline.
  - -- The requirement to file the "Notice of Loss or Damage After Delivery" within 75 days is separate from the requirement to file the claim within two years—damage for privately owned vehicles (POVs) is noted on DD Form 788 at the port. If additional damage is discovered after leaving the Vehicle Processing Center (VPC), but within 48 hours of vehicle pickup, the member should contact the VPC and alert the VPC of the additional damage.

Proper Claimants

- Active duty Air Force military personnel
- Retired or separated Air Force military personnel who suffer loss or damage resulting from the last entitled storage or movement of their personal property
- Air Force civilian employees paid from appropriated and nonappropriated funds. Claims filed by nonappropriated funds civilian employees are paid from nonappropriated funds.
- Civilian employees of the Defense Commissary Agency (DeCA) who work on an Air Force installation
- DoD dependent school teachers and administrative personnel serviced by an Air Force installation

- Air Force Reserve (AFR) and Air National Guard (ANG) personnel when performing federally-funded active duty, full-time Guard duty, inactive duty for training, and ANG technicians serving under 32 U.S.C. § 709
- Air Force Reserve Officer Training Corps (AFROTC) cadets traveling at government expense or on active duty summer training
- United States Air Force Academy cadets
- Survivor of a deceased proper claimant or authorized agent or legal representative of a proper claimant

Payable Claims

- For loss or damage in the following general categories:
  - -- Government-sponsored transportation or storage under orders
    - --- Examples include household goods and unaccompanied baggage shipments, shipped vehicles, mobile homes and contents in shipment, and, in some circumstances, personally procured moves (PPM), also known as do-it-yourself (DITY) moves, luggage and hand-carried property
  - -- At quarters and other authorized places
    - --- Examples include fire, explosion, hurricane, theft, and vandalism in continental United States (CONUS) base housing or at overseas quarters either on or off-base
  - -- Privately owned vehicles (POVs)
    - --- Examples include damage in shipment, theft or vandalism to parked cars, damage or loss during TDY where POV is authorized, and paint over-spray. Members should proceed to their local legal office as soon as possible to complete an inspection and have photos taken.
  - -- Other categories
    - --- As described in AFI 51-502, *Personnel and Carrier Recovery Claims*
- **Uniform items damaged while performing normal duties are not payable**
  - -- Claims for damaged or missing uniforms are not paid automatically. All claims must be investigated and any payment must be supported by the facts contained in the claim file. There should be no negligence or lack of due care on the claimant's part, claimant must have done everything possible to "protect" the clothing items, and the damage cannot be a result of normal risks associated with daily work duties.
- To contact the CSC, call DSN 986-8044 or commercial toll free 1-877-754-1212 or via e-mail at AFCSC.JA@us.af.mil. To file a claim on the world wide web, visit: https://claims.jag.af.mil/.

References

Military Personnel and Civilian Employees' Claims Act (Personnel Claims Act), 31 U.S.C. §§ 3701, 3721

32 U.S.C. § 709

DoDD 5515.10, *Settlement and Payment of Claims Under 31 U.S.C. 3701 and 3721, "The Military Personnel and Civilian Employees' Claims Act of 1964"* (24 September 2004), certified current 31 October 2006

AFI 51-502, *Personnel and Carrier Recovery Claims* (5 August 2016)

Air Force Claims Service Center, https://claims.jag.af.mil/

DISASTER CLAIMS

Disasters come in all shapes and sizes at installations around the globe. From hail storms, floods, fire, tornados, hurricanes, ice storms, and high wind events, the Air Force Claims Service Center (CSC) and base legal offices work together when a disaster strikes to ensure Airmen and their families receive compensation for lost and destroyed personal property that is lost incident to service.

Disaster Claims Team

- A disaster claims team from the Air Force Legal Operations Agency, Claims and Tort Litigation Division is available to assist base legal offices in large disasters. The disaster claims team, along with reach-back support, or even on-site assistance from CSC personnel, will deploy to the disaster location at the request of the wing or installation commander.
- The CSC, with Defense Finance and Accounting Services (DFAS) support, can make emergency payments within 96 hours by electronic funds transfer (EFT). Alternatively, the CSC can provide the wing accounting liaison officer (ALO) an emergency funding document in order to make cash payments, if needed.
- If the claims team is deployed to the disaster location, CSC personnel, along with base legal personnel, will inspect and document damaged property, and assist Airmen and their families file claims. Claims must first be filed with any available insurance coverage. Claims filed against the Air Force are secondary.
- Affected Airmen and their families have two years from the date of the disaster to file their claims with the Air Force
- CSC Contact Information: DSN 986-8044, COMM 937-656-8044, toll free 1-877-754-1212 or via e-mail at AFCSC.JA@us.af.mil

References

Military Personnel and Civilian Employees' Claims Act (Personnel Claims Act), 31 U.S.C. §§ 3701, 3721
32 U.S.C. § 709
DoDD 5515.10, *Settlement and Payment of Claims Under 31 U.S.C. 3701 and 3721, "The Military Personnel and Civilian Employees' Claims Act of 1964"* (24 September 2004), certified current 31 October 2006
AFI 51-502, *Personnel and Carrier Recovery Claims* (5 August 2016)
Air Force Claims Service Center, https://claims.jag.af.mil/

TORT CLAIMS

Dependents, retirees, and nonaffiliated civilians may contact you to complain about accidents or injuries they have suffered. In those situations, you may inform them that it is their right to file a claim to seek compensation for their loss. You should refer them to your servicing staff judge advocate's (SJA) office but do not make any promises or implications that their claim will be approved. There are numerous legal reasons a person's claim may not be payable even though at first blush it may appear to be.

Introduction

- Under certain circumstances, federal law subjects the United States to liability for property damage, personal injuries, and death that result(s) directly from the negligent or wrongful acts/omissions of government personnel acting within the scope of their employment
- Federal law authorizes the United States to pay for property damage, personal injuries, and death that directly result(s) from "noncombat activities" of United States armed forces
- Normally, to receive compensation, an injured person or entity must present a signed written request for payment of a specific amount of money (claim) within two years of the accident or incident to the agency that created the loss, personal injury, or death
- In some cases, denial of a claim or failure to resolve a claim within six months after it is presented to the Air Force creates a right to sue the United States in federal district court
- Installation legal offices work with the Air Force Legal Operations Agency, Claims and Torts Litigation Division (JACC) to receive and process claims against the Air Force and help defend the Air Force when claims are litigated

Claims and Claimants

- Claims arising from alleged negligent or wrongful acts or omissions of government personnel while acting within the scope of their office or employment are tort claims
- Common tort claims include government motor vehicle (GMV)-privately owned vehicle (POV) accidents, slips and falls on base, barrier or bollard accidents, medical malpractice, aircraft accidents, or mishaps with rental cars while on temporary duty (TDY)
- Claimants may be individuals, organizations, or companies that have suffered loss because of alleged negligent or wrongful acts or omissions by government personnel acting within the scope of their employment
- Claimants may also be agents, legal representatives, or persons with subrogation rights of the injured party

Payable Claims

- Claim must demand a specific amount of money and be signed by claimant or authorized agent
- Claim must allege damage to real or personal property, personal injury, or death
- Damage must be a direct result of negligent or wrongful act or omission of government personnel acting within the scope of employment
- A negligent act occurs when a person's failure to exercise the degree of care considered reasonable under the circumstances results in an unintended injury to another party

- Government personnel include Air Force military and civilian employees, Civil Air Patrol members performing Air Force authorized missions, and Air National Guard military members in federal status
- The base legal office determines (preliminarily) whether an employee acted within the **scope of employment** after reviewing relevant facts, circumstances, and applicable law
  - -- Ordinarily, a person is within the scope of employment if the actions in question were serving some governmental purpose when the negligent act or omission allegedly occurred
  - -- Not a line of duty question
- Generally, the extent of government liability is about the same as that of a private person
  - -- For claims arising in the United States and its territories, liability is determined based on the law of the place (state) where the alleged negligent act or omission occurred
  - -- For claims arising in foreign countries, liability is based on legal standards controlled by United States military regulation or policy, or applicable international agreements
  - -- The principles of absolute or strict liability do not apply
- If the loss, injury or death is the direct result of "noncombat activity," the claim may be paid without regard to negligence or other fault
  - -- "Noncombat activity" is a term of art that means any activity, other than combat, war or armed conflict that is particularly military in character, has little parallel in civilian pursuits, and has been historically considered as furnishing the proper basis for claims. However, "noncombat activity" should not be interpreted as simply meaning, "not combat."
  - -- Common "noncombat activities" include operation of military aircraft/spacecraft/missiles, practice bombing or firing of heavy guns and missiles, movement of tanks, and explosive ordinance disposal (EOD) operations

Claims Not Payable

- Claims specifically excluded by statute
- Examples of excluded claims
  - -- Damages, injuries, or death that stem from the performance of or failure to perform a discretionary function by a federal agency or government employee
  - -- Intentional torts (acts that the person intends to commit) such as assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contractual rights (claims may be payable with regards to acts or omissions of investigative or law enforcement officers of the United States Government arising out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution)
  - -- Government taking of air space over land
  - -- Personal injury, death or property damage of a military member incurred incident to service
  - -- Personal injury or death of a civilian employee of the United States sustained while in performance of his/her duty
  - -- Punitive damages

Processing and Payment

- Installation legal office accepts, investigates, and adjudicates most tort claims alleging $25,000 or less in losses with the exception of personal injury and medical malpractice tort claims. Claims above $25,000 for personal injury or alleging medical malpractice at Continental United States (CONUS) locations are forwarded immediately to AFLOA/JACC.
  - -- All installation level claims, other than those settled under the Federal Tort Claims Act (FTCA) for more than $2,500, are paid from Air Force claims funds
    - --- If JA approves an FTCA claim for more than $2,500, payment comes from the Judgment Fund Group of the Department of the Treasury
  - -- Installation legal office consults with AFLOA/JACC prior to adjudicating claims alleging:
    - --- Personal injury
    - --- Legal malpractice
    - --- Property damage caused by an Air Force member driving a rental vehicle
    - --- Property damage that occurred in a navigable waterway (admiralty and maritime claims)
    - --- Property damage caused by activities of the Civil Air Patrol
    - --- Property damage or personal injury to wing commander, vice wing commander or their immediate family members
- AFLOA/JACC investigates and takes final action on all medical malpractice claims arising within the United States. At USAFE bases and at PACAF bases outside the 50 states, base legal offices investigate medical malpractice claims and forward the claims files to AFLOA/JACC for final action.
- If installation legal office denies a claim, claimant may appeal or request reconsideration, depending on which statute dictates processing of the claim
  - -- Installation legal office can grant appeal or reconsideration request
  - -- Installation legal office must forward any appeal or reconsideration request it does not grant to AFLOA/JACC for final action
- CONUS installation legal offices accept claims alleging more than $25,000 in damages or personal injury
  - -- Installation legal office will appoint a point of contact (POC) (attorney or paralegal) within the installation legal office to work with AFLOA/JACC to investigate the claim
  - -- In some cases, installation POC will take a more proactive role in the adjudication process, to include legal research, drafting memoranda, and negotiating settlements, to provide training and increase experience for both attorneys and paralegals
- Outside the continental United States (OCONUS) installation legal offices accept, investigate, and may settle non-medical malpractice claims up to $25,000. Those claims not settled for less than $25,000 are forwarded to JACC with the full investigation and recommendation for final adjudication.
  - -- Before adjudicating a claim, OCONUS legal offices should ensure they have single-service claims responsibility within the country they are located. If not, forward claims to the appropriate military service for investigation and adjudication.

- In certain cases, claimant may sue the Air Force within six months after final action is taken on the claim
  - -- Final action is taken by mailing the denial of claim or, when applicable, denial of a reconsideration request. Six months of no action may be deemed a denial by the claimant and the claimant can file suit.
  - -- Suit is in federal district court. Department of Justice (DOJ) defends the Air Force in litigation. JACC works with the installation legal office to help DOJ defend litigation.
- Special procedures apply to claims arising in a foreign country. Installation legal offices coordinate with the Foreign Claims Branch of JACC when handling foreign and international claims.

References

Military Claims Act, 10 U.S.C. § 2733
Foreign Claims Act, 10 U.S.C. § 2734
International Agreement Claims Act, 10 U.S.C. §§ 2734(a), 2734(b)
National Guard Claims Act, 32 U.S.C. § 715
Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2401, 2671-2680
AFI 51-501, *Tort Claims* (13 September 2016), including AFI51-501_AFGM2018-01, 13 March 2018

AVIATION CLAIMS

- Aviation claims occur in a variety of ways, including claims arising from low overflights and sonic booms, and accidents involving active duty, Air Force Reserve (AFR), Air National Guard (ANG), Aero Club, and Civil Air Patrol aircraft
- If the claim arose from military flight activity, it may be payable under the "noncombat activity" provisions of the Military Claims Act (MCA) or the National Guard Claims Act (NGCA)
  - -- There is no requirement to show negligence in noncombat activity claims. Causation and damages are the only issues.
  - -- MCA/NGCA claimants may receive advance payments under certain circumstances, primarily for damage mitigation purposes
  - -- If the claim cannot be settled, the claimant may bring a lawsuit under the Federal Tort Claims Act (FTCA), unless otherwise exempted, but must prove negligence, causation, and damages

Sonic Boom and Low Overflight Claims

- Sonic Boom Damage:
  - -- Overpressures based upon speed, altitude and location of aircraft relative to a claimant's property, in pounds per square feet, will determine whether claimed damage could have been caused by sonic boom
  - -- Sonic booms are not selective and may encompass an entire area. A sonic boom is unlikely to cause damage to a claimant's home while having no effect on nearby properties.
  - -- Window glass and bric-a-brac are generally the first items to be damaged. A sonic boom is unlikely to cause significant structural damage, such as cracked foundations or sidewalks, without also breaking windows or shaking bric-a-brac from shelves.
- Low Overflight Damage:
  - -- Noise alone generally does not cause damage to property
  - -- Noise may harm animals, such as by stampeding cattle and horses; startling chickens, silver foxes, and minks; cracking exotic bird eggs; or injuring ostriches
  - -- Claims alleging loss of property value due to noise from repeated low overflights are not usually payable under any tort claims statute. The property owner's remedy is a "takings" claim under the Fifth Amendment's due process clause.

Aircraft Accident Claims

- ANG Claims:
  - -- Settlement authorities may settle claims for death, personal injury, or property damage arising out of the authorized noncombat activities of the ANG under the NGCA, 32 U.S.C. § 715
  - -- Determine status of crewmembers or ANG personnel involved in mishap
    - --- Title 10 – federal active duty orders
    - --- Title 32 – federally funded training orders (e.g., inactive duty training (IDT) or active duty training (ADT))
    - --- State duty – disaster response, riot control, emergency situations

-- The United States is only liable for negligence of ANG members performing federal duties under Title 10 or Title 32 at time of incident. The provisions do not apply when a member is performing duty for the state.

-- ANG aviation claims are adjudicated under the noncombat activity provisions of the MCA if the member was in Title 10 status, or the NGCA if the member was in Title 32 status

- AFR Claims:

  -- Crewmembers have same status as active duty personnel

  -- AFR aviation claims are usually adjudicated under the noncombat activity provisions of the MCA

- Aero Club Claims:

  -- Aero Club participation is a recreational activity, and the United States is not liable for the negligence of Aero Club members or participants while engaged in Aero Club activities because such activities are outside the scope of their employment

  -- All Aero Club members and participants are covered under the National Association of Flight Instructors (NAFI) liability insurance for their negligence in causing a mishap

    --- Look to NAFI insurance to pay third party claims caused by the negligence of Aero Club members or participants engaged in Aero Club activities

    --- Not cognizable under Air Force claims statutes

  -- Third-party claims arising from the negligence of Aero Club employees or military members working at the Aero Club in their official capacity are cognizable under the FTCA. Aero Club claims settled under the FTCA are paid from nonappropriated funds administered by USAF/JAA-S, Joint Base San Antonio-Lackland, Texas.

  -- The *Feres* doctrine bars active duty, guard and reserve military members from receiving compensation under federal claims statutes for death or injuries arising out of their participation in Aero Club activities. Such participation is deemed incident to their military service.

  -- Similarly, the Federal Employees Compensation Act (FECA) bars Air Force civilian employees from receiving compensation under federal claims statutes for death or injuries arising from their participation in Aero Club activities

- Civil Air Patrol (CAP) Claims:

  -- CAP is a federally supported, congressionally chartered, nonprofit civilian corporation, and a volunteer civilian auxiliary of the Air Force. Its mission is to provide aerospace education and training to its senior and cadet members, provide volunteer emergency services, and promote civil aviation in the public sector.

  -- The Air Force is authorized to use the services of the CAP in fulfilling certain noncombat programs and missions of the Air Force that have been officially designated as Air Force Assigned Missions (AFAMs)

    --- Typical AFAMs include support of homeland security, search and rescue, disaster relief, and counter-narcotics reconnaissance flights

    --- CAP is an instrumentality of the United States when performing an AFAM

    --- Third-party claims arising out of activities of CAP while performing AFAMs are cognizable under FTCA

--- Senior CAP members or CAP cadets (18 years or older) are covered under FECA for their death or injuries incurred while in the performance of an AFAM

-- The United States is not liable for third party claims arising out of CAP corporate activities or for claims for the use of privately owned property that CAP or its members use during AFAMs

References

Federal Employees Compensation Act, 5 U.S.C. §§ 8101 *et seq.*
Military Claims Act, 10 U.S.C. § 2733
Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680
National Guard Claims Act, 32 U.S.C. § 715
AFI 51-501, *Tort Claims* (13 September 2016), including AFI51-501_AFGM2018-01, 13 March 2018

FOREIGN AND INTERNATIONAL CLAIMS

Single Service Claims Responsibility

- DoDI 5515.08, *Assignment of Claims Responsibility,* assigns certain countries to each military department (Army, Navy, and Air Force) and makes the military departments responsible for final action on tort claims arising within their assigned countries. This instruction applies to numerous claims statutes, including the Foreign Claims Act (FCA), International Agreement Claims Act (IACA), Military Claims Act (MCA), Use of Government Property Claims Act (UGPCA), and Advance Payments Act (APA).
- Naval Forces Afloat Exception: Naval forces afloat visiting foreign ports may settle claims arising outside the scope of duty for under $2,500 without regard to single service assignment
- Not all countries are assigned under DoDI 5515.08. Claims arising in unassigned countries will be adjudicated by the command responsible for generating the claim. If the command is joint, the claim should be adjudicated by the service component command whose personnel allegedly caused the claim.
- Claims in foreign countries are settled under the regulations of the service having single service claims responsibility
- DoD/GC can change assignments by updating DoDI 5515.08 or by interim letter

International Agreement Claims Act (IACA) – U.S. Military in Foreign Countries

- 10 U.S.C. § 2734a applies to acts and omissions of U.S. forces in foreign countries when the United States has a status of forces agreement (SOFA) with a foreign government and the SOFA explicitly provides for both governments to share the cost of any claim payout
  - -- Under the NATO SOFA, "receiving State" is the state receiving visiting forces and "sending State" is the state sending forces
  - -- For NATO SOFA claims against U.S. personnel in foreign countries, the United States would be the sending state
- Claims are adjudicated and paid by the receiving state (host nation), which sends the United States a bill for its pro rata share of any claim payout
  - -- Host nation must adjudicate the claim applying the same statutes it would apply if its own military had caused the damage
  - -- Host nation statute of limitations applies to these claims
  - -- If the host nation pays attorney fees as part of the settlement, the United States is obligated to pay its percentage of those fees
  - -- Claims caused by U.S. enemy actions or actions of U.S. forces in combat are not payable
- The United States currently has cost-sharing SOFAs with NATO members, many Partnership for Peace (PfP) countries, Portugal (for the Azores), Iceland, Japan, Korea, Australia, and Singapore
  - -- NATO SOFA and PfP SOFA (latter incorporates NATO SOFA by reference) are reciprocal, which means they apply to tortious incidents in the territories of all parties to the agreement
  - -- SOFAs with Iceland, Japan, Korea, Australia, as well as the Lajes Technical Agreement (for the Azores), are not reciprocal. They apply only to tortious incidents by U.S. personnel in these foreign countries.

-- Singapore Counter Agreement is also not reciprocal. However, it applies solely to tortious incidents by Singaporean personnel in the United States (see below "International Agreement Claims Act (IACA) – Foreign Personnel in the United States").

-- U.S. reimbursement percentage is usually 75 percent, but this percentage can vary if more than one nation is responsible for the damage, injury, or death, or if a different cost-sharing arrangement has been negotiated

- The United States can object to a bill for reimbursement if the host nation paid a claim not cognizable under the SOFA or the host nation did not adjudicate the claim under the laws that would apply to its own military

International Agreement Claims Act (IACA) – Foreign Personnel in the United States

- 10 U.S.C. § 2734b applies to acts of foreign forces in the United States when the foreign country has a SOFA with the United States and the SOFA explicitly provides for both governments to share the cost of any claim payout

  -- For NATO SOFA claims against foreign personnel in the United States, the United States would be the receiving state

- Claims are adjudicated and paid by the United States as the host nation, which sends the responsible foreign country a bill for its pro rata share of any claim payout. The Air Force will investigate these claims to the extent they involve foreign military personnel or property involved in an Air Force activity, but only the Army is authorized under DoDI 5515.08 to settle (pay or deny) these claims.

  -- The United States will adjudicate the claim applying the same statutes it would apply if its own military had caused the damage

  -- U.S. statute of limitations applies to these claims

  -- If the United States pays attorney fees as part of the settlement, the foreign country is obligated to pay its percentage of those fees

  -- Claims caused by U.S. enemy actions are not payable

- Cost-sharing agreements with applicability in the United States include the NATO SOFA, PfP SOFA, and Singapore Counterpart Agreement

  -- SOFAs with Japan, Korea, Australia, and the Azores are not reciprocal and apply only to tortious incidents arising in those countries

  -- According to the United States State Department, NATO SOFA applies to Alaska, but not Hawaii

  -- Foreign government reimbursement percentage is usually 75 percent, but this percentage can vary if more than one nation is responsible for the damage, injury, or death, or if a different cost-sharing arrangement has been negotiated

- Responsible foreign government can object to a bill for reimbursement if the United States paid a claim not cognizable under the SOFA or the United States did not adjudicate the claim under the laws that would apply to its own military

- Immediately notify JACC of any on-base or off-base incident involving foreign military personnel or property in the United States

Foreign Claims Act (FCA)

- 10 U.S.C. § 2734 applies only to claims arising abroad where the IACA is not applicable (IACA takes precedence over FCA). The Secretary of the Air Force (SecAF) has promulgated AFI 51-501, *Tort Claims*, as authorized by 10 U.S.C. § 2734, to implement Air Force policy under the FCA.
  - -- Use IACA where SOFA cost-sharing exists and damages, injury, or death are caused in the performance of official duty (as understood by the United States and the foreign government)
  - -- Use FCA where no SOFA cost-sharing exists or where damages, injury, or death arise outside the scope of employment
- Claimant must be a foreign inhabitant
  - -- U.S. military members, federal civilian employees, and dependents are not foreign inhabitants
- Claims personnel must be appointed a Foreign Claims Commission (FCC) in order to act on an FCA claim (AFI 51-501 governs appointments/delegations of FCC authority)
- Two-year statute of limitations applies to FCA claims
- Damage, injury, or death must be either incident to a noncombat activity or caused (negligently or wrongfully) by a DoD military member or civilian employee
- Statutory exceptions to payment include claims by subrogees and acts of the United States in combat. However, a claim may be allowed if it arises from an accident or malfunction incident to operation of an aircraft of the armed forces of the United States, including its airborne ordnance, indirectly related to combat and occurring while preparing for, going to, or returning from a combat mission.
- Apply the law of the country where the incident occurs to the extent it does not conflict with AFI 51-501. If conditions for payment exist, and no basis under AFI 51-501 prohibits payment, payment may occur. All payments are *ex gratia* and remain within the discretion of SecAF.
- Claimants are paid in the currency of the country where the incident occurred unless JACC receives a compelling justification why payment should occur in some other foreign currency

Solatia (Rarely Justified)

- Solatium payment is a nominal payment made immediately to a victim or victim's family to express sympathy. Paid with personal funds or command (O&M) funds, it is not compensation (thus not deducted from claim award) and is not subject to single service claims responsibility. Immediately report to JACC any attempt to pay solatia in a country where solatia has not been explicitly authorized by U.S. military regulation, as proof of clear custom must be established to justify such payment.

References

Military Claims Act, 10 U.S.C. § 2733
Foreign Claims Act, 10 U.S.C. § 2734
International Agreement Claims Act, 10 U.S.C. §§ 2734(a) and 2734(b)
Use of Government Property Claims Act 10 U.S.C. § 2737
Advance Payments Act, 37 U.S.C. § 1006
DoDD 5515.3, *Settlement of Claims Under Sections 2733, 2734, 2734a, and 2734b of Title 10, United States Code* (27 September 2004), certified current 31 October 2006
DoDI 5515.08, *Assignment of Claims Responsibility* (30 August 2016)
AFI 51-501, *Tort Claims* (13 September 2016), including AFI51-501_AFGM2018-01, 13 March 2018

PROPERTY DAMAGE TORT CLAIMS IN FAVOR OF THE UNITED STATES

The United States may assert and collect claims for damage to its property through someone's negligence or wrongful act. As a property owner, the Air Force is often the victim of a tort and has the right under the Federal Claims Collection Act, 31 U.S.C. § § 3701, 3711-3719, to collect for tort damages. Claims on behalf of the United States for property damage by a tortfeasor require the base to be proactive and aggressively look for these claims, which are known as "G" claims or government claims. This does **NOT** include medical cost reimbursement claims.

Assertable Claims

- Claims personnel may assert claims against a tortfeasor for loss or damage to government property when:
  - -- The loss or damage to government property is for $100 or more. If the loss or damage is less than $100, assert the claim if it can be collected easily.
  - -- The loss or damage is based on a contract and the contracting officer does not intend to assert a claim under the contract. Document the contracting officer's decision not to assert a claim for the file.
  - -- The claim arises from the same incident as a medical cost reimbursement claim
    - --- Process the two claims separately
    - --- Coordinate the investigations
  - -- The tortfeasor or his insurer presents a claim against the government arising from the same incident, i.e., counterclaims. Coordinate the processing of both the pro-government and anti-government tort claims together.
  - -- The claim is based on products liability theory of recovery. Due to the unique nature of product liability issues and claims litigation, obtain approval from AFLOA/JACC before asserting.

Nonassertable Claims

- Claims personnel do not assert a claim for loss or damage of government property in these instances. Do not assert a claim:
  - -- For reimbursement against military or civilian employees for claims paid by the United States due to that employee's negligence
  - -- For loss or damage that a nonappropriated fund instrumentality (NAFI) employee causes to government property while on the job
  - -- If the loss or damage was caused by a government employee with accountability for the property under the reports of survey system

Statute of Limitations

- The United States must file a lawsuit for loss or damage of government property, based in tort, within **three years** after the date when a responsible official of the United States knew or reasonably should have known the material facts that resulted in the claimed loss
- Suits based in contract, upon state law, or upon some other legal theory may have a different statute of limitations period

Collecting Claims

- Claims personnel collect tort claims in favor of the government
- The settlement authority may accept a third party's offer to repair or replace the damaged property to the satisfaction of the accountable property officer
- The Air Force may offset a tort claim against an amount that it owes to the claimant
- When two or more tortfeasors are jointly and severally liable, settlement authorities may divide the payment between the tortfeasors
- A settlement authority may waive prejudgment interest (where statute, contract, or regulation do not require it) to encourage payment

Depositing Collections

- Claims personnel deposit collections
  - -- Deposit collections for loss, damage, or destruction to Air Force family housing, caused by abuse or negligence, to the DoD military family housing management account
  - -- Deposit collections for loss, damage, or destruction to other real property to the appropriate funds account of the organization responsible for the repair, maintenance, or replacement of the real property. These funds may not be reused without their appropriation by Congress.
  - -- Deposit collections for loss, damage, or destruction to property of an Air Force industrial fund or other revolving funds account to that account
  - -- Pay or deposit recoveries involving NAFI property to the appropriate NAFI
  - -- Deposit all other collections for which there is no statutory exception to the United States Treasury miscellaneous receipts account

---

References

10 U.S.C. § 2415
10 U.S.C. § 2782
10 U.S.C. § 2831
31 U.S.C. § 3302
Federal Claims Collection Act, 31 U.S.C. §§ 3701, 3711-3719
AFI 51-502, *Personnel and Carrier Recovery Claims* (5 August 2016)

MEDICAL COST REIMBURSEMENT CLAIMS

The Air Force may recover the cost of providing medical care to active duty and retired military members and their beneficiaries who are injured as a result of tortious conduct of third parties under the Federal Medical Care Recovery Act (FMCRA) and for all care covered by a third party payer under the Coordination of Benefits statute (COB). The Air Force may also recover pay given to an active duty member during a period of disability caused by tort under the FMCRA.

Federal Medical Care Recovery Act (FMCRA)

- Under this statute, the government's recovery is predicated on "circumstances creating tort liability"
  - -- Usually, the four common law elements of tortious conduct (duty, breach, causation, damages) must be present before considering the assertion of a Medical Cost Reimbursement claim (MCR) under the FMCRA
  - -- The FMCRA applies even in no-fault jurisdictions. Where a system of tort liability has been replaced by a no-fault system, the government may pursue an FMCRA claim as a third party beneficiary.
  - -- At the same time, any defenses available under state law that may negate tort liability, such as contributory negligence, may be interposed to defeat the government's claim. However, state procedural defenses cannot be interposed to defeat the claim.
  - -- In general, a federal statute of limitation of three years applies
  - -- Since the United States has an independent statutory right of recovery, a release signed by the injured party is usually not effective in extinguishing the government's claim
- All successful collections for treatment provided by a military treatment facility (MTF) are deposited into the Operations and Maintenance (O&M) account of the MTF rendering treatment. Collections for active duty pay are deposited to the O&M account of the unit to which the disabled member was assigned at the time of the injury. Recoveries for TRICARE paid treatment is returned to the TRICARE Management Activity.

Coordination of Benefits (COB) Claims

- Congress allows MTFs to pursue recoveries from statutorily defined plans
  - -- These include health insurance policies/plans, auto insurance providing for medical treatment, workers' compensation coverage, and similar plans, policies, and programs
  - -- The COB statute makes the United States a third-party beneficiary under such plans
  - -- In general, a federal statute of limitations of six years applies
- Successful recoveries of medical expenses are deposited directly into the treating MTF's O&M account
- Claims offices use COB as the primary statutory basis of recovery against various types of automobile insurance
- COB has been extended to allow recovery of payments made through TRICARE. Medical expenses paid for by TRICARE are deposited into a TRICARE Management Activity

Collection of Medical Cost Reimbursement Claims

- These claims are collected either by overseas base legal offices or one of eight Medical Cost Reimbursement Program ("MCRP") regional offices within the United States. The MCRP offices are located at:
  - -- Joint Base McGuire-Dix-Lakehurst, New Jersey
  - -- Joint Base Langley-Eustis, Virginia
  - -- Eglin Air Force Base, Florida
  - -- Wright-Patterson Air Force Base, Ohio
  - -- Joint Base San Antonio-Lackland, Texas
  - -- Offutt Air Force Base, Nebraska
  - -- Nellis Air Force Base, Nevada
  - -- Travis Air Force Base, California
- Collections are generated from reports of injuries to covered personnel from medical treatment facilities, medical treatment providers, Security Forces blotters, and notice from the injured party's chain-of-command. If commanders become aware of an injury to an active duty or retired military member and/or their beneficiaries caused by a tortious act, the commander should promptly notify the base legal office for guidance on how to process this information and/or advise the injured party to contact the closest MCRP office.

References

10 U.S.C. § 1095
Federal Medical Care Recovery Act, 42 U.S.C. §§ 2651-2653
AFI 51-502, *Personnel and Carrier Recovery Claims* (5 August 2016)

ARTICLE 139 CLAIMS

Under Article 139, UCMJ, commanders may direct collection and pay a claim for property that military personnel willfully damage or wrongfully take, if the claim results from riotous, violent, or disorderly conduct.

Scope of Article 139 Claims

- Assertable Claims:
  - -- ***Property claims only***; not personal injury or wrongful death
  - -- Must involve willful misconduct, not performance of legally authorized duties; and must arise from riotous, violent, or disorderly conduct, not conduct involving simple negligence or, for example, bad checks or private indebtedness
- Article 139 claims are entirely separate and distinct from disciplinary action taken under any other article of the UCMJ, or any other administrative action that may be appropriate
- Proper Claimant:
  - -- Any individual, to include military and civilian, business entity, state, territory, local government, or nonprofit organization may file an Article 139 claim
    - --- However, an appropriated fund (AF) or nonappropriated fund (NAF) instrumentality of the United States may not file an Article 139 claim

Procedures

- The claim must be submitted to an appropriate commander within 90 days of the date of the incident, unless the commander determines good cause for a delay
  - -- Examples of good cause for delay may include deployment, a claimant who does not know the identity of the tortfeasor, or the claimant's reasonable lack of knowledge of the ability to file an Article 139 claim
  - -- The claim should be submitted to the commander of the military organization or unit of the alleged offending member or members. However, it may be presented to the commander of the nearest military installation to be forwarded to the appropriate commander for jurisdiction.
  - -- Initially, the claim may be presented orally, but it must be written and state a sum certain before final action may be taken
- The claim is sent directly, or through channels, to the appointing commander, who is the officer exercising special court-martial convening authority over the offender. The appointing commander appoints a board of officers to investigate the claim.
  - -- A board of officers may consist of one to three commissioned officers
  - -- After evaluating all available evidence, which may include interviewing the individual against whom the claim was asserted (in accordance with Article 31, UCMJ, rights and the right to counsel), the board:
    - --- Determines if the claim falls under Article 139, UCMJ
    - --- Identifies the offender(s)
    - --- Determines liability and damages

  - -- The board may recommend:
    - --- Assessing damages against the identified service member (deducting from the assessment any voluntary or partial payments already made)
    - --- Assessing damages against members who were present during the incident, if authorities cannot individually identify the offenders
    - --- Disapproving the claim
- After the board completes its review, it forwards the claim to the staff judge advocate for a legal review prior to action by the appointing commander

Action by the Appointing Commander

- Determine if the claim falls under Article 139, UCMJ
- Assess an amount against each offender, but not more than the board's recommended amount
  - -- Cognizable claims in excess of $5,000 must be approved by AFLOA/JACC prior to payment
- Forward the board's report to the appropriate commander if it is determined that one or more offenders are in a different command, since only the commander of an offender may order payment of the claim under Article 139, UCMJ
- Direct the Defense Finance and Accounting Services (DFAS) office to withhold the specified amount from each offender's pay and to pay the claimant
- Notify the offender and claimant of the action taken

Appeal and Reconsideration

- The commander's action may not be appealed by the claimant or the offender
- The commander who originally ordered the assessment may reconsider and change the decision if the findings later prove to be wrong, even if the offender is no longer a member of that command
- A successor in command may change or cancel the assessment only on the basis of newly discovered evidence, fraud, or obvious error of law or fact

---

References

UCMJ art. 139
AFI 51-501, *Tort Claims* (13 September 2016), including AFI51-501_AFGM2018-01, 13 March 2018

LIABILITY FOR DAMAGE TO RENTAL VEHICLES

Introduction

- Vehicles rented on government orders are for official use only
- "Special conveyance use is limited to *official purposes*, including transportation to and from duty sites, lodgings, dining facilities, drugstores, barber shops, places of worship, cleaning establishments, and similar places required for the traveler's subsistence, health or comfort." Joint Federal Travel Regulations (JTR), see Chapter 3, Section 3320(E).
- The use of a rental vehicle for other than official purposes places a member at risk of personal liability for damages
- "Official Purposes" is a different standard than "scope of employment"
  - -- ***"Official purposes"*** is a standard in the JTR, and is used to determine whether or not a renter will be reimbursed for damage to a rental vehicle
  - -- ***"Scope of employment"*** is based on the law of the state in which the accident occurs and is the legal standard under the claims statutes that will be used to determine whether or not the United States will defend a renter in a lawsuit
  - -- Within NATO Status of Forces countries, there is yet a third standard, "in the performance of official duty," which bears on both claims and foreign criminal jurisdiction questions
- Use must be reasonable, but even if reasonable, may still not be in scope of employment
- It is important for commanders to factor into rental car authorizations whether or not the member/employee has private automobile liability insurance that could be relied upon in the event the member/employee were in an accident and found to be outside the scope of employment
- When renting a vehicle pursuant to an authorization on orders, it is mandatory to obtain the rental vehicle through the commercial travel office (CTO). See JTR, Chapter 3, Section 3000(B).
  - -- Generally, CTO will reserve a vehicle from a company participating in the Defense Travel Management Office (DTMO) negotiated agreement
  - -- It is TRANSCOM policy for CTOs to reserve a rental vehicle from a company that subscribes to the DTMO-negotiated agreement
    - --- Use of companies and rental car/truck locations participating in the DTMO agreement is encouraged because their government rate includes liability and vehicle loss and damage insurance coverage for the traveler and the government
    - --- Rental companies having a negotiated agreement with DTMO will be used, unless another rental company can provide better service at a lower cost and abides by the same rules/guidance contained in the DTMO-negotiated car/truck rental agreement
    - --- Government Administrative Rate Supplement (GARS). The GARS is a $5 per day fee added by rental car/truck companies that are party to the DTMO Car Rental Agreement. GARS is reimbursable to the traveler as specified in the JTR, Appendix G, *Reimbursable Expenses on Official Travel* and Appendix O, Section T4030(C)(2).

DTMO Rental Vehicles Agreement

- Major rental car companies subscribe to a memorandum of understanding (MOU) with DTMO. The MOU sets rates and conditions of the rental.
- Names of companies participating in the rental car program, current maximum rates offered, and terms and conditions of the U.S. Government Rental Car Agreement, effective 17 March 2016, are published on the DTMO website: http://www.defensetravel.dod.mil/Docs/DomesticCeilingRates.pdf
- Travel orders must reflect that a rental vehicle is authorized
- Agreement is not valid when using an International Merchant Purchase Authorization Card (IMPAC)
- Must rent from a participating company **AND** location. While most rental car companies subscribe to the agreement, a particular location may opt out.
- Rental agency should be notified of all persons who are going to be driving vehicle
  - -- While not mandatory under the DTMO agreement, it might relieve the renter of personal liability if another driver uses the vehicle on other than official business
  - -- Rental agency cannot charge for the addition of other drivers. A contractor is not your "fellow employee" and may not drive a car you rent on official business.
- DTMO Car Rental Agreement: Applies to cars and mini-vans, available at https://www.defensetravel.dod.mil/Docs/CarRentalAgreement.pdf
- DTMO Truck Rental Agreement:
  - -- Available at https://www.defensetravel.dod.mil/Docs/TruckRentalAgreement.pdf
  - -- Applies to cargo vans, pick-ups, utility, and straight trucks. Gross weight must not require a Class C driver's license.
  - -- Trucks are not necessarily listed with the commercial travel office (CTO)—must call company or go to DTMO website: https://www.defensetravel.dod.mil/site/rental.cfm
  - -- Driver must be 21 years old
  - -- Unlike cars, if a driver rents a different truck than one with DTMO rate, DTMO agreement does not apply
  - -- May apply to do-it-yourself (DITY) moves, but coverage under the agreement does not extend to spouse driving vehicle, nor to detour, e.g., driving out of the way to see parents. Some states do not consider permanent change of station (PCS) moves to be in scope of employment, so government would not defend member for negligence causing damage or injury to another.

Liability for Damages to the Rental Vehicle and to Others

- Four Different Situations:
  - -- Rented on orders pursuant to DTMO agreement
  - -- Rented on orders not under DTMO agreement
  - -- Personal rental vehicle on official temporary duty (TDY)
  - -- Rented pursuant to umbrella contract
- Claims personnel do not pay claims for damage to rental vehicles rented on orders pursuant to DTMO agreement. Follow guidance below for each situation.

Rented on Orders Pursuant to DTMO Agreement

- The rental company assumes and bears the entire risk of loss of or damage to the rented vehicles up to the policy limits; full comprehensive and collision coverage is in effect
- Renter may be personally liable for loss or damage caused by a fellow government traveler in official travel status while acting outside the scope of their employment duties
  - -- *Example*: A unit sends five people TDY and authorizes one rental car. One member rents the vehicle and charges the rental on the member's government travel card (GTC) (not the unit's government purchase card (GPC)). Any of the five members are authorized drivers while acting *within the scope of their employment duties*. But if one of the members takes the vehicle to a bar late at night, gets drunk, and crashes the car, that member would not be considered an authorized driver at the time of the accident.
- Negligence claims for personal injury or property damage against the driver by third parties are covered under the liability insurance provided by the rental car company, up to the policy limits. Under the current DTMO agreement, rental companies must have personal injury policy limits of at least $100,000 per person/$300,000 per occurrence and property damage limits of $25,000 per occurrence. Regardless of fault, so long as the driver was within the scope of employment, the government will defend the driver in any civil lawsuit. Within the United States, the exclusive remedy is against the government—the driver cannot be held personally liable while he/she was within the scope of employment.

Rented on Orders, Not Under the DTMO Agreement

- For damage to rental vehicle, the government travel card currently carries collision coverage
  - -- The traveler must decline the rental car company's collision damage waiver insurance
  - -- Damage must be reported to the government travel card company immediately
  - -- Covers collision or rollover, theft and theft-related charges, malicious vandalism, windshield damage due to road debris, and loss of use and towing charges due to covered damage
  - -- Does not apply if the vehicle is rented for more than 31 days; if used off-road; if driver is driving under the influence (DUI); if damage results from hail, lightning, flood or other weather-related causes; or if damage is from failure to protect the car, e.g., leaving the car running and unattended
  - -- Does not apply to expensive, exotic, and antique autos; vans over eight passenger; trucks; motorcycles; limos; or recreational vehicles
  - -- If no travel charge card coverage, member usually pays rental company and claims reimbursement on the travel voucher under JFTR, Appendix G
    - --- Defense Finance and Accounting Service (DFAS) can also pay rental company directly
    - --- Travel claim comes to the legal office for review
    - --- Payment for damage is from unit travel funds
- For damage to another vehicle, property, or personal injury, the claims office adjudicates
- So long as the driver was in the scope of employment, the United States will defend the driver
  - -- Within the United States, the driver cannot be held personally liable if the accident occurred while he/she was within the scope of employment

Personal Rental Vehicle on Official TDY

- For damage to rental vehicle, the driver is usually personally responsible
- For damage to another vehicle, property, or personal injury, the United States will defend the driver if driver is in the scope of employment
  - -- Within the United States, the driver cannot be held personally liable if the accident occurred while he/she was within the scope of employment

Rented Pursuant to Contract

- DTMO agreement not applicable unless made a part of the contract
- Will be subject to specific contractual provisions under Federal Acquisition Regulations (FAR) (FAR clause 52.228-8 is required within the United States); generally, the United States is liable for any damages to the rental vehicle except fair wear and tear and loss or damage caused by the negligence of the contractor
- Along with typical contracts for fleet rentals, rental with a GTC is a government contract, and not a rental between the traveler and the company
- Claims for damage to rental vehicles under contract are settled under contractual provisions as claims against the contract
- Unlike vehicles rented on a GTC, a report of survey may be required for damage to a vehicle rented under a government contract
- For damages to another vehicle or property, the claims office adjudicates as a tort claim. Again, so long as the driver is within the scope of employment, the government will defend the driver. Within the United States, the driver cannot be held personally liable if the accident occurred within the scope of employment.

In Case of Accident

- Call the rental company and report. If rented on a government travel card, call travel card company and report immediately.
- If the police respond, try to get a copy of the accident report. If you cannot get a copy of the report, find out how to get a copy later.
- If someone else is injured in the accident and you are TDY at or near a base, let the base legal office know of the accident. If not near a base, contact your base legal office upon return.
- Inform the staff judge advocate immediately if you become aware litigation is filed regarding a vehicle rented by an Air Force member/employee, even if the United States is not a named party in the suit
- Never admit liability at the site of an accident

References

28 U.S.C. § 2679
Joint Federal Travel Regulations (JTR), http://www.defensetravel.dod.mil/Docs/perdiem/JTR.pdf
Federal Acquisition Regulation (FAR) §§ 28.312, 52.228-8
Defense Transportation Regulation (DTR) DoD Regulation 4500.9-R-Part I, *Passenger Movement* (May 2016), including changes through 13 July 2018
AFI 51-501, *Tort Claims* (13 September 2016)
Defense Travel Management Office, http://www.defensetravel.dod.mil/index.cfm

REPORTS OF SURVEY (ROS)

Commanders at all levels are responsible for not only the personnel in their unit, but also for all assigned equipment and property under their control. Occasionally some of that equipment may be lost, damaged or destroyed. Depending on the type of item(s) that are lost or damaged, a report of survey (ROS) might be required to investigate and document the circumstances and as a tool to determine the appropriate corrective actions to prevent recurrence. This paper will walk you through the fundamentals of the ROS process. It is important to note that this information does not apply to nonappropriated funds (NAF) assets (see AFI 34-202, *Procedures For Protecting Nonappropriated Funds Assets*, Chapter 8 for guidance).

Purposes

- The primary purpose of the ROS program is to determine financial liability for the loss, theft, damage, or destruction of government property
- The general purposes of the ROS program are to:
  - -- Investigate the cause of loss, damage, or destruction of property and determine if it was attributable to an individual's negligence or abuse
  - -- Assess monetary liability or relieve individuals from liability if no evidence of negligence, willful misconduct, or deliberate unauthorized use
  - -- Provide documentation to support adjustment of accountable records
  - -- Provide commanders with case histories to enable them to take corrective action to prevent recurrence of the incident

Mandatory Reports of Survey

- There are certain situations in which a ROS is mandatory. These situations include the following:
  - -- Damage or destruction of sensitive, classified, or leased (Capital Lease) property regardless of initial acquisition costs
  - -- Gains and other losses of sensitive items regardless of dollar value
  - -- Damage or destruction of real property
  - -- Gains and losses of pilferable items when the unit price times the quantity is equal or greater than $2,500 for each stock number
  - -- Any inventory loss when there is an indication of fraud, theft, or negligence
  - -- Cases with evidence of negligence or abuse and the value of the government-owned equipment has an initial cost (value) of $5,000 or more
  - -- See FMR, Volume 12, Chapter 7, paragraph 070807 for additional mandatory situations

When Reports of Survey are Not Mandatory

- For all other losses, commanders have discretion to conduct a formal ROS investigation when the circumstances warrant it. For example, when the loss, damage, destruction or thefts of small amounts of property occur frequently enough to suggest a pattern of wrongdoing.
- There are certain situations/items that do not require initiation of an ROS. The most common situations not requiring an ROS include:
  - -- When an individual voluntarily agrees to pay for property (provided the item(s) are not subject to mandatory ROS requirements)

-- Property lost in combat operations

-- Property becomes unserviceable due to fair wear and tear

Report of Survey Liability Thresholds

- Before moving into the process itself, it is important to be aware of the amount of financial liability Air Force members may be expected to repay. These amounts vary depending on the nature of the items affected by the loss/damage.
  - -- In most cases, the liability threshold is limited to the full amount of the loss, damage, or destruction, or up to one month's regular pay, whichever is less
  - -- There are some exceptions that permit the Air Force to recover the full amount of the loss or damage. Approving authorities should consult the financial manager for additional guidance.

The Report of Survey Process

- The first step to initiating an ROS is for the appointing authority to appoint an investigating officer (IO) to determine the facts. Some of the investigative processes are highlighted below.
  - -- At a minimum, the IO will answer the following six questions:
    - --- What Happened?
    - --- How?
    - --- Where?
    - --- When?
    - --- Who was involved?
    - --- Was there any evidence of negligence, willful misconduct, or deliberate unauthorized use or disposition of the property?
  - -- Based on the facts, the IO makes findings and recommendations on the issue of liability of the person(s) involved
  - -- The ROS is forwarded for legal review
  - -- Upon legal review, the ROS and IOs recommendations are reviewed by the appointing authority who determines liability
  - -- If liability is approved, the appointing authority informs the subject(s) of determination and gives him/her an opportunity to provide a rebuttal
  - -- The approving authority then reviews the rebuttal and makes a second determination as to liability after considering the rebuttal
  - -- If the member is held liable, the approving authority sends the ROS to the financial manager to process for collection
  - -- The final paperwork then goes to the equipment custodian to write off the property

Processing Times

- As lost, damaged, or destroyed property has an impact on both the Air Force and the individual(s) who caused the loss, damage, or destruction, the Air Force has established the following timelines for initiation and completion of a ROS
  - -- The unit's supervision will conduct the initial inquiry (not formal ROS) and gather data within 10 days from the date of the discovery of the loss

-- If a formal ROS is required/desired, the appointing authority will appoint an IO and obtain an ROS case number within 11 days from the date of the discovery of the loss

-- Additional timelines for each step of the ROS process may be found in the SAF/FMF Reports of Survey Program policy memo, dated 9 November 2018. The ROS should be completed within 90 days of the date of the discovery of the loss.

References

Financial Management Regulation (FMR), Volume 12, Chapter 7, *Financial Liability for Government Property Lost, Damaged, Destroyed, or Stolen*
SAF/FMF Reports of Survey Program Policy Memo (9 November 2018)
AFI 34-202, *Procedures For Protecting Nonappropriated Funds Assets* (22 December 2015)

13
CHAPTER THIRTEEN: FISCAL AND CONTRACTING ISSUES

FOUNDATIONS OF FISCAL LAW

Fiscal law requires the commander to have affirmative (or positive) authority to use funds for a particular purpose. This is unlike many other areas of the law that permit commanders to exercise authority so long as not expressly prohibited in order to complete the mission. Here, any expenditure of funds requires Congress to have authorized and appropriated funds. The three pillars of affirmative authority are "purpose, time, and amount."

Purpose

- Funds may be expended only for the purpose intended by Congress. However, not every expenditure is required to be specified in an appropriations act; the Government Accountability Office (GAO) applies a three-part test to determine whether an expenditure is a "necessary expense" and meets the purpose of a particular appropriation:
  - -- The expenditure must be necessary and incident to the purposes of the appropriation;
  - -- The expenditure must not be prohibited by law; and
  - -- The expenditure must not otherwise fall within the scope of another appropriation or statutory funding scheme
- Examples of common issues regarding questionable expenses (i.e., items that are generally for personal use/convenience):
  - -- Bottled Water: Generally a personal expense, with some exceptions for disasters and locations where no potable water exists
  - -- Personal Office Furniture and Equipment: If items only serve a single individual (exception for handicapped employees)
  - -- Clothing: Generally a personal expense with limited exceptions
  - -- Payment of Fines and Penalties: For example, an employee receives a moving violation citation while driving a government motor vehicle (GMV)
  - -- Food: Generally a personal expense with some exceptions for certain situations involving training, conferences, and award ceremonies

Time

- An agency may obligate funds only within the time limits applicable to the appropriation (e.g., installation operation and maintenance (O&M) funds are typically available for one year, while military construction (MILCON) funds are typically available for five years)
  - -- Bona Fide Needs Rule: Generally, government agencies may not purchase supplies or services unless there is a bona fide (good faith) need for the supply/service in the year in which they are to be purchased. In other words, the default rule is that current fiscal year money should only be used for current year needs. (Generally, the time limitations apply to the obligation of funds and not the disbursement or payment of the funds.)
  - -- For Supplies: Common exceptions to the default rule are allowed where a lead-time is required to either produce or deliver the supply, or to maintain normal/customary (i.e., not excessive) stock levels of a supply

-- For Services: The bona fide need does not arise until the services are rendered and must be funded with funds current as of the date the services are performed. For severable services, such as lawn maintenance, DoD agencies may obligate funds current at the time of contract award to finance a severable services contract with a period of performance that does not exceed one year (may cross fiscal years). For non-severable services, such as the results of a longitudinal healthcare study, the DoD must fund with dollars available for obligation at the time the contract is executed and performance of the contract may cross fiscal years.

-- Every appropriation has a period of availability during which money can be obligated from the appropriation; generally, an appropriation is available for new obligations only during its period of availability. Once the period of availability lapses, the appropriation will expire and eventually close.

Amount

- An agency must obligate funds within the amounts appropriated by Congress. In other words, do not spend more money than Congress has authorized the agency to spend.

The Anti-Deficiency Act (ADA)

- The ADA was originally enacted by Congress to prevent the federal government from making expenditures in excess of the amounts that Congress appropriated. Under the ADA an officer or employee of the U.S. Government may not:
  - -- Make or authorize an expenditure or obligation exceeding an amount available in an appropriation unless authorized by law;
  - -- Involve the government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law;
  - -- Make or authorize an expenditure or obligation exceeding an apportionment, or the amount permitted by regulations; or
  - -- Accept voluntary services for the United States or employ personal services, except for emergencies involving the safety of human life or the protection of property, or unless authorized by law
- Either a purpose or time violation may also lead to an ADA violation. However, these violations can be "corrected." Officials can avoid an ADA violation if both of the following conditions are met:
  - -- Proper funds were available at the time of the erroneous obligation; and
  - -- Proper funds were available at the time of correction for the agency to correct the erroneous obligation
- Potential consequences for ADA violations include adverse personnel actions and/or criminal penalties for a knowing and willful ADA violation, a Class E felony, include not more than a $5,000 fine, confinement for up to two years, or both

References

10 U.S.C. § 2410a
31 U.S.C. § 1301(a)
Anti-Deficiency Act, 31 U.S.C. §§ 1341 *et seq.*
31 U.S.C. § 1341(a)(1)(A), (a)(1)(B)
31 U.S.C. §§ 1342, 1351, and 1517(a)
United States v. MacCollom, 426 U.S. 317 (1976)
GAO, Principles of Federal Appropriations Law, 4th ed., 2016 ("The Redbook"), https://www.gao.gov/legal/appropriations-law-decisions/red-book
DoD 7000.14-R, *Department of Defense Financial Management Regulation* (June 2017), http://comptroller.defense.gov/fmr.aspx
AFI 65-601v1, *Budget Guidance and Procedures* (16 August 2012), incorporating Change 1, 29 July 2015
AFI 65-608, *Antideficiency Act Violations* (29 December 2015)

FOUNDATIONS OF CONTRACT LAW

The current acquisition environment is complex and faces increased scrutiny and restraints. Concurrently, the DoD is relying more than ever on contractors to deliver necessary supplies and services to the warfighter. Budgetary pressures, intense scrutiny of a commander's use of appropriated funds, and increased requirements have resulted in a more complex legal landscape. Despite this, the Air Force contracting workforce has decreased in the last decade. Thus, it is imperative that acquisition professionals, attorneys, and commanders work together to protect the integrity, precision, and reliability of the acquisition process.

Contracting Authority

- Commanders have a duty to ensure personnel are informed of proper contracting authority
- Normally, only contracting officers (COs) who have been delegated authority by the head of an agency in the form of a "warrant" have the authority to enter into contracts on behalf of the U.S. Government to purchase the supplies, services, and construction requirements for the operation of the installation or unit
  - -- Contract authority and limitations are specified in the CO's "warrant"
  - -- Government purchase card (GPC) cardholders (with limited thresholds) have limited contract authority
- Generally, commanders do not have contracting authority

Unauthorized Commitments

- On occasion, an individual without contract authority will enter into a commitment to accept supplies or services; once discovered, unauthorized commitments may be "ratified" by a person with contract authority, allowing for government payment. Ratification procedures and authorization levels are provided in the Air Force Federal Acquisition Regulation Supplement (AFFARS).
- An unauthorized commitment must meet the criteria set forth at Federal Acquisition Regulation (FAR) 1.602-3 to be eligible for ratification
- The commander of the organization involved must ensure the CO is provided a report of the circumstances surrounding the unauthorized commitment, including a statement on corrective actions taken to prevent a recurrence of the event and a description of disciplinary action taken, or an explanation why no action was taken
- Any unauthorized commitments that are not ratified are the sole financial responsibility of the individual making the unauthorized commitment and are not the financial responsibility of the government

---

References

FAR 1.6, *Career Development, Contracting Authority, and Responsibilities*
FAR 1.602-3, *Ratification of Unauthorized Commitments*
DFARS 201.603, *Selection, Appointment, and Termination of Appointment for Contracting Officers*
AFFARS Subpart 5301.6, *Career Development, Contracting Authority, and Responsibilities*
AFFARS MP 5301.602-3, *Ratification of Unauthorized Commitments*
AFMAN 34-214, *Procedures for Nonappropriated Funds Financial Management and Accounting* (14 February 2006), incorporating through Change 5, 23 March 2010

ACQUISITION STRATEGY AND PLANNING

Acquisition planning is required to ensure the Air Force obtains requirements in the most effective, economical, and timely manner possible. Commanders must ensure sufficient capability to manage and oversee the contracting process from start to finish. Some functions, such as inherently governmental functions, cannot be performed by contractors. Other functions require special consideration before deciding to contract and how the contract ought to be administered.

Inherently Governmental Functions (IGFs)

- IGFs must not be performed by anyone other than a government employee. Contractors are specifically prohibited from performing these functions. If, after awarding a contract, monitoring reveals that contractors are performing IGFs, Air Force personnel must reestablish control over these functions by strengthening oversight, in-sourcing the work to government employees, refraining from exercising options under the contract, or terminating all or part of the contract.
- Examples of Functions Designated as IGF:
  - -- The direct conduct of criminal investigations
  - -- The control of prosecutions and performance of adjudicatory functions
  - -- The command of military forces
  - -- Combat
  - -- The determination of budget policy, guidance, and strategy
  - -- The direction and control of federal employees

Contracts and Inherently Governmental Functions

- -- FAR 7.503(c)(12) lays out the prohibited functions that contractors may not perform. FAR 7.503(d) also explains the functions that are **NOT** automatically considered inherently governmental and also explains how the nature of the function, the manner in which the work is performed and how the Government administers the performance are all important considerations.
- -- Contract provisions may reinforce the limitations on contractor authority
- -- Determinations of IGFs are made by the manpower analysts following DoDI 1100.22

References

10 U.S.C. §§ 2383, 2461, and 2463
FAR Part 7, *Acquisition Planning*
DFARS 207.5, *Inherently Governmental Functions*
Office of Procurement Policy, Policy Letter 11-01, *Performance of Inherently Governmental and Critical Functions* (12 September 2011)
OMB Cir A-76 (Revised), *Performance of Commercial Activities* (29 May 2003)
DoDI 1100.22, *Policies and Procedures for Determining Workforce Mix* (12 April 2010), incorporating Change 1, 1 December 2017
AFI 63-138, *Acquisition of Services* (11 May 2017)

COMPETITION IN CONTRACTING

Federal law, such as the Competition in Contracting Act (CICA), requires the Government to achieve competition when selecting contractors to perform services or provide supplies. Commanders should ensure that any contracts not awarded through "full and open competition" fall under a statutory exception and include the required written justifications.

The Competition in Contracting Act

- CICA, 10 U.S.C. § 2304, requires "full and open competition through the use of competitive procedures" unless an express exception applies. To fulfill competition requirements, the procuring office will advertise the requirement, request bids or proposals, and select an awardee based on the solicitation's evaluation criteria.
- CICA has two categories of exceptions, allowing limited competition and sole-source awards
  - -- Limited Competition: "Full and open competition after exclusion of sources" allows the procuring office to limit the sources from which it seeks competition. Examples of these limitations include the requirements of the Small Business Act, assistance needed after a major disaster or during an emergency wherein solicitations can be limited to local firms, or to establish or maintain alternate sources of supplies or services.
  - -- Sole Source Awards: Made through "other than full and open competition" and will require a written justification identifying the specific exception. Non-exhaustive examples of acceptable justifications might include factors such as unusual or compelling urgency (i.e., delay in award would result in serious injury, financial or other, to the government), or only one contractor can provide the service or supply.
- Air Force installations have designated competition and commercial advocates whose duties include promoting full and open competition and commercial practices in acquisition programs
- Contract Modifications: A modification to an existing contract will violate CICA when the changes are beyond the scope of the original contract and a sole source award has not been justified. This analysis of scope considers the degree of change in the type of work, performance period, contract cost, and whether the change is the type that offerors could have anticipated when bidding on the originally awarded contract.
- Unsolicited Proposals: Commanders may potentially receive an unsolicited proposal from a business, apart from (not in response to) any solicitation from the government. An unsolicited proposal is a written proposal introducing a new or innovative idea and seeking a contract with the government without competition. Regulation prescribes procedures and standards for evaluating unsolicited proposals. CICA requirements are not waived for unsolicited proposals. If award of a contract is contemplated, a sole source award justification and approval must be accomplished.

References

The Competition in Contracting Act, 10 U.S.C. § 2304
FAR Part 2, *Definitions of Words and Terms*
FAR Part 6, *Competition Requirements*
FAR Subpart 15.6, *Unsolicited Proposals*
Defense FAR Supplement (DFARS) Part 206, *Competition Requirements*
Air Force FAR Supplement (AFFARS) Part 5306, *Competition Requirements*
AFFARS MP306.502, *Air Force Competition and Commercial Advocacy Program*
AFFARS MP5315.606-90, *Receipt, Evaluation, and Disposition of Unsolicited Proposals*

ACQUISITION PROCESS

"Acquisition process" describes how the Air Force purchases supplies and services. The acquisition process is subject to the rules contained in various Federal, DoD and Air Force regulations. The process is heavily regulated even for small purchases. If issues arise when purchasing supplies or services the best course of action is to work with your contracting squadron and legal office.

Micro-Purchases

- A micro-purchase is a government purchase of supplies or services which in the aggregate, for the DoD, does not exceed a specific threshold (may vary by fiscal year and subject to change, based on Congressional legislation), currently set at $5,000, except for:
  - -- Acquisition of supplies or services for basic research programs and for activities of the DoD science and technology reinvention laboratories, when the value is $10,000
  - -- Construction, when the value is $2,000
  - -- Services, when the value is $2,500
  - -- Support of contingency or chemical/biological/radiological/nuclear (CBRN) recovery/defense operations (excluding construction), the threshold is $20,000 inside the United States and $30,000 outside the United States
- The DoD is directed to use the government purchase card (GPC) to pay for purchases valued at or below the micro-purchase threshold. Purchases on the GPC are limited to the micro-purchase threshold unless orders are placed against pre-priced vehicles (such as the federal supply schedule, a blanket purchase agreement, or an indefinite delivery, indefinite quantity (IDIQ) contract), in which case the limit is $25,000 for authorized cardholders. Note: splitting a larger purchase into smaller segments to stay under the micro-purchase threshold is **NOT** allowed.
- Timeline: Full and open competition is not required; a determination must be made by the authorized individual that the price is reasonable. As much as possible, micro-purchases should be distributed equitably among qualified suppliers.

Simplified Acquisition Procedures

- Simplified acquisition procedures allow the contracting officer to reduce the amount of time required to procure supplies and services below the simplified acquisition threshold, and to create or utilize more efficient ordering methods. These procedures are used to purchase more routine items like office supplies and grounds-keeping services. The simplified acquisition threshold for FY18 was $250,000.
  - -- For support of contingency or CBRN recovery/defense operations (excluding construction), the threshold is $750,000 inside the United States, and $1.5 million outside the United States
  - -- Acquisitions under the simplified acquisition threshold are reserved exclusively for small businesses
- Commercial Items: It is the government's policy to procure commercial items when possible. Contracting officers can use simplified acquisition procedures when purchasing commercial items not exceeding $7 million ($13 million if purchasing commercial items in support of contingency or CBRN recovery/defense operations).
- Timeline: Contracting officers can use streamlined acquisition procedures designed to reduce the time required to solicit and award contracts. Generally, agencies must publish notice of the proposed action at least 15 days before issuing a solicitation, and then issue a solicitation, which must remain posted for at least 10 days or until after quotations have been opened, whichever is later.

Negotiated Procurement

- Most Federal acquisitions over $250,000 use negotiated procurement. This is accomplished by using the best-value process, seeking either the lowest-priced technically acceptable offer, or a best-value tradeoff where the Air Force may select a higher priced offer because the offeror has superior past performance or technical skill. There is no dollar threshold limiting the use of negotiated procurement techniques.
- Timeline: Generally, for proposed contract actions expected to exceed the simplified acquisitions threshold ($250,000), contracting officer's must publicly synopsize a solicitation for 15 days, and then issue a solicitation allowing at least 30 days to respond. Timelines for solicitations and the government evaluation of proposals can vary greatly depending upon the monetary value, item, and complexity of the acquisition.

References

10 U.S.C. §§ 2338, 2339
41 U.S.C. § 134, including FY18 NDAA, Pub. L. 115-91
FAR Subpart 2.1, *Class Deviation 2017-O0007, Micro-purchase threshold*
FAR Part 12, *Acquisition of Commercial Items*
FAR Part 13, *Simplified Acquisition Procedures*
FAR Subpart 13.2, *Actions at or Below the Micro-Purchase Threshold*
FAR Part 15, *Contracting by Negotiation*
DFARS Part 213, *Simplified Acquisition Procedures*
DFARS Part 215, *Contracting by Negotiation*
DoDI 5000.02, *Operation of the Defense Acquisition System* (7 January 2015), incorporating through Change 3, 10 August 2017
AFI 64-117, *Air Force Government-wide Purchase Card (GPC) Program* (22 June 2018)

CONTRACT ADMINISTRATION

Contract administration concerns everything after forming the contract. This section reviews common issues in contract administration, including inspection and rejection of supplies or services that fail to conform to the contract, warranties, modifying a contract, terminating a contract, and resolving disputes between the Air Force and the contractor.

Inspection, Rejection, and Warranties

- Standard contract clauses normally give the government the right to inspect supplies and services before acceptance, reject supplies and services that fail to conform to the contract, and demand the contractor provide supplies and services that comply with the contract. After acceptance, the government normally loses those rights. However, the government does not lose these rights if the defect was latent (meaning a reasonable inspection would not have discovered the defect, fraud upon the government, or gross contractor mistake). Some supply contracts contain warranties, which allow the government, after acceptance, to demand the contractor repair or replace defective supplies or demand the contractor remit a portion of the paid price.

Contract Changes (Modifications)

- Contract changes or modifications are any additions, subtractions, or modifications to the work or performance time required by a contract. Only a contracting officer (CO) may effect a contract modification. Contract modifications are of two types:
  - -- **Unilateral**, meaning the CO directs a change to the contract. The contractor must comply with the change, but may be entitled to additional compensation or time.
  - -- **Bilateral**, meaning both the CO and the contractor agree to modify the contract
- Contract modifications should be in writing. When the contractor believes the government's intentional or unintentional action has, in effect, modified the contract without a written modification, the FAR outlines a procedure for the contractor to notify the CO and resolve the matter. These type of contracts are called "constructive changes." Contract modifications may not change a contract so drastically that it fundamentally changes the original agreement. Such modifications, called out-of-scope or cardinal changes, may create grounds for competitors to protest at the Court of Federal Claims (COFC) or the Government Accountability Office (GAO) and may allow the contractor to file a claim for money damages.

Terminating a Contract for the Convenience of the Government

- A termination for convenience (T4C) occurs when the government terminates fully or partially a contract because termination is in the government's best interest. The government and the contractor may mutually agree to terminate a contract and incorporate the terms of that mutual agreement into the termination, including a term for the contractor to release all claims against the government. If the government and the contractor cannot agree, or no negotiations occur, the contract and FAR outline a process for the contractor to submit a settlement claim to the contracting officer; this process, and its resolution, vary depending on the type of contract involved and other circumstances. If the contractor dislikes the CO's final decision on settlement, the contractor may appeal that decision to the Armed Services Board of Contract Appeals (ASBCA) or the Court of Federal Claims (COFC). The government has no duty to terminate a contract for the contractor's benefit.

Terminating a Contract because of a Contractor's Failure to Perform

- A termination for default (T4D), or termination for cause, for commercial contracts occurs when the government terminates a contract because the contractor has failed, without excuse, to perform the contract. If the CO believes the contractor's action or inaction is endangering performance of the contract, the CO usually must provide the contractor written notice of the issue and give the contractor a reasonable amount of time (at least 10 days) to "cure" the issue. This is called a **cure notice**.
- If the contractor fails to positively respond to the cure notice, or fails to perform in situations in which a cure notice is not necessary, the CO usually must provide the contractor written notice of the failure and request the contractor "show cause" why the CO should not terminate the contract. This is called a **show cause** notice.
- If the contractor fails to positively respond to the **show cause** notice, or if no show cause notice is necessary, the CO may issue a final decision terminating the contract for default or cause. The CO and contractor will then negotiate a final settlement of the termination, including any damages the contractor owes the government. If the parties cannot agree, the CO will issue a final decision and the contractor may appeal to the ASBCA or COFC.

Resolving Government and Contractor Disputes

- Disputes between the Air Force and a contractor are resolved through a process established in the Contract Disputes Act (CDA) and implemented in the FAR mandatory contract clauses. If a contractor believes the he is entitled additional money, time, or other relief, the contractor may demand, in writing to the government CO, that relief; that demand is called a **claim**. If the government believes that it is entitled to additional money, time, or other relief, the government CO will issue a final decision asserting a right to that relief. Only the prime contractor may submit a claim. Claims of subcontractors ("pass through claims") must be filed by the prime contractor. After a claim is submitted, the CO has 60 days to issue a written final decision, or if the claim exceeds $100,000, identify a firm date by which a final decision will be issued; if no final decision or firm date notice is issued, the contractor may treat the claim as denied, called a deemed denial, and appeal the denial. All CO's final decisions, including on claims, must be sent to AFLOA/JAQK for review.

References

Title 41, Subtitle I, Part C, Procurement, U.S.C. § 41
U.S.C. §§ 7101-7109
FAR Part 43, *Contract Modifications*
FAR Part 49, *Terminations of Contracts*
AFFARS Subpart 5333.2, *Disputes and Appeals*
AFFARS Part 5349, *Termination of Contracts*
Rules of the United States Court of Federal Claims
Rules of the Armed Services Board of Contract Appeals

COMMUNICATIONS WITH INDUSTRY/INTERFACING WITH CONTRACTORS

- Air Force leaders are expected to proactively and effectively engage with industry groups and commercial entities to help ensure we maintain our ability to rapidly innovate and stay ahead of our adversaries. However, such engagement efforts by Air Force personnel must comply with federal laws and regulations on procurement and ethical conduct.
- Meetings are generally permitted subject to the following guidelines:
  - -- Ensure the purpose of the meeting is clear to the Air Force and industry participants. The nature and types of information shared or obtained during these meetings must not provide the commercial entity with an unfair competitive advantage.
  - -- Include other interested or potentially interested parties and commercial entities in such meetings if possible and practical, in order to avoid the appearance you are providing exclusive access to a particular company or group. If you meet exclusively with one entity—and another entity requests the same opportunity—then you should honor the request, in order to avoid any perception of unfair or preferential treatment.
  - -- Avoid meeting alone with industry. Meetings should include more than one Air Force representative, including appropriate subject matter experts who can help keep discussions focused on appropriate subjects, and a designated note taker to ensure discussions are accurately recorded and properly characterized.
  - -- Focus discussions on topics the Air Force can discuss, share publicly, and on publicly-available information the Air Force would share with any interested party. Avoid discussing proprietary or procurement-sensitive information; if it arises, you are legally obligated to protect it from disclosure to third parties. Do not discuss ongoing procurements or litigation.
  - -- Do not invite other contractor personnel into the meeting. If support contractor personnel are absolutely necessary as subject matter experts, the senior Air Force participant should clearly identify the contractor personnel. A commercial entity may require support contractor personnel to sign a nondisclosure agreement as a condition of participation. In accordance with the Trade Secrets Act, government employees should not sign nondisclosure agreements due to their affirmative duty under federal law to protect business trade secrets and proprietary information.
- Senior Air Force leaders are often in high demand as speakers, including invitations from non-federal entities to speak at their conferences, roundtables, and other events. To optimize Air Force messaging, as well as to coordinate efforts and avoid the potential for preferential treatment, work with SAF/PA to assist synchronizing your comments with Air Force strategic themes and messages. Note: you may not solicit invitations from non-federal entities to have a formal speaking role or otherwise participate in an event in a manner that would not be available to a member of the public, e.g., sitting at a head table or having exclusive access to event sponsors.
- Due to concerns regarding preferential treatment, disclosure of non-public information, and appearance of special access to Air Force leaders, you should generally decline invitations to speak to a non-federal entity's internal audience. Additionally, DoD and Air Force conference policies contain specific rules and restrictions regarding participation as a speaker at a non-federal entity hosted conference where a large percentage of the speakers are Air Force or Department of Defense employees and/or where there is a high cost to attend the conference.

References

Trade Secrets Act, 18 U.S.C. § 1905
DoD 5500.07-R, *Joint Ethics Regulation*, incorporating through Change 7 (17 November 2011)
SAF/GC Memorandum, *Guidance on Industry Engagement* (28 August 2017), with attached SecDef Memorandum, *Dialogue with Industry* (24 April 2017)

CONFLICTS OF INTEREST (PERSONAL AND ORGANIZATIONAL)

The Federal Acquisition Regulation (FAR) requires government business to be conducted in a manner above reproach and, except as authorized/required by statute or regulation, with complete impartiality. The general rule is to strictly avoid even the appearance of a conflict of interest in government-contractor relationships.

Personal Conflicts of Interest (PCIs)

- Air Force employees (military and civilian) are prohibited from participating personally and substantially (e.g., making a decision, giving advice, or making a recommendation) in any government matter that would have a direct and predictable effect on the financial interests of:
  - -- The employee, employee's immediate family, or general partner;
  - -- An organization for which the employee serves as an officer, director, trustee, general partner, or employee; or
  - -- A company or organization with which the employee is negotiating for employment or has an arrangement for future employment
- Air Force employees also should not participate in a particular government matter if the employee believes a reasonable person with knowledge of the facts would question his/her impartiality—unless the employee's supervisor and ethics counselor determine that the government's interest outweighs the appearance of a conflict. Such a determination is required where an employee's participation would affect the financial interests of:
  - -- A person or organization with which the employee has a business, contractual, or other financial relationship, or is an active participant (e.g., committee chair or project officer);
  - -- A member of the employee's household or a relative with whom the employee has a close personal relationship;
  - -- An organization for which the employee's spouse, parent, or dependent child works (as an officer, employee, consultant, etc.); or
  - -- An organization the employee has worked for in the past year

Organizational Conflicts of Interest (OCIs)

- OCIs are situations where, because of other activities or relationships, a contractor or potential contractor is: unable or potentially unable to render impartial assistance to the government; in a situation of impaired or potentially impaired objectivity; or, has an unfair competitive advantage
- The three types of OCIs are:
  - -- *Unequal Access to Information* (i.e., a contractor's access to nonpublic information may give it an unfair advantage in future competitions);
  - -- *Biased Ground Rules* (i.e., a contractor's involvement in defining requirements, preparing work statements, or developing business cases could skew a competition in its own favor); and
  - -- *Impaired Objectivity* (i.e., a contractor's judgment or objectivity in performing a contract may be impaired because its performance may affect its other activities or interests)
- Since OCIs call into question the integrity of the procurement process, no specific prejudice must be proven to justify a sustained protest when it is challenged by a competing offeror

References

18 U.S.C. § 208
5 C.F.R. § 2635.502
FAR 9.5, *Organizational and Consultant Conflicts of Interest*
Keith R. Szeliga, *Conflict and Intrigue in Government Contracts: A Guide to Identifying and Mitigating Organizational Conflicts of Interest*, 35 Pub. Cont. L.J. 639 (2006)

CONTRACTOR PERSONNEL AUTHORIZED TO ACCOMPANY THE U.S. ARMED FORCES

Contractors support military forces overseas—including in contingency environments—today more than ever. Commanders must understand the basic rules and policies regarding contractor personnel overseas. There are two types of contractors who support these overseas contingency operations: those with "Contractors Authorized to Accompany the Force (CAAF)" status and those without this status (non-CAAF).

Contractors Authorized to Accompany the Force (CAAF)

- CAAF are contractor personnel, including all tiers of subcontractor personnel, who are authorized to accompany the force in applicable contingency operations and have been afforded CAAF status through a letter of authorization (LOA)
- CAAF generally include U.S. citizen and third-country national contractor employees not normally residing within the operational area whose area of performance is in the direct vicinity of U.S. forces and who routinely are co-located with U.S. forces (especially in non-permissive environments). CAAF status does not apply to contractor personnel in support of contingencies within the boundaries and territories of the United States.
- Contractors are generally responsible for providing their own logistical support. However, in austere, uncertain, and/or hostile environments, the DoD may provide logistical support to CAAF to ensure continuation of essential contractor services. Contractors authorized to accompany the force (CAAF) may receive government-furnished support commensurate with the operational situation in accordance with the terms and conditions of their contract. Non-CAAF are not provided the same government-furnished support as they differ from CAAF typically being permanent residents in the operational area or third country nationals (TCNs) not routinely residing with U.S. forces. Non-CAAF support is typically limited to force protection, emergency medical care, and basic human needs (e.g., bottled water, latrine facilities, security, and food when necessary) when performing their jobs in the direct vicinity of U.S. forces.

International Law and Contractor Legal Status

- CAAF may support military operations if the force they accompany designates the contractors as CAAF, and also provides CAAF with an appropriate identification card pursuant to the Geneva Conventions
- CAAF may provide communications support, transport munitions and other supplies, perform maintenance functions for military equipment, and provide logistic services such as billeting and messing. Like all contractors, CAAF may not perform inherently governmental functions such as combat.
- If captured during armed conflict, CAAF are entitled to prisoner of war status
- Subject to the application of international agreements, CAAF must comply with applicable host nation and third country nation laws
- CAAF remain subject to U.S. laws and regulations and may be subject to prosecution under the Military Extrajurisdictional Act of 2000 (MEJA) and the Uniform Code of Military Justice (UCMJ)
- To be CAAF, the contractor must have an LOA from the contracting officer specifying this status. CAAF employees usually process through a deployment center.

Medical Issues

- CAAF must provide medically and physically qualified personnel. The Secretary of Defense may direct immunizations as mandatory for CAAF performing DoD essential contractor services. Generally, CAAF must provide their employees medical care at CAAF's expense. The government may provide resuscitative care, stabilization, hospitalization and emergency care to prevent the loss of life, limb or eyesight at a military treatment facility. Refer to the underlying contract to determine what, if any additional care the government agreed to provide CAAF employees.

Individual Protective Equipment

- Generally, contractors shall be required to provide all life, mission, and administrative support to its employees necessary to perform the contract. When necessary and directed by the geographic Combatant Commander (CCDR), the contracting officer will include language in the contract authorizing CAAF and selected non-CAAF, as designated by the CCDR, to be issued military individual protective equipment (IPE) (e.g., chemical/biological/radiological/nuclear protective ensemble, body armor, ballistic helmet). This equipment shall typically be issued at the deployment center (where CAAF will receive training on the IPE), before deployment to the designated operational area, and must be accounted for and returned to the government or otherwise accounted for in accordance with appropriate DoD Component standing regulation.

Uniforms

- CAAF are responsible for providing their own personal clothing, including casual and work clothing required by the particular assignment. Generally, commanders shall not issue military clothing to CAAF or allow the wearing of military or military look-alike uniforms. However, CCDRs (or a subordinate Joint Force Commander (JFC) deployed forward) may authorize certain CAAF personnel to wear standard uniform items for operational reasons. This authorization shall be in writing and maintained by authorized CAAF personnel at all times. Care must be taken to ensure, consistent with force protection measures, that the CAAF personnel are distinguishable from military personnel through the use of distinctive patches, arm bands, nametags, or headgear.

Force Protection and Weapons Issuance

- CCDRs must develop a security plan for protection of those CAAF personnel (and non-CAAF personnel) in locations where there is not sufficient or legitimate civil authority and the commander decides that it is in the interests of the government to provide security because of any of the following:
  - -- The contractor cannot obtain effective security services;
  - -- Such services are unavailable at a reasonable cost; or
  - -- Threat conditions necessitate security through military means
- CAAF personnel may be armed for individual self-defense, on a case-by-case basis, **ONLY IF**
  - -- It is determined that military force protection and legitimate civil authority are deemed unavailable or insufficient;
  - -- It is authorized by the geographic combatant commander; and
  - -- It does not violate applicable U.S., host nation, and international law, relevant status of forces agreements (SOFAs) or international agreements, or other arrangements with local host nation authorities

- Commanders should consult with their staff judge advocate prior to authorizing the arming of CAAF. If weapons are authorized:
  - -- The government shall ensure completion of weapons familiarization, qualifications, and briefings on the rules regarding the use of force
  - -- Acceptance of weapons by CAAF personnel shall be voluntary and permitted by the defense contractor and the contract; and
  - -- These CAAF personnel must not be otherwise prohibited from possessing weapons under U.S. law

Security Services

- If consistent with applicable U.S., host nation, and international law, and relevant status of forces agreements (SOFAs) or other international agreements, a defense contractor may be authorized to provide security services provided they are not performing an inherently governmental function, and are limited to providing a defensive response to hostile acts, or to demonstrated hostile intent
- Whether a particular use of contract security personnel to protect military assets is permissible is dependent on the facts and requires legal analysis
  - -- Requests shall be reviewed on a case-by-case basis by the appropriate staff judge advocate to the CCDR (or designee)
  - -- Contractors shall be used cautiously in contingency operations where major combat operations are ongoing or imminent. In these situations, contract security services will not be authorized to guard U.S. or coalition military supply routes, military facilities, military personnel, or military property except as specifically authorized by the geographic combatant commander.

References

10 U.S.C. § 802(a)(10)
18 U.S.C. § 2441
18 U.S.C. § 3261
DoDI 3020.41, *Operational Contract Support* (20 December 2011) incorporating through Change 2, 31 August 2018
DoDI 3020.50, *Private Security Contractors (PSCs) Operating in Contingency Operations, Humanitarian or Peace Operations, or Other Military Operations or Exercises* (22 July 2009), incorporating through Change 2, 31 August 2018

14
CHAPTER FOURTEEN: ETHICS ISSUES

STANDARDS OF ETHICAL CONDUCT

Each commander has the responsibility of ensuring that the standards of conduct in the Joint Ethics Regulation (JER), DoD 5500.07-R, are brought to the attention of all personnel. DoD employees shall not engage in any personal business or professional activity that places them in a position of conflict between their private interests and the public interest of the United States. In order to preserve the public confidence in the Air Force, even the appearance of a conflict of interest must be avoided.

- DoD personnel shall not use inside information to further a private gain for themselves or others if that information was obtained by reason of their DoD position and is not generally available to the public
- Personnel may obtain further clarification of the standards of conduct and conflict of interest provisions by consulting with their servicing legal office
- Commanders must emphasize that resolution of a conflict of interest must be accomplished as soon as practicable
- The JER prohibits some specific activities, including:
  - -- Active duty members making personal commercial solicitations or solicited sales to DoD personnel junior in rank at any time (on or off duty, in or out of uniform), particularly for insurance, stocks, mutual funds, real estate, or any other commodities, goods, or services
  - -- Soliciting or accepting any gift, entertainment, or thing of value from any person or company, which is engaged in procurement activities or does business with any agency of the DoD (including contractors). There are numerous exceptions to this rule, so if offered a gift consult the ethics counselor—normally the staff judge advocate (SJA).
  - -- Soliciting contributions for gifts to a superior, except voluntary gifts or contributions of nominal value (not to exceed $10) on special occasions like marriage, birth/adoption of a child, transfer (PCS/PCA), or retirement
  - -- Active duty military or civilian personnel using their grades, titles, positions, or organization names in connection with activities performed in their personal capacities
  - -- Endorsing a non-federal entity, event, product, service, or enterprise (explicit or implied). DoD employees must not use their official capacities and titles, positions, or organization names to suggest official endorsement or preferential treatment of any non-federal entity except those listed in subsection 3-210 of the JER, such as the Combined Federal Campaign and the Air Force Assistance Fund.
  - -- Accepting employment outside of the DoD, if it interferes with or is not compatible with the performance of government duties, or if it might discredit the government
  - -- Unauthorized gambling, while on-base or on-duty
- DoD employees may not participate in their official DoD capacities in the management of non-federal entities without authorization from the DoD General Counsel, except under very limited circumstances requiring the approval of the Service Secretary

- DoD employees may, however, serve as DoD liaisons to non-federal entities when appointed by the head of the DoD component command or organization who determines there is a significant and continuing DoD interest to be served by such representation. Liaisons serve as part of their official DoD duties, under DoD component memberships, and represent only DoD interests to the non-federal entity in an advisory capacity.
- The JER imposes annual financial reporting requirements for officers in the grade of O-7 or above and other government officials such as commanding officers and procurement officials

Reference

DoD 5500.07-R, *Joint Ethics Regulation* (30 August 1993), incorporating through Change 7, 17 November 2011

FINANCIAL DISCLOSURE FORMS

The DoD currently uses two different financial disclosure forms—the OGE 450 and the OGE 278e. The Code of Federal Regulations (CFR) describes who must file, outlines the required contents in these reports, and specifies filing times. The form an individual must use depends on the rank or grade and responsibilities of that individual. Office of Government Ethics (OGE) policy requires OGE 278e filers to use the www.Integrity.gov on-line reporting system, unless electronic filing is not practically possible, such as in certain deployed or remote locations. DoD policy requires OGE 450 filers to use the Financial Disclosure Management (FDM) online reporting system. Both systems utilizes the most current OGE forms and build upon prior years' inputs to reduce duplication of efforts. However, OGE 278e filers are also required to file monthly OGE 278T periodic transaction reports within Integrity.gov. Contact your servicing staff judge advocate (SJA) to determine whether these online systems are available at your location.

Confidential Financial Disclosure Report (OGE 450)

- Persons required to file this form include:
  - -- Commanding officers, heads and deputy heads of all installations or activities, if the military member is O-6 and below or if a civilian, is GS-15 or below. Commanders, heads, and deputy heads who are general officers or senior executive service employees file the OGE 278e report exclusively.
  - -- All military members (O-6 and below) and all civilian employees (GS/GM-15 and below) when their duties require them to participate personally and substantially in taking an official action for contracting or procurement, or if the supervisor determines such a report is necessary to avoid an actual or apparent conflict of interest
- Specific requirements for this report are set forth in Chapter 7 of the JER, including:
  - -- The report must provide sufficient information about the individual, as well as spouse and dependent children, such that an informed judgment can be made regarding compliance with conflict of interest laws
  - -- No disclosure of amounts or values is required
  - -- This report must be filed within 30 days after assuming a covered position and annually thereafter
- Annual reports are submitted to the servicing SJA no later than 15 February for the preceding calendar year

Public Financial Disclosure Report (OGE 278e)

- Persons required to file this form include:
  - -- Regular and Reserve officers whose grade is O-7 or above
  - -- Members of the Senior Executive Service
  - -- Civilian employees whose positions are classified above GS/GM-15 or whose rate of basic pay is fixed at or above 120 percent of the minimum rate of basic pay for a GS/GM-15
- Specific requirements for the content of this report are set forth in Chapter 7 of the JER:
  - -- Generally, this report is far more detailed in content than the OGE 450
  - -- Although specific amounts are not required on the report, individuals must indicate the value of assets within both a given range and type of asset
  - -- General officers must report a mortgage on their personal residence

- This report must be filed within 30 days after assuming a covered position
- Annual reports must be filed between 1 January and 15 May and cover the preceding calendar year
- An individual must also file a termination report within 30 days after terminating a covered position unless, within 30 days, the individual assumes another covered position
- Late reports are subject to a $200 penalty, absent an approved extension

Periodic Transaction Report (OGE 278T)

- Must be filed by OGE 278e filers who conduct the sale, purchase, or exchange of stocks, bonds, and other securities held by the filer, the filer's spouse, or dependent children, with a transaction value exceeding $1,000
  - -- This will allow the filer to use the OGE 278T reports when building the annual OGE 278e incumbent report, Schedule B (Transactions)
- Filed on a monthly basis (usually by the 15th of every month); negative reports not required
- Reports are considered late (subject to the $200 penalty), absent an approved request for an extension, if they are filed more than 30 days after they are due (i.e., 30 days after notification of a covered transaction or 45 days after the actual covered transaction)

References

DoD 5500.07-R, *Joint Ethics Regulation* (30 August 1993), incorporating through Change 7, 17 November 2011

U.S. Department of Defense Standards of Conduct Office, http://www.dod.mil/dodgc/defense_ethics/

OGE 278e, OGE 278T and OGE 450 are available at http://www.oge.gov/

GIFTS TO THE AIR FORCE

Accepting or Rejecting Gifts

- 10 U.S.C. § 2601 provides general statutory authority to accept gifts to the Air Force. AFI 51-601, *Gifts to the Department of the Air Force*, provides gift acceptance authorities and procedures for the Air Force.
- The Secretary of the Air Force (SecAF) is the authority to accept or reject gifts of personal property more than $50,000 and real property more than $10,000. Gifts of lesser amounts may be accepted by MAJCOM commanders and other delegated officials. Installation commanders may accept gifts of personal property up to $5,000 value (regardless of other delegations).
- Types of Gifts: *Unconditional* gifts have no conditions attached to them. *Conditional* gifts have specific conditions tied to their acceptance (e.g., "a gift of $15 million to construct a new library wing at the United States Air Force Academy").
- Gifts may be rejected for any of the following reasons: acceptance involves expending funds in excess of amounts appropriated by Congress; the offered item is extremely dangerous or in bad taste; acceptance of the gift would raise a serious question of impropriety in light of the donor's present or prospective business relationships with the Air Force; the cost of acceptance and maintenance is disproportionate to any benefit; or acceptance would not be in the best interest of the Air Force

Gifts for Distribution

- AFI 51-601, Chapter 5, governs gifts that are received for distribution to individual Airmen
- These types of gifts must be used for health, comfort, convenience, or morale. Examples include: sporting tickets, handheld electronic devices, and toiletry kits. Alcohol and tobacco products are **NOT** acceptable gifts.

Recognition of Donors is Limited

- Receiving commanders may send an appropriate letter of thanks; do not grant special concessions to donors, and do not initiate publicity for donors
- If the gift itself is worthy of a press release (e.g., new USAFA library wing) then the release may discuss the fact of the gift and the identity of the donor without emphasis

Gifts of Voluntary Service

- 10 U.S.C. § 1588 permits installation commanders to accept limited gifts of volunteer services, such as: voluntary medical services, dental services, nursing services, or other health-care related services; voluntary services to be provided for a museum or a natural resources program; and voluntary services provided for programs providing services to members of the armed forces and their families, including: family support, child development and youth services, library and education, religious, employment assistance to spouses of military members, and morale, welfare, and recreation
- Volunteers must complete a DD Form 2793, *Volunteer Agreement for Appropriated Fund Activities & Nonappropriated Fund Instrumentalities*

References

10 U.S.C. § 1588
10 U.S.C. § 2601
DoDI 1100.21, *Voluntary Services in the Department of Defense* (11 March 2002), incorporating Change 1, 26 December 2002
AFI 51-601, *Gifts to the Department for the Air Force* (26 November 2003)
DD Form 2793, *Volunteer Agreement for Appropriated Fund Activities & Nonappropriated Fund Instrumentalities* (March 2018)

GIFTS OF TRAVEL

Acceptance of Gifts

- A non-federal entity (NFE) may gift the cost of an employee's travel to the Air Force pursuant to 31 U.S.C. § 1353, in order to allow employees to attend a "meeting" (i.e, meetings, conferences, speaking engagements and events where the employee receives a public service award from the NFE); however, this authority **CANNOT** be used for a "widely attended gathering" or for permissive TDYs
- Allowable costs include transportation, lodging, meals and conference registration fees
- Approval level for acceptance of travel benefits is at the "highest practical administrative level" (typically the employee's travel approving authority) and such travel benefits should be approved in advance of employee travel

Travel Payments

- In-kind provision of travel, lodging and meals is preferred as NFE funds should not pass directly through employee's hands
- In the continental United States (CONUS), the cost of lodging provided may exceed the authorized per diem rate if similar lodging is provided to all other attendees/speakers. Outside of continental United States (OCONUS), the cost of lodging provided may not exceed the Department of State area per diem rate.
- Travel benefits accepted must be reported to SAF/GCA on the semi-annual SF 326, *Semiannual Report of Payments Accepted from a Non-Federal Source*

Spouse Travel

- An NFE may also pay for travel for employee's spouse if: spouse attendance supports Air Force mission; the employee is to receive award or honorary degree from an NFE; or the spouse participates in substantive programs related to Air Force programs/operations

---

References

31 U.S.C. § 1353
41 C.F.R. Part 304
SF 326, *Semiannual Report of Payments Accepted From A Non-Federal Source*

GIFTS TO SUPERIORS

- In order to avoid the appearance that a supervisor is being improperly influenced, the Joint Ethics Regulation (JER) issues the following guidelines concerning gifts to superiors
- Generally, Air Force personnel **MAY NOT**:
  - -- Solicit a contribution from other DoD personnel for a gift to a superior
  - -- Make a donation for a gift or give a gift to a superior
  - -- Accept a gift from subordinate personnel
- Exceptions to the general rule prohibiting gifts to superiors or their solicitation:
  - -- On an occasional basis, including occasions where gifts are traditionally given or exchanged, items having an aggregate market value of $10 or less per occasion, items such as food and refreshments, or personal hospitality at a residence may be given to superiors and accepted from subordinates
  - -- On special, infrequent occasions (marriage, birth of child, etc.) or on occasions that terminate the superior-subordinate relationship (retirement, separation, or permanent change of station (PCS))
    - --- Employees may solicit a contribution for a group gift for a special, infrequent occasion, but *requests* for contributions must not exceed $10 per person (individual voluntary contributions may exceed this amount, subject to the overall cap of $300). Solicitation must be without pressure or coercion.
    - --- The general rule is that a DoD employee **MAY NOT** accept a gift that exceeds $300 in value from a group that consists of one or more subordinates to the honoree. Further, if an individual donates to more than one donating group, then the donating groups will be considered to be one donating group and the combined value of the gifts from the groups must be $300 or less.
    - --- Donating groups should be defined by reasonable and rational parameters and are usually related to the structure of the overall organization and individual units within that organization. There is no limit on the number of donating groups.
    - --- Under all circumstances, gifts must be truly **voluntary**

References

5 C.F.R. §§ 2635.301–2635.304, 3601.104
DoD 5500.07-R, *Joint Ethics Regulation* (30 August 1993), incorporating through Change 7, 17 November 2011

GIFTS FROM OUTSIDE SOURCES

When considering the issue of gifts from outside sources/non-federal entities (NFEs), it is important to recall that all DoD employees (military and civilian) are beholden to the same Standards of Ethical Conduct as other employees of the Executive Branch. One of the fundamental tenets in this area is that public service is a public trust; in other words, DoD employees must not abuse their official position for undue personal gain—to include using public office to acquire gifts from NFEs that may look like bribes/kick-backs.

- General Rule: The Joint Ethics Regulation (JER) prohibits DoD employees from soliciting or accepting a gift from an NFE if it is offered *because* of their official position. Similarly, DoD employees may not solicit or accept a gift from a "prohibited source" (i.e., an NFE engaged in or seeking to engage in business with the agency, or seeks official agency action). A gift is considered anything with value—to include discounts, memberships, and other items of tangible or intangible property. Additionally, gifts to DoD employee's dependents will be considered to be gifts to the DoD employee (ownership is imputed).
- Values-based Decision-making: Every DoD employee has a fundamental responsibility to the United States and its citizens to place loyalty to the Constitution, laws, and ethical principles above private gain. An employee's actions should promote the public's trust that this responsibility is being met. For this reason, employees should consider declining otherwise permissible gifts if they believe that a reasonable person with knowledge of the relevant facts would question the employee's integrity or impartiality as a result of accepting the gift. Factors to consider are the value of the gift, the timing of the gift, the identity of the donor, and any potential access the gift may provide the donor.
- Exceptions to the General Rule Against Accepting Gifts: There are numerous exceptions to the general prohibition above. Common exceptions include: prizes/discounts/incentives open to the public or all DoD employees without regard to official position; modest items of food/refreshment (not alcohol); the $20/$50 rule (DoD employee may accept a gift valued at up to $20 per occasion, per source, and no more than $50 per year from the same source); and the widely attended gathering (WAG) rule.
- These and the many other gift exceptions require a fact-specific analysis and legal review in order to ensure that a gift may be accepted without creating the reasonable appearance of impropriety or even violating criminal statutes. As such, gift issues should be discussed as early as possible with the servicing staff judge advocate or ethics counselor.

References

5 C.F.R. §§ 263 (Subpart B), and 3601
DoD 5500.07-R, *Joint Ethics Regulation* (30 August 1993), incorporating through Change 7, 17 November 2011

FOREIGN GIFTS

The U.S. Constitution prohibits persons holding an "office of profit or trust" for the United States from accepting gifts from foreign "personages or governments" without consent of Congress. Congress has consented to retaining and accepting gifts under certain conditions and when following certain procedures.

- The general prohibition against accepting foreign gifts applies to military members, civilian employees, consultants, and their spouses or other dependents. This includes retired and reserve component members, regardless of duty, Air National Guard members, when federally recognized, and their spouses and dependents.
- No DoD employee may request, or otherwise encourage, the offer of a gift from a foreign government
- Small table favors, mementos, remembrances, or other tokens bestowed at official functions, and other gifts of minimal value received as souvenirs or marks of courtesy from a foreign government (e.g., plaques or paper certificates), may be accepted and retained by the recipient
- "Minimal value," is currently defined as not exceeding $390 in retail value. "Minimal value" is based on the Consumer Price Index and is *subject to chang*e. The value of the gift is determined by retail value/fair market value in the United States. If multiple gifts are offered on the same occasion, they will be aggregated when determining value.
- DoD employees **MUST REFUSE** offers of gifts of more than minimal value if practical to do so. The donor should be advised that U.S. law prohibits persons in service of the United States or their dependents from accepting the gift; however, refusal requires Department of State approval (coordinated through SAF/AA). Nonetheless, the employee may accept a gift greater than minimal value if refusal is likely to offend or embarrass the donor or adversely affect foreign relations (the gift becomes U.S. property and must be reported to the Air Force in accordance with procedures prescribed in AFI 51-901, *Gifts from Foreign Governments*). Further, the employee may purchase a gift (by paying fair market value) if he/she desires by paying full retail value.
- For all foreign gifts, the person receiving the gift should make a written record describing the circumstances of the gift, including the date and place of presentation, identity and position of the donor, description and value of gift, and means by which the value was determined
- For gifts equal to or less than minimal value, the recipient may retain the gift for their personal use including destruction or re-conveyance of the gift as desired
- For gifts of more than minimal value, request disposition instructions from SAF/AA and make a recommendation as to the disposition of the gift (e.g., display in unit common areas). Gifts of more than minimal value may also be donated to charitable non-Federal entities, including installation-recognized Private Organizations.

References

5 U.S.C. § 7342
41 C.F.R. § 102-42.10
DoD 5500.07-R, *Joint Ethics Regulation* (30 August 1993), incorporating through Change 7, 17 November 2011
DoDD 1005.13, *Gifts and Decorations from Foreign Governments* (19 February 2002), incorporating Change 1, 6 December 2002, certified current 21 November 2003
AFI 51-901, *Gifts from Foreign Governments* (19 December 2016)

HONORARIA

Federal employees may accept the payment of money or anything of value for an appearance, speech or article *unrelated* to their official duties, assuming there are no statutory or regulatory prohibitions.

- An honorarium is generally defined as a payment given to someone, such as a consultant or a speaker, for services for which fees are not legally required
- In the context of the Joint Ethics Regulation (JER), honoraria are considered compensation for a lecture, speech, or writing and involve the payment of money or anything of value
- At one time, federal employees were prohibited from accepting any honorarium on any topic, even if there was no connection between the subject of the appearance, or article, and the official duty of the individual. However, pursuant to the *Wolfe v. Barnhart* case, that prohibition is no longer strictly enforced against government employees, military or civilian. Federal employees are no longer prohibited from accepting the payment of money or anything of value for an appearance, speech, or article, *unrelated* to their official duties.
- Federal employees may accept compensation for a lecture, speech or writing based on the employee's field of individualized expertise (rather than official duties or agency operations), even if that field is generally within the agency's area of responsibility
- Use of a military member's grade (e.g., as part of an introduction), requires a disclaimer (either written or verbal) that the views being expressed are those of the speaker/writer and do not necessarily represent the views of DoD or the Air Force
- Although travel reimbursement for a speech related to official duties may be accepted under certain circumstances (see Gifts of Travel), a fee or other direct compensation for speaking for such an engagement **MAY NOT** be accepted

---

References

Wolfe v. Barnhart, 446 F.3d 1096 (10th Cir. 2006)
5 C.F.R. § 2635.807
DoD 5500.07-R, *Joint Ethics Regulation* (30 August 1993), incorporating through Change 7, 17 November 2011

USE OF GOVERNMENT MOTOR VEHICLES (GMVS)

Government Motor Vehicles (GMVs) are closely controlled because of their easy accessibility, high visibility and potential for misuse. Whether rented, leased, or owned, GMVs should only be used for official purposes. Decisions regarding authorized GMV use/support must be resolved in favor of strict compliance with controlling guidance, with special consideration for avoiding negative public perception. For detailed guidance concerning GMV use for various situations, please consult Chapter 2 of AFMAN 24-306.

Command and Control Vehicles (CACV) and Domicile to Duty (DTD) Transportation

- CACV are for commanders with overall responsibility for operations or installation security needing 24/7 emergency communication support; the approval authority for such vehicles is the MAJCOM/CC (or MAJCOM/CV if delegated)
- CACV authority is not the authority for DTD transportation; CACV should **NOT** be taken to the employee's residence for routine, even if brief, stops
- DTD transportation, per 31 U.S.C. 1344, is only authorized for:
  - -- Secretary of the Air Force (SecAF) and Chief of Staff of the U.S. Air Force (CSAF)
  - -- Field work (e.g., recruiters, medical officers performing outpatient service away from military treatment facility (MTF))
  - -- Intelligence, counterintelligence, protection services, or law enforcement duty
  - -- Emergent circumstances—namely, highly unusual circumstances that present a clear and present danger, emergency situations, or other compelling operational considerations
- SecAF is the approval authority for DTD transportation, and Congress must be notified when DTD transportation is authorized

---

References

31 U.S.C. §§ 1344 and 1349(b)
DoDD 4500.09E, *Transportation and Traffic Management* (11 September 2007), incorporating Change 1, 31 July 2017
DoDM 4500.36, *Acquisition, Management, and Use of Non-Tactical Vehicles* (7 July 2015)
AFI 24-301, *Ground Transportation* (1 November 2018)
AFMAN 24-306, *Operation of Air Force Government Motor Vehicles* (9 December 2016)

USING GOVERNMENT FUNDS: MEMENTOS/GIFTS AND OFFICIAL REPRESENTATION FUNDS (ORF)

Federal law requires that appropriated funds not be used to purchase gifts for military members, employees, or private citizens unless specifically authorized by law. The only authority to use Air Force appropriated funds for gifts is AFI 65-603, *Official Representation Funds*, which specifies the circumstances and the individuals to whom gifts (or "mementos") may be presented. Generally, nonappropriated funds cannot be used when appropriated funds are authorized, whether such funds are available or not.

Impermissible Use of Funds

- Appropriated Funds: May not be used to purchase permanent change of station (PCS) or retirement mementos for either military or DoD civilian personnel
- Nonappropriated Funds: May not be used to purchase PCS mementos for either military or DoD civilian personnel. In general, you cannot use nonappropriated funds to purchase trophies and awards that are used to recognize either mission accomplishment or individual achievements that contribute to military effectiveness.
- Mission accomplishment recognition funding cannot be used to honor PCS or retiring personnel. AFI 36-2803, *The Air Force Awards and Decorations Program*, provides additional guidance on appropriate recognition in these circumstances.

Permissible Use of Funds

- Nonappropriated Funds: May be used in support of a *retirement* ceremony to purchase light refreshments and mementos ($20 limit) for retiring military and DoD civilian personnel. Likewise, nonappropriated funds may be used to purchase trophies and make nominal monetary awards for winners under the individual recognition program, provided appropriated funds are not available/authorized.
- Appropriated Funds: May be used to to purchase special trophies and plaques that are used to recognize mission accomplishment, such as personnel of the quarter awards. Additionally, appropriated funds, such as Official Representation Funds (ORF), may *potentially* be used to purchase mementos/gifts for distinguished citizens of foreign countries, and prominent U.S. citizens who are not DoD employees under certain circumstances.

Official Representation Funds (ORF)

- ORF is one type of emergency and extraordinary expense fund allowed by 10 U.S.C. § 127. Its purpose is to extend official courtesies of the United States to foreign and domestic dignitaries.
- Use of ORF requires certain ratios of invited attendees; invite the minimum number of guests to extend proper courtesies. In parties of less than 30 persons, at least 20% of the guests are required to be non-DoD. In parties of more than 30 persons, at least 50% of the guests are required to be non-DoD.
- Only certain individuals will qualify for use of ORF. Examples include members of Congress and Cabinet members, prominent U.S. citizens (retired O-10s are automatically considered prominent U.S. citizens), foreign distinguished citizens, military personnel, and government officials, and the Secretary of the Air Force, (SecAF) Undersecretary of the Air Force (USecAF), Chief of Staff of the Air Force (CSAF), Vice Chief of Staff of the Air Force (VCSAF), certain other Office of the Secretary of Defense (OSD) members.

- AFI 65-603, *Official Representation Funds*, governs the use of ORF. ORF may be used for meals, receptions and refreshments, reasonable gratuities for services rendered by non-government personnel, recreation events such as sporting activities, sightseeing tours, and concerts for authorized personnel, floral and candle centerpieces for receptions and meals, mementos, modest welcome baskets, and the cost of the gift wrapping, paper or bows, and alcohol at evening events.
- Prohibited uses of ORF: Unless specifically approved by SAF/AA the following uses are **NOT** allowed:
  - -- Personal items such as toiletry articles, hair and beauty care, souvenirs, and personal clothing items (unless the article of clothing bears the command or unit logo and is given as a memento)
  - -- Personal phone calls or transportation when official duties are not involved
  - -- Expenses for support staff (e.g., aides, executive officers, official drivers, and protocol personnel). These individuals are not considered members of the official party.
  - -- Gifts, flowers, or wreaths for presentation by authorized guests
  - -- Seasonal greeting and calling cards
  - -- Cost of music/entertainment for social hours, receptions, and dinners
  - -- DoD members' (and spouses') cost for recreational activities
  - -- Membership fees or dues

References

10 U.S.C. § 127

DoDI 7250.13, *Use of Appropriated Funds for Official Representation Purposes* (30 June 2009), incorporating Change 1, 27 September 2017

AFI 36-2803, *The Air Force Military Awards and Decorations Program* (18 December 2013), including AFI36-2803_AFGM2018-01, 8 February 2018

AFI 65-601, *Budget Guidance and Procedures*, Vol 1 (24 October 2018)

AFI 65-603, *Official Representation Funds* (24 August 2011)

OFF-DUTY EMPLOYMENT

Generally, Air Force members may participate in off-duty employment, subject to the limitations and prohibitions stated in the Joint Ethics Regulation (JER).

- Personnel should inform their supervisor prior to engaging in outside employment. Air Force financial disclosure filers must request approval of outside activities using the AF Form 3902, *Application and Approval for Off-Duty Employment*. Although the Air Force does not require other individuals to complete the AF Form 3902, there may be a local or command policy to do so. Additionally, all Air Force civilian employees **MUST** report outside business activity or compensation to their supervisors, per AFI 36-703.
- Financial disclosure filers shall obtain prior approval **BEFORE** working for a prohibited source. For more information on who is required to file financial disclosures, consult your servicing staff judge advocate.
- Personnel may not engage in outside employment, with or without compensation, that:
  - -- Interferes with or is not compatible with performing their government duties
  - -- May reasonably be expected to bring discredit upon the government or the Department of Defense
  - -- May tend to create a conflict of interest
  - -- Will detract from readiness or pose a security risk
- Personnel are **encouraged** to engage in teaching, writing, or speaking. Such activities must not depend upon information gained as a result of government service, unless available to the public or with approval from the Secretary of the Air Force. Generally, federal employees may not receive payment for articles or speeches related to their official duties.
- Additional requirements for certain professions:
  - -- Medical providers must consult applicable guidance from AF/SG (to include AFI 44-102, *Medical Care Management*) prior to engaging in off-duty employment
  - -- Judge advocates desiring to perform off-duty employment should review AFI 51-110, *Professional Responsibility Program*

References

5 C.F.R. § 2635, subpart H
DoD 5500.07-R, *Joint Ethics Regulation* (30 August 1993), incorporating through Change 7, 17 November 2011
AFI 36-703, *Civilian Conduct and Responsibility* (30 August 2018)
AFI 44-102, *Medical Care Management* (17 March 2015), including AFI44-102_AFGM2018-02 (20 February 2018)
AFI 51-110, *Professional Responsibility Program* (11 December 2018)
AF Form 3902, *Application and Approval for Off-Duty Employment* (March 1995)

KEY SPOUSE PROGRAM

The Air Force Key Spouse Program is a commander's program to enhance unit family readiness. The role of the Key Spouse is designed to enhance mission readiness and resilience, and establish a sense of community. It is a commander's initiative that promotes partnerships with unit leadership, families, volunteer key spouses, centers, and other installation community agencies. DoD components can accept certain volunteer services; the Key Spouse Program falls under such voluntary services (see "Gifts to the Air Force").

- All key spouses should be appointed by the unit commander
- Once appointed, they should complete key spouse training, sign a DD Form 2793, *Volunteer Agreement*, and complete any necessary information security training, if they will be given access to Air Force information technology systems
- Key spouses **MAY NOT** serve in a policy making position; supervise paid employees or military personnel; perform inherently governmental functions; obligate government funds; be accountable for the management, quality, financial solvency, and health/safety of an installation program or activity
- Key spouses are supervised the same way as compensated employees providing like services
- Key spouses receive Federal Tort Claims Act (FTCA) protections for injuries or damage they may cause when they perform official duties as volunteers
- Key spouses receive Federal Employee Compensation Act (FECA) protections for injuries they may incur when they perform official duties as volunteers
- Key spouse members can use government resources/facilities (including office space, computers, e-mail, telephones, supplies, equipment, etc.) and may have access to Privacy Act protected information, as needed to perform their assigned duties. However, they should complete the same training required of any compensated employee or military member who will have access to these resources.
- Training for key spouses shall be provided by the Airman and Family Readiness Center at least on a quarterly basis, or as requested
- If key spouses engage in fundraising (e.g., as a member of a spouses' club), either on or off base, they must adhere to relevant guidance (see "Private Organizations") and ensure they are not acting in their official capacity as the commander's key spouse

References

AFI 36-3009, *Airman and Family Readiness Centers* (30 August 2018)
DD Form 2793, *Volunteer Agreement* (May 2009)

UTILIZATION OF ENLISTED AIDES (EAs)

Authorized EA Duties

- An EA is assigned to assist the general officers (GOs). They are not assigned to assist the GO's spouse, family, or staff.
- Examples of Permissible EA Duties Include:
  - -- Cleaning of common areas in GO quarters (GOQ) and general lawn care
  - -- Care of military uniforms and civilian attire worn for qualifying representational events (QREs)
  - -- Receiving guests at QREs
  - -- Planning, preparation and conduct of QREs, receptions, and parties
  - -- Preparation of daily meals for the GO (and those immediate family members that eat with the GO)
  - -- Packing of uniforms and professional items and books in permanent change of station (PCS) move
  - -- Assisting the GO with errands that have a substantive connection to the GO's official responsibilities
- EAs are assigned to support assigned GOs and relieve them of routine duties so the GO can focus on military duties

Unauthorized EA Duties

- Any form of care for family, personal guest, or pets
- Operation or maintenance of any privately owned vehicle (POV) or private recreational equipment
- Personal services or errands for the sole benefit of the GO's family or unofficial guests
- Landscaping in areas not used for QREs
- Skilled maintenance of GOQ or cleaning of private family areas

Sharing of EAs

- GOs can loan EAs to another GO who is authorized use of EAs in order to support a QRE
- A GO's spouse can be designated as an alternate for the purpose of receiving EA support, if the spouse hosts a QRE that has direct connection to the GO's official duties. This includes events when the spouse is hosting events attended by spouses of U.S. dignitaries, foreign dignitaries or foreign military officers when the GO is separately meeting with those individuals.

Permissible and Impermissible EA Assignments

- DoDI 1351.09, *Utilization of Enlisted Aides (EAs) on Personal Staffs of General and Flag Officers (G/FOs),* enclosure 4, contains examples of permissible and impermissible EA assignments in support of QREs

- Permissible QREs Include:
  - -- Events to honor local government, congressional personnel, and foreign dignitaries
  - -- Customary unit morale events such as hail and farewell gatherings and holiday parties
  - -- Events to welcome peers and subordinates
  - -- Official events in support of family readiness programs
- Impermissible Non-QREs Include:
  - -- Purely social events for family, friends and peers (EAs can enter into voluntary off-duty employment arrangements with the GO for such events in return for just compensation)
  - -- Spouse-hosted social events for unit spouses

References

DoDI 1315.09, *Utilization of Enlisted Aides (EAs) on Personal Staffs of General and Flag Officers (GO/FOs)* (6 March 2015), incorporating Change 1, 1 December 2017
AFI 36-2123, *Management of Enlisted Aides* (8 November 2018)

15

CHAPTER FIFTEEN: CIVILIAN PERSONNEL AND FEDERAL LABOR LAW

OVERVIEW OF THE CIVILIAN PERSONNEL SYSTEM

The area of labor and personnel relations is covered by an assortment of statutes, executive orders, and regulations. It is administered by a myriad of administrative bodies located in a variety of federal departments and independent agencies and is a complicated area of the law.

The Workforce Structure

- Six categories offer varying degrees of protection from adverse personnel actions:
  - -- *Competitive Service*: Consists of all positions not specifically exempted; most employees enter federal service after passing a competitive exam
  - -- *Excepted Service*: Usually excepted from competition by OPM regulations
  - -- *Senior Executive Service (SES)*: Reserved for federal civilian employees above GS-15; considered general officer equivalents
  - -- *Probationary Employees:* Employees under a competitive appointment in their first two years of service
  - -- *Hybrid Military/Civilian*: Includes National Guard technicians and Air Reserve technicians
  - -- *Nonappropriated Fund (NAF) Employees*: Consists of morale, welfare and recreation employees

Pay Systems

- Appropriated Fund Employees
  - --- *General Schedule (GS)*: Divided into 15 grades, GS-1 through GS-15; statutory base pay scale nationwide, plus varying levels of locality pay; automatic pay increases for "acceptable" performance
  - --- *Executive Schedule*: Statutory basic pay nationwide; potential for merit pay increases
  - --- *Federal Wage Survey*: Wage Grade (WG)/Wage Leader/Wage Supervisor; pay reflects private sector pay rates in locality for same type of work; manner of computing pay set by statute
- Nonappropriated Fund (NAF) Employees: Pay rates determined by management and may be negotiable with unions

Administrative and Adjudicative Bodies

- Merit Systems Protection Board (MSPB)
  - -- Adjudicates cases brought by the Office of Special Counsel, such as whistleblower claims, allegations of mismanagement, and requests by SES members for performance deficiencies and for informal hearings
  - -- Hears appeals by certain civilian employees of agency actions in performance or misconduct cases where the employee was disciplined by reduction in grade, removal, suspension for more than 14 days or furloughed for 30 days or less for misconduct under 5 U.S.C. §§ 7511-7514
  - -- Possesses authority to mitigate or completely reverse agency adverse actions, but cannot mitigate performance based actions taken under 5 U.S.C., Chapter 43
  - -- Hears appeals concerning reduction-in-force (RIF)

- Equal Employment Opportunity Commission (EEOC)
  - -- Adjudicates claims of unlawful discrimination based on race, religion, national origin, sex (including pregnancy, sexual orientation and sexual stereotyping), color, disability, or age, and claims of unlawful reprisal
  - -- If illegal discrimination is found, it may order back pay, retroactive personnel actions, correction of records, reinstatement, promotion, payment of attorney fees, and compensatory damages
- Federal Labor Relations Authority (FLRA)
  - -- Administers the interaction between federal agencies, labor organizations and employees
  - -- Decides unfair labor practice (ULP) cases filed by either the agency or the union
  - -- Decides appeals of certain arbitration awards and negotiability appeals
  - -- Has authority to direct the Air Force to comply with its orders
- Federal Service Impasses Panel (FSIP): Resolves negotiation impasses between agencies and labor organizations
- Federal Mediation and Conciliation Service (FMCS): Aids federal agencies and labor organizations in resolving negotiation impasses; provides parties with lists of arbitrators; provides mediators for alternative dispute resolution
- Office of Personnel Management (OPM): Addresses personnel management issues such as civil service retirement programs, insurance, examinations, and classification appeals
- Office of Special Counsel: Investigates and prosecutes allegations of violations of merit principles; prohibited personnel practices; fraud, waste and abuse; and violations of the Hatch Act

References

5 U.S.C. §§ 7101-7135, 1201-1204, 5101-5115, and 9902
5 C.F.R. Part 1201
29 C.F.R. Part 1614
DoDI 1400.25_V771_AFI 36-706, *Administrative Grievance System* (14 November 2018)
AFI 36-701, *Labor Management Relations* (6 April 2017)
AFI 36-704, *Discipline and Adverse Actions of Civilian Employees* (3 July 2018)
AFI 36-2706, *Equal Opportunity Program Military and Civilian* (5 October 2010), including AFI36-2706_AFGM2017-01 (9 February 2017), reissued 1 February 2018
AFI 51-301, *Civil Litigation* (2 October 2018)

OVERVIEW OF FEDERAL LABOR MANAGEMENT RELATIONS

Labor law concerns relationships among management, employees, and unions. Generally, it covers the rules that govern how employees and managers should work together to accomplish the mission.

- Employee Rights: The Federal Service Labor-Management Relations Statute (FSLMRS) recognizes certain employee rights; namely: the right to form, join or assist any union, or to refrain from any such activity, freely and without fear of penalty or reprisal (no right to strike); to serve as representative of union; to present union views to management; and to engage in collective bargaining about conditions of employment (COE) through chosen representatives
- Management Rights: The FSLMRS similarly recognizes certain rights that are reserved to management. When the agency exercises a reserved management right, the agency is not required to bargain over the substance of that decision. However, the agency is required to bargain over any legitimate proposals that the union submits concerning the impact or implementation of the agency's decision to exercise a reserved management right. Some of the reserved management rights include the right to determine agency mission, budget, organization, number of employees, internal security practices, to hire/assign/direct/retain/promote/discipline employees, to assign work, and make determinations on outsourcing.
- Union Representation Rights and Duties: A union is entitled to negotiate a collective bargaining agreement (CBA) covering employees in unit. Installations are represented by base negotiating team. Both sides must negotiate in good faith (duty to approach negotiations with sincere resolve to reach agreement). A union may designate its representative during the negotiations. A union is entitled to be present during *formal discussions* between one or more representatives of the Air Force and one or more employees in the bargaining unit (or their representatives) concerning any grievance or any personnel policy or practices or other general condition of employment.
  - -- There are a number of factors that can be considered to determine if the discussion is *formal*. Some of the factors include who held the meeting, where the meeting was held, how long the meeting lasted, whether there was a formal agenda, whether attendance was mandatory, and how the meeting was conducted. *Discussion* is synonymous with *meeting* and does not require debate or argument. Commanders and supervisors should consult civilian personnel section (CPS) and the SJA before conducting such discussions to see if the union should be notified.
  - -- A union representative is entitled to be present during an investigatory interview of a bargaining unit employee if the employee reasonably believes that the examination may result in disciplinary action against the employee, **AND** the employee requests representation. This is known as receiving *Weingarten Rights* after a Supreme Court case, *Nat'l Labor Relations Board v. Weingarten*, 420 U.S. 251 (1975). Generally, management does not have to advise the employee of these rights at the beginning of each interview unless the collective bargaining agreement between management and the union requires it.
  - -- A union is entitled to information "normally maintained by the agency in the regular course of business" that is "reasonably available and necessary" for full and proper negotiation and not prohibited from disclosure by law. A union is not required to file a request pursuant to the Freedom of Information Act (FOIA) for this information. Undue delay, failing to explain a denial, or failing to advise the union that the information does not exist, may be grounds for an unfair labor practice (ULP).

-- Union representatives are entitled to wages when on official time to negotiate all collective bargaining issues (e.g., ground rules for negotiations, CBA negotiations, mid-term negotiations, or impact/implementation bargaining). The union has a statutory right to official time for as many negotiators as are on the management negotiating team, although the union has the right to negotiate official time for additional negotiators as well. However, official time shall not be used for internal union business (collecting dues, soliciting new members, etc.). Official time must be granted for any employee participating in any phase of a Federal Labor Relations Authority (FLRA) proceeding if the FLRA determines the employee's presence is necessary. Official time for other purposes is bargainable and the CBA should outline who is entitled to the official time and how much time they are entitled to receive.

Unfair Labor Practices (ULP)

- It is a ULP for agency management to:
  - -- Interfere with, restrain, or coerce employees in exercising their FSLMRS rights. Lack of illegal motivation or anti-union animus is not a defense.
  - -- Encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment
  - -- Sponsor, control, or assist a union
  - -- Discipline or otherwise discriminate against an employee for filing a ULP or testifying in a ULP proceeding
  - -- Refuse to bargain in good faith, to include failing or refusing to cooperate in impasse procedures or decisions
  - -- Enforce a rule or regulation which conflicts with a preexisting CBA
  - -- Otherwise fail or refuse to comply with any provision of FSLMRS
- It is a ULP for a Union to:
  - -- Coerce, discipline, or fine a union member as punishment to hinder or impede employee's work performance
  - -- Discriminate regarding union membership on basis of race, creed, color, sex, age, handicap, marital status, national origin, or political affiliation
  - -- Call, participate in, or condone a strike, work stoppage, or slowdown; nondisruptive informational picketing is permitted
  - -- Refuse to bargain in good faith, to include failing or refusing to cooperate in impasse procedures or decisions
  - -- Otherwise fail or refuse to comply with any provision of FSLMRS
- ULP Procedures: The charge will be filed with FLRA regional office. The investigation is conducted by FLRA regional office attorney/agent.
  - -- Investigation conducted in person or by interviewing witnesses over the phone
  - -- Air Force must make bargaining unit employees available for interview
  - -- Investigators are **NOT** always neutral and detached (i.e., they may represent the agency)
  - -- Charges may be amended by investigator to conform to their investigation

- **NEVER** permit management officials to be interviewed without notifying the legal office. With the exception of some bases within AFMC, the Air Force Legal Operations Agency/ General Litigation Division (Labor Law Field Support Center (LLFSC)) is designated as the agency representative for ULP charges. For those cases in which the LLFSC is designated as the agency representative, the LLFSC must be notified before management officials are interviewed by the FLRA.

References

Federal Service Labor Management Relations Statute, 5 U.S.C. §§ 7101-7135
NLRB v. Weingarten, 420 U.S. 251 (1975)
AFI 36-701, *Labor Management Relations* (6 April 2017)

COLLECTIVE BARGAINING

The Federal Service Labor-Management Relations Statute (5 U.S.C. §§ 7101-7135) is contained in the Civil Service Reform Act of 1978. This Act grants certain federal employees the right to join or form labor unions and to engage in collective bargaining through their chosen representatives. Air Force labor-management relations policies and procedures are set forth in AFI 36-701, *Labor Management Relations*.

- The Air Force **must bargain** with bargaining unit employees through their duly elected representative (union) over all conditions of employment (COE), which are defined as personnel policies, practices, and matters affecting working conditions
- The Act **does not require bargaining** with appropriated fund employees over certain matters, including issues *specifically* regarding certain political activities, classification of positions, matters provided for by federal statute (e.g., pay, vacations, health benefits, holidays, or retirement plans), proposals that conflict with government-wide rules/regulations or that conflict with "reserved management rights" under the Act
- Management is not required to bargain over matters already covered in the contract (or CBA). To the extent a matter arises concerning a COE that is not covered in the contract, the union can engage management in mid-term bargaining. The union may not engage management in mid-term bargaining if the collective bargaining agreement contains a "zipper" clause that bars such during the life of the agreement.
- The Air Force must bargain in good faith, including having negotiators who have authority to bind the activity. Additionally, the AF must bargain before changing COE even if the change is made during life of CBA.
- Parties may establish a COE by consistently, over an extended period of time, engaging in a certain practice, and a labor contract clause can be modified or even overturned by such a COE created in this manner (often called a "past practice"). This refers to matters that are already considered conditions of employment and the past practice has merely changed the way the condition of employment was originally handled; it is not possible for a past practice to create a condition of employment where the subject matter underlying the practice does not pertain to a COE.

Determining Whether an Issue is "Bargainable"

- Determining whether an issue is open for bargaining can be a confusing and highly complex matter in federal labor law. If commanders are presented with a demand that a dispute or issue be dealt with through formal bargaining, the safe response is merely to advise the union representative that he/she will ask the civilian personnel section (CPS) and staff judge advocate to review the request. This area is sufficiently sensitive that wing staff organizations will coordinate a decision to declare a proposal "nonnegotiable" with MAJCOM DPC and AFLOA/JACL.

References

5 U.S.C. §§ 7101-7135
AFI 36-701, *Labor Management Relations* (6 April 2017)

AIR FORCE CIVILIAN DRUG TESTING PROGRAM

Executive Order 12564, *Drug-Free Federal Workplace* (1986), formally announced the President's policy that federal employees would refrain from the use of illegal drugs.

- President's Statement of Policy: Use of illegal drugs by federal employees, on or off duty, is contrary to the efficiency of the service; persons who use illegal drugs are not suitable for federal employment; each agency will develop a plan to achieve objectives of the Executive Order
- Air Force Policy: The Air Force, as a result of its national defense responsibilities, and the sensitive nature of its work, has a compelling obligation to eliminate illicit drug use from its workforce. Civilian employees of the Air Force must refrain from illicit drug use whether on or off duty. Performing duties under the influence of illicit drugs adversely affects personal safety, risks damage to government property, significantly impairs day-to-day operations, and exposes sensitive information to potential compromise. Use of illicit drugs is inconsistent with the high standards of performance, discipline, and readiness necessary to accomplish the Air Force mission.
- Air Force policy is based on federal criminal statutes on controlled substances and is not affected by state laws legalizing the use of marijuana or other controlled substances, even if for medical use. Thus, in accordance with federal law, Air Force civilians are prohibited from using marijuana, a Schedule I controlled substance.
- Specimens are tested for evidence of the consumption of certain drugs as authorized by the Department of Health and Human Services. With prior approval, drugs not on the standard panel of substances routinely tested, can be requested.

Types of Drug Testing

- Random Drug Testing: Only employees in "sensitive positions," which are also known as testing designated positions (TDP), are subject to random drug testing. TDPs include positions that involve work that impacts national security and public health or safety. Any testing requirement must be identified in a position description and vacancy announcement (if applicable). Applicants for such positions are also subject to testing after tentative selection. If a non-TDP employee becomes a TDP employee, 30 days notice must be provided to the employee before random testing may begin.
- Voluntary Testing: For Air Force federal civilian employees not in TDP positions, employees can volunteer to be included in pool for random drug testing. Employees remain in this pool until the employees notify the personnel office of withdrawal; such notice must occur at least 48 hours prior to being scheduled for a random test.
- Reasonable Suspicion Testing: An Air Force employee can be tested based on reasonable suspicion that the employee has engaged in illicit drug use and that evidence of such use is presently in the employee's body. Reasonable suspicion is a specific and fact-based belief that an employee has engaged in illicit drug use, and that evidence of illicit drug use is presently in the employee's body, drawn from specific and particularized facts, and from reasonable inferences based on those facts. Employees in TDPs may be tested on a reasonable suspicion of illicit drug use on or off duty; employees in non-TDPs may be tested based upon reasonable suspicion only when the supervisor suspects on-duty drug use or impairment. Examples of evidence that may justify reasonable suspicion testing (list is not all inclusive):

  - -- Direct observation of illicit drug use or possession and/or physical symptoms of being under the influence of an illegal drug, including behavior, speech, appearance, and body odors of the employee
  - -- A pattern of abnormal conduct or erratic behavior consistent with the use of illegal drugs
  - -- Evidence of drug-related impairment supported by hearsay from identified or unidentified sources supported by corroboration from a manager or supervisor with training and experience in the evaluation of drug-induced job impairment
  - -- Recent arrest or conviction for drug-related offense; or, the identification of an employee as the focus of a criminal investigation into illegal drug possession, use, or trafficking
  - -- Information of illicit drug use provided by a reliable and credible source or independently corroborated
  - -- Evidence that the employee has tampered with or avoided a recent or current drug test
- A basic overview of the procedure is as follows:
  - -- Supervisor gathers all information, facts, and circumstances supporting the suspicion and documents it
  - -- Supervisor coordinates with the staff judge advocate (SJA), Civilian Personnel/Human Resources, and the functional chain of command
  - -- Written notification must be provided to the member and must include the dates and times of the drug-related incidents and the sources of information considered (i.e., the rationale leading to the test)
- Consent Testing:
  - -- All Air Force civilian employees may be asked to consent to be tested for illicit drug use
  - -- Prior to requesting such consent, consult with the installation SJA
  - -- Consent testing may be requested if reasonable suspicion does not exist or before the employee is ordered to test based on reasonable suspicion
  - -- Employee's consent must be knowing and voluntary
  - -- Positive test results on consent-based tests do not exempt the employee from disciplinary action
- Following Accident or Safety Mishap: Air Force policy is to test employees after certain accidents or safety mishaps when the member's supervisor, after coordination with a higher-level supervisor and an attorney from the servicing SJA's office, reasonably concludes an employee's conduct (to include inaction) may have caused or contributed to the mishap or accident
- Rehabilitation (Follow-up) Testing: Employees referred for counseling or treatment for illicit drug use will be subject to unannounced testing for a minimum of one year from the time of initiated rehabilitation services
- **Failure** of an employee **to appear** for a test may be considered refusal to participate in testing and may subject an employee to the full range of administrative and/or disciplinary actions, including, but not limited to, removal
- Drug testing of civilian employees may **NOT** be conducted for gathering evidence to use in criminal proceedings

Personnel Actions on Finding of Illegal Drug Use

- Potential actions upon a finding of illegal drug use include temporary reassignment and denial of access to classified information (if applicable), removal from TDP, disciplinary actions initiated under AFI 36-704, *Discipline and Adverse Actions of Civilian Employees*, and other applicable guidance. The range of disciplinary actions includes reprimand to removal for drug use, drug possession, or failure to take test.
- However, disciplinary action for illicit drug use is generally **NOT** permitted if the civilian employee voluntarily admits drug use prior to being notified of requirement to provide a specimen and prior to being identified through other means (such as a drug investigation), the employee obtains and cooperates with counseling or rehabilitation, he/she signs an agreement (called last chance agreement) to refrain from further drug use **AND** the employee refrains from further use of illegal drugs
- Mandatory initiation of action to remove employee for refusing or unsuccessfully completing rehabilitation or counseling is required after a second finding an employee has used illegal drugs, if employee sells or transfers an illegal drug, or if the employee tampered with a urine specimen (i.e., the employee attempted to alter, adulterate, or substitute a specimen for the employee's own or that of another employee)
- As with any kind of disciplinary action taken against a civilian employee, SJA involvement is strongly encouraged

---

References

Anti-Drug Abuse Act of 1988, 21 U.S.C. §§ 1501 *et seq.*
Executive Order 12564, *Drug-Free Federal Workplace* (15 September 1986)
U.S. Office of Personnel Management Memorandum for Heads of Executive Departments and Agencies, *Federal Laws and Policies Prohibiting Marijuana Use* (26 May 2015)
AFI 36-704, *Discipline and Adverse Actions of Civilian Employees* (3 July 2018)
AFI 44-121, *Alcohol and Drug Abuse Prevention and Treatment (ADAPT) Program* (18 July 2018)
AFI 91-204, *Safety Investigations and Hazard Reporting* (27 April 2018)

CIVILIAN EMPLOYEE WORKPLACE SEARCHES

The general rule is that a government search of private property without proper consent is unreasonable and unconstitutional under the Fourth Amendment—unless the search has been authorized by a valid search warrant. However, the government employer can in some instances conduct a warrantless search of an employee's workplace for "work-related" purposes, such as to retrieve government property or to investigate work-related misconduct.

- In the leading case on workplace searches, *O'Connor v. Ortega*, 480 U.S. 709 (1987), the Supreme Court recognized that government employees may have a reasonable expectation of privacy in their work areas which may be protected from warrantless searches by a government employer and law enforcement
- Government offices are provided to employees for the purpose of facilitating the work of an agency. Employees may avoid exposing personal belongings at work by simply leaving them at home.
- Government searches to retrieve work-related materials or to investigate violations of work-place rules do not violate the Fourth Amendment. Hence, supervisors are generally not required to obtain a search warrant when they need to enter an employee's desk, office, or file cabinet.
- Personal handbags, luggage, and briefcases are **NOT** typically considered part of the workplace and, therefore, a search warrant or authorization is generally required before searching them
- Consult the staff judge advocate before proceeding with any search and seizure action

References

U.S. Const. Amend. IV
O'Connor v. Ortega, 480 U.S. 709 (1987)

CIVILIAN EMPLOYEE DISCIPLINE

- Disciplinary action or adverse action must be taken without regard to marital status, political affiliation, race, color, religion, sex, national origin, or age. Adverse action based on physical handicap is not taken when the employee can perform the essential functions of his/her job either with or without a reasonable accommodation.
- Disciplinary action or adverse action should be taken to promote the efficiency of the service, and carried out promptly and equitably. Disciplinary actions and adverse actions are personal matters and are carried out in private.
- Some types of adverse actions are appealable to the Merit Systems Protection Board. These include removals, suspensions for more than 14 days, furloughs for 30 days or less, and reductions in grade or pay.
- Adverse actions may or may not be for disciplinary reasons

Authority and Requirements

- All Air Force commanders and supervisors are delegated authority to take disciplinary and adverse action when necessary. AFI 36-704, *Discipline and Adverse Actions of Civilian Employees*, covers all competitive and excepted service employees. AFI 34-301, *Nonappropriated Fund Personnel Management and Administration*, covers nonappropriated fund employees.
- Management may take a disciplinary or adverse action only for such cause as will promote the efficiency of the service, unless the action is being taken for unacceptable performance, in which case different standards apply
- Management may not take an action that would result in a prohibited personnel practice. A prohibited personnel practice is an adverse action taken against an employee for an illegal or inappropriate reason, such as reprisal or discrimination.

Procedures

- Management Procedures (absent a local collective bargaining agreement that contains other provisions): Gather the facts; interview the employee if necessary, but a bargaining unit employee has rights (called *Weingarten Rights*) to have union representation if the employee believes disciplinary action could result from questioning from his/her employer **AND** he/she requests a union representative. Consult with the Civilian Personnel Section (CPS) and the staff judge advocate (SJA) to consider options and determine what action is appropriate.
- Civilian Personnel Section will prepare and the Labor Law Field Support Center (LLFSC) will review the notice letter of adverse and/or disciplinary action for signature by the "proposing official" (normally a first or second level supervisor)
  - -- The notice must include all aggravating factors considered by the proposing official, e.g., prior discipline, poor performance, seriousness of the alleged offense. There are limitations on what prior discipline may be considered; suspensions may be considered if the effective date fell within the last three years, while admonishments and reprimands must have occurred within the last two years.
  - -- The **employee** gets a reasonable amount of time, but not less than seven days to answer orally and in writing, and to furnish affidavits and other documentary evidence in support of the answer

- The **"deciding official"** makes the final decision. This is usually the supervisor one level up from the proposing official (but may be the same person). In most cases, the final decision is made 30 days after the notice is given to the employee.
  - -- The deciding official must also document his/her consideration of the *Douglas Factors* governing appropriate penalty selection. *Douglas Factors* are those factors that management must consider before taking disciplinary action. They include, for example, the seriousness of the misconduct, the work record of the employee, and other similar considerations. See AFI 36-704. Use the CPS and SJA to assist in preparation.

Air Reserve Technicians (ARTs)

- ARTs are "dual status" federal civilian employees and members of the Selected Reserve. As a condition of federal civilian employment, ARTs must maintain membership in the Selected Reserve. ART positions within the Selected Reserve span a broad spectrum to include command billets.
- ARTs who are in the military status performing duty for pay/points are subject to the UCMJ
- ARTs who are in federal civilian employee status are not subject to the UCMJ; however, they are subject to all civilian employee disciplinary measures discussed in this section. Additionally, an ART in civilian employee status may be subject to military administrative actions such as letters of counseling, admonishment, reprimand (LOC/LOA/LOR), demotion and discharge.
- Military discharge of an ART will lead to the loss of an ART's civilian employee position
- ART commanders must be in military status when taking certain actions such as preferral/referral of charges, Article 15 actions, urinalysis testing and command directed investigations. Consult with your local SJA for guidance regarding actions in which military status is required.

References

5 U.S.C. § 9902
McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)
Douglas v. Veterans Admin., 5 M.S.P.R. 280 (1981)
AFI 34-301, *Nonappropriated Fund Personnel Management and Administration* (9 October 2018)
AFI 36-704, *Discipline and Adverse Actions of Civilian Employees* (3 July 2018)

CIVILIAN EMPLOYEE INTERROGATION

In 1975, the U.S. Supreme Court, in *N.L.R.B. v. Weingarten*, 420 U.S. 251 (1975), detailed the a right for an employee to have union representation present, if the employee believes disciplinary action could result from questioning by his employer, and if the employee requested the presence of a union representative. This section outlines the employee's rights during an interrogation. These rights are commonly known as *Weingarten Rights*.

- The union's and the employee's right to union representation in connection with an investigation are applicable when four conditions are present:
  - -- A meeting is held in which management questions a bargaining unit employee;
  - -- The examination is in connection with an investigation (does not have to be a Security Forces or other formal investigation; **HOWEVER**, Executive Order 12171 ***exempts*** Air Force Office of Investigations (AFOSI), when acting under its independent mandate to conduct criminal and security investigations, from the Federal Labor Management Relations Statute—in such criminal investigations, AFOSI is not obligated to honor an employee's request for representation);
  - -- The employee reasonably believes that discipline could result from the examination; **AND**
  - -- The employee requests representation
- The role of the union representative during the interview is to clarify the facts and the questions, help the employee express his/her views, suggest other avenues of inquiry, suggest other employees who may have knowledge of the facts, and ensure the employer does not initiate or impose unjust punishment. There may also be a right for the union representative and the employee to confer in private, but this depends on the nature of the case.
- Agencies must announce this right on an annual basis at all places where employees normally receive employment information
- Individuals being investigated may not serve as representatives for other employees being investigated until their own investigations are completed
- Management cannot tell a union representative to remain silent or not to offer advice. The employer may place reasonable limitations on union representative's role to prevent adversarial confrontation, but aggressive, unreasonable management behavior interferes with the right to union representation. This is an unfair labor practice (ULP).
- Once an employee requests a union representative, management may either grant the request, suspend the interview, or give the employee the choice of having an interview without a union representative or having no interview
- Civilian employees also have a legal obligation to account for the performance of their duties, and a failure to provide desired information can serve as a basis for removal under certain circumstances; however, an employee cannot be discharged simply because he/she invokes his/her Fifth Amendment privilege against self-incrimination; nor can statements coerced by a threat of removal be used against the employee in a subsequent prosecution. An employee **CAN** be removed for not replying if he/she is adequately informed both that he/she is subject to discharge for not answering and that his/her replies cannot be used against him/her in a criminal case.
  - -- Any desire to offer immunity to an employee must be coordinated with the SJA who will consult with (and possibly get approval from) the Department of Justice and/or U.S. Attorney

- A bargaining unit employee also has the right to be advised of the consequences of participating or not participating in an interview for a third-party proceeding (unfair labor practice hearing, arbitration, Merit Systems Protection Board (MSPB) hearing, etc.), and failure to do so can be a unfair labor practice (ULP) by management. These rights are known as *Brookhaven* rights, from *IRS and Brookhaven Service Center*, 9 F.L.R.A. 930 (1982), and the employee must be advised of:
  - -- The purpose of the interview;
  - -- That no reprisal will take place if the employee refuses to participate; and
  - -- Participation is voluntary
- The interview cannot be coercive in nature. Questions must not exceed the scope of the legitimate purpose of the inquiry and cannot otherwise interfere with the employee's statutory rights.

References

5 U.S.C. §§ 7114(a)(2)(B); 7116(a)(1)
NLRB v. Weingarten, 420 U.S. 251 (1975)
Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation, 392 U.S. 280 (1968)
Kalkines v. United States, 473 F.2d 1391 (Ct. Cl. 1973)
IRS and Brookhaven Service Center, 9 FLRA 930 (1982)

16
CHAPTER SIXTEEN: ENVIRONMENTAL LAW

ENVIRONMENTAL LAWS – OVERVIEW

Federal, state, and local environmental laws and regulations are intended to protect human health and the environment. While carrying out this function, these laws and regulations frequently also limit commander options. Failure to comply with applicable environmental laws and regulations will frequently inhibit full mission accomplishment and can severely impact installation resources. Moreover, commanders can be held criminally liable for violations. Familiarization with this chapter is crucial to a commander's ability to minimize negative impacts to the mission and to the environment.

Environmental Statutes

- Federal statutes now cover virtually all major environmental issues
  - -- Exemptions from federal statutes and rules are rare because they usually require personal action by the President or the Secretary of Defense
  - -- Most major federal environmental statutes waive federal government immunity from state and local pollution control regulations (including permitting and procedural requirements) and substantive pollution control standards
    - --- Most statutes subject the Air Force to state and local enforcement
    - --- The Air Force is also subject to state and local fines and penalties for violations of requirements related to hazardous waste, underground storage tanks, drinking water, lead-based paint, and others
  - -- Most statutes subject Air Force personnel to criminal liability for violations of environmental laws and regulations
- Federal environmental statutes usually establish a joint federal-state system of pollution control. In addition, state authority allows delegation to local regulatory agencies.
  - -- The typical role of the federal government is to establish the basic pollution control standards and to ensure that the states achieve those standards
  - -- Most states have been delegated authority to establish standards for particular sources of pollution, integrate the individual controls into an overall plan to achieve the federal standards, and enforce controls on a daily basis

Enforcement Authority

- Three levels of enforcement authority typically apply:
  - -- U.S. Environmental Protection Agency (EPA): Retains authority to enforce when it has not delegated that authority to the relevant state or when it learns of violations not being prosecuted or otherwise dealt with by a delegated state
  - -- State or Local Enforcement Agencies: Have primary responsibility for taking administrative or judicial actions for most violations
  - -- Private Citizens: When federal, state, or local enforcement authorities have failed to abate violations, most environmental statutes allow private citizens to initiate civil enforcement proceedings in a federal district court

Assistance

- The base has a number of offices with expertise in environmental matters. These offices typically include civil engineering, legal/staff judge advocate (SJA), bioenvironmental engineering, medical, safety office, and others.

- Required meetings of the installation Environment, Safety and Occupational Health Council (ESOHC), which is normally chaired by the vice commander, will assist leadership in addressing environmental issues

Overseas

- Environmental requirements for U.S. forces outside the states, territories, and possessions that comprise the United States are determined primarily by treaties and international agreements, DoD and geographic combatant command policies, and service and subordinate command directives. Few U.S. environmental laws apply outside the United States and those that do apply extraterritorially are incorporated into DoD policy for overseas installations and operations.

References

32 C.F.R. Part 187
32 C.F.R. Part 989
DoDI 4165.69, *Realignment of DoD Sites Overseas* (6 April 2005), incorporating Change 1, 31 August 2018
DoDI 4715.05, *Environmental Compliance at Installations Outside the United States* (1 November 2013), incorporating Change 1, 5 October 2017
DoDI 4715.08, *Remediation of Environmental Contamination Outside the United States* (1 November 2013), incorporating through Change 2, 31 August 2018
DoDI 4715.19, *Use of Open-Air Burn Pits in Contingency Operations* (15 February 2011), incorporating through Change 4, 6 October 2017
DoDI 4715.22, *Environmental Management Policy for Contingency Locations* (18 February 2016), incorporating Change 1, 14 November 2017
AFI 32-1067, *Water and Fuel Systems* (4 February 2015)
AFI 32-7001, *Environmental Management* (16 April 2015), incorporating Change 1, 8 April 2016
AFI 32-7020, *The Environmental Restoration Program* (7 November 2014), incorporating Change 1, 18 April 2016
AFI 32-7040, *Air Quality Compliance and Resource Management* (4 November 2014), incorporating Change 1, 14 October 2016
AFI 32-7042, *Waste Management* (7 November 2014)
AFI 32-7044, *Storage Tank Environmental Compliance* (18 August 2015), incorporating Change 1, 22 April 2016
AFI 32-7047, *Environmental Compliance, Release and Inspection Reporting* (22 January 2015)
AFI 32-7061, *The Environmental Impact Analysis Process* (12 March 2003), certified current 28 March 2014
AFI 32-7063, *Air Installations Compatible Use Zones Program* (18 December 2015)
AFI 32-7064, *Integrated Natural Resources Management* (18 November 2014), incorporating through Change 2, 22 November 2016
AFI 32-7065, *Cultural Resources Management* (19 November 2014), incorporating Change 1, 6 October 2016
AFI 32-7066, *Environmental Baseline Surveys in Real Property Transactions* (26 January 2015)
AFI 32-7086, *Hazardous Materials Management* (4 February 2015)
AFI 32-7091, *Environmental Management Outside the United States* (18 March 2016)
AFI 90-801, *Environment, Safety, and Occupational Health Councils* (4 August 2016)
AFH 10-222, vol 4, *Environmental Considerations for Overseas Contingency Operations* (1 September 2012)

CONTROLS ON AIR FORCE DECISION-MAKING – NEPA

The National Environmental Policy Act (NEPA) requires federal agencies to evaluate environmental impacts as part of their overall planning and decision-making process. It also requires the public be informed of, and involved in, the decision-making process. Failure to properly follow NEPA planning may result in a court halting the project until the NEPA process is complete. This section is limited to NEPA procedural requirements within the jurisdiction of the United States and United States territories.

Process

- Within the Air Force, NEPA's mandates are carried out through the Environmental Impact Analysis Process (EIAP). Before any final decision on a proposed action is made, the Air Force EIAP (found at 32 C.F.R. Part 989), requires the Air Force to:
  - -- Determine if a Categorical Exclusion (CATEX) applies. CATEXs define those categories of actions that do not individually or cumulatively have potential for significant effect on the environment, therefore, no further environmental analysis is necessary (see 32 C.F.R. Part 989, Appendix B, for a list of CATEXs).
  - -- Documentation:
    - --- Normally, an AF Form 813, *Request for Environmental Impact Analysis* will be used to document a CATEX; or
    - --- Prepare an Environmental Assessment (EA) and a Finding of No Significant Impact (FONSI); or
    - --- Prepare an Environmental Impact Statement (EIS) and a Record of Decision (ROD)
- Within EIAP and in accordance with other requirements, certain unique circumstances (e.g., wetlands, floodplains) dictate additional documentation and MAJCOM approval
- Air Force must also complete EIAP for a private action essentially under Air Force "control" (e.g., actions requiring Air Force permission)
- Failure to follow EIAP can result in the action being delayed by litigation challenging the adequacy of the NEPA documentation
- Presence of classified information does not exempt the Air Force from its NEPA responsibilities, but it may modify the public's right to participate in the NEPA process. Unclassified portions of the required analysis are shared with the public.
- Generally, the Air Force may not irretrievably commit money or resources for any proposed action until the EIAP is completed

Environmental Assessment (EA) or Environmental Impact Statement (EIS)

- If a proposed action does not lead to a CATEX, the Air Force must determine whether to prepare an EA or an EIS
- EAs and EISs are similar, in that they both consider alternatives and impacts, but the EIS is substantially more in-depth and has greater opportunities for public comment/participation
- An EIS is required for any "major federal action significantly affecting the quality of the human environment." If the action does not rise to the level of an EIS, an EA is required to analyze appropriate alternatives to recommended courses of actions.

-- "Major" refers to impact on the environment, not to the size of the project; thus, even a small project can qualify as "major"

-- Proponents consider whether environmental effects are significant based on context and intensity

-- A reviewing court's focus will be whether the Air Force has taken a "hard look" and made a good faith assessment of potential impacts to the environment and whether reasonable alternatives were considered

-- The term "human environment" includes the natural and physical environment, as well as the relationship of people with that environment

--- A particularly important area for Air Force actions is the potential impacts on air quality

---- The Air Force is prohibited from supporting or taking any action affecting air quality (e.g., construction, weapon system bed-down, mission realignment, training exercise, etc.) which does not conform to a State Implementation Plan (SIP)

---- This requirement is called "general conformity," and requires the Air Force to demonstrate the proposed action will not hinder attainment or maintenance of air quality standards.

-- Executive Order 12898, *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations,* requires federal agencies to consider effects of proposed projects on minority and low-income populations

-- The heart of NEPA is the identification and analysis of alternatives. Furthermore, a range of reasonable alternatives satisfying the purpose and need of the proposed action must be analyzed, including a "No Action" alternative.

NEPA is a Procedural Law

- The Air Force must ensure environmental concerns are given "appropriate consideration," but NEPA does not require the Air Force to rank environmental concerns above mission goals

- The Air Force must ensure all reasonable measures are taken to mitigate adverse environmental impacts associated with an action it has chosen to implement

-- An EIS or EA/FONSI should clearly identify mitigation measures

-- A ROD must state whether all practical means to avoid or minimize environmental harm from the alternative selected have been adopted or, if not, why they were not

-- If mitigation measures are proposed, proponents must prepare a mitigation plan and submit it to HQ USAF/A7CI for each FONSI or ROD containing mitigation measures

---

References

National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.*
40 C.F.R. Parts 1500-1508
32 C.F.R. Part 989
Executive Order 12898, *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (11 February 1994)
AFI 32-7061, *The Environmental Impact Analysis Process* (12 March 2003), certified current 28 March 2014, including AFI32-7061_AFGM2018-01, 14 September 2018

ENVIRONMENTAL MANAGEMENT SYSTEM (EMS), ENVIRONMENTAL INSPECTIONS, AND ESOH COUNCIL

The Air Force environmental management system (EMS) is a framework for continual program and process improvement through clearly defined environmental roles and responsibilities, planning requirements, budgeting, effective implementation and operation, and management review. The Air Force is committed to three priorities: compliance, risk reduction, and continuous improvement. The Environment, Safety, and Occupational Health (ESOH) Council is a steering group which establishes goals, monitors progress, and advises installation senior leadership. Inspections and ESOH Council activities are part of EMS.

EMS

- EMS incorporates business processes and business rules for managing and reducing environmental risk. All personnel have a role in their installation's EMS.
  - -- EMS drives continuous improvement for all Air Force environmental programs
  - -- EMS is a management tool for focusing resources and accomplishing core goals of mission sustainability and readiness
  - -- EMS is based on the International Organization for Standardization (ISO) 14001, *Environmental Management Systems*, standard
  - -- EMS uses a "Plan, Do, Check, Act" approach (see Figure 16.1)
  - -- eDASH, an Internet-based document control system maintained by the Air Force Civil Engineer Center (AFCEC), implements EMS across the Air Force
    - --- eDASH can be accessed by the following link: https://cs2.eis.af.mil/sites/10040/WPP/HomePage/Home.aspx

Environmental Inspections

- Installations will conduct EMS conformance and compliance self-assessments, and track preventative/corrective actions, in accordance with DoDI 4715.17, DoDI 4715.06, AFI 90-201, *The Air Force Inspection System*, AFI 90-801, *Environment, Safety, and Occupational Health Councils*, and other AF/A4C and AFCEC/CZ guidance

Release of Environmental Inspection Documents and Information

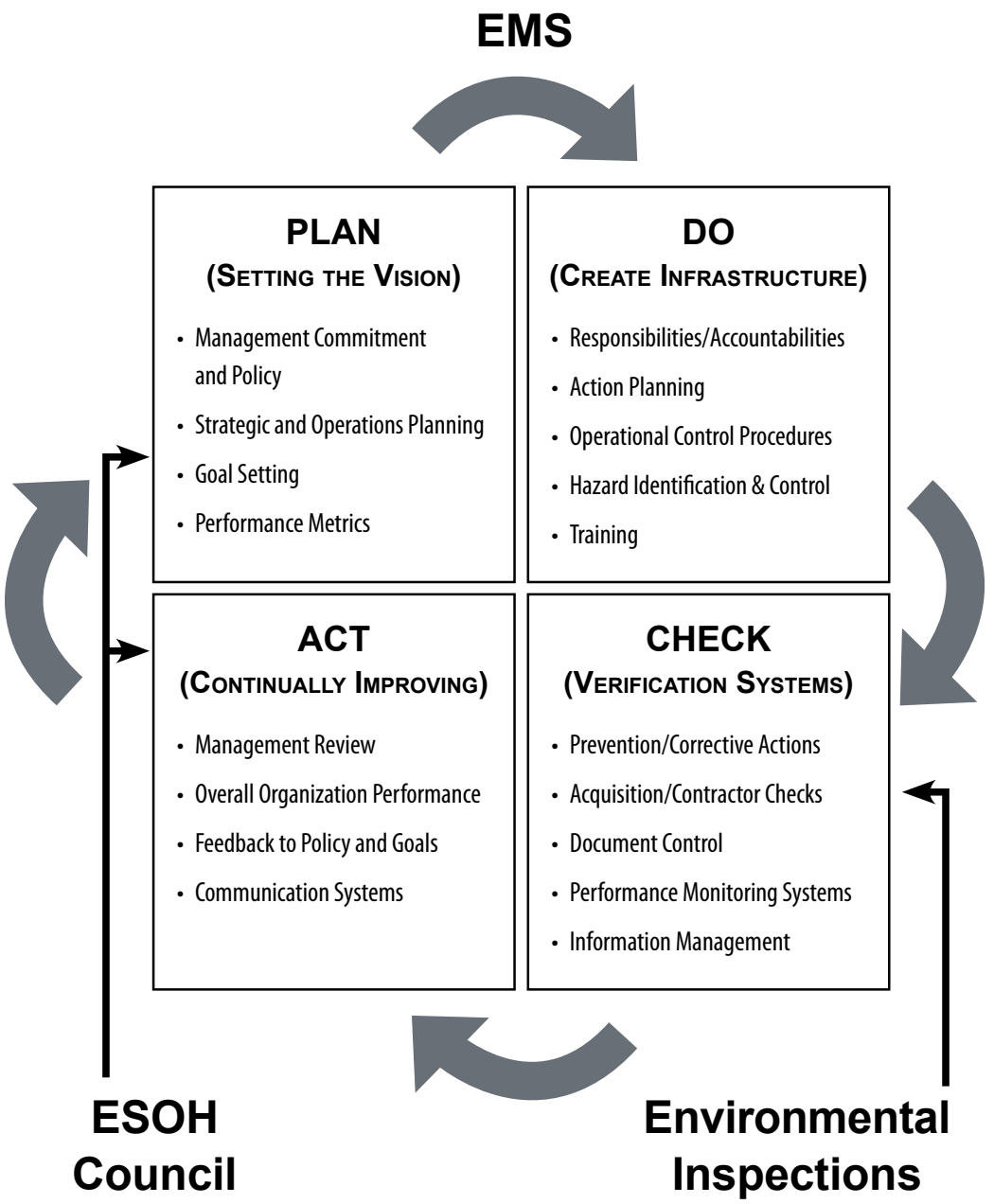
- Inspection documents and information must be managed and protected in accordance with applicable laws, regulations, and policies
  - -- The Freedom of Information Act (FOIA), 5 U.S.C. § 552; DoDM 5400.7, DoD *Freedom of Information Act Program*; DoD 5400.7-R_AFMAN 33-302, *Freedom of Information Act Program*; and AFI 90-201 govern release of inspection records

ESOH Council

- The ESOH Council is the cornerstone of the Environment, Safety, and Occupational Health (ESOH) program and provides senior leadership involvement and direction at all levels of command
  - -- Develop, approve, and monitor ESOH risk-based performance goals and objectives
  - -- Report annually on the progress of ESOH goals, as defined by next higher level ESOHC, and any issues requiring higher level assistance or direction until closure

-- Report annually to the next higher level ESOHC on the effectiveness of the management systems, evaluate high risk and/or problematic open findings, and track progress to correct validated deficiencies

Figure 16.1. Interaction of EMS, Environmental Inspections, and ESOH Council



References

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

DoDI 4715.05, *Environmental Compliance at Installations outside the United States* (1 November 2013), incorporating Change 1, 5 October 2017

DoDI 4715.06, *Environmental Compliance in the United States* (4 May 2015), incorporating Change 1, 27 October 2017

DoDI 4715.17, *Environmental Management Systems* (15 April 2009), incorporating Change 1, 16 November 2017

DoDD 5400.07, *DoD Freedom of Information Act (FOIA) Program* (2 January 2008), certified current 2 January 2015

DoDM 5400.07, *DoD Freedom of Information Act (FOIA) Program* (25 January 2017)

DoD 5400.7-R_AFMAN 33-302, *Freedom of Information Act Program* (27 April 2018)

AFI 32-7001, *Environmental Management* (16 April 2015), incorporating Change 1, 8 April 2016

AFI 90-201, *The Air Force Inspection System* (21 April 2015), incorporating Change 1, 11 February 2016, including AFGM2017-02, 7 December 2017

AFI 90-801, *Environment, Safety, and Occupational Health Councils* (4 August 2016)

ISO 14001:2015(E), *Environmental Management Systems–Requirements with guidance for use* (September 2015)

INTERACTION WITH OSHA

The federal Occupational Safety and Health Administration (OSHA) establishes occupational safety and health (OSH) standards to ensure safe and healthful conditions in workplaces throughout the United States. OSHA enforces its standards through inquiries, inspections, investigations, and issuing citations for violation of OSHA standards.

Applicability of OSHA standards

- Federal agencies must provide safe and healthful working conditions for employees
- Federal agencies must establish and maintain OSH programs that obey OSHA standards or approved alternate standards
  - -- Does not apply to workplaces that use or handle DoD equipment, systems, and operations that are unique to national defense mission
    - --- E.g., military aircraft, ships, early warning systems, tactical vehicles, field maneuvers, naval operations, and flight operations
  - -- "Military unique" workplaces and places where only military members work do not have to obey OSHA standards
- AFI 48-145, *Occupational and Environmental Health Program*, specifies Air Force occupational and environmental health standards that apply to all military and civilian personnel
- AFI 91-203, *Air Force Consolidated Occupational Safety Instruction*, provides Air Force industrial and ground safety policy that implements OSHA standards

Contact from OSHA

- There are four typical contacts a base may have with OSHA: (1) Inquiry; (2) Inspection; (3) Investigation; and (4) Citation
- Inquiry: Process that occurs in response to a complaint from a non-employee or when a complaint alleges a violation occurred, but there is no present danger to workers
- Inspection: On-site evaluation of workplace(s) that can be scheduled ahead of time or conducted unannounced under some circumstances
  - -- Inspections are triggered when OSHA receives a complaint from an employee or an employee's representative, and OSHA believes a violation exists that exposes employees to risk of physical harm
  - -- Inspections are also triggered when OSHA receives a complaint that alleges imminent danger of death or serious injury exists
  - -- Inspections can result if OSHA is not satisfied with the installation's response to an inquiry
- Investigation: In-depth look into a fatality or catastrophe (defined as an incident resulting in hospitalization of three or more employees) caused by a workplace hazard
  - -- Goal of an investigation is to determine the cause of the incident, whether a violation of OSHA standards occurred, and any relationship between the violation and the incident
  - -- Air Force must investigate the incident and, upon request, provide OSHA with a report of the investigation's findings
  - -- OSHA Area Director decides if OSHA will conduct an investigation of the incident
    - --- OSHA may conduct an independent investigation or participate in the Air Force's investigation

- Citation: Is a OSHA-2H Form, *Notice of Unsafe or Unhealthful Working Conditions* (also known as an OSHA Notice)
  - -- Issued by OSHA Compliance and Safety Health Officer (inspector) or OSHA Area Director
  - -- Notifies agency of violations of OSHA standards, alternate standards, and/or 29 C.F.R. Part 1960
    - --- A copy of the citation must be posted at or near the location of each violation addressed in the citation
    - --- The copy must remain posted until the violation is abated or three working days, whichever is later

Responses to OSHA

- Inquiry and Citation: The Air Force reply should be responsive, respectful, timely, and sincere
  - -- Answer OSHA's questions and address OSHA's concerns
  - -- If a violation occurred, specify what has been done—or will be done—to fix it and prevent a repeat problem
- Inspection and Investigation: During inspections and investigations, Air Force representatives should be cooperative, respectful, and interested
  - -- Be open; facilitate site visits, interviews, and document reviews
  - -- Provide escorts for inspectors and investigators
  - -- Take pictures of whatever inspectors or investigators take pictures of and take samples of whatever OSHA samples
- Ensure the servicing legal office knows about and provides support regarding all OSHA contacts and responses

More on Citations

- Each specified violation normally will be categorized as willful, serious, or other-than-serious
  - -- Willful Violation: Exists when the employer knowingly failed to comply with a legal requirement or acted with plain indifference to employee safety
  - -- Serious Violation: Occurs when a workplace hazard could cause an accident or illness that would most likely result in death or serious physical harm and the employer knew of the hazard or could have known of the hazard
  - -- Other-than-serious Violation: Occurs when a hazardous condition exists but would most likely not cause death or serious physical harm
- A repeated violation exists where a facility has been cited previously for the same or a substantially similar condition within the past three years
- An installation can appeal a citation or a failure of an informal conference to resolve issues
- OSHA cannot impose fines or penalties for violations by DoD Components
  - -- Federal agencies (except the United States Postal Service) do not pay fines or penalties for their violations of OSHA standards
  - -- Despite the fact fines and penalties cannot be imposed, installations may still be found to be in violation of OSHA standards

State OSH Regulations and Regulators

- Generally speaking, state OSH laws and regulations do not apply to Air Force workplaces (except for contractors)
- Air Force contractors are subject to federal and state OSH requirements

References

Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-78
29 C.F.R. Part 1960, *Field Federal Safety and Health Councils*
29 C.F.R. Part 1975, *Coverage of Employers under the Williams-Steiger Occupational Safety and Health Act of 1970*
OSHA Instruction CPL 02-00-159, *Field Operations Manual (FOM)* (1 October 2015)
DoDD 4715.1E, *Environment, Safety, and Occupational Health (ESOH)* (19 March 2005)
DoDI 6055.01, *DoD Safety and Occupational Health (SOH) Program* (14 October 2014)
DoDI 6055.05, *Occupational and Environmental Health (OEH)* (11 November 2008), incorporating Change 1, 21 November 2017
AFMAN 48-146, *Occupational & Environmental Health Program Management* (15 October 2018)
AFPD 90-8, *Environment, Safety & Occupational Health Management and Risk Management* (14 March 2017)
AFPD 91-2, *Safety Programs* (1 May 2017)
AFI 48-145, *Occupational and Environmental Health Program* (11 July 2018)
AFI 90-801, *Environment, Safety, and Occupational Health Councils* (4 August 2016)
AFI 91-203, *Air Force Consolidated Occupational Safety Instruction* (15 June 2012), incorporating Change 1, 26 October 2016, including AFI91-203_AFGM2018-01, 18 July 2018

ENVIRONMENTAL ENFORCEMENT ACTIONS

Environmental regulators issue enforcement actions to notify bases they have violated environmental requirements, what must be done to achieve compliance, and whether the base will be fined/penalized for the violation. Enforcement actions can be serious and costly, and trigger various immediate reporting requirements.

Receiving an Enforcement Action

- Enforcement actions may be issued by various regulatory agencies at all levels:
  - -- Federal (e.g., Environment Protection Agency, U.S. Army Corps of Engineers, Occupational Safety and Health Administration, etc.)
  - -- State (e.g., Texas Commission on Environmental Quality, Massachusetts Department of Environmental Protection, South Carolina Department of Health and Environmental Control, etc.)
  - -- Local (e.g., Hillsborough County Environmental Protection Commission, Stormwater Management Division of the Prince George's County Department of the Environment, etc.)
- Enforcement actions are sometimes called EAs, notices of violation (NOV), notices of non-compliance (NON), notices of deficiency (NOD), compliance agreements (CA), or consent orders (CO)
- Enforcement actions are often issued after an inspection, with or without notice
- Enforcement actions can be issued without an inspection based upon reports filed with the regulator (e.g., effluent limitations, spills, etc.). Also, a failure to report can result in an enforcement action.
- Depending on the nature of the violation, fines and penalties (including supplemental environmental projects) may be assessed and are ultimately paid using installation O&M funds
- Regulators may seek injunctions to shut down operations
- Violations can lead to criminal penalties, such as imprisonment and fines
- Installations may be issued enforcement actions for acts of non-Air Force personnel such as AAFES employees, contractor employees, property lessees, other agency personnel, etc.

Reporting & Tracking Enforcement Actions

- The base Civil Engineer, Installation Management Flight (CEI) must timely notify the installation commander, the installation staff judge advocate (SJA), and AFCEC/CZ of any written notice of a non-compliance by a regulatory agency. Overseas locations notify AFCEC/CF and Air National Guard installations notify NGB/A7AN.
- Base CEIs shall report all written notices, e-mail messages, field citations, and other correspondence from regulatory agencies pertaining to non-compliance with applicable environmental requirements within one business day through the Enforcement Actions, Spills and Inspections (EASI) database
- The base SJA or representative shall notify the Regional Counsel Office and the base CEI within one business day of receiving any notice of a non-compliance or obtaining knowledge of any potential non-compliance
- Bioenvironmental engineers (BEs) must notify MAJCOM/BEs of any violation of potable water quality sampling within one business day and immediately implement public notification procedures required by the regulator

Responding to an Enforcement Action

- Respond in a timely manner, in writing, to the regulator who issued the enforcement action. Some may include a required response date. Continue good communication with the regulator throughout the process.
- Do not assume the base is subject to the rule or law you allegedly violated or that you are required to do what the regulator is telling you to do (like pay a fine or penalty). You must seek legal advice from your SJA to determine the validity of the EA.
- Do not agree to anything without coordinating with your SJA and AFLOA/JACE

Enforcement Action Process

- An Environmental Protection Agency (EPA) "complaint" triggers a formal administrative process
  - -- The base **MUST** file an answer within 20 days
  - -- Failure to respond to any given allegation is an admission of its truth
  - -- Ensure a coordinated effort is made to preserve evidence and document site conditions, as it may be some time before the hearing
  - -- The Regional Counsel Office is the lead negotiator for all notices of violation in order to ensure consistency throughout the region
- The base should follow state or local rules if it receives an enforcement action from those agencies
  - -- Civil fines or penalties assessed as part of an enforcement action normally are the funding responsibility of the installation. Payment of fines or penalties must be approved by the AFLOA/JACE Division Chief a minimum of 10 business days prior to payment.

Avoiding Enforcement Actions in the Future

- Enforcement actions are not a foregone conclusion. Attention to certain details may avoid violations.
- Stress the importance to unit personnel of complying with all environmental and safety instructions (e.g., AFIs, DoD regulations, permits, material safety data sheets (MSDS), etc.)
- Be prepared for inspections by regulators
  - -- Conduct regular self-inspections
  - -- Know your weak areas
  - -- Complete the "easy fixes," do not wait to be directed
  - -- "Neatness" in environmental operations and in record-keeping really does count
  - -- Have a no-notice inspection response plan ready to activate, and exercise it
  - -- Select and prepare a knowledgeable and professional escort team to respond and accompany inspectors during even no-notice inspections and during non-duty hours to mirror the inspectors by duplicating the information they collect (take pictures of what the inspectors photograph and create a copy of the documents they collect because oftentimes regulators will issue enforcement actions but refuse to provide the accompanying evidence which makes it difficult to defend ourselves)
  - -- You may need to verify and vet inspectors to ensure installation security

-- Know the areas most likely to produce violations:

--- Hazardous waste management plans

--- Personnel training records

--- Documentation of "cradle-to-grave" management of hazardous waste, to include return manifests showing wastes destined for disposal sites actually arrived

--- Labeling and condition of hazardous waste barrels

--- Contingency plans and emergency procedures

--- Inconsistencies between air and water discharge monitoring reports and actual permit limitations

--- AAFES and DECA facilities

--- Government owned and contractor operated remote sites

--- Privatized housing

Bottom Line

- Preparation is the key to avoiding enforcement actions
- Prompt, cooperative response is the key to resolving enforcement actions
- Consult with the base SJA, CEI, and BE immediately upon receiving an enforcement action and before signing anything

References

AFI 32-7047, *Environmental Compliance, Release and Inspection Reporting* (22 January 2015)
AFI 51-301, *Civil Litigation* (2 October 2018)
AFI 65-601V1, *Budget Guidance and Procedures*, para. 10.66 (16 August 2012), incorporating Change 1, 29 July 2015

MEDIA RELATIONS AND ENVIRONMENTAL CONCERNS

The Air Force develops public engagement programs to build sustained public understanding and trust and support for Air Force missions and people. Public Affairs (PA) activities are to inform and include audiences during critical decision-making windows, and to communicate the Air Force's commitment to environmental excellence. Major areas of PA involvement are discussed below.

Environmental Impact Analysis Process (EIAP) PA Responsibilities

- Ensure all PA aspects of EIAP actions are conducted in accordance with 32 C.F.R. 989 and AFI 35-108, *Environmental Public Affairs*
- Review and clear environmental documents in accordance with AFI 35-101, *Public Affairs Responsibilities and Management* and AFI 35-108, prior to public release
- Assist Air Force judge advocates in planning and conducting public hearings
- Advise the Environmental Planning Function (EPF) and the action proponent on PA activities on proposed actions and reviewing environmental documents for public involvement issues
- Advise the EPF of issues and competing general public and stakeholder interests that should be addressed in the EIS or EA
- Attend and assist in preparation of and attending scoping and other public meetings or media sessions on environmental issues
- Prepare, coordinate, and distribute timely news releases and other public information materials related to and aligned with the proposal and associated EIAP documents
- Notify the media (television, radio, newspaper) of actions as necessary under 32 C.F.R. 989.24, *Public notification*, and purchase advertisements when newspapers will not run notices free of charge. The project proponent will fund the required advertisements.
- Determine and ensure Security and Policy Review requirements are met for all information proposed for public release as guided by AFI 35-102, *Security and Policy Review Process*

Installation Restoration Program (IRP) PA Responsibilities

- Serve as the focal point for PA aspects of proposed IRP actions as noted in AFI 35-108
- Advise on and support the PA aspects of the base's development and participation in the Restoration Advisory Board, a community based advisory board, plus other public information activities
- Ensure all concerned stakeholders, community groups and governmental entities are in the communication channel
- Prepare an IRP community relations plan and announce the availability and location of information repositories (often called the Administrative Record)

Air Installation Compatible Use Zone (AICUZ) Program PA Involvement

- Base Community Planner (BCP) generally manages the AICUZ program. PA assists the BCP to prepare for public meetings and releases and distributes relevant information.
- PA will handle noise complaints directly and provide timely, responsive, and factual answers to maintain good media and community relations. PA also presents these complaints to appropriate installation meetings or boards. PA will refer all claims for damages to the base legal office.

References

32 C.F.R. Part 989
AFI 35-101, *Public Affairs Responsibilities and Management* (30 January 2017)
AFI 35-102, *Security and Policy Review Process* (4 May 2016), incorporating Change 1, 7 June 2017
AFI 35-108, *Environmental Public Affairs* (14 July 2015)

ENCROACHMENT MANAGEMENT AND MISSION SUSTAINMENT

Issues regarding encroachment and sustainment challenges have the potential to directly affect both the ability of Air Force installations to accomplish their mission and the quality of life in surrounding communities. The Air Force has developed an Air Force Encroachment Management (AFEM) Program to address common issues impacting installations; the program integrates existing foundational programs such as noise regulation and the Air Installation Compatible Use Zone (AICUZ) Program.

Installation Encroachment Management Team (IEMT)

- The installation commander establishes an IEMT to assist in implementing the AFEM Program at an installation
- The team will be a cross-functional team with representatives from various organizations
- Goal of the IEMT:
  - -- Address encroachment across the Installation Complex/Mission Footprint (IC/MF)
  - -- Brief the installation commander at least annually, on encroachment, emerging threats, the status of progress on prioritized action items, and recommended encroachment management focus areas for the coming fiscal year
- Installation Complex Encroachment Management Action Plan (ICEMAP): Three volume document (Action Plan, Reference Book, and Community Brochure) which addresses current and future encroachment and sustainment challenges facing Air Force installations and their surrounding communities

Federal Noise Control Act (FNCA)

- The FNCA exempts aircraft, military weapons, and equipment designed for combat use from noise regulation under the Act
- Although the FNCA generally subjects government agencies to state and local noise control regulation, courts have determined state and local regulation of aircraft noise is preempted by FAA regulation
- The FNCA requires the Air Force to comply with state and local noise stationary source regulations to the same extent as any other person

Air Installation Compatible Use Zone (AICUZ) Program

- Local governments ordinarily establish land use regulations. The Air Force supports and encourages local zoning and other land use controls that ensure land areas surrounding bases, especially private lands adjacent to runways, remain compatible with continued Air Force operations.
- The DoD has established the AICUZ program to assist local governments in establishing suitable land use regulations in the vicinity of bases
- The Air Force develops and provides local land use planning authorities recommendations designed to ensure continued compatibility between installations and neighboring civilian communities
  - -- The first step in preparing an AICUZ proposal is to identify areas with high accident potential or affected by high noise levels from military aircraft operations
  - -- The Air Force uses this information to assess compatibility of land uses with current and projected Air Force operations and to make recommendations to the local zoning authority

-- The Air Force has no authority to implement the land use recommendations set forth in the AICUZ study or to control or regulate off-base land use. It simply presents the proposal to the local zoning authority which may approve or reject the proposal.

-- Close coordination between the commander, the base comprehensive planner, and local zoning officials is essential. This coordination serves to educate local land use planners regarding noise and safety impacts on private lands.

-- Congress has provided authority to acquire property interests, including restrictive use or conservation easements where necessary to sustain the mission and prevent encroachment (10 U.S.C. § 2684a)

-- Air Force representatives may not threaten the local community with reprisals if the Air Force proposal is not accepted. Air Force representatives may not appear to coerce or otherwise unduly influence local zoning officials. For example, reprisal or coercion could include linking acceptance of a proposal to potential Base Realignment and Closure (BRAC) decisions.

-- Constant consultation with the base SJA will minimize potential for lawsuits and impacts on the mission

References

Noise Control Act of 1972, 42 U.S.C. §§ 4901-18
10 U.S.C. § 2684a
DoDI 4165.57, *Air Installations Compatible Use Zones (AICUZ)* (2 May 2011), incorporating Change 1, 12 March 2015
AFI 32-7063, *Air Installations Compatible Use Zones Program* (18 December 2015)
AFI 90-2001, *Encroachment Management* (3 September 2014)
AFH 32-7084, *AICUZ Program Manager's Guide* (1 March 1999)

CONTROL OF TOXIC SUBSTANCES

The Toxic Substances Control Act (TSCA) (15 U.S.C. §§ 2601-92) regulates the manufacture, processing, and distribution of chemicals that pose unreasonable risk of injury to human health or the environment. TSCA authorizes the Environmental Protection Agency (EPA) to screen existing and new chemicals to identify potentially dangerous products or uses and to take action ranging from banning production, import, and use to requiring warning labels. The Frank R. Lautenberg Chemical Safety for the 21st Century Act provided EPA significant authority enhancements in 2016 to evaluate current and new chemical uses. The amendments have the potential to impact Air Force operations, in particular, Air Force air frame maintenance as EPA is in the process of evaluating several solvents in use in the Air Force inventory.

Polychlorinated Biphenyls (PCBs)

- TSCA prohibits manufacture and distribution of polychlorinated biphenyls (PCBs)
  - -- PCBs were common components in hydraulic fluids, lubricants, insecticides, and heat transfer fluids and were used in electrical equipment (e.g., transformers, capacitors)
  - -- Old transformers and capacitors containing PCBs may be found on installations, as might PCB-contaminated soil
  - -- Past insecticide spraying, ceiling tile coatings, and certain painted surfaces may also be sources of PCBs
  - -- Installation personnel should be trained to avoid mixing normal used oil and oil containing PCBs. Managing PCB imbued oil under TSCA is far more expensive than managing used oil under RCRA.

Asbestos

- TSCA also regulates asbestos
  - -- Asbestos was widely used in thousands of products because it is strong, flexible, will not burn, insulates effectively, and resists corrosion (e.g., floor tiles, insulation, or sealants)
  - -- Inhalation or ingestion of asbestos fibers can cause disabling or fatal diseases
  - -- Regulatory requirements cover, among many things, remediation of asbestos hazards, implementation of proper work practices, and training in proper handling
  - -- Installations are most likely to encounter asbestos when maintaining, repairing, renovating, or demolishing buildings or utilities
  - -- Asbestos is also regulated by other statutes, including the Clean Air Act and the Occupational Safety and Health Act

Radon

- TSCA requires studies of federal buildings to determine the extent of indoor radon contamination, but does not require monitoring or abatement of radon
- Radon is a naturally-occurring radioactive gas that may be found in drinking water and indoor air, and which presents serious health risks, including cancer
- Radon in soil under homes is the biggest source of radon in indoor air

Lead-Based Paint

- TSCA addresses lead hazards, including requirements for the identification, reduction, disclosure, and management of lead-based paint
  - -- Lead exposure can cause serious health effects, particularly in children
  - -- Lead, especially lead-based paint (LBP), is a major concern on installations where it was commonly used on military family housing and other buildings prior to 1950
  - -- Bases must address lead hazards during maintenance, repair, renovation, and demolition of buildings
  - -- TSCA seeks to reduce the lead hazard to young children by focusing on child-occupied facilities and "target housing" (housing built before 1978)
  - -- Although TSCA does not contain a general waiver of sovereign immunity, the waiver for LBP is extensive, requiring DoD to comply with federal, state, and local requirements
  - -- DoD policy requires military installations to comply with disclosure regulations related to LBP in military family housing
- TSCA also authorizes established state programs (e.g., California) to establish LBP standards for the reduction of lead in buildings not otherwise covered by the child-occupied target buildings referenced above. Check with your SJA to determine if an applicable state program is in effect that could potentially impact the installation.

References

Toxic Substances Control Act (TSCA), 15 U.S.C. §§ 2601-92
AFI 32-1052, *Facility Asbestos Management* (24 December 2014)
AFI 32-7042, *Waste Management* (7 November 2014), incorporating Change 1, certified current 8 February 2017
AFI 48-145, *Occupational and Environmental Health Program* (11 July 2018)

UTILITY LAW

Utility costs are often a large part of the operating cost of federal facilities. The Air Force has established the Utility Law Field Support Center (AFLOA/JACE-ULFSC), embedded within the AFCEC Energy Directorate (AFCEC/CN), at Tyndall Air Force Base, Florida, to assist continental United States (CONUS) commanders in minimizing utility costs. The ULFSC assists installations by supporting contracting actions with utility providers, by representing Air Force interests in utility rate litigation, and by advising on conservation and renewable energy projects. The ULFSC provides legal advice and counsel to all levels of command, from the base legal office to Air Force Headquarters.

Methods of Purchasing Utilities

- General Services Administration (GSA) administers area wide contracts for energy acquisition
  - -- Area wide contracts are convenient and are modifiable to address specific base issues
  - -- GSA area wide contracts are found at http://www.gsa.gov/portal/content/184627
- Federal Acquisition Regulation (FAR) Part 41 individual installation contracts are the most common utility purchase method
- Base legal offices are responsible for reviewing utility services solicitations and proposed contracts to determine if they are legally sufficient. The ULFSC is available as reach-back support for all utility contract questions.
- Base legal offices ensure utility service contracts comply with Federal, state, and local laws, including ordinances, commission rulings, court decisions, and opinions of the Comptroller General

Utility Litigation Challenging Rate Increases

- The ULFSC represents Air Force interests in utility rate cases
- Utility rate cases are triggered by utility companies filing with a request for change in rates
- The Base Civil Engineer (BCE) should give all known details regarding an actual or potential case to the base legal office, base contracting, and AFCEC/CNR within 24 hours of change notification, which usually comes from the utility company as part of a notice with the monthly bill
- Within one week of the date that the installation informs AFCEC/CNR of a proposed rate increase, the BCE should provide AFCEC/CNR, base contracting, and the ULFSC via the base legal office all required information related to the request

Conservation and Renewable Energy Projects

- Installation energy conservation goals can be met through various vehicles
  - -- An Energy Savings Performance Contract (ESPC) is a collaboration between a federal agency and a third-party contractor
  - -- Utility Energy Service Contracts (UESC) are performed by local utility service providers
- Energy generation projects, such as combined heat and power plants and solar arrays, may lower energy costs
- Note: Legal offices are advised to contact the ULFSC when they become aware of any type of utility projects on base, such as installing new generation and privatization of base utilities. Regardless of who owns the project, the installation, a tenant or other, often these projects can have effects on the installation's utility contracts, the installation's utility bills, and the installation's contractual liability to others.

-- Under a power purchase agreement (PPA), an installation leases land to an energy generation developer (local utility company or third-party contractor) and contracts to purchase energy produced by the project

-- For cost effectiveness, project energy rates must be less than preexisting rates

-- Enhanced Use Leases (EUL) involve a land lease to a developer who builds an energy project on the leased land

Assistance

- Utility acquisition matters can be very complex. Installations should notify AFCEC and the ULFSC of energy rate increases and seek assistance on utility matters.

  -- The 24-hour AFCEC reach-back support center is available at (850) 283-6995/ DSN 523-6995 or http://www.afcec.af.mil

  -- The ULFSC is available at (850) 283-6347/DSN 523-6347 or ulfsc.tyndall@us.af.mil

References

Economy Act, 31 U.S.C. 1535
48 C.F.R. Part 41
AFI 32-1061, *Providing Utilities to U.S. Air Force Installations* (27 January 2016), with corrective actions applied 25 August 2016, including AFI32-1061_AFGM2018-01, 12 June 2018
AFPAM 32-10144, *Implementing Utilities at U.S. Air Force Installations* (8 March 2016)

17
CHAPTER SEVENTEEN: INTERNATIONAL AND OPERATIONS LAW

INTRODUCTION TO OPERATIONS LAW

In pursuit of the Air Force mission to fly, fight, and win in air, space, and cyberspace, Airmen conduct operations in accordance with U.S. and international law. Respect for the rule of law is a fundamental part of who we are as the world's greatest Air Force and as a nation. Compliance with the law is not only an end in and of itself, but is a strategic and operational imperative. Failure to comply with the law undermines the legitimacy of U.S. military operations and can result in mission failure. Accordingly, commanders must understand the relationship between adherence to the law and the achievement of operational objectives. The following provides an overview of operations law and the role of judge advocates as operations law advisors. This discussion establishes the foundation for the remaining sections in this chapter.

Operations Law Defined

- Operations law is the domestic, foreign and international law associated with the planning and execution of military operations in peacetime or hostilities and the application of law to a specific mission of the supported Air Force unit
- Topics normally associated with operations law include legal bases for the use of force, the Law of War (LoW), rules of engagement (ROE), and international agreements. Operations law also includes any area of the law that impacts a commander's ability to plan and successfully execute the unit's mission, e.g., contract law, fiscal law, and military justice.

Role of Judge Advocates

- The Air Force, like other Services, continues to operate in an increasingly complex environment around the world, demanding nothing less than the very best in legal capability. Operations law attorneys are mission-focused and provide commanders with options and recommendations to enable mission accomplishment. Operations law is a mindset as much as an area of practice.
- Legal support to Air Force commanders is critical to mission success because proper legal counsel enhances commanders' decision-making ability. Successful commanders are those who demand close coordination with their servicing staff judge advocate (SJA). Judge advocates must be thoroughly integrated into unit planning and execution of military operations in order to ensure mission accomplishment.

References

Air Force Doctrine Annex 1-04, *Legal Support to Operations* (28 Dec 2016)
Air Force Operations & the Law (2014), 3rd Ed. (2014)

THE LAW OF WAR

It is Air Force policy to comply with the law of war (LoW, also known as the law of armed conflict (LOAC) or international humanitarian law (IHL)) at all times, and to ensure that Air Force personnel understand and enforce the LoW. Commanders cannot assume that every Airman is fully aware of all his/her rights and responsibilities under the LoW. Now more than ever, in the myriad of operational situations in which Air Force units are involved, commanders **MUST ENSURE** their personnel are trained in and comply with the LoW. Judge advocates are available to assist commanders with this responsibility.

What Is Law of War?

- For the purposes of this section, the LoW is the part of international law that regulates the conduct of hostilities and the protection of war victims in both international and non-international armed conflict; belligerent occupation; and the relationships between belligerent, neutral, and non-belligerent States. This section will not address the international law governing the resort to armed force (*jus ad bellum*).
- LoW has two main sources: (1) treaty law arising from formal written international agreements, which are binding on states that are parties; and (2) customary international law arising from the practice of States followed out of a sense of legal obligation. Customary international law is unwritten and, once formed, is generally binding on all States.
- LoW treaty law is generally divided into two overlapping areas: (1) Geneva Law, named for treaty negotiations held over the years at Geneva, Switzerland, and (2) Hague Law, named for treaty negotiations held at The Hague, Netherlands.
  - -- Geneva Law: Generally consists of four treaties known as the 1949 Geneva Conventions, which are concerned with protecting persons involved in conflicts (wounded and sick; wounded, sick, and shipwrecked at sea; prisoners of war (POWs); and civilians)
    - --- The Geneva Conventions are supplemented by three additional protocols. The United States is not a party to Additional Protocol I (AP I) concerning international armed conflicts or Additional Protocol II (AP II) regarding non-international armed conflicts but accepts certain aspects of AP I and AP II as reflecting customary international law. Advice should be sought from a judge advocate if in doubt as to the applicable law.
    - --- The United States is a party to Additional Protocol III (AP III), which recognizes a red crystal as an additional distinctive protective emblem
  - -- Hague Law: Is concerned mainly with the means and methods of warfare (e.g., lawful and unlawful weapons, targeting)
    - --- The Hague Peace Conferences of 1899 and 1907 resulted in bans on certain types of war technology and established a court to settle international disputes
    - --- Conferences in 1922-1923 to create the Hague Rules of Air Warfare resulted in draft rules that never took effect, but are today viewed as reflecting guidelines for proper conduct

Basic Legal Principles of Law of War

- Military Necessity:
  - Military necessity is the principle that justifies the use of all measures needed to defeat the enemy as quickly and efficiently as possible that are not prohibited by the LoW
  - The principle of military necessity permits attacks on military objectives, i.e., any objects which by their nature, location, purpose, or use make an effective contribution to military action and whose total or partial destruction, capture, or neutralization, in the circumstances ruling at the time, offers a definite military advantage. Examples include troops, bases, supplies, lines of communications, and headquarters.
- Humanity:
  - Humanity forbids the infliction of suffering, injury, or destruction unnecessary to accomplish a legitimate military purpose. Once a military purpose is achieved, the infliction of further suffering is unnecessary.
  - Humanity is the logical inverse of the principle of military necessity; if certain necessary actions are justified, then certain unnecessary actions are prohibited
- Distinction:
  - Distinction requires parties to a conflict to distinguish principally between the armed forces and the civilian population, and between unprotected and protected objects
  - Military force may be directed only against military objectives, and not against civilian objects. Civilian objects are such objects as places of worship, schools, hospitals, and dwellings. However, these objects can lose protected status in certain circumstances.
  - The principle of distinction prohibits the following types of actions: (1) Attacks of combatants hors de combat (out of the fight); (2) Attacks against civilian objects; and (3) Deliberate attacks against civilians
  - Commanders will be advised by judge advocates on whether civilians or civilian objects may be made the object of attack. Commanders must reach a conclusion in ***good faith***, based on their assessment.
  - Parties to a conflict have an obligation to separate civilians and civilian objects from military objectives. Failure to separate them could lead to a loss of their protected status.
- Proportionality and Feasible Precautions:
  - Proportionality is the principle that even where one is justified in acting, one must not act in a way that is unreasonable or excessive
  - Commanders who plan military operations must take into consideration the extent of civilian destruction and probable casualties that will result and, to the extent consistent with the necessities of the military situation, seek to avoid or minimize such casualties and destruction
    - The loss of civilian life and damage to civilian property incidental to attacks must not be excessive in relation to the concrete and direct military advantage expected to be gained
    - This concept does not apply to military facilities and forces, which are legitimate targets anywhere and anytime. However, individual military personnel may be in a protected status (e.g., chaplains, medics, wounded, sick, shipwrecked at sea, surrendering, or aircrews parachuting from disabled aircraft).

-- Commanders must take feasible precautions when planning and conducting attacks to reduce the risk of harm to the civilian population and other protected persons and objects

--- Feasible precautions are those that are practicable or practically possible, taking into account all circumstances ruling at the time, including humanitarian and military considerations. For example, if a commander determines that taking a precaution would result in a risk of failing to accomplish the mission or an increased risk of harm to his/her own forces, then the precaution would not be feasible and would not be required.

- Honor:

-- Honor (also called chivalry) requires a certain amount of fairness in offense and defense and a certain mutual respect between opposing military forces. However, honor does allow for lawful ruses, such as camouflage false radio signals, and mock troop movements.

-- Honor forbids treacherous acts such as perfidy. These acts involve misuse of internationally recognized symbols or status to take unfair advantage of the enemy, such as false surrenders, placing anti-aircraft artillery in hospitals, and misuse of the red cross, red crystal, or the red crescent.

Conclusion

- Compliance with the LoW is critical to mission success. Proper legal counsel enhances commanders' decision-making ability, aiding in mission success. One key to success for commanders is to ensure judge advocates are thoroughly integrated into unit planning and execution of military operations so that commanders are aware of their options and recommendations to enable mission accomplishment and compliance with the LoW.

References

Geneva Convention for the Protection of War Victims, August 12, 1949, 6 U.S.T. 3217
DoDD 2311.01E, *DoD Law of War Program* (9 May 2006), incorporating Change 1, 15 November 2010, certified current 22 February 2011
CJCSI 5810.01D, *Implementation of the DoD Law of War Program* (30 April 2010)
DoD Law of War Manual (June 2015), updated December 2016
AFPD 51-4, *Operations and International Law* (24 July 2018)
AFI 36-2201, *Air Force Training Program* (13 September 2010), incorporating through Change 3, 7 August 2013
AFI 51-401, *The Law of War* (3 August 2018)
Air Force Operations & The Law, 3rd Ed. (2014)

RULES OF ENGAGEMENT (ROE) AND RULES FOR THE USE OF FORCE (RUF)

This chapter will describe both Rules of Engagement (ROE) and Rules for the Use of Force (RUF), the differences between the two sets of rules, their purposes, and when they apply. In operations, there are typically mission-specific ROE and RUF, typically built upon the Standing Rules of Engagement (SROE) and Standing Rules for the Use of Force (SRUF). These standing rules are issued by the Secretary of Defense (SecDef), and are contained in Chairman of the Joint Chiefs of Staff Instruction (CJCSI) 3121.01B, *Standing Rules of Engagement/ Standing Rules for the Use of Force for U.S. Forces*. All commanders should familiarize themselves with CJCSI 3121.01B. While portions of the SROE are classified SECRET and may not be reproduced in this publication, significant portions are unclassified, particularly the self-defense policy and procedures.

What Are ROE?

- JP 1-04, *Legal Support to Military Operations*, defines ROE as "directives issued by competent military authority that delineate the circumstances and limitations under which United States forces will initiate and/or continue combat engagement with other forces encountered"
- ROE govern the use of force in military operations and are premised upon law (domestic, law of war (LoW), etc.), government policy, and a host of other political and practical considerations and constraints. ROE are owned by the commander and implemented by those who actually execute the mission.

What Are RUF?

- CJCSI 3121.01B defines RUF as "fundamental policies and procedures governing actions to be taken by U.S.…forces during all [Department of Defense] civil support (e.g., military assistance to civil authorities) and routine Military Department functions (including [Anti-Terrorism/ Force Protection] duties) occurring within U.S. territory or U.S. territorial seas"
- It can be seen from this reference that in contrast to ROE, RUF concern the use of force by U.S. forces within U.S. territory and outside of military operations. Furthermore, unlike ROE, RUF are not generally permissive.

Purposes of ROE

- ROE derive from national policy goals, mission requirements, and the LoW and serve three functions:
  - -- Provide direction on the use of force from the President, SecDef, and subordinate commanders to units conducting military operations
  - -- Provide a control mechanism for the transition from peacetime to armed conflict
  - -- Provide a mechanism to facilitate planning
- The three functions all emphasize control, which is necessary for three purposes (political, military, and legal):
  - -- Political: To ensure that action in the field reflects the national policy objectives (for example by restricting the scale of action, target, or weapon types to influence international and domestic opinion). Such political concerns include how the conflict (and possible escalation thereof) is viewed internationally or with a host nation.

-- Military: For commanders to provide permissions to use force and restraints to ensure that the application of force furthers the accomplishment of the mission (e.g., by authorizing offensive force and designating target sets, or by imposing limits/restricting authorizations to prevent undesired escalation and ensure the commander has control over certain uses of force)

-- Legal: To ensure compliance with the law. As ROE is an expression of national policy, it often contains greater constraints on action than the law requires. ROE can never be more permissive than the law allows. Commanders should be familiar with the legal basis for their mission as it will determine what is permissible. Commanders may also formulate ROE to emphasize compliance with certain legal principles, such as prohibitions on the destruction of religious or cultural property or the minimization of injury to civilians and civilian property.

SROE

- The current SROE came into force on 13 June 2005. Their purpose is to provide implementation and guidance on two important issues: (1) the inherent right of self-defense; and (2) the application of force for mission accomplishment.

SROE Applicability

- SROE apply to:

  -- All military operations and contingencies outside U.S. territory and outside U.S. territorial seas

  -- The air and maritime (but not land—see SRUF) homeland defense mission conducted within U.S. territory and territorial seas

Self-Defense in SROE

- Inherent Right of Self-Defense: In accordance with CJCSI 3121.01B, Enclosures A & L, unit commanders have an inherent right and obligation to exercise unit self-defense in response to a hostile act or demonstrated hostile intent. Unless otherwise directed by their commander, individual military members may exercise individual self-defense.

- Unit and individual self-defense arises in either of two circumstances:

  -- *In response to a hostile act*: An attack or other use of force against the United States or U.S. forces or other designated property, including force used directly to impede the mission and/or duties of U.S. forces (including personnel recovery)

  -- *In response to demonstrated hostile intent*: The imminent threat of use of force that would satisfy the hostile act definition. Determining the imminence of a threat will be based on an assessment of all the facts and circumstances known to U.S. forces at the time and may be made at any level. Imminent does not necessarily mean immediate or instantaneous.

- National Self-Defense: The right of a State to defend itself against armed attack is recognized in international law both individually and collectively (i.e., as part of an alliance such as NATO or at the request of another State), and enshrined in Article 51 of the UN Charter

  -- National self-defense is defined in the SROE as "Defense of the United States, U.S. forces, and, in certain circumstances, U.S. persons and their property, and/or U.S. commercial assets from a hostile act or demonstration of hostile intent. Unit commanders may exercise National Self-Defense, as authorized in Appendix A to Enclosure A, paragraph 3."

- Collective Self-Defense: In accordance with CJCSI 3121.01B, Enclosure A, collective self-defense is defined as "Defense of designated non-U.S. military forces and/or designated foreign nationals and their property from a hostile act or demonstrated hostile intent. Only the President or SecDef may authorize collective self-defense." Typically, the scope of collective self-defense is spelled out in theater or mission-specific ROE.
- Procedures in Self-Defense: All necessary means available and all appropriate actions may be used in self-defense. Four guidelines are included in the unclassified SROE:
  - -- *De-escalation*: When time and circumstances permit, the forces committing hostile acts or demonstrating hostile intent should be warned and given the opportunity to withdraw or cease threatening actions
  - -- *Necessity*: Exists when a hostile act occurs or when a force demonstrates hostile intent. When such conditions exist, use of force in self-defense is authorized while the force continues to commit hostile acts or exhibit hostile intent.
  - -- *Proportionality*: The force used may exceed the means and intensity of the hostile act or hostile intent, but the nature, duration and scope of force used should not exceed what is required to decisively respond to the hostile acts or demonstrated hostile intent. This principle of proportionality should not be confused with attempts to minimize collateral damage during offensive operations.
  - -- *Pursuit in Self-Defense*: Self-defense includes the authority to pursue and engage forces that have committed a hostile act or demonstrated hostile intent, if those forces continue to commit hostile acts or demonstrate hostile intent)

ROE for Mission Accomplishment

- SROE provide direction on the use of force for mission accomplishment. Supplemental measures are produced to provide for mission-specific ROE, which should be drafted based on the templates provided in CJCSI 3121.01B, Enclosure I.
- The SROE are designed to be permissive in nature. Therefore, unless a specific weapon or tactic requires SecDef or combatant commander approval, or unless a specific weapon or tactic is restricted by an approved supplemental measure, commanders may use any lawful weapon or tactic available for mission accomplishment.
- Declared Hostile Force: SROE permit appropriate U.S. authority to declare any recognized enemy as a declared hostile force. U.S. forces may engage declared hostile forces regardless of whether such forces have committed a hostile act or demonstrated a hostile intent, subject to the LoW and in accordance with prescribed targeting guidance or other ROE provisions.

Critical Factors that Influence the Promulgation of ROE

- National security policy (protect interests of the United States and allies)
- Operational and policy concerns (protect our forces and those of our allies, take steps beyond LoW requirements to address casualties)
- Domestic law and regulations (e.g., Executive Order 11850, *Enunciation of Certain Uses in War of Chemical Herbicides and Riot Control Agents*, limiting use of riot control agents)
- International law (LoW, Status of Forces agreements (SOFAs), UN Security Council Resolutions)
  - -- LoW is the part of international law that regulates the conduct of armed hostilities (violations are punishable under the UCMJ)

-- ROE must comply with and can **NEVER** authorize an act that is forbidden under the LoW. Essentially, ROE are always at least as restrictive as the LoW. DoD policy is to comply with the LoW for all military operations regardless of the nature of the conflict.

Specific Guidance for U.S. Forces Operating With Multinational Forces

- U.S. forces assigned under operational control (OPCON) or tactical control (TACON) of a multinational force (MNF) will follow the ROE of the MNF for mission accomplishment, if authorized by order of the SecDef. U.S. forces retain the right of self-defense. Apparent inconsistencies between the right of self-defense contained in U.S. ROE and the ROE of the MNF will be submitted through the U.S. chain of command for resolution. While a final resolution is pending, U.S. forces will continue to operate under U.S. ROE.
- When U.S. forces are under U.S. OPCON or TACON, operating in conjunction with a MNF, reasonable efforts will be made to develop common ROE. If common ROE cannot be developed, U.S. forces will operate under all applicable U.S. ROE and the MNF forces will be informed of this fact.

Considerations When Preparing ROE

- Different ROE must be drafted for different missions (e.g., information operations, counter-drug support operations, noncombatant evacuation operations, domestic support operations, and cyber, maritime, land, air, and space operations). In creating mission-specific ROE, it is important to ask several questions:
  - -- First, what is the goal of the President and the SecDef? (e.g., hostage rescue, freedom of navigation, destruction of a terrorist training base, humanitarian assistance)
  - -- Second, in order to carry out that goal, what is the mission? (e.g., conduct a show of force, limited or minor attack, establish a no-fly zone, or occupy hostile territory)
  - -- Third, who are the adversary forces, if any? Has there been a hostile force declaration?
  - -- Fourth, who are our allies? (e.g., NATO, coalition partners, UN)
  - -- Fifth, are there any unique concerns? (e.g., preserving a coalition, avoiding escalation of the conflict)
  - -- Sixth, what specific topics need not be addressed? (e.g., strategy, doctrine, restatements of the LoW, tactics, and safety-related restrictions)
  - -- Seventh, who should draft the ROE? (e.g., those familiar with the weapons and the systems, keeping in mind, commanders are responsible for the ROE) Does the combatant command or joint force command have an ROE working group established?
  - -- Eighth, how are ROE disseminated? (e.g., EXORD, FRAGORD, Special Instructions (SPINS), joint task force guidance)

Supplemental Measures and Command Guidance

- Although the SROE are fundamentally permissive, commanders at all echelons may issue or request approval of supplemental ROE. The SROE specify the required approval level for certain types of supplemental measures. Supplemental measures are primarily used to define limits or grant authority for the use of force for mission accomplishment. Clarity is the goal.
- Subordinate commanders may issue tactical directives or other forms of command guidance to clarify the application of the governing ROE or RUF for members of their command. But if a commander's guidance further restricts approved ROE, that commander is obligated to notify SecDef, as soon as practical of any imposed restriction.

- In order to ensure compliance with the LoW in the application of force under ROE instructions have been promulgated by the Chairman of the Joint Chiefs of Staff applicable to the Services and Combatant Commands. These include the manner in which targets are developed and selected for engagement, how it is determined what facilities, entities or persons may not be struck, and the methodology and mitigation to be used when considering collateral damage when planning.

SRUF

- In contrast to SROE, the SRUF are not designed to be permissive. Specific weapons and tactics not approved within the SRUF require SecDef approval.
- SRUF apply to:
  - -- Actions taken by U.S. commanders and their forces during all DoD civil support and routine Military Department functions (including AT/FP duties) occurring inside U.S. territory or territorial seas
  - -- Land-based homeland defense missions occurring within U.S. territory
  - -- DoD forces, civilians and contractors performing law enforcement and security duties at all DoD installations (including those outside U.S. territory)

SRUF Self-Defense

- Outside of military operations, U.S. forces may use force only in self-defense
- Inherent Right of Self-Defense: Unit commanders have an inherent right and obligation to exercise unit self-defense. Unless otherwise directed by their commander, individual military members may exercise individual self-defense.
- Unit and Individual Self-Defense: Arises in response to hostile acts or demonstrated hostile intent, which are defined the same in the SRUF as in the SROE

Mission Specific RUF

- Commanders may submit requests to the SecDef for mission-specific RUF if required. Such mission-specific RUF may be requested for tasks that due to their distinctive nature require the use of different weapons or tactics not permitted by the SRUF.
- Such mission-specific RUF may also be tailored to meet the challenges presented by developing threats (e.g., active shooters on installations) or developing technology (e.g., remotely piloted aircraft) by altering the weapons or tactics available for employment

---

References

Charter of the United Nations, Art. 51 (26 June 1945)
DoDD 2311.01E, *DoD Law of War Program* (9 May 2006), incorporating Change 1, 15 November 2010, certified current 22 February 2011
DoD Law of War Manual (June 2015), updated December 2016
CJCSI 3121.01B, *Standing Rules of Engagement for U.S. Forces* (13 June 2005), certified current 18 June 2008
CJCSI 3160.01C, *No Strike and the Collateral Damage Estimation Methodology* (9 April 2018)
CJCSI 3370.01B, *Target Development Standards* (6 May 2016)
CJCSI 5810.01D, *Implementation of the DoD Law of War Program* (30 April 2010)
Joint Publication 1-04, *Legal Support to Military Operations* (2 August 2016)

INTERNATIONAL HUMAN RIGHTS LAW

International Human Rights Law (IHRL) is the body of law focusing on the protection of life and dignity of human beings. In contrast to most areas of international law, IHRL is concerned with the rights of individuals rather the rights of sovereign states. It imposes obligations upon states to protect the life and dignity of individuals. It is the policy and practice of the United States Government to respect and implement its obligations under the international human rights treaties to which it is a party. It is also U.S. policy that the prevention of mass atrocities and genocide is a core national security interest and core moral responsibility.

Law of War (or Law of Armed Conflict) and IHRL

- The U.S. position is that the Law of War (LoW) and IHRL are separate bodies of law. However, to the degree that both can be applied without conflict, the protections of both the LoW and IHRL should be applied during military operations (in peacetime and in conflict).
- In military operations where provisions of the LoW and IHRL seem to conflict, the provisions of the LoW will prevail over IHRL. This includes the conduct of hostilities and the protection of persons involved in armed conflict. Advice should be sought from judge advocates if there is any doubt about the applicable law.
- Commanders should be aware that some coalition partners may be subject to different IHRL obligations. Coalition partners may be subject to different treaty obligations and may have different interpretations of the law and the scope of its application in military operations. For example, the European Court of Human Rights has ruled that aspects of the European Convention on Human Rights apply to a party's military forces serving abroad and during armed conflict.

IHRL Obligations

- The LoW directly incorporates many core human rights protections. Per DoDD 2311.01E, *DoD Law of War Program*, the DoD shall apply the LoW in all military operations.
  - -- The United States accepts Article 75 of Additional Protocol I to the 1949 Geneva Conventions as reflective of U.S. policy and practice. This article applies to persons who fall under the power of the United States during international armed conflict, and at a minimum (unless other LoW provisions offer greater protection):
    - --- Prohibits adverse distinction of those in the United States' power based on race, color, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or other similar criteria
    - --- Prohibits violence to their life, health, or physical or mental well-being (in particular murder; torture of all kinds, whether physical or mental; corporal punishment; and mutilation)
    - --- Prohibits outrages upon personal dignity (in particular humiliating and degrading treatment, enforced prostitution, and any form of indecent assault), the taking of hostages, collective punishments, and threats to commit any of the above acts
    - --- Guarantees that those arrested, detained, or interned for actions related to the conflict will be informed of the reason for the actions taken
    - --- Guarantees provisions for fundamental fairness at any court, hearing, or tribunal
    - --- Provides that detained women will be held separate from detained men (other than family members), and will be immediately supervised by women

  - -- Common Article 3 of the 1949 Geneva Conventions applies to non-international armed conflicts. It provides similar protections for civilians and those persons no longer taking part in the conflict.
- IHRL obligations may arise out of U.S. treaty law or customary international law. While there is no definitive list of these provisions, the following acts are prohibited:
  - -- Genocide
  - -- Slavery
  - -- Murder or forced disappearance
  - -- Torture or other cruel, inhuman, or degrading treatment or punishment
  - -- Prolonged arbitrary detention
  - -- Systemic racial discrimination
  - -- Hostage taking
  - -- Punishment without fair trial

Obligations to Prevent or Punish Human Rights Violations

- Commanders have a legal obligation to ensure that forces under their command do not commit human rights breaches. Such violations may be punishable under the UCMJ, the War Crimes Act, or under other federal law.
- U.S. forces should recognize that enemy forces, partner states, or other parties in an area of military operations may commit human rights violations. If U.S. forces become aware of human rights violations committed by U.S. forces, enemy forces, or other parties, this should be reported up the chain of command as soon as possible.
- Prior to any forceful intervention to stop IHRL violations, U.S. forces must ensure that their actions are consistent with the rules of engagement (ROE) or rules for the use of force (RUF) for the operation
  - -- Under the Standing Rules of Engagement (SROE), collective self-defense of non-DoD persons or the affirmative defense of others would not be authorized unless for the protection of previously designated persons or groups. Commanders should seek prior authorization before acting.
  - -- Under the Standing Rules for the Use of Force (SRUF), the use of deadly force would be authorized when reasonably necessary to prevent an imminent threat of life or serious bodily harm to civilians directly related to the assigned mission. However, the scope of application of the SRUF is narrow.

References

War Crimes Act of 1996, 18 U.S.C. § 2441

PSD-10, Presidential Study Directive on Mass Atrocities (4 August 2011)

Executive Order 13107, *Implementation of Human Rights Treaties*, 63 Fed. Reg, 68,991 (15 December 1998)

CJCSI 3121.01B, *Standing Rules of Engagement for U.S. Forces* (13 June 2005), certified current 18 June 2008

DoDD 2311.01E, *DoD Law of War Program* (9 May 2006), incorporating Change 1, 15 November 2010, certified current 22 February 2011

DoD Law of War Manual (12 June 2015), updated December 2016

INTERNATIONAL LAW AND INTERNATIONAL AGREEMENTS

International law consists of rules and principles regulating the conduct of nations (often referred to as "states") and international organizations in their relations with individuals, other international organizations, or other states. International law is not just applied by international tribunals and domestic courts, but it is also applied in many contexts beyond judicial proceedings. To the extent that an international norm is perceived as "law" by the international community, it imposes restraints on the behavior of states and affects their decision-making process. States rely on it in their diplomatic relations, in their negotiations, and in their policy-making and often defend their actions and challenge the conduct of other states by invoking the authority of international law. Commanders should be familiar with international law concepts because it is these types of issues which will most commonly impact mission success.

Two Main Sources of International Law: International Agreements and Customary Law

- International Agreements: A broad category of mostly written, but sometimes oral, agreements entered into by authorized representatives of the parties to the agreement, with each party being either a state or a recognized international organization. In very limited and specific circumstances, Air Force commanders may have authority to negotiate and conclude international agreements in accordance with Air Force policy and guidance.
  - -- The parties enter into commitments involving the subject matter of the agreement, and agree that international law shall govern the terms of the agreement with the force of law
  - -- International law does not distinguish between treaties and international agreements, both of which are viewed as binding. Bilateral agreements involve two parties, while multilateral agreements involve more than two parties. Any treaty or agreement is binding only on the parties who have agreed to be bound by it.
  - -- International agreements are called by many names, to include treaty, convention, covenant, pact, protocol, status of forces agreement (SOFA), executive agreement, memorandum of understanding (MOU), memorandum of agreement (MOA), etc. Whatever their designation, all such agreements have the same status under international law.
  - -- International agreements to which the United States is a party are part of U.S. law, equivalent in authority to a federal statute, if its provisions are deemed self-executing or have been implemented by other federal legislation
- Customary Law: International law resulting from the general and consistent practice of states which they follow due to a sense of legal obligation. This would not include practices that states generally follow but feel legally free to disregard. In determining whether a state considers a practice or custom to be customary law, positive evidence must exist that the state (1) considers itself legally obligated to follow the practice or custom, and (2) actually follows the practice or custom.
  - -- Customary law is also called international custom and customary international law. The Supreme Court has ruled that customary international law is part of U.S. law, as long as it does not conflict with a pre-existing federal executive or legislative act.
  - -- Customary law may take centuries to evolve, or it may be formed very quickly. Examples include:
    - --- *Outer Space Overflight:* Prior to the 1957 Sputnik flight, states had to seek consent before overflying the territory of other nations. No nation objected to Sputnik's historic overflight in outer space, which evolved into the customary law that a state's space vehicles may pass over the territory of other states while in outer space without seeking prior consent. This principle was ultimately incorporated into the 1967 Outer Space Treaty.

--- *Law of Aerial Warfare*: Practices between warring states on land over years evolved into customary principles of the law of war (e.g., necessity, distinction, and proportionality), which further evolved by state practice applying them to the distinctive aspects of aerial warfare and more specifically, customary rules relating to interception, diversion, search, and capture of enemy and neutral aircraft during armed conflict

--- *Law of the Sea*: Although the United States is not a party to the UN Convention on the Law of the Sea, it considers the Convention's provisions on freedom of navigation and overflight as reflecting customary international law binding upon all nations

International Agreements in the United States Air Force

- AFI 51-701 generally regulates this area for all Air Force personnel, consistent with the obligations set forth in DoDD 5530.3, *International Agreements*. Air Force individuals seeking to negotiate and conclude international agreements must first secure approval from the Secretary of the Air Force or designee, and may only negotiate and conclude international agreements on matters within their authority and responsibility.
- All international agreements must be promptly reported to the State Department, Defense Intelligence Agency, or National Security Agency, as described in AFI 51-701, paragraph 8. With this firmly in mind, be careful that your own words or conduct do not lead your foreign counterpart to believe that **YOU** are entering into an international agreement.
- This can occasionally be challenging, as the definition of an international agreement is fairly broad. Under AFI 51-701, an international agreement is any agreement concluded with one or more foreign governments (including their agencies, instrumentalities, or political subdivisions) or with international organizations, that:
  - -- Is signed or agreed to (oral agreements can be binding), by personnel of any DoD Component, or by representatives of the Department of State, or from other departments or agencies of the U.S. Government
  - -- Signifies the intention of the parties to be bound in international law, and is denominated as an international agreement or as a memorandum of understanding, memorandum of agreement, memorandum of arrangements, exchange of notes, exchange of letters, technical arrangement, protocol, note verbale, aide-mémoire, agreed minute, plan, contract, arrangement, statement of intent, letter of intent, statement of understanding, standard operating procedure, CONPLAN, or any other name connoting a similar legal consequence
- The definition of "negotiation" is similarly broad under AFI 51-701, attachment 1
  - -- Communication by any means of a position or offer, on behalf of the United States, DoD, or of any officer or organizational element thereof, to an agent or representative of a foreign government or international organization, with such detail that acceptance would result in an international agreement (includes provision of a draft agreement or discussion concerning a draft document, whether or not titled "agreement")

Bottom Line

- Don't do anything that might be construed as a negotiation unless you have received advance authority. Commanders do not have any independent or inherent power to negotiate international agreements. Any power to do so arises from a delegation of the President's executive power. There must be a specific grant of authority delegated to the commander to permit the making of such an agreement.

- According to both DoDD 5530.3 and AFI 51-701, DoD personnel are prohibited from making any unilateral commitment to any foreign government or international organization (either orally or in writing), tender to a prospective party thereto any draft of a proposed international agreement, nor initial or sign an international agreement, before obtaining legal concurrence and the required approval to proceed

References

Case-Zablocki Act, 1 U.S.C. § 112b

22 C.F.R. Part 181.5, *Twenty-day rule for concluded agreements*

Restatement of the Law, Third, Foreign Relations Law of the United States (1987)

DoDD 5530.3, *International Agreements*, 11 June 1987, incorporating Change 1, 18 February 1991, certified current 21 November 2003

AFPD 51-4, *Operations and International Law* (24 July 2018)

AFI 51-701, *Negotiating, Concluding, Reporting, and Maintaining International Agreements* (5 December 2017)

Air Force Operations and the Law, 3rd Ed. (2014)

DEPLOYED FISCAL LAW

In an era marked by a rapidly-expanding operational tempo, commanders must be aware of the rules regarding the spending of appropriated funds in their Area of Responsibility (AOR). Fiscal law is often a complex area of law to navigate and can be challenging in a contingency environment. One of the basic tenets of fiscal law is that you must have specific authority to spend funds **BEFORE** any funds can be obligated. In a deployed environment, the basic rules of fiscal law still apply. There is **no deployed exception** to fiscal law. Since statutory authority, threshold amounts, and funding levels can fluctuate from year to year, commanders should consult with financial management and legal personnel on fiscal law issues.

Overseas Contingency Operations (OCO) Funds

- Congress appropriates funds for the Department of Defense (DoD) specifically for designated ongoing contingency operations. From 2001 until 2010, these appropriations were commonly called Global War on Terrorism or GWOT funds.
- OCO is a special type of funding (could be Operation and Maintenance (O&M) or another type of appropriation) requested by DoD and provided by Congress specifically for overseas contingency operations. OCO funds are to be used only for incremental expenses incurred in direct support of a specific contingency operation and not for day-to-day "normal" operations.

Military Construction Funding Sources

- In addition to the two primary construction authorities, specified and unspecified Military Construction (MILCON), there are other important authorities of which to be aware in advising on construction projects in the deployed environment
  - -- Emergency Construction (10 U.S.C. § 2803): Unobligated MILCON funds for projects not otherwise authorized. These are for projects that are vital to national security or to the protection of health, safety, or the environment, and are so urgent that they can't wait until the next MILCON authorization act.
  - -- Contingency Construction (10 U.S.C. § 2804): The Secretary of Defense (SecDef) may authorize MILCON when waiting for the next MILCON authorization act would be "inconsistent with national security or national interest." The expenditure must be within the amount appropriated for such purpose, and is normally used on extraordinary projects that develop unexpectedly. In addition, these funds may not be used for projects denied authorization in previous Military Construction Appropriations Acts.

Funds for Emergencies, Extraordinary Expenses, and CCDR Support

- Emergency and Extraordinary Expenses (10 U.S.C. § 127): Funding provided to the Secretaries of the military departments for unanticipated emergencies or extraordinary expenses, including unanticipated, short-notice construction. Controlled by SAF/AA.
- Official Representation Funds (ORF) (AFI 65-603, *Official Representation Funds)*: A subset of 10 U.S.C. § 127 funds, ORF may be used to extend official courtesies, on a modest basis, to authorized guests. These courtesies include hosting meals, providing entertainment to maintain civic and community relationships, and to purchase gifts and mementos for presentation to authorized guests.
- Combatant Commander Initiative Funds (CCIF) (10 U.S.C. § 166a): Enables the Chairman of the Joint Chiefs of Staff to act quickly to support the combatant commanders with: (1) force training, (2) contingencies, (3) selected operations, (4) command and control, (5) joint exercises, (6), humanitarian and civic assistance, (7) military education and training to military and related civilian personnel of foreign countries, (8) personnel expenses of defense personnel for bilateral

or regional cooperation programs, (9) force protection, and (10) joint warfighting capabilities. Funds are controlled by the combatant commander (CCDR).

Training and Equipping of Foreign Forces

- Funding foreign forces is not a proper purpose for using O&M funds. Generally, the duty to train and provide assistance to foreign countries rests with the Department of State (DoS) under Title 22 of the U.S. Code. There are two exceptions to the general rule:
  - -- Training or instruction for foreign forces for the primary purpose of promoting interoperability, safety, and familiarization training with U.S. forces, with the overall benefit being to U.S. military forces. This is sometimes called "little 't' training."
  - -- Specific authorization from Congress for DoD to obligate defense funding to conduct foreign assistance
- Afghanistan Security Forces Fund: Authorizes the SecDef to provide certain support to the Afghan security forces, including the provision of equipment, supplies, services, training, facility, and infrastructure repair, renovation, construction, and funding. The Commander, Combined Security Transition Command-Afghanistan (CSTC-A), controls and administers this fund in Afghanistan.
- Section 1206 "Train and Equip" Authority: Provides funds for equipment, supplies, training, defense services, and small-scale military construction activities to build the capacity of foreign military forces and national level security forces. The approval authority is SecDef with the Secretary of State (SecState) concurrence.
- Counter-Islamic State of Iraq and Syria (ISIS) Train and Equip Fund: Provides funds for training, equipment, logistics, supplies, stipends, facility and infrastructure repair and renovation, and sustainment to military and other security forces of or associated with the Government of Iraq, including Kurdish and tribal security forces or other local security forces for the purpose of defending Iraq, its people, allies, and partner nations from the threat posed by ISIS and groups supporting it; and securing the territory of Iraq
- Acquisition and Cross-Servicing Agreements (ACSA): Bilateral agreements for the reimbursable mutual exchange of Logistic Support, Supplies, and Services (LSSS) with foreign military forces. There are three methods of reimbursement: (1) payment in kind; (2) replacement in kind; and (3) equal value exchange. Commanders must still use proper appropriated funds for acquiring LSSS from foreign forces.

Humanitarian Assistance Funding

- Traditionally, humanitarian assistance (HA) is considered foreign assistance within the realm of the DoS. However, recognizing that the need exists, in 1986 Congress enacted DoD's first statutory authority for HA in 10 U.S.C. § 401.
- Overseas Humanitarian, Disaster, and Civic Aid (OHDACA): A series of interrelated statutes. These statutes include 10 U.S.C. 401 (Humanitarian & Civic Assistance (HCA)), 402 (Relief Supplies Transportation), 404 (Foreign Disaster Assistance), 407 (Humanitarian Demining), 2557 (Excess Non-Lethal Supplies), and 2561 (Humanitarian Assistance). OHDACA's purpose is to support the SecDef and CCDRs' security cooperation strategies to build indigenous capabilities and cooperative relationships with allies, friends, civil society, and potential partners.
- Commander's Emergency Response Program (CERP) (FY18 NDAA § 4302): CERP is designed to enable local commanders in Afghanistan to respond to urgent humanitarian relief and reconstruction by carrying out programs that will immediately assist the indigenous population. CERP is intended to be used for small-scale projects that, optimally, can be sustained by the local population or government.

AOR Specific Guidance

- Many contingency environments have theater-specific or local guidance governing the expenditures of funds in that AOR. For example, "Money As A Weapons System-Afghanistan (MAAWS-A)" provides guidance, processes, and approval thresholds for the expenditure of various types of funds in Afghanistan. Consult your servicing legal office and Comptroller for additional information.

References

10 U.S.C. § 127
10 U.S.C. § 166a
10 U.S.C. § 401
10 U.S.C. § 402
10 U.S.C. § 407
10 U.S.C. § 2282
10 U.S.C. § 2342
10 U.S.C. § 2557
10 U.S.C. § 2561
10 U.S.C. § 2803
10 U.S.C. § 2804
National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2015, Pub.L. 113-291
NDAA FY 2016, Pub.L. 114-192
NDAA FY 2018, Pub.L. 115-91
The Honorable Bill Alexander, B-213137, 63 Comp. Gen. 422 (1984)
AFI 65-603, *Official Representation Funds* (24 August 2011)

INTELLIGENCE OVERSIGHT (IO)

During periods of our nation's history, intelligence capabilities were sometimes used in a manner that Congress and the American people believed were improper, even if lawful, or that infringed upon the constitutional and privacy rights of United States Persons (USP). As a result, an oversight regime consisting of statutes, executive orders (EOs), and agency regulations was established to ensure the proper use of intelligence capabilities and the proper conduct of intelligence activities. The Air Force possesses an array of intelligence and counterintelligence capabilities designed to provide commanders and national leaders with information on foreign nationals, hostile or potentially hostile forces or elements, and areas of actual or potential operations. Intelligence collection is a specialized mission with tactics, techniques, and procedures that require strict control and oversight. The purpose of this chapter is to enable installation-level commanders and their staffs to recognize potential legal issues related to intelligence activities.

Intelligence Oversight (IO) Governance

- IO is defined as the process of independently ensuring all DoD intelligence, counterintelligence, and intelligence-related activities are conducted in accordance with applicable U.S. law, EOs, Presidential directives, and DoD issuances designed to balance the requirement for acquisition of essential information by the intelligence community (IC), and the protection of Constitutional and statutory rights of U.S. persons (USP). IO also includes the identification, investigation, and reporting of questionable intelligence activities (QIAs) and Significant/Highly Sensitive Matters (S/HSMs) involving intelligence activities.
  - -- The term USP includes U.S. citizens, but is broader. It also includes permanent resident aliens, unincorporated associations substantially composed of U.S. citizens or permanent resident aliens, and corporations incorporated in the United States and not directed and controlled by a foreign government. A person or organization in the United States is presumed to be a USP, unless specific information to the contrary is obtained. A person outside the United States or whose location is unknown is presumed to not be a USP, unless specific information to the contrary is obtained.
  - -- The IO rules apply to all DoD activities conducting intelligence or intelligence-related activities. Specific Defense Intelligence Components (DICs) are DoD organizations listed in DoDM 5240.01 and have particular authorities. DICs provide necessary information about the activities, capabilities, plans, and intentions of foreign powers, organizations, and persons, and their agents.
  - -- The duties and obligations placed on DICs arise from the U.S. Constitution; EO 12333 (as amended), *United States Intelligence Activities*; DoDD 5240.01, *DoD Intelligence Activities*, DoDD 5148.13, *Intelligence Oversight*; DoDM 5240.01, *Procedures Governing the Conduct of DoD Intelligence Activities*; and parts of DoD 5240.1-R, Change 2, *Procedures Governing the Activities of DoD Intelligence Components that Affect United States Persons*, and its classified annex. In addition, the Air Force has its own governing instruction, AFI 14-104, *Oversight of Intelligence Activities*. Careful reading of the rules and definitions is critical when operating/advising within this environment.

- Roles and Responsibilities:
  - IO is a shared responsibility between the Airmen performing intelligence activities, the commander, the staff judge advocate (SJA), and the inspector general (IG). Airmen are the first line of defense and must know the IO standards, comply with them, and report any suspected QIAs or S/HSMs. Commanders should support an active IO program, designate appropriate oversight officials, provide appropriate training, provide reprisal protection for persons reporting QIAs or S/HSMs, and implement corrective action to address substantiated allegations. Resources are available at the DoD Senior Intelligence Oversight Office (SIOO) website: http://dodsioo.defense.gov/.
  - Servicing SJAs provide advice and counsel on proposed and on-going intelligence activities, interpretations of DoDM 5240.01, and assistance to Intelligence Monitors and IGs as each performs their missions. They also support unit training. Legal support should align to the chain of command of the intelligence unit rather than the location of the unit (i.e., regardless of location, intelligence units get IO support through their MAJCOM; signals intelligence units get IO support through 25 AF to the National Security Agency). SAF/GCI provides policy-significant interpretations of IO guidance.
  - IGs conduct inspections to verify that: (1) Air Force intelligence personnel understand rules and responsibilities; (2) only Air Force elements with assigned intelligence mission are conducting intelligence functions; (3) intelligence activities comply with laws and policies; and (4) reporting procedures are being followed. The IG is also responsible for reviewing every QIA and S/HSM and reporting up to the DoD Senior Intelligence Oversight Office.
- DoD IO regulations and policy are grounded in EO 12333. The term "intelligence activities" refers to all activities that DoD intelligence components are authorized to undertake pursuant to EO 12333. There are only two lawfully assigned intelligence mission sets for the DoD:
  - Foreign intelligence:
    - Title 50, United States Code (U.S.C.), § 3003(2), defines "foreign intelligence" as "information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities"
  - Counterintelligence:
    - Title 50, U.S.C. § 3003(3), defines "counterintelligence" as "information gathered, and activities conducted, to protect against espionage, other intelligence activities, sabotage, or assassinations conducted by or on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities"
  - DoDD 5240.01 implements EO 12333 and establishes broad responsibilities of officials and offices across the DoD and establishes as DoD policy that all DoD intelligence and counterintelligence activities will be carried out pursuant to the authorities and restrictions of the U.S. Constitution, applicable law, EO 12333, and other relevant DoD policies
  - DoDM 5240.01 and the remaining parts of DoD 5240.1-R provide the sole authority by which DoD intelligence components may collect, retain and disseminate United States person information (USPI) and also contain the structure for reporting possible violations. DoDM 5240.01 serves as the regulatory foundation for Service, Combatant Command, and DoD intelligence agency IO programs.

Identifying, Investigating, and Reporting QIAs or S/HSMs

- A questionable intelligence activity (QIA) is one that:
  - -- Any intelligence or intelligence-related activity when there is reason to believe such activity may be unlawful or contrary to an EO, Presidential Directive, Intelligence Community Directive, or applicable DoD policy governing that activity
  - -- DICs submit a quarterly report of all QIAs through SAF/IG to DoD SIOO, which is presented to the President's Intelligence Oversight Board
- A Significant or Highly Sensitive Matter (S/HSM) must be reported immediately and is an intelligence or intelligence-related activity (regardless of whether the intelligence or intelligence-related activity is unlawful or contrary to an EO, Presidential Directive, Intelligence Community Directive, or DoD policy), or serious criminal activity by intelligence personnel, that could impugn the reputation or integrity of the Intelligence Community, or otherwise call into question the propriety of intelligence activities. Such matters might involve actual or potential:
  - -- Congressional inquiries or investigations
  - -- Adverse media coverage
  - -- Impact on foreign relations or foreign partners
  - -- Systemic compromise, loss, or unauthorized disclosure of protected information
- Personnel shall report suspected QIAs or S/HSMs to their chain of command immediately
- If not practicable, personnel may report to their unit's servicing legal office, IG, SAF/GCI, SAF/IG, DoD Office of General Counsel, or DoD Senior Intelligence Oversight Official. Personnel are highly encouraged to additionally report suspected QIAs to their chain of command and Intelligence Oversight Monitors. Generally, IGs investigate QIAs and legal offices advise those conducting the investigation. Specific procedures are found in DoDD 5148.13, Section 4. Reprisal is prohibited for reporting or even intending to report.

IO Analytical Framework

- Applicability: IO procedures govern the conduct of DICs and non-intelligence components or elements, or anyone acting on behalf of those components or elements, when conducting intelligence activities under DoD's authorities
- The Air Force Intelligence Component: Members of the Air Force intelligence component include all Air Force intelligence units and personnel **AND** non-intelligence personnel assigned to intelligence functions or activities. This includes active duty, reserve, Air National Guard (ANG) personnel in Title 10 or Title 32 status, civilian personnel, and contractors. All members of the intelligence component must comply with the previously identified laws and regulations established for intelligence activities and are subject to IO.
  - -- Air Force intelligence units and personnel support strategic, operational, and tactical operations by providing information and services to a diverse set of customers, ranging from national to unit-level decision makers. Every unit with assigned intelligence personnel will have a Senior Intelligence Officer (SIO) who is responsible authority for intelligence functions and operations within an organization.
- Air Force Units Performing Missions for Intelligence Agencies or Combatant Commands: Those units are also subject to any guidance issued by that agency or command

- Other Air Force Units and Personnel Who Acquire Intelligence: In addition to members of the Air Force intelligence component, EO 12333, DoDM 5240.01, and AFI 14-104 apply to non-intelligence units and staffs when assigned an intelligence mission or when doing intelligence work as an additional duty. The SIO will make determinations as to applicability.
- Everyone Else: Information collected by non-intelligence personnel/equipment for nonintelligence purposes and is not considered an intelligence-related activity is not intelligence subject to IO. For example, information Security Forces and AFOSI collect pursuant to their law enforcement missions is not intelligence subject to IO requirements. However, research and development of intelligence capabilities is intelligence-related and subject to the IO rules. Such information must still comply with other applicable laws and regulations.

Threshold Questions:

- ***Does the unit have an authorized mission requiring the collection of the information?***
  - -- It is not enough to be a member of the intelligence component conducting an intelligence activity. An intelligence unit must have an assigned mission necessitating the collection of information.
  - -- Intelligence activities, whether against a USP or foreign target, are required to be directly related to a unit's assigned mission. For Air Force units (not part of a national mission) involved in intelligence collection, this means the collection must relate to defense-related foreign intelligence or counterintelligence. This generally means "information concerning foreign nations, hostile or potentially hostile forces or elements, or areas of actual or potential operations." In some very limited circumstances, this will include domestic collection.
  - -- For example, AFOSI has the authorized standing mission to perform counterintelligence. As such, it may collect intelligence information on a USP under the procedures of DoDM 5240.01 for that purpose.
- ***What authorities allow the collection of information under an authorized mission?***
  - -- Even if an intelligence unit has the mission to collect the information, it must also have specific legal authorization to collect the information
  - -- Intelligence collection is "authorities-driven," meaning that unlike many military functions that are included under a commander's inherent authority, a commander must have specific authority to perform an intelligence mission. Such authority may exist in orders, directives, publications, or other documentation of delegated authority from one vested with authority under EO 12333.
  - -- Intelligence collection in the course of military operations is typically authorized by the Execution Order (EXORD) directing that mission. The assigned commander may use any intelligence assets under his/her command in furtherance of the assigned mission contained in the EXORD, unless its use is prohibited by higher headquarters or elsewhere in law. Additionally, oversight procedures in DoDM 5240.01 concerning USPs must still be complied with.
- ***What information is being collected?***
  - -- If the unit has a valid mission and there is specific authority to collect information, the next question is whether USPI has been collected as that term is defined by DoDM 5240.01
  - -- Under DoDM 5240.01, information is collected "when it is received by a Defense Intelligence Component, whether or not it is retained by the Component for intelligence or other purposes. Collected information includes information obtained or acquired by any means, including information that is volunteered to the Component."

-- Collected information does not include:

--- Information that only momentarily passes through a computer system of the Component

--- Information on the internet or in an electronic forum or repository outside the Component that is simply viewed or accessed by a Component employee but is not copied, saved, supplemented, or used in some manner

--- Information disseminated by other Components or elements of the Intelligence Community

--- Information that is maintained on behalf of another U.S. Government agency and to which the Component does not have access for intelligence purposes

-- Critically, information is only collected (and therefore subject to IO rules) if it is received by a member of the DoD intelligence component. This drives the next question of who is actually seeking the information.

--- Once information has been received by a member of the DIC, it triggers the procedures of DoDM 5240.01. This represents a change from the old rule that information had to be "accepted" by a member of the component. How and where the USPI is collected will govern how long the information can be retained. The clock is triggered for "unintelligible information" once it is decrypted or understandable.

- ***If the information has been collected, the next question is whether it is USPI?***

-- USPI is information that is reasonably likely to identify one or more specific U.S. persons. USPI may be either a single item of information or information that, when combined with other information, is reasonably likely to identify one or more specific U.S. persons.

-- Determining whether information is reasonably likely to identify one or more specific U.S. persons in a particular context may require a case-by-case assessment by a trained intelligence professional. USPI is not limited to any single category of information or technology.

-- Depending on the context, examples of USPI may include: names or unique titles; government-associated personal or corporate identification numbers; unique biometric records; financial information; and street address, telephone number, and Internet Protocol address information. USPI does not include:

--- A reference to a product by brand or manufacturer's name or the use of a name in a descriptive sense, as, for example, Ford Mustang or Boeing 737

--- Imagery from overhead reconnaissance or information about conveyances (e.g., vehicles, aircraft, or vessels) without linkage to additional identifying information that ties the information to a specific U.S. person

-- If the information collected is USPI, the analysis turns to application of the procedures in DoDM 5240.01 and DoD 5240.1-R governing when and how it can be collected (Procedure 2), how long it can be retained (Procedure 3), where it can be disseminated (Procedure 4), and whether any other detailed rules, prohibitions, or approvals for specialized collection methods and techniques apply (Procedures 5-10)

Additional Restrictions:

- In addition to rules on gathering USPI, DoD 5240.1-R, Change 2 contains rules on contracting by intelligence activities, intelligence support to law enforcement, and human experimentation

- Also, special issues are often connected with intelligence activities. These include using false identities on the Internet, certain uses of publicly available information, and uses of emerging technologies like "Big Data" and unmanned aircraft systems. Because these issues are subject to shifting rules, legal counsel are encouraged to elevate the issues.

IO Takeaways:

- To be successful, IO programs require initial and annual training tailored for units who perform intelligence or intelligence-related activities. This begins with familiarity with not only the authority for that intelligence mission, but also the applicable restrictions in DoDM 5240.01 and DoD 5240.1-R:
  - -- USPI must be properly collected, retained, and disseminated (DoDM 5240.01, Procedures 2-4)
  - -- Special collection techniques require approvals (DoDM 5240.01, Procedures 5-10)
  - -- Air Force intelligence professionals must know their responsibilities for reporting QIAs and S/HSMs
  - -- Day to day command and control is essential and IO should be incorporated into planning and execution

---

References

10 U.S.C. § 162
10 U.S.C. § 164
10 U.S.C. § 8013
50 U.S.C. §§ 3001 *et seq.*
50 U.S.C. § 3038
EO 12333, as amended by EO 13284 (2003), 13355 (2004) and 13470 (2008)
DoDD 5148.11, *Assistant to the Secretary of Defense for Intelligence Oversight (ATSD(IO))* (24 April 2013)
DoDD 5148.13, *Intelligence Oversight* (26 April 2017)
DoDD 5200.27, *Acquisition of Information Concerning Persons and Organizations Not Affiliated with the Department of Defense* (7 January 1980)
DoDD 5240.01, *DoD Intelligence Activities* (27 August 2007), incorporating Change 1, certified current 27 August 2014
DoDM 5240.01, *Procedures Governing the Conduct of DoD Intelligence Activities* (8 August 2016)
DoD 5240.1-R, *Procedures Governing the Activities of DoD Intelligence Components that Affect United States Persons* (December 1982), incorporating through Change 2, 26 April 2017
AFI 14-104, *Oversight of Intelligence Activities* (5 November 2014), including AFGM 2018-01 4 October 2018
AFI 14-1020, *Intelligence Mission Qualification and Readiness* (8 November 2017)
AFI 71-101V4, *Counterintelligence* (26 January 2015), certified current 17 December 2015
Office of the Director of National Intelligence, Office of General Counsel, *Intelligence Community Legal Reference Book*; https://www.dni.gov/index.php/who-we-are/organizations/clpt/clpt-related-menus/clpt-related-links/ic-legal-reference-book

FOREIGN CRIMINAL JURISDICTION

Air Force members serving or deployed to locations outside the United States may be subject to criminal proceedings by both the host nation (HN) and by the United States for offenses allegedly committed in the HN. It is the policy of the DoD and the Air Force to protect, to the maximum extent possible, the rights of U.S. personnel who may be subject to criminal trial by foreign courts and imprisonment in foreign prisons.

Jurisdiction

- As a starting point, unless an exception has been granted, the HN has jurisdiction under international law over any person, including another nation's service members, physically within its borders based on territorial sovereignty
- Simultaneously, the United States always has court-martial jurisdiction over its service members for UCMJ offenses (the UCMJ applies "in all places")
  - -- Normally only one nation will exercise criminal jurisdiction against the Air Force member. That nation is referred to as having primary jurisdiction.
  - -- Primary jurisdiction of the case is often governed by the terms of any applicable status of forces agreement (SOFA) with the particular HN. In certain peace operations, especially those run by the United Nations, a status of mission agreement (SOMA) may be used instead of a SOFA. In this discussion, SOFA will refer to both SOFAs and SOMAs.

Violations of HN Law

- If a U.S. military member commits an offense that violates HN law, regardless of whether it violates the UCMJ, numerous actions may be triggered. Military commanders generally have an obligation to place U.S. service members on "international hold" pending resolution of criminal cases within the HN.
  - -- U.S. service members generally are made available to HN officials by commanders in consultation with the local staff judge advocate (SJA) (specific timing of release varies by country). Consultation and cooperation with HN law enforcement agencies is always desirable, but it should be noted that in some HNs, local law enforcement have the right to enter the installation to arrest the member regardless of the desire for consultation and cooperation.
  - -- U.S. service members, dependents and civilian employees of the U.S. Armed Forces facing HN criminal charges may request the Air Force employ legal counsel and pay counsel fees, court costs, bail, and other expenses incident to the representation. Reasonable counsel fees for civilian HN attorneys may be paid on behalf of U.S. service members. They may also request a Military Legal Advisor (who must be an Air Force judge advocate appointed by the SJA) to advise the member on U.S. related matters arising out of the criminal charges.
- U.S. service members, dependents and civilian employees of the U.S. Armed Forces will have a trial observer, usually a designated judge advocate, appointed by the U.S. Chief of Mission, monitor HN criminal proceedings to report whether the trial was fair. If convicted by a HN court, U.S. service members, dependents and civilian personnel face HN sentencing, including the possibility of confinement in the HN.
- The DoD seeks to assure that U.S. military personnel, civilian employees, and dependents, when in the custody of foreign authorities, are treated fairly at all times. DoD further seeks to assure that when confined (pretrial, during trial, and post-trial) in foreign penal institutions, these personnel receive the same or similar treatment, rights, privileges, and protections of personnel confined in U.S. military facilities.

- A U.S. service member or civilian employed by or accompanying the armed forces who is the victim of a crime being adjudicated by the HN criminal justice system may request payment of counsel fees for representation in the case, if: (1) the HN confers on the victim a right to be represented in court; and (2) the commander determines if it is in the best interests of the government

SOFAs

- The major SOFAs (NATO, Japan, and Korea) contain similar formulas for determining which country gets to exercise jurisdiction over U.S. personnel for criminal offenses
  - -- Exclusive jurisdiction belongs to:
    - --- United States for crimes under U.S. military or other applicable law that are not violations of HN law (e.g., absent without leave (AWOL), disrespect, and disobeying orders)
    - --- HN for acts that are crimes under the HN's laws but not under U.S. law (e.g., religious crimes, political crimes, and certain negligent acts that, under U.S. law, do not rise to the level of criminal conduct)
  - -- Concurrent (shared) jurisdiction occurs when conduct is criminal under both U.S. and HN law. The HN has the primary right to try all concurrent cases, except:
    - --- Official duty cases: When the offense arises out of an act in the performance of the U.S. service member's official duty
    - --- Inter se*:* When the crime affects only U.S. parties or U.S. property
  - -- DoD policy is to maximize U.S. jurisdiction, subject to any international or bilateral agreements
    - --- With concurrent jurisdiction, when the HN has the primary right to try a case, the United States will normally request a waiver of jurisdiction from the HN
    - --- The procedures for and the likely success of a request for waiver vary depending on the HN and, frequently, the seriousness of the offense (the more serious the offense, the less likely it will be granted)
    - --- When a waiver is granted, the United States, pursuant to treaty or other appropriate legal authority, may report to the HN the final result of the action, if any, taken against the member
- In other HNs not covered by the major SOFAs, there may be other relevant bilateral agreements or diplomatic notes. The SJA should be consulted regarding jurisdiction and procedures.

Civilians and Dependent Family Members Accompanying the Force

- Civilians (rarely contractors) and dependent family members accompanying U.S. forces abroad are normally considered subject to the terms of the applicable SOFA
- The HN will have jurisdiction based on its territorial sovereignty, but the U.S. commander usually does not have UCMJ authority over these persons
- If the HN cedes primary jurisdiction to the United States, or otherwise chooses not to exercise jurisdiction, the options of the commander are limited to administrative procedures (e.g., Family Member Misconduct Boards, early return of dependents and employment disciplinary procedures, if appropriate)

- To remedy this problem, Congress passed the Military Extraterritorial Jurisdiction Act (MEJA) of 2000. The Act extends U.S. jurisdiction to cover offenses committed by dependents and other civilians accompanying our forces if the criminal act is punishable by at least one year in confinement. This act allows the Department of Justice, not the Air Force or DoD, to prosecute the offending civilian. MEJA can also extend jurisdiction over military personnel and contractors' employees who are not normally resident in the HN.
- Congress also amended Article 2a(10), UCMJ, to provide jurisdiction over civilians serving with or accompanying U.S. armed forces in the field during either declared war or a contingency operation
- Reasonable counsel fees for civilian HN attorneys may be paid on behalf of U.S. personnel

Absence of a SOFA or Other Agreement

- The prevailing international view is that, in the absence of an agreement to the contrary, criminal jurisdiction rests exclusively with the HN. While the United States has worldwide personal jurisdiction over U.S. service members, the exercise of that jurisdiction in the HN without HN permission may be considered a breach of its territorial sovereignty.

References

10 U.S.C. § 802(a)(10)
10 U.S.C. § 805
10 U.S.C. § 1037
Military Extraterritorial Jurisdiction Act,18 U.S.C. §§ 3261 *et seq.*
Status of Forces Policies and Information, 32 C.F.R. Part 151 (2014)
DoDD 5525.1, *Status of Forces Policy and Information* (7 August 1979), incorporating through Change 2, 2 July 1997, certified current 21 November 2003 (editor's note: at the time of printing, this DoDD was current, however, it is intended to be replaced with DoDI 5525.01 in the near future)
AFJI 51-706, *Status of Forces Policies, Procedures, and Information* (15 December 1989), certified current 8 January 2016
AFI 51-402, *International Law* (6 August 2018)

DEFENSE SUPPORT OF CIVIL AUTHORITIES

Defense Support of Civil Authorities (DSCA) is support provided by U.S. Federal military forces, Department of Defense (DoD) civilians, DoD contract personnel, DoD component assets, and National Guard forces [when under Federal command and control, or when the Secretary of Defense (SecDef), in coordination with the Governors of the affected States, elects and requests to use those forces in Title 32, United States Code (U.S.C.), status] in response to requests for assistance from civil authorities for domestic emergencies, law enforcement support, and other domestic activities, or from qualifying entities for special events. "Special events," in this context, means events recognized or defined in the relevant provisions of the United States Code or the Code of Federal Regulations (e.g., Presidential inaugurations, international summits, the Olympics, and World Cup soccer games). The federal government maintains a wide array of capabilities and resources that, in accordance with governing statutes, as well as DoD and Air Force regulations and policy, can be made available to civil authorities upon request. While the DoD is normally the lead agency for homeland defense missions, the DoD conducts DSCA operations in a supporting role.

DSCA Generally

- DSCA is initiated when civil authorities or qualifying entities request DoD assistance or when assistance is authorized by the President of the United States (POTUS) or the SecDef
  - -- Unless approval authority is delegated by the SecDef, all DSCA requests shall be submitted to the Office of the Executive Secretary of the DoD
  - -- Except for immediate response and emergency authority, as well as situations in which SecDef has delegated authority to the commanders of NORTHCOM and PACOM via the DSCA Standing execute order (EXORD), only SecDef may approve requests from civil authorities or qualifying entities for Federal military support for:
    - --- Response to civil disturbances
      - ---- Civil disturbance operations generally require authorization from the POTUS (but see, discussion of emergency authority below)
    - --- Response to chemical, biological, radiological, nuclear, and explosives (CBRNE) events
    - --- Assistance to civilian law enforcement organizations
    - --- Response with potentially lethal assets, which includes:
      - ---- The lending of arms, aircraft, or ammunition
      - ---- Assistance to the Department of Justice (DOJ) in emergency situations involving weapons of mass destruction
      - ---- Assistance to the DOJ concerning prohibited transactions involving nuclear material
      - ---- Support to counterterrorism operations
      - ---- Support to civilian law enforcement authorities in situations where it is reasonable to anticipate a confrontation between civilian law enforcement and civilian individuals or groups
  - -- The Joint Staff (JS), upon SecDef approval of DoD assistance, coordinates with the Services to source the assistance to be provided
    - --- Based on the capabilities required, Air Force assets may be directed to provide assistance
- Federal military forces employed for DSCA are to remain under Federal military command and control at all times

- Per DoDD 3025.18, *Defense Support of Civil Authorities*, requests for DSCA, except requests for support under immediate response authority (discussed below) and mutual or automatic aid arrangements (such as reciprocal fire protection agreements under 42 U.S.C. §§ 1856-1856p and governed by DoDI 6055.06, *DoD Fire and Emergency Services (F&ES) Program*), must be submitted in writing
- Written requests shall include a commitment to reimburse the DoD in accordance with the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. §§ 5121 *et seq*.), the Economy Act (31 U.S.C. § 1535), or other statutory reimbursement authorities
  - -- Support may be provided on a non-reimbursable basis only if required by law or if both authorized by law and approved by the appropriate DoD official
- All DSCA requests for assistance must be evaluated for:
  - -- Legality
  - -- Lethality (potential that DoD Forces may use or be subject to the use of lethal force)
  - -- Risk to the safety of DoD Forces
  - -- Cost (including the source of funding and the effect on the DoD budget)
  - -- Appropriateness (whether providing the requested support is in the interest of the DoD)
  - -- Readiness (impact on the DoD's ability to perform its primary missions)
    - --- Assistance may not be provided if such assistance would adversely affect national security or military readiness
- On 18 August 2018, SecDef issued *Guidance for the Domestic Use of Unmanned Aircraft Systems in U.S. National Airspace*, which rescinded DepSecDef Policy Memorandum (PM) 15-002, *Guidance for the Domestic Use of Unmanned Aircraft Systems* (17 Feb 15)
  - -- Pursuant to the 18 Aug 18 SecDef memorandum, Service secretaries are delegated authority to approve domestic use of Group 1-3 Unmanned Aircraft Systems (UAS). Geographic combatant commanders were also given approval authority for domestic use of Group 1-3 UASs for force protection or Defense Support of Civil Authorities (DSCA) Incident Awareness and Assessment (IAA). Finally, state governors may approve their respective National Guards' domestic use of Group 1-3 UASs for state/civil authorities' Search and Rescues (SAR) and IAA operations.
  - -- Any domestic use of UASs must be in accordance with FAA regulations and other applicable laws, policies, and memoranda of agreement concerning UAS use in the NAS

Matters Not Within Scope of DSCA

- Joint investigations of matters within their respective jurisdictions conducted by military criminal investigative organizations (e.g., Air Force Office of Special Investigations) and civilian law enforcement agencies, where each is using its own forces and equipment
- Assistance provided by DoD intelligence and counterintelligence components in accordance with DoDD 5240.01, *DoD Intelligence Activities*; Executive Orders 12333 and 13388; DoD 5240.1-R, *Procedures Governing the Activities of DoD Intelligence Components That Affect United States Persons* (Procedures 11-13); and other applicable laws and regulations
- Support provided in response to foreign disasters (e.g., foreign consequence management or foreign humanitarian assistance/disaster response)

Immediate Response Authority (IRA)

- Upon request and without SecDef approval, Air Force commanders may temporarily employ the resources under their control to save lives, prevent human suffering, or mitigate great property damage within the United States. Immediate response authority is always subject to higher headquarters direction and limitation.
  - -- For support under IRA to be proper, "imminently serious conditions" must be present such that time does not permit seeking approval from higher authority. Requests are time-sensitive and shall be received from local government officials within 24 hours following completion of a damage assessment.
  - -- Due to the emergent nature of the situation, the initial request for DoD assistance may be made orally, but it should be followed with a written request at the earliest opportunity. Civil authorities shall be informed that oral requests for assistance in an immediate response situation must be followed by a written request that includes an offer to reimburse the DoD at the earliest available opportunity.
  - -- The Air Force commander directing a response under IRA shall immediately notify the National Joint Operations and Intelligence Center (NJOIC) through the chain of command
  - -- Where appropriate or legally required, support provided under immediate response authority should be provided on a cost-reimbursable basis. Air Force commanders should not delay or deny support under immediate response authority based on the fact that the requester is unable or unwilling to commit to reimbursing the DoD.
  - -- Immediate response authority does not permit actions that would subject civilians to the use of military power that is regulatory, prescriptive, proscriptive, or compulsory, and therefore violate the Posse Comitatus Act
  - -- Air Force commanders must consider the impact providing immediate response would have on military mission requirements. Commanders must not jeopardize the Air Force mission to provide immediate response.
  - -- An immediate response shall end when the urgent need giving rise to the response is no longer present (i.e., when there are sufficient non-DoD resources available to adequately respond and that agency or department is responding) or when the initiating DoD official or a higher authority directs an end to the response
    - --- The Air Force commander directing a response under IRA shall reassess as soon as practicable, but if immediate response activities have not yet ended, not later than 72 hours after the request for assistance was received
  - -- Per DepSecDef Policy Memorandum 15-002, "*Guidance for the Domestic Use of Unmanned Aircraft Systems*," DoD UAS may not be used for Federal, State, or local immediate response
- Air Force commanders acting under IRA shall not use military force to quell civil disturbances unless specifically authorized by the POTUS in accordance with the Insurrection Act of 1807 or unless permitted under emergency authority as outlined below

Emergency Authority

- Air Force commanders have the authority, in extraordinary emergency circumstances where prior POTUS authorization in accordance with the Insurrection Act of 1807 is not possible and where duly constituted local authorities are unable to control the situation, to temporarily engage in activities necessary to quell large-scale, unexpected civil disturbances when:
  - -- Such activities are necessary to prevent significant loss of life or wanton destruction of property and are necessary to restore governmental function and public order; or

-- When duly constituted civil authorities are unable or unwilling to provide adequate protection for Federal property or Federal governmental functions. However, Federal military forces are authorized to protect Federal property or functions.

TABLE OF AUTHORITIES

	Immediate Response Authority (IRA); DoDD 3025.18	Stafford Act 42 U.S.C. §§ 5121-5207	Economy Act 31 U.S.C. § 1535
Authorized for	Save lives, prevent human suffering, mitigate great property damage	Federal Response for declared major disaster or emergency	Order of goods or services between Federal agencies or major organizational unit within agency
Requesting Authority	Civil Authority*	State Governor**	Head of an agency or major organizational unit within agency
Requirements	- Imminently serious conditions - Time does not permit higher authority approval - Reassess NLT 72 hours - Notify NJOIC thru Service chain	- State resources are overwhelmed - State has implemented Emergency Response Plan - State requests POTUS make Stafford Act declaration	- Funds available - Best interests of U.S. - Cannot be conveniently or cheaply provided by commercial enterprise
Approval Authority	Federal military commanders, Heads of DoD Components, and/or responsible DoD civilian officials (C2 remains w/Svc)	POTUS	Head of agency or major organizational unit within agency
Payment or Reimbursement	Cost-reimbursable basis, but will not be delayed based on inability or unwillingness to make commitment to reimburse	Incremental costs – (per diem, travel, etc) when DoD is tasked by FEMA via Request for Assistance (RFA)/ Mission Assignment (MA)	Actual costs – all associated costs including pay and allowances

* Elected and appointed officers and employees who constitute the USG, State governments, D.C., Commonwealth of PR, U.S. territories, and political subdivisions thereof (JP 3-28)

** POTUS has authority to make unilateral Stafford Act declaration when it is determined an emergency exists on property where Federal government exercises exclusive preeminent responsibility or authority (i.e., federal property)

References

10 U.S.C. §§ 331-335
10 U.S.C. § 2564
18 U.S.C. § 831
18 U.S.C. § 1385
31 U.S.C. § 1535
42 U.S.C. §§ 5121 *et seq.*
32 C.F.R. § 183.3
DoDD 3025.18, *Defense Support of Civil Authorities* (29 December 2010), incorporating through Change 2, 19 March 2018
DoDI 3020.52, *DoD Installation Chemical, Biological, Radiological, Nuclear, and High-Yield Explosive (CBRNE) Preparedness Standards* (18 May 2012)
DoDI 3025.21, *Defense Support of Civilian Law Enforcement Agencies* (27 February 2013)
DoDI 6055.06, *DoD Fire and Emergency Services (F&ES) Program* (21 December 2006)
Secretary of Defense (SecDef) Memorandum, *Guidance for the Domestic Use of Unmanned Aircraft Systems in U.S. National Airspace* (18 August 2018)
Joint Publication 3-28, *Defense Support of Civil Authorities* (31 July 2013)
AFI 10-801, *Defense Support of Civil Authorities* (23 December 2015)

SMALL UNMANNED AIRCRAFT SYSTEMS

As use of small unmanned aircraft systems (sUAS) by hobbyist/recreational, commercial/civil, and public (i.e., government) users increases, questions regarding the use of sUAS on or near military installations are also increasing. Additionally, questions regarding the potential threat to the safety and security of Air Force operations are being addressed. The law and policy in this area is still developing, therefore installations and legal offices should coordinate with their respective MAJCOMs and HAF/JAO as issues arise. Judge advocates are also encouraged to review information on JAO's NIPR and SIPR SharePoint sites.

Definitions

- The DoD categorizes unmanned aircraft systems (UAS) into five groups based on the weight, altitude, and speed of the system
  - -- sUAS generally fall within Groups 1 and 2 with Group 3 serving as an overlapping middle ground between sUAS, such as the commercially available DJI Phantom, and large UAS platforms such as the MQ-9 Reaper
- The FAA considers sUASs to be any aircraft under 55 pounds and requires registration for any aircraft over that weight. The FAA has also issued operating rules for sUASs that vary depending on whether the sUAS is flown for commercial or non-noncommercial use.

Operation of Nongovernmental sUAS on or over Military Installations

- Airspace within the United States, including airspace above DoD installations, is regulated by the FAA
  - -- sUAS operations in the airspace above military installations must comply with FAA regulations and guidance; installation commanders generally do not have the authority to further restrict the use of airspace above an installation
  - -- In 2017, at the request of DoD, the FAA promulgated Special Security Instructions (SSIs) under 14 C.F.R. § 99.7. The SSIs prohibit any UAS flight within the airspace above most CONUS military installations. The prohibitions extend from the ground to 400 feet above ground level (AGL) and encompass installation perimeters. An interactive map of current restricted airspace can be found at http://uasfaa.opendata.arcgis.com.
  - -- Under UAS NOTAM FDC 7/7282, UAS flight operations are prohibited 24/7 and airspace violations are subject to administrative, civil, or criminal penalties. The NOTAM contains exceptions for certain UAS operations, including government or military UAS operations or other pre-approved flights. The DoD/FAA Policy Board for Federal Aviation (PBFA) is in the process of promulgating SOPs for the approval and coordination of authorized flights.
  - -- As of the date of this writing, Headquarters, Air Force is creating a standard AFVA sign for installation ECPs and fence lines that will inform the public of these restrictions
  - -- FAA regulations fall into three categories of UAS use: public, commercial, and hobby or recreational use. Regardless of size or cost, as a general matter, aircraft purchased by the Armed Forces or operated by a Service for military purposes are public aircraft and are ineligible for exceptions available to model aircraft operators. Note that with respect to UASs used as model aircraft, the FAA has reiterated that to qualify as a model aircraft, the aircraft must be operated purely for recreational or hobby purposes.
- For authorized flights on or over military installations, operators must comply with certain FAA rules depending on the use of the aircraft:
  - -- In June 2016, the FAA promulgated the "Small Unmanned Aircraft Rule" (Part 107 of the Federal Aviation Regulations) that imposes pilot and aircraft certification requirements

and operational restrictions on commercial sUASs. The FAA also promulgated the "Special Rule for Model Aircraft" (Part 101 of the Federal Aviation Regulations) governing hobby or recreational use of certain model aircraft below 55 pounds incorporating restrictions from Section 336 of Public Law 112-95.

-- When flying sUASs for hobby or recreational purposes under the Special Rule for Model Aircraft, sUASs are required to operate in a manner as to not endanger the safety of the U.S. National Airspace (NAS). For example, operators are expected to contact the airport operator and airport air traffic control (ATC) tower (when applicable) if they are planning to operate a sUAS within five nautical miles of an airport. Installations not covered by an SSI, such as joint use airfields, may receive such notifications from groups or individuals operating sUASs for this reason.

-- The term "airport" is broadly defined and would likely include any military airfield. The statutory definition used by the FAA is contained in 49 U.S.C. § 47102(2) and the FAA provides further information about airports on its website (see References section below).

-- Joint use airfield managers and ATC towers (or equivalent) must be aware of FAA regulations regarding the use of sUASs to be able to respond accordingly to notifications from sUAS operators. Note that the requirement is to provide notification only to the airport and ATC tower, not to request permission to operate.

-- Do not assume that those requesting to operate near or over an installation are legally entitled to do so. sUAS users may not understand the regulations and restrictions that pertain to them. If there are questions about particular sUAS operations, coordinate with your local FAA office.

-- Be aware of any airspace authorities that may have been granted to the installation commander (or designee) by the FAA to restrict or prohibit sUAS activities. If such a delegation exists, it will generally be in the form of a memorandum of agreement (MOA) between the installation ATC, or similar, and the FAA.

- Installation commanders, consistent with their authority over the installation and its activities, may prohibit (or limit) the operation of sUAS **ON** the installation, to include a sUAS taking off from the installation, a sUAS landing on the installation, and controlling a sUAS from the installation

  -- As previously noted, the authority of an installation commander does not generally extend to restricting the use of the airspace above an installation. The national airspace, including the airspace above defense installations, falls under the exclusive jurisdiction of the FAA. Absent a delegation of authority from the FAA to the installation commander, the commander has no independent authority to place any restrictions on the use of that airspace.

- While simply flying a sUAS near or above an installation may be permissible under current FAA regulations, if the sUAS is being used to conduct another activity (e.g., taking photos or videos), additional restrictions may apply

  -- Installation legal offices should familiarize themselves with any state or local laws relating to UAS that may be applicable to operations near, on, or over the installation

  -- Federal laws may also prohibit certain activities, for example:

    --- 18 U.S.C. § 795, *Photographing and Sketching Defense Installations* and 18 U.S.C. 796, *Use of Aircraft for Photographing Defense Installations*, criminalize photographing "vital military and naval installations or equipment without first obtaining permission of the commanding officer." Note that such installations must be designated by the President, SecDef, or a service secretary. Executive Order 10104, *Definition of Vital Military and*

Naval Installations and Equipment contains the President's definitions of these items. They are broadly defined to include all "military, naval, or air-force installations and equipment which are now classified, designated, or marked under the authority or at the direction of the President, the Secretary of Defense, the Secretary of the Army, the Secretary of the Navy, or the Secretary of the Air Force as top secret," "secret," "confidential," or "restricted," and all military, naval, or air-force installations and equipment which may hereafter be so classified, designated, or marked with the approval or at the direction of the President."

--- Monitoring the content of suspected downlink video does not violate 18 U.S.C. §§ 2511, *et seq.*, if sufficient consent can be shown or the downlink is configured to be "readily accessible to the general public" under 18 U.S.C. § 2510(16)

- Commanders retain the inherent right of self-defense against sUASs that pose a threat to DoD installations, assets, and personnel consistent with the provisions of CJCSI 3121.01B, *Standing Rules of Engagement/Standing Rules for Use of Force*. However, DoD has issued additional classified guidance on a commander's authority to counter sUASs. Commanders should consult this guidance and related Air Force guidance before engaging in any counter-small UAS (C-sUAS) operations.

  -- 10 U.S.C. § 130i authorizes SecDef to take certain actions necessary to mitigate the threat of an unmanned aircraft or unmanned aircraft systems that pose an imminent threat to the safety or security of certain assets or facilities of national security significance. Commanders of such covered assets and facilities should consult their staff judge advocate on the implementation of this authority.

- At OCONUS locations, the host nation generally regulates the use of the airspace above U.S. military bases. Status of Forces Agreements (SOFAs) or other host nation agreements may give installations some rights with respect to airspace control.

Operation of sUAS within the United States by DoD Organizations

- On 18 August 2018, SecDef issued *Guidance for the Domestic Use of Unmanned Aircraft Systems in U.S. National Airspace*

  -- Pursuant to the 18 August 2018 SecDef memorandum, Service secretaries are delegated authority to approve domestic use of Group 1-3 UASs. Geographic combatant commanders were also given approval authority for domestic use of Group 1-3 UASs for force protection or Defense Support of Civil Authorities (DSCA) Incident Awareness and Assessment (IAA). Finally, state governors may approve their respective National Guards' domestic use of Group 1-3 UASs for state/civil authorities' Search and Rescues (SAR) and IAA operations.

  -- Any domestic use of UASs must be in accordance with FAA regulations and other applicable laws, policies, and memoranda of agreement concerning UAS use in the NAS

  -- Pursuant to a DepSecDef memorandum dated 23 May 2018, Air Force units may neither purchase nor use commercial off-the-shelf (COTS) UASs without prior DepSecDef approval. The approval process can take between one to three months.

  -- AFI 11-502V3, *Small Unmanned Aircraft Systems Operations*, paragraph 1.1.3, states, "Units do not have the authority to obligate the Government to purchase, lease, procure, or contract of any new Air Force SUAS to include UA, Ground Control Station (GCS), Remote Video Terminal (RVT), Electro-Optical/Infrared (EO/IR), or any other payload prior to coordination with SAF/AQIJ. Include HQ AFSOC/A5KJ, HQ AFSOC/A3OU, and MAJCOM/A3 as information addressees."

- DoD operation of sUAS is subject to specific training requirements and other restrictions, to include:
  - -- A 2013 MOA with the FAA requires "Pilots/operators and crew members of DoD UAS… [to] be qualified and medically certified by the appropriate Military Department to operate in the class of airspace in which operations are to be conducted." The term "operator" is a DoD specific term used to "describe individuals with the appropriate training and Military Department certification for the type of UAS being operated, and as such, is responsible for the UAS operations and safety. It is understood that all DoD UAS will be flown with a designated Pilot in Command (PIC)."
  - -- AFI 11-502V3, paragraph 1.3 defines a sUAS operator (SUAS-O) as "[a]n individual who has completed Initial Qualification Training (IQT) in a specific UAS and is responsible for the safe ground and flight operation of the Unmanned Aircraft (UA) and Ground Control Station (GCS). The SUAS-O shall be current and qualified in the SUAS to be operated or under the supervision of a SUAS-I[nstructor]."
  - -- All sUASs must be assessed for airworthiness pursuant to AFI 62-601, *USAF Airworthiness*
  - -- sUAS operators must be familiar and ensure compliance with relevant technical orders for the aircraft pursuant to AFI 11-502V3, Chapter 2
  - -- sUASs must also have proper and adequate technical orders for their use, operation, and maintenance, designed to ensure safety of flight and avoid mishaps resulting in damage (and potential government liability) to persons or property, both military and civilian
  - -- sUASs should be tracked for maintenance and accountability with a sUAS Manager pursuant to AFI 11-502V3, paras. 1.5 and 11.2, and consistent with AFI 21-103, *Equipment Inventory, Status, and Utilization Reporting*, Chapter 2
  - -- sUAS operators will also need to ensure the radio frequency (RF) used is deconflicted
    - --- This deconfliction should consider both the capacity of the UAS to cause harmful interference with local RF usage (civilian and military) as well as the potential for any local RF usage to interfere with the operator's ability to maintain control of the sUAS, as addressed in AFI 11-502V3, paragraph 2.5. See also AFI 11-502V3, paragraph 3.3.9 (frequency deconfliction directives).
  - -- Operation of sUASs must also comply with DoDM 5240.01, *Procedures Governing the Conduct of DoD Intelligence Activities*; DoD 5240.1-R, *Procedures Governing the Activities of DoD Intelligence Components That Affect United States Persons* (Procedures 11-15); AFI 14-104, *Oversight of Intelligence Activities*; and applicable AFOSI issuances

Operation of sUAS Outside of the United States by DoD Organizations

- In addition to any DoD or Service regulation applicable to the operation of sUAS by military organizations, the operation of sUASs within the national airspace of another country may be severely restricted by the domestic laws of that country
  - -- If no specific rights have been granted in a SOFA, basing agreement, or other host nation agreement, assume that specific permission will likely be needed to operate a sUAS (i.e., even if citizens of the host nation are typically allowed to operate sUASs, do not assume that U.S. operations are authorized)
    - --- Follow all applicable coordination and approval procedures to ensure that operations within the airspace of another county are authorized by the host nation and conducted in conformity with all applicable conditions of the permission granted. Be aware that conditions frequently include respect for the laws and regulations of that host nation.

References

10 U.S.C. § 130i, *Protection of Certain Facilities and Assets from Unmanned Aircraft*

Special Rule for Model Aircraft, Pub. L. No. 112-95 § 336

14 C.F.R. Part 107, *Small Unmanned Aircraft Systems*

Memorandum of Agreement (with the FAA) *Concerning the Operation of Department of Defense Unmanned Aircraft Systems in the National Airspace System* (16 September 2013)

Secretary of Defense (SecDef) Memorandum, *Guidance for the Domestic Use of Unmanned Aircraft Systems in U.S. National Airspace* (18 August 2018)

Deputy Secretary of Defense (DepSecDef) Memorandum, *Unmanned Aerial Systems Cybersecurity Vulnerabilities* (23 May 2018)

DepSecDef Memorandum 17-00X, *Supplemental Guidance for Countering Unmanned Aircraft* (5 July 2017) [CLASSIFIED]

DepSecDef Policy Memorandum 16-003, *Interim Guidance for Countering Unmanned Aircraft* (18 August 2016) [CLASSIFIED]

AFPD 11-5, *Small Unmanned Aircraft Systems (SUAS) Rules, Procedures, and Service* (8 October 2015)

AFI 11-502V1, *Small Unmanned Aircraft Systems Training* (19 August 2015)

AFI 11-502V2, *Small Unmanned Aircraft Systems Standardization/Evaluation Program* (19 August 2015)

AFI 11-502V3, *Small Unmanned Aircraft Systems Operations* (21 August 2015)

AFI 14-104, *Oversight of Intelligence Activities* (5 November 2014), Incorporating AFGM 2017-01 (19 September 2017)

AFI 21-103, *Equipment Inventory, Status, and Utilization Reporting* (16 December 2016)

AFI 62-601, *USAF Airworthiness* (11 June 2010)

http://www.faa.gov/uas/

http://www.faa.gov/airports/planning_capacity/passenger_allcargo_stats/categories/

18
CHAPTER EIGHTEEN: CYBER LAW

CYBER LAW OVERVIEW

The term "cyber law" can be misleading. Rather than being a discrete legal field, cyber law is essentially specialized subsets of traditional legal fields (criminal law, international law, administrative law, privacy law, tort law, etc.). This chapter addresses the legal issues in cyberspace that Air Force commanders are most likely to encounter, such as searching and seizing computers/accessing electronically stored information and computer misuse (criminal law); defending Air Force networks and attacking adversary networks (the law of war/international law); and the Freedom of Information Act (FOIA), the Privacy Act, and Personally Identifiable Information (privacy law). Most of these discrete areas of the law have their own chapter or section throughout this handbook, so this chapter will only focus on their cyber-specific aspects.

While the content of this chapter continues to be revised from previous editions, it is important to remember the technology, law, and policy in this area are dynamic. Commanders and judge advocates should seek the most current guidance from subject matter experts at the 67th Cyberspace Wing (CW) legal office, 24th Air Force (24 AF) legal office, or the Air Force Space Command (AFSPC) legal office.

Roles and Responsibilities

- Commander, U.S. Cyber Command (USCYBERCOM): In August of 2017, USCYBERCOM was elevated to a Unified Combatant Command and assigned the responsibility to direct operations and defense of the Department of Defense (DoD) Information Networks (DODIN) as well as the general responsibilities of a Unified Combatant Command. The Air Force Information Network (AFIN) is included as a portion of the DODIN.

- Commander, AFSPC: Pursuant to AFI 10-1701 (renumbered as 17-201), *Command and Control (C2) for Cyberspace Operations*, AFSPC/CC is responsible for the command, control, implementation, security, operations, maintenance, sustainment, configuration, and defense of the Air Force Network (AFNET)

- Commander, 24th Air Force (AFCYBER): The 24 AF Commander is triple-hatted and serves as 24 AF/CC, CDR AFCYBER, and Commander, Joint Force Headquarters, -Cyber (JFHQ-Cyber). AFCYBER is the Air Force component to U.S. Cyber Command (USCYBERCOM). Accordingly, CDR AFCYBER issues cyber orders to MAJCOMs, wings, Integrated Network Operations and Support Centers, and Communications Focal Points via the 624 Operations Center (624 OC). CDR AFCYBER also presents forces to USCYBERCOM and other combatant commanders as required in support of cyberspace operations as directed. Additionally, AFSPC/CC has delegated 24 AF/CC the authority to ensure the AFIN is secure, assured, and interoperable, and that all personnel are appropriately trained. In the role of CDR JFHQ-Cyber, the commander directs operational planning as part of coordinated efforts supporting Air Force Component and Combatant Commanders and, upon the approval of the President and/or the Secretary of Defense, the execution of offensive cyberspace operations.

- 624th Operations Center (OC): The 624 OC is the 24 AF/AFCYBER operations center responsible for issuing cyber orders as directed by 24 AF/CC/CDR AFCYBER. 624 OC also oversees compliance with Air Force and USCYBERCOM cyber operations and relays status of those orders to 24 AF/CC/CDR AFCYBER and USCYBERCOM as directed.

- SAF/CIO: The Chief, Information Dominance and Chief Information Officer (SAF/CIO A6) is the principal advisor to the SecAF, CSAF, and senior Air Force leadership on information technology (IT)/Cyberspace and National Security Systems (NSS)

Cyber Definitions

- Department of Defense Information Networks (DODIN) (JP 3-12): The globally interconnected, end-to-end set of information capabilities, and associated processes for collecting, processing, storing, disseminating, and managing information on-demand to warfighters, policy makers, and support personnel, including owned and leased communications and computing systems and services, software (including applications), data, security services, other associated services, and national security systems
- Air Force Information Networks (AFIN): The AFIN is the Air Force portion of the DODIN
- Air Force Network (AFNET): The AFNET is the physical structure of the AFIN and is defined as the Air Force's underlying Non-classified Internet Protocol Router Network (NIPRNET) that enables Air Force operational capabilities and lines of businesses, consisting of physical medium and data transport services. Including transmission mediums, gateways, routers, switches, hubs and firewalls, and the functions required to support and enable the environment such as command and control, management, maintenance, network authentication, and defense.
- Cyberspace (JP 3-12): A global domain within the information environment consisting of the interdependent networks of information technology infrastructures and resident data, including the Internet, telecommunications networks, computer systems, and embedded processors and controllers
- Defensive Cyberspace Operations (DCO) (JP 3-12): Passive and active cyberspace operations intended to preserve the ability to utilize friendly cyberspace capabilities and protect data, networks, net-centric capabilities, and other designated systems
- DODIN Operations (JP 3-12): Operations to design, build, configure, secure, operate, maintain, and sustain DoD networks to create and preserve information assurance on the DODIN
- Offensive Cyberspace Operations (OCO) (JP 3-12): Cyberspace operations intended to project power by the application of force in or through cyberspace

LEGAL ISSUES IN AIR FORCE INFORMATION NETWORK (AFIN) OPERATIONS

AFIN Operations Authority

- The operational chain of command delegated the authority to secure, operate, and defend the AFIN to CDR AFCYBER. This authority includes Directive Authority to Conduct Cyberspace Operations (DACO) for the AFIN in order to effectively implement orders from USCYBERCOM/JFHQ-DODIN and to ensure the timely and efficient security, operation, and defense of the AFIN. This authority allows CDR AFCYBER to issue orders and directives in order to compel unity of action to secure, operate, and defend the AFIN.
- AFIN operations authorities can be summarized as the responsibility to secure, operate, and defend the AFIN as well as the authority to issue various orders in furtherance of those responsibilities. Some of these orders consist of Air Force Cyber Tasking Orders (CTOs), Maintenance Tasking Orders (MTOs), and Cyber Control Orders (CCOs).
- Cyber orders issued by 24 AF/CC/CDR AFCYBER, via the 624 OC, are mandatory military orders
- 24 AF/CC, in the role of CDR AFCYBER or CDR JFHQ-Cyber (AFCYBER), directs Air Force cyberspace forces in executing missions and tasks assigned by USCYBERCOM and exercises OPCON over Air Force forces assigned/attached to USCYBERCOM in support of joint objectives
- There is significant overlap between the Air Force service authority to operate and defend Air Force networks and the USCYBERCOM authority to defend Air Force networks. However, in addition to the delegations of authority described above, AFSPC/CC has delegated to 24 AF its service authority to ensure the AFIN is secure, assured, and interoperable, and that all personnel are appropriately trained.

Computer Monitoring and Stored Communications

- Commanders may have to deal with questions concerning monitoring active duty members or obtaining electronic data stored somewhere on the AFIN. These requests typically come from law enforcement, but they also may be requested by unit commanders, investigative officers, judge advocates or civilian attorneys, safety investigation boards, etc. The following discussion examines the law in this area, some exceptions, and the process for obtaining these items in the Air Force.
  - -- Fourth Amendment: The Fourth Amendment establishes the right to be free from unreasonable searches and seizures. This applies to electronic systems and communications. What constitutes an unreasonable search is dependent upon whether an individual has a reasonable expectation of privacy (REP).
    - --- Determination of a REP on any given piece of information on any given computer or computer system (including servers) depends upon a number of factors, such as the owner of the computer (i.e., personal or business); the relationship of the information to the computer system (i.e., in transit or stored); the nature of the data communicated (i.e., metadata or content); the location of the information; and the information owner's citizenship
    - --- The Air Force and Department of Defense (DoD) do not recognize a REP on government computers or computer systems. All users are expected to understand and acknowledge the DoD notice and consent banner and user agreement before accessing a government computer or the AFIN.

- Computer Fraud and Abuse Act, 18 U.S.C. § 1030: Prohibits unauthorized access (or exceeding authorized access) to any "protected computer." A "protected computer" includes any computer involved in interstate or foreign commerce or communications. Sometimes referred to as the anti-hacking statute.
- The Electronic Communications Privacy Act (ECPA): ECPA covers various forms of wire and electronic communications. It includes e-mail, telephone conversations, and data stored electronically. ECPA is broken up into three separate sections. Title I of ECPA is commonly referred to as the Federal Wiretap Act. Title II is the Stored Communications Act. Title III addresses pen register and trap and trace devices.
- Federal Wiretap Act (18 U.S.C. §§ 2510 *et seq.*): Prohibits a third party to a communication from wiretapping, monitoring, or intercepting that communication in transit. The Wiretap Act covers both telephone conversations and electronic communications, and it grants protection to individuals above that in the Fourth Amendment. However, there are numerous exceptions to the Wiretap Act prohibitions:
  - -- *The Service Provider Exception (18 U.S.C. § 2511(2)(a)(i))*: Permits service providers to "intercept, disclose, or use" a communication while engaged in activity necessary to the provision of service or the protection of the provider's rights or property. This authority is broad, but there must be a substantial nexus between the monitoring and the system administrator's duties to maintain and protect the system.
  - -- *Consent (18 U.S.C. § 2511(2)(c)-(d))*: Just as in other applications, consent to a "search" eliminates a privacy interest in the subject to be searched. The DoD banner, as mandated by the DoD Chief Information Officer (DoD-CIO), obtains consent to monitoring from any potential user prior to authorized use of DoD computer networks. The consent banner and user agreement are now used universally in the Air Force and are the main exception to the Federal Wiretap Act.
  - -- *Pursuant to Foreign Intelligence Surveillance Act (18 U.S.C. § 2511(2)(e))*: This exception will most likely only be used by an intelligence-gathering agency
  - -- *Communication readily accessible to the general public (18 U.S.C. § 2511(2)(g)(i))*: An intercepted or accessed electronic communication which is readily accessible by the general public (e.g., social media post, status update) is excepted
  - -- *Trespasser Exception (18 U.S.C. § 2511(2)(i))*: An individual acting lawfully is authorized to intercept the communications of a trespasser into a computer system (i.e., hackers). The Air Force Office of Special Investigations (AFOSI) frequently relies on this exception when conducting counter intelligence investigations.
  - -- *Pursuant to a Court Order (18 U.S.C. § 2518)*: Applications for orders authorizing or approving the interception of electronic communications are made in writing to a judge of competent jurisdiction
- Stored Communications Act (18 U.S.C. §§ 2701 *et seq.*): The protection in this statute applies to stored communications, rather than in-transit communications covered by the Wiretap Act (see above). Similar to the Wiretap Act, the Stored Communications Act provides an exception for service providers.
  - -- 18 U.S.C. § 2702(a) limits voluntary disclosure of communications or records by those providing electronic communication services "to the public." The AFIN does not provide electronic communications services to the public. *Bohach v. City of Reno*, 932 F. Supp. 1232 (D.Nev.1996). Accordingly, the Stored Communications Act does not limit the Air Force's use of stored communications on the AFIN.

-- Service provider exception does not require a nexus between maintaining and protecting the system and accessing stored data

- Pen Register Trap and Trace Statute (18 U.S.C. §§ 3121 *et seq.*): The protection in this statute applies to information about communications, such as a log of telephone numbers called. In cyberspace, this statute is most often applied to proxy logs and network routing data. Like other portions of the ECPA, this statute contains exceptions for service providers.

- Reliance on the DoD notice and consent banner and user agreement is the usual method by which stored data can be legally obtained in the Air Force and will apply in most situations. One exception is privileged communications. The DoD notice and consent banner still protects some uses of the content of privileged communications or work product related to personal representation or services by attorneys, psychotherapists, or clergy, to include their assistants. Pursuant to the notice and consent banner, these communications cannot be used in personnel misconduct, law enforcement, or counterintelligence investigations. Commanders should consult with their servicing legal offices if such communications are encountered.

- Search authorizations for electronically stored information should not be used in most cases. AFI 51-201, *Administration of Military Justice*, states "[o]nly if the totality of the facts and circumstances indicate that the subject has a reasonable expectation of privacy, usually because the government property was issued for exclusive personal use, is obtaining a search authorization warranted."

- Routine use of search authorizations to collect information from government computer systems would contravene the language in the consent banner and could create a reasonable expectation of privacy in government computer systems

Bottom Line

- There is no reasonable expectation of privacy on Air Force networks

- The DoD banner implemented throughout all Air Force computer systems, telephone networks, and other electronic communications systems, provides notice of monitoring and is evidence of implied and explicit consent from all users to monitor their activities and retrieve data under the relevant exceptions of the ECPA (see *U.S. v. Larsen*, 525 F.2d 444 (2008))

- Accordingly, law enforcement and AFOSI personnel do not require a search authorization to examine data for law enforcement purposes on the AFIN and should only seek search authorizations in unusual cases

- Air Force system administrators do not require permission to take action on any computer or system device to properly operate, maintain, or defend the AFIN under the Stored Communications Act and Federal Wiretap Act exceptions for system administrators. However, the Federal Wiretap Act exception requires a more substantial nexus to actively monitor in-transit activities and communications.

Electronically Stored Information Request Process

- Electronically stored information (ESI) may be requested for any official purpose. Common purposes include: court-martial proceedings, criminal investigations, administrative investigations, commander-directed investigations, civil litigation involving the Air Force, or retrieving e-mails of an absent member in support of some military mission or duty.

  -- The DoD notice and consent banner eliminates the need for search authorization from a search authority in almost all cases (see discussion above)

- As outlined in AFI 17-101, *Risk Management Framework (RMF) for Air Force Information Technology*, paragraph 2.6, Authorizing Officials (AO, formerly known as Designated Accreditation Authorities or DAA) are responsible for accepting a level of risk for a system balanced with mission requirements. In accordance with AFI 17-130, *Air Force Cybersecurity Program Management*, paragraph 2.8, the AO renders decisions for DoD information systems within their purview and may appoint an AO Designated Representative to perform some AO responsibilities.
  - -- As such, the AFSPC/A6, the AO for AF Enterprise Information Technology, has delegated to the 24 AF/CC, 624 OC/CC, and installation commanders the authority to approve certain requests for ESI, and approve real-time monitoring of network communications requests by AFOSI (AFSPC/A6 Delegation Memo, dated 7 December 2009)
- AFCYBER Tasking Order (TASKORD) 17-0004, *E-Mail Format and Authority for Release of Electronically Stored Information (ESI)*, issued by AFCYBER A3/6, standardizes the process for requesting ESI. The order requires all requests for ESI located on the AFIN be submitted through the 624 OC via a digitally signed e-mail and follow a designated format (see ESI Request Format below).
- Installation commanders have the authority to grant access and release e-mails and data on systems under their control as delegated by AFSPC/A6; however, that authority is not further delegable
  - -- This authority only extends to ESI located on information systems under the control of the installation commander, e.g., a .pst or similar file stored on the hard drive of a computer that is located on the installation
  - -- All other requests for ESI must go through the 624 OC

Freedom of Information Act (FOIA)/Privacy Act (PA) Requests vs. ESI Requests

- ESI requests must be differentiated from FOIA/PA requests, but at times may follow similar procedures. The servicing legal office should be the first line of defense in determining whether the request requires processing under FOIA.
- Generally, requests for ESI are those which are not of a personal nature and have an inherent military mission or function for its use. For example, requesting e-mails pursuant to a commander directed investigation would be an ESI request. Also, requesting e-mails of a recently deceased member to continue a military duty is an ESI request. A request by an individual not selected for an advertised position for all e-mails between person 1 and person 2 concerning the selection decision would be a FOIA/PA request.
- If the request received is FOIA/PA, it must be processed through proper channels. FOIA/PA managers will still need to request the release of e-mails and data through the 624 OC. During this process, the information should be released back to the FOIA/PA managers for continued processing.
  - -- Approval of the request to retrieve e-mails or data for FOIA/PA requests does not constitute a FOIA/PA approval/disapproval. Only FOIA/PA managers and the servicing legal office will ascertain whether information contained in the e-mails should be released to the third party.

ESI Request Format

- A request for ESI must contain key information for System Administrators, exchange administrators, and judge advocates to process the request. The ESI request format directed by AFCYBER TASKORD 17-0004 is on the next page. The ESI request should be sent to the 624 OC Senior Duty Officer (SDO) at 624OC.SDO@us.af.mil. Investigating Officers should include a copy of their appointment letter.

ELECTRONICALLY STORED INFORMATION (ESI) E-MAIL MESSAGE TEMPLATE

MEMORANDUM FOR 624 OC/CC
FROM: _____ (Requestor)
SUBJECT: Request for Access to Electronically Stored Information in support of _____ (brief description of investigation "CDI involving…", "Security Forces Case #")

1. On _____(date)_____, _____ (appointing CC) appointed _____ (investigator's name) investigating officer for a Command Directed Investigation, to examine _____(fill in purpose of CDI).
2. Request access to ESI on the Air Force Information Network (AFIN), as described below, to support the listed investigation (ensure the that the following information is included, preferably using this format):

a. Requestor: Name, Rank, unit:
b. Requestor Duty Address:
c. Requestor E-mail address:
d. Requestor Duty Phone (Comm & DSN):
e. Requestor's After Duty Hours Phone:
f. Preferred method of receiving the requested information (encrypted e-mail, remote delivery to the requestor's desk, secure FTP, CD, etc….):
g. System where the information will be found and expected classification of the information: NIPRNET (Unclassified) or SIPRNET (Secret):
h. Expected location of e-mail and/or data if known:
i. Specific dates of any requested e-mails and/or data (logs, etc….): From _____ to _____ (must include an end date):
j. List of e-mail accounts (individual and/or organizational) to examine: (subject's name/e-mail account address/unit, EIN): [Note: it is best to **scope the request down as far as possible** while still satisfying the purpose of the request]
k. Purpose of Request: [Note: be very detailed as this is the information the DAA uses to make the substantive decision regarding whether the ESI will be released—for instance: "to investigate communications regarding possible inappropriate relationships between ____ and ____, and ____ knew about it"]
l. Is the requested e-mail and/or data believed to contain communications involving a lawyer, clergy, health care provider, parties married to each other, or information protected by HIPAA? Yes/No (explain if possible)
m. Is the requested e-mail and/or data expected to contain proprietary information relating to government contracts, or contractor-related protected information? Yes/No (explain if possible)

//REQUESTOR'S ELECTRONIC SIGNATURE BLOCK//

[Administrative Note: Requestor must sign and encrypt the e-mail]

1st Ind, 624 OC/CC MEMORANDUM FOR RECORD
I approve/disapprove
624 OC/CC Signature Block

ESI Request Reviews

- An ESI request legal review, conducted by 24 AF/JA, generally will analyze the following:
  - -- Proper authority of the requesting individual (valid basis to request information)
  - -- Privilege(s), proprietary information, and any classification claimed
  - -- Ensure legitimacy of request (not overly broad, for official purpose, etc.)
  - -- Ensure sufficiently detailed description of data requested in light of basis
  - -- Advise if data may be released and any remarks regarding the data being released
- E-mail requests typically provide **ALL** e-mails for the period requested. These will require the requestor to perform a content review prior to certain uses of the data. The requestor is responsible for ensuring proper uses of all retrieved data and should seek legal advice from the servicing legal office as appropriate.
  - -- Review is required to safeguard any proprietary information of DoD Contractors, or privileged communications between the individual and clergy, health care practitioners, or attorneys

Computer Misuse Incident Program

- Seemingly, small incidents of computer misconduct may have large impacts for the AFIN
  - -- For example, installing unauthorized software on a single computer may expose the entire network to malware infection and disruption
- The 67 CW, one of the wings under 24 AF, has instituted a Computer Misuse Incident Program to promote accountability for these actions across the Air Force
  - -- The objective of the Computer Misuse Incident Program is to increase awareness and accountability of computer misuse around the Air Force and to empower the owning commander to respond to computer misuse as he/she would to any other misconduct
- AFI 17-130, *Air Force Cybersecurity Program Management*, describe specifically prohibited conduct on the AFIN
  - -- Common inappropriate uses include, but are not limited to: (1) unauthorized personal use; (2) uses that would adversely reflect on the DoD or the Air Force; (3) unauthorized storing, processing, displaying, sending, or otherwise transmitting prohibited content (i.e., pornography, sexually explicit or sexually oriented material, use for personal gain, etc.); and (4) downloading and installing freeware or shareware or any other software product without AO approval
- If computer misuse is detected or reported to the 67 CW, 67 CW/JA will create a narrative of the incident and potential UCMJ violations
  - -- The 67 CW Commander then shares this narrative with the Installation Commander of the relevant installation for further action as the owning commander deems appropriate. 67 CW/JA also provides a courtesy copy of the narrative to the servicing legal office where the individual resides.
- CDR AFCYBER may also issue orders regarding proper conduct on the AFIN, which, if violated, could represent chargeable offenses under the UCMJ

Personally Identifiable Information (PII)

- PII breaches have recently become a high-level interest issue. PII breaches create personal vulnerabilities for individuals, but can also create AFIN vulnerabilities.
- Per AFI 33-332, *The Air Force Privacy and Civil Liberties Program*, PII is information which can be used to distinguish or trace an individual's identity, such as their name, social security number, biometric records, etc. alone, or when combined with other personal or identifying information which is linked or linkable to a specific individual, such as date and place of birth, mother's maiden name, etc.
- E-mails containing PII (alpha rosters, recall rosters, investigative reports, etc.,) must be encrypted and must contain a Privacy Act statement (see AFI 33-332, paragraph 2.5)
- Misuse of the AFIN or failure to follow directives such as those requiring encryption of PII may result in a suspension of access per AFMAN 17-1301, *Computer Security (COMPUSEC)* paragraph 4.5

References

Freedom of Information Act, 5 U.S.C. § 552
Privacy Act, 5 U.S.C. § 552a
The Stored Communications Act, 18 U.S.C. §§ 2701-2712
The Wire Tap Act, 18 U.S.C. §§ 2510-2520
Pen Register Trap and Trace Act, 18 U.S.C. §§ 3121-3127
Computer Fraud and Abuse Act, 18 U.S.C. § 1030
Bohach v. City of Reno, 932 F.Supp. 1232 (D.Nev.1996)
U.S. v. Larsen, 525 F2d 444 (2008)
Unified Command Plan (3 November 2017) (FOUO)
Joint Publication 3-12(R), *Cyberspace Operations* (5 February 2013)
AFI 17-101, *Risk Management Framework (RMF) for Air Force Information Technology* (2 February 2017)
AFI 17-130, *Cybersecurity Program Management* (31 August 2015), including AFI17-130_AFGM2017-01, 30 November 2017
AFI 10-1701, *Cyberspace Operations* (31 July 2012), renumbered as AFI 17-201, including AFI10-1701_AFGM2018-01, 7 February 2018
AFI 33-332, *The Air Force Privacy and Civil Liberties Program* (12 January 2015)
AFI 51-201, *Administration of Military Justice* (8 December 2017)
AFSPC/A6 Delegation Memorandum, *Delegation of Authorities to Access Stored Data and Monitor Communications* (7 December 2009)
AFCYBER TASKORD 17-0004

LEGAL ISSUES IN CYBERSPACE OPERATIONS

Terminology

- Cyberspace terminology changes frequently and is not always used consistently. Even across U.S. Government agencies there are variations with certain cyber lexicon. Terminology may also not be consistent with their traditional uses (e.g., the definition of Cyberspace Attack is inconsistent with notions of an armed attack under international law). Consultation of source documents such as JP 3-12(R) is recommended when drafting documents related to cyberspace operations.

Mission Sets

- Cyber Operations Definitions (JP 3-12(R)): There are three basic mission sets for cyber operations:
  - -- Offensive Cyberspace Operations (OCO): Cyberspace operations intended to project power by the application of force in or through cyberspace
  - -- Defensive Cyberspace Operations (DCO): Passive and active cyberspace operations intended to preserve the ability to use friendly cyberspace capabilities and protect data, networks, net-centric capabilities, and other designated systems
  - -- DoD Information Network (DODIN) Operations: Operations to design, build, configure, secure, operate, maintain, and sustain DoD networks to create and preserve information assurance on the DoD information networks

Cyberspace Actions

- Cyberspace Attack: Cyberspace actions that create various direct denial effects in cyberspace (i.e., degradation, disruption, or destruction) and manipulation that leads to denial that is hidden or that manifests in the physical domains. These specific actions are:
  - -- *Deny*: To degrade, disrupt, or destroy access to, operation of, or availability of a target by a specified level for a specified time. Denial prevents adversary use of resources. There are three types of deny actions:
    - --- *Degrade*: To deny access (a function of amount) to, or operation of, a target to a level represented as a percentage of capacity
    - --- *Disrupt*: To completely but temporarily deny (a function of time) access to, or operation of, a target for a period represented as a function of time
    - --- *Destroy*: To permanently, completely, and irreparably deny (time and amount are both maximized) access to, or operation of, a target
  - -- *Manipulate*: To control or change the adversary's information, information systems, and/or networks in a manner that supports the commander's objectives. Manipulation uses an adversary's information resources for friendly purposes.
- Cyberspace Defense: Actions normally created within DoD cyberspace for securing, operating, and defending the DODIN
  - -- Specific defensive actions are usually created by the joint force commander (JFC) or service that owns or operates the network, except in such cases where these defensive actions would affect the operations of networks outside the responsibility of the respective JFC or service

- Cyberspace Intelligence, Surveillance, and Reconnaissance (ISR): An intelligence action conducted by the JFC authorized by an EXORD or conducted by attached Signals Intelligence (SIGINT) units under temporary delegated SIGINT Operational Tasking Authority (SOTA)
  - -- Cyberspace ISR includes ISR activities in cyberspace conducted to gather intelligence from target and adversary systems that may be required to support future operations, including OCO or DCO. These activities synchronize and integrate the planning and operation of cyberspace systems, in direct support of current and future operations.
  - -- ISR in cyberspace is conducted pursuant to military authorities and must be coordinated and deconflicted with other U.S. Government departments and agencies in accordance with the *Trilateral Memorandum of Agreement Among the Department of Defense, the Department of Justice, and the Intelligence Community Regarding Computer Network Attack and Computer Network Exploitation Activities*, 9 May 2007, and Executive Order 12333, United States Intelligence Activities (EO 12333 addresses only intelligence activities and not surveillance or reconnaissance activities)
- Cyberspace Operational Preparation of the Environment: OPE consists of the non-intelligence enabling activities conducted to plan and prepare for potential follow-on military operations. OPE requires cyberspace forces trained to a standard that prevents compromise of related intelligence community operations. OPE in cyberspace is conducted pursuant to military authorities and must be coordinated and deconflicted with other U.S. Government departments and agencies.

"Title 10" vs. "Title 50"

- "Title 10" and "Title 50" are often used for shorthand for "military operations" and "intelligence operations," respectively. Usually, the speaker refers to DoD activity ("Title 10") or Intelligence Community activity ("Title 50"). Although such terminology is widespread, it is generally incomplete, inaccurate, and confusing.
  - -- Title 10: The heading of Title 10, United States Code, is "Armed Forces." It is the primary authority for the manning, training, and equipping of the armed forces by each Service.
  - -- Title 50: The heading of Title 50 is "War and Defense." It provides the authority for operating the intelligence community, providing a breakdown of responsibilities for Departments and Agencies with intelligence community elements, including major agencies within the DoD.
- DoD is authorized to conduct both Title 10 and Title 50 operations. Proper legal and operational analysis begins with identifying the purpose of the activity, the entity that is conducting the activity, and how the information gathered during the activity is to be used.

Covert Action and Traditional Military Activity

- Covert Action: Defined in 50 U.S.C. § 3093 as "…activities of the United States Government to influence political, economic, or military conditions abroad, where it is intended that the role of the United States will not be apparent or acknowledged publicly"
  - -- Covert actions must be approved by the President and have significant congressional oversight
- Traditional Military Activities (TMA): Are expressly deemed not covert actions, even when conducted clandestinely. At a minimum, to qualify as a TMA, the activities must be under the direction and control of a military commander.
- Regardless of the underlying authority, many cyberspace operations are conducted at higher classification levels, so it is imperative that any legal advisor receive the pertinent classification and read-in(s) prior to providing legal advice

Domestic Law

- With respect to the application of domestic law, there is no substantive difference between whether an activity is classified as "Title 10" or "Title 50." Activities conducted under both titles must comply with the Constitution and with U.S. law.
- Domestic laws place considerable restraints on cyberspace operations, particularly within the United States, but also in foreign countries
- Although many of the statutes provide exceptions for law enforcement, they do not expressly provide exceptions for military operations (however, the military can rely on the generally applicable exceptions). At the end of this section is a list of the pertinent laws in this area.

Policy

- Presidential Policy Directive-20 (PPD-20), U.S. Cyber Operations Policy: All cyber operations must comply with PPD-20. The document itself is classified.
- The 2015 DoD Cyber Strategy establishes policy for the U.S. DoD Cyber Enterprise. Under this strategy, the DoD will focus on five overarching goals.
  - -- First, the DoD will build and maintain ready forces and capabilities to conduct cyberspace operations
  - -- Second, the DoD will defend the DoD information network, secure DoD data, and mitigate risks to DoD missions
  - -- Third, the DoD will be prepared to defend the U.S. homeland and U.S. vital interests from disruptive or destructive cyberattacks of significant consequence
  - -- Fourth, the DoD will build and maintain viable cyber options and plan to use those options to control conflict escalation and to shape the conflict environment at all stages
  - -- Fifth, the DoD will build and maintain robust international alliances and partnerships to deter shared threats and increase international security and stability
- Air Force Policy Regarding Cyber Capabilities:
  - -- Air Force policy requires that cyber capabilities "being developed, bought, built, modified or otherwise acquired by the Air Force that are not within a Special Access Program are reviewed for legality under [the Law of Armed Conflict], domestic law, and international law prior to their acquisition for use in a conflict or other military operation" (AFI 51-402, *Legal Reviews of Weapons and Cyber Capabilities*, paragraph 1.1.2)
    - --- Note that this requirement applies to all cyber capabilities, not just to weapons. However, this requirement is directed for Air Force cyber capabilities, and it is not automatically extended to joint operations and capabilities.
    - --- The legal review must be coordinated and staffed by the MAJCOM or Field Operating Agency developing/acquiring the capability
    - --- AFI 51-402 defines a cyber capability requiring a legal review as "…any device or software payload intended to disrupt, deny, degrade, negate, impair or destroy adversarial computer systems, data, activities or capabilities." It does not include any "device or software that is solely intended to provide access to an adversarial computer system for data exploitation," also referred to as access-only tools.

-- Authority to execute the legal review may be delegated to AF/JAO or to MAJCOM staff judge advocates. Currently, for cyber capabilities developed/acquired within AFSPC, legal review authority for cyber capabilities **NOT** rising to the level of a weapon resides with the AFSPC/SJA.

-- The legal review is required to address the following:

--- Whether there is a specific rule of law, whether by treaty obligation of the United States or accepted by the United States as customary international law, prohibited or restricting the use of the weapon or cyber capability

-- If there is no express prohibition, the following issues are analyzed:

--- Whether the weapon or cyber capability is calculated to cause superfluous injury

--- Whether the weapon or cyber capability is capable of being directed against a specific military objective and, if not, is of a nature to cause an effect on military objectives and civilians or civilian objects without distinction

- The fact that another service or the forces of another country have adopted the weapon or cyber capability may be considered in determining the legality of such a weapon or cyber capability, but such fact shall not be binding

International Law and Law of Armed Conflict (LOAC) Considerations

- *Jus ad bellum:*

-- The United States has generally treated the terms "use of force" and "armed attack" from the UN Charter synonymously. The issue of whether OCO rises to the level of an armed attack is an important one for ensuring the United States complies with the UN Charter and because of the potential application of the nation's inherent right of self-defense.

-- Currently, there is no official international consensus regarding what constitutes a use of force or armed attack in cyberspace

--- However, there is also a growing body of state practice supporting the position that disruptive actions resulting in annoyance or harassment, even if for an extended period of time against many websites, do not amount to an armed attack

--- There is also a growing consensus among academics and policymakers that cyber activities that proximately result in death, injury, or significant destruction would likely be viewed as a use of force/armed attack

-- If OCO rises to the level of an "armed attack," then the state where the action occurs would be justified under Article 51 of the UN Charter to use force in response

-- Under international law, it is still unsettled how a state may respond to OCO that does not rise to the level of a use of force/armed attack

--- Many would claim that such actions, if committed against cyber infrastructure within a state's territory, would still constitute a violation of that state's sovereignty, to which the state could respond with necessary and proportionate countermeasures that themselves do not rise to the level of a use of force/armed attack

- Military Necessity:
  - -- It is unlawful for a party to a conflict to "destroy or seize the enemy's property unless such destruction or seizure is imperatively demanded by the necessities of war" (Hague IV, Annex, art. 23(g)). Lawful military objectives (targets) are those objects "which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definitive military advantage (Additional Protocol I, art. 52(2)).
  - -- Just as for kinetic targets, a legal review will address employment of cyberspace capabilities in both a targeting review (is it a valid target?) and in the operational legal review (will the method to prosecute that target advance a legitimate military objective?)
- Unnecessary Suffering:
  - -- As stated in the Chapter 17, the use of arms which are calculated to cause unnecessary suffering is prohibited. Generally, cyber capabilities will not cause such effects, but if such effects are likely, they will be addressed in the operational legal review.
- Proportionality:
  - -- Just as with physical operations, cyber operations must take into account potential collateral damage caused to the civilian population, and it must not be excessive in relation to the military advantage anticipated
    - --- For example, a cyber operation to disrupt a nation's air traffic control feed in order to take out a valid military target aboard an aircraft may run afoul of the proportionality requirement
  - -- The commander must assess whether the damage to civilians and civilian property is excessive in relation to the military advantage anticipated by the cyber operation
- Distinction:
  - -- Sometimes referred to as discrimination, requires parties to a conflict to distinguish between combatants and the civilian population and property
  - -- Due to the overlapping nature of military and civilian uses of cyberspace, distinction can play a very important role in cyber operations. Depending on the language of the code, cyber capabilities can be developed with specific or generic targets.
    - --- For example, a cyber capability designed to only create effects on certain industrial control systems known to be used in an adversary's nuclear enrichment facility would likely be considered a discriminate weapon. In contrast, a virus (such as the "Conficker worm" in the early 2000s) designed to replicate and spread to any system it touches on the Internet would raise distinction concerns because it does not distinguish between civilian and military systems.
  - -- Dual-use systems provide service and capabilities to the civilian population and are also used for military purposes
    - --- Terrorists, enemy combatants, and even nation-states will use civilian networks and cyber infrastructure for their operations, so any operation targeting these capabilities will, by definition, target civilian infrastructure
    - --- These dual-use systems are lawful military targets if they make an effective contribution to the enemy. This unique aspect of cyberspace targeting will be addressed in both the targeting and operational legal reviews.

- Honor:
  -- As mentioned in the Chapter 17, the principle of honor (or chivalry) permits lawful ruses such as camouflage, false signals, and mock troop movements but forbids perfidious acts
  -- Because the infrastructure allowing for the delivery of cyber effects crosses multiple countries and cyber effects can be created by non-state actors (e.g., independent hackers), attributing a cyber effect to a particular source can be difficult
    --- An additional issue is that, unlike physical attacks, the ability to mislead an adversary as to the source of cyber operations is much greater
  -- Disguising cyber effects as normal Web traffic or concealing the source of such operations is similar to a permissible lawful ruse and does not violate the principle of honor
- The Tallinn Manual on the International Law Applicable to Cyber Warfare: The manual, published in 2013, contains 95 rules related to both the *jus ad bellum* and *jus in bello* aspects of cyber warfare. The manual is not binding international law, but rather represents opinions of how the law of armed conflict applies to actions in cyberspace.
- The Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations: The manual, published in 2017, expands on the scope of and replaces the original Tallinn Manual. Where the original focused on cyber operations that constitute a use of force and trigger the right of self-defense, Tallinn 2.0 also examines more common cyber operations and incidents at the sub-use of force threshold.

References

50 U.S.C. § 3093
Hague Convention No. IV, Respecting the Laws and Customs of War on Land and Annex Thereto, October 18, 1907
Additional Protocol to the Geneva Convention of 12 August 1949 (Protocol I), art. 52(2) October 10, 1980, 1343 U.N.T.S. 137
Additional Protocol to the Geneva Convention of 12 August 1949 (Protocol I), art. 51(2)
Executive Order 12333, *United States Intelligence Activities*, 4 December 1981
Presidential Policy Directive-20 (PPD-20), *U.S. Cyber Operations Policy* (October 2012)
Trilateral Memorandum of Agreement Among the Department of Defense, the Department of Justice, and the Intelligence Community Regarding Computer Network Attack and Computer Network Exploitation Activities, 9 May 2007
AFI 51-402, *Legal Reviews of Weapons and Cyber Capabilities* (27 July 2011)
The DoD Cyber Strategy (April 2015)
DoD Law of War Manual (June 2015), updated December 2016
Tallinn Manual On the International Law Applicable to Cyber Warfare (2013)
Tallinn Manual 2.0 On the International Law Applicable to Cyber Operations (2017)

INDEX

A

B

C

D

E

F

G

H

I

J

K

L

M

N

O

P

Q

R

S

T


THE JUDGE ADVOCATE GENERAL'S CORPS
UNITED STATES AIR FORCE
WISDOM • VALOR
JUSTICE

The Judge Advocate General's School
150 Chennault Circle (Bldg 694)
Maxwell Air Force Base, Alabama 36112-6418
Comm. (334) 953-2802 or DSN 493-2802
AFLOA.AFJAGS@us.af.mil

This publication is available at:
https://www.afjag.af.mil/Library/AFJAGS-Library

9781585662890