92. (Services) What opportunities does a victim of sexual assault have to be heard during the pretrial, merits, sentencing, and post-trial phases of a court-martial?

USA	Victims have the opportunity to be heard, depending on the circumstances of the case, in the pretrial, merits, sentencing, and post-trial phases of a court-martial. On the merits and on sentencing, victims are typically the primary government witness. For pretrial proceedings, Army Regulation 27-10, paragraph 17-15 directs that, when appropriate, the trial counsel will consult with the victim concerning decisions not to prefer charges, decisions concerning pretrial restraint, pretrial dismissal of charges, negotiations of pretrial agreements and their potential terms. Army Regulation 600-20, paragraph 8-5o(21) requires commanders to, when appropriate, consult with the victim on pretrial and charging decisions. Victims will now have a formalized role in post-trial proceedings before the convening authority. The Joint Service Committee on Military Justice (JSC) has drafted an Executive Order creating a new Rule for Court-Martial, 1105A (Matters submitted by the victim), which will allow named victims in the charge sheet to submit matters to the convening authority prior to action. These matters will be attached to the Staff Judge Advocate Recommendation. In addition, the Fiscal Year 14 NDAA revises Article 60 to provide the victim an opportunity to submit matters for consideration by the CA in any case in which findings and sentence have been adjudged for an offense that involved a victim. In the Army, the victim also has an opportunity to be heard in the appellate process and at the parole and clemency stages. An Army Victim Witness Liaison assigned to the Army Court of Criminal Appeals notifies all victims when an offender's case reaches appellate review. This victim witness liaison provides written information about the appellate process and offers personal contact for any victim with questions or concerns. Victims are notified of, and may attend, oral arguments at the appellate court and are provided with copies and explanations of court decisions. Victim Witness Liaisons at the Army Corrections Command also notify victims, upon election, of the offender's place of confinement, projected minimum release date, change in status or transfer, scheduling of clemency or parole, and release. At the Army Parole and Clemency Board, victims are provided the opportunity to either submit a written impact statement or appear in person and speak to any matters the victim wishes. Army Victim Witness Liaisons at the local installations are trained to educate victims about this process and advise victims to provide impact statements immediately after the verdict that can be updated in the future.
USAF	Victims have both a right to consult with the government at certain stages of the case involving their alleged perpetrator and the right to be heard at certain stages of military justice proceedings in which they are a victim. Pretrial

	Article 32, UCMJ, does not provide a right for a victim to be heard during Article 32 pretrial hearings. If a victim is called to testify as a witness for the government or defense during the hearing, their testimony will be taken under oath and they will be subject to cross-examination. Military Rules of Evidence (MRE) 412, 513, and 514 provide victims with "a reasonable opportunity to attend…and be heard" at the hearing the military judge conducts prior to ordering production or admission of evidence trial or defense counsel seek to admit pursuant to these rules. LRM v. Kastenberg (Atch XX) discusses a victim's right to be heard in the context of whether the right to be heard includes the right to be heard through counsel. In the decision, the Court of Appeals for the Armed Forces ruled that a "reasonable opportunity to be heard at a hearing [under MREs 412 and 513 (also, while not specifically discussed in LRM, MRE 514, the victim advocate privilege, seems to be encompassed as well)] includes the right to present facts and legal argument, and that a victim or patient who is represented by counsel be heard through counsel." In the decision, CAAF also stated that: 1. The right to be heard through counsel is not absolute. A military judge has discretion under Rule for Court-Martial 801, and may apply reasonable limitations, including restricting the victim or patient and their counsel to written submissions if reasonable to do so in context. If counsel indicates at a MRE 412 or 513 hearing that the victim's or patient's interests are entirely aligned with those of trial counsel, the opportunity to be heard could reasonable be further curtailed. 2. MREs 412 and 513 do not create a right to legal representation for victims or patients who are not already represented by counsel. 3. MREs 412 and 513 do not create a right for the victim or patient to appeal an adversary evidentiary ruling. Merits Victims do not have a right to be heard during the merits of the case. Either the government or the defense may call the victim as a witness in their case in chief and/or on rebuttal. The victim's testimony will be taken under oath and they will be subject to cross-examination. Sentencing Victims do not have a right to be heard during the pre-sentencing phase of the court-martial. However, the government has the opportunity to present evidence in aggravation pursuant to RCM 1001 and victims of crime frequently testify as government witnesses pursuant to this rule. Victims who testify during pre-sentencing do so under oath and are subject to cross-examination. Victims do not have the right to give an unsworn statement during pre-sentencing. Post-Trial Pursuant to Air Force policy, in Air Force courts-martial resulting in a conviction of

	the victim's perpetrator for an offense in which the victim is named, the victim has a right to provide a written victim impact statement for consideration by the convening authority. Procedures for notifying a victim of the opportunity to submit a victim impact statement are outlined in AFI 51-201, Administration of Military Justice, Section 9D as follows: 9.9. Post-Trial Submission of Victim Impact Statements. Immediately following trial, or as soon thereafter as practicable, the trial counsel or designee generates a letter to each victim, if any, notifying them about the accused's result of trial. The trial counsel or designee should personally serve this letter on the victim(s), or his or her Special Victims' Counsel if applicable, at the same time as the DD Form 2704, Victim/Witness Certification and Election Concerning Prisoner Status. The SJA of the wing where the court-martial occurred signs the letter. This letter invites the victim(s) to provide input, in the form of a written victim impact statement, to the convening authority's SJA, as to whether or not the convening authority should approve the findings and sentence or grant some form of clemency. The letter provides that the victim has 10 calendar days to submit a statement and states the time and date by which their statement must be received in order to be considered. It also advises that any statements will be provided to the accused and defense as part of the post-trial process and that the defense will have an opportunity to comment on it as a part of their post-trial submission to the convening authority. See Figure 9.2. Like the accused, a victim can request a one-time extension. 9.9.1. Eligible victims may consult with a legal assistance attorney or Special Victims' Counsel about the results of the court-martial and the post-trial process IAW AFI 51-504, Legal Assistance, Notary, and Preventive Law Programs. The trial counsel or designee may explain the post-trial process to victims IAW DD Form 2703, Post-Trial Information for Victims and Witnesses of Crime. 9.9.2. SJAs should generally not delay processing post-trial matters as a result of these statements. For example, they should not delay providing the SJAR and post-trial paperwork to the accused and defense counsel in order to try to locate a victim who is not readily available or who chooses to provide a statement after the time and date set forth in the letter from the SJA to the victim. This applies to victims of all crimes to include, but not limited to, sexual assault, larceny, etc. 9.10. Service of Victim Impact Statements. Serve the victim impact statements, if any, on the accused and defense counsel at the same time as the ROT. Generally, the victim impact statements should be provided as attachments to the SJAR. If an SJA decides to accept a victim impact statement that is received after the SJAR and ROT have been served on the accused and defense counsel, the SJA shall serve the victim impact statement on the accused and defense counsel at that time, re-starting the 10 days provided for the accused to respond. Figure 9.2. Sample Letter to Victim Regarding Victim Impact Statement Submission

Narrative responses have been consolidated by the Response Systems Panel (RSP). Please forgive formatting errors in text and data. Source documents for narrative responses can be obtained by contacting the RSP.

	[Letterhead] (Date) MEMORANDUM FOR (Grade and Name of Victim) FROM: (JA Office and Grade and Name of Base level SJA) SUBJECT: Submission of matters, United States v. (Grade and Name of accused) 1. On (Date of conviction), (Current grade and name of the accused) was convicted by (Type of Court-Martial) of (Insert charges and specifications). For these crimes, (he/she) was sentenced to (Sentence). The next step in the process is for the Convening Authority, (grade and name of Convening Authority), to decide whether to approve all or any portion of the findings and sentence. I am writing to let you know how you can provide input to (me) (the Convening Authority's Staff Judge Advocate (SJA)) for the Convening Authority's consideration. 2. Now that (current grade and name of the accused) has been found guilty, (his/her) case will be reviewed by the Convening Authority. (He/She) will determine whether to approve the findings and sentence. Before the Convening Authority takes action, (I) (the Convening Authority's SJA) will, pursuant to Rules for Courts-Martial (RCM) 1106, submit a recommendation to (him/her), with a copy to defense counsel. (I) (the Convening Authority's SJA) will review the record of trial and advise the Convening Authority on whether the court-martial was lawfully constituted and had jurisdiction over the accused and each offense, whether any errors were committed which materially prejudiced (his/her) substantial rights, whether there is enough evidence in the record to support each finding of guilty, and whether the adjudged sentence is lawful. Per RCM 1107, the Convening Authority can approve the sentence as adjudged, approve a lesser sentence, or disapprove the sentence entirely. The Convening Authority can also disapprove some or all of the findings of guilt. However, (he/she) cannot take any action that makes the verdict or sentence worse, i.e. (he/she) cannot add charges or more punishment. 3. You may submit a statement in writing to (me) (the Convening Authority's SJA) for consideration in advising the Convening Authority. The choice is entirely yours. This statement could describe the impact (Current grade and name of the accused)'s crime had on your life. You may also discuss whether you believe the Convening Authority should approve the findings and sentence or grant some form of clemency. However, this statement should not reference any crimes for which (Current grade and name of the accused) was not convicted of by the court-martial in order to avoid any prejudice to (his/her) post-trial rights. 4. If you want to submit a statement, please provide it to me no later than (time/date) at the following office or email address: (office address) (email address). Your signature is required on any statement submitted. [I will then provide your letter to the

	Convening Authority's SJA.] If you submit a statement, we will provide it, along with all of the relevant trial related documents, to (Current grade and name of the Accused) and (his/her) attorney. (Current grade and name of the accused) and (his/her) attorney will then have an opportunity to provide our office with anything they want the Convening Authority to consider when making (his/her) decision on whether to approve the findings and sentence. 5. (If eligible)You may also consult with (a legal assistance attorney) or (Special Victims' Counsel) on whether to submit a victim impact statement and the contents of such a statement IAW AFI 51-504, Legal Assistance, Notary, and Preventive Law Programs. _____ (NAME), (Grade), USAF Staff Judge Advocate 1st Ind, (Grade and Name of Victim) Date: MEMORANDUM FOR (JA Office and Grade and Name of Base level SJA) I understand that I may provide a statement to (the Convening Authority's Staff Judge Advocate (SJA)) for consideration in advising the Convening Authority on whether to approve all or any portion of the findings and sentence. (I am submitting the attached statement) (I do not intend to submit a statement) (Grade and Name of Victim) 2nd Ind, (JA Office and Grade and Name of Base level SJA) MEMORANDUM FOR (Grade and Name of Victim) ((Grade and Name of Victim) provided a statement) ((Grade and Name of Victim) did not provide a statement) (NAME), (Grade), USAF Staff Judge Advocate Clemency and Parole Consideration Victims have a right to make a statement to the Clemency and Parole Board on how the crime affected them. The statement may be on audio or video tape or in writing and sent to the Service Clemency and Parole Board. A personal appearance before the Board may also be permitted. Victims are informed of this right via DD Form 2703, Post-Trial Information for Victims and Witnesses of Crime. (Atch XX) In order to exercise this right a victim must fill out DD Form 2704, Victim/Witness Certification and Election Concerning Inmate Status, in order to be notified of the dates of any clemency and parole hearings. (Atch XX) The trial counsel or designee provides the victim with DD Forms 2703 and 2704 and explains to the victim their post-trial rights. The trial counsel or designee completes the DD Form 2704 and sends one copy to the

Narrative responses have been consolidated by the Response Systems Panel (RSP). Please forgive formatting errors in text and data. Source documents for narrative responses can be obtained by contacting the RSP.

	Central Repository, Headquarters Air Force Security Forces Center, one copy to the confinement facility where the accused is in post-trial confinement, and gives a redacted copy to the victim. AFI 51-201, paras. 7.18.3. and 7.18.4. AFI 31-205, The Air Force Corrections System, para. 10.6.14, provides that included in the disposition board case file that is forwarded to the Air Force Clemency & Parole Board is "A statement from the confinement/corrections facility's victim/witness coordinator that all individuals enrolled in the Victim/Witness Program were informed of the disposition board hearing by written notification, the date of the notification and whether or not victim impact statements were submitted. If victim impact statements were submitted, they shall be attached and included in the disposition board case file." AFI 31-205, para. 10.8.6, provides that the Air Force Clemency & Parole Board considers any written, audio, or video material sent by or on behalf of victims. AFI 51-201 http://static.e-publishing.af.mil/production/1/af_ja/publication/afi51-201/afi51-201.pdf AFI 31-205 http://static.e-publishing.af.mil/production/1/af_a4_7/publication/afi31-205/afi31-205.pdf
USN	Victims of sexual assault have the opportunity to provide input to NCIS, Trial Counsel, and the Convening Authority on a sexual assault case, via the Trial Counsel and newly established Victims' Legal Counsel, during all phases of investigation and disposition, including court- martial. The discussion accompanying Rule for Courts-Martial 306(b) provides that in making a disposition decision, the Convening Authority should consider – among other factors – "the views of the victim as to disposition." When desired by a victim, Victims' Legal Counsel (VLC) assist and facilitate communication with the Trial Counsel and other parties on behalf of the victim. During the pretrial phase, the victim is consulted on whether they wish to cooperate with the investigation and prosecution and their desires regarding preferral of charges, prosecution or administrative alternatives. Input is obtained from victims regarding any negotiated pleas and other pre-trial agreement terms. Sexual assault victims are also consulted on military protective orders and pretrial confinement regarding the alleged offender and whether confinement should continue, if ordered. Prior to dismissal of any and all charges, victims are contacted, informed and given the opportunity to provide input to the convening authority. Article 32 The most serious sexual assault cases are litigated at a general court-martial preceded by an Article 32 Hearing. An Article 32 hearing is the preliminary investigation into the charges to determine if reasonable grounds exist to believe the accused committed the crimes charged. Victims' Legal Counsel assist victims in understanding how an Article 32 is conducted and informs them of possible questions. A victim is sometimes called as a witness at an Article 32 hearing. A civilian victim cannot be compelled to testify at an Article 32 hearing. When requested to testify, a civilian

	victim can choose whether or not to do so. A victim has a right to be heard before any evidence is offered concerning the victim's prior sexual behavior or sexual predisposition is admitted into evidence both at the Article 32 hearing and at trial. Mil. R. Evid. 412(c)(2). The victim may be heard through counsel. LRM v. Kastenberg, 72 M.J. 364 (C.A.A.F. 2013). A victim has similar protections with regard to disclosure of confidential statements to a psychotherapist made for the purpose of facilitating diagnosis or treatment of the victim's mental or emotional condition or confidential statements to a victim advocate. Mil. R. Evid. 513(e)(2); Mil. R. Evid. 514(e)(2). VLC may work alongside the trial counsel in preparing the victim for an Article 32 hearing, including testifying if required. Court-Martial Victims of sexual assault are often called by the prosecution to testify during the merits of a court-martial as to the facts of the assault. This is the victim's opportunity to testify as to what happened. Victims' Legal Counsel work in coordination with the trial counsel to ensure the victim understands the process, the different roles of the participants in the court-martial proceeding, likely questions to be asked and provides other advice to the victim before testifying. Sentencing During sentencing, the victim may testify regarding impact of the offense. This testimony may include emotional, physical and financial effects. If the allegations result in a plea of guilty, the victim may not be called to testify in person but, as part of a pre-trial agreement, may provide a sworn statement or the parties may enter into stipulations of fact of expected testimony which can be submitted as part of the government's case in sentencing. Additionally, the victim can make a post-trial submission to the convening authority. DoD Directive 1030.1 expressly authorizes the Convening Authority to "consider victim statements on the impact of crime." DoD Directive 1030.1, ¶ 4.5 (Apr. 13, 2004). VLC can assist victims of sexual assault in drafting their statements. Clemency and Parole Board Military inmates are eligible for clemency and are also eligible for parole consideration after they have completed one third of their confinement, and every year thereafter. Sexual assault victims may make a statement to the Clemency and Parole Board regarding how the crime affected them. The statement may be on audio or video tape or in writing. VLC are available to assist sexual assault victims in preparing their statements to the Clemency and Parole Board regardless of the format elected by the victim.
USMC	Pursuant to MCO 5800.14 (Victim Witness Assistance Program), prior to trial, the victim has the right to consult with the trial counsel about his or her case. Additionally, MCO 5800.14 requires the trial counsel to consult with the victim about the victim's need for reasonable protection from the accused and about any disposition decision by the convening authority. The victim must also be notified about any public proceedings involving the case, whether they are administrative or judicial. If the defense files any motions to obtain or use during the court-martial any

	protected information related to the victim pursuant to Military Rules of Evidence 412 (prior sexual acts or disposition), 513 (communications with a psychotherapist), or 514 (communications with a victim advocate), the victim has a right to be heard through counsel on the motion. Finally, if any of the victim's records or belongings are subject to subpoena, the victim has the right to be heard on a motion to quash the subpoena pursuant to Rule for Court-Martial 703(f)(4)(C). On the merits, the victim always has the opportunity to testify regarding the offenses at issue and may be heard on any issues that arise regarding Military Rules of Evidence 412, 513, or 514. During sentencing, if the accused is convicted of any offenses involving the victim, the victim has the opportunity to be heard on the financial, social, psychological, and medical impact that the accused's offense had upon the victim pursuant to Rule for Court-Martial 1001(b)(4). Finally, after the trial, the victim has the right to be reasonably heard at any public proceeding involving the release, plea, or parole of the accused pursuant to MCO 5800.14 and to obtain a copy of the record of trial pursuant to Article 54(e) UCMJ. Whenever a sexual assault victim wishes to exercise the right to be heard as identified above, they can now be assisted by a Victims Legal Counsel (VLC). See Question 4 in the USMC RFI submission of November 5, 2013 for a detailed explanation of the Marine Corps' Victims Legal Counsel Office (VLCO).
USCG	If the victim has made an unrestricted report, it is likely the victim is participating in a court-martial process as a witness. If an Article 32 is held, the victim-witness is critical to the pretrial investigation. However, a civilian victim cannot be compelled to testify at an Article 32 hearing, so when requested to do so, a civilian victim can choose whether to testify at an Article 32 investigation. Pretrial investigations are governed by R.C.M. 405, which states in pertinent part that military rules of evidence 301, 302, 303, 305, 412 and section V apply to pretrial investigations. At a court-martial, the victim-witness will also have the opportunity to testify and participate in the process to determine admissibility of M.R.E. 412 evidence. If there is an intention to submit 412 evidence, the military judge must conduct a closed hearing and may call the victim-witness who must be afforded a reasonable opportunity to attend and be heard, either personally or through their Special Victim's Counsel. A victim-witness may also participate at sentencing if called to testify by the prosecution, the defense, and/or the fact finder. Pursuant to R.C.M. 1001(e) witnesses may testify during presentence proceedings subject to the discretion of the military judge and subject to the limitations in 1001(e)(2). Finally, a victim-witness might participate in a post-trial proceeding to correct an error, omission or improper or inconsistent action by the court-martial. If a witness were to have information appropriate for post-trial sessions per R.C.M. 1102, the military judge could give the witness an opportunity to be heard. A 39(a) Session may be called upon a motion by counsel or the military judge to inquire into matters that arise after trial that substantially affect the legal sufficiency of the findings of guilty.

AF Q4
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DEPARTMENT OF THE AIR FORCE
HEADQUARTERS UNITED STATES AIR FORCE
WASHINGTON DC 20330

AFI51-504_AFGM1
24 January 2013

MEMORANDUM FOR DISTRIBUTION C
MAJCOMs/FOAs/DRUs

FROM: AF/JA

SUBJECT: Air Force Guidance Memorandum to AFI 51-504, *Legal Assistance, Notary, and Preventive Law Programs*

RELEASABILITY: There are no releasability restrictions on this publication.

By Order of the Secretary of the Air Force, this AF Guidance Memorandum (AFGM) immediately changes AFI 51-504, *Legal Assistance, Notary, and Preventive Law Programs* (dated 27 October 2003). Compliance with this Memorandum is mandatory. To the extent its directions are inconsistent with other Air Force publications, the information herein prevails, in accordance with AFI 33-360, *Publications and Forms Management*.

In advance of a rewrite of AFI 51-504, the Attachment to this Memorandum is updated to provide new guidance for implementation of the Special Victim's Counsel (SVC) Program that is effective immediately. This publication does not apply to Air Force Reserve Command (AFRC) Units. An asterisk (*) indicates newly revised material.

Ensure all records created as a result of processes prescribed in this Memorandum are maintained in accordance with AF Manual (AFMAN) 33-363, *Management of Records*, and disposed of in accordance with the Air Force Records Disposition Schedule (RDS) located at https://afrims.amc.af.mil/.

This Memorandum becomes void after 180 days have elapsed from the date of this Memorandum, or upon incorporation by interim change to, or rewrite of AFI 51-504, whichever is earlier.

RICHARD C. HARDING
Lieutenant General, USAF
The Judge Advocate General

ATTACHMENT
Guidance Changes

The below changes to AFI 51-504, dated 27 October 2003, are effective immediately.

1.2.1. Official matters in which the Air Force has an interest or is involved in the final resolution, unless acting as a SVC.

1.2.2. Criminal law issues under the UCMJ or any local state or federal criminal law, unless acting as a SVC.

1.2.9. Representation of the client in a court-martial or administrative proceeding, unless acting as a SVC.

(Added) 1.3.13. Eligibility for appointment of SVC.

(Added) 1.3.13.1. All Air Force Active Duty, Air Force Reserve, and Air National Guard victims, who are in Title 10 status at the time of the offense, and report they are a victim of a sexual assault under the UCMJ (as defined in the Special Victims' Counsel Rules of Practice and Procedure) or state and federal laws criminalizing sexual assault.

(Added) 1.3.13.2. All adult dependents of Active Duty Air Force members who report that they are a victim of sexual assault under the UCMJ, when an Air Force commander may exercise jurisdiction over the alleged offender. For purposes of eligibility for appointment of SVC, the non-spouse dependents, as defined in AFI 36-3026, Identification Cards for Members of the Uniformed Service, their Eligible Family Members, and Other Eligible Personnel, must be unmarried between the ages of 18 and 20, a full-time student between the ages of 18 and 22, or an incapacitated child over the age of 21.

(Added) 1.3.13.3. All Army, Navy, Marine Corps and Coast Guard Active Duty, Reserve, and National Guard victims, who are in a Title 10 status at the time of the offense and file an unrestricted report that they are the victim of sexual assault under the UCMJ are eligible for SVC when an Air Force commander may exercise jurisdiction over the alleged offender.

(Added) 1.3.13.4. All adult dependents of Active Duty members of other Services who file an unrestricted report that they are the victim of sexual assault under the UCMJ when an Air Force commander may exercise jurisdiction over the alleged offender.

(Added) 1.3.13.5. All remaining categories of adult individuals eligible for legal assistance under paragraph 1.3 who file an unrestricted report that they are the victim of sexual assault under the UCMJ and the Air Force may exercise jurisdiction over the alleged offender.

(Added) 1.3.13.6. All entry-level status Air Force Active Duty, Air Force Reserve, and Air National Guard members who are alleged to have been involved in an unprofessional

relationship, as defined by AETC policy, that involves physical contact of a sexual nature with basic military training or technical training faculty or staff.

(Added) 1.3.13.7. Clients appointed SVC under this provision remain eligible for assistance under this provision even if they would otherwise lose their eligibility for legal assistance under the provisions of paragraphs 1.3.1 through 1.3.11. However, assistance in these circumstances is limited to matters directly related to the alleged sexual assault. Such assistance will terminate when case disposition is complete, when the client releases the SVC, or as otherwise limited in the Representation Letter signed by the client and the SVC at the time representation commenced. For courts-martial, case disposition is considered complete at action or earlier termination of charges.

1.9.2. Except as provided herein, do not keep formal files on legal assistance clients. Return original documents to clients as soon as possible.

(Added) 1.9.2.1. SVC may maintain client files necessary to effect the representation of clients under the SVC Program.

BY ORDER OF THE
SECRETARY OF THE AIR FORCE

AIR FORCE INSTRUCTION 51-504

27 OCTOBER 2003
Incorporating Through Change 3, 24 May 2012

Law

LEGAL ASSISTANCE, NOTARY, AND PREVENTIVE LAW PROGRAMS

COMPLIANCE WITH THIS PUBLICATION IS MANDATORY

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(Lt Col Timothy Alan Guiden)

Certified by: AFLSA/JAC
(Col Evan L. Haberman)

Pages: 37

Supersedes: AFI 51-504, 1 May 1996.

This instruction implements AFPD 51-5, *Military Legal Affairs*, and DoDD 1350.4, *Legal Assistance Matters*, April 2001. It describes the Air Force legal assistance, notary, and preventive law programs. It implements 10 U.S.C. 1044, which authorizes legal assistance as resources permit; 10 U.S.C. 1044a, which authorizes certain military personnel to act as notaries public and identifies the eligible beneficiaries for military notary services; 10 U.S.C. 1044b, which establishes the legal effect of military powers of attorney without regard to state law, exempting them from any requirement as to form, substance, formality, or recording; 10 U.S.C. 1044c, which establishes the legal effect of military advance medical directives, exempting them from any requirement as to form, substance, formality, or recording; and 10 U.S.C. 1044d, which defines the requirements for preparation of military testamentary instruments and establishes their legal effect, exempting them from any requirement as to form, formality, or recording.

SUMMARY OF CHANGES

This interim change removes the reference to rescinded Department of Defense guidance on providing legal assistance to contractor personnel, incorporates congressional authorization for providing legal assistance to agents of service members who die on active duty or as a result of an injury incurred while on active duty, incorporates Department of Defense guidance regarding legal assistance for family care planning, clarifies the responsibility to provide legal assistance to victims of crime, provides guidance on the use of the Air Force Legal Assistance Website, and removes the minimum enlisted grade requirement for a paralegal to act as a notary.

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Chapter 1

LEGAL ASSISTANCE PROGRAM

1.1. Purpose. Legal offices provide legal assistance in connection with personal civil legal matters to support and sustain command effectiveness and readiness. Under 10 U.S.C. §1044, the ability to offer legal assistance and legal services to the eligible categories of personnel is contingent upon the availability of legal staff resources and expertise. Although legal assistance is not separately funded, it has been provided for members of the armed forces since 1943 and is now perceived as one of the benefits of military service. Therefore, Staff Judge Advocates (SJAs) should make every effort to satisfy legal assistance needs, assigning mobilization- and deployment-related legal assistance the highest priority. Mobilization- and deployment-related legal assistance is not determined by the subject matter of legal assistance provided, but by the relationship between Command readiness and solving the member's specific legal issue(s). For example, although wills and powers of attorney are generally associated with pre-deployment legal assistance, a landlord-tenant issue is also mobilization- and deployment-related if it would have an adverse effect on the member's ability to perform his or her duties if not solved prior to deployment.

1.2. Scope. Legal assistance establishes an attorney-client relationship and consists of Air Force attorneys providing advice on personal, civil legal matters to eligible beneficiaries. For any other legal concern, the Air Force remains the client. On such other matters, do not provide advice to, or enter into an attorney-client relationship with, individuals or entities. Air Force attorneys, acting in an official capacity, may not enter into an attorney-client relationship in the following areas:

1.2.1. Official matters in which the Air Force has an interest or is involved in the final resolution.

1.2.2. Criminal issues under the *Uniform Code of Military Justice (UCMJ),* or any local, state or federal criminal law.

1.2.3. Standards of ethical conduct issues.

1.2.4. Law of Armed Conflict (LOAC) issues.

1.2.5. Issues involving personal commercial enterprises (unless such advice is related to the Soldiers' and Sailors' Civil Relief Act [SSCRA]).

1.2.6. Legal issues or concerns raised on behalf of third parties, even if the third party is eligible for legal assistance.

1.2.7. Drafting or reviewing real estate sale or closing documents, separation agreements or divorce decrees, and inter vivos (living) trusts. This limitation does not preclude a general review to identify potential problems for which the client may require more expert assistance or to protect a client from signing an unconscionable agreement. If the SJA determines that an attorney in the office, whether active duty or reservist, has the expertise to draft or review and edit these documents, then the SJA may authorize that attorney to do so.

1.2.8. Private organizations (e.g., spouses clubs and squadron booster clubs) that have been chartered by appropriate authority to function on Air Force installations. Although prohibited

from entering into an attorney-client relationship with private organizations, under the auspices of the Civil Law program Air Force attorneys may provide legal guidance and advice through the base private organizations monitor to ensure private organizations are properly chartered and comply with pertinent statutes and regulations.

1.2.9. Representation of the client in a court or administrative proceeding.

1.3. Eligibility for Legal Assistance. Among the eligible beneficiaries outlined in the subparagraphs immediately following, the highest priority shall be given to Air Force personnel who need mobilization- or deployment-related legal assistance that facilitates Command readiness. Assigning this priority is especially important when the deployment is on short notice. The following categories of personnel are eligible for legal assistance subject to the availability of legal staff resources and expertise.

1.3.1. Members of the armed forces who are on active duty, including reservists, National Guard members, and contract ROTC cadets on federal active duty under Title 10, United States Code.

1.3.1.1. Air Reserve Component members performing Active Guard/Reserve (AGR) tours, including those under 10 USC § 10211, 10 USC § 12310 or 32 USC § 502(f), are eligible for legal assistance.

1.3.2. Members entitled to retired or retainer pay or equivalent pay and former members of reserve components entitled to retired pay under 10 U.S.C. §12731 (formerly 10 U.S.C. §1331). Persons eligible under this provision include members and former members receiving retired pay as a result of retirement due to permanent disability or placement on the temporary disability retired list.

1.3.3. Officers of the commissioned corps of the Public Health Service who are on active duty or entitled to retired or equivalent pay.

1.3.4. Members of reserve components not covered in paragraph **1.3.1** and **1.3.2** following release from active duty under a call or order to active duty for more than 30 days issued under mobilization authority (as determined by the Secretary of Defense). Eligibility for such legal assistance shall begin on the date of the release and continue for a period of time equal to twice the length of the period served on active duty under that call or order to active duty. SJAs may require reservists and National Guard members to present a copy of the pertinent orders at the legal office to verify eligibility for legal assistance under this provision.

1.3.5. Dependents of members and former members listed in **1.3.1**, **1.3.2**, **1.3.3**, and **1.3.4**, who are entitled to an identification card.

1.3.6. Civilian employees deploying to or in a theater of operations are furnished the opportunity and assistance to prepare and execute wills and any necessary powers of attorney, in accordance with DoDI 1400.32, *DoD Civilian Work Force Contingency and Emergency Planning Guidelines and Procedures*.

1.3.7. Civilian contractor personnel who are deploying to or in a theater of operations, and produce documentation of the contract that requires the government to give the contractor employees legal assistance, may be provided with limited legal assistance for wills and deployment related powers of attorney.

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1.3.8. Inactive Reservists or National Guard Members. For members of the reserve components subject to federal mobilization (National Guard, Ready Reserves, contract ROTC cadets) in an inactive status, provide mobilization- and deployment-related legal assistance. Subject areas include wills, advance medical directives, powers of attorney, protections and responsibilities under the Soldiers' and Sailors' Civil Relief Act and Uniformed Services Employment and Reemployment Rights Act, and notary services. This list is not exhaustive. SJAs retain discretion to determine whether the circumstances of a reserve component member warrant the provision of legal assistance to ensure readiness for mobilization and deployment. Provide no other legal assistance to members of the reserve components until the member is on federal active duty under Title 10, United States Code, and for the period of time after release from active duty noted in paragraph **1.3.4**. Dependents of reserve component personnel are not authorized legal assistance except during the time the reserve component member is on federal active duty under Title 10, United States Code, or for the period of time after release from active duty noted in paragraph **1.3.1.4**.

1.3.9. Civilian employees of the Department of Defense and the military departments assigned outside the United States and its territories and their dependents residing with them.

1.3.10. Foreign military personnel, and their dependents, assigned to the United States either permanently or temporarily under official orders for purposes of combined missions with United States personnel and for training in programs sponsored by the United States. This assistance does not extend to foreign military personnel present in the United States solely to carry out another nation's unilateral mission, such as use of ranges on a United States installation to test the foreign nation's weapons system without the participation of United States personnel in the training.

1.3.10.1. Assistance provided under this section should be limited in scope to matters involving the interpretation or application of United States domestic law only. Such matters involve issues pertinent to a person's relocation and requirement to be present in the United States to carry out official duties. Examples include but are not limited to landlord-tenant, consumer affairs, driver's licenses, customs, tax relief, and similar assistance. Assistance should not be provided for matters implicating the laws of the sending state, such as wills and domestic relations, nor should any legal assistance be provided on matters that would impact the person's status in the United States.

1.3.11. Unique Situations. When it benefits the command, SJAs may authorize legal assistance to persons not specifically identified above as an eligible beneficiary. These situations must involve people who have a present, past and future military obligation relevant to the legal problem. Examples are reservists or National Guard members who have demobilized; Reserve Office Training Corps Cadets who must meet dependent care responsibilities; and next-of-kin of someone killed on active duty.

1.3.12. Provide legal assistance, including tax assistance, on an expedited, prioritized basis to the executor, personal representative, administrator, or legally recognized estate representative for 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. When uncertainty exists about the status of those listed in this paragraph, or when otherwise appropriate, legal assistance shall be provided to the primary next-of-kin to the same degree as noted in this paragraph.

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1.4. Legal Services Provided. Legal assistance may be provided for personal civil legal matters subject to the availability of legal staff resources and expertise. The subparagraphs in this section provide guidance and context for personal civil legal matters commonly encountered in the legal assistance program. They are not intended as an exhaustive list of the subject matter on which clients may receive legal assistance.

1.4.1. Wills. Wills distribute the property of the testator/testatrix after death. All Commanding Officers shall urge military personnel to seek legal counsel to assess their need for a will before mobilization, deployment, or similar activities. However, any testamentary instrument, to be legally effective, must be the free and voluntary act of the person making it.

1.4.1.1. The basic will is the primary document attorneys in the Office of the Judge Advocate General (OTJAG) will prepare for legal assistance clients. This document effectively serves the needs of the vast majority of our clients, including the following: statement of residency; payment of final expenses of the estate; specific and residuary bequests with contingent beneficiaries; distributions to minors and appointment of guardians of minors; and appointment of executor/executrix and alternates. Additionally, the basic will contains the simplest of trusts, allowing assets intended for a minor beneficiary to be passed in trust to a trustee named in the will, who generally serves at no cost to the estate or the minor's assets. If the basic wills legal assistance attorneys provide do not contain these simple trust provisions, state probate courts will appoint trustees to act on behalf of minor beneficiaries at a cost to the estate. The will-drafting program employed by legal offices must be able to prepare these simple testamentary trusts. When used properly, the *DL Wills* program will include the required provisions in the will.

1.4.1.2. Every will shall be prepared and executed as a military testamentary instrument. In accordance with 10 U.S.C. 1044d and DoDD 1350.4, *Legal Assistance Matters* (April 2001), a military testamentary instrument shall:

1.4.1.2.1. Be executed by the testator/testatrix (or, if the testator/testatrix is unable to execute the instrument personally, executed in the presence of, by the direction of, and on behalf of the testator/testatrix).

1.4.1.2.2. Be executed in the presence of a military legal assistance counsel as presiding attorney.

1.4.1.2.3. Be executed in the presence of at least two disinterested witnesses (in addition to the presiding attorney), each of whom attests to witnessing the testator's/testatrix's execution of the instrument by signing it.

1.4.1.2.4. Include a statement of preamble in form and content, substantially similar to the following:

"This is a MILITARY TESTAMENTARY INSTRUMENT prepared pursuant to section 1044d of Title 10, United States Code, and executed by a person authorized to receive legal assistance from the Military Services. Federal law exempts this document from any requirement of form, formality, or recording that is provided for testamentary instruments under the laws of a State, the District of Columbia, or a commonwealth, territory, or possession of the United States. Federal law specifies that this document shall receive the same legal effect as a testamentary instrument prepared and executed in accordance with the laws of the State in which it is

presented for probate. It shall remain valid unless and until the testator/testatrix revokes it."

Programs such as *DL Wills* may produce preambles for wills substantially similar to the above. In the event the will preparation program used by the legal office does not include an acceptable preamble, insert a verbatim copy of this preamble at the top of the first-page of each will prepared.

1.4.1.2.5. Include a self-proving affidavit. A self-proving affidavit is a notarized, written declaration signed by each witness and the testator/testatrix that attests to the circumstances under which the will was executed. Include (or have attached to the will), a self-proving affidavit, in form and content, substantially similar to the following:

"We, the testator/testatrix and the witnesses, whose names are signed to the attached or foregoing instrument, being first duly sworn, do hereby declare to the undersigned authority that in the presence of a military legal assistance counsel and the witnesses the testator/testatrix signed and executed the instrument as the [testator's/testatrix's] military testamentary instrument and that [he][she] had signed willingly (or willingly directed another to sign for [him][her]), and that [he][she] executed it as [his][her] free and voluntary act for purposes therein expressed. It is further declared that each of the witnesses, in the presence and hearing of the testator/testatrix and a military legal assistance counsel, signed the military testamentary instrument as witness and that to the best of [his][her] knowledge the testator/testatrix was at that time eighteen years of age or older or emancipated, of sound mind, and under no constraint or undue influence."

Programs such as *DL Wills* may produce self-proving affidavits substantially similar to the above. Self-proving affidavits that address all the basic elements of the above affidavit in a different order or that use different wording for some elements are considered substantially similar to the above. If the program used does not produce substantially similar language, use the above language verbatim to prepare the self-proving affidavit for each execution.

1.4.1.3. Will questionnaires or worksheets should be used to record basic information as to domicile, family situation, designation of guardians and personal representatives, the nature and approximate value of assets owned so as to establish federal estate tax thresholds, and the testator's/testatrix's intentions for disposition of property and other assets. The questionnaire should be the starting point for the individual interview with the client. See the AFLSA/JACA website at **https://aflsa.jag.af.mil/GROUPS/AIR_FORCE/JAC/jaca/index.html** for sample will questionnaires.

1.4.1.4. Due to the potential for conflicts of interest during the representation, legal assistance attorneys should consider using a dual representation letter when providing advice on and drafting wills and related documents for married couples. The letter accomplishes a number of key objectives in the dual representation situation. It informs the married couple of the scope of matters that will be covered in the representation. It also alerts the married couple that information received from either client during the representation of both shall not be confidential between them. Finally, the dual

representation letter advises the married couple that the attorney may withdraw from representation of either client and advise both to obtain individual representation in the event of a conflict of interest between them. If dual representation letters are used, legal offices should retain them in a file dedicated to that purpose for a period of at least 1 year from the date the clients endorse the letter. A sample dual representation letter is at **Attachment 2** to this instruction.

1.4.1.5. Will executions. The signing of the will and self-proving affidavit represents one of the most significant legal events a client will undertake. Conduct the execution ceremony with the dignity appropriate to the significance of these documents to the client and his or her family. To assist offices in this process, **Attachment 3** to this instruction provides a Standard Operating Procedure for use in the execution of wills as military testamentary instruments. The procedure outlines the requirements for the execution ceremony and the questions to be asked of the testator/testatrix and witnesses. Documents signed following the will execution, such as advance medical directives and powers of attorney, will be completed in accordance with their particular requirements.

1.4.1.5.1. Mass will executions involving large numbers of people exceed the presiding attorney's and witness' reasonable capacity to control the proceeding. These mass actions thus render a will susceptible to a challenge and therefore are strongly discouraged. However, separate execution ceremonies for each individual or couple are not required. Multiple persons may execute their wills simultaneously before the presiding attorney and the required two witnesses, provided the group is not so large as to exceed the ability of the attorney and witnesses to engage with the clients to ensure they understand and properly complete the execution procedures and to respond to any questions regarding the execution process. SJAs and their staffs exercise their discretion, governed by reasonableness and maintaining customer service standards and the dignity of the process, in determining the number of document executions to conduct simultaneously. Persons with questions about the content of their wills and related documents should be excused from the room where the execution is taking place to ensure confidentiality.

1.4.1.6. If clients have sophisticated estate planning problems or complex financial situations that exceed the professional capabilities of a legal office, then refer them to other attorneys (paragraph **1.7**).

1.4.2. Advance Medical Directives. Advance medical directives include living wills and medical powers of attorney. A living will states a person's desires regarding the termination of life support in the event of a terminal, incurable medical condition. A client uses a medical power of attorney to appoint a trusted person to make medical care decisions in the event of incompetence or inability to communicate decisions or desires. Although drafting programs such as *DL Wills* produce both living wills and medical powers of attorney, the legal assistance attorney remains responsible for reviewing these documents to ensure they effect the client's intent and are consistent with each other or otherwise create confusion about the client's desires.

1.4.2.1. Advance medical directives shall be prepared in accordance with DoDD 1350.4 and must include a statement or preamble, in form or content, substantially similar to the following:

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"This is a military advance medical directive prepared pursuant to section 1044c of Title 10, United States Code. It was prepared by an attorney authorized to provide legal assistance for an individual eligible to receive legal assistance under section 1044 of Title 10, United States Code. Federal law exempts this advance medical directive from any requirement of form, substance, formality, or recording that is provided for advance medical directives under the law of a State. Federal law specifies that this advance medical directive shall be given the same legal effect as an advance medical directive prepared and executed in accordance with the laws of the State concerned."

Programs such as *DL Wills* may produce preambles for military advance medical directives substantially similar to the above. If the program used does not, insert a verbatim copy of this preamble at the top of the first-page of each advance medical directive prepared. Also, check to ensure that preambles of living wills and powers of attorney to make health care decisions cite section 1044c, and not section 1044b of Title 10, United States Code. The latter provision applies not to advance medical directives but to powers of attorney generally.

1.4.3. Powers of Attorney. Section 1044b of Title 10, United States Code, requires recognition of general and special powers of attorney prepared for persons eligible for legal assistance. Although *DL Wills* produces general powers of attorney and WebLIONS produces general and special powers of attorney, the legal assistance attorney remains responsible for reviewing the documents produced by these programs to ensure they are accurate and effect the client's intent.

1.4.3.1. Powers of attorney shall be prepared in accordance with DoDD 1350.4, and must include a statement or preamble, in form and content, substantially similar to the following:

"This is a military Power of Attorney prepared pursuant to section 1044b of Title 10, United States Code, and executed by a person authorized to receive legal assistance from the Military Services. Federal law exempts this power of attorney from any requirement of form, substance, formality, or recording that is prescribed for powers of attorney by the laws of a State, the District of Columbia, or a commonwealth, territory, or possession of the United States. Federal law specifies that this power of attorney shall be given the same legal effect as a power of attorney prepared and executed in accordance with the laws of the jurisdiction where it is presented."

Programs and forms such as *DL Wills*; Air Force *WebLIONS*; AF Form 165, *General Power of Attorney*; and AF Form 831, *Special Power of Attorney* may produce preambles for military general or special powers of attorney substantially similar to the above. If the program used to prepare powers of attorney does not, insert a verbatim copy of the preamble set forth immediately above at the top of the first-page of each power of attorney prepared.

1.4.3.2. The Soldiers' and Sailors' Civil Relief Act (SSCRA) at 50 U.S.C. App. §591 mandates all powers of attorney for military personnel categorized as prisoners of war or missing-in-action are deemed durable for the entire period of such status.

1.4.4. Notary Services. Notary services are authorized by 10 U.S.C. §1044a, and are discussed in **Chapter 2**.

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1.4.5. Dependent Care Issues. All Air Force members with families must have family care arrangements that reasonably cover all situations, both short- and long-term, in accordance with AFI 36-2908, *Family Care Plans*. Legal assistance is provided to assist members in making adequate family care arrangements. Legal assistance attorneys advise and assist clients in the drafting and execution of documents and with other preparations necessary for the effective transfer of care and custody of dependents in the event the family care plan must be executed.

1.4.5.1. Legal assistance attorneys shall, when appropriate, provide a full explanation of the potential consequences of not including the non-custodial biological or adoptive parent in the creation of a family care plan.

1.4.5.2. Legal assistance attorneys shall, when appropriate, discuss with the client the benefits of validating, with an appropriate court, temporary custody arrangements and the return of the child to the member upon the member's return.

1.4.6. Adoption. Legal assistance attorneys research and provide general information on state adoption laws and requirements, coordinate when appropriate with the relevant state adoption agency, and advise on questions derived from adoption documents. Attorneys, paralegals, and civilian notaries provide notarization services to assist members in the completion of adoption documents. Legal assistance attorneys also advise on the DoD's adoption reimbursement program. Under 10 U.S.C. §1052, the DoD may reimburse "qualifying adoption expenses" incurred by a service member in the adoption of a child under 18 years of age. The statute identifies the expenses that qualify for reimbursement and distinguishes those expenses the program does not cover. DoDD 1341.9, *DoD Adoption Reimbursement Policy* (July 1993), implements the statute and addresses qualifying adoptions, qualifying expenses, eligible members, and procedures for requesting reimbursements. Reimbursement is authorized up to $2,000 per child with a maximum reimbursement to one service member or military couple not exceeding $5,000 in any calendar year. Expenses either not qualifying for reimbursement under the DoD program or exceeding the program's reimbursement ceiling may be eligible for the adoption expenses tax credit when the member files his or her federal income tax return. Expenses reimbursed under the DoD Adoption Reimbursement program do not qualify for the adoption expenses tax credit and are not to be considered in its calculation.

1.4.7. Financial Responsibility. Air Force members, retirees, and their dependents may receive advice and assistance on personal financial responsibilities under AFI 36-2906, *Personal Financial Responsibility*, such as adequate financial support to family members and responding to allegations of paternity. Additionally, legal offices provide assistance on issues of financial responsibility under federal and state laws, including involuntary allotments/garnishments to satisfy civil debts and the Uniformed Services Former Spouses" Protection Act (see 10 U.S.C. §1408).

1.4.8. Domestic Relations. Subject to the limitations stated in paragraph **1.2.7** with respect to separation agreements and divorce decrees, legal assistance attorneys research applicable state laws and provide advice on marriage, dissolution of marriage or divorce, child support, child custody, property distribution, and related family law matters.

1.4.9. Soldiers' and Sailors' Civil Relief Act (SSCRA). The SSCRA, 50 U.S.C. App. §§501–593, codifies Congressional recognition of the need to protect persons in military service by

suspending the enforcement of certain civil obligations. For protection under most SSCRA provisions, service members must demonstrate: 1) a financial obligation initiated prior to entering active federal service and that service materially affects the service member's ability to meet the obligation; or 2) active federal service materially affects the service member's ability to participate and preserve rights in civil judicial proceedings, mortgage foreclosures, or lease evictions. Some categories of protection include: maximum interest rates of 6% (excluding student loans); stays of judicial proceedings and reopening default judgments; limitations on the enforcement of mortgage foreclosures, installment contracts (excluding automobile leases unless otherwise provided for in the lease--legal assistance attorneys should use §590 of the SSCRA to support a member's effort to terminate an automobile lease entered prior to active duty where military service materially affects the member's ability to continue payments or otherwise honor the terms of the lease), rents, and liens; continuation of commercial life insurance policies; and reinstatement of commercial health insurance policies upon release from active duty. The SSCRA at 50 U.S.C. App. §591 mandates all powers of attorney for military personnel categorized as prisoners of war or missing-in-action are deemed durable for the entire period of such status. Army Publication 260, *Soldiers' and Sailors' Civil Relief Act Guide*, provides detailed guidance on SSCRA issues.

1.4.9.1. Legal assistance attorneys and paralegals may not file requests for stays of proceedings under the SSCRA with a civil court. Nor may legal assistance attorneys and paralegals send letters under their own signatures to a court requesting a stay of civil proceedings. These types of civil filings are outside the scope of the legal assistance program and may, if improperly handled in SSCRA cases, subject the member to the jurisdiction of the court or otherwise adversely affect the member's rights and options in the case. Legal assistance attorneys may draft or assist in drafting correspondence for the client's or relevant Commander's signature requesting or supporting a request for stay of civil proceedings.

1.4.10. Veterans' Reemployment Rights. Sections 4301 through 4333, Title 38, United States Code, the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) and comparable state statutes afford eligible active and reserve component members the right to return to civilian jobs when they are released from active duty. Legal assistance attorneys advise service members on USERRA eligibility, their obligations to provide appropriate notice to their employers, and their reemployment rights and benefit entitlements under USERRA.

1.4.10.1. Legal assistance attorneys should not contact service members' employers concerning relief under USERRA. This action could cause the service member to forfeit assistance from the Department of Labor's Veterans' Employment and Training Service (VETS), the federal agency responsible for enforcement of USERRA. Instead, legal assistance attorneys should refer service members experiencing employment problems or concerns deriving from their military service to the Ombudsmen Services in the National Committee for Employer Support of the Guard and Reserve (ESGR), a DoD entity, and the VETS for pursuit of relief under USERRA. Legal assistance attorneys may assist service members in preparing DOL Form VETS-1010, *Eligibility Data Form: Veterans' Reemployment Rights Program*, to open a file with VETS. Access information on ESGR assistance at **http://www.esgr.org/** and the VETS at **http://www.dol.gov/vets/welcome.html**.

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1.4.11. Casualty Affairs. Legal offices assist Casualty Assistance Representatives in providing casualty assistance to the primary next of kin of military members and retirees, in accordance with AFI 36-2002, *Casualty Services.* Casualty Assistance Representatives are responsible for counseling family members and other beneficiaries regarding rights, helping to file applications for benefits and privileges, and resolving problems and complaints. Legal assistance attorneys may provide dependents only preliminary advice on probate and settlement of estates, court appearances, preparation of inheritance tax returns, civil employment, and business matters. Since direct assistance to resolve these matters falls outside the scope of the legal assistance program, it may be necessary to refer dependents to civilian attorneys (see paragraph **1.7**).

1.4.12. Landlord-Tenant. Legal assistance practitioners review lease agreements prior to signing and propose changes to best protect the service member's interest as either tenant or landlord, especially with respect to military clauses allowing for early termination on a tenant's receipt of permanent change of station orders or reentry of a military landlord on receipt of orders to return to the property's location. Of note, ownership and renting of property as a commercial enterprise exceeds the scope of the legal assistance program, as per paragraph **1.2.5** of this instruction. Legal assistance practitioners review the particular facts and circumstances of each military landlord's situation in making this determination. Clients may also receive advice and assistance in resolving landlord/tenant disputes. Areas of particular concern include security deposits, pre- and post-lease inspections, lease terms, condition of premises, and early termination of leases.

1.4.13. Consumer Affairs. Legal assistance attorneys provide counseling on a wide range of consumer issues such as bankruptcy, consumer fraud, identity theft, retail purchases, and vehicle leases. An exceptional tool in assisting clients in this area is the Military Sentinel web site, a joint operation by the DoD and Federal Trade Commission (FTC). This site allows service members and their families to file consumer fraud and identity theft complaints on-line directly with the FTC. Military Sentinel also provides easy access to a wealth of consumer education and fraud prevention material. Access the web site at **http://www.consumer.gov/military/**. In addition, the FTC's main web site provides consumer protection educational materials and information on FTC and state consumer protection actions. Access the site at **http://www.ftc.gov/**.

1.4.14. Taxes.

1.4.14.1. Under the legal assistance program, Air Force attorneys provide advice and assistance on legal matters pertaining to federal, state, and local tax problems. Air Force attorneys also provide assistance filing current and prior year individual income tax returns throughout the year. Examples of this type of legal assistance include responding to letters from the IRS or state tax authorities, advising on responding to audits, and assisting in non-income tax matters, like real estate taxes or personal property taxes. Bases report this type of legal assistance in WebLIONS (see **paragraph 1.9** of this instruction).

1.4.14.2. In addition to the service provided under **paragraph 1.4.14.1,** Air Force tax assistance programs (which remain separate and distinct from the legal assistance program) involve JA staff, detailed service members, and base volunteers preparing and filing federal and state income tax returns for those eligible to receive this assistance.

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SJAs will supervise and manage these programs at their bases, exercising discretion concerning the scope of assistance provided, eligible beneficiaries, and sources of support for training and electronic filing. All Air Force bases will operate individual income tax assistance programs, to include electronic filing services.

1.4.14.2.1. Air Force tax assistance programs may take advantage of the Internal Revenue Service (IRS) Volunteer Income Tax Assistance (VITA) and electronic filing programs, or other viable sources of support, to effect training of tax assistance volunteers and provision of electronic filing services at their bases. Other sources include commercially available training programs and electronic filing software.

1.4.14.2.2. Eligible beneficiaries include active duty service members and their dependents and retirees and their dependents. Additionally, SJAs may authorize preparation and electronic filing of tax returns for federal civilian employees, to the extent permitted by the IRS Volunteer Income Tax Assistance (VITA) program. In making this determination, SJAs must c onsider whether the resources available to the installation tax program are sufficient to support the increased demands such an extension of support would entail. When they seek tax assistance, federal civilian employees must adhere to applicable rules concerning use and accounting of their time.

1.4.14.3. Bases file statistics for their tax assistance programs in the Tax Program Reporting System (TPRS) at **https://aflsa.jag.af.mil/training/jaguar/tax/tax_home.php**. Do not use WebLIONS either to input client information or tax program workload.

1.4.15. Issues that The Judge Advocate General (TJAG), Major Command (MAJCOM) SJAs, Numbered Air Force (NAF) SJAs, Commanders, or the base SJAs deem connected with personal civil legal affairs.

1.4.16. Victims of Crime. Provide legal assistance to victims of crimes, including sexual assault, consistent with the availability of resources, the expertise within the legal office as currently organized and staffed, and the SJA's ability to manage conflicts of interest. If resources at the legal office do not permit providing legal assistance to a victim of crime, the SJA shall inform the next judge advocate in the functional chain of command.

1.5. Supervisory Responsibilities.

1.5.1. The Judge Advocate General (TJAG):

1.5.1.1. Establishes and manages the Air Force Legal Assistance and Preventive Law Programs.

1.5.1.2. Communicates with the American Bar Association (ABA) and other associations TJAG deems necessary to further the legal assistance and preventive law programs.

1.5.1.3. Delegates authority to operate these programs to the Legal Assistance and Preventive Law Division, Air Force Legal Services Agency (AFLSA/JACA).

1.5.2. AFLSA/JACA:

1.5.2.1. Monitors the Air Force Legal Assistance and Preventive Law Programs.

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1.5.2.2. Carries out the overall administration of the Air Force Legal Assistance and Preventive Law Programs.

1.5.2.3. Gives advice on legal assistance, notary, and preventive law matters that affect Air Force personnel worldwide.

1.5.2.4. Monitors the Web-based Legal Information Online System (WebLIONS) outlined in paragraph **1.9**, the *DL Wills* program, and the Tax Program Reporting System (TPRS).

1.5.3. MAJCOM, Field Operating Agency (FOA), and Direct Reporting Unit (DRU) SJAs:

1.5.3.1. Supervise functional program staffs within their Commands.

1.5.3.2. Ensure compliance with this instruction.

1.5.3.3. May add requirements for mobilization- and deployment-related legal assistance (paragraphs **1.1** and **1.3**) and may impose limits on non-mobilization- and deployment-related legal assistance (AFPD 51-5 subparagraph **12.2**).

1.5.4. NAF SJAs: May add requirements for mobilization- or deployment-related legal assistance to ensure mission readiness.

1.5.5. Wing/Base SJAs:

1.5.5.1. Manage the personnel providing legal assistance and the operation of the legal assistance program at their offices consistent with this instruction.

1.5.5.2. Brief the office staff, including reservists, on the purposes of legal assistance, the base program, and this instruction. Conduct this briefing as frequently as necessary to assure the quality of the legal assistance program but at least once annually.

1.5.5.3. Communicate with local bar organizations, legal aid offices, and appropriate federal and state agencies.

1.5.5.4. Publicize the office's limits on non-mobilization- and deployment-related legal assistance.

1.5.5.5. Manage legal services volunteers (paragraph **1.8**).

1.5.6. AFLSA/JAS (Legal Information Services). AFLSA/JAS provides hardware and software support for WebLIONS.

1.5.7. AF/JAZ (Strategic Plans and Policy). AF/JAZ provides software support for the Tax Program Reporting System (TPRS).

1.6. Ethical Responsibilities and Rules. SJAs administer the legal assistance program in strict compliance with Air Force ethical responsibilities and rules such as TJAG Policy Memoranda TJS-2, *Air Force Rules of Professional Conduct and Standards for Civility in Professional Conduct*; TJS-5, *TJAGD Professional Responsibility Program*; and ARC-1, *Rules and Standards for Professional Conduct for Air Reserve Component Judge Advocates*. Of note, in the event of conflicts or differences between the applicable Air Force rules of professional responsibility and the equivalent state rules, the Air Force provisions will control (TJS-2). TJAG's Professional Responsibility Administrator (AFLSA/PR) serves as the dedicated focal point for professional

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responsibility advice and counsel. Access Professional Responsibility Program information at **https://aflsa.jag.af.mil/cgi-bin/genwebhtml.pl?jagmail=profresp**.

1.6.1. Only attorneys give legal advice. Paralegals and clerical staff members shall not provide any legal advice to a client, or render any other services to a client that constitute the practice of law unless under the direct supervision of an Air Force legal assistance attorney.

1.6.1.1. Paralegals and clerical staff members may question prospective clients to determine the subject matter of their concerns and whether it is within the scope of the legal assistance program. They may also prepare and maintain legal documents under the direct supervision of an attorney and perform such acts as notarizations and the preparation of routine powers of attorney using approved legal office forms.

1.6.1.2. A paralegal may conduct an initial client interview, preliminary to an attorney-client meeting. During this interview, the paralegal should ascertain the general nature and pertinent facts of the client's legal problem or concern. Because of the likelihood privileged information will be discussed, this interview should occur in a confidential setting. The paralegal may provide the client with handouts or references providing basic information about laws, regulations, rules, policies and procedures that may be relevant to the client's situation.

1.6.2. Information received from a client during legal assistance, attorney work-product, and documents relating to the client are confidential. Release them only with the client's express permission, pursuant to a court order, or as otherwise permitted by the *Air Force Rules of Professional Conduct* and the *Air Force Standards for Civility in Professional Conduct* and other Air Force rules pertaining to ethical conduct and professional responsibility. Such release should only be accomplished after contacting AFLSA/JACA through the appropriate supervisory chain.

1.6.3. Judge advocates and civilian attorneys who perform legal assistance must have private offices.

1.6.4. When contacting third parties, legal assistance attorneys must avoid creating the impression that they represent the Air Force's interests in resolving the client's concerns or that the Air Force has an interest in the outcome of the matter. When writing letters on a client's behalf, do not use Air Force letterhead. Include a statement in the letter making it clear the Air Force does not represent the client in resolving the matter.

1.6.5. Legal assistance attorneys may not interfere with an existing attorney-client relationship. When a member is already represented by counsel, the legal assistance attorney ordinarily should refer the member to his or her attorney. In some cases, however, the legal assistance attorney can play a valuable supporting role for the member, such as in the identification of military-unique considerations or the interpretation and discussion of military-specific statutes, regulations, and instructions. In this situation, the legal assistance attorney may consult with the member represented by counsel provided the attorney communicates to the legal assistance attorney the desire for this support. Otherwise, advising a client already represented by an attorney, providing a "second opinion," is not permitted.

1.7. Referrals. The nature of a client's legal problem may exceed the competence of the initial attorney consulted or the scope of the Air Force legal assistance program. In such cases, the legal assistance attorney should refer the client to, as appropriate, another Air Force attorney, another

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Armed Forces legal assistance office, or civilian lawyer referral services. Follow these guidelines when making referrals:

1.7.1. For civilian criminal matters, refer military members to the appropriate military defense counsel and civilians to the local civilian criminal defense bar.

1.7.2. For matters with the potential to involve the prospective client in adverse action under the UCMJ or adverse administrative action, refer the person to the appropriate military defense counsel. As the client provided the information to the legal assistance attorney in an attorney-client relationship, the legal assistance attorney may not disclose information concerning past criminal acts or other acts of misconduct to investigators or other attorneys in the legal office who may work on a case involving this person.

1.7.3. For a prospective client seeking assistance in filing a complaint under Article 138, UCMJ, refer the person to the appropriate military defense counsel or the Office of the Inspector General.

1.7.4. For military members who are or may be the subject of court-martial charges or other disciplinary action, the appropriate military defense counsel shall coordinate any need for legal assistance with the appropriate SJA, even if the matter would ordinarily fall within the scope of legal assistance.

1.7.5. For matters in which the person has already retained a civilian attorney, refer to that civilian attorney. Serving as a source of a "second opinion" for a client already represented by an attorney is not appropriate. However, as noted in paragraph **1.6.5** of this instruction, in some cases the legal assistance attorney can play a valuable supporting role for the member represented by a civilian attorney, such as in the identification of military-unique considerations or the interpretation and discussion of military-specific statutes, regulations, and instructions. Where the civilian attorney communicates to the legal assistance attorney the desire for this support, the legal assistance attorney may consult with the client.

1.7.6. In foreign areas, with the consent of consular officials and after consultation with the national bar, if appropriate, prepare a list of attorneys in accordance with the applicable status of forces agreement or implementing instruction. Refer persons who may face charges before a foreign court to the military legal advisor (see AFI 51-703, *Foreign Criminal Jurisdiction*).

1.7.7. Referral Guidelines. It is essential that each office establish referral guidelines that are free from favoritism or other impropriety. When referring persons to other attorneys, use the following guidelines:

1.7.7.1. Referrals should be made to the source best able to assist the client in the resolution of the particular problem or concern at the earliest time. For matters exceeding the particular legal assistance attorney's expertise, there is no need to exhaust military referrals, such as another legal assistance attorney, either active duty or reservist, or legal assistance attorneys in another military legal office, before referring a client to civilian bar referral services. The goal is to facilitate the client's consulting with an attorney competent to provide the required assistance. Options include another attorney on the legal office staff whether civilian or military, active or reserve; another military legal office, regardless of service; and the civilian bar.

1.7.7.2. Where the client's situation requires specialized expertise beyond the scope of the military legal assistance programs, refer to bar referral services operated by the American Bar Association (ABA) or state or local bar associations. If an organized bar or lawyer referral service does not exist in a base's area, refer the client to a local listing of attorneys who have expressed interest in serving military clients.

1.7.7.3. Make referrals based on the knowledge of or experience with the particular military attorney, military legal assistance office, civilian bar referral service, or, in the case of locations lacking a referral service, the local legal community.

1.7.7.4. Ensure the client understands that the decision to consult with or be represented by another legal assistance attorney, or to consult with and retain the services of a civilian attorney recommended through a bar referral service, is solely that of the client. The client is free to consult with and retain any lawyer.

1.7.7.5. Make clear to the client that referral to bar referral services operated by the ABA or state or local bar associations, or to a list of local attorneys maintained by the legal office in locations not covered by a referral service, does not constitute a federal or Air Force endorsement of any of the individual attorneys participating in these services.

1.7.8. Referral Services.

1.7.8.1. The American Bar Association (ABA) and many state and local bar associations operate bar referral services. Legal assistance attorneys should familiarize themselves with the services available through these bar associations. Contact with representatives of the bar associations is encouraged to determine how the lists are compiled and maintained and what standards apply for an attorney's inclusion on the lists. Providing information of this sort to clients enhances their ability to make informed decisions about use of the referral service. Prior contact will also yield information on any special programs the bar association may operate to assist military legal assistance attorneys and military clients and ensures the bar association is willing to accept referrals of military clients.

1.7.8.1.1. *Operation Enduring LAMP* is one example of a bar referral service. In 2001, the ABA Standing Committee on Legal Assistance for Military Personnel (LAMP) launched *Operation Enduring LAMP*, a project to help organize and educate civilian attorneys who wish to provide *pro bono* legal assistance to military personnel who are mobilized for military service and their family members who will be left behind. Most state bar associations participate in *Operation Enduring LAMP*; however, each state's program differs. Therefore, SJAs are encouraged to contact the base's state bar association regarding the registration and referral of participating *Operation Enduring LAMP* attorneys. Access information on this program at **http://www.abanet.org/legalservices/helpreservists/home.html**.

1.7.8.1.2. The ABA and state and local bar associations may maintain listings of attorneys who have volunteered to provide advice and guidance to military legal assistance attorneys. For example, *Operation Stand-By* is a project of the ABA Family Law Section's Military Committee through which attorneys agree to take calls, e-mail or other correspondence from JAG officers and answer inquiries about family law issues in their state. Access information on *Operation Stand-By* and a list,

by state, of the participating attorneys at **http://www.abanet.org/family/military/opstandby.doc**.

1.7.8.1.3. State and local bar associations may maintain lists of attorneys who have expressed interest in providing military clients with either *pro bono* service or service at reasonable fees.

1.8. Legal Services Volunteers. SJAs may accept the services of a licensed attorney, paralegal, or other legal professional to provide legal assistance under 10 U.S.C. §1044 and in accordance with 10 U.S.C. §1588(a)(5); DoDI 1100.21, *Volunteer Services in the Department of Defense*; and TJS-8, *Use of Legal Services Volunteers*. DoDI 1100.21, TJS-8 and the AFLSA/JACA web site provide detailed guidance on the process of accepting voluntary legal services and the scope and limitations of voluntary legal services. General guidance consistent with DoDI 1100.21 follows.

1.8.1. Volunteer services agreement and volunteer confidentiality agreement. All volunteers shall read and sign the appropriate part of DD Form 2793, *Volunteer Agreement for Appropriated Activities or Nonappropriated Fund Instrumentalities*. Also, legal services volunteers must be briefed on, understand, and comply with the same confidentiality requirements applicable to all members of the legal office staff, such as TJAG Policy Memorandums TJS-2, *Air Force Rules of Professional Conduct and Standards for Civility in Professional Conduct* and TJS-3, *Air Force Standards for Criminal Justice*. All legal services volunteers shall read and sign the *Legal Services Volunteer Confidentiality Agreement* attached to TJAG Policy Memorandum TJS-8. Acceptance of the volunteer services and confidentiality agreements shall be acknowledged before an individual is allowed to provide volunteer services. Copies of the signed agreements should be given to the volunteer prior to commencing volunteer services.

1.8.2. When required, volunteers must be licensed, privileged, appropriately credentialed or otherwise qualified under applicable laws, regulations, or policy to provide the voluntary services involved. Prior to acceptance as a volunteer, attorneys must provide a letter of good standing from each state Bar of which they are a member.

1.8.3. Supervision and scope of legal assistance. Legal services volunteers, even if licensed attorneys, may not be permitted to provide direct, unsupervised advice to Commanders or other agency clients on matters affecting Air Force interests, or to legal assistance clients. Also, legal services volunteers cannot perform the functions of a judge advocate or other inherently governmental services, such as representing clients in an area defense counsel office. They can, however, perform paralegal-type functions or provide other legal services, including advice and assistance to legal assistance clients, if acting under the direction, supervision, and control of an Air Force military or civilian attorney. Supervisory authority with respect to volunteers will be through designation of authorized duties, training, counseling, assessment of the quality of service provided, and determinations regarding continuation of acceptance of voluntary services. The degree of supervision of volunteers will be comparable to that provided with respect to paid employees providing similar services. Examples of permissible uses include researching, drafting legal opinions for review and signature by an Air Force attorney, and helping with legal assistance matters.

1.8.4. Legal services volunteers are not employees of the United States or any instrumentality thereof, except for certain purposes relating to compensation of injuries

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occurring during the performance of approved volunteer services, tort claims, the Privacy Act, criminal conflicts of interest, and defense of suits arising out of legal malpractice.

1.8.5. Expenses. The Air Force may not compensate legal services volunteers. However, legal services volunteers may use dedicated legal office or desk space, equipment, supplies, computers, and telephones as needed to accomplish assigned duties. Expenses directly connected to assigned duties that are incurred off base, such as long distance telephone calls, may be reimbursed as incidental expenses. Submit Standard Form 1164, *Claim for Reimbursement for Expenditures on Official Business*, to the servicing finance office for reimbursement of incidental expenses. Installations may accept voluntary services from host-nation or third-country citizens so long as the installation determines that acceptance of voluntary services from such persons will not subject the United States to potential liability or unauthorized expenses. This includes payment of employment benefits for a volunteer due to host-nation labor or voluntary service laws, U.S.-host-nation treaties, Status of Forces Agreements, or other arrangements.

1.9. Records/Reports. Effective 1 Jan 03, offices must record legal assistance visits and workload in the Web-based Legal Information Online System (WebLIONS). As a web-based program, WebLIONS eliminates the requirement for base legal offices and higher headquarters to prepare and compile the annual report of legal assistance. Statistical data of each office will be available to that office and its higher headquarters through WebLIONS on demand. Offices are not permitted to employ alternative automated data management and workload tracking systems for legal assistance. (RCS: JA(A)7501) This report is designated emergency status code C-2. Continue reporting during emergency conditions, normal precedence. Access WebLIONS at **https://lions.jag.af.mil**.

1.9.1. Offices should retain AF Forms 1175, *Legal Assistance Record*, for temporary use in the event of interruption of WebLIONS access or service. On these occasions, information recorded on the cards must be entered into WebLIONS when service resumes.

1.9.2. Do not keep formal files on legal assistance clients. Return original documents to clients as soon as possible.

1.10. Personal Legal Readiness Briefings. SJAs support readiness at their installations by ensuring personnel tasked for deployment at their bases are personally contacted and briefed on preparing their personal and family legal affairs for deployment. Subject areas include, but are not necessarily limited to, wills; SGLI designations; general and special powers of attorney; medical planning, including advance medical directives (living wills and medical or health care powers of attorneys), and designation of anatomical gifts; guardians or in loco parentis powers of attorney to ensure care of minor children; landlord-tenant matters; income exclusions and/or tax return filing extensions applicable to potential deployment locations; property and financial affairs management; protections under the Soldiers" and Sailors" Civil Relief Act (SSCRA); protections under the Uniformed Services Employment and Reemployment Rights Act (USERRA) for reserve personnel deploying; and ensuring important documents are maintained in safe, secure, and reasonably accessible locations.

1.10.1. According to requirements described in AFPD 51-5, attachment 2, offices must report the percentage of personnel tasked for deployment who are personally contacted and briefed on their personal legal needs or who receive mobilization- and deployment-related legal assistance every 15 months. This period aligns with the standard Aerospace

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Expeditionary Force (AEF) cycle. Base legal offices report this information by letter, through the MAJCOM, to be received by AFLSA/JACA upon entering their AEF window for deployment.

1.11. Software Licenses. *DL Wills* software is currently used to prepare documents such as wills, advance medical directives, and powers of attorney, and is licensed and copyrighted by a non-governmental corporate entity. Use of the software is governed by a licensing agreement that requires a separate license for each computer the program is installed upon. The AFLSA/JACA web site provides strict guidance on license acquisitions, controls and restrictions. Base SJAs and LOMs should ensure their offices have licenses for each computer on which *DL Wills* software is installed.

1.12. Communications. Legal assistance practitioners may communicate directly with other legal assistance officers or paralegals. When necessary, seek guidance from your higher headquarters legal offices before contacting AFLSA/JACA.

1.13. Air Force Legal Assistance Website. Every legal office shall incorporate the Air Force Legal Assistance Website (LAWS) into its legal assistance program. The LAWS provides a valuable preventive law education tool through its "Legal Assistance Topics" section. The LAWS enhances the provision of legal assistance by allowing clients to complete online worksheets for wills, healthcare documents and powers of attorney. Finally, the LAWS collects online feedback that allows us to identify areas of strength and weakness in our legal assistance program and to make adjustments as needed.

1.13.1. The Judge Advocate General established the Legal Assistance Website Honor Roll to recognize legal offices that excel at integrating the document production and feedback features of the LAWS into their legal assistance program. The Honor Roll recognizes both feedback and efficiency honorees.

1.13.1.1. A legal office must meet two requirements to be recognized for excellence in garnering feedback as a "Feedback Honoree." First, the average customer satisfaction rating on website surveys for the preceding month must be 4.0 or higher. Second, the office must receive website surveys for 10 percent or more of the office visits in the previous month. The office visits are tracked in WebLIONS, and can be viewed on the annual report.

1.13.1.2. "Efficiency Honorees" are those offices that use the website to produce 20 percent or more of their special powers of attorney, general powers of attorney, advanced medical directives and wills. The document numbers are tracked in WebLIONS, and can be viewed on the annual report. It is important that if the office utilizes a LAWS will worksheet to produce more than one document it select the appropriate indicators in WebLIONS.

1.13.2. The LAWS enhances legal assistance by increasing the efficiency of the process of obtaining legal assistance documents. The system is designed so that a client can consider the necessary decisions, and obtain the necessary information, for their legal documents from the comfort of their home. Legal offices can utilize the client's "Legal Worksheets" function of the LAWS in their legal offices in order to educate clients about the advantages of the LAWS. Legal offices shall not force clients to utilize the LAWS prior to receiving legal

assistance, and shall not institute procedures that decrease efficiency for the client in order to obtain recognition on the Honor Roll.

1.13.3. Feedback should be personally submitted by the client directly into the LAWS, and shall not be input by members of the legal office.

1.14. Legal Assistance Training Requirements. The below requirements will ensure legal assistance attorneys possess the requisite training for excellent legal assistance representation, and all judge advocates maintain currency in this core practice area.

1.14.1. **Annual Refresher Webcast.** Each January, The Air Force Judge Advocate General's School broadcasts a webcast with updates and changes to the law impacting the provision of legal assistance. Viewing the webcast is mandatory for all active duty and Air Reserve Component (ARC) judge advocates and for any civilian attorneys whose core document or position description references legal assistance. Those unable to view the webcast live must watch the recorded version by 15 April of the same year.

1.14.2. **Advanced Core Training (ACT).** Starting in 2012, four ACT modules will be released on CAPSIL Learning Management System (CAPSIL): Estate Planning, SCRA, Consumer Law, and Family Law. Certain judge advocates and civilian attorneys will be required, as follows, to complete the training.

1.14.2.1. Active duty judge advocates assigned to an office that provides legal assistance must complete all four ACT modules within 120 days of assignment.

1.14.2.2. ARC judge advocates assigned or attached to an office that provides legal assistance, as well as judge advocates assigned at Air National Guard state headquarters offices, must complete all four ACT modules within one year of assignment or attachment.

1.14.2.3. Any civilian attorney whose core document or position description references legal assistance must complete all four ACT modules within 120 days of employment in the position.

1.14.2.4. During the initial release of the ACT modules in 2012, the required timelines in **paragraphs 1.14.2.1** through **1.14.2.3** apply from the date of module release. The ACT modules are a one-time requirement that may be completed during any period of military service or employment with The Judge Advocate General's Corps. For example, a civilian attorney who completed the ACT modules while previously serving as a judge advocate would not have to complete them again.

1.14.3. **Military Continuing Legal Education (MCLE) in Legal Assistance.** MCLE is legal assistance training provided, sponsored, or co-sponsored by the judge advocate component of a military Service. Legal assistance in-residence courses, annual refreshers, webcasts, CAPSIL training modules, SJA approved office-wide training, sessions at Keystone and Annual Survey of the Law, and ABA LAMP CLE are examples of MCLE. Training not affiliated with the military, such as estate planning training offered by a state bar, would not qualify as MCLE.

1.14.3.1. All active duty judge advocates, as well as any civilian attorney whose core document or position description references legal assistance, must certify completion of four hours of MCLE in legal assistance each year.

1.14.3.2. All ARC judge advocates must certify completion of four hours of MCLE in legal assistance every other year.

1.14.3.3. MCLE certification will be accomplished through PR CERT, an automated program used to annually certify certain professional responsibility requirements. Each year the certification period is publicized in advance by AF/JAA-PR.

1.14.3.4. Training completed via CAPSIL will be tracked automatically.

Chapter 2

NOTARIAL ACTS AND OATHS

2.1. Notarial Acts.

2.1.1. Federal Authority. Section 1044a of Title 10, United States Code, grants the specific categories of persons listed in paragraphs **2.1.3** and **2.1.7** of this instruction the general powers of a notary public and of a consul of the United States. This authority derives from the federal statute and is distinct from the notary authority created by each state's laws. Notarial acts performed under 10 U.S.C. §1044a are legally binding throughout the world for federal and non-federal purposes.

2.1.2. Role of Notary. A notary acts as an official, unbiased witness to the identity and signature of the person who comes before the notary. A notary has the authority to administer oaths and affirmations. Every notary act affects the legal rights of others. SJAs will make sure notaries do not abuse their authority.

2.1.3. Persons with Notary Authority. Under the authority of 10 U.S.C. §1044a, the following persons have the general powers of a notary public and of a consul of the United States for notary acts executed for eligible legal assistance beneficiaries:

2.1.3.1. All judge advocates, including judge advocates of the Air Force Reserve whether or not in a duty status.

2.1.3.2. Civilian attorneys, licensed to practice law in the United States, employed by the Air Force and serving as legal assistance attorneys.

2.1.3.3. All adjutants, assistant adjutants, and personnel adjutants, including reserve members on active duty or performing inactive duty training.

2.1.3.4. Enlisted paralegals on active duty or performing inactive duty training (see paragraph **2.1.6**).

2.1.3.5. Active duty Air Force personnel who satisfy **all three** of the following criteria:

2.1.3.5.1. A commissioned officer or senior non-commissioned officer (holding the rank of Master Sergeant or higher);

2.1.3.5.2. Stationed at a geographically separated unit (GSU) or remote location where no judge advocate or paralegal notary is also assigned; and,

2.1.3.5.3. Appointed in writing, by the unit's servicing general court-martial (GCM) convening authority SJA to exercise notary authority under 10 U.S.C. 1044a and this instruction.

2.1.3.6. At locations outside the United States, civilian Air Force employees appointed by the SJA servicing the base to serve as notaries under the authority of 10 U.S.C. §1044a(b)(5).

2.1.4. Individuals Eligible To Use Military Notary Services. In accordance with 10 U.S.C. §1044a, the following persons may receive notary service:

2.1.4.1. All members of the United States Armed Forces.

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2.1.4.2. All other individuals eligible for legal assistance under this instruction.

2.1.4.3. All individuals serving with, employed by, or accompanying the armed forces outside the United States and outside Puerto Rico, Guam, and the Virgin Islands.

2.1.4.4. All individuals subject to the UCMJ outside the United States.

2.1.4.5. Where a document requires signatures of multiple persons, notarize only the signatures of those persons eligible for military notary services per the above four classifications.

2.1.5. Civilian Employees as State Notaries (other than civilian legal assistance attorneys). Staff Judge Advocates may designate civilian employees to serve as notaries as part of their official duties. The notarial authority created by 10 U.S.C. Section 1044a does not cover this type of designation. Therefore, any designated civilian employee must qualify as a notary under the laws of the state where he or she will perform notarial duties.

2.1.5.1. Designations of employees as notaries must be in writing and state that reimbursement for expenses is authorized. Title 5 U.S.C. Section 5945 authorizes reimbursement of commission expenses. These expenses may not exceed the actual cost of any fees, bonds, seals, perforating devices, and any other expenses actually incurred. Make reimbursements in accordance with local procedures.

2.1.5.2. Where an installation has multiple SJAs, each SJA may make this designation for his or her respective Command or agency.

2.1.5.3. As the notaries designated under this provision are reimbursed for commission expenses, they may only provide notary services for the eligible beneficiaries specified in paragraph **2.1.4** above.

2.1.6. Paralegals as Notaries. Staff Judge Advocates will not allow paralegals to perform notary duties until they have received proper training. This limitation means that only those paralegals who have been trained to perform notary acts as specified by the Career Field Education and Training Plan (CFETP) will act as notaries.

2.1.7. Non-JA Notaries at Geographically Separated Units (GSU). GCM SJAs are responsible for identifying those units where a non-JA notary should be appointed. Staff Judge Advocates are advised to appoint only the number of non-JA notaries necessary to avoid undue hardship to members at the GSU or remote site. All notary appointments must be in writing. The GCM SJA will maintain a copy of the written appointment letter for at least two years beyond the end of the notary's assignment. The GCM SJA may revoke the non-JA notary's authority at any time, with or without cause.

2.1.7.1. The base legal office that supports the GSU or remote site will provide all support to non-JA notaries. This support will include, at a minimum, training and supervision. The base legal office is responsible for notifying the GCM SJA when the non-JA notary is reassigned from the unit, an event that terminates the notary's authority.

2.1.7.2. Non-JA notaries are bound by the same rules set out for attorney, paralegal and civilian notaries under this instruction. In addition, non-JA notaries must comply with the following rules:

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2.1.7.2.1. The notary shall not exercise notary authority until the servicing base level SJA has determined that the notary has been properly trained.

2.1.7.2.2. The notary may not provide legal advice. The notary may not assist another in preparing or executing legal documents, including wills, deeds, contracts, leases, affidavits, separation agreements and powers of attorney, except for completing the notary jurat on such documents.

2.1.7.2.3. The notary may only exercise notary authority while performing official duties at the duty site. The notary may not perform notary duties while in a TDY or leave status.

2.1.7.2.4. The notary's authority automatically terminates when the notary is re-assigned from the GSU or remote unit. The notary will deliver, or ensure delivery of, his or her personal notary log to the servicing base SJA. The notary seal or stamp will be retained at the duty location at which the notary worked for use by the notary appointed to succeed the departing notary. In the event a new notary is not appointed, the seal or stamp will be returned to the servicing base SJA.

2.1.8. Authenticity and Seals. When signing documents in their official capacity, notaries specify the date and location, list their title and office, and use a raised seal or inked stamp citing 10 U.S.C. §1044a (for military notaries) or state authority (for civilian employee notaries designated pursuant to paragraph **2.1.5** of this instruction).

2.1.8.1. Installations should employ a raised seal or inked stamp citing the authority of 10 U.S.C. §1044a and including the identifiers "U.S. Air Force" and "Judge Advocate." Experience with the Authentication Division of the Department of State demonstrates these identifiers are essential to acceptance of military notarizations on documents being presented to foreign governments. The issue arises most frequently in connection with international adoptions by military families. Use of the identifiers will ensure documents with military notarizations are accepted as authentic.

2.1.9. Notary Guidelines.

2.1.9.1. Before performing a notary act, verify the identity of each person whose signature you will notarize.

2.1.9.2. Do not accept any signature as genuine on the word of a third person. **The person whose act is the subject of the notary act must personally appear and sign the document before the notary.**

2.1.9.3. Administer oaths or affirmations for any sworn document. The person being sworn must appear before the notary.

2.1.9.4. Notaries should familiarize themselves with state law requirements for acknowledgement of documents. Questions or concerns should be resolved by research of the appropriate state statutes or consultation with the entity requiring the document be notarized.

2.1.9.5. Do not notarize incomplete documents. A client's assurance to add missing information subsequent to the notarization is not adequate and must not be honored. Documents must include all required information at the time of signing and notarization. Please note some documents are completed in stages, requiring the addition of

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information and signatures subsequent to the signatures for which notarization is sought. In such cases, ensure the document is complete to the stage in the process at which the client is seeking notary services.

2.1.9.6. Consistent with paragraph **2.1.4.5** of this instruction, notarize only the signatures of persons eligible for military notary service. The military notary program does not extend to other signators on a document not eligible for military notary service under paragraph **2.1.4** of this instruction.

2.1.9.7. Certification of a document as a true and accurate copy of the original document is not a notarial act. Such a certification requires verification of the authenticity of the document represented by the client to be the original. Only the entity that created the document or maintains the original document or electronic record as part of its official responsibilities can make this verification. Therefore, notaries and other members of the legal office staff may not certify documents as true and accurate copies of original documents which are neither created by the office nor maintained by the office as part of its official responsibilities.

2.1.9.7.1. Notaries may notarize the certification of authenticity and signature of the document custodian from the office responsible for maintaining the original document or electronic record. This act establishes the authenticity of the certification of the document or record as a true and accurate copy of the original version maintained by the responsible office. Additionally, if sufficient to meet the client's needs, the notary may notarize the signed statement of the client that a document is a true and accurate copy of the original record he or she has received and maintained. For example, clients often request legal assistance practitioners to notarize copies of a DD Form 214 or NGB Form 22 as true and accurate reproductions of the original documents. Legal office notaries may not make this certification. Specific agencies can certify a copy of a DD Form 214 as a true and accurate reproduction of the original. JACA has published guidance to the field through The Judge Advocate General's Online News Service. As another example, although a notary may not certify copies of a service member's medical records to be true and accurate, the notary may notarize the statement and signature of the medical records custodian certifying the copies to be true and accurate.

2.1.9.8. Maintain a notary log. All legal assistance notaries, both military and civilian, shall maintain a personal log of notary acts performed. The log must include the signer's name and signature, the type of document, date, and location. Military notaries take their notary logs with them when they make a PCS move, except non-JA military notaries who provide the logs to the servicing base SJA consistent with paragraph **2.1.7.2.4** of this instruction. On separation or retirement, military notaries leave the notary log at their last duty station. Civilian employee notaries must follow the relevant state law regarding disposition of notary logs. If state law is silent, civilian employee notaries moving to a new position or location in federal civil service take their notary logs with them. Retiring civilian employee notaries and those leaving government will leave their notary logs at their last office of employment.

2.1.9.9. Security of Notary Equipment. Notaries must maintain vigilance to prevent misuse, loss, or theft of notary seals, stamps, and log books. Persons not authorized to

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serve as notaries under this instruction shall not use or maintain notary equipment. When not in use, secure notary seals, stamps, and log books in a desk drawer or file cabinet. Each notary shall ensure his or her notary equipment is similarly secured at the end of each duty day.

2.2. Oaths and Affirmations. The United States Code authorizes military members to administer oaths and affirmations. SJAs will ensure that their staffs are familiar with the following:

2.2.1. Title 10 U.S.C. Section 936(a), which grants specific people the authority to administer oaths and affirmations for military administration, including military justice.

2.2.2. Title 10 U.S.C. Section 936(b), which authorizes specific people to administer oaths and affirmations when necessary to perform their duties.

2.2.3. Title 10 U.S.C. Sections 502 and 1031, which authorize United States Armed Forces commissioned officers to administer oaths of enlistment (section 502) and oaths of enlistment or appointment in the armed forces (section 1031).

2.3. Notary Restrictions.

2.3.1. Compensation. Under 10 U.S.C. §1044a(c), no fee may be paid to or received by any person for the performance of a notarial act authorized under the legal assistance program.

Chapter 3

PREVENTIVE LAW PROGRAM

3.1. Purpose. No legal assistance program can succeed without a vigorous preventive law program. Educating Commanders, members, and their families on legal issues prevents legal problems and reduces the time and resources needed to resolve legal problems. Preventing legal problems enhances Command effectiveness and readiness, especially during periods of mobilization and deployment of personnel. Effective preventive law activities require full communication and cooperation among Air Force legal office staff members, Commanders, and base personnel, both uniformed and civilians.

3.2. Scope. Every base will have an active preventive law program. The SJA implements the program for his or her installation or organization. All attorneys have a responsibility to integrate preventive efforts into legal assistance consultations and presentations to base audiences on legal programs.

3.2.1. Preventive law programs focus on education and recommend preventive measures in legal areas where the Air Force has a direct interest in the outcome as well as those likely to impact base readiness and morale. At a minimum, include the following subject areas:

3.2.1.1. Mobilization and Deployment Preparation. Educate members on their personal legal needs to ensure readiness for mobilization and deployment. Examples include preparing their personal and family legal affairs for the demands of and dislocations caused by mobilization and deployment, training on their rights under the SSCRA and the USERRA, and disseminating information through all effective media on other matters pertaining to legal readiness.

3.2.1.1.1. Stress to Commanders the importance of making predeployment planning a priority within their units. For example, in accordance with DoDD 1350.4, *Legal Assistance Matters*, all Commanding Officers shall urge military personnel to seek legal counsel regarding wills, living wills, advance medical directives, and powers of attorney well before mobilization, deployment, or similar activities. Although not specifically cited in DoDD 1350.4, First Sergeants hold a similar responsibility. Ultimately, the decision to prepare and execute any of these documents must remain the free and voluntary act of the member. However, Commanders and First Sergeants play a vital role in highlighting and emphasizing the importance of seeking legal assistance as part of readiness preparations.

3.2.1.2. Commander/First Sergeant Awareness. Educate Commanders, First Sergeants, and staff agency chiefs on the full range of legal services provided by the legal office (not just legal assistance matters); the advantages to the Command or organization of timely use of these legal services; and all legal matters affecting the installation, including, as examples, fraud, waste and abuse, standards of conduct, environmental issues, contract issues, military justice issues, and claims matters. Communicate with Commanders, First Sergeants, and staff agencies on the status of legal services. Advise unit Commanders and First Sergeants of the legal office's availability to present informational briefings concerning the scope of the legal assistance program and preventive law measures at

Commanders' and First Sergeants' seminars, Commanders" Calls, staff meetings, base committee meetings, and newcomers" orientations.

3.2.1.3. Promote service member awareness of the importance of recognizing legal issues and seeking timely legal advice. Promote service member awareness of the importance of considering the legal consequences of their actions prior to signing legal documents such as purchase agreements, contracts, leases, and separation agreements. Ignoring legal issues or concerns and signing documents without advice on their terms and significance leads to legal problems later.

3.2.1.4. Identify common legal problems encountered by service members and family members. With its capability to provide statistical reports on demand, WebLIONS is an excellent resource for developing this information. Develop materials providing information and guidance aimed at preventing or minimizing service member and family member exposure to these potential legal problems.

3.2.1.5. Maintain vigilance to identify novel legal concerns, such as new consumer scams. Promptly develop and disseminate educational materials to help the base community make informed decisions and avoid potential legal problems.

3.2.1.6. Encourage the following base-wide activities:

3.2.1.6.1. Submission of articles for base newspapers, daily bulletin boards, and military legal publications on current legal assistance issues.

3.2.1.6.2. Distribution of handouts or pamphlets on preventive law measures at legal offices or other appropriate offices, such as the Family Support Center and squadron orderly rooms.

3.2.1.6.3. Development and maintenance of legal office web sites that provide office operating hours and contact information and that provide or link to current preventive law materials.

3.2.1.6.4. Presentation of preventive law lectures and seminars.

3.2.1.7. Law Day is observed each year on the first day of May to draw attention to the principles of justice and the practice of law, by an annual Proclamation of the President of the United States in accordance with Public Law 87-20 of April 7, 1961, as amended. Each year, in advance of 1 May, TJAG announces a Law Day theme. Staff Judge Advocates and preventive law officers join thousands of national organizations, businesses and schools and participate in innovative Law Day activities such as a high school mock trial, a middle school art and essay contest, or a community question and answer panel discussion.

3.2.1.8. Encourage legal office attorneys to participate in state or local bar associations to gain information on support programs available through these associations to benefit military clients and preventive law efforts and to educate civilian attorneys on the military in general and military legal programs in particular.

3.2.1.9. Seek support from bar associations to provide no-fee or reduced-fee legal services for service members and family members, particularly those with low incomes.

3.2.1.10. Encourage participation by local attorneys and state and local bar associations in programs sponsored by the ABA's Standing Committee on Legal Assistance for Military Personnel (LAMP), such as *Operation Enduring LAMP*, and the Military Committee of the ABA's Family Law Section, such as *Operation Stand-By*.

3.2.1.11. Tax Assistance. The Internal Revenue Service operates the Volunteer Income Tax Assistance (VITA) Program. If approved by base Commanders, establish an active, aggressive, well-publicized tax assistance program as outlined in **1.4.14.2**.

3.3. Program Management. See AFPD 51-5, Section C, for a full description of responsibilities in the program.

3.3.1. MAJCOM SJAs supervise the programs within their Commands.

3.3.2. To manage the base-level preventive law program, base SJAs appoint a Chief of Preventive Law or preventive law officer, charged with developing and implementing educational initiatives as a primary duty. In performing these duties, the appointed leader should review preventive law materials disseminated by AFLSA/JACA, which are maintained on its web site (see paragraph **3.5.1** of this instruction). Also, he or she should communicate with other military legal offices, particularly those in the same state, higher headquarters legal offices, and appropriate federal, state, and local agencies, such as bar referral services and consumer protection agencies.

3.4. Communication. All judge advocates may communicate directly with each other and with relevant organizations and persons about preventive law matters.

3.5. Preventive Law Resources.

3.5.1. AFLOA/AFJAGS' web site provides information on legal assistance subject areas covered under the legal assistance program, field guidance, and preventive law updates. Access the site at: **https://aflsa.jag.af.mil/AF/lynx/afjags/**.

3.5.2. WebFLITE. AFLSA/JAS's WebFLITE includes a "Web Links" page that provides access to a wide-range of Air Force and legal assistance internet and intranet web sites. WebFLITE also provides helpful links to other agencies, statutes and regulations, and specific legal assistance subject areas. Access these links at: **https://aflsa.jag.af.mil/flite/links.php**.

3.6. Forms Prescribed.

3.6.1. AF Form 165, **General Power of Attorney.**

3.6.2. AF Form 831, **Special Power of Attorney.**

3.6.3. AF Form 1175, **Legal Assistance Record.**

3.7. Forms Adopted.

3.7.1. DOL Form VETS-1010, **Eligibility Data Form: Veterans' Reemployment Rights.**

3.7.2. DD Form 2793, **Volunteer Agreement for Appropriated Activities or Nonappropriated Fund Instrumentalities.**

3.7.3. SF 1164, **Claim for Reimbursement for Expenditures on Official Business.**

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RICHARD C. HARDING
Lieutenant General, USAF
The Judge Advocate General

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Attachment 1

GLOSSARY OF REFERENCES AND SUPPORTING INFORMATION

References

5 U.S.C. 5945, *Notary Public Commission Expenses*

10 U.S.C. 502, *Enlistment Oath: Who May Administer*

10 U.S.C. 936, *Art. 136. Authority to Administer Oaths and to Act as Notary*

10 U.S.C. 938, *Art. 138. Complaints of Wrongs*

10 U.S.C. 1031, *Administration of Oath*

10 U.S.C. 1044, *Legal Assistance*

10 U.S.C. 1052, *Reimbursement of Adoption Expenses*

10 U.S.C. 1408, *Payment of Retired or Retainer Pay in Compliance with Court Orders*

10 U.S.C. 1588, *Authority to Accept Certain Voluntary Service*

10 U.S.C. 12731, *Age and Service Requirements*

38 U.S.C. 4301-4333, *Employment and Reemployment Rights of Members of the Uniformed Services*

50 U.S.C. App. 501-593, *Soldiers' and Sailors' Civil Relief Act*

AFI 36-2906, *Personal Financial Responsibility*

AFI 36-2908, *Family Care Plans*

AFPD 51-5, *Military Legal Affairs*

ARC-1, *Rules of Professional Conduct for Air Reserve Component Judge Advocates*

Army Pub. 260, *Soldiers' and Sailors' Civil Relief Act Guide*

DoDI 1100.21, *Voluntary Services in the Department of Defense*

DoDD 1341.9, *DoD Adoption Reimbursement Policy* (Jul 93)

DoDD 1350.4, *Legal Assistance Matters* (Apr 01)

DoDI 1400.32, *DoD Civilian Workforce Contingency and Emergency Planning Guidelines and Procedures*

DoDI 3020.37, *Continuation of Essential DoD Contract Services During Crises*

P.L. 87-20, *Law Day*, 7 April 1961

TJS-2, *Air Force Rules of Professional Conduct and Standards for Civility in Professional Conduct*

TJS-3, *Air Force Standards for Criminal Justice*

TJS-8, *Legal Services Volunteer Confidentiality Agreement*

Attachment 2

DUAL REPRESENTATION AUTHORIZATION

Legal assistance attorneys may use the following form to inform clients of the parameters of, and to secure their consent to, dual representation. Each client should independently read and sign a letter to confirm that each wishes to be dually represented by a single attorney.

Dear Client:

You and your spouse have indicated that you wish to meet with an attorney together to discuss and execute both of your wills and related documents. There exists the potential for conflicts of interest to arise between spouses concerning the division and distribution of their property. For this reason, each may retain separate, independent counsel at the outset to avoid the possibility that advice given to one of you is influenced by the representation of the other. Where both spouses express the desire to be represented by a single attorney, it is the practice of this office to raise the potential for conflicts of interest with you and require your independent consent prior to proceeding with dual representation. Your signature below will confirm the following:

1. You and your spouse have requested the same legal assistance attorney represent each of you in advising on and preparing your wills and related documents.

2. You recognize that you and your spouse's wills and related documents need not be uniform. They may be entirely unique from each other in content. Each of you will review your documents prior to execution to ensure they reflect your individual wishes.

3. The scope of this representation will include the following:

- Analysis of the assets owned by each of you at the time of your marriage, including consideration of the fair market value of such property and the manner in which the title was then held;

- Analysis of all property now owned by each of you, including consideration of its fair market value, the manner in which title to such property is now held, and a categorization of such property as separate, marital, community, or quasi-community property;

- Discussion concerning the manner in which you wish to dispose of any property you may have the power to dispose of at the time of your death; and

- Preparation of the documents necessary to accomplish the desired disposition of your property.

4. You are aware that during the course of the representation, disagreements may arise between you and your spouse regarding ownership and disposition of property.

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5. Difference of opinion regarding the disposition of property does not, in and of itself, prevent an attorney from representing both husband and wife. However, during the course of the representation, conflicts of interest between you and your spouse may arise that might preclude me from further representing either of you.

6. If a conflict of interest does occur, and it is of such a nature that I believe it impossible for me to ethically perform services for either of you, I will immediately cease all representation of both of you in this matter and advise that you both obtain independent counsel.

7. You agree that there will be complete and free disclosure of all information I receive from either of you within the course of representing you and your spouse. You further agree that such information shall not be confidential between you and your spouse regardless of whether I obtain such information when you and your spouse are both present or when only one of you is present. This disclosure authorization includes any conferences that may have taken place before the date of this letter.

Very Respectfully,

SIGNATURE BLOCK

Legal Assistance Attorney

I, (print your name)_____, have read and understand the foregoing letter and consent to being represented by _____, our legal assistance attorney, together with my spouse, _____, in the creation of our individual testamentary instruments. I likewise consent to the free disclosure and exchange between my spouse and I of information received by said attorney within the scope of his/her representation of us in the same.

Signed the ___ day of _____, 20XX

_____

Client

Attachment 3

STANDARD OPERATING PROCEDURE FOR EXECUTING WILLS

The following procedure, or one covering substantially the same points, is recommended as a standard for the execution of wills. This procedure meets the requirements for execution of military testamentary instruments, the standard for the execution of wills in the United States Air Force.

A. Present for the execution should be the following:

(1) the testator/testatrix

(2) two witnesses, who must be persons who have no interest, vested or contingent, in the property disposed of by the will or in the testator's/testatrix's estate in the event of intestacy. An attorney presiding over the execution ceremony may NOT act as a witness. Under 10 USC §1044d(c)(3), the two witnesses must be "in addition to the presiding attorney."

(3) the presiding attorney - 10 USC §1044d requires a military testamentary instrument to be "executed in the presence of a military legal assistance counsel acting as presiding attorney."

(4) notary - as the notary will notarize the signatures of the witnesses, the notary cannot serve as one of the witnesses.

a. Execution of the document as a military testamentary instrument does not require use of a military notary acting under 10 USC §1044a.

b. The statute does not preclude the presiding attorney from notarizing the will and other documents. Taking that approach would require notarization under the authority of 10 USC §1044a, with use of the appropriate captions in the documents. However, if questions are raised later concerning how the will was executed, this approach risks a significant problem. If an attorney served as notary, particularly a JAG, he or she will likely have PCSed or maybe even left the Air Force by the time questions come up. The witnesses will likely fall into similar situations. They will be difficult to find at best. Even when found, because they may have executed the will years ago, they will rely on distant memories of how the process was accomplished. In contrast, because civilian notaries often work in the same office for years they are most familiar with a particular office's will execution practices and are best placed to respond to questions concerning the execution of the documents.

B. If the will consists of more than 1 page, the pages should be fastened together securely. The will should specify the exact number of pages of which it consists (e.g., number each page at the bottom "1 of 3," "2 of 3," "3 of 3"). This page numbering does not include the self-proving affidavit, unless it has been incorporated as part of the will. The self-proving affidavit should, however, be fastened to the will.

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C. The testator/testatrix should read the will and the self-proving affidavit in their entirety and the legal assistance attorney should ensure understanding of all terms prior to the execution.

D. The presiding attorney and/or notary should ask for and examine the identification cards of the testator/testatrix and witnesses.

E. The attorney or notary presiding at the execution ceremony should ask the testator/testatrix the questions from the section below entitled "Will Execution Requisites."

F. Assuming appropriate responses to the questions, the testator/testatrix then initials and dates in the margin at the bottom of each page of the will except the page including the testator's/testatrix's signature at the end of the will. This step assures identification and prevents subsequent addition and substitution of pages. The testator/testatrix also signs in the appropriate space at the end of the will. The witnesses should be seated or standing in a position to observe the signing and/or initialing.

G. The attorney or notary presiding at the execution ceremony asks the witnesses the listed questions from the section below entitled "Will Execution Requisites."

H. Each witness should read and then declare that the attestation clause is a true and correct statement.

I. Each witness then initials and dates in the margins in the same area as the testator/testatrix (again, this step assures identification and prevents subsequent addition and substitution of pages) **and** signs in the appropriate places at the end of the will. The witnesses also read and sign the self-proving affidavit. The witnesses' printed or typed name and rank (if military) and printed or typed duty address should be included under or next to their signatures.

WILL EXECUTION REQUISITES

The presiding attorney or notary asks each Testator/Testatrix the following questions. The witnesses must be assured the Testator/Testatrix understands the questions and responds to them consistent with the intent to execute the document as his/her last will and testament.

For executions involving multiple clients, substitute the phrase "each of you" for "you" in each question and request the clients to answer aloud and make the appropriate nod for affirmative or negative.

(1) Do you (state full name of testator/testatrix) declare in the presence of (state the names of the witnesses) that this document is your will?

(2) Are you at least 18 years of age?

(3) Do you consider yourself to be of sound mind?

(4) Have you read the will in its entirety and do you fully understand its terms?

(5) Do you have any additions or corrections you desire made to the will?

(6) Does the will as drafted represent your intentions as to how you wish your property to be distributed in the event of your death?

(7) Have you prepared and are you executing this document voluntarily?

(8) Do you feel you have been under any sort of duress, coercion, or undue influence as you discussed and provided information for the preparation of the will or now as you get ready to sign the will?

(9) Do you publish and declare this document to be your last will and testament?

(10) Do you desire that we (state the names of the witnesses) witness your signature and execution of this will?

Questions to the witnesses:

(1) Does the testator/testatrix appear to be at least 18 years of age?

(2) Does the testator/testatrix appear to be of sound mind?

(3) Does he/she appear to understand the nature of his/her actions?

(4) Does he/she appear to be acting under duress or coercion?

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LRM, Airman First Class,
U.S. Air Force, Appellant

v.

Joshua E. KASTENBERG, Lieutenant Colonel,
U.S. Air Force, Military Judge, Appellee

and

Nicholas E. DANIELS,
Airman First Class, U.S. Air Force, Real Party in Interest

No. 13-5006
App. Misc. Dkt. No. 2013-05

United States Court of Appeals for the Armed Forces

Argued June 11, 2013

Decided July 18, 2013

BAKER, C.J., delivered the opinion of the Court, in which ERDMANN, J., and EFFRON, S.J., joined. STUCKY, J., filed a separate opinion, concurring in part and dissenting in part and in the result. RYAN, J., filed a dissenting opinion, in which STUCKY, J., joined as to Part A.

Counsel

For Appellant: Colonel Kenneth M. Theurer, (argued); Major Christopher J. Goewert, Major Matthew D. Talcott, and Major R. Davis Younts (on brief).

For Appellee: Major Ryan N. Hoback (argued).

For Real Party in Interest: Dwight H. Sullivan, Esq. (argued); Captain Christopher D. James and Captain Danko Princip (on brief).

Amici Curiae:

For the United States: Major Tyson D. Kindness (argued); Colonel Don M. Christensen and Gerald R. Bruce, Esq. (on brief).

For the Army Defense Appellate Division: Colonel Patricia A. Ham, Lieutenant Colonel Jonathan F. Potter, and Captain Matthew M. Jones.

For the Navy-Marine Corps Appellate Defense Division: Captain Paul C. LeBlanc, JAGC, USN, and Captain Jason R. Wareham, USMC.

For the National Crime Victim Law Institute: Margaret Garvin, Esq., Rebecca S. T. Khalil, Esq., and Sarah LeClair, Esq.

For the U.S. Marine Corps Defense Services Organization: Colonel John G. Baker, USMC.

For the Air Force Trial Defense Division: Colonel Donna Marie Verchio.

For Protect Our Defenders: Peter Coote, Esq.

Military Judge: Joshua E. Kastenberg

THIS OPINION IS SUBJECT TO REVISION BEFORE FINAL PUBLICATION.

Chief Judge BAKER delivered the opinion of the Court.

The Air Force Judge Advocate General (JAG) certified three issues for review by this Court:

I. WHETHER THE AIR FORCE COURT OF CRIMINAL APPEALS ERRED BY HOLDING THAT IT LACKED JURISDICTION TO HEAR A1C LRM'S PETITION FOR A WRIT OF MANDAMUS.

II. WHETHER THE MILITARY JUDGE ERRED BY DENYING A1C LRM THE OPPORTUNITY TO BE HEARD THROUGH COUNSEL THEREBY DENYING HER DUE PROCESS UNDER THE MILITARY RULES OF EVIDENCE, THE CRIME VICTIMS' RIGHTS ACT AND THE UNITED STATES CONSTITUTION.

III. WHETHER THIS HONORABLE COURT SHOULD ISSUE A WRIT OF MANDAMUS.

BACKGROUND

On October 16, 2012, Airman First Class (A1C) Nicholas Daniels (Real Party in Interest) was charged with raping and sexually assaulting A1C LRM in violation of Article 120, UCMJ, 10 U.S.C. § 920 (2006). Lieutenant Colonel (Lt Col) Joshua E. Kastenberg (Appellee) was detailed to the case as military judge. The Real Party in Interest was arraigned at Holloman Air Force Base, New Mexico, and elected trial by enlisted and officer members.

Captain (Capt) Seth Dilworth was appointed as special victims' counsel for LRM. In his formal notice of appearance, Capt Dilworth stated that LRM had "standing involving any issues arising under [Military Rules of Evidence (M.R.E.)] 412, 513, and 514 in which she is the patient or witness as the subject of

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the motion." Capt Dilworth noted that his formal involvement in the court-martial would "be limited to asserting A1C [LRM]'s enumerated rights as a victim of crime under federal law and [M.R.E.] 412, 513, and 514." He requested that the court direct counsel to provide LRM with copies of related motions. Trial counsel and trial defense counsel did not object to LRM receiving copies of the motions, but trial defense counsel opposed Capt Dilworth's presence or participation at the evidentiary hearings. Before the arraignment hearing, LRM received copies of defense motions to admit evidence under M.R.E. 412 and 513.

Initially during the arraignment hearing, Capt Dilworth indicated that he did not intend to argue at any future M.R.E. 412 or 513 motions hearings. Later during the same hearing, Capt Dilworth argued that there may be instances where LRM's interests in the motions hearings were not aligned with the Government, in which case Capt Dilworth asked the court to reserve LRM's right to present an argument. The military judge treated this request as a "motion in fact."

In a judicial ruling, the military judge limited LRM's right to be heard to factual matters, finding that standing "denotes the right to present an argument of law before a court, which is fundamentally different than the opportunity to be heard." The military judge then found that LRM had no standing,

through counsel or otherwise, to motion the court for relief in the production of documents, and that Capt Dilworth could not argue evidentiary matters in LRM's interest. The military judge concluded that "the prospect of an accused having to face two attorneys representing two similar interests [is] sufficiently antithetical to courts-martial jurisprudence" and would "cause a significant erosion in the right to an impartial judge in appearance or a fair trial."

LRM filed a motion to reconsider, asking for relief in the form of production and provision of documents, and that the military judge grant LRM "limited standing to be heard through counsel of her choosing in hearings related to M.R.E. 412, M.R.E. 513, [Crime Victims' Rights Act, 18 U.S.C. § 3771 (CVRA)], and the United States Constitution." The military judge denied the motion for reconsideration in full.

LRM filed a petition for extraordinary relief in the nature of a writ of mandamus and petition for stay of proceedings, but the CCA concluded that it lacked jurisdiction to review LRM's petition for extraordinary relief. After the United States Air Force Criminal Court of Appeals (CCA) denied LRM's motion for reconsideration en banc, the Air Force JAG certified three issues for review by this Court.

JURISDICTION

Jurisdiction is a question of law that this Court reviews de novo. United States v. Ali, 71 M.J. 256, 261 (C.A.A.F. 2012).

As a preliminary matter, this Court has statutory jurisdiction to review the decision of the CCA under Article 67, UCMJ, 10 U.S.C. § 867 (2006). Article 67(a)(2), UCMJ, provides that this Court shall review the record in "all cases reviewed by a Court of Criminal Appeals which the Judge Advocate General orders sent to the Court of Appeals for the Armed Forces for review."

In United States v. Curtin, this Court considered the definition of a "case" as used in Article 67(a)(2), UCMJ. 44 M.J. 439 (C.A.A.F. 1996), cited with approval in United States v. Dowty, 48 M.J. 102, 107 (C.A.A.F. 1998). In Curtin, the military judge ruled that trial counsel's subpoenas duces tecum for the financial statements of the accused's wife and her father were administrative, and that the appropriate United States district court was the proper forum for challenging the subpoenas. Id. at 440. The Air Force JAG filed a certificate for review of a CCA decision denying the government's petition for extraordinary relief in the form of a writ of mandamus. Id. This Court held that it had jurisdiction, and determined that the "definition of 'case' as used within that statute includes a

'final action' by an intermediate appellate court on a petition for extraordinary relief." Id. (citing United States v. Redding, 11 M.J. 100, 104 (C.M.A. 1981)).

Similarly, in this case the CCA took a final action on a petition for extraordinary relief when it denied LRM's writ-appeal petition. Thus, as in Curtin, this Court has jurisdiction over the certificate submitted by the JAG pursuant to Article 67(a)(2), UCMJ, as we would in the case of a writ-appeal.

Subject-Matter Jurisdiction

The CCA erred by holding that it lacked jurisdiction to hear LRM's petition for a writ of mandamus. The All Writs Act, 28 U.S.C. § 1651 (2006), and Article 66, UCMJ, 10 U.S.C. § 866 (2006), establish the CCA's jurisdiction. The All Writs Act grants the power to "all courts established by act of Congress to issue all writs necessary and appropriate in aid of their respective jurisdiction and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). Extraordinary writs serve "to confine an inferior court to a lawful exercise of its prescribed jurisdiction." Bankers Life & Casualty Co. v. Holland, 346 U.S. 379, 382 (1953). "[M]ilitary courts, like Article III tribunals, are empowered to issue extraordinary writs under the All Writs Act." United States v. Denedo, 556 U.S. 904, 911 (2009).

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The All Writs Act is not an independent grant of jurisdiction, nor does it expand a court's existing statutory jurisdiction. Clinton v. Goldsmith, 526 U.S. 529, 534-35 (1999). Rather, the All Writs Act requires two determinations: (1) whether the requested writ is "in aid of" the court's existing jurisdiction; and (2) whether the requested writ is "necessary or appropriate." Denedo v. United States, 66 M.J. 114, 119 (C.A.A.F. 2008) (internal quotation marks omitted). In the context of military justice, "in aid of" includes cases where a petitioner seeks "to modify an action that was taken within the subject matter jurisdiction of the military justice system." Id. at 120. A writ petition may be "in aid of" a court's jurisdiction even on interlocutory matters where no finding or sentence has been entered in the court-martial. See, e.g., Hasan v. Gross, 71 M.J. 416 (C.A.A.F. 2012); Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 25 (1943).

To establish subject-matter jurisdiction, the harm alleged must have had "the potential to directly affect the findings and sentence." Ctr. for Constitutional Rights v. United States (CCR), 72 M.J. 126, 129 (C.A.A.F. 2013) (citing Hasan, 71 M.J. 416). There is no jurisdiction to "adjudicate what amounts to a civil action, maintained by persons who are strangers to the courts-martial, asking for relief . . . that has no bearing on any findings and sentence that may eventually be adjudged by the

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court-martial." Id. The CCA's holding that the present case "does not directly involve a finding or sentence that was -- or potentially could be imposed -- in a court-martial proceeding," does not accurately reflect this analysis.

Under the appropriate analysis, LRM prevails. The petition invited the CCA to evaluate whether the military judge can limit the right to be heard under M.R.E. 412 and 513 by precluding LRM from presenting the basis for a claim of privilege or exclusion, with or without counsel, during an ongoing general court-martial. The military judge's ruling has a direct bearing on the information that will be considered by the military judge when determining the admissibility of evidence, and thereafter the evidence considered by the court-martial on the issues of guilt or innocence -- which will form the very foundation of a finding and sentence. Furthermore, unlike "strangers to the courts-martial," CCR, 72 M.J. at 129, LRM is the named victim in a court-martial seeking to protect the rights granted to her by the President in duly promulgated rules of evidence, namely to a claim of privilege under M.R.E. 513 and a right to a reasonable opportunity to be heard under M.R.E. 412(c)(2) and 513(e)(2). Indeed, this Court has reversed court-martial convictions based on erroneous M.R.E. 412 evidentiary rulings. See, e.g., United States v. Ellerbrock, 70 M.J. 314, 321 (C.A.A.F. 2011) (reversing rape conviction after finding that evidence of the

victim's prior extramarital affair was improperly excluded under M.R.E. 412). LRM is not seeking any civil or administrative relief. Cf. Goldsmith, 526 U.S. at 533 (challenging an administrative separation proceeding, rather than a court-martial). Rather, she is seeking her right to be heard pursuant to the M.R.E. Thus, the harm alleged has "the potential to directly affect the findings and sentence," and the CCA erred by holding that it lacked jurisdiction. See CCR, 72 M.J. at 129.

Standing

LRM's position as a nonparty to the courts-martial, see Rule for Courts-Martial (R.C.M.) 103(16), does not preclude standing. There is long-standing precedent that a holder of a privilege has a right to contest and protect the privilege. See, e.g., CCR, 72 M.J. 126 (assuming that CCR had trial level standing to make request); United States v. Wuterich, 67 M.J. 63, 66-69 (C.A.A.F. 2008) (assuming standing for CBS in part under R.C.M. 703); United States v. Harding, 63 M.J. 65 (C.A.A.F. 2006) (assuming standing for victim's mental health provider); United States v. Johnson, 53 M.J. 459, 461 (C.A.A.F. 2000) (standing for nonparty challenge to a subpoena duces tecum or a subpoena ad testificandum during an Article 32, UCMJ, 10 U.S.C. § 832 (2006), pretrial investigation); ABC, Inc. v. Powell, 47 M.J. 363, 364 (C.A.A.F. 1997) (standing under First Amendment); Carlson v. Smith, 43 M.J. 401 (C.A.A.F 1995)

(summary disposition) (granting a writ of mandamus where the real party in interest did not join petitioners, but rather was added by this Court as a respondent).

Limited participant standing has also been recognized by the Supreme Court and other federal courts. See Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580 (1980) (standing created by First Amendment right); Church of Scientology v. United States, 506 U.S. 9, 11, 17 (1992) (standing created by attorney-client privilege). In particular, "[f]ederal courts have frequently permitted third parties to assert their interests in preventing disclosure of material sought in criminal proceedings or in preventing further access to materials already so disclosed." United States v. Hubbard, 650 F.2d 293, 311 n.67 (D.C. Cir. 1980); see, e.g., United States v. Antar, 38 F.3d 1348, 1350 (3d Cir. 1994); In re Subpoena to Testify Before Grand Jury Directed to Custodian of Records, 864 F.2d 1559, 1561 (11th Cir. 1989); Doe v. United States, 666 F.2d 43, 45 (4th Cir. 1981); Anthony v. United States, 667 F.2d 870, 872-73 (10th Cir. 1981); In re Smith, 656 F.2d 1101, 1102-05, 1107 (5th Cir. 1981); United States v. Briggs, 514 F.2d 794, 796, 799 (5th Cir. 1975).

Ripeness

Finally, this issue is ripe for review. The military judge's ruling limits LRM's right to be heard to factual

matters, preventing her from making legal arguments while invoking her legal privilege under M.R.E. 513.

Furthermore, while LRM's counsel initially indicated at the arraignment hearing that he did not intend to argue at a future motions hearing, noting that LRM had not received any documents, discovery, or court filings with respect to such hearings, counsel asked the military judge to reserve that right. The military judge treated this request as a "motion in fact." In the judicial ruling, the military judge specified whether counsel had standing to represent LRM during applicable hearings arising from the M.R.E. at trial as one of the issues before the court-martial, and ultimately denied the motion to grant standing. Accordingly, LRM interpreted the military judge's ruling as finding that she "does not have standing to be represented by counsel during applicable hearings arising from the military rules of evidence at trial." In the motion to reconsider, LRM asked for relief in the form of production and provision of documents, and that the military judge grant LRM "limited standing to be heard through counsel of her choosing in hearings related to M.R.E. 412, M.R.E. 513, CVRA, and the United States Constitution." The military judge denied the motion for reconsideration in full.

Thus, the issue of whether LRM has limited standing to be heard through counsel in hearings related to M.R.E. 412 and 513

comes to this Court in the form of a challenge by a limited participant to a concrete ruling by a military judge in an adversarial setting. See United States v. Chisholm, 59 M.J. 151, 153 (C.A.A.F. 2003) ("In the absence of a challenge by a party to a concrete ruling by a military judge in an adversarial setting, we conclude that consideration of Issue I under the circumstances of the present case would be premature."). The parties have argued, and the military judge has addressed, the relevant legal issues. The issue is ripe for review by this Court.

SUBSTANTIVE ISSUES

Construction of a military rule of evidence, as well as the interpretation of statutes, the UCMJ, and the R.C.M., are questions of law reviewed de novo. United States v. Matthews, 68 M.J. 29, 35-36 (C.A.A.F. 2009); United States v. Lopez de Victoria, 66 M.J. 67, 73 (C.A.A.F. 2008).

The military judge erred by determining at the outset of the court-martial, during arraignment proceedings and before any M.R.E. 412 or 513 evidentiary hearings, that LRM would not have standing to be represented through counsel during applicable hearings arising from the M.R.E. The President has expressly stated the victim or patient has a right to a reasonable opportunity to attend and be heard in evidentiary hearings under M.R.E. 412 and 513. M.R.E. 412(c)(2) provides that, before

admitting evidence under the rule, the military judge must conduct a hearing where the "alleged victim must be afforded a reasonable opportunity to attend and be heard." See also M.R.E. 513(e)(2) ("The patient shall be afforded a reasonable opportunity to attend the hearing and be heard . . . ."). M.R.E. 513(a) also provides that a patient has the privilege to refuse to disclose confidential communications covered by the psychotherapist-patient privilege. A reasonable opportunity to be heard at a hearing includes the right to present facts and legal argument, and that a victim or patient who is represented by counsel be heard through counsel. This is self-evident in the case of M.R.E. 513, the invocation of which necessarily includes a legal conclusion that a legal privilege applies.

Statutory construction indicates that the President intended, or at a minimum did not preclude, that the right to be heard in evidentiary hearings under M.R.E. 412 and 513 be defined as the right to be heard through counsel on legal issues, rather than as a witness. Both M.R.E. 412 and 513 permit the parties to "call witnesses, including the alleged victim [or patient]." M.R.E. 412(c)(2); M.R.E. 513(e)(2). However, in addition to providing that the victim or patient may be called to testify as a witness on factual matters, the rules also grant the victim or patient the opportunity to "be heard." Id. Furthermore, every time that the M.R.E. and the R.C.M. use

the term "to be heard," it refers to occasions when the parties can provide argument through counsel to the military judge on a legal issue, rather than an occasion when a witness testifies. See, e.g., R.C.M. 806(d) Discussion; R.C.M. 917(c); R.C.M. 920(c); R.C.M. 920(f); R.C.M. 1005(c); R.C.M. 1102(b)(2); M.R.E. 201(e).

This interpretation of a reasonable opportunity to be heard at a hearing is consistent with the case law of this Court and other federal courts. In Carlson, for example, this Court provided extraordinary relief to two sexual assault victims who had sought to prevent "unwarranted invasions of privacy" and to protect their rights under M.R.E. 412, Article 31, UCMJ, 10 U.S.C. § 831, and other privileges recognized by law. 43 M.J. 401. The Court ordered that the victims "will be given an opportunity, with the assistance of counsel if they so desire, to present evidence, arguments and legal authority to the military judge regarding the propriety and legality of disclosing any of the covered documents." Id. (emphasis added). While Carlson is a summary disposition, this Court "has profited from guidance offered in prior summary dispositions." United States v. Diaz, 40 M.J. 335, 339-40 (C.M.A. 1994); see also Hicks v. Miranda, 422 U.S. 332, 344-45 (1975) (holding that "lower courts are bound by summary decisions by" the Supreme Court); United States v. Sanchez, 44 M.J. 174, 177 (C.A.A.F.

1996) (citing Carlson). Similarly, in United States v. Klemick, the Navy-Marine Corps CCA found that the military judge did not abuse his discretion in rulings on M.R.E. 513 matters. 65 M.J. 576, 581 (N-M. Ct. Crim. App. 2006). During the evidentiary hearing, the patient opposed trial counsel's motion "through counsel who entered an appearance in the court-martial on her behalf for this limited purpose," and the military judge considered the patient's brief and argument. Id. at 578.

Furthermore, while the military judge suggests that LRM's request is novel, there are many examples of civilian federal court decisions allowing victims to be represented by counsel at pretrial hearings. Although not precedent binding on this Court, in the United States Court of Appeals for the Fifth Circuit, for example, victims have exercised their right to be reasonably heard regarding pretrial decisions of the judge and prosecutor "personally [and] through counsel." In re Dean, 527 F.3d 391, 393 (5th Cir. 2008). The victims' "attorneys reiterated the victims' requests" and "supplemented their appearances at the hearing with substantial post-hearing submissions." Id.; see also Brandt v. Gooding, 636 F.3d 124, 136-37 (4th Cir. 2011) (motions from attorneys were "fully commensurate" with the victim's "right to be heard."). Similarly, in United States v. Saunders, at a pretrial Fed. R. Evid. 412(c)(1) hearing, "all counsel, including the alleged

victim's counsel, presented arguments." 736 F. Supp. 698, 700 (E.D. Va. 1990). In United States v. Stamper, the district court went further and, in a pretrial evidentiary hearing, allowed counsel for "all three parties," including the prosecution, defense, and victim's counsel, to examine witnesses, including the victim. 766 F. Supp. 1396, 1396 (W.D.N.C. 1991).

While M.R.E. 412(c)(2) or 513(e)(2) provides a "reasonable opportunity . . . [to] be heard," including potentially the opportunity to present facts and legal argument, and allows a victim or patient who is represented by counsel to be heard through counsel, this right is not absolute. A military judge has discretion under R.C.M. 801, and may apply reasonable limitations, including restricting the victim or patient and their counsel to written submissions if reasonable to do so in context. Furthermore, M.R.E. 412 and 513 do not create a right to legal representation for victims or patients who are not already represented by counsel, or any right to appeal an adverse evidentiary ruling. If counsel indicates at a M.R.E. 412 or 513 hearing that the victim or patient's interests are entirely aligned with those of trial counsel, the opportunity to be heard could reasonably be further curtailed.

Based on the foregoing discussion, the military judge's ruling in the present case runs counter to the M.R.E., and is in

error for three reasons. First, by prohibiting LRM from making legal arguments, the military judge improperly limited LRM's right to be heard on the basis for the claim of privilege or admissibility. M.R.E. 513(a) creates a privilege to refuse to disclose confidential communications, which necessarily involves a legal judgment of whether the privilege applies, as well at the opportunity for argument so that a patient may argue for or against the privilege. Neither M.R.E. 412 nor 513 preclude the victim or patient from arguing the law.

Second, the military judge's ruling, made during the arraignment hearing process and prior to any M.R.E. 412 or 513 proceedings, is a blanket prohibition precluding LRM from being heard in M.R.E. 412 or 513 proceedings through counsel without first determining whether it would be unreasonable under the circumstances. Instead, the military judge based his ruling on his flawed conclusion that LRM was precluded from making legal argument. While LRM's right to be heard through counsel is not absolute, LRM has a right to have the military judge exercise his discretion on the manner in which her argument is presented based on a correct view of the law.

Third, the military judge cast the question as a matter of judicial impartiality. It is not a matter of judicial partiality to allow a victim or a patient to be represented by counsel in the limited context of M.R.E. 412 or 513 before a

military judge, anymore than it is to allow a party to have a lawyer. The military judge's ruling was thus taken on an incorrect view of the law, and is in error.

REMEDY

As a threshold matter, the Government argues that, even though the Judge Advocate General has certified three issues to this Court, this Court is not authorized to act with respect to matters of law when the CCA has not acted with respect to the same matters of law. The relevant text of Article 67, UCMJ, states:

> (a) The Court of Appeals for the Armed Forces shall review the record in --
>
> . . . .
>
> (2) all cases reviewed by a Court of Criminal Appeals which the Judge Advocate General orders sent to the Court of Appeals for the Armed Forces for review;
>
> . . . .
>
> (c) In any case reviewed by it, the Court of Appeals for the Armed Forces may act only with respect to the findings and sentence as approved by the convening authority and as affirmed or set aside as incorrect in law by the Court of Criminal Appeals. In a case which the Judge Advocate General orders sent to the Court of Appeals for the Armed Forces, that action need be taken only with respect to the issues raised by him. In a case reviewed upon petition of the accused, that action need be taken only with respect to issues specified in the grant of review. The Court of Appeals for the Armed Forces shall take action only with respect to matters of law.

Emphasis added. The first clause of Article 67(c), UCMJ, does not confine the second clause in the way the Government proposes. In United States v. Leak, for example, this Court considered that:

> One possible reading of the language in subsection (c) of the statute is that because the lower court did not affirm the finding with respect to Appellant's rape charge, or set it aside as incorrect in law, this Court is without authority to "act." Under this reading, this Court would be obliged to "review" the Judge Advocate General's certified question, but we would have no statutory authority to "act."

61 M.J. 234, 239 (C.A.A.F. 2005). The Court concluded that "Article 67 does not preclude review of questions of law certified by Judge Advocates General where the courts of criminal appeals have set aside a finding on the ground of factual insufficiency." Id. at 242. Similarly, in the present case, even though the CCA did not reach the substantive issues, this Court may still take action with respect to all of the certified issues, including whether this Court should issue a writ of mandamus.

Furthermore, prudential concerns, such as the impending court-martial start date, the parties' interest in the speedy resolution of these issues, and the JAG's certification of all three issues, counsel the Court to reach all the substantive issues and proceed to grant relief at this time, if appropriate. In addition, the military judge's ruling raises issues of law of

first impression which could apply in all M.R.E. 412 and M.R.E. 513 hearings. Absent any guidance from this Court and with no other meaningful way for these issues to reach appellate review, every military judge could interpret the scope and extent of a victim's rights differently, so that a victim or patient's rights vary from courtroom to courtroom. Under these circumstances, this Court should not decline to address substantive issues which are properly before it, and which present a novel legal question regarding the interpretation of the M.R.E. affecting an ongoing court-martial. As in Wuterich, "[i]n view of the pending court-martial proceedings, and because this case involves an issue of law that does not pertain to the unique factfinding powers of the Court of Criminal Appeals, we [should] review directly the decision of the military judge without remanding the case to the lower court." 67 M.J. at 70. "[N]either justice nor judicial economy would be served by delaying the [court-martial] pending remand to the Court of Criminal Appeals." Powell, 47 M.J. at 364.

However, while this Court may appropriately take action at this time, a writ of mandamus is not the appropriate remedy. At the lower court, LRM petitioned for a writ of mandamus directing the military judge "to provide an opportunity for [LRM] to be heard through counsel at hearings conducted pursuant to [M.R.E.] 412 and 513, and to receive any motions or accompanying papers

reasonably related to her rights as those may be implicated in hearings under [M.R.E.] 412 and 513." The military judge's ruling must be based on a correct view of the law. M.R.E. 412 and M.R.E. 513 create certain privileges and a right to a reasonable opportunity to be heard on factual and legal grounds, which may include the right of a victim or patient who is represented by counsel to be heard through counsel. However, these rights are subject to reasonable limitations and the military judge retains appropriate discretion under R.C.M. 801, and the law does not dictate the particular outcome that LRM requests.

CONCLUSION

Certified questions I and II are answered in the affirmative. Certified question III is answered in the negative. The current record is returned to the Judge Advocate General of the Air Force for remand to the military judge for action not inconsistent with this opinion.

LRM v. Kastenberg, No. 13-5006/AF

STUCKY, Judge (concurring in part and dissenting in part and in the result):

While I agree with the majority that we have subject matter jurisdiction in this case, I nonetheless agree with the discussion of standing in Part A of Judge Ryan's dissent. I would therefore dismiss the petition for lack of standing and would not reach either the second or the third certified issues.

RYAN, Judge, with whom Stucky, J., joins as to Part A (dissenting):

A.

Whether it is more irregular that the Judge Advocate General of the Air Force (TJAG) "certified" these issues or that the Court chooses to answer them is a close call, particularly in light of the Supreme Court's recent decision in Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1155 (2013) (holding that the respondents lacked standing "because they cannot demonstrate that the future injury they purportedly fear is certainly impending," and, therefore, cannot establish a sufficient injury-in-fact), and the plain language of Article 67(a)(2) and Article 69, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 867(a)(2), 869 (2006).

The putative victim in this pending court-martial, LRM, through her attorney, asked the military judge to order that she be provided copies of motions related to the admission of evidence under Military Rules of Evidence (M.R.E.) 412, 513, and 514, and that the court reserve to her attorney the right to argue on those motions, although, at that point, her attorney admitted that he "[did] not intend to do so." Trial and defense counsel did not object to LRM receiving informational copies of any motions filed

pursuant to those rules. While the military judge found that LRM lacked standing to motion the court for production of documents or be heard through counsel, the Government avers that trial counsel provided LRM, through her attorney, with (1) copies of defense motions to admit evidence pursuant to M.R.E. 412 and 513, (2) the Government's response to the defense motion to admit evidence under M.R.E. 412, and (3) other trial-related documents.[1]

Based on the foregoing, at this point in the proceedings, LRM -- having no intention to speak or legal arguments to raise -- has not suffered any actual harm. She alleges no "certainly impending" harm, Clapper, 133 S. Ct. at 1155, and does not allege any divergence between her interests and those of the Government, or that such a divergence in interests is likely, let alone certain, to occur at a later stage in the proceedings. The absence of any actual or imminent injury to LRM, a nonparty to the pending court-martial below, makes TJAG's unprecedented use of his certification power to certify interlocutory issues to this Court all the more perplexing.

[1] In the Government's Response to Judicial Order -- Special Victims' Counsel, the Government avers that it did not provide LRM with a copy of its response to defense motion to admit evidence under M.R.E. 513.

While we are assuredly not an Article III court, we have, up until now, understood ourselves to be bound by the requirement that we act only when deciding a "case" or "controversy." See U.S. Const. art. III, §2; United States v. Johnson, 53 M.J. 459, 462 (C.A.A.F. 2000) (holding that the appellant lacked standing to object to an unlawful subpoena issued to secure the attendance of his wife as a witness at an Article 32, UCMJ, 10 U.S.C. § 832 (2006), hearing where the appellant "was neither deprived of a right nor hindered in presenting his case"); United States v. Jones, 52 M.J. 60, 63-64 (C.A.A.F. 1999) (holding that the appellant lacked standing to challenge the violation of a witness's Article 31(b), UCMJ, 10 U.S.C. § 831(b) (2006), or Fifth Amendment rights and explaining that "[t]he requirement is designed to allow a moving party with a personal stake in the outcome to enforce his or her rights" (quotation marks and citations omitted)). "No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 341 (2006) (quotation marks and citations omitted). And paramount to enforcing that jurisdictional threshold is

the requirement that, inter alia, a party have standing. See Raines v. Byrd, 521 U.S. 811, 818 (1997).

Integral to standing is a showing of injury-in-fact; "an injury must be 'concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling.'" Clapper, 133 S. Ct. at 1147 (citing Monsanto Co. v. Geertson Seed Farms, 130 S. Ct. 2743, 2752 (2010)). This requirement ensures that federal courts resolve only actual disputes where people are being harmed in fact, leaving hypothetical issues of law to be resolved where they should be, by the coordinate executive and legislative branches of government. See Hollingsworth v. Perry, 133 S. Ct. 2652, __ (2013), slip op. at 6 ("The doctrine of standing . . . 'serves to prevent the judicial process from being used to usurp the powers of the political branches.'" (quoting Clapper, 133 S. Ct. at 1146)); Allen v. Wright, 468 U.S. 737, 752 (1984) ("[T]he law of Art. III standing is built on a single basic idea -- the idea of separation of powers.").

The issues before us are not justiciable because LRM has not been presently harmed and any future injury "is too speculative to satisfy the well-established requirement that threatened injury must be 'certainly impending.'" Clapper, 133 S. Ct. at 1143. Per the representations of

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both parties, LRM either has or will be permitted to have the documents she requested, and her attorney stated that he does not intend to speak on LRM's behalf, as LRM's interests are aligned with the Government's. Which begs the question: at this point, what, if any, injury would be redressed by a favorable decision from this Court? On these facts, I can see no injury to be remedied, rendering any decision from this Court purely advisory and outside the "judicial Power" of Article III federal courts. See U.S. Const. art. III, §2. On this ground alone the certification should be dismissed.

B.

Additional grounds exist for dismissal of this certification. By acting on the present certificate, the majority approves a road map for evading the ordinary limitations on our review of interlocutory issues. LRM, a nonparty to the litigation who has not suffered any actual injury or even a reasonable likelihood of future injury, had interlocutory issues involving hypothetical future harm to her rights certified by TJAG to this Court via Article 67(a)(2), UCMJ. This unprecedented use of Article 67(a)(2) was made despite the fact that to have its interlocutory issues considered, the Government would have to meet the stringent requirements of Article 62, UCMJ, 10 U.S.C. § 862

(2006), and an accused would have to satisfy both the jurisdictional requirements of Article 67, UCMJ, in order to invoke the power of the All Writs Act, 28 U.S.C. § 1651(a) (2006) (allowing this Court to issue "all writs necessary or appropriate in aid of [its] respective jurisdiction"), and the extraordinary burdens needed to meet the criteria for an extraordinary writ. See, e.g., Hasan v. Gross, 71 M.J. 416, 416-17 (C.A.A.F. 2012) ("Applying the heightened standard required for mandamus relief, [and] conclud[ing] that based on a combination of factors, a reasonable person, knowing all the relevant facts, would harbor doubts about the military judge's impartiality.").

Further exacerbating the impropriety of the situation is that the instant certification was made in the early stages of a criminal case; TJAG's actions having ground the accused's proceedings to a halt ostensibly to determine the contours of a right of a witness who has identified no injury-in-fact and no divergence between her interests and those of the Government. Considering that "[t]he exercise of prosecutorial discretion is a prerogative of the executive branch of government," United States v. O'Neill, 437 F.3d 654, 660 (7th Cir. 2006) (citing Wayte v. United States, 470 U.S. 598, 607 (1985)), and the ordinary state

of affairs in our adversarial system where the government, not TJAG, is the accused's adversary, TJAG's decision to certify the question whether this nonparty should be allowed to effectively intervene in this criminal proceeding is all the more remarkable.

Nor is the certification proper under any provision of the UCMJ. As relevant to this issue, Article 69(d), UCMJ, provides that a Court of Criminal Appeals (CCA) may review (1) "any court-martial case which (A) is subject to action by [TJAG] under this section, and (B) is sent to the [CCA] by order of [TJAG]; and, (2) any action taken by [TJAG] under this section in such case." Article 69(a)-(c), UCMJ, provides the circumstances in which TJAG may modify or set aside the findings and sentence in a court-martial case. Nowhere do these sections provide TJAG with authority to intermeddle on an interlocutory issue that is not case dispositive, let alone the authority to certify an interlocutory issue to this Court.

Yet despite the lack of statutory authority to intrude at this juncture of the case, TJAG "certified" the issues before this Court pursuant to Article 67(a)(2), UCMJ, which presents yet another problem. Article 67(a)(2), UCMJ, provides that "[this Court] shall review the record in all cases reviewed by a [CCA] which [TJAG] orders sent to [this

Court] for review." In reviewing such "cases," this Court may "act only with respect to the findings and sentence as approved by the convening authority and as affirmed or set aside as incorrect in law by the [CCA]." Article 67(c), UCMJ; see also Ctr. for Constitutional Rights v. United States, 72 M.J. 126, 128-30 (C.A.A.F. 2013).

But there have been no findings or sentence entered here, and in requesting review of this particular interlocutory ruling, TJAG has not properly certified a "case" under Article 67(a)(2), UCMJ. In United States v. Redding, 11 M.J. 100, 102-04 (C.M.A. 1981), the Court clearly and fully considered whether TJAG had properly certified a "case" when he requested review of a trial judge's ruling "which rejected a command determination that a military lawyer requested by the accused . . . was unavailable" and where review of that ruling had been initiated directly in the Court of Military Review by a petition for extraordinary relief after the trial judge effectively dismissed the case for failure to make the requested military lawyer available.

The Court directly addressed whether the proceedings before it constituted a "case," and, therefore, were properly certifiable, and explicitly distinguished the military judge's ruling from "an intermediate or

interlocutory order" solely because "[the ruling] end[ed] court-martial proceedings on the charges; it is, therefore, not an intermediate or interlocutory order but a final decree." Id. at 104. The Court reasoned that because "the posture of the proceedings . . . was tantamount to a final disposition of the case," TJAG had properly certified a "case" within the meaning of Article 67(b)(2), UCMJ (now Article 67(a)(2), UCMJ). Id. (internal quotation marks and citation omitted).

Given the plain language of Articles 67 and 69, UCMJ, Redding at best expresses the outermost limits of TJAG's certification power, allowing him to certify an interlocutory issue only where it is "tantamount to a final disposition" of a case. Id. The majority, however, ignores both the plain statutory language and this precedent and instead, in cursory fashion, relies on United States v. Curtin, 44 M.J. 439 (C.A.A.F. 1996), a case which cited Redding to hold, without discussion, and contrary to both the plain language of Article 67, UCMJ, itself and the actual holding in Redding, that a "case" within Article 67(a)(2) "includes a 'final action' by an intermediate appellate court on a petition for extraordinary relief," quoting Redding, 11 M.J. at 104. See Curtin, 44 M.J. at 440; LRM v. Kastenberg, __ M.J. __, __ (6-7) (C.A.A.F.

2013). Redding narrowly held that "proceedings of the kind in issue are certifiable" and distinguished between action by a military judge that amounts to a "final decree," which could be certified because "[s]uch action ends court-martial proceedings on the charges," from a ruling that is "interlocutory in nature," which could not be certified. Redding, 11 M.J. at 104 (internal quotation marks and citation omitted).[2]

Where, as here, an interlocutory ruling is not "tantamount to a final disposition of the case," id., the proper channels of review of the issue include (1) review in the ordinary course of appellate review by the CCA under Article 66, UCMJ, (2) an appeal by the Government subject

[2] Moreover, in responding to the Government's argument that "this Court is not authorized to act with respect to matters of law when the CCA has not acted with respect to the same matters of law," LRM, __ M.J. at __ (19), the majority misapplies United States v. Leak, 61 M.J. 234 (C.A.A.F. 2005), in holding that, here, as in Leak, this Court may act on the substantive issues "even though the CCA did not reach [them]." LRM, __ M.J. at __ (20). Leak, however, more narrowly held that this Court could review "a lower court's determination of factual insufficiency for application of correct legal principles," Leak, 61 M.J. at 241, and the majority's passing extension of that holding to the present case is unwarranted. See United States v. Nerad, 69 M.J. 138, 147 (C.A.A.F. 2010) ("[T]he power to review a case under Article 67(a)(2), UCMJ, includes the power to order remedial proceedings . . . to ensure that the lower court reviews the findings and sentence approved by the convening authority in a manner consistent with a 'correct view of the law.'" (quoting Leak, 61 M.J. at 242)).

to the limitations of Article 62, UCMJ, or (3) a petition for extraordinary relief from the interlocutory ruling requested by a person with standing to challenge the ruling. See Article 66, UCMJ; Article 62, UCMJ; 28 U.S.C. § 1651(a).

It is entirely unclear why this Court would adopt a more expansive interpretation of "case" in this context, contrary to the plain language of the statute and unsupported by legislative history. The Supreme Court, in those limited instances where its jurisdiction is mandatory, see, e.g., 15 U.S.C. § 29 (particular class of civil antitrust cases), has been most exacting in requiring that the case is actually one it must decide. See Heckler v. Edwards, 465 U.S. 870, 876 (1984) (interpreting 28 U.S.C. § 1252 (repealed 1988), to provide mandatory jurisdiction in the Supreme Court only where "the holding of federal statutory unconstitutionality is in issue"); Palmore v. United States, 411 U.S. 389, 395-96 (1973) (holding that an appeal as of right would not lie to the Supreme Court under 28 U.S.C. § 1257 (amended 1988), in the context of a District of Columbia court's upholding a local statute against constitutional attack, and noting that "[j]urisdictional statutes are to be construed with precision and with fidelity to the terms by which Congress

has expressed its wishes; and we are particularly prone to accord strict construction of statutes authorizing appeals to this Court") (internal quotation marks and citations omitted).

What the instant certification amounts to is an improper attempt by TJAG to shortcut proper procedure without statutory authority to do so at this juncture and force this Court to review an interlocutory ruling that (1) does not come before us in the form of a petition for extraordinary relief, (2) is neither case dispositive nor an adjudged finding or sentence, and (3) does not involve an injury-in-fact to anyone (other than perhaps the accused's right to a speedy trial). This is not an effort that should be rewarded. Article 67(a)(2), UCMJ, which requires us to decide certified issues in "cases," should be strictly construed to require just that, and all interlocutory routes to this Court should require parties with standing and issues that qualify for review under either Article 62, UCMJ, or the All Writs Act and Article 67, UCMJ. By presently certifying issues pursuant to Article 67(a)(2), UCMJ, TJAG circumvented (1) the specific requirements for a Government appeal under Article 62, UCMJ; (2) the heightened scrutiny required for an extraordinary writ by either LRM or the accused; and (3)

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this Court's discretion over whether to grant review of this issue if, in the future, LRM suffers or is reasonably certain to suffer injury-in-fact and seeks a writ appeal.

TJAG may employ both congressional and executive routes to answer interlocutory questions definitively where his curiosity cannot await resolution of a particular case and where those claiming a right have no injury-in-fact such that they could seek a writ themselves. Permitting certification of interlocutory issues that are neither justiciable nor case dispositive in any sense distorts the limited role of both TJAG and this Court within the military justice system. For these additional reasons, I would dismiss the certification as improper, and I respectfully dissent.

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Your Rights As A Victim.

As a victim of a crime, you have the following rights under the Victim's Rights and Restitution Act of 1990 (Public Law No. 101-647):

- To be treated with fairness and with respect for your dignity and privacy;

- To be reasonably protected from the accused;

- To be notified of court proceedings;

- To be present at all public court proceedings related to the offenses, unless the court determines that your testimony would be materially affected if you heard other testimony at trial;

- To confer with the attorney for the Government (Trial Counsel) in the case;

- To receive available restitution;

- To receive information about the conviction, sentencing, imprisonment, parole eligibility and release of the accused.

Points of Contact:

Service Central Repository

_____
(Name)

_____
(Telephone Number)

Confinement Facility

_____
(Name)

_____
(Telephone Number)

Service Clemency and Parole Board

_____
(Name)

_____
(Telephone Number)

Other

_____
(Name)

_____
(Telephone Number)

For further information on crime issues, see the DoD Victim and Witness Assistance Council web page at:
http://dod.mil/vwac

DEPARTMENT OF DEFENSE

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POST-TRIAL INFORMATION FOR VICTIMS AND WITNESSES OF CRIME

DD FORM 2703, MAY 2004

Previous edition is obsolete.
Adobe Professional 7.0

Post-Trial Information
For Victims and Witnesses of Crime

Introduction.

This brochure details the post-trial process and your rights in that process. Most important is your right to be notified of changes in the confinement status of the offender in your case.

Location of Confinement Facility.

The Victim and Witness Assistance Program does not end with the completion of the court-martial. If the accused is convicted of any offense, the court-martial will sentence the accused. If the sentence includes confinement, the accused, now called "inmate", is usually taken immediately to jail. If there is a confinement facility at the installation where the trial was held, the inmate will be held there temporarily.

Depending on the security level of the inmate, he/she may be assigned to various work details around the installation. If the inmate's period of confinement is minimal, and there are adequate facilities on the installation, the inmate may serve the entire sentence at the installation.

If there is no confinement facility at the installation, the facility is not adequate to house the inmate, or the sentence is in excess of what is handled on the installation, he/she will be taken to a regional confinement facility. The inmate may later be transferred to other facilities available, based on length of sentence, programs and security levels. You will be notified of these changes if you fill out a form called DD Form 2704, "Victim/Witness Certification and Election Concerning Inmate Status." It is very important that you keep the confinement facility informed of your current address and telephone number.

Convening Authority Action.

The other parts of the sentence (e.g., forfeitures of pay, reduction in rank) will not be effective until the "convening authority", usually a senior officer, takes "action" on it, generally within 6 to 9 months. The convening authority may disapprove the findings, disapprove or reduce any part of the sentence, or approve everything except a punitive discharge. The convening authority cannot increase any part of the sentence. You have the right to submit a statement to the convening authority on how you feel about the inmate receiving clemency. You can ask the Trial Counsel about this right.

Clemency and Parole Consideration.

Military inmates are eligible for parole consideration when they have completed 1/3 of their confinement, and every year thereafter. You may make a statement to the Clemency and Parole Board on how the crime affected you. The statement may be on audio or video tape or in writing and may be sent to the Service Clemency and Parole Board at the address on the back of this page. A personal appearance before the Board may also be permitted.

Notification Rights.

You have the right to be notified in writing of the following changes in the inmate's status: transfer to another facility, parole, escape, release from confinement, or death while in confinement. If the inmate is released on temporary home leave (for example, to visit a dying parent), the confinement facility will make every effort to notify you in advance.

How To Exercise Your Rights.

If you want to exercise these rights, and be notified of the dates of any clemency and parole hearings, and changes in the inmate's status, you must fill out DD Form 2704, "Victim/ Witness Certification and Election Concerning Inmate Status." You MUST notify the Service Central Repository of all address and telephone number changes if you want to receive notices. This information will be kept confidential.

Points of Contact.

From now on, your point of contact will be the confinement facility or the Service Central Repository listed on the back of this page. Please call if you have any questions.

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VICTIM/WITNESS CERTIFICATION AND ELECTION CONCERNING PRISONER STATUS

PRIVACY ACT STATEMENT

AUTHORITY: 42 U.S.C. 10607 et seq.; 18 U.S.C. 1512 et seq; DoDI 1325.07; DoDI 1030.2; and DoDD 1030.1.
PRINCIPAL PURPOSES: To inform victims and witnesses of their post-trial rights; to determine whether the victim or witness of a crime elects to be notified of changes in the confinement status of a convicted criminal offender; and to record the election by the victim or witness of their desire to be notified about subsequent changes in prisoner status.
ROUTINE USES: None.
DISCLOSURE: Voluntary; however, failure to provide identifying information will prevent the correctional facility from notifying victim or witness of changes in a criminal offender's status.

SECTION 1 - ADMINISTRATIVE INFORMATION

Incident Number _____

Installation _____ City _____ State _____ ZIP Code _____

Court-martial case of United States v. _____ _____,
Print Name of Accused (Last, First, Middle Initial) *Social Security Number (last 4 only)*

Convened by _____,
Court-Martial Convening Order Number, Date, and Issuing Command

SECTION 2 - CERTIFICATION OF NO VICTIM(S) OR WITNESS(ES)

I certify that this case does not involve a victim or witness entitled to receive information about the confinement status of the defendant as required by 42 U.S.C. 10607 et seq., and U.S.C. 3771 et seq.

Date (YYYYMMDD) *Signature of Trial Counsel or Designee* *Type Name (Last, First, Middle Initial)*

Grade and Title *Telephone Number (Include area code)*

IF THERE ARE NO VICTIM(S) OR WITNESS(ES), STOP HERE AND SKIP TO SECTION 4.

SECTION 3 - CERTIFICATION OF ADVICE TO VICTIM(S) AND WITNESS(ES)

I certify that on this date I personally notified the victim(s) and witness(es) in the above-named court-martial case that included a sentence to confinement, of their right under 42 U.S.C. 10607 et seq., and U.S.C. 3771 et seq., to receive information about the status of the prisoner named in Section 1 of this form, to include length of sentence, anticipated earliest release date, likely place of confinement, the possibility of transfer, and the right to receive notification of a new place of confinement. I advised of the possibility of parole or clemency with an explanation of these terms. Additionally, I advised of the right to prior notification of the prisoner's parole hearings, release from confinement, escape and death. I advised the victim(s) and witness(es) that to receive notification of the prisoner's transfer, parole hearings, and release confinement, the victim or witness **MUST PROVIDE THE INFORMATION REQUIRED ON PAGE 2 OF THIS FORM.** I advised all victim(s) and witness(es) that if they elect to terminate or reinitiate notifications, or if they change their address, they must contact the Military Service Central Repository listed in Section 4. When a Victim or Witness is not present to initial box 4 (on page 2 of this form) the Trial Counsel or Designee shall contact the Victim or Witness in order to determine their election choice (Yes or No). Once verified, the Trial Counsel or Designee shall initial box 4 indicating and validating the Victim's or Witness's election choice.

Date (YYYYMMDD) *Signature of Trial Counsel or Designee* *Type Name (Last, First, Middle Initial)*

Grade and Title *Telephone Number (Include area code)*

SECTION 4 - DISTRIBUTION

1. MILITARY SERVICE CENTRAL REPOSITORY	2. LAW ENFORCEMENT/SPECIAL INVESTIGATION	3. CORRECTIONAL FACILITY

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SECTION 5 - LIST OF VICTIM(S) AND WITNESS(ES)
VICTIM/WITNESS CERTIFICATION AND ELECTION CONCERNING PRISONER STATUS

Court-martial case of United States v. _____ _____
(Printed Name of Accused - Last, First, Middle Initial) *(SSN - last 4 only)*

STATEMENT OF UNDERSTANDING: The victim(s) and witness(es) that have elected to receive information about changes in the status of the prisoner are required to notify the respective Military Central Repository with an accurate address and telephone number to continue receiving notifications on the prisoner's status, if their relocation results in changes to their address and/or telephone numbers.

STATEMENT OF TRANSFER NOTIFICATION: This transfer notification only applies in the event the above named prisoner is permanently transferred to another Federal, State or local law enforcement agency or correctional facility. The victim(s) and witness(es) will be notified using the address on file by DD Form 2705 of the prisoner's new location. The receiving Federal, State, or local agency will be responsible for all further notifications to the victim(s) and witness(es) about the prisoner's status. The military correctional facility retains responsibility for clemency board notifications.

INSTRUCTIONS: LIST ALL VICTIMS AND WITNESSES INVOLVED IN THE CASE. Using the drop-down box, indicate whether Adult, Parent, Legal Guardian, Minor/Age, Incompetent, Incapacitated. If under 18 years old, incompetent or incapacitated, also list parent or legal guardian's name. Using the next drop-down box, indicate whether victim (V), witness (W), or victim and witness (V&W). For all minor victims/witnesses, ensure minor status and age (at time of CM) are identified after their full name in Column 1. All minors, incapacitated and incompetent persons require a competent adult to be notified on their behalf by placing an adult and minor victim in the same row. Individuals that elect to be notified of prisoner status changes initial the "Yes" block in Column 4; otherwise initial the "No" block adjacent the respective name. The Trial Counsel or Designee (TC/D) are required to enter their initials in the Yes or No box in Column 4 for unavailable victims or witnesses.

1. NAME - Last, First, Middle Initial/AFFILIATION/STATUS *(Select affiliation and status from drop-down lists.) (Provide age if Victim/Witness is a minor.) (List Parent or Guardian if Victim/Witness is under 18 or incompetent or incapacitated.)*	2. ADDRESS - Street, Apartment No., City, State, ZIP Code *(If under 18 years old, incompetent or incapacitated, also list Parent or Legal Guardian's address, if different from victim/witness)*	3. TELEPHONE NUMBER *(Include Area Code) (If under 18 years old, incompetent or incapacitated, also list Parent or Legal Guardian's number, if different from victim/witness)*	4. NOTIFY *(Initial)* YES	NO
			TC/D:	
			TC/D:	
			TC/D:	
			TC/D:	
			TC/D:	
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INSTRUCTIONS FOR COMPLETING DD FORM 2704, VICTIM/WITNESS CERTIFICATION AND ELECTION CONCERNING PRISONER STATUS

PURPOSE: This form shall be used for victims and appropriate witnesses (those who fear harm by the offender) to elect to be notified of changes in the offender's status while in confinement. For all cases resulting in a sentence to confinement, the DD Form 2704 shall be completed and forwarded to the Service Central Repository, the gaining confinement facility, local responsible official, and the victim or witness, if any.

SECTION 1 - ADMINISTRATIVE INFORMATION

Incident Number: Obtained from the DD Form 1569.
Installation, City, State and Zip Code: The geographical location of the Convening Authority (CA).
Court-Martial Case of United States v.: Add the offender's name and last four digits of his/her Social Security number.
Convened By: Add the court-martial convening order number, date, and issuing command.

SECTION 2 - CERTIFICATION OF NO VICTIM(S) OR WITNESS(ES)

Complete this section only if there are no victims or witnesses who are entitled to notification under the Victim's Rights and Restitution Act of 1990, and DoD Instruction 1030.2.
Date and Signature certifying there are no victim(s) or witness(es) who are entitled to notification under the Victim's Rights and Restitution Act of 1990, and DoD Instruction 1030.2.
Print Name (Last, First, Middle Initial), **Grade, Title and Telephone Number.** Add the same identification as the individual signing the form.
If there are no victims or witnesses involved in this case, stop and go to Section 4.
Forward Page 1 only to the respective Military Central Repository.

SECTION 3 - CERTIFICATION OF ADVICE TO VICTIM(S) AND WITNESS(ES)

Complete this section, print, date and sign, certifying the victim(s) and/or witness(es) have been advised of their rights to be notified by the person signing this document.
Date and Signature certifying that any victim(s) or witness(es) have been advised of their rights to notification under the Victim's Rights and Restitution Act of 1990, and DoD Instruction 1030.2. The authorized signature per DoDI 1030.2 is the "Trial Counsel or Designee" as identified by Service specific regulations.
Print Name (Last, First, Middle Initial), **Grade, Title and Telephone Number.** Add the same identification as the individual signing the form.
When a victim or witness **is not present** to initial box 4 (on Page 2 of this form), **the certifying official of this document shall contact the Victim or Witness in order to determine their election choice (Yes or No). Once verified, the certifying official shall initial box 4 indicating and validating the Victim's or Witness's election choice.**
Forward Page 1 and all other pages listing victims and witnesses to the Military Central Repository.

SECTION 4 - DISTRIBUTION

A copy of the completed form shall be forwarded to each of the listed agencies.
Block 1 - Military Service Central Repository. Add the address for the offender's branch affiliation.
Block 2 - Law Enforcement/Special Investigation. Add the address for the offender's branch affiliation.
Block 3 - Correctional Facility. Add the location of the prisoner's confinement.

SECTION 5 - LIST OF VICTIM(S) AND WITNESS(ES)

Statement of Understanding should be read to the victim(s) and witness(es) when possible.
Statement of Transfer Notification should be read to the victim(s) and witness(es) when possible.
Column 1. Add the identified victim(s) and witness(es). Provide age if victim/witness is a minor. Indicate whether Adult, Parent, Legal Guardian, Minor, Incompetent, Incapacitated. If under 18 years old, incompetent or incapacitated, also list parent or legal guardian's name. Indicate whether victim (V), witness (W), or victim and witness (V&W) in this case.
Column 2. Add the address of the identified victim(s) and witness(es). If under 18 years old, incompetent or incapacitated, also list parent or legal guardian's address (if different from that of victim or witness).
Column 3. Add the complete telephone number of the identified victim(s) and witness(es). If under 18 years old, incompetent or incapacitated, also list parent or legal guardian's telephone number (if different from that of victim or witness).
Column 4. Victim, witness, or Trial Counsel or Designee are required to enter initials in the Yes or No column, indicating desire to be notified regarding the prisoner's status.
NOTE: Prevent victim(s) and witness(es) personal information from being released to other victim(s) and witness(es).
NOTE: DO NOT provide this form to the prisoner. This form (when filled in) is FOIA and PA exempt from release under DoD 5400.7R and 5 U.S.C.

TERMS AND DEFINITIONS

Victim: A person who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of a crime committed in violation of the UCMJ (Chapter 47 of the U.S.C., reference (b)) or in violation of the law of another jurisdiction if any portion of the investigation is conducted primarily by the DoD Components. Refer to DoDD 1030.1, Enclosure 1, E1.1.5. - E1.1.5.4. for the list of individuals included as victims. When Victim is under 18 years of age, the term includes Parent, etc. (loco parentis precedence) and are afforded the same notification status as the victim due to the minor victim relationship. Ensure their loco parentis title, e.g., Parent, is completed after their name in Column 1.

Witness: A person who has information or evidence about a crime, and provides that knowledge to a DoD Component about an offense in the investigative jurisdiction of a DoD Component. When the victim is a minor, that term includes a family member or legal guardian.
THE TERM "WITNESS" DOES NOT INCLUDE A DEFENSE WITNESS OR AN INDIVIDUAL INVOLVED IN THE CRIME AS A PERPETRATOR OR ACCOMPLICE. Further state - when the parent or guardian are crime witnesses for which the accused is found guilty and ordered a confinement sentence (witnessed charges), in addition of being afforded the Victim status for the notification of a minor, as a parent/guardian, they are also afforded the Witness status - annotate as (V & W). Those parent(s)/legal guardians of minors who assume the Victim status for notification purposes but did not witness or provide evidence of the crime only assume the Witness status.