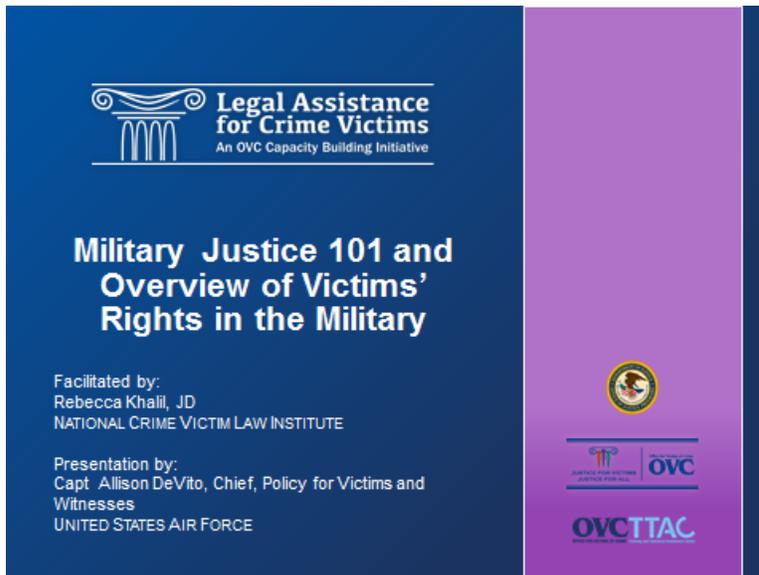




OVC
Webinar Transcript

Military Justice 101 and
Overview of Victims' Rights in the Military

October 30, 2013



Welcome

[recording begins with comments in progress]

Rebecca Khalil: ... series of Webinar trainings, and we are proud to present this Webinar as part of that effort. My name is Rebecca Khalil, and I am one of the staff attorneys here at the National Crime Victim Law Institute (NCVLI), and I will be facilitating today's Webinar, which focuses on victims' rights in military proceedings, including an overview of the Air Force's Special Victims' Counsel program, which was the first program in the military to provide attorneys to victims of sexual assault, and which is doing some really great work on behalf of, and in support of, victims of crime.

Rebecca Khalil: Captain Allison DeVito will be leading today's presentation. Captain DeVito is the Chief of Policy for Victims and Witnesses in the Military Justice Division of the Air Force Legal Operations Agency at Joint Base Andrews in Maryland. Captain DeVito develops and implements programs and policies for victim-related issues and coordinates with other divisions to implement victims' services programs. NCVLI is so pleased to offer this training with Captain DeVito and in coordination with OVC TTAC. But before we dive into the meat of this Webinar, we are going to briefly cover a few housekeeping issues.

Flow of the Webinar



- You are muted but you can ask questions & participate – and we hope that you do!
- You will receive an email with the powerpoint slides and the recording of the Webinar will be available online.
- Please provide feedback!

Flow of the Webinar

Goldann Salazar: My name is Goldann, and I am the Administrative Assistant here at NCVLI, and we are going to be together for the next hour. Just before we begin here, though, I am going to go through a few housekeeping topics that will help this Webinar run more smoothly. Right now, you are muted, but you can ask questions and participate using your comment box, which we hope that you will do. It will – you will see in the next slide. There will also be a survey at the end of the Webinar immediately after it ends. And we really encourage you to fill that out and we hope that you will help improve our future trainings, and we really appreciate your feedback. It is also a really good idea to turn off all of your cell phones and any other wireless devices because they can interfere with the Webinar. So if you are getting any static on the audio on your side, this is one of the most common causes.

How to Ask Questions During the Webinar

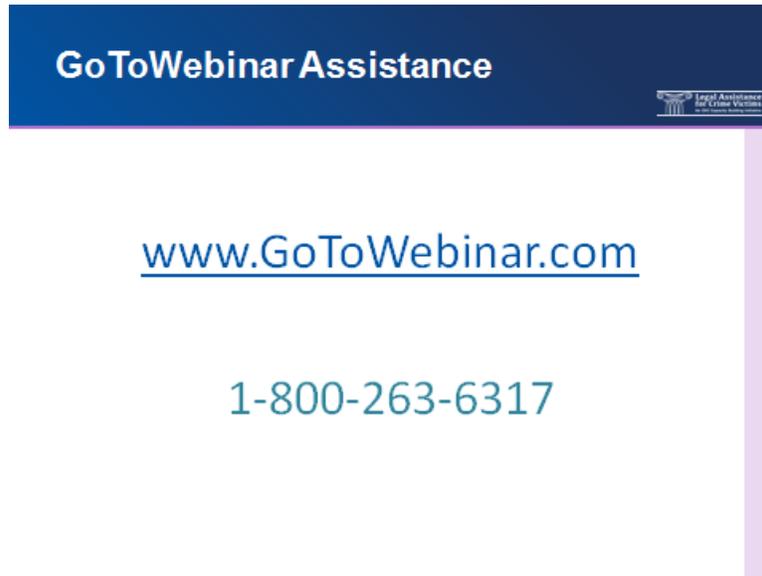


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How to Ask Questions During the Webinar

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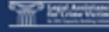
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Goldann Salazar: If you have any other technical difficulties, please call GoToWebinar. That is 800-263-6317, and they will be able to help you with any technical difficulties you have on your end.

Goldann Salazar: Lastly, a PowerPoint, a PDF of the slides will be available, as well as a recording of this training and a certificate of completion. Those will all be e-mailed to you following the end of this Webinar. Additionally, the recording of the Webinar will be available on our Web site and so you can access it there in the near future.

Goldann Salazar: Lastly, we hope that you will join us in the future for our 2013 trainings and our Webinar series. We have multiple free Webinars per month, and those are always updated on the front of our Web site, which is www.ncvli.org. So, check www.ncvli.org for more information to learn about future trainings. And with that, I am going to turn it back to over to our facilitator, Rebecca Khalil.

Goals for the Session



1. Provide an overview of the military justice system
2. Explain the scope and purpose of victim services in the military, including the Air Force's Special Victims' Counsel program
3. Identify what victims' rights attach in the military justice system
4. Identify open questions of law regarding the scope of victims' rights in the military

Goals for the Session

Rebecca Khalil: Great, thank you, Goldann. So what you are seeing now are the goals for the session. And a brief overview of the goals: we are going to overview what the military justice system looks like, explain the scope and purpose of victim services, identify generally what rights may attach in military proceedings, and talk about some of the open questions of law having to do with victims' rights in the military. So with that, we are pleased to present Captain DeVito.

Headquarters U.S. Air Force

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Military Justice 101 and Overview of Victims' Rights in the Military



U.S. AIR FORCE

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Captain Allison DeVito: All right. Good afternoon, everyone. This is Captain DeVito, coming to you from Andrews Air Force Base in Maryland. I am really excited to be with you this afternoon.

You can go ahead and go to the next slide. And actually just go ahead, you can go to the next one. And we will jump right in here, starting to talk a little about military justice.



Why a Separate Justice System for Military Personnel?

**Are they not subject to the same laws and
protections as civilians?**

The answer is “YES” ...

...and “NO”

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Why a Separate Justice System for Military Personnel?

Captain Allison DeVito: Just to kind of provide a little bit of context to the rest of the discussion, which is really focusing on the [unclear] program and the status of victims' rights in the military. But I wanted to at least provide some of the background on the military justice process, what our system looks like, how it is similar to and different from civilian justice systems.

Captain Allison DeVito: So, first off, why do we have a separate justice system for military personnel at all? Are they not subject to the same laws and protections as civilians? Well, the answer to this is yes and also no. And when I look at this again, I think the answer is really kind of yes, and then some. So we are definitely subject to the same laws as civilians in any jurisdiction you happen to be in the United States and globally. And we are also then subject to this funny little thing called the UCMJ, Uniform Code of Military Justice. Next slide.



U.S. AIR FORCE

Military vs. Civilian Communities

- **In most civilian communities, individuals report crimes to their local police departments, which investigate and make decisions about charges**
- **In the military, Commanders are responsible for maintaining law and order in the communities over which they have authority, and for maintaining the discipline of the fighting force**

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Captain Allison DeVito: So, in most civilian communities you would, of course, if a crime happened – if you were a witness or a victim yourself – you would pick up the phone, call 911, or contact your local police department to make a report. And then an investigation and possible charges would follow. Military members can, of course, do the same thing. Yes, we wear a uniform and, you know, we are members of the military 24/7, but we can certainly pick up a phone, call 911, and make police reports just like any other member of the community.

Captain Allison DeVito: However, in the military, we also have commanders that are responsible for maintaining law and order. And they also have authority over crimes that are committed by members of the military because they are responsible for maintaining discipline of the fighting force. Next slide.



The Military Justice Process

- **The civilian justice system varies from state to state**
- **The military justice process is the same for all military organizations**
- **Some issues are specific to victims and the military justice system**

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The Military Justice Process

Captain Allison DeVito: So, civilian justice, of course, varies from state to state and then has the federal system. Military justice is the same for all the military departments. So, whether you are in the Marine Corps, Navy, Army, or Air Force, the same military justice applies to you. You are subject to the same statutes, the Uniform Code of Military Justice, and then the rules of evidence and rules for court martial that apply if you are, you know, are involved in a case as a perpetrator or a victim or in executing the system as a lawyer. It is the same regardless of which system, which service you find yourself in.

Captain Allison DeVito: We have some issues that are specific to victims and the military justice system. I think some issues that are specific to victims that wear a military uniform and issues they might face because they are subject to a commander's authority. And then also there are some specific issues to victims of military members that are civilians and just having to interface with the military and being part of the military justice as a victim or a witness themselves and how that might be intimidating or confusing in a way that might be on top of what a victim or a witness would go through if they were involved in the civilian justice process. Next slide.



Modern Military Justice System

U.S. AIR FORCE

- **US Constitution**
 - Congress has power to make rules for governance of land and naval forces
 - President is Commander in Chief
- **The Uniform Code of Military Justice (UCMJ)**
 - Federal statute passed by Congress in 1950 and effective in 1951
 - Basic structure remains in place – several amendments over the years
 - **Goals of UCMJ:**
 - Good order and discipline
 - Rehabilitation
 - Deterrence
 - Accountability

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Captain Allison DeVito: Can we go to the next slide, please? All right, great. So, our modern military justice system is founded on the U.S. Constitution and the UCMJ. So the UCMJ was federal statute passed post-World War II. And that is really important when thinking in context of some of the discussions we will talk about later in terms of some of the protections that are included in the UCMJ for alleged perpetrators and the accused, and kind of the context of coming out of World War II, where maybe the system was seen as being too biased against perpetrators. There were not enough protections for them. It was too easy for a commander to maybe arbitrarily bring charges and convict a member of an offense. So, that is just kind of the placeholder in history for what was happening when the UCMJ was first signed into law.

Captain Allison DeVito: Goals of the UCMJ, very similar to civilian justice in terms of rehabilitation, deterrence, and accountability. And then kind of this idea of good order and discipline. We need to have a fighting force that is responsive to the commanders, that, you know, when says, "Charge that hill," members charge the hill. And that kind of comes back to this very basic understanding of, "Are you responsible to your leadership?" Which is a little bit different than if you think about a civilian job. And yes, you respect your boss. You probably listen to what they tell you to do. But there needs to be more order and discipline to that and more responsive, less questioning, in a sense, in the military. Next slide.



UCMJ

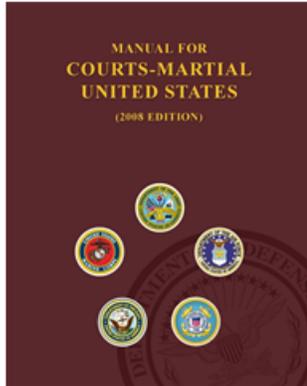
- **A complete set of criminal laws**
- **Same offenses as federal and state criminal codes (murder, rape, theft, etc.)**
- **BUT also unique military offenses**
 - Desertion
 - Absence without leave
 - Failure to obey
 - Dereliction of duty

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Captain Allison DeVito: So, the UCMJ is a complete set of criminal laws. We have the same offenses as federal and state criminal codes. It looks very similar, in fact, in terms of crimes you would think of, such as murder, rape, theft, etc. And then we also have uniquely military offenses that you would not find criminalized in civilian criminal codes, desertion, absence without leave, failure to obey orders, dereliction of duty, which can cover things basically like failure to follow technical orders, failure to stand post, basically failure to execute your duties as an officer and enlisted member in the military. And then we also have some crimes like, you know, adultery and some other offenses, which might still be criminalized in certain jurisdictions, but are probably – let us see – have less of a prosecutorial interest in civilian jurisdictions than the military might still take in those offenses. Next slide.



Manual for Courts-Martial



- Statutorily based
- Supplemented by Executive Order
- First MCM published in 1951
- Reviewed annually by Joint Service Committee on Military Justice

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Manual for Courts-Martial

Captain Allison DeVito: The Manual for Courts-Martial (MCM) is statutorily based. The MCM includes our rules for evidence and our rules for court martial. So, it is supplemented by an executive order. We typically get an executive order signed each year. Typically what happens, for instance, if there are changes to the federal rules of evidence, they are automatically incorporated into the MCM and to our military rules of evidence, unless the military acts otherwise and seeks an executive order to make those changes. And then, otherwise, our changes to our rules of court martial will be changed if there is a change in statute, if there are updates to the UCMJ that require a change in practice, or if, based on case law, we see that we need to make changes to our MCM to comply. Next slide.



UCMJ Jurisdiction

- **Military members are subject to the UCMJ world-wide, on and off duty, on and off base**
- **Concurrent jurisdiction may still exist**
 - **Jurisdiction may be shared with state, federal, or foreign government**
 - **Typical considerations:**
 - Location of crime
 - Duty status of accused
 - Victim's status
 - Type of offense - military specific
 - **Status of Forces Agreements (SOFAs)**

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UCMJ Jurisdiction

Captain Allison DeVito: All right, so our jurisdiction. Where do we have jurisdiction? Well, actually go back one. Sorry. We have jurisdiction everywhere, worldwide. So, when I go home at night, the military owns me. When I was deployed to Afghanistan, the military owns me. Anywhere I am, if I or someone else in the military commits an offense, we are subject to the jurisdiction of the military. Now, of course, concurrent jurisdiction may still exist. If, on my way home, I am pulled over and get a speeding ticket, something like that, the military could take action, or the local jurisdiction could take action. And so, typically, what happens in those scenarios is there a discussion between military prosecutor and the local civilian prosecutor about who is going to take primary jurisdiction of the case. And typical considerations will be the location of the crime, what was the duty status of the accused, the victims – are they a military member or a civilian? And the type of offense. Is this something that is really uniquely harmful to the military, or is it something that is criminalized in civilian criminal code as well?

Captain Allison DeVito: Status of Forces Agreements have to do with overseas bases and where our members are deployed to. Probably the most prominent example these days would be Iraq and Afghanistan, and the failure to reach a Status of Forces Agreement in Iraq really hinged on the idea that the United States was seeking immunity for military members that may have committed crimes in Iraq. Really, the idea being not that we think that military members should not be held accountable for those crimes, but kind of the idea that we would like to hold them accountable through the UCMJ. And the same thing is going to be true in Afghanistan, with current negotiations going on with the Karzai government.



UCMJ Jurisdiction

- **Special Cases – the Air Reserve Component (ARC)**
- **Air Force Reserve**
 - **Active Duty (AD) Tours**
 - **Inactive Duty For Training (IDT)**
- **Air National Guard (ANG)**
 - **State Status (Title 32) – belong to Governor of their state**
 - **Federal Status (Title 10) – attached to AD unit**
- **ARC Members Subject to UCMJ Jurisdiction**
 - **Air Force Reserve – AD or IDT**
 - **ANG – only in federal status**

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Captain Allison DeVito: All right. So, special cases are our Reserve and Air National Guard. And, as an active duty Judge Advocate General (JAG), I have to say these cases always just really make my head hurt because I think it is entirely confusing and difficult to wade through knowing whether you have jurisdiction over a Reserve and Guard member. Because it really depends on whether they were on duty at the time. Remember our Reservists are, you know, civilians in their everyday life, and they come in and they serve their two weeks a year and additional days of training and duty for the military. It is really only during that time when they are subject to UCMJ jurisdiction. National Guard is kind of the same way. They are in state status most of the time, and they belong to the governor of their state, who would have jurisdiction over them under their state codes, and are only in federal status when they are in Title 10 attached to an active duty unit, typically when they are deployed. Next slide.



Military Justice System

- **Commander driven**
 - **Immediate unit commander**
 - **Court-martial convening authority**
 - **Commanders must administer military justice fairly and impartially, while maintaining good order and discipline**
 - Requires positive involvement
 - Must ensure fair and open process
 - Must be even-handed

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Captain Allison DeVito: So, our military justice system is a commander-driven system. So, whereas, of course, in civilian systems it is not, for instance, the mayor of a city that makes prosecutorial decisions. It is the district attorney. In the military, it is our commander that has the authority to take action against a member that is alleged to have committed an offense. So we have what would be called kind of your immediate unit commander. So that would be your first commander who has command authority over you in a chain. And in the Air Force, that commander is called a squadron commander. And they typically have the rank of a major or a lieutenant colonel with 10 to 15 years of service in the military. And then we kind of go more senior from there. We have our wing commanders who typically own – in terms of being responsible for an entire military base. Sometimes we have multiple wing commanders on a given installation. And they are typically an 06, a colonel, or an 07, a one-star general, with somewhere between probably 20 and 25 years of experience in the military. And they are the ones that have basically the initial say, typically, in what kind of, you know, disposition should happen in a given case.

Captain Allison DeVito: And then from there it will go to, if they are going to pursue court-martial, to what is called a court-martial convening authority. It is just another higher level of command. So every year, we publish what is called the *Worldwide Convening Order* that says these are the positions that have this level of authority. And so, we will talk about the different types of courts martial in a few slides. But right now, in sexual assault cases only – every sexual assault case has to go at least to a colonel, an 06, who has special court-martial convening authority disposition to review a case. So for us, it is a pretty high level to be reviewing every single sexual assault allegation for disposition. And then for our more serious courts-martial, they go to even a higher level if the commander decides they are going to go to court, typically to a two or three-star general.

Captain Allison DeVito: The commanders are, of course, required to administer justice fairly and impartially. They are advised on the process throughout the process by their staff judge advocates. And 99 percent of the time, the commander agrees with the advice that is provided by their staff judge advocate. Our judge, our lawyers, and our commanders tend to have excellent

relationships, compared to the other staff officers that advise commanders. Judge advocates tend to be very well-trusted and very much relied on, and there is very little daylight usually between the recommendations of a staff judge advocate and the decision of the commander. Next slide.



Military Justice System

- **Commanders are required to refer all sexual assault allegations to the Military Criminal Investigative Organizations (AFOSI, CID, NCIS), which conduct an independent investigation**
- **Staff judge advocate advises and executes decisions**
- **Individual judge advocates perform unique roles**

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Captain Allison DeVito: So, very importantly, commanders are required to refer all sexual assault allegations to our professional law enforcement investigations. So, I am sure everyone has heard of NCIS (Naval Criminal Investigative Service) from the very popular TV show, but these other services have their own law enforcement agencies as well. In the Air Force, it is AFOSI, the Air Force Office of Special Investigation. Army is CID, and the Navy and Marine Corps is NCIS. And they are professionally trained. In the Air Force, they are all trained down at the Federal Law Enforcement Training Center down in Georgia. And they run an independent investigation. And the commander cannot interfere in that investigation. And so they [unclear audio] AFOSI detachment on each military installation. And even though there is a unit [unclear audio] installation, the commander does not own them. They do not report to the commander. They are not supervised by the commander. They are really there to be able to conduct independent investigations.

Captain Allison DeVito: The staff judge advocate is the lead lawyer that advises your wing commander. So, our staff judge advocates range typically from majors, 04s, up to colonels, 06s, with 10 to 20 plus years of experience in the JAG Corps. And I guess the rank tied to the position is going to be based on the size of the installation and [unclear audio] responsibilities they are going to have. And then we have individual JAGs that perform unique roles. We have JAGs that serve as our prosecutors, who we call trial counsel. We have JAGs that serve as defense counsel, area defense counsel and senior defense counsel. And they are equivalent to public defenders. They are provided free of charge to the military accused. And now we have JAGs serving as our special victims' counsel. And same deal, they are provided free of charge to our adult victims of sexual assault. Next slide.



Unlawful Command Influence

- **Commanders may not:**
 - **Attempt to control courts-martial**
 - **Attempt to influence testimony**
 - **Have a closed or inflexible mind about offenses**
 - **Punish court members for their judicial actions**
 - **Interfere with the military judge**

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Unlawful Command Influence

Captain Allison DeVito: So, unlawful command influence is a concept that is also unique to the military. And the idea is that in our very bureaucratic, top-down structure, the commander-in-chief all the way down to your newest airman basic on their first day of basic training, is that we have to ensure that commanders cannot control the outcomes of our judicial process. Our judicial process still needs to be fair, and it has to be free of that outside control that commanders have over a lot of things. However, it is very problematic if commanders attempt to control courts-martial, influence testimony, etc. So we do a lot of work with commanders on even training they can conduct at what we would call commander calls, and how they can talk about issues to members of their unit. It is really important that while they can have very strong messages of, of course, zero tolerance for sexual assault and talk about the fact that perpetrators are going to be held appropriately accountable, they still need to have the idea and know that when they get an individual case, that they need to look at that individual case independently and openly before making a disposition decision.

Captain Allison DeVito: And same goes if a case goes through courts-martial. Our jury members are officers and enlisted members, and they need to be able to sit through proceedings and listen to the evidence presented and the instructions given by judges, and make a decision based on the evidence and the instructions of the judge without influence by their commander or what someone more senior in the chain might think. That is why, I think, there was a comment – there has been a lot of focus on this issue this year in the military, going all the way up to comments from our president, President Obama, making comments that every member of the military who commits sexual assault should be dishonorably discharged. And that immediately kind of created some of these unlawful command influence issues from us, because he was basically prescribing what type of sentence our court members should come back with in every single case., which is something that – they need to be able to listen to the sentencing evidence and make a decision in each case on an individual basis without being influenced from the top. Next slide.



Military Justice System

- **Commanders are required to refer all sexual assault allegations to the Military Criminal Investigative Organizations (AFOSI, CID, NCIS), which conduct an independent investigation**
- **Staff judge advocate advises and executes decisions**
- **Individual judge advocates perform unique roles**

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Disciplinary Options

Captain Allison DeVito: I will just kind of let this slide build. I think I forgot that it was one of those fun-filled ones. But this is just to provide a quick comparison of disciplinary options available between military and federal systems, just to show that military – court-martial is not our only option. We have lesser disciplinary options, which are typically not going to be taken, of course, in sexual assault cases. But we do have what we would call Article 15, nonjudicial punishment, and administrative measures, and usually these are going to be actions that are taken in our military-specific case, like a dereliction of duty or a failure to obey a lawful order. And these are measures that are really looked much more as rehabilitative, particularly for our junior members that might just need some counseling or feedback, who kind of screwed up this first time but we still hope can continue to be outstanding members of the military. It would be very rare for a sexual assault case to be resolved in Article 15 or a lesser form of action. The only time where it would normally occur is if we had a victim that declined to participate, so we are unable to proceed into court-martial for that reason. Next slide.



Types of Courts-Martial

- **Summary Court-Martial**
 - **One officer**
 - **Accused can refuse**
 - **Limited punishment (30 days confinement)**

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Captain Allison DeVito: We have three different types of courts-martial. I will go through these relatively quickly. Summary court-martial would be our least serious, kind of available for our most minor crimes. It is really just one level above nonjudicial punishment. As you can see, the maximum punishment available is 30 days confinement. The presiding officer is not a military judge, and the accused can refuse to be tried by a court-martial. So again, this is not a type of a court-martial where we are going to see sex assault offenses land.



Types of Courts-Martial

- **Special Court-Martial**
 - **Military judge presides**
 - **Minimum of three officer panel members (enlisted accused can request enlisted members); accused can elect for the military judge to hear the case without members**
 - **Maximum punishment: bad conduct discharge; confinement for 1 year; forfeitures of 2/3 pay for 1 year; reduction to lowest enlisted grade**

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Captain Allison DeVito: Special court-martial is kind of the next level. A military judge does preside. We have a minimum of a panel of three officers, although the accused can elect for the

military judge to hear the case without members. And the maximum punishment is a bad conduct discharge and confinement for one year. So, when a commander and a convening authority, they make the decision to what we would call refer charges to a court-martial, they are deciding also what forum to send the court-martial to. So, it is decided at the outset if the case is referred to a special court-martial. You know going in that that is the forum that has been selected and that, regardless of what the offense that the member is convicted of, that their maximum punishment is going to be one year. Next slide.



Types of Courts-Martial

- **General Court-Martial**
 - **Military judge presides**
 - **Minimum of five officer panel members (enlisted accused can request enlisted members); accused can elect for the military judge to hear the case without members**
 - **Preceded by Article 32 investigation**
 - **Maximum sentence authorized for offense**

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Captain Allison DeVito: General court-martial is our highest level, most serious forum for handling serious offenses. So we would kind of sometimes refer to general courts-martial as felony courts and our special courts-martial as misdemeanor courts, just kind of the best comparison to civilian practice. Again, a military judge presides. Our panel of members – we call it a panel of members, but it is a jury – has to be at least five officer members. Enlisted can request enlisted members. And the only requirement on that is that in either case, the officers that are sitting at the panel must be senior to the member that is being tried. General courts-martial are preceded by an Article 32 investigation, sometimes somewhat inaccurately described as akin to a grand jury proceeding. However, an Article 32 ends up being, in some cases, like a mini-trial where both the prosecution and defense can present evidence and witnesses, including the victim, that are called to testify can be cross-examined. The maximum sentence authorized for general courts-martial is according to – we have maximum punishments that are set for each offense up to life in prison and death for a couple specific offenses. We have no mandatory minimums in the military, and we do not have sentencing guidelines, either. So this is an interesting issue in the sentencing case, the government and defense both have the opportunity to provide sentencing evidence and make recommendations to the panel. But I know that sometimes they kind of might wish they had [unclear audio] sentencing to guide them in some of these difficult cases.



Court-Martial Personnel

- **Convening Authority – Convenes the Court**
- **Staff Judge Advocate – Legal advisor to the Convening Authority**
- **Trial Counsel – Prosecutor**
- **Defense Counsel – Counsel for the Accused**
- **Court Members – Jury**
- **Military Judge**

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Court-Martial Personnel

Captain Allison DeVito: For court-martial personnel, our convening authority, again that is our commander that convenes the court, anywhere typically from an O6 colonel up to a three-star general. Staff judge advocate is your legal advisor to the convening authority. Trial counsel is the prosecutor. Defense counsel, counsel for the accused, etc. Next slide.



Convening Authority

- **Commander**
- **Responsibilities**
 - **Decides the type of court and refers charges to trial**
 - **Appoints court members**
 - **Reviews the results and approves or disapproves findings and sentence (may not change findings of not guilty)**
 - **Considers whether clemency appropriate (may not increase sentence)**

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Convening Authority

Captain Allison DeVito: So, the convening authority, in addition to referring charges to courts-martial, decides what type of court to refer the charges to. Also appoints the court members. What happens is – probably every service and even every installation might handle this a little bit differently – but usually there is a pool of court members for every, let us say, quarter of the year. And a kind of pool of members is compiled and presented to the convening authority to select. And they review data sheets on the members. We ensure that there is no conflict of interest. For instance, the accused’s commander would not be a court member. The victim’s commander would not be a court member. Really look to eliminate all conflicts of interest. And then the convening authority looks to appoint court members who have a diversity of background, experiences, etc. And then you would go through a typical [unclear audio] process, so you would have [unclear audio] that is very similar to civilian practice.

Captain Allison DeVito: Convening authority also reviews the results and approves or disapproves findings and sentences, and considers whether clemency is appropriate. And we will discuss clemency a little bit later, as this is one of the things that might be changing in the near future.



Staff Judge Advocate

- **Gives legal advice to Commanders, Convening Authorities, and MCIO investigators**
 - Is it “legal”?
 - Is it a good idea?

- **Advises and assists commanders with:**
 - Administrative disciplinary actions
 - Nonjudicial punishment
 - Prosecution of service members

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Staff Judge Advocate

Captain Allison DeVito: Staff judge advocate gives legal advice to commanders, convening authorities, as well as investigators. And we give advice on is this legal and is this a good idea, same as any other lawyer. Get your straight up legal advice and then you talk about policy considerations. You talk about the specifics of the case and some of the intangibles. Advise and assist commanders with admin disciplinary actions. That is like some of those other lesser forms of action that commanders have available. Your nonjudicial punishment, and then prosecution itself. Once they refer charges to courts-martial, it is your trial counsel that are taking over and prosecuting that case on behalf of the commander and the government. Next slide.



Discovery

- **Article 46, UCMJ**
 - “The trial counsel, defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence”
 - **Rule for Courts-Martial 701**
 - **Regulates disclosure by prosecution and defense**
 - **Information not subject to disclosure if**
 - Protected from disclosure by the Military Rules of Evidence
 - Attorney work-product
 - **Continuing duty to disclose**
 - **Regulation of discovery**
 - Time, place, and manner
 - Protective and modifying orders

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Discovery

Captain Allison DeVito: Discovery. We have a very robust discovery process in the military. Essentially, open disclosure and open discovery for defense counsel. Timing is when charges are preferred in a case, so that is when the accused is formally informed of the charges against them. So, discovery does not attach, you know, during the investigation or anything like that, but it does attach at preferral. The continuing duty to disclose – otherwise, not terribly different, I think our biggest, probably, issue is part of the discovery is, you know, availability to interview witnesses, and that includes the victim in the case, but generally the government is certainly not there to impede access to witnesses to the defense counsel. And if victims and witnesses decline to be interviewed by defense counsel, the remedy, you know, more often than not is just going to be [unclear audio] on cross-examination. But it can also impede courts occasionally because of this open access to discovery role that we have.



Pretrial Investigation

<u>Federal</u>	<u>Military</u>
<ul style="list-style-type: none">• Grand Jury<ul style="list-style-type: none">• Secret proceedings• Defendant usually not present• Defense counsel not in grand jury room• No right to cross-examine witnesses• Indictment often sealed• No defense witnesses	<ul style="list-style-type: none">• Article 32 Investigation<ul style="list-style-type: none">• Open proceedings• Accused present• Defense counsel present• Right to cross-examine witnesses / present evidence• Public record – accused gets copy• Defense witnesses, including experts, paid by government• Recent SecDef requirement that Art 32 Investigating Officers be JAGs

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Pretrial Investigation

Captain Allison DeVito: So, our pretrial investigation, real quickly, under Article 32 investigation process, highlighted most recently, unfortunately, by some kind of troubling proceedings that occurred at the Naval Academy in one of their cases. So our Article 32 investigation is an open proceeding. The accused and the defense counsel to be present. Right to cross-examine witnesses, and there is a public record. There has been a recent SecDef requirement – Secretary of Defense requirement – that Article 32 Investigating Officers (IOs) be judge advocates. That has long been the practice in the Air Force, and some of the other services are moving to implement that. There is also just a lot of discussion generally about Article 32 these days, from changes that can be made by executive order to whether there is a statutory need to change Article 32 itself. The idea being that, in particular sexual assault cases, that maybe this process is not necessary anymore to protect the rights of the accused, kind of going back to what we talked about with the UCMJ being implemented after World War II and kind of a need to provide extra protection to defendants at that time. But now, maybe we have these extra protections in place for the defendants and we do not have a risk of arbitrarily taking cases to trial. And that kind of the idea that the Article 32 investigation might be very onerous to victims and lead victims to not want to participate further in the courts-martial and whether we need to be re-examining that. So, it is certainly something that is under consideration, frankly at all levels of the Department of Defense (DoD) and within Congress. So, would not be surprised if we continue to see changes to our Article 32 process over the course of the next year. Next slide.



Jury

<u>Federal</u>	<u>Military</u>
<ul style="list-style-type: none">• Randomly selected “jury of peers” chosen from entire community• Multiple preemptory defense challenges• Unlimited challenges for cause	<ul style="list-style-type: none">• Convening authority selects panel members based on age, education, training, experience, length of service, and judicial temperament<ul style="list-style-type: none">• panel almost always more highly educated than civilian juries• officer/enlisted membership• One preemptory defense challenge• Unlimited challenges for cause• May ask questions / call witnesses

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Jury

Captain Allison DeVito: Our jury. In some ways we think that our jury is certainly unique in that it is a jury of your peers. However, if we compare to our civilian juries, we think that our [unclear audio] juries are probably better educated, better trained, and better experienced to serve in the role they have been selected for. Next slide.



Appeals

<u>Federal</u>	<u>Military</u>
<ul style="list-style-type: none">• No automatic appeals except death penalty cases• Only one appellate level in most cases• Almost always requires defendant to hire appellate specialist(s)	<ul style="list-style-type: none">• Automatic review by convening authority (likely changes in FY14 NDAA)• Additional review by appellate courts (military and civilian) in most serious cases<ul style="list-style-type: none">• Courts of Criminal Appeals (military)• Court of Appeals for the Armed Force (civilian)• United States Supreme Court• Accused provided free appellate specialists

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Appeals

Captain Allison DeVito: We have a robust appellate process in the military. Currently, there is automatic review by the convening authority. This is what I mentioned a few slides ago with our clemency process. So right now, our convening authorities have the authority to overturn the findings and sentence in the case. And this provision was part of the UCMJ prior to our appellate courts being as robust as they are now. So we think this is something that is going to go away in this year's National Defense Authorization Act, partially because of a high-profile case we had this year where a convening authority overturned a sexual assault conviction of a lieutenant colonel. And it is a change that the Department of Defense agrees with. We agree that keeping this authority for commanders to overturn convictions in serious cases is not an authority that convening authorities need any more to protect defendant rights because we have this robust appellate process that can review findings of legal error. Next slide.



Typical Victim Participation

- **Pretrial**
 - **Interviews with government and defense counsel**
- **Article 32 Investigation**
- **Trial**
 - **Direct**
 - **Cross-examination**
- **Sentencing**
 - **Victim impact testimony**
 - **Not exactly the same as a victim impact statement**

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Typical Victim Participation

Captain Allison DeVito: The typical victim participation in military cases are going to be interviews with government and defense counsel. Article 32 investigation, they are going to be invited to participate. Military victims can be ordered to participate, however, it is very unlikely they would be probably ordered to participate. Really a rare case. The only time I think we really see victims ordered to participate tends to be multi-victim cases where a commander has to consider the inputs and the impact from multiple victims and outcome on their case. Civilian victims are invited to participate in Article 32. However, we do not have subpoena authority at that point, so it really is invitation only. Of course, we hope that they will participate. Trial, direct and cross, and then sentencing, providing victim impact testimony. I say it is not exactly the same as a victim impact statement because, right now, victims do not have the right to stand up in court and give an unsworn statement. They would be testifying during the sentencing phase as to matters in aggravation – so giving victim impact testimony – but they can be cross-examined still on that testimony. So that is kind of a small distinction there between civilian process. Next slide.



Typical Victim Issues

- **Victim's consent**
 - **Refuted with physical evidence and/or traumatic responses**
 - **Privacy issues associated with using trauma evidence**
- **Victim's sexual history**
 - **MRE 412 Rape Shield**
- **Victim's mental health history**
- **Collateral misconduct**

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Typical Victim Issues

Captain Allison DeVito: [unclear audio] victim issues in civilian practice. Consent tends to be our, you know, central issue that is litigated in every case. Privacy issues are probably maybe a little bit more acute in the military, just based on the fishbowl nature of it being in the military. Victim's sexual history, we have Military Rule of Evidence 412, which mirrors Federal Rule of Evidence 412. Victim's mental health history. Then collateral misconduct, which I think is kind of a uniquely military issue. That is if the victim was underage drinking at the time of the offense or in violation of curfew. That can be something where they could be -- some sort of typically administrative action is taken against them for that offense, and it also somewhat harms their case because it is an issue they are likely to be cross-examined on. It also affects, we think, probably victim reporting because victims are concerned that their military career is going to be impacted for their own minor misconduct if they report these offenses. Commanders do, though, have the ability to decide, of course, what time and what disposition is appropriate for the relatively minor offense committed by the victim compared to the sexual assault allegation, which is what the commander and the Air Force is really interested in investigating and holding the member accountable.



Victim and Witness Assistance Program

VWAP Objectives

- **Mitigate the physical, psychological, and financial hardships suffered by victims and witnesses of offenses investigated by USAF authorities**
- **Foster cooperation of victims and witnesses within the military criminal justice system**
- **Ensure best efforts are made to accord to victims of crime certain enumerated rights**

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Captain Allison DeVito: We have a Victim and Witness Assistance Program (VWAP). Same really objectives as your victim witness liaison programs in civilian sector, which is to help victims and witnesses participate in the system and ensure that they are afforded their rights. Next slide.



Victim and Witness Assistance Program

- **Services must treat victims and witnesses with fairness and respect**
 - **Bases for program requirements: Federal statutes, Department of Defense implementing directives, Service instructions**
- **Applies in all cases in which criminal conduct adversely affects victims or in which witnesses provide information regarding criminal activity**
- **Victim: A person who suffered direct physical, emotional, or financial harm as the result of an offense**

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Captain Allison DeVito: Very importantly, Victim and Witness Assistance Program applies in every single case. So there is not a status requirement. You do not have to be a member of the military to receive assistance from the VWAP program. Anyone who is a victim of crime committed by a military member that the military is investigating and taking action on is eligible

for support from the VWAP program. And it applies to all crime, not just sexual assault crime. Next slide.



**Victim and Witness Assistance
Program Guidance**

- AFI 51-201, Administration of Military Justice, Chapter 7
- Victim and Witness Protection Act of 1982 (42 U.S.C. §§ 10601-10605)
- Crime Victims' Rights Act (18 U.S.C. § 3771)
- DoD Directive 1030.1, Victim and Witness Assistance
- DoD Instruction 1030.2, Victim and Witness Assistance Procedures

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Victim and Witness Assistance Program Guidance

Captain Allison DeVito: And this is just, you know, kind of some guidance that guides our VWAP program. Next slide.



**Purpose of the Air Force Special
Victim Counsel (SVC) Program**

- Provide advocacy: protect the rights afforded to victims in the military justice system
- Provide advice: develop victims' understanding of the investigatory and military justice processes
- Empower victims by removing barriers to their full participation in the military justice process

Providing this service to victims will result in a more robust opportunity for victims to be heard, to retain and take advantage of their rights, and enhance the military justice system while neither causing unreasonable delay, nor infringing upon the rights of an accused.

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Purpose of the Air Force SVC Program

Captain Allison DeVito: So now to the really good stuff and what hopefully is kind of the exciting part, and that is the program that the Air Force has been on the forefront of in

implementing just in January of this year. So, we implemented our Special Victims' Counsel (SVC) program with three central goals. We wanted to provide advocacy for members. We wanted to provide advice and really help them understand the process they were going through. I think it is confusing to anyone that is kind of looking in from the outside – even more confusing for a victim trying to understand, trying to just survive going from step to step, wondering why someone is calling them for a piece of information or another interview. So really wanted to be there to help victims understand and gain more control of the process by understanding it and being able to provide input at the appropriate places. And by doing that, we think that the program really empowers victims by removing barriers to their participation. By giving them some control back in the process, we hope that victims in most cases are going to be more willing to participate in the process. That is, of course, not going to be the case all the time, and the program and the individual SVCs certainly support victims who opt out of participating at any juncture. Next slide.



SVC Role

- **Advocacy to military justice actors, including commanders, convening authorities, investigators, trial counsel, and defense counsel**
 - May attend interviews
 - May include in-court representation
- **Advocacy to AF and DoD agencies/offices**
- **Advocacy to civilian prosecutors/agencies**
 - May **NOT** represent victims in civilian courts
 - May not advocate to Department of Veterans Affairs
- **Collateral misconduct**

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SVC Role

Captain Allison DeVito: So the role of our SVC – our program, we consider it to be full spectrum in that our victims' counsel are representing the victims for both criminal and civil legal issues. So they have the authority under the rules we have established to advocate to essentially anyone in our process. They can set up a meeting with a commander. They can talk to investigators, trial counsel, defense counsel. They can advocate to any Air Force and DoD agency, and it includes in-court representation, which we will talk about a little bit later. Kind of our only thing that we are saying no, you cannot do this, is that we cannot represent victims in civilian courts, and that has everything to do with our licensing and the fact that victims' counsel are only licensed in one state most of the time and it is typically not going to be the state where they are stationed. So, while we have authority to practice in military courts worldwide, we do not have that same, you know, licensing and background to be able to practice in civilian court.



SVC Role

- **Advocacy to military justice actors, including commanders, convening authorities, investigators, trial counsel, and defense counsel**
 - May attend interviews
 - May include in-court representation
- **Advocacy to AF and DoD agencies/offices**
- **Advocacy to civilian prosecutors/agencies**
 - May **NOT** represent victims in civilian courts
 - May not advocate to Department of Veterans Affairs
- **Collateral misconduct**

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Captain Allison DeVito: And then collateral misconduct. If a victim wants assistance from their victims' counsel for their collateral misconduct – meaning their underage drinking, drug use, anything else that was happening, their own misconduct at the time of the offense – the victims' counsel can represent them for that as well. They are also eligible to have a defense counsel. What we have found, though, is that our victims' counsel are doing a fantastic job of interfacing with commanders on issues of collateral misconduct, particularly if it happens to be kind of post sexual assault collateral misconduct, and really informing commanders and talking to them about what the commander might view as misconduct and their airmen screwing up is really typical post-traumatic behavior of the victim. And we think the SVCs are making a lot of money in that role. Figuratively, of course. They work pro bono. All right. Next slide.



SVC Role in Military Justice Process

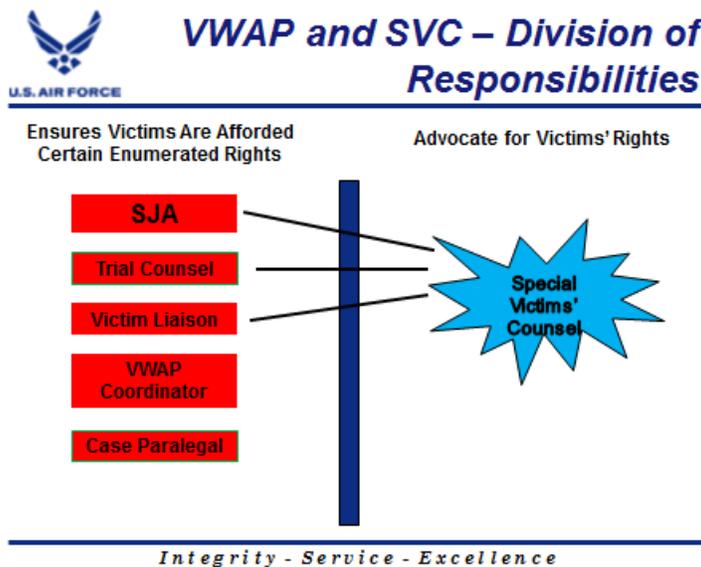
- **Advocacy to any actor in military justice process, including commanders, convening authorities, SJA, TC, ADC**
 - Includes matters in which the Government is required to consult with the victim
 - e.g., decisions not to prefer charges, to dismiss charges, plea negotiations, pretrial confinement, and scheduling of judicial proceedings
- **Advocacy to the military judge, to the extent authorized by the Manual for Courts-Martial**
 - Rape shield hearing / mental health records
 - Assert rights under the CVRA

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SVC Role in Military Justice Process

Captain Allison DeVito: They can advocate to any actor in the justice process and includes all matters in which the government is required to consult with the victim. So this is the real part about empowering victims to be part of the process. We always had these requirements to consult with victims on these issues. The trial counsel would talk to them about the status of the case, would talk to them and get their input before there was a decision not to prefer charges or dismiss charges and plea negotiations. But the prosecutor cannot tell the victim what to do and cannot advise the victim on all these issues. And so I think the victims probably felt a real power or education or understanding differential in those discussions and were more likely to either throw up their hands and say, "I do not know. Just make a decision," or really feel uninformed, like they did not have the ability to give informed consent on issues. Now, with the advice of their SVC that is able to talk to them and advise them on these issues, not just once but over the period of their attorney-client relationship, we think that they are making more informed decisions, and that is giving them more confidence in the input that they are giving back to the prosecutor, the trial counsel.

Captain Allison DeVito: They can advocate to military judges to the extent authorized by our Manual for Courts-Martial. This is definitely a developing area of practice. We think right now, of course, we are looking at areas where victims have a specific privacy interest, which is going to be rape shield and mental health – hearings on mental health records. And they can assert rights under the Crime Victims' Rights Act (CVRA). Next slide.



VWAP and SVC – Division of Responsibilities

Captain Allison DeVito: Between our VWAP and SVC programs, this is kind of our division of responsibilities. We still have the responsibility in the government and the prosecutor's office to ensure that victims are afforded enumerated rights, and then it is really the SVC that is the one that is advocating for those rights on the other side there. Next slide.



Which CVRA Rights Apply in the Military?

1. The right to be reasonably protected from the accused
2. The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused
3. The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding
4. The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding
5. The reasonable right to confer with the attorney for the Government in the case
6. The right to full and timely restitution as provided in law
7. The right to proceedings free from unreasonable delay
8. The right to be treated with fairness and with respect for the victim's dignity and privacy

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Which CVRA Rights Apply in the Military?

Captain Allison DeVito: So, which CVRA rights apply to the military? The ones that I have highlighted in the red are the rights that we currently have incorporated into the Department of Defense and service policy. The two ones in black are rights that are coming. So, these are things that are being currently written into our policy. So, you know, stay tuned. Like a lot of things that we are changing, this is one of them in terms of being formally written into our policies. Next slide.



The right to be reasonably protected from the accused

VWAP Responsibility

- **Inform the victim about protection and report any intimidation, harassment, or similar conduct to military authorities**
 - Restraining Orders or other similar protections (Military Protective Orders)

SVC Role

- **Same!**
- **Expedited transfer**
- **Pretrial confinement**

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The Right to Be Reasonably Protected From the Accused

Captain Allison DeVito: So, in terms of right to be reasonably protected from accused, one of the ways that we kind of would implement that in the military, we would have restraining orders that they can seek from civilian jurisdictions as well as military protective orders. A program called Expedited Transfer where a victim who makes a sexual assault allegation can request to be changed or transferred to a new assignment or even a new unit. And then pretrial confinement, if the perpetrator is a threat to basically continue committing the crime, then they can be placed in pretrial confinement. And that is something that the victim has input on. Next slide.



The right to reasonable, accurate, and timely notice ...

- (b) *Victims' Right to Notification of all Court-Martial Proceedings.* IAW AFI 51-201, para. 7.12.8, the government will provide the victim with the earliest possible notice of:
- i. The status of the investigation of the crime, to the extent it will not interfere with the investigation and is appropriate
 - ii. The accused's pretrial status and any subsequent change in that status, including, but not limited to, the accused being placed in pretrial confinement, being released from pretrial confinement, or escaping from pretrial confinement
 - iii. Preferral and referral of charges or a decision not to pursue prosecution
 - iv. A pretrial confinement hearing and/or Article 32 investigation
 - v. Notification of the scheduling, including changes and delays, of each court-martial proceeding the victim is entitled to or required to attend
 - vi. The acceptance of a guilty plea or announcement of findings
 - vii. The sentence imposed, including the date on which the accused becomes eligible for release from confinement, or parole, if applicable

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The Right to Reasonable, Accurate, and Timely Notice

Captain Allison DeVito: Victims have right to reasonable, accurate, and timely notice. And these are all the issues that they receive notice of from the government. Next slide.



How Notice Is Provided

- **DD Form 2701, Initial Information for Victim and Witnesses of Crime (AFOSI, SFOI)**
- **DD Form 2702, Court-Martial Information for Victims and Witnesses of Crime (TC/Vic Liaison)**
- **DD Form 2703, Post Trial Information for Victims and Witnesses of Crime (TC/Vic Liaison)**
- **DD Form 2704, Victim/Witness Certification and Election Concerning Inmate Status (TC/Vic Liaison)**
- **DD Form 2705, Victim and Witness Notification of Inmate Status (Confinement Facility)**

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How Notice is Provided

Captain Allison DeVito: We have a very formal process of providing these notices through some Department of Defense forms. SVCs are really making their money, though, in helping explain these forms. I think everyone knows, gosh, when you are handed a piece of paper from the government, it probably looks like Greek for one. And who knows if people actually read or throw it out. So it is really our VWAP program should be explaining these things to victims and not once, not twice, but really as necessary. And that is what the victims' counsel are there for, too. Victim is not going to remember all the initial information they need to when they first report a crime. You know, it would be impossible to ask anyone to do that. So the victims' counsel is really there to help explain these things along the way. Next slide.



The reasonable right to confer with the attorney for the Government in the case

- (a) ***Victims' Right to Consultation.*** IAW AFI 51-201, para. 7.12.12, the government will consult with victims and obtain their views concerning:
- i. Decisions not to prefer charges
 - ii. Dismissal of charges
 - iii. Pretrial restraint or confinement, particularly an accused's possible release from any pretrial restraint or confinement
 - iv. Pretrial agreement negotiations, including PTA terms
 - v. Plea negotiations
 - vi. Discharge or resignation in lieu of trial by court-martial
 - vii. Scheduling of judicial proceedings where the victim is required or entitled to attend.

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The Reasonable Right to Confer with the Attorney for the Government in the Case

Captain Allison DeVito: Again, a reasonable right to confer with attorney for the government in the case. These are all the decisions that a victim has a right to consultation on under our Air Force regulations. Really important that the victims' counsel are proactive in advising their clients on these issues. And I think they have done a great job so that when we are going to court or not going to court or there is a pretrial agreement, that they really understand these things. So, you know, they kind of say they have a voice but not a veto. It is still, of course, the government's decision at the end of the day what disposition to take in a case. But the fact that I think we are doing a much more robust job of ensuring that victims' input is not only sought, but that it is an informed victim input and that that is communicated to the commander. And I know that every commander and convening authority, that will be one of their questions when the staff judge advocate makes recommendation on the case is, "What does the victim think?" And they will want to know the background of the victim's opinion.



The reasonable right to confer with the attorney for the Government in the case

VWAP Responsibility

- **Consult and obtain the victim's view – BUT victim's opinion is not the final word...decision belongs to the appropriate official**

SVC Role

- **Discuss courses of action with victim**
- **Advocate for victim's choice**

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Captain Allison DeVito: I kind of already talked about this. Victim's opinion is not the final word. The decision still belongs to the appropriate official. SVC really, though, discusses the courses of action with the victim and then advocates for the victim's choice. And, you know, one of the interesting things about the military, and I think one of the good things about our system, is we have this lengthy chain of command. So even if a victim or a victim's counsel is kind of, you know, shot down at a lower level, it has become not unheard of for a victim's counsel that feels strongly about a case and about their client's position to go up the chain of command and advocate to the initial commander's boss, essentially, about that. And I think that has been effective in some cases where it has been necessary.



The right to full and timely restitution as provided in law

VWAP Responsibility

- **Inform victims of intra-familial abuse of the availability of limited transitional compensation benefits, waiver of mandatory forfeitures, and possible entitlement to a portion of the active duty member's retirement benefits**

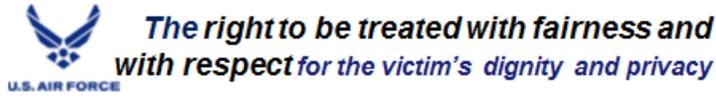
SVC Role

- **Assist victim with transitional compensation and other restitution programs**
- **Advocate for waiver of forfeitures**

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The Right to Full and Timely Restitution

Captain Allison DeVito: The right to full and timely restitution: SVC will assist victims with transitional compensation and restitution programs, and advocate for waiver of forfeitures in cases where the forfeitures would end up going to the victim. Next slide.



VWAP Responsibility

- **Protect victim's privacy interests (Privacy Act, need to know)**
- **Safeguard victim's property held as evidence and return to the victim as soon as possible**
- **During trial proceedings, provide victim with a waiting area removed from and out of sight and hearing of the accused and defense witnesses**

SVC Role

- **Same!**

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The Right to Be Treated With Fairness and With Respect for the Victim's Dignity and Privacy

Captain Allison DeVito: The right to be treated with fairness and with respect. I know I have heard presenters from NCVLI talk a lot throughout this year, and I think I am more convinced than ever that this is a substantive right and that our SVCs are becoming more and more creative in advocating for what this right actually means. Next slide.



Victim Standing in Military Courts-Martial

■ **LRM v. Kastenberg**

- "A reasonable opportunity to be heard at a hearing [under MREs 412 and 513] includes the right to present facts and legal argument, and that a victim or patient who is represented by counsel be heard through counsel."
- "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 MRE 412 or 513 before a military judge, anymore than it is to allow a party to have a lawyer."

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Victim Standing in Military Courts-Martial

Captain Allison DeVito: So, victim standing in court-martial. We had a huge victory this summer. When the Air Force program was implemented back in January, we kind of went out all alone in implementing this pilot program for the Department of Defense, and all the other services were watching to see what happens. And one of the huge open questions is, "Hey, what is the role of a victim's counsel in a court-martial proceeding?" Which is really a question of what is the role of a victim. We are only used to hearing from the victims when we are calling them to testify. And in the second day of our program implementation, we were asserting standing and asserting standing in pretrial hearings under 412 and 513. And we lost in the trial level, filed a writ of mandamus with our Air Force Court of Criminal Appeals. The Air Force Court essentially punted on the issue, saying they did not have jurisdiction to hear the case. And the judge advocate general for the Air Force certified the issue to the Court of Appeals for the Armed Forces (CAAF). And this is what CAAF had to say in LRM v. Kastenberg. That a reasonable opportunity to be heard at a hearing includes the right to present facts and legal argument, and that a victim who is represented by counsel can be heard by counsel.



Victim Standing in Military Courts-Martial

■ **LRM v. Kastenberg**

- The right to be heard through counsel is not absolute. A military judge has discretion under RCM 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 reasonably be further curtailed.
- MREs 412 and 513 do not create a right to legal representation for victims or patients who are not already represented by counsel.
- MREs 412 and 513 do not create a right for the victim or patient to appeal an adverse evidentiary ruling.

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Captain Allison DeVito: Really importantly, and this is going to a lot of the arguments raised by defense counsel in a lot of the amicus briefs filed by our different military appellate defense offices, is that it is not a matter of judicial partiality to allow a victim to be represented by counsel any more than it is to have a party to have a lawyer. So one of the big arguments being made by defense counsel at the outset of this program was that giving a victim an attorney would basically be stacking on, and just adding another attorney to the prosecution team and stacking the parties against the accused. And so this is a really important decision, not only to affirm the role of the victim to be able to have their attorney stand up there making factual and legal arguments on their behalf, but also the fact that giving a victim an attorney is not a matter of judicial partiality. It is not this zero sum game, but that by enforcing a victim's right and a victim's participation in a process where they have a role in the process, that it somehow takes away from the rights of the accused. Next slide.

Captain Allison DeVito: And our appellate court did give some caveats to the decision, saying the right to be heard through counsel is not absolute and still gave military judges discretion. And I think that in practice, this has I do not think necessarily been a bad thing thus far. We will wait to see when it is actually tested and whether we have any victims' counsel that thinks it is a real issue. But I think in general, in many cases, our victims' counsel recognize that their client's interests are aligned with the government, and if the government is arguing – and I think they certainly submit motions in their client's [unclear audio] but do not necessarily need to provide oral argument. And I think that the written motions and replies that victims' counsel have been providing have been persuasive and are providing judges with a different view that they did not necessarily have before. Next slide.



Status of Victims' Rights in Military

- **Does the Crime Victims' Rights Act apply to military courts-martial?**
 - **Air Force Court of Criminal Appeals said no**
 - **Court of Appeals for the Armed Forces did not address the issue in LRM v. Kastenberg**

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Status of Victims' Rights in Military

Captain Allison DeVito: So, I will kind of conclude the substantive portion with an open-ended question of: Does the Crime Victims' Rights Act apply to military courts-martial? I talked about, earlier in this presentation, the fact that we were applying the Crime Victims' Rights Act by policy and writing all these requirements into our policies, and that we are certainly having victims' counsel advocate for victims' rights, but we do not know if it actually applies as a matter of law. And the reason for that is that the issue was addressed by our Air Force Court of Criminal Appeals in the LRM v. Kastenberg case. And they said no, that the CVRA does not apply. And that the Court of Appeals for the Armed Forces did not address the issue in LRM.

Captain Allison DeVito: So this might actually be another issue that Congress is taking up. They kind of inquired about this throughout the year. I think they were really troubled earlier in this year when it looked like this new, great victims' counsel program that members of Congress were really happy we implemented, but it looks like it might somehow be undercut in our courts and then somewhat alleviated by the LRM v. Kastenberg decision. And I think that they might still be waiting to see how some of these things play out, whether there is actually a problem with enforcing victims' rights in the military that needs to be addressed statutorily.

Captain Allison DeVito: So, you know, our program is only 9 months in at this point, certainly having a lot of success and doing a lot of great things on behalf of victims. In some ways, though, we are just getting started. One of the great ways that we are just getting started is that the other services now kind of have seen the success of the program and are being required to implement similar programs. So, the Secretary of Defense has directed the other services to implement special victims' advocacy programs as well, and they have a requirement to do so by 1 January. So, next slide.

Questions? Comments?

Legal Assistance
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Questions? Comments?

Captain Allison DeVito: I think that concludes, actually, my formal presentation. I feel like I just flew through a whole bunch of stuff really fast, so I am certainly happy to take any questions that anyone has.

Rebecca Khalil: So, we have received a few – this is Becca again – and I will go ahead and start asking some of those. If folks have more questions that they would like to submit, go ahead and type them into the box and, as long as we have time, we will get to as many as possible. And if we are not able to get to a question you submitted, please feel free to e-mail us here at NCVLI and we will do our best to try to get those questions answered for you.

Rebecca Khalil: So, starting off with the first one, Captain DeVito. We had a question if you could – there are a lot of acronyms in military justice proceedings...

Captain Allison DeVito: I know. I am so sorry.

Rebecca Khalil: And we had a participant ask if you could go over what UCMJ stands for one more time, please.

Captain Allison DeVito: Yes. It is the Uniform Code of Military Justice. So, all it is is our criminal code. It is our statutes. It tells us what offenses are criminalized.

Rebecca Khalil: And in terms of SVC representation of victims in the military, does that apply to folks who are victimized while on duty here in the United States and abroad, or is it more limited than that?

Captain Allison DeVito: Yes, in general. So, we have – the statutory basis for allowing us to implement this program is the military has the authority by statute to provide legal assistance to its military members. When we think about legal assistance generally, this has always been things

like members can come get a will drafted by a JAG, get powers of attorney, come in and talk to JAGs about what we would call personal civil legal matters. Things like divorce and custody issues, maybe lemon law, landlord-tenant. And so we had to go get a legal opinion by general counsel last year saying, "Hey, we can use the same statutory authority," where Congress has also gone on to say that you can provide legal assistance to victims of crime. We had always thought, though, legal assistance rights usually means a pretty finite relationship of coming into a legal office for like an hour appointment, get some basic legal advice, but not the kind of long-term attorney-client relationship that a victim of crime really needs, particularly a sexual assault victim. So the response that we got to that was basically, "Yes, you can go ahead and do this." Well, the other thing is we cannot provide legal assistance statutorily to every victim of crime. So our restrictions are to active duty military members, Reserve and National Guard when they are in Title 10 status, dependents of military members, so spouses as well as children, and retirees. But anyone that fits into those categories, yes, we can provide them an SVC regardless of whether they are victimized. So we, of course, have military members stationed all over the world, and whether their perpetrator is a member of the Air Force, or as long as they were an active duty member, even if the perpetrator is a civilian without any ties to the military whatsoever, we are also providing them victims' counsel. A little bit more limited in the scope of what we can do for a victim in that case, of course, just because of our limitations on not being able to practice in civilian courts, but we certainly still provide them counsel and in those cases we will work to find them civilian counsel that can represent them, if necessary.

Rebecca Khalil: Great, thank you. And two sub-questions that fall out of that. When a SVC and a victim are working together, do all the usual protections of an attorney-client relationship, like privilege, attach to that relationship?

Captain Allison DeVito: Yes, absolutely. It is very clear that there is attorney-client privilege with all the same protections and same exceptions you would have representing any other client.

Rebecca Khalil: Now, if a victim does not have an SVC that can assist them, could they hire a civilian attorney to go into military court to enforce their rights in connection with a court-martial?

Captain Allison DeVito: Yes, absolutely. It has been, you know, rare so far. I think there is, of course, a civilian attorney, Susan Burke, that represented the victim in the Navy case that has gained a lot of attention. But absolutely, civilian attorneys can practice in military courts. We have civilian defense counsel that practice in military courts and, you know, make their living serving solely as civilian counsel for military defendants.

Rebecca Khalil: So, when victims' rights attach in military proceedings, would they apply in both the court-martial proceedings and the Article 32 proceedings?

Captain Allison DeVito: Yes. And I think SVCs are starting to become more confident about what their role is and what their role can be in Article 32 hearings, particularly getting involved with the Article 32 investigating officers early on and, you know, filing objections to certain lines of questioning before the hearing even takes place or during the hearing itself, providing support, and, of course, just participating in the pretrial interviews before the Article 32s and in that process. So, yes, absolutely.

Rebecca Khalil: And I think we have time for two more questions. So, we have got a question having to do with the CVRA and the DoD directives incorporating at least some of those rights. Do those policies incorporate remedies to challenge a failure to recognize those victims' rights?

Captain Allison DeVito: No. We do not have an enforcement mechanism right now, and that is something that the Joint Service Committee on Military Justice is currently studying, as to what an enforcement mechanism would look like for the military. And that is another reason why I think Congress has been looking at this issue and whether it is something that they need to legislate to make it clear that the CVRA applies to the military or, you know, if it needs to be tweaked somewhat to fit the military justice system, to make that change.

Rebecca Khalil: Now we have got a question specific to the 412 – so the rape shield hearings. Does the victim have access to any kind of discovery to help them prepare to participate in those hearings?

Captain Allison DeVito: I think this is probably something that is still developing. There was a lot of, I guess, different opinions on this at kind of the outset of the implementation of our program. The LRM v. Kastenber decision we think took care of a lot of that. My understanding right now is that victims' counsel are not having trouble anymore getting access to motions in which their clients have an interest, so that they are being provided copies of the motions in cases and others that might be related to those hearings [unclear audio] a draft of the Army guidance that the Army is implementing for their program. And it also look like it is a matter of course when there is a filing that directly impacts the victim, that the victims' counsel is going to automatically provide a copy of that.

Rebecca Khalil: And then one final question for you. Have you received any feedback from victims about the SVC program and the impact that it has had?

Captain Allison DeVito: Yes. I mean, gosh, the feedback has been overwhelmingly positive. You know, earlier this year we kind of, you know, implemented the typical survey feedback mechanism process so that we could hear from victims. And, you know, we kind of were not sure what kind of response we would get. We were like, oh, are people going to want to fill out our little online survey to provide feedback? And overwhelmingly, not only have they wanted to do so, but they have provided glowing feedback on the impact that this program has had on their lives. I mean, for some victims, they talk about, "I could not have participated in the process if I did not have the victims' counsel with me." Or, "The victims' counsel gave me the confidence I needed to take the stand and to make it to the court-martial." So, I mean, our statistics are over [unclear audio] right now in talking about victims being extremely satisfied with the support they received from their SVC and their SVC helping them understand the investigation and prosecution process, and feeling that their SVC advocated effectively on their behalf. So, those are all great things for us to hear, and it has been really positive feedback for our victims' counsel in knowing that they are doing their jobs well, and then just sharing feedback with each other about what we can continue to do better. But I think it has had a really powerful impact on the lives on the victims that they represent.

Rebecca Khalil: That is really great. Thank you very much, Captain DeVito, for helping to present this Webinar, and we really appreciate not only the work that the SVCs are doing, but also all of the work that is going on around the country in terms of facilitating victims' rights.

Contact Information



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Contact Information

Rebecca Khalil: So we have got on the screen some contact information, both for us here at NCVLI and for Captain DeVito, and this will be part of the PowerPoint presentation that all the participants are e-mailed at the conclusion.

Are you working on a case with a victims' rights issue?

NCVLI provides legal technical assistance to practitioners serving crime victims.

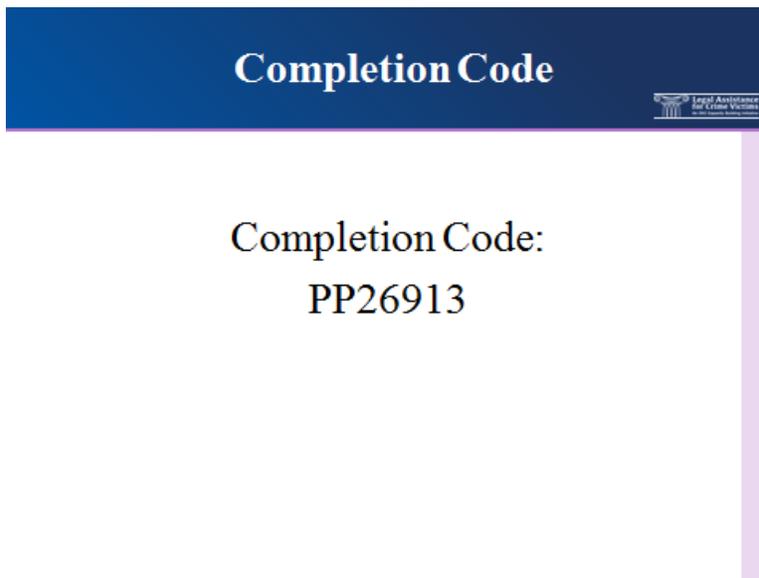
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Rebecca Khalil: Before we end, we just want to put out here a little bit of information about NCVLI for those of you who are not already familiar with us. We have got our links to our Web site – if you look on our Web site, you will be able to find these as well. There is an online form for requesting technical assistance, so requesting any kind of help relating to a victims' rights

issue that you are working on, or it also links to requests specified, like particularized trainings on a number of different topics.

Rebecca Khalil: We also wanted to mention that our conference will be coming up next June, and although this is quite far in advance, it is not too early to get involved. We are currently accepting proposals for presentations, and there is a form on our Web site. And we are also accepting nominations for our NCVLI's Outstanding Achievement awards. So if you have not already visited our Web site and taken a look at that information, please do so, and please feel free to nominate your colleagues and other folks you have worked with who are helping to do this great work on behalf of victims.



Completion Code

Completion Code:
PP26913

Completion Code

Rebecca Khalil: Finally, we have got a completion code for those of you who would like to seek some kind of continuing education credit for this Webinar. We have got a completion code here if you want to jot that down just to show us and to show anybody you are submitting materials to that you sat through the Webinar and you finished it. A certificate of completion will be e-mailed to all participants at the conclusion of the Webinar and after the pop-up survey appears for you.

Rebecca Khalil: Thank you again for joining us.

As part of the *[Legal Assistance for Crime Victims: An OVC Capacity Building Initiative](#)*, OVC is working to expand the availability of pro bono and no-cost legal assistance for victims of crime nationally. Part of that effort includes support for a series of free webinar trainings on victims' rights issues developed and delivered by the National Crime Victim Law Institute in collaboration with the OVC Training and Technical Assistance Center (TTAC).

For additional information about the Initiative and to register for upcoming Webinars, please visit: <https://www.ovcttac.gov>.

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