BY ORDER OF THE
SECRETARY OF THE AIR FORCE

AIR FORCE INSTRUCTION 51-301

1 JULY 2002

Law

CIVIL LITIGATION

COMPLIANCE WITH THIS PUBLICATION IS MANDATORY

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OPR: AFLSA/JACL (Col Timothy J. Malloy) Certified by: AFLSA/JAC (Col David L. Thomas)
Supersedes AFI 51-301, 15 August 2001 Pages: 73
Distribution: F

This instruction implements Air Force Policy Directive (AFPD) 51-3, *Civil Litigation* by setting guidelines for Air Force personnel dealing with litigation, tax disputes, and legal or administrative proceedings. It sets procedures for releasing information for use in litigation and sets in motion the procedures and service of legal process involving the Air Force, Air Force personnel performing official duties, and Air Force instrumentalities (including nonappropriated fund activities) in the United States and foreign countries.

This instruction directs collecting and maintaining information subject to the *Privacy Act of 1974* (hereinafter the Privacy Act), 5 United States Code, Section 552a, authorized by 10 U.S.C. 8013. System of records notices F051 AF JA D, Litigation Records (Except Patents), and F051 AFJA D, Patent Infringement and Litigation Records, apply.

The reporting requirements in this instruction are exempt from licensing in accordance with paragraph 2.11.8 of AFI 37-124, *The Information Collections and Reports (ICR) Management Program; Controlling Internal, Public, and Interagency Air Force Information Collections*.

SUMMARY OF REVISIONS

This document is substantially revised and must be completely reviewed.

This revision clarifies the guidance on processing representation requests (paragraph **1.3.**); reorganizes **Chapter 1** to add the related subject of indemnification requests (paragraph **1.4.**); updates point of contact information for garnishment and other involuntary withholding of pay matters (paragraph **1.5.**); clarifies the standards for Privacy Act protection of litigation report documents (paragraph **1.8.1.4.**) and for the disclosures necessary to be made in litigation matters (paragraph **1.8.1.5.**); adds a new format to aid in the creation of litigation reports (**Figure 1.4.**); adds, further explains some duties specific to handling claims litigation discovery requests and processing requests for representation in negligence cases (paragraphs **2.3.** and **2.4.**); provides substantial new information about the points of contact and distribution of litigation responsibility within AFLSA/JACL (paragraph **3.1.**); updates point of contact and other information

for telephone rate and service cases (paragraph **3.10.**); adds a new section on Right to Financial Privacy Act Litigation (**Section 3H**); provides a new checklist on how to prepare an administrative record, particularly for civilian personnel cases (**Figure 3.1.**); clarifies litigation responsibility for contract litigation before the United States District Courts and Court of Federal Claims (paragraph **4.1.4.**); clarifies the guidance on environmental fee vs. tax issues (paragraph **5.4.**) and on litigation report requirements in environmental cases (paragraph **5.5.2.**); adds new guidance and reporting requirements for environmental administrative actions (paragraphs **5.3.2.** and **5.5.3.**); adds a new paragraph on commenting on environmental rule-making proceedings (paragraph **5.7.**); provides alternative service options for international commercial litigation involving the Air Force (paragraph **6.6.2.1.** and **Figure 6.1.**); updates the correct point of contact location for Air Force patent, trademark and copyright litigation (**Chapter 7**); adds recommended formats for authenticating official Air Force records (**Figure 8.1.**) or for certifying by a records custodian that he or she does not have such records (**Figure 8.2.**); clarifies the scope of applicability of **Chapter 9** (paragraph **9.1.**); clarifies some necessary terms (paragraph **9.2.**); revises and clarifies procedures for the release of information in litigation (**Section 9B**); delegates additional authority to wing staff judge advocates to release official information and witnesses for testimony in private litigation (paragraphs **9.3.1.** and **9.13.1.**); clarifies the position of the Air Force on the release of official information and provision of expert or opinion testimony by former Air Force personnel (paragraphs **9.4.** and **9.21.**); clarifies procedures for Air Force witness requests (**Section 9C**); clarifies how witness requests for litigation involving the United States will be made (paragraph **9.18.2.**); clarifies how release authority is obtained for opinion or expert testimony by Air Force personnel (paragraph **9.20.**); and substantially updates and clarifies the information regarding the process for exempting Air Force personnel from service on state and local juries (**Section 9D**).

This latest revision makes minor corrections to various sections throughout the instruction, and should be carefully reviewed.

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Chapter 1

GENERAL PROVISIONS

1.1. Responsibilities of The Judge Advocate General (TJAG). TJAG responsibilities are as written in this instruction and must be consistent with Secretary of the Air Force Orders 111.1, *Functions and Duties of the General Counsel*, April 26, 1999, and 111.5, *Delineation of Responsibilities of the General Counsel and the Judge Advocate General*, October 30, 1997. Those acting on behalf of TJAG (such as the various civil litigation divisions in the Air Force Legal Services Agency [AFLSA] and the International and Operations Law Division [HQ USAF/JAI]) may perform the functions detailed in paragraph **1.1.3.** Additionally:

1.1.1. Commands subordinate to HQ USAF and AFLSA must not initiate or take any action pertaining to these responsibilities unless TJAG specifically authorizes them.

1.1.2. Commands and judge advocates should make every effort to identify causes of action in favor of the United States and promptly notify the proper division in the office of TJAG or AFLSA.

1.1.3. The Judge Advocate General, in coordination with the Office of the Air Force General Counsel (SAF/GC):

1.1.3.1. Protects the interests of the United States Air Force in legal and administrative proceedings in the United States and foreign countries.

1.1.3.2. Maintains close liaison with the Department of Justice (DoJ) to:

1.1.3.2.1. Obtain evidence to support the government's position.

1.1.3.2.2. Prepare pleadings and briefs.

1.1.3.2.3. Compile and evaluate evidence.

1.1.3.2.4. Litigate or assist in the litigation of civil cases.

1.1.3.3. Makes Air Force recommendations about:

1.1.3.3.1. Initiating legal actions and appeals in domestic and foreign courts in significant Air Force cases. (Except for appeals involving Armed Services Board of Contract Appeals cases).

1.1.3.3.2. Accepting proposed compromises or settlements of pending litigation or controversies in significant Air Force cases, including those in foreign countries.

1.1.3.4. Coordinates closely with other Department of Defense (DoD) agencies, the General Accounting Office (GAO), and other federal agencies in procuring evidence to support the government's position.

1.1.3.5. Negotiates and presents evidence, pleadings, and briefs to federal, state, and municipal regulatory bodies in administrative and quasi-judicial proceedings.

1.1.4. The appropriate civil litigation division of AFLSA or HQ USAF/JAI, on behalf of TJAG, ordinarily determines who may appear as an attorney or counsel for the Air Force in a civil judicial or administrative action (foreign or domestic). As a matter of written Air Force legal policy, as established by TJAG or SAF/GC, there may already be existing delegation for installation level judge advocates and attorneys to appear on behalf of the Air Force before certain administrative bodies. In

cases where direct representation of the United States before a state, federal or foreign court is involved, the concurrence of DoJ may be required.

1.1.5. No person on active duty with the Air Force, or employed in a civilian or reserve capacity by the Air Force, may appear or represent any individual, corporation, association, or other outside entity as their attorney or counsel in a civil judicial or administrative action (foreign or domestic) without the written permission of TJAG or TJAG's designee.

1.2. Representing the Air Force and Air Force Officials Sued in Their Official Capacities. DoJ has the statutory responsibility to represent the Air Force and Air Force officials who are being sued in their official capacities (*Title 28, United States Code*, Sections 516-519). This responsibility extends to litigation in foreign courts. (However, see *Title 10, United States Code*, Section 1037 and AR 27-50/SECNAVINST 5820.4G/AFJI 51-706, *Status Of Forces Policies, Procedures, And Information*, 15 December 1989.)

1.2.1. Occasionally, this responsibility is delegated entirely to TJAG.

1.2.2. When the Attorney General is served a copy of a complaint, DoJ formally requests that the appropriate AFLSA civil litigation division send a litigation report to the attorney defending the Air Force official.

1.2.3. Installation staff judge advocates (SJAs) or other Air Force officials gather the specific information and documents to comply with DoJ requests, and forward such information and documents to the appropriate AFLSA civil litigation division or HQ USAF/JAI.

1.3. Requests by Air Force Officials for Representation by DoJ. Past or present Air Force personnel or employees who are named as individual defendants for personal liability in civil or criminal proceedings for acts or omissions arising from the performance of their official Air Force duties may request representation by DoJ (see Title 28, Code of Federal Regulations, Sections 50.15, and 50.16). **NOTE**: **Because personnel sued in their personal capacity may have as little as twenty (20) days to respond to a complaint, time is of the essence in processing these requests.**

1.3.1. DoJ will not defend an individual against a federal criminal action.

1.3.2. Under certain circumstances, Air Force contractors being sued by third parties may also request government representation.

1.3.3. An individual who wants government representation:

1.3.3.1. Writes a request (see **Figure 1.1.** for the request format) and sends it through the SJA or the official designated in paragraph **1.5.**to HQ USAF/JAI or the appropriate AFLSA litigation division (see **Chapter 2** through **Chapter 7**).

NOTE: Officials in the Secretariat send requests through SAF/GC.

1.3.3.2. Submits an affidavit or declaration (see **Figure 1.2.**) showing that the matter arose out of the performance of official Air Force duties.

1.3.3.3. Submits an affidavit or declaration (see **Figure 1.3.**) from the requester's commander or supervisor stating that:

1.3.3.3.1. He or she has read the complaint and the requester's affidavit or declaration.

1.3.3.3.2. The matter arose out of the performance of official Air Force duties.

1.3.4. Air Force personnel may request, from the nearest installation SJA, the assistance of Air Force legal counsel in preparing their request for representation. If such counsel is provided, an attorney-client relationship will exist between the Air Force counsel and the requesting Air Force employee until a decision on the representation request is reached, or the assistance is voluntarily terminated by one or more of the parties involved. Communications and confidences shared between the Air Force counsel and the requesting Air Force employee for purposes of the provided legal assistance shall be privileged. Air Force personnel who are required to have access to such privileged information for the purpose of processing the request are also required to maintain the privilege. Given this privilege, and because of the SJA's inherent duties to administer military justice and investigate claims or potential claims against the Air Force, SJAs should exercise caution in the assignment of personnel to process these requests. Any subsequent representation of the employee by DoJ attorney or US Attorney personnel shall also be considered to be covered by the attorney-client privilege.

1.3.5. Requests for representation of Air Force personnel shall be forwarded to the appropriate civil law division (JACL, JACN, JACE, or JACT) of the Air Force Legal Services Agency, or to HQ USAF/JAI, if foreign criminal or civil proceedings are involved. (Note: See **Chapter 2** through **Chapter 7** for more information on the litigation subject matter coverage of these various divisions and offices.) Requests for representation of Air Force contractors should be forwarded to SAF/GCQ. Attorney-client privileged information should not be forwarded with the request unless absolutely necessary to the processing of the request. In such instance, SJAs should only forward privileged information with the written consent of the requester, and the prior approval and knowledge of the receiving AFLSA civil litigation division, HQ USAF/JAI, or SAF/GCQ, as applicable.

1.3.6. Provision of representation and continuation of the representation is within the sole discretion of the Attorney General or appropriate designee. Representation of Air Force personnel will be based upon the following criteria:

1.3.6.1. That the actions or omissions of the Air Force personnel being complained of occurred within the scope of employment;

1.3.6.2. That the representation is in the interest of the United States; and

1.3.6.3. That there is no unresolved conflict of interest between the United States and the Air Force personnel to be represented as to their relative legal positions.

1.3.7. Representation of Air Force personnel by private counsel at federal expense, or with reimbursement of the private counsel fees, may be provided at the discretion of the Attorney General, and under the same criteria as in paragraph **1.3.6.** (The amount of reimbursement is determined through fee schedules set by the Civil Division of DoJ. For information on current fee schedules, please contact the Director, Constitutional Torts Staff, Civil Division, at (202) 616-4140.) Such defense representation may be provided under the following circumstances:

1.3.7.1. In some rare federal criminal proceedings where it is in the interest of the United States and in accordance with the limitations of 28 CFR 50.16;

1.3.7.2. In subject matter-related civil, congressional or state criminal proceedings where federal criminal proceedings prohibit representation by DoJ or US Attorney personnel;

1.3.7.3. In cases involving the representation of multiple Air Force personnel with conflicting or potentially conflicting legal or factual positions that make representation by one attorney inappropriate;

1.3.7.4. In cases where the Solicitor General declines to authorize seeking further appellate review by the United States; or

1.3.7.5. In cases when DoJ personnel involved become aware that continued representation of the Air Force personnel could involve the assertion of a position that conflicts with the interests of the United States.

1.3.8. The government will not be responsible for the expenses of individuals who hire private counsel without express prior authorization except in circumstances beyond the individual's control, such as government dilatoriness or inaction, in which it then becomes necessary to hire private counsel in order to protect the individual's interests. Ordinarily, the government will not be responsible for any judgments made against individuals in their personal capacities.

1.4. Indemnification Requests.

1.4.1. The Air Force usually cannot indemnify Air Force members or employees for any verdict, judgment, settlement, or other monetary award entered against them in their personal capacities. The Air Force considers a request for indemnification if:

1.4.1.1. The conduct giving rise to the verdict, judgment, settlement, or award was within the member's or employee's scope of employment; and

1.4.1.2. It is in the interest of the United States to indemnify the individual.

1.4.2. The Air Force member or employee seeking indemnification must submit a signed, written request to his or her servicing SJA and include:

1.4.2.1. Copies of all documents proving liability.

1.4.2.2. An explanation of how the conduct that created the liability was within the requester's scope of employment or official duties.

1.4.2.3. An explanation of how indemnification would be in the interest of the United States.

1.4.2.4. A statement indicating if the requester has insurance or any other source of indemnification, and whether the requester has sought indemnification from such source.

1.4.2.5. This declaration:

"I understand that the Air Force's acceptance of this request for indemnification for processing in accordance with AFI 51-301 does not constitute an acceptance of any obligation by the Air Force to make such indemnification. Any indemnification that the Air Force might make is a permissive action taken solely in the interest of the United States and not for my personal benefit."

1.4.3. Requesters must include with the request a recommendation by the servicing SJA specifically addressing each requirement of paragraph **1.4.2.**Send the request and recommendation through SJA channels with recommendations from each level to the chief of the appropriate litigation division. Comments from the SJA at major command (MAJCOM), field operating agency (FOA), or direct reporting unit (DRU) are particularly important.

1.4.4. Before forwarding a recommendation in favor of indemnification to the appropriate AFLSA civil litigation division or HQ USAF/JAI, the MAJCOM, FOA, or DRU SJA coordinates the recommendation with that level FM.

1.4.4.1. The chief of the responsible litigation division sends the request and recommendations, through channels, to the appropriate Secretarial designee for a decision.

1.4.4.2. If there is insufficient time to submit an indemnification request through normal channels, submit the request directly to the Chief, General Litigation Division, who coordinates with the appropriate SJAs.

1.4.5. The requester must include all documents or information necessary to process the indemnification request.

1.4.6. The MAJCOM/FOA/DRU pays indemnification from their funds unless SAF/FM decides to use other funds.

1.4.7. Indemnity decisions by the Secretarial designee are final and not subject to appeal of any kind.

1.5. Other Authority.

1.5.1. For non-garnishment-related administrative pay withholdings for debts owed to the federal government, contact:

1.5.1.1. For current Air Force, Air Force Reserve and Air National Guard (ANG) members: Customer Service, Military Pay Division of the Defense Finance and Accounting Service, Denver Center (DFAS-DE/FJ), Denver CO, 80279, (800) 433-0461.

1.5.1.2. For former Air Force, Air Force Reserve and ANG members: Customer Service, Debt and Claims Management Division of the Defense Finance and Accounting Service, Denver Center (DFAS-DE/FY), Denver CO, 80279, (800) 962-0648.

1.5.2. The following offices handle all notices of garnishment, to the extent allowed by state and local law, for alimony and child support under *Title 42, United States Code*, Section 659, and for private commercial debt, under *Title 5, United States Code*, Section 5520a, for:

1.5.2.1. Active duty, Reserve, Air National Guard (ANG), retired military members and civilian employees of appropriated fund activities: Garnishment Operations Directorate, DFAS - Cleveland Center (DFAS-CL-L), Code L, P.O. Box 998002, Cleveland, OH 44199-8002, (216) 522-5301 or DSN 580-5301. (**Note**: This office also handles inquiries about divisions of retired pay under the *Uniform Services Former Spouses Protection Act*, *Title 10, United States Code*, Section 1408.) DFAS also has a web site (**http://www.dfas.mil** under their "money matters" index page) with several fact sheets and other information on garnishment.

1.5.2.2. Nonappropriated fund civilian employees of Air Force installation exchanges: Headquarters Army and Air Force Exchange Service (HQ AAFES), Attention: GC-G, P.O. 650062, Dallas TX 75265-0062, (214) 312-4473 or DSN 967-4473. Faxes may be sent to (214) 312-3229 or DSN 967-3229.

1.5.2.3. Civilian employees of all other Air Force nonappropriated fund instrumentalities: Office of Legal Counsel, Air Force Services Agency, 10100 Reunion Place, Suite 503, San Antonio TX 78216-4138, (210) 652-7051 or DSN 487-7051.

1.5.3. See paragraph **6.6.5.**for information concerning other types of notices of garnishment.

1.6. Reporting Responsibilities. The SJA of the installation or unit must comply with the reporting requirements in this instruction. If the installation or unit has no SJA:

1.6.1. The contracting office chief meets reporting requirements on all matters of contracts, subcontracts, and purchase orders.

1.6.2. The installation or unit commander meets reporting requirements on all other matters.

1.7. Records Disposition. Maintain and dispose of records created as a result of processes prescribed in this publication in accordance with AFMAN 37-139, *Records Disposition Schedule*.

1.8. Litigation Reports. See **Chapter 2** through **Chapter 7** for reporting requirements when the Air Force or any of its instrumentalities is a defendant (including cases where the United States is a defendant and there is Air Force involvement) or Air Force officials are being personally sued for actions within their official capacity. Report new litigation by immediately telephoning the civil litigation division that normally handles such cases. Follow the directions of the assigned action officer with regard to forwarding the complaint to the appropriate AFLSA civil litigation division or HQ USAF/JAI, and as to whether or not a litigation report is required. Installation level staff judge advocates or, in accordance with paragraph **1.6.**, other responsible officials should also notify the relevant, responsible numbered air force legal office (NAF/JA) and major command legal office (MAJCOM/JA) of new litigation. All are encouraged to call the appropriate office with any questions they may have about the preparation, content, or submission of a litigation report.

1.8.1. If a formal litigation report is required:

1.8.1.1. Submit it in letter form to the appropriate civil litigation division as soon as possible after telephonic notification of the litigation. (See **Figure 1.4.** for a suggested format.)

1.8.1.2. Except for tort actions under the *Federal Tort Claims Act* (FTCA)*, Title 28, United States Code*, Sections 1346(b), 1402(b), 2401(b), and 2671-2680, send an information copy of the litigation report to the relevant MAJCOM. (See **Chapter 2** for information on FTCA cases). This report gives the litigation division enough information to formulate responses to the factual allegations in the complaint.

1.8.1.3. Include a detailed statement of the relevant facts and a summary of the procedural history.

1.8.1.4. Prepare, identify, handle and safeguard the litigation report to preserve its character as attorney work product. Also, keep in mind that information protected under the Privacy Act, *Title 5, United States Code*, Section 552a, is often, by necessity, included in the litigation report. Further, the case file records to be forwarded with the litigation report may be from a Privacy Act system of records or contain Privacy Act information. If so, the litigation report, the records, or both may need to be protected as Privacy Act records and should be appropriately marked with a footer indicating they should be considered to be part of a Privacy Act system of records.

1.8.1.5. At a minimum, the information and evidence that must be provided are what would be required for initial disclosure under the *Federal Rules of Civil Procedure* (FRCP), Rule 26(a)(1). Include:

1.8.1.5.1. The identities of all parties to the litigation and the court or administrative forum involved.

1.8.1.5.2. The case's docket number.

1.8.1.5.3. The amount of damages or other relief sought.

1.8.1.5.4. The nature of the litigation with a complete summary of known facts giving rise to the litigation.

1.8.1.5.5. A proposed answer with detailed comments on each allegation of the pleadings.

1.8.1.5.6. For lawsuits or non-federal criminal proceedings brought against former or present Air Force personnel or employees arising from actions that reasonably appear to have been performed within the scope of their employment, describe in detail how those individuals were acting within the scope of their office or employment.

1.8.1.5.7. Comments on available defenses, setoffs, cross-claims, and counter-claims.

1.8.1.5.8. Details of process service and pleading suspense dates.

1.8.1.5.9. Specifics of how the service was effected, on whom, and the service date.

1.8.1.5.10. All documents, including envelopes.

1.8.1.5.11. Any government indemnity rights, such as insurance, bonds, and guaranty agreements.

1.8.1.5.12. Any previous actions on the subject matter (including administrative claim adjudications, associated claims, and previous lawsuits).

1.8.1.5.13. Names, phone numbers, homes of record, addresses of witnesses, and summaries of their expected testimony.

1.8.2. Attach to the report:

1.8.2.1. A copy of each of the pleadings.

1.8.2.2. Any requests for government representation and supporting affidavits. (See paragraph **1.3.**)

1.8.2.3. All pertinent records or documents (such as correspondence, statements of witnesses, photographs, diagrams, administrative claims files, and so on). Indicate the location and the name and address of all of the custodians of the documents, especially for custodians of original documents not being forwarded.

1.8.3. When you copy documents:

1.8.3.1. If the original file contains both legal- and letter-sized documents, prepare uniformly sized copies by reducing oversize documents to letter size.

1.8.3.2. Number administrative records consecutively in the lower right hand corner of the page before copying.

1.8.3.3. Bind administrative records at the top, using prong fasteners and press board covers. Where records are extensive, divide them into volumes.

1.8.3.4. To avoid having to authenticate documents at trial, have the records custodian certify the documents using the AF Form 44, **Certificate of Records** (see paragraph **8.3.**for instructions on the use of the AF Form 44).

1.8.3.5. Installation SJA offices keep a file copy of all documentation for future reference.

1.8.4. If you can't send all of the requested material and still get the report in promptly:

1.8.4.1. Send an interim report that includes what you have available.

1.8.4.2. Explain where to find the missing material, what you are doing to preserve or obtain it, and when you will send it.

1.8.4.3. Act immediately to prevent the routine destruction of relevant documents.

1.8.4.4. When you obtain the missing or additional material or information, send it with an amended report.

1.8.4.5. If the required material is unavailable or if the litigation office can get the material from official repositories more easily than local reporting authorities, explain why and send the report without such materials.

1.8.5. As soon as possible, notify appropriate officials of pending litigation and arrange to protect relevant records.

1.8.6. Send the litigation report to the office with responsibility for handling the case. (See **Chapter 2** through **Chapter 7**).

Figure 1.1. Format for a Request for Government Representation.

FORMAT FOR A REQUEST FOR GOVERNMENT REPRESENTATION

[Date]

[Place]

Request for Government Representation

I hereby request the Attorney General of the United States to designate counsel to defend on my behalf the case of [CASE NAME, COURT, CASE NUMBER].

I recognize I may be required to pay any judgment against me. I further recognize that, absent an official finding that payment is in the interest of the United States, there is no statutory authority to pay any judgment against me out of the Treasury of the United States absent special legislation to that effect and that representation will be governed by the Attorney General's Guidelines set forth in 28 CFR.15-50.16.

[SIGNATURE]

[TYPED NAME]

Figure 1.2. Sample Declaration of Defendant.

SAMPLE DECLARATION OF DEFENDANT

(Attached to Representation Request, **Figure 1.1.**)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF _____

_____)
Plaintiff,)
)
v.) Declaration
)
_____)
Defendant.)

Declaration of _____

I, _____, am, and at all times relevant to this case have been, a (civil service employee) (nonappropriated fund employee) (active duty military member) (a member of the Air National Guard) (a member of the Air Force Reserve) of the United States Air Force. I am presently assigned to _____ Air Force Base, _____ , as a _____. (As a federal employee, one of my responsibilities is to insure the protection of Air Force property by reporting suspected abuse of such property to the proper authorities, and to report conflicts of interest within the Defense Department). (See Exhibit _ attached, a copy of my job description). (See Exhibit _, a description of my Air Force Specialty Code (AFSC)).

(On _____, I made a signed sworn statement to the Air Force Office of Special Investigations (OSI) describing what I had observed and learned. I made this statement because it was my duty as a federal employee and as a member of the Air Force to report the incidents. The OSI investigated the matter.)

(From _____ to _____, I was performing temporary duty in the Washington, D.C. area. As part of my travel orders to perform this duty, I was authorized the rental of a vehicle. (See Exhibit attached, a copy of my official travel orders). I rented a (year, make and model of vehicle) from (name and location of rental agency). (See Exhibit __, a copy of the rental contract). On _____, while proceeding from my hotel to a restaurant for dinner, I was involved in a traffic accident at (location) with a person identified to me as _____.)

All of my actions in this matter were within the scope of my official Air Force duties and under color of my office as _____. I acted in the good faith belief that my actions were reasonable and in accordance with the law. (My report was based on the honest belief that these offenses had occurred and only to ensure Air Force property was properly safeguarded and rules and regulations were complied with.)

I declare under penalty of perjury that the foregoing is true and correct. Signed this _____ day of _____, 20___, at _____, _____.

SIGNATURE BLOCK
OF EMPLOYEE
REQUESTING
REPRESENTATION

Figure 1.3. Sample Declaration of Supervisor.

SAMPLE DECLARATION OF SUPERVISOR

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF _____

_____	)
Plaintiff,	)
	)
v.	) Declaration
	)
_____	)
Defendant.	)

I, _____, am, and at all times relevant to this case have been, the _____, at _____ Air Force Base, _____. As such, I am the (supervisor)(commander) of _____. I am familiar with the allegations of the complaint in _____ v. _____.

I certify _____was performing official Air Force duties when the events upon which the complaint is based occurred. His/her actions were taken in the good faith belief that they were authorized, reasonable, and in accordance with the law. (An Air Force employee is responsible for reporting all suspected incidents of theft or wrongful appropriation to the proper authorities. Resource protection and the prevention of conflict of interest are important concerns in the Air Force. See AFI _____, Exhibit ____, attached hereto.) (An Air Force employee on temporary duty is authorized to use a rental vehicle in a reasonable manner to acquire meals.) All of _____'s actions with respect to this case were within the scope of his/her federal employment and under color of his/her office as _____.

I declare under penalty of perjury that the foregoing is true and correct. Signed this __ day of _____, 20__, at _____, _____.

SIGNATURE BLOCK
OF REQUESTING EMPLOYEE'S
SUPERVISOR

Figure 1.4. Recommended Format for Litigation Report.

MEMORANDUM FOR AFLSA/JAC_
1501 Wilson Blvd Ste ___
Arlington VA 22209-2403

FROM: 999 XW/JA
77 Erewhon St
Anybase, USA 55555-9999

SUBJECT: Litigation Report, *Plaintiff(s) v. Defendant(s),* Case Docket #

Introduction. This paragraph gives you the opportunity to briefly introduce the subject litigation, including its nature (i.e., civil or criminal), and type (e.g., EEO discrimination, contract dispute, medical malpractice, auto or aircraft accident tort claim, FOIA appeal, etc.) This paragraph can also be used to preview your expected bottom line recommendations/conclusions regarding the case (i.e., defend, settle, etc.)

Case Identification Information. This paragraph ordinarily will list the preliminary identification information relevant to the litigation. This includes:

a. The name, address and telephone number of each plaintiff.

b. The name, address, and telephone number of each attorney representing any and all plaintiffs.

c. All defendants, including (for all those not the United States or the Air Force) complete individual and organizational names and addresses.

d. Contact telephone numbers for each individual defendant, as well as a name, address and telephone number of at least one representative for each organizational defendant.

e. The name, address and telephone number of each attorney representing a defendant other than the United States or the Air Force.

f. The name address and telephone number of the court or administrative forum involved.

[This notice should be on report]: **ATTORNEY WORK PRODUCT, COMMUNICATION: This document has been prepared in the course of litigation. All or portions of it may be privileged as attor-**

ney work product or attorney-client communications. [This notice should also be included when social security numbers or other private identifying information about any person, or personal information from an Air Force system of records is included in the report]: **PRIVACY ACT WARNING NOTICE: Private identification information and/or Privacy Act information from an Air Force system of records has been included. Please safeguard this document in accordance with Privacy Act requirements.**

g. If a civil case, a complete listing of all relief sought, including damages and all equitable or other remedies. If a criminal case, a listing of each type (or a brief description) of offense alleged against the defendant(s), and the maximum sentence possible for each offense.

Service Information. Because of the critical impact on jurisdiction, the timing of the answer, and possible affirmative defenses, this paragraph should provide the details regarding service of process for as many of the relevant defendants as are known. If proper service did not actually occur, explain the circumstances of how reporting unit came to know of the litigation. This service-related information should include:

a. Who was served (i.e., individual's name, title, and contact telephone number).

b. When service was made (i.e., date, as well as time of service if known).

c. Where service occurred (e.g., an individual defendant's home or office, a commander's office, an SJA's office, mailroom, US attorney's office, etc.)

d. How service was achieved (e.g., in person by sheriff's deputy, in person by private process server or other agent of the plaintiff(s), by first-class mail, by express mail, by fax, etc.)

e. If criminal service was involved, whether an arrest was made, if the affected defendant(s) is/are still in custody (and where), or if the defendant(s) has/have been released, along with the terms of that release (i.e., on own recognizance, into custody and control of another, or by bail bond, along with the amount of the bond).

f. Whether service was properly made, and whether the proper defendant(s) was/were served.

Answer Due Date and Other Litigation Status Information. This paragraph should provide the current known or anticipated due date for answer by the defendant(s), as well as other information about the status of the litigation or other known or anticipated deadlines or hearing dates. A non-exclusive list of examples of the information to provide includes:

a. Known or anticipated answer due date.

b. Known or anticipated date(s) for any emergency hearings on a temporary restraining order (TRO) or for other emergency relief. [**NOTE: This should also be coordinated with the appropriate AFLSA civil litigation division or HQ USAF/JAI by telephone as soon as it is known.]**

c. Known or anticipated date(s) of any status conference with the judge, hearing officer, or other tribunal head.

d. Known or anticipated deadlines for discovery.

e. Known or anticipated deadlines for the filing of counter-claims, jury demands, dispositive motions or affirmative defenses.

f. In a criminal case, known or anticipated date(s) of any arraignment, preliminary hearing, etc.

Request for Representation. If a request for representation by the United States of any defendant is being made, or is anticipated to be made, all details that are known should be addressed here. [**NOTE**: *Copies of the documentation for a request for representation should be included with the report, but the request for representation itself should be processed separately.*]

Case Facts. This paragraph should outline all known, relevant information about the circumstances surrounding and resulting in the litigation. This would include, but is not limited to, the time, date, location, parties to, and circumstances of any accident or other triggering event or incident, or the date, involved parties, and circumstances of a final agency administrative action. All facts relevant to a decision on whether an Air Force employee defendant or causal agent was acting within the scope of his or her employment should be included here.

Previous Actions. This paragraph should outline all previous administrative actions taken or litigation that has occurred in the matter, if not previously completely described as a part of the case facts paragraph above. Associated or related administrative actions or litigation should also be discussed and described here. Non-exclusive examples of information to be included here are:

a. Previous claims adjudications;

b. Prior Merit Systems Protection Board (MSPB), Federal Labor Relations Authority (FLRA), Equal Employment Opportunity Commission (EEOC), Armed Services Board of Contract Appeals (ASBCA) or GAO proceedings or appeals;

c. Previous state or federal court criminal or civil litigation (including courts-martial); and

d. civilian or military administrative disciplinary actions involving any plaintiff, defendant or potential witness.

Potential Exhibits. These should be listed here, and if possible, copies or photographs of each document or other item should be attached.

Potential Witness List. The names, addresses, and contact telephone numbers of all known potential witnesses, including possible expert witnesses, along with a summary of their expected testimony, should be included here. [**NOTE**: *If social security numbers, home addresses or home telephone numbers are also provided to assist with future witness travel funding, etc., be sure to include the suggested Privacy Act Warning Notice*.]

Other Rule 26(a)(1) Initial Disclosures. Provide or reference here any other initial disclosures for the case not covered by any other report section or paragraph that would be required by FRCP 26(a)(1). [See paragraph **1.8.1.5.** above.]

Legal Analysis. Use this paragraph to briefly and succinctly describe your legal analysis of the case, including all known applicable statutes, regulations, or case law. This is where comment should be made as to available defenses, setoffs, cross-claims, counter-claims, etc.

Proposed Answer. Use this paragraph to provide an allegation-by-allegation set of responsive answers to the complaint (i.e., admit, deny, neither, and, as necessary, an explanation for each proposed answer.)

Government Indemnity Right(s). This paragraph should describe any and all rights the government may have to be held harmless or otherwise indemnified in the event of an adverse

judgment against it. Include all sources, such as contractor or other insurance, bonds, warranties, or guaranty agreements.

Recommendation. Finally, give your opinion as to whether a full defense of the litigation is warranted, settlement sought, or some other strategy pursued. If settlement is recommended, reasonable and/or maximum terms for such a settlement should be proposed.

SIGNATURE BLOCK OF PERSON WHO
PREPARED THE REPORT IF OTHER THAN
THE SJA

(Comments and/or concurrence, as necessary.)

SIGNATURE BLOCK, Grade, USAF
Staff Judge Advocate

Attachments:
1. Complaint
2. Potential Exhibits
3. Other Relevant Documents

Chapter 2

FEDERAL TORT CLAIMS ACT LITIGATION

2.1. Litigation Responsibility.

2.1.1. DoJ, through the local US Attorney or the Civil Division at DoJ, handles tort litigation involving the US as a plaintiff or a defendant.

2.1.2. The Tort Claims and Litigation Division (AFLSA/JACT) assists DoJ with Air Force cases involving the Federal Tort Claims Act (FTCA). The Environmental Law and Litigation Division (AFLSA/JACE) assists DoJ with environmental cases involving the FTCA. AFLSA/JACT or /JACE normally retains litigation responsibility for all FTCA cases. However, AFLSA/JACT or /JACE may delegate litigation responsibility of a particular case to a installation while retaining overall control of litigation assistance. Delegations will be in writing from the chief of the division.

2.2. Handling Complaints Received at Installation Level.

2.2.1. When you receive a complaint under the FTCA, immediately telephone AFLSA/JACT or /JACE with: the names of all parties to the litigation; the court involved; the case's docket number; the amount of damages requested; the nature of the litigation; and complete information regarding service of process, pleading suspense dates, and any information about other government agencies involved.

2.2.2. Send the complaint to AFLSA/JACT or /JACE as soon as possible, by datafax and first class mail.

2.2.3. If AFLSA/JACT or /JACE delegates the litigation support in a particular case to the installation, prepare the litigation report (see paragraph **1.8.**), then send it along with the complete original administrative claim file to the local defending US Attorney, and if requested by DoJ, send a copy of the litigation report to the Torts Branch, Civil Division, DoJ.

2.2.3.1. Send litigation reports to the US Attorney or DoJ no later than 14 days before the answer is due.

2.2.3.2. At the same time, send a copy of the complete claim file, pleadings, correspondence, and the litigation report to AFLSA/JACT or /JACE.

2.3. Handling Discovery Requests at Installation Level. In all cases, except when litigation support is delegated to the installation on a particular case, AFLSA/JACT or /JACE will respond to all discovery requests (interrogatories, document production, admissions) on behalf of the Air Force. However, the installation may be tasked to assist in responding to the discovery request. When tasked to assist during discovery, promptly respond in accordance with the specific guidance received from AFLSA/JACT or /JACE.

2.4. Handling Personal Negligence Complaints Against Air Force Employees at Installation Level -- Substitution.

2.4.1. When a Complaint alleges common law negligence against an Air Force employee being sued in the employee's personal capacity, substitution of the United States for the employee may be appropriate under the FTCA.

2.4.1.1. Where substitution may be the appropriate remedy, the employee makes a request for representation under paragraph **1.3.**Claims personnel investigate incidents within their geographic area of responsibility to ascertain the facts and circumstances. SJAs forward requests for representation to AFLSA/JACT or /JACE with a recommendation as to whether or not the United States should be substituted for the employee. The SJA's forwarding documents must include the applicable state law on scope of employment, and an analysis of whether the employee was acting in the scope of employment at the time of the incident giving rise to the lawsuit.

2.4.1.2. The Air Force (i.e., AFLSAJACT or /JACE) forwards a recommendation to DoJ or the US Attorney whether or not substitution is appropriate.

2.4.1.3. The decision to seek substitution of the United States for the employee resides with DoJ or the local US Attorney. Whether or not DoJ or the local US Attorney seeks substitution is based strictly upon whether or not the employee was acting in the scope of employment at the time of the incident. Scope of employment is determined by the applicable state law.

Chapter 3

LITIGATION IN DOMESTIC COURTS AND ADMINISTRATIVE AGENCIES, OTHER THAN FEDERAL TORT CLAIMS ACT CASES, CONTRACTS, BANKRUPTCY, PATENT, COPYRIGHT, TRADEMARK, AND ENVIRONMENTAL AND LAND USE CASES

Section 3A—General Information

3.1. Litigation Responsibility. The General Litigation Division of the Air Force Legal Services Agency (AFLSA/JACL) protects Air Force interests in litigation and similar administrative matters covered by this chapter. Subordinate commands must give DoJ, US Attorneys, and designated agency representatives in administrative proceedings the support they need to properly represent the Air Force. Subject area responsibility for specific types of litigation or similar administrative matters is specifically assigned to the following branches of AFLSA/JACL.

3.1.1. The Employment Litigation Branch [Telephone: (703) 696-9150; DSN 426-9150] represents the Air Force interests in civilian personnel and EEO litigation matters (See **Section 3B**) that occur before:

3.1.1.1. All state courts.

3.1.1.2. Federal district courts.

3.1.1.3. United States Court of Federal Claims.

3.1.1.4. All federal appellate courts.

3.1.2. The Central Labor Law Office (CLLO) [Telephone (703) 696- 9158; DSN 426-9158] provides litigation advice, training and technical support to Air Force agency representatives in administrative proceedings involving individual civilian personnel and EEO matters. The CLLO also represents Air Force interests in other labor matters. (See **Section 3C**.) This includes representation in administrative proceedings regarding:

3.1.2.1. Unfair labor practices.

3.1.2.2. Labor representation petitions.

3.1.2.3. EEO class action complaints.

3.1.3. The Military Personnel Litigation Branch [Telephone (703) 696-9112; DSN 426-9112] represents Air Force interests in litigation concerning military personnel actions. (See **Section 3D**.) Types of cases include:

3.1.3.1. Collateral attacks on courts-martial.

3.1.3.2. Administrative discharges.

3.1.3.3. Other adverse administrative actions.

3.1.4. The Utilities Litigation Team (ULT) [Telephone (850) 283-6217; DSN 523-6217] provides legal advice and support to Air Force installations in administrative proceedings and litigation involving utility services, rates, and any other utilities-related issues. (See **Section 3E**.)

3.1.5. The Information Litigation (IL) Branch [Telephone (703) 696-9141; DSN 426-9141] represents the Air Force in all matters arising from:

3.1.5.1. Administrative appeals under the Freedom of Information Act (FOIA) and the Privacy Act (PA) forwarded to the designated Air Force representative (SAF/GCA) for a decision.

3.1.5.2. Federal FOIA and PA litigation where the Air Force is a party or otherwise involved. (See **Section 3F**).

3.1.5.3. All administrative disputes, proceedings, or federal litigation regarding taxes levied against the Air Force and its instrumentalities. (SAF/GCQ performs this function for administrative disputes, proceedings, or federal litigation involving Air Force contractors) (See **Section 3G**).

3.1.5.4. Litigation arising under the Right to Financial Privacy Act (RFPA) where the Air Force is a party or otherwise involved. (See **Section 3H**).

3.1.5.5. Litigation involving alleged constitutional or personal torts not covered by the FTCA filed against the Air Force or Air Force personnel in their private capacity. (See **Section 3I**).

3.2. Matters You Must Report. Report the matters detailed in this section to AFLSA/JACL per paragraph **1.8.** When in doubt, immediately telephone AFLSA/JACL for advice before submitting a written report.

3.2.1. Report to the appropriate AFLSA/JACL branch or office:

3.2.1.1. All litigation in domestic courts involving matters per paragraph **3.1.**(See **Section 3B** through **Section 3I**).

3.2.1.2. The issuing of any legal process affecting the Air Force mission or requiring or prohibiting action by Air Force personnel or employees in connection with the performance of their official Air Force duties. For ongoing litigation in which the Air Force has an interest, report the matter to the branch or office handling the litigation. If it is a legal process involving military personnel, report the matter immediately to the Military Personnel Litigation Branch. (See paragraph **3.8.**) For private litigation or any other new matters unrelated to any of the above, report the matter to the duty officer in the IL Branch. The types of legal process to report include, but are not limited to:

3.2.1.2.1. Habeas corpus petitions.

3.2.1.2.2. Temporary restraining orders.

3.2.1.2.3. Subpoenas.

3.2.1.2.4. Attachments.

3.2.1.2.5. Complaints.

3.2.1.3. Administrative Proceedings and Actions.

3.2.1.3.1. See **Section 3C** for administrative civilian personnel litigation. Report all other administrative proceedings and actions that could affect the Air Force mission to AFLSA/JACL. *EXCEPTIONS*:

3.2.1.3.1.1. Transportation (see AR 55-355/NAVSUPINST 4600.70/AFR 75-2*/MCO P4600.14B/DLAR 4500.3, *Defense Traffic Management Regulation*, July 31, 1986. *Eventually to be redesignated/republished as AFJI 24-211, Volume 1.)

3.2.1.3.1.2. Utility rate changes that result in annual rate increases of less than $200,000 per year for electrical, gas, water or sewage disposal service, and $75,000 per year for telephone service. See **Section 3E** for utility rate changes that exceed these amounts.

3.2.1.3.1.3. Pollution control, unless authorities have served a notice of violation or taken enforcement action on an Air Force installation. (See **Chapter 5**)

3.2.1.3.1.4. Air Installation Compatible Use Zones (AICUZ) studies, unless you expect litigation. (See **Chapter 5**)

3.2.1.3.2. See **Section 3C** for specific instructions for reporting administrative proceedings on:

3.2.1.3.2.1. Labor-management relations.

3.2.1.3.2.2. Administrative proceedings under Title VII of Public Law 95-454, *Civil Service Reform Act of 1978*, October 13, 1978.

3.2.1.3.3. See paragraph **1.8.**for the reporting format for these administrative proceedings and actions.

Section 3B—Civilian Personnel Litigation

3.3. General Information. The US Court of Federal Claims or federal district courts hear cases brought by present or former civilian employees. These courts may permit trial de novo in Equal Employment Opportunity (EEO) cases. Most other civilian personnel cases involve appeals based wholly or in part on administrative records. (See **Figure 3.1.** for checklist items for the preparation of an administrative record.)

3.3.1. Civilian employees may appeal adverse decisions by the MSPB, and arbitrator decisions where the grievance involved a personnel action appealable to the MSPB, to the Court of Appeals for the Federal Circuit.

3.3.2. The types of administrative records and litigation support at the beginning of litigation may vary widely. The litigation support requirements in paragraphs **3.3.3.**through **3.3.5.** are the minimum for each type of case. AFLSA/JACL may require additional support in certain cases.

3.3.3. EEO Cases. Although employees may usually get a trial de novo, administrative records frequently play a central role in these cases. Accordingly, SJAs should promptly obtain these records, including a transcript of the administrative hearing, from the custodian and submit five copies with a litigation report per paragraph **1.8.**

3.3.4. MSPB Appeals. These appeals are based solely upon facts developed during MSPB administrative hearings or arbitrations.

3.3.4.1. The MSPB provides official copies of the record only to DoJ, not the agency involved.

3.3.4.2. AFLSA/JACL usually encounters a lengthy delay before receiving a copy of this record.

3.3.4.2.1. In these cases, SJAs must provide a detailed procedural history of the case and a description of issues raised in the administrative hearings instead of the formal litigation report.

3.3.4.2.2. Refer to and attach copies of relevant documents, including a transcript of the administrative hearing.

3.3.5. Other Civilian Personnel Court Litigation. SJAs provide formal litigation reports with five copies of the administrative records according to paragraph **1.8.**, unless AFLSA/JACL directs otherwise.

3.4. Administrative Cases. See **Section 3C**for litigation support requirements and responsibilities for cases pending before the Merit Systems Protection Board, Federal Labor Relations Authority, or Equal Employment Opportunity Commission.

Section 3C—Administrative Actions Involving Civilian Personnel Or Labor Matters

3.5. Responsibilities and Reporting Requirements.

3.5.1. Except as provided in paragraph **3.5.2.**, the Central Labor Law Office (CLLO) is responsible for all class complaints of discrimination, both informal and formal, and for all litigation before the Federal Labor Relations Authority.

3.5.2. AFMC/JA is delegated responsibility for administrative litigation involving the Air Force Materiel Command before the Federal Labor Relations Authority. The Staff Judge Advocate, HQ AFMC, may delegate this authority to installation staff judge advocates within AFMC.

3.5.3. What to Report. You must report:

3.5.3.1. Unfair labor practice charges and complaints.

3.5.3.2. All representation petitions (filed by management or an union under 5 U.S.C., 7111, 7112, 7113, 7115, or 7117) whether or not the Federal Labor Relations Authority orders a hearing in the case.

3.5.3.3. Discrimination (EEO) class action complaints, both informal and formal, report them to the Central Labor Law Office (CLLO). See the Air Force Equal Employment Opportunity instructions and guidance for reporting requirements.

3.6. How To Report.

3.6.1. Report all matters listed in paragraph **3.5.**immediately by telephone to the CLLO of AFLSA/JACL. Send any unfair labor practice charges or complaints involving Air National Guard military technicians to CLLO with an information copy to the Office of Chief Counsel, National Guard Bureau, ATTN: NGB-JA, 1411 Jefferson Davis Highway, Suite 11300, Arlington, VA 22202-3231. Send one copy of the complete case file within one working day to both offices. ***Note: Never send case files by less than first class mail.***

3.6.2. Include in a case file copies of all materials from the FLRA.

3.6.2.1. Include in discrimination class action complaints case files copies of all filings plus any attachments.

3.6.2.2. When you notify the CLLO by telephone, provide all relevant information on the case, including:

3.6.2.2.1. A summary of allegations.

3.6.2.2.2. Descriptions of any supporting evidence.

3.6.2.2.3. An analysis of management's perception of the issues.

3.6.2.2.4. A statement of management's position on the merits of the charge or complaint and its views on the possibility of settlement.

3.6.3. As soon as possible after you notify the CLLO by telephone and send the case file, forward a written litigation report (see paragraph **1.8.**).

3.6.3.1. Although all aspects of the litigation report requirements may not apply to administrative litigation, review each requirement.

3.6.3.2. Resolve questions as to what materials or information to include by calling the CLLO for guidance.

3.6.3.3. Send only one copy of information for administrative litigation reports. Include:

3.6.3.3.1. All matters that you previously summarized orally.

3.6.3.3.2. Any further information you learned or developed.

3.6.3.3.3. A copy of documentary evidence.

3.6.3.3.4. Statements from all management officials who know about the case. (A judge advocate or other government attorney must take such statements to protect them from compulsory discovery.)

3.6.3.4. Send the names of installation personnel (judge advocates and civilian personnel officers) who are the local points of contact.

3.6.3.5. Points of contact personnel continue to advise the CLLO or NGB/JA (immediately by telephone with follow-up by mail) as further information becomes available.

3.6.4. Do not contact or interview bargaining unit employees without prior express approval of the CLLO or NGB/JA attorney for the case.

3.7. Requesting Representation and Assistance.

3.7.1. The CLLO's primary mission is to represent the interests of the Air Force in litigation before the Federal Labor Relations Authority. Resources permitting, CLLO representation is available for EEO, MSPB, or arbitration matters. An initial request for representation may be made by telephone. Oral requests for assistance must be followed up with a written request for representation within one workday. The written request for representation should include the reason for requesting assistance and a fund citation which the CLLO can use to cover its costs associated with the representation. Send the litigation report (prepared according to paragraph **1.8.**) as soon as possible. (See paragraph **3.6.3.**)

3.7.2. CLLO provides legal advice and assistance in labor relations and other civilian personnel matters. Air Force attorneys are encouraged to call the CLLO for assistance.

Section 3D—Military Personnel Litigation

3.8. General Information.

3.8.1. SJAs must provide formal litigation reports for cases by present and former active duty and reserve service members concerning military personnel actions (unless otherwise directed by AFLSA/JACL) if the cases affect any of these areas:

3.8.1.1. Active duty or reserve status.

3.8.1.2. Collateral attacks of courts-martial or other actions under the *Uniform Code of Military Justice* (UCMJ).

3.8.1.3. Pay, retirement, and disability matters.

3.8.2. Such cases include:

3.8.2.1. Administrative discharge.

3.8.2.2. Assignments.

3.8.2.3. Reenlistment.

3.8.2.4. Involuntary separation.

3.8.2.5. Active duty service commitment.

3.8.2.6. Recall to active duty.

3.8.2.7. Dress and appearance.

3.8.2.8. Conscientious objectors.

3.8.2.9. Promotion.

3.9. Temporary Restraining Order (TRO) and Habeas Corpus. Many military personnel cases involve applications for a TRO, preliminary injunction or writ of habeas corpus.

3.9.1. You must notify AFLSA/JACL by telephone as soon as possible during normal duty hours (0730-1700 hours Eastern Standard Time) on the same or next duty day about all court applications for a TRO, preliminary injunction, or writ of habeas corpus.

3.9.2. You must notify AFLSA/JACL by telephone as soon as possible during normal duty hours on the same or next duty day about any individual who threatens a lawsuit for injunctive relief or habeas corpus, even when that person has not yet filed suit.

3.9.3. Send a copy of the complaint or petition and any allied papers to AFLSA/JACL as quickly as possible. You must assemble all pertinent documents as quickly as possible or as directed by the responsible attorney in AFLSA/JACL. (See paragraph **1.8.2.**)

3.9.4. For cases involving injunctive relief or habeas corpus, AFLSA/JACL sometimes permits direct contact between the office of the SJA and the US Attorney's Office. SJAs must nonetheless remember that litigation decisions and advice to the US Attorney's Office must come from AFLSA/JACL. The SJA must never agree to any form of injunctive relief or other legal restraints against the United States (see paragraph **1.1.**). After responding expeditiously, you must prepare a formal litigation report (see paragraph **1.8.**), unless AFLSA/JACL directs otherwise.

Section 3E—Utilities Litigation

3.10. Utility Litigation.

3.10.1. Report any administrative proceedings before independent regulatory bodies involving utility rate changes that could result in annual rate increases for the installation of more than:

3.10.1.1. $200,000 for electric, natural gas, water, or wastewater (sewage) service.

3.10.1.2. $75,000 for telephone service.

3.10.1.3. Increases which appear unreasonable , unjustified, or discriminatory (for example, an increase of 15%)

3.10.2. Installations may also elect to report rate increases other than those they must report.

3.10.3. Report other substantive utility issues that may affect mission accomplishment regardless of their immediate dollar value.

3.10.4. To report electric, gas, water, and sewage disposal rate cases, telephone or mail the report to AFLSA/JACL (ULT). Use the telephone to avoid delay in getting the information to AFLSA/JACL (ULT). Use the format in paragraph **1.8.**For follow-on reporting (under AFI 32-1061, *Providing Utilities To US Air Force Installations*) of electric, gas, water, and sewage disposal rate cases, send information copies to MAJCOM SJA offices and the installation civil engineer. Installation and MAJCOM judge advocate representatives should ask their civil engineering counterparts to obtain copies of civil engineering rate increase reports for AFI 32-1061.

3.10.5. To report telephone rate cases, telephone or mail the report to the appropriate installation communications officer and 38 EIW/JA, Tinker AFB, OK.

3.10.6. The Utility Litigation Team, working with the Air Force Civil Engineer Support Agency, is the center of expertise for all utility matters, including utility rate interventions, utility privatization, and energy conservation. Judge advocates should contact the Utility Litigation Team in any action that may impact utility service to the installation.

Section 3F—Freedom of Information Act (FOIA) and Privacy Act (PA) Litigation

3.11. General Information. In FOIA litigation, the Government has 30 days to answer a complaint, not the normal 60-day period allowed for other litigation. (***Note: Those unfamiliar with FOIA litigation often incorrectly indicate the 60-day period on the summons.***) Prompt reporting of both PA and FOIA issues is imperative since a single complaint may include both.

3.12. Reporting Requirements. You must notify AFLSA/JACL by telephone on the duty day that you receive a complaint. Immediately send the summons, complaint, and other available materials to AFLSA/JACL by fax, express mail, or similar means pending the complete litigation report. Contact the appropriate US Attorney's office to verify the effective date of service and identify the Assistant US Attorney handling the case.

3.12.1. After making initial contact with AFLSA/JACL, send a formal litigation report that includes:

3.12.1.1. A redacted and an unredacted copy of the records at issue in the litigation.

3.12.1.2. A chronology reflecting the processing of the underlying FOIA/PA request.

3.12.1.3. The name, address, commercial, and DSN phone numbers of the responsible FOIA/PA officer.

3.12.2. For Privacy Act lawsuits, the litigation report must include a statement indicating if the plaintiff filed a request for amendment to the record. If such a request was filed, include a copy of the request and the agency's response.

3.12.3. If the record includes photographs, send photographic prints rather than photocopies. Index and separately certify the redacted and unredacted records.

3.12.4. The record custodian should use AF Form 44, **Certificate of Records**.

Section 3G——Tax Litigation

3.13. Tax Disputes.

3.13.1. Whether in litigation or not, report all disputes about:

3.13.1.1. The validity or refund of taxes against property belonging to the Air Force or its instrumentalities.

3.13.1.2. The validity or refund of taxes against property belonging to contractors who use the property to perform their work for the Air Force or its instrumentalities.

3.13.1.3. Taxes imposed on Air Force personnel that raise issues under Section 574, *Soldiers' and Sailors' Civil Relief Act* (*Title 50 Appendix, United States Code*, Section 574).

3.13.2. Report tax disputes through command channels by letter or telephone to AFLSA/JACL. In cases involving Government contractors, report disputes to SAF/GCQ. Use the format in paragraph **1.8.**

3.13.3. Do not negotiate the Air Force's position on any tax dispute with officials of a political entity or state without prior authorization by AFLSA/JACL, or, in cases involving Government contractors, do not negotiate without prior authorization from SAF/GCQ.

Section 3H——Right To Financial Privacy Act Litigation

3.14. General Information. From time to time, the Air Force needs to seek information, for a legitimate law enforcement purpose, contained in the records of a bank or other financial institution regarding an Air Force employee or military member. When this happens, the Air Force and its subordinate organizations are required to comply with the requirements of the *Right to Financial Privacy Act* (RFPA), *Title 12, United States Code*, Sections 3401-3422. The RFPA gives individual customers of financial institutions certain rights to notice, to object to release, or to sue federal agencies for violations of the RFPA. Questions about how to comply with the requirements of the RFPA should be directed, via the organizational SJA, to the IL Branch.

3.15. Reporting Requirements. Whenever the Air Force or subordinate organization is named in or a party to litigation under the RFPA, the IL Branch should be notified by telephone as soon as possible, preferably on the duty day you receive notice of such action. Also, you will need to provide AFLSA/JACL, by fax, express mail, or similar means, pending a complete litigation report:

3.15.1. Copies of the summons, complaint, motion to quash, or other documentation filed with the court in the pending litigation;

3.15.2. A copy of the customer authorization, subpoena, judicial order, formal written request, or other paperwork used by the Air Force to request the financial information or records in question;

3.15.3. A copy of all notices provided to the Air Force member or employee whose records were sought;

3.15.4. A copy of any motion to quash, application to enjoin, completed motion form, or other written customer objections filed in an attempt to prevent release of the financial information;

3.15.5. A copy, if any, of all judicial orders or decisions already issued regarding release of the financial information in question; and

3.15.6. A copy of any released financial information that is the subject of the litigation.

Section 3I—Constitutional Torts and Personal Tort Suits Not Brought Under the Federal Tort Claims Act

3.16. Reporting Requirements. Whenever litigation names individual defendants who were acting within the scope of their employment, you must act quickly to process representation requests (see paragraph **1.3.**) and, when necessary, to effect removal to federal court.

3.16.1. Notify AFLSA/JACL by telephone on the duty day that you receive notice of such action:

3.16.1.1. Send the summons, complaint, and other available materials to AFLSA/JACL by fax, express mail, or similar means, pending the complete litigation report.

3.16.1.2. Send all material received by each individual, including copies and the envelope.

3.16.1.3. Make copies for the individual.

3.16.1.4. Contact the US Attorney's office to verify the effective date of service and identify the Assistant US Attorney handling the case.

3.16.2. Follow initial contacts with a complete litigation report. In unusual situations, after getting telephone approval by AFLSA/JACL, you may send a copy of the report directly to the Assistant US Attorney. Use the format in paragraph **1.8.**

Figure 3.1. Checklist Items for Preparation of an Administrative Record.

CHECKLIST ITEMS FOR PREPARATION OF THE ADMINISTRATIVE RECORD

1. Obtain ALL documentation related to the lawsuit.

2. Safeguard records of others (personnel records, IG Reports, promotion profiles) to prevent routine retirement or destruction.

3. Keep the originals and make copies for the administrative record. Copies of two-sided documents should be made single-sided.

4. Arrange documents into chronological order.

5. When practical, delete duplicates from the administrative record.

6. Bind records at top using Acco prong fasteners and pasteboard covers. Remember, this document will likely be a court exhibit; professionalism counts!

7. Divide bulky records into volumes 1-1½ inches thick.

8. Prepare a master index and an index for each volume and insert behind the AF Form 44.

9. Paginate records at the lower right corner BEFORE making copies of the record. Continue numbering consecutively in each volume (*e.g.*, Vol. I—pages 1-100; Vol. II—pages 101-200; Vol. III—pages 201-266).

10. Reduce oversize pages to 8½" x 11".

11. Have the appropriate records custodian certify the volumes on AF Forms 44. (See paragraph **8.3.** for information on procedures for the certification and authentication of records using the AF Form 44.)

12. Send one original AF Form 44 for each volume of the record. Attach each such form to the front of the volume it is meant to authenticate.

13. Ensure that the description of the records on the AF Form 44 accurately describes the records ("This is Volume II of III, pages 101-200").

14. Do not fill in the bottom of the AF Form 44 or attach a seal—that will be accomplished at the Secretary of the Air Force's office.

15. Do not include any privileged material (including your litigation report) in the administrative record.

16. Retain a complete copy of the administrative record along with your litigation report to facilitate future work on the case.

17. Send the original (the copy with the originally signed AF Form 44) and three copies of the administrative record to JACL.

Final Points:

18. Keep the JACL action attorney advised of all local developments.

19. Remember that JACL is the focal point for all contact between the Air Force and the Assistant US Attorney defending the case.

20. Forward copies of all notices of depositions, proposed answers to interrogatories, and other discovery to JACL for approval prior to release to the Assistant US Attorney.

Chapter 4

CONTRACT LITIGATION

4.1. Contract Litigation.

4.1.1. The Commercial Litigation Division (AFLSA/JACN) assists DoJ in handling court actions based on or relating to contracts with the Air Force or its instrumentalities, including:

4.1.1.1. Contract claims against the Air Force in any state or federal court.

4.1.1.2. Actions seeking equitable relief, including temporary restraining orders and injunctions.

4.1.1.3. Bankruptcy proceedings involving Air Force contractors.

4.1.2. The Air Force Materiel Command Directorate of Contract Appeals (AFMC LO/JAB) handles contract cases involving litigation at the ASBCA.

4.1.3. SAF/GCQ handles protest cases at the General Accounting Office (GAO).

4.1.4. AFLSA/JACN assists DOJ with protest cases filed at the United States District Courts and United States Court of Federal Claims (COFC) unless SAF/GCQ elects to assist DoJ with the case.

4.1.5. Patent, Copyright and Trademark cases. See **Chapter 7**.

4.2. Reporting Requirements. Fax or telephone AFLSA/JACN immediately when you learn of contract litigation involving or arising out of activities of the Air Force or its instrumentalities, whether or not the Air Force is a party to the litigation. Follow the initial contact with a litigation report in accordance with paragraph **1.8.**, unless AFLSA/JACN directs otherwise.

4.2.1. *Title 28, United States Code* 520(b) gives the information requirements for suits brought in the US Court of Federal Claims or the US Court of Appeals for the Federal Circuit on a contract, agreement, or transaction with any executive or military department. Make sure to fulfill these requirements when handling such suits. If you have any questions about including particular information, contact AFLSA/JACN immediately. ***Note: You must adhere to AFLSA/JACN suspense dates to meet litigation deadlines imposed by court rules or DoJ direction.***

4.3. Third Party Litigation. Contract litigation may require compliance with discovery requests for actions in which the Air Force is not a named party, such as prime contractor or subcontractor suits. These actions routinely seek information from the Air Force regarding an underlying contract.

4.3.1. Unless it appears that this action might result in liability for the Air Force, you need not prepare a litigation report.

4.3.2. Do notify AFLSA/JACN of these cases to ensure a consistent Air Force response.

4.3.3. The SJA of the installation or unit or other individual responsible for litigation reporting must handle the subpoena or information request in accordance with DoD Directive 5405.2, *Release of Official Information in Litigation and Testimony by DoD Personnel as Witnesses*, and **Chapter 9** of this instruction.

4.4. Contract Fraud Cases.

4.4.1. SAF/GCQ assists DoJ in handling litigation, discovery, and settlement of contract fraud cases, including "qui tam" actions under the *False Claims Act*, *Title 31, United States Code*, Sections 3729-3731. AFI 51-1101, *Air Force Procurement Fraud Remedies Program*, may also apply.

4.4.2. The responsible SJA supports SAF/GCQ as requested.

Chapter 5

ENVIRONMENTAL AND LAND USE LAW LITIGATION

5.1. Who Is Responsible . The Air Force Environmental Law and Litigation Division (AFLSA/JACE) is primarily responsible for managing environmental and land use litigation involving the Department of the Air Force. AFLSA/JACE works closely with DoJ and US Attorneys nationwide to deal with civil litigation concerning Air Force installations and various environmental protection statutes. AFLSA/JACE also works closely with MAJCOM SJAs to deal with administrative litigation concerning Air Force installations and arising under the various environmental protection statutes. Installation SJAs must report all actual or potential environmental or land use litigation to AFLSA/JACE, the appropriate MAJCOM SJA, and the appropriate regional environmental counsel.

5.2. Reportable Environmental and Land Use Litigation . In addition to the reporting requirements set forth in AFI 32-7047, *Compliance Tracking And Reporting*, reportable litigation includes, but is not limited to:

5.2.1. Suits; notices of intent to sue; notices of violation (NOVs); notices of noncompliance (NON); or any other notifications from a federal, state or local environmental agency that challenge or allege Air Force violation of any environmental law, such as:

5.2.1.1. The *Clean Air Act* (CAA), 42 U.S.C. 7401-7671q, or implementing regulations, 40 CFR Parts 50-99 and/or any state or local law, regulation, permit or permit requirement implementing the CAA.

5.2.1.2. The *Clean Water Act* (CWA), *Title 33, United States Code*, Sections 1251-1387; the *Safe Drinking Water Act* (SDWA), 42 U.S.C. 300f—300j-26, or implementing regulations, 40 CFR Parts 104-149, and/or any state or local law, regulation, permit or permit requirement implementing the CWA or SDWA.

5.2.1.3. The *Solid Waste Disposal Act* (SWDA), 42 U.S.C. 6901-6992k, as amended by the *Resource Conservation and Recovery Act*, and other Acts (collectively referred to as RCRA), and implementing regulations, 40 CFR Parts 240-299, and/or any state or local law, regulation, permit or permit requirement implementing RCRA.

5.2.1.4. The *Comprehensive Environmental Response, Compensation, and Liability Act* (CERCLA or Superfund), 42 U.S.C. 9601-9675, implementing regulations, 40 CFR Parts 300-374, and any other related laws or implementing regulations.

5.2.1.5. The *National Environmental Policy Act of 1969* (NEPA), *Title 42, United States Code*, Sections 4321-4370d, or implementing regulations, Title 40, Code Of Federal Regulations, Parts 1500-1508.

5.2.1.6. Historic preservation statutes, including, but not limited to, *the Native American Graves Protection and Repatriation Act* (NAGPRA), *Title 16, United States Code*, Sections 1361-1407, as implemented by 43 CFR Part 10 and the *National Historic Preservation Act* (NHPA), *Title 16, United States Code*, Sections 470--470w-6, and implementing regulations, 36 CFR Parts 60-68; 78 and 800.

5.2.1.7. Endangered species protection, including the *Endangered Species Act* (ESA), 16 U.S.C. 1531-1544, or any related or implementing regulations.

5.2.1.8. The *Marine Mammal Protection Act* (MMPA), 16 U.S.C. 1361-1407.

5.2.2. Other environmental and natural resource issues.

5.2.2.1. Air Force land use including those based on Public Law 94-579, *Federal Lands Policy and Management Act* (FLPMA), October 21, 1976, and other land use or land acquisition statutes.

5.2.2.2. Acquisition, management or disposal of Air Force property including, but not limited to the *McKinney Homeless Assistance Act*, 42 U.S.C. 11411, et seq. and the *Redevelopment Act of 1994*, 10 U.S.C. 2687, 2901, et seq.

5.2.2.3. Wildlife or habitat management under the *Sikes Act,* 16 U.S.C. 670a-670f.

5.2.2.4. Inverse condemnation by Air Force activities or efforts to challenge or discredit the Air Force Air Installation Compatible Use Zone (AICUZ) Program.

5.2.2.5. Annexation proposals by local political entities seeking to acquire or extend jurisdiction or control over Air Force property (see paragraph **5.5.**)

5.2.2.6. Any other litigation including quiet title and ejectment suits affecting Air Force real property interests. Report these actions informally through the MAJCOM SJA to AFLSA/JACE to determine if a substantive, formal litigation report is necessary.

5.3. Affirmative Litigation. Although the kinds of litigation in paragraph **5.2.** are mainly defensive, SJAs must report circumstances under which the Air Force may want to initiate litigation or join as an intervenor or third party in litigation where the Air Force is not named as a party.

5.3.1. Examples of civil cases would include:

5.3.1.1. Proposals to establish landfills or waterfowl habitats near operational runways that might pose a substantial bird strike hazard.

5.3.1.2. Annexation proposals (see paragraph **5.6.**), e.g., local political subdivision expansion of geographic boundaries to cover Air Force controlled lands that may entail adverse consequences to the Air Force installation.

5.3.1.3. Potentially responsible parties (PRPs) under CERCLA.

5.3.1.4. Cost recovery actions under CERCLA or RCRA.

5.3.1.5. Other cases in which the Air Force has an interest.

5.3.2. Examples of administrative cases:

5.3.2.1. Denial of permit modification requests;

5.3.2.2. Requests for declaratory rulings by an administrative law judge; and

5.3.2.3. Approval of permits that infringe upon the rights of Air Force interests.

5.4. Disputes of Environmental Fees (e.g. Fee/Tax) Issues. Generally, Air Force facilities are required to pay environmental compliance and administrative fees. However, occasionally, such “fees” may in fact be nonpayable taxes. When an SJA believes an environmental fee is not payable, the SJA should request advice from AFLSA/JACE through the appropriate MAJCOM on whether or not the fee should be paid. In general, an environmental fee is not payable when the fee is:

5.4.1. Discriminatory in either application or effect;

5.4.2. Used for a service denied to a federal agency;

5.4.3. Assessed under a statute in which federal sovereign immunity has not been clearly and unambiguously waived;

5.4.4. Disproportionate to the intended service or use; or

5.4.5. A financial assurance fee.

5.5. Reporting Environmental Litigation. SJAs must immediately report by telephone or electronic mail any actual or possible environmental or land use litigation (including, but not limited to, notices of intent to sue, notices of violation or other adverse documentation that could be resolved administratively by any federal, state or local environmental authority, and FOIA requests pertaining to environmental matters.) If electronic mail is used for reporting, it is the responsibility of the sender to ensure receipt.

5.5.1. SJAs should report prospective litigation promptly, even if formal documentation, including, but not limited to, a complaint, process, or notice has not been received. Such reports should be made to AFLSA/JACE, the appropriate MAJCOM, and the appropriate regional environmental counsel. Typically, SJAs become aware of deficiencies that are likely to result in administrative action or litigation following inspections by state or local inspectors.

5.5.2. Formal Litigation Reports.

5.5.2.1. SJAs will prepare a formal litigation report in accordance with paragraph **1.8.**, when it appears AFLSA/JACE will have to defend Air Force interests in state or federal litigation or when otherwise directed by AFLSA/JACE.

5.5.2.2. In addition to other materials required under paragraph **1.8.**, SJAs should be prepared to provide the following documentation, if relevant to the litigation:

5.5.2.2.1. One copy of state or local statutes alleged to have been violated.

5.5.2.2.2. One copy of relevant environmental permits.

5.5.2.2.3. Five copies of an installation or area map, with annotations showing pollution control facilities, construction sites, discharge points, easements, and other relevant features.

5.5.2.2.4. Five copies of any relevant draft or final Environmental Impact Statement or assessment.

5.5.2.2.5. One copy of any documents relating to consultations with other federal agencies (i.e., biological assessments and requests for consultation under the ESA).

5.5.2.2.6. As many copies of all records pertaining to the litigation, such as correspondence, records, photography, or reports, as the particular case may require. AFLSA/JACE determines the quantity of such documents in each case.

5.5.2.2.7. Electronic versions of the aforementioned documentation may be provided in lieu of paper documentation, unless otherwise directed by AFLSA/JACE. If electronic mail is used to deliver such documents, it is the responsibility of the sender to ensure receipt.

5.5.3. Other litigation reporting requirements.

5.5.3.1. Administrative actions. SJAs must report to AFLSA/JACE, the servicing MAJCOM, and the appropriate regional environmental counsel any time a federal, state or local regulatory authority seeks a fine or penalty for a violation of an environmental law. This will usually occur when the federal, state or local regulatory agency issues adverse documentation (including, but not limited to, an NOV, NON or field citation) informing the Air Force installation a fine is a possible consequence for the resolution of the alleged violation set forth in the adverse documentation.

5.5.3.2. Settlement of Administrative actions.

5.5.3.2.1. AFLSA/JACE must give approval before settlement of any administrative action where the terms of the settlement include provisions for the payment of fines (this includes settlement agreements that accept terms for stipulated penalties or suspended fines) or supplemental environmental projects (SEP).

5.5.3.2.2. SJAs requesting authority to settle administrative actions should forward such requests through the MAJCOM SJA to AFLSA/JACE for approval.

5.5.3.3. SJAs must report to AFLSA/JACE, the servicing MAJCOM, and the appropriate regional environmental counsel whenever a federal, state or local regulatory authority initiates criminal action against an Air Force member or employee. (NOTE: Special interest case reporting procedures to AFLSA/JAJM would also apply to these cases. See AFI 51-201, *Administration of Military Justice*, paragraph 12.8., especially subparagraph 12.8.2.3.)

5.5.4. SJAs must report the actual payment of any fines or penalties paid under environmental statutes to AFLSA/JACE through the MAJCOM SJA within 30 days of payment to the appropriate federal, state or local environmental authority.

5.6. Annexation Proposals.

5.6.1. DoD Directive 4165.6, *Real Property Acquisition, Management, And Disposal,* September 1, 1987, at paragraph (F)(2)(g), sets forth DoD policy on annexations of military installations by local communities or political entities. This directive states:

> "Annexation. It is DoD policy to be neutral relative to annexation by a municipality or political subdivision in accordance with State law, unless the Secretary of the Military Department concerned determines that such action would not be in the best interest of the Federal Government, or it is opposed by another local jurisdiction."

5.6.2. The installation SJA sends a report analyzing the potential impact of a proposed annexation that specifically addresses the impact of annexation on the right of the installation to contract for utility and waste disposal services to AFLSA/JACE and to AFLSA/JACL (ULT). If the right of the installation to contract for telephone services is impacted, a copy of the report should also be sent to 38 EIW/JA, Tinker AFB, OK. [See paragraph **3.10.**] **Figure 5.1.** outlines information that usually applies to annexation proceedings.

5.7. Rule-making Proceedings. Installation SJAs may submit comments on proposed state and local rules after approval by the Division Chief, AFLSA/JACE. SJAs shall submit proposed comments to the appropriate regional counsel office of AFLSA/JACE for obtaining such approval.

Figure 5.1. Outline of Information Regarding Annexation Proposals.

1. Outline of Factors Bearing on Proposed Annexation.

a. Impact on the mission:

1. Impact on AICUZ or other land compatible use requirements.
2. Future installtion expansion requirements.
3. Pollution standards, ordinances, and codes.

b. Impact on operational and maintenance costs:

1. Water and sewer rates.
2. Electric and gas rates.
3. Telecommunications and other rates.
4. Franchise taxes.
5. Taxes on US contractors (including license fees, gross receipts taxes, personal property taxes, etc.) likely to be passed on to the United States.
6. Regulatory ordinances, building codes, etc. (fees or noncompliance penalties).

c. Potential public relations impacts (pro and con).

d. Impact upon military and civilian personnel:

1. Taxes (personal property, income, employment).
2. Licensing requirements.
3. Changes in school districts.
4. Taxes on installation exchange concessionaires.
5. Telephone rates.
6. Automobile insurance rates.
7. Benefits derived from increased city revenue (use of libraries, parks, and other facilities).

e. Potential city services to be obtained:

1. Police and fire prevention (conflicts with present agreements).
2. Trash and garbage removal.
3. Snow removal and street maintenance.

f. Advantages or benefits to accrue to the annexing jurisdiction:

1. Revenue sharing (other federal rights).
2. Conformity with city plan (growth pattern maintenance).

g. Impact on other political jurisdictions - nature and reason for opposition of others.

h. Degree of legislative jurisdiction exercised by the United States over the area to be annexed.

2. Remarks and Recommendations.

3. Memorandum of State Annexation Law:

a. Criteria and standards.

b. Annexation procedure.

c. Right of and forums for protest.

d. Unique status afforded United States as landowner (if any).

e. Other relevant laws or ordinances.

Chapter 6

CIVIL LITIGATION IN FOREIGN COURTS

6.1. Litigation Responsibility. The International and Operations Law Division (HQ USAF/JAI) monitors foreign civil litigation involving the Air Force, its instrumentalities, and its officials, and supports DoJ in its efforts to protect Air Force interests in foreign courts. Send foreign civil litigation reports per paragraph **6.2.**to HQ USAF/JAI.

6.2. Reporting Requirements. Report the following types of foreign suits, actions or disputes to HQ USAF/JAI using the format in paragraph **1.8.**

6.2.1. Proceedings in which the United States has an interest but is not a named party defendant (i.e., obligation under international agreement to share the expense of any judgment awarded).

6.2.2. Disputes concerning the validity or refund of taxes assessed by a foreign authority against the property or transactions of the Air Force, its contractors or instrumentalities, including nonappropriated fund activities.

6.2.3. Legal actions arising out of Air Force contracts, subcontracts and purchase orders, bankruptcy, receivership, assignment, and probate proceedings that affect the interests of the United States.

6.2.4. Proceedings involving proposed new or amended administrative rules or regulations of a foreign government or agency that may affect the Air Force mission.

6.2.5. Legal process of foreign courts affecting the Air Force or Air Force personnel in their official capacity.

6.3. Reporting Methods.

6.3.1. Electronic Reporting. The reporting authority submits an initial message, datafax or electronic mail to HQ USAF/JAI, with an information copy to the MAJCOM, immediately on receiving notice of the start of a foreign suit, action, or proceeding that requires reporting. (See paragraph **6.2.**) If datafax or electronic mail is used, it is the responsibility of the sender to ensure its receipt. This initial report precedes the formal litigation report (see paragraph **1.8.**) and explains the subject of the action. Both reports should be identified as attorney work product. For the European theater, HQ USAFE/JA is responsible for advising DoJ's European Office of all initiated suits.

6.3.2. Confirming Letter. Reporting authorities confirm each electronic message by sending a letter (see paragraph **6.4.**) Attach 2 legible copies of each legal document, memorandum, and letter that applies to the foreign suit, action, or proceeding.

6.3.3. Litigation Report. Send the litigation reports immediately following initial notification to allow time for other government departments to comment or act before issuing instructions on how to defend civil cases that arise in foreign jurisdictions.

6.4. Report Contents. Include in each report:

6.4.1. All information per paragraph **1.8.**

6.4.2. A recommendation on which qualified local counsel (preferably bilingual) should handle the case. Choose a counsel from the list of attorneys maintained by the nearest US embassy or consulate.

6.5. Follow-up Action.

6.5.1. Advise HQ USAF/JAI fully and promptly of all later developments.

6.5.2. Send HQ USAF/JAI two copies of all pertinent correspondence and documents.

6.5.3. Send information copies to the MAJCOM/JA and NAF/JA (see paragraph **6.3.**)

6.6. Commencement of Proceedings.

6.6.1. Foreign Jurisdiction. The defense of sovereign immunity or a lack of jurisdiction of a foreign court may be proper only when the United States or one of its agencies or instrumentalities is a named party defendant, and in such event may be asserted only with the prior approval of DoJ and TJAG.

6.6.2. Suits Against the United States. Send to the SJA any writ, summons, notice of legal proceedings, or other foreign civil process delivered to an Air Force officer, employee, or activity immediately on receipt.

6.6.2.1. The SJA then returns the document to the issuing authority, with a suitable statement respectfully and tactfully explaining the lack of authority of the person or activity to accept service on behalf of the United States, and suggesting that service or delivery be made on the US Embassy through established channels, or on the Department of Justice, Washington, DC, under the *1965 Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*. Their address is Office of International Judicial Assistance, Civil Division, Department of Justice, Washington, DC 20530. SJAs should also forward courtesy copies of these documents, including their written statement, to this DoJ office.

6.6.2.2. No exceptions to this procedure exist except with prior approval from TJAG and DoJ, and clearance from the chief of the US diplomatic mission in the country. (See **Figure 6.1.** for a model letter returning such a process).

6.6.2.3. Refer questions concerning this policy to HQ USAF/JAI.

6.6.3. Suits Against United States Government Agencies and Instrumentalities.

6.6.3.1. United States Government agencies and instrumentalities in foreign countries, such as military units and installations, installation exchanges, open messes, and military missions, lack juridical personality under United States law. Such government activities of the United States generally are not subject to civil proceedings or service of process in foreign countries. Claims nominally against such activities are in law suits against the United States.

6.6.3.2. Except for proceedings against US personnel arising outside of performance of official duties, the United States is the only proper party defendant or respondent in any foreign civil proceedings.

6.6.3.3. The US embassy in that country is the only United States activity that may receive and accept service of foreign process.

6.6.3.4. In suits against United States Government agencies and instrumentalities, the SJA returns the foreign process to the issuing authority with a suitable statement respectfully and tactfully explaining the lack of juridical personality on the part of the United States Government agency or instrumentality involved. (See **Figure 6.1.** for model letter returning process).

6.6.4. Suits Against Individuals Acting in an Official Capacity.

6.6.4.1. These guidelines apply to civil suits, actions, and proceedings in foreign countries against individual members or employees of the Air Force for acts or omissions arising out of the performance of their official duties.

6.6.4.2. The guidelines on returning process to issuing authorities do **not** apply if TJAG decides that applying them is inconsistent with pertinent provisions of a status of forces or similar agreement, or that applying them may adversely affect the defense of such suits in that country.

6.6.4.3. When a process on its face establishes that the act or omission complained of is patently a governmental act:

6.6.4.3.1. Return it to the issuing authorities with a letter signed by the SJA explaining that the act or omission complained of was performed by the subject while acting as an official of the Air Force or an agency of the United States Government, and in the performance of official duties under superior orders.

6.6.4.3.2. Further state that in legal effect the subject is not the proper party defendant. The letter should not contain any express statement that suit should be brought against the United States, as this is an improper invitation of suits against the United States.

6.6.4.4. When a process does not on its face establish that the act was governmental:

6.6.4.4.1. Return it with a similar letter of explanation to that described above.

6.6.4.4.2. Attach a certified statement from the member's immediate commander attesting to the employment or military status of the individual and indicating that the individual was performing official duties at the time and place when the alleged act occurred.

6.6.4.4.3. If the issuing authority rejects the return of process:

6.6.4.4.3.1. Allow the service of the process according to applicable international agreement and local law and procedures.

6.6.4.4.3.1.1. If proper service is obtained, the defendant must defend the suit, and the defendant must prove during the trial that the occurrence was part of his or her official duties.

6.6.5. Garnishment and Attachment Proceedings. As a general rule, the United States and its agencies and instrumentalities are not subject to garnishment orders or money attachment proceedings in foreign countries aimed at wages or other funds due and payable by the United States to alleged or adjudicated debtors of the parties on whose behalf garnishment or attachment is attempted.

6.6.5.1. An exception to this rule exists in the Federal Republic of Germany. Under Article 34(3), German Supplementary Agreement to the NATO Status of Forces Agreement, the United States must (see Public Law 93-647, *Social Services Amendments of 1974*, January 4, 1975) honor writs of garnishment issued by German courts against members of US forces or civilian component stationed in the Federal Republic of Germany for child support or alimony obligations. Consult the DoD *Military Pay and Allowances Entitlements Manual,* paragraph 70710.

6.6.5.2. In all other cases, the United States cannot honor garnishment orders or money attachments. You may cooperate with the foreign judicial and administrative authorities and advise of the date, time, and place of payment to the debtor. The creditor can exercise legal rights directly against the debtor without submitting the United States or its activities to the jurisdiction of the

foreign court or agency. Upon receipt of any writ, order, or petition for garnishment or money attachment served on, or otherwise delivered to an Air Force officer, employee, or activity, refer such document to the SJA.

6.6.5.3. If the United States cannot honor the garnishment or money attachment request, per paragraph **6.6.5.2.**, the SJA returns it to the issuing authority.

6.6.5.3.1. The SJA advises the foreign court or other agency that the US military authorities will cooperate with the local authorities to allow the creditor to pursue remedies under local law directly against the debtor. (See **Figure 6.1.** for a model letter.)

6.6.5.3.2. If the debtor is a United States citizen or resident alien, release only information authorized under the Privacy Act (see AFI 33-332, *Air Force Privacy Act Program*).

6.6.5.3.3. Send full electronic report of each case immediately to the NAF/JA, MAJCOM/JA, and HQ USAF/JAI.

6.6.5.4. If the United States can honor the garnishment or money attachment request, per paragraph **6.6.5.1.**, the MAJCOM SJA will implement procedures for processing such requests. Send a full report of each case immediately to the NAF/JA, MAJCOM/JA, and HQ USAF/JAI.

6.7. Defending Against Foreign Suits and Proceedings.

6.7.1. DoJ prosecutes and defends in all foreign courts all civil suits by or against the United States, US agencies, US instrumentalities, or officials and employees whose official conduct is involved. The information contained in reports made under this chapter constitutes the basis for a report by HQ USAF to DoJ and for an Air Force recommendation to that Department as to the action to be taken in the case. DoJ, in turn, takes action to ensure that steps are taken to institute or defend the suit.

6.7.2. United States Government Representation of an Individual. DoJ represents military personnel and civilian employees of the Air Force being sued in foreign courts because of actions they took in the line of duty in the performance of their official duties.

6.7.2.1. DoJ decides for each case if it will provide representation or permit the Air Force to do so.

6.7.2.2. Submit requests for United States Government representation in foreign courts (see paragraph **1.3.**) in writing through HQ USAF/JAI.

6.7.2.3. The United States Government does not pay for private counsel that individuals hire without specific authorization and will not pay any judgment against the individual (see paragraphs **1.3.**and **1.4.**).

6.7.3. United States Government Representation of an Air Force Contractor. If an Air Force contractor requests United States Government representation before a foreign civil court, contact HQ USAF/JAI for guidance and follow the procedures in paragraph **1.3.**

6.7.4. Obtaining a Continuance. If the date set for a hearing does not allow enough time to retain United States Government counsel, the SJA, in consultation with DoJ, may be instructed to attempt to get a continuance.

6.7.4.1. In attempting to obtain such continuance, the SJA does not appear in court or do anything else that can be construed as a defense or a legal appearance.

6.7.4.2. Advise HQ USAF/JAI electronically of all such attempts.

6.7.5. Cooperating with Foreign Counsel. SJAs will give information and evidence to foreign counsel that DoJ retains to represent US interests.

6.7.6. Communicating with DoJ. DoJ retains, instructs, and pays foreign counsel.

6.7.6.1. The retained counsel keeps in touch with DoJ.

6.7.6.2. SJAs are encouraged, as the need arises, to communicate directly with DoJ and, where necessary, their retained counsel. Back brief NAF/JA and MAJCOM/JA, as appropriate.

6.7.7. Handling Administrative Legal Problems in Civil Litigation. Do not consult with foreign counsel retained by DoJ on administrative legal problems collateral to the civil litigation. When the local SJA cannot resolve such problems, refer them to the next higher command.

6.8. Suing in a Foreign Court.

6.8.1. The United States may:

6.8.1.1. Sue for money damages.

6.8.1.2. Petition for injunctive relief.

6.8.1.3. Sue for the return of personal or real property.

6.8.1.4. Sue for the specific performance of a contract.

6.8.2. DoJ prosecutes civil suits for the United States. The DoJ will:

6.8.2.1. Quickly identify the basis for any legal action.

6.8.2.2. Notify HQ USAF/JAI promptly.

6.8.3. If a contractor is facing criminal proceedings based on an activity or transaction for which the United States may sue in civil court, the SJA shall notify HQ USAF/JAI immediately. When such action serves the interest of the United States, DoJ can intervene as a complainant in the criminal case.

6.8.4. After you identify a wrong and deem action proper, the SJA shall alert DoJ immediately by message to HQ USAF/JAI. Include:

6.8.4.1. A description of the facts of the case.

6.8.4.2. A discussion of the local law that applies to the dispute.

6.8.4.3. An analysis of why a suit is appropriate.

6.8.4.4. Date at which the applicable statute of limitations will run.

6.8.4.5. Amount of claim or relief sought.

6.8.4.6. Nature of anticipated defenses or counterclaims.

6.8.4.7. Other interested parties or possible intervenors.

6.8.4.8. Efforts made to collect the debt or seek other relief before filing suit.

6.8.4.9. Recommendation for selection of local counsel, with cost and fee estimate.

6.8.4.10. Statement of availability of witnesses and evidence.

Figure 6.1. Format for Letter Returning Foreign Process and Tendering Assistance in Garnishment and Attachment Proceedings.

FORMAT FOR LETTER RETURNING FOREIGN PROCESS AND TENDERING ASSISTANCE IN GARNISHMENT AND ATTACHMENT PROCEEDINGS

SUBJECT: (Identification of process)

TO: (Court or other authority from which process issued)

1. Enclosed is the (identification of process) which was delivered by (mode of delivery, for example, mail or personal tender) to (individual or unit by which process was received) at (place of delivery) on (date of delivery).
2. Under the law of the United States, the (unit or activity to which process is directed) is a government agency or instrumentality that possesses no independent juridical personality, and thus is not itself amenable to civil process. The claim asserted in the present proceeding is a claim against the United States, and the only agency empowered to receive service of foreign process in such cases is the United States Embassy or Diplomatic Mission within the country concerned. Usually, service of process upon the Embassy or Diplomatic Mission is accomplished through diplomatic channels. Alternatively, service may also be possible on the United States Department of Justice, Washington D.C., under the *1965 Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*. Their address is Office of International Judicial Assistance, Civil Division, Department of Justice, Washington, D.C. 20530.
3. Although circumstances outlined above require the return of this (identification of process), and without prejudice to the immunities enjoyed by the United States as sovereign, I can furnish you the date, time, and place of payments to be made to the debtor so that the creditor may pursue remedies under local law directly against the debtor. In this regard, the sum of (amount of payment, expressed in local currency) will be paid to (name of debtor) at (place of payment) on (date of payment) at (time of payment). (If the debtor is an employee, include statement of future payment schedule.)

Chapter 7

PATENT, COPYRIGHT, AND TRADEMARK LITIGATION

7.1. Litigation Responsibility.

7.1.1. The Patents Branch of the Commercial Litigation Division (AFLSA/JACN):

7.1.1.1. Assists DoJ in patent, copyright, trademark, or related litigation that involves the Air Force.

7.1.1.2. Maintains liaison with DoJ and other governmental agencies on such litigation.

7.1.2. Report all prospective litigation involving patent, copyright, trademark, and related matters affecting the Air Force to AFLSA/JACN.

7.1.3. Direct all questions regarding litigation of these cases to AFLSA/JACN.

7.2. Responding to Calls, Interrogatories, Court Orders, and Requests. AFLSA/JACN:

7.2.1. Responds to calls by the Attorney General to the Secretary of the Air Force for information and help, according to 28 U.S.C. 520, to defend the United States in patent, copyright, trademark, and related litigation.

7.2.2. Responds to court calls, court orders, interrogatories, and any other requests for information.

7.2.3. Provides any necessary additional information and assistance to DoJ.

7.3. Obtaining Information and Documents for Responses.

7.3.1. AFLSA/JACN may request Air Force activities to provide information and documents to it for use by DoJ.

7.3.2. When an Air Force activity receives such a request, it should fax or express mail the requested information and documents to AFLSA/JACN.

7.3.3. The activity must meet any set time limits or send an interim report to AFLSA/JACN in sufficient time for DoJ to request an extension of time from the court.

7.3.4. The request to the Air Force activity usually specifies the purpose and type of information and materials required.

7.3.5. When AFLSA/JACN requests information in order to respond to calls from the Attorney General, the Air Force activity:

7.3.5.1. Identifies all items or processes manufactured by or for the government that might fall under the terms of the charge of infringement.

7.3.5.2. Includes the name and address of the contractor or subcontractor.

7.3.5.3. Includes specific contract information including the contract date under which all disputed items were procured.

7.3.5.4. Provides copies of the patent indemnity, notice and assistance, and authorization and consent clauses in the contracts and pertinent subcontracts.

7.3.5.5. Indicates the number, date of delivery, unit cost, and total cost of all involved items.

7.3.5.6. Attaches drawings, descriptions, diagrams, photographs, manuals, and so on that contain data pertaining to the alleged infringement.

7.3.5.7. Describes any government rights under the patent, copyright, or trademark due to work the plaintiff performed under government contracts.

7.3.5.8. Includes the names and addresses of officers and employees of the Air Force who know pertinent engineering and procurement facts and who could consult with DoJ attorney and testify for the government.

7.3.5.9. Identifies any other Air Force activities that might have an interest in the matter.

7.3.5.10. Identifies any setoffs or counterclaims applicable to the matter.

7.3.5.11. Includes additional information on defenses available to the United States, particularly as they pertain to the validity of the patent, copyright, or trademark.

7.3.5.12. Provides two copies (or whatever number of copies is specified) of all attachments to the response.

Chapter 8

AUTHENTICATING OFFICIAL AIR FORCE RECORDS FOR ADMISSION INTO EVIDENCE

8.1. Terms.

8.1.1. Official Air Force Records. All documents, records, or papers which are required by the Department of the Air Force to be prepared or processed and retained.

8.1.2. Custodian. A person in charge of an office in which official Air Force records are filed by law, regulation, or custom, or a person whom proper authority so designates; and for certain purposes, a person who has physical possession of official Air Force records for use in official duties.

8.2. Rules of Evidence. The rules of evidence at common law and various statutes specify how to authenticate documents and records for use as evidence. Methods include:

8.2.1. Oral testimony.

8.2.2. Authenticated copies of public records.

8.2.3. Other authorized methods. The method of authenticating official Air Force records specified in this chapter does not prevent proof of genuineness by any other authorized method.

8.3. Authenticating Official Records. Custodians must authenticate official Air Force records.

8.3.1. Civilian Judicial or Quasi-Judicial Proceedings:

8.3.1.1. An official Air Force record or an entry in it may be evidenced by an official publication thereof in the *Federal Register*, or the record custodian may authenticate a copy and certify that he or she has lawful custody of that record.

8.3.1.1.1. Use AF Form 44 to authenticate official Air Force records and copies or extracts from them.

8.3.1.1.2. Prepare the first certificate (the top part of AF Form 44) and forward it to the HQ USAF or AFLSA division handling the case together with the documents being authenticated. (See **Figure 8.1.**)

8.3.1.1.3. Submit only the copies that have been requested for certification.

8.3.1.2. Charge individuals requesting documents who are not from federal agencies for:

8.3.1.2.1. Search time.

8.3.1.2.2. Document reproduction.

8.3.1.2.3. Certifying and validating the document.

8.3.1.3. Send a letter to the appropriate AFLSA civil litigation division or HQ USAF/JAI indicating that you:

8.3.1.3.1. Billed the requester, and

8.3.1.3.2. For records subject to the Privacy Act, that you worked within its guidelines, with a description of your reasons for releasing the records.

8.3.1.4. The Secretary of the Air Force or designee signs under the second certificate (the bottom part of the form) and affixes the Air Force seal to the AF Form 44. This procedure satisfies FRCP, Rule 44, for admitting official Air Force records as evidence and usually satisfies state jurisdiction requirements too.

8.3.2. Getting Assistance from the SJA. Custodians of official Air Force records should consult their SJA or the responsible AFLSA/JAC litigation division on preparing AF Form 44.

8.3.3. Voluminous Records. Divide voluminous records at logical points and put a covering AF Form 44 on each section. Unless otherwise specified by court rules, each section should be no more than 1½" thick.

8.3.4. Freedom of Information Act, Privacy Act, and **Chapter 9**. When releasing official Air Force records to other than federal agencies, ensure the material is releasable under the Freedom of Information Act, 5 U.S.C. 552, that the privacy of individuals, under the requirements of the Privacy Act, 5 U.S.C. 552a, has been satisfied, and **Chapter 9** of this instruction has been followed. When responding to requests from other non-DoD federal agencies, comply with the Privacy Act, 5 U.S.C. 552a, and systems notices made pursuant to the Privacy Act.

8.4. Offering Records into Evidence.

8.4.1. Do not offer official Air Force records physically into evidence unless they can be withdrawn and a copy substituted for the original. Copies of Air Force records, authenticated as provided in this chapter, are usually admissible in evidence instead of the actual records.

8.4.2. If the custodian of official Air Force records certifies that after diligent search no record or entry of a specified matter exists in the records of his or her office, that certificate is admissible as evidence of such fact.

8.4.2.1. See **Figure 8.2.** for instructions and exact wording to use when you cannot find records.

8.4.2.2. Forward AF Form 44 for completion.

Figure 8.1. Sample AF Form 44 Format for Authenticating Official Records.

United States of America

DEPARTMENT OF THE AIR FORCE

Barksdale AFB, LA 7 August , 2000
(Place) *(Date)*

I HEREBY CERTIFY that the attached copies, listed below, are true copies of the following official records maintained in Military Personnel Records Section, 301st Mission Support Squadron, 301st Air Base Group:

Unfavorable Information File of Thomas Doe

John Smith
Chief, Military Personnel Records Section
301st Mission Support Squadron
Barksdale AFB, LA 71110

I HEREBY CERTIFY that , who signed the foregoing certificate, is the , and that to their certification as such, full faith and credit are and ought to be given.

IN TESTIMONY WHEREOF I, , Secretary of the Air Force, have hereunto caused the seal of the Department of the Air Force to be affixed and my name to be subscribed by the Administrative Assistant to the Secretary of the Department, at the City of Washington, this _____ day of _____, _____.

_____
Secretary of the Air Force

By_____
Administrative Assistant

AF FORM 44, 19960601 *(EF-V3)* PREVIOUS EDITIONS ARE OBSOLETE.

Figure 8.2. Sample AF Form 44 Format for Certifying Custodian Who Does Not Have the Official Records Requested.

United States of America

DEPARTMENT OF THE AIR FORCE

Maxwell AFB, AL 21 May , 2000
(Place) (Date)

I HEREBY CERTIFY that I made, or caused to be made, a thorough and diligent search for any and all medical records of Senior Airman Stuart A. Doe containing blood alcohol testing results. No such records exist within those records of which I am the custodian. If such records existed, they would be within the records system of which I am the custodian.

Richard Roe, SMSgt, USAF
Chief, Medical Records Section
50th Medical Group
Maxwell AFB, AL 36112

I HEREBY CERTIFY that , who signed the foregoing certificate, is the , and that to their certification as such, full faith and credit are and ought to be given.

IN TESTIMONY WHEREOF I, , Secretary of the Air Force, have hereunto caused the seal of the Department of the Air Force to be affixed and my name to be subscribed by the Administrative Assistant to the Secretary of the Department, at the City of Washington, this _____ day of _____, _____.

_____
Secretary of the Air Force

By_____
Administrative Assistant

AF FORM 44, 19960601 *(EF-V3)* PREVIOUS EDITIONS ARE OBSOLETE.

Chapter 9

RELEASING INFORMATION IN LITIGATION, TESTIFYING, AND SERVING ON STATE AND LOCAL JURIES

Section 9A—Chapter Scope and Definitions

9.1. Applicability and Scope.

9.1.1. Applicability When Air Force is Executive Agent or Single Service Manager. To the extent they do not conflict with DoD directives, instructions or regulations, the release authority and procedures in this chapter will apply when the Department of Defense delegates to the Air Force responsibility as executive agent for a particular case or subject matter area, or responsibility as a single service manager for claims and litigation occurring in specified foreign countries or other overseas areas.

9.1.2. Exceptions. This chapter does **not** apply to releasing official information or testimony by Air Force personnel in the following situations:

9.1.2.1. Before courts-martial convened by military departments or in administrative proceedings conducted by or on behalf of a DoD component.

9.1.2.2. In administrative proceedings for:

9.1.2.2.1. The Equal Employment Opportunity Commission.

9.1.2.2.2. The Merit Systems Protection Board.

9.1.2.2.3. The Federal Labor Relations Authority.

9.1.2.2.4. A negotiated grievance procedure under a collective bargaining agreement to which the government is a party.

9.1.2.3. To the Defense Office of Hearing Appeals (DOHA) or the DOHA Appeals Board pursuant to DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, January 2, 1992.

9.1.2.4. Disclosing information to federal, state, and local prosecuting and law enforcement authorities for use in a criminal investigation by a DoD organization.

9.1.3. This instruction does not preclude applying AFI 33-332 to any written request for agency records that is not in the nature of a legal process.

9.1.4. This chapter does not supersede or modify:

9.1.4.1. Existing laws or Air Force programs governing the testimony of Air Force personnel.

9.1.4.2. Laws or rules governing the release of official Air Force information during grand jury proceedings.

9.1.4.3. Laws or rules governing the release of official information not involved in litigation.

9.1.4.4. How official information is released under the FOIA, 5 U.S.C. 552, the Privacy Act, 5 U.S.C. 552a, or the *Federal Service Labor-Management Relations Statute*, *Title 5, United States Code*, Section 7114(b)(4).

9.1.4.5. The procedures in AFI 90-401, *Air Force Relations with Congress*, on how official information or testimony by Air Force personnel is provided to members, employees, committees, or individual chambers of Congress. AFLSA/JACL or other civil litigation divisions might, however, be tasked to assist SAF/GC in making recommendations regarding legal or other privileges.

9.1.4.6. The procedures in AFI 51-1101 involving litigation under the False Claims Act, 31 U.S.C. §§ 3729-3733.

9.1.5. This Chapter does not infringe on or displace the responsibilities of DoJ to litigate on behalf of the United States.

9.2. Terms.

9.2.1. Air Force personnel includes:

9.2.1.1. Present and retired US Air Force military personnel, including Air Force Reserve personnel and Air National Guard personnel when in federal service.

9.2.1.2. Former US Air Force military personnel.

9.2.1.3. US Air Force Academy cadets.

9.2.1.4. Present, retired and former civilian employees of the Air Force, including:

9.2.1.4.1. Nonappropriated fund activity employees.

9.2.1.4.2. Non-US nationals who perform services overseas for the United States under status of forces agreements.

9.2.1.4.3. Other specific individuals hired through contractual agreements by or on behalf of the Department of the Air Force.

9.2.2. Demand. Subpoena, order, or other demand of a court of competent jurisdiction, or other specific authority, to produce, disclose, or release official Air Force information (or other official federal agency information subject to release under this chapter) or which require that Air Force personnel (or other DoD personnel subject to this chapter) testify or appear as witnesses.

9.2.3. Judicial Proceeding. Any action, suit or other proceedings of a judicial nature. Examples include:

9.2.3.1. Hearings and conferences before a court, magistrate, commission or committee with the power to compel testimony.

9.2.3.2. Grand jury proceedings.

9.2.3.3. Coroners' inquests.

9.2.3.4. Informational proceedings such as hearings and conferences conducted by a prosecuting attorney to determine whether an information or charge should be made in a particular case, alternative dispute resolution conferences or hearings, or other alternative criminal disposition proceedings.

9.2.4. Applicable Jurisdictions. In addition to all federal courts and agencies, civil judicial and administrative proceedings in the following jurisdictions are included among those to which this chapter is applicable: the District of Columbia, a state, territory, or possession of the United States, including the Commonwealth of Puerto Rico; or the Commonwealth of the Northern Mariana Islands. (See **Chap-**

ter 6 for procedures regarding civil litigation involving the Air Force or Air Force personnel in foreign countries.)

9.2.5. Litigation. All pretrial, trial, and post-trial stages of all existing or reasonably anticipated judicial or administrative actions, hearings, investigations, or similar proceedings before civilian courts, commissions, boards, or other tribunals, foreign and domestic. This includes:

9.2.5.1. Responses to discovery requests, depositions, and other pretrial proceedings.

9.2.5.2. Responses to formal or informal requests by attorneys or others in existing or reasonably anticipated litigation matters.

9.2.6. Official Information. All information of any kind, however stored, that is in the custody and control of the Department of the Air Force, relates to information in the custody and control of the Department, or was acquired by Air Force personnel as part of their official duties or because of their official status within the Department while such personnel were employed by or on behalf of the Department or on active duty with the US Air Force. Official information that is the property of the Air Force but is in the possession, custody or control of another federal agency is also included in this definition. Generally, official information includes, but is not limited to:

9.2.6.1. Classified information of any kind;

9.2.6.2. Paper, photographic or computer records about the acquisition, construction, operation, maintenance, physical condition or readiness, as applicable, of DoD, Air Force, or other federal government property, facilities, equipment, data management systems or personnel, including, but not limited to, unit records, training records, individual personnel or medical records, and official Air Force publications;

9.2.6.3. Personal observations by Air Force personnel of the acquisition, construction, operation, maintenance, physical condition or readiness, as applicable, of any particular DoD, Air Force or other federal government property, facility, equipment, data management system or personnel;

9.2.6.4. Any records obtained, generated, or maintained by the Air Force about or for the morale, support, or fitness of Air Force personnel, family members, or contractors, including, but not limited to, all investigative reports of any kind; and

9.2.6.5. Personal observations by Air Force personnel of the morale, support, or fitness of any particular Air Force personnel, family member, or contractor.

9.2.7. Private Litigation. Litigation in which neither the United States, nor its employees, in an official capacity, is a party and in which the United States has no identifiable direct or indirect legal, contractual, financial, administrative, mission-related or other interest. Examples of litigation likely to be considered private include the personal bankruptcy, civil consumer, divorce (except where the payment of child support or alimony, or the division or withholding of active duty, civilian or retired pay is involved), landlord-tenant or similar litigation of individual Air Force civilian or military personnel, past or present. Potential situations where the United States may have an interest in third party litigation can include litigation involving: Air Force contractors; manufacturers of Air Force equipment and property; incidents arising from Department of Defense or Air Force activities; litigation involving the personal injury of Air Force personnel or family members, or the personal injury of third parties by Air Force personnel; or the foreign or civilian criminal prosecution of Air Force personnel, family members, contractors, or manufacturers of Air Force equipment or property.

Section 9B—Release of Official Information

9.3. Release Authorities for Official Information. The following personnel are the release authorities for official Air Force information in the following litigation situations:

9.3.1. SJAs are the release authorities for official, unclassified factual information in private litigation cases. In lieu of an available SJA, Secretariat personnel should consult with SAF/GC.

9.3.2. Likewise, Medical Law Consultants (MLCs) are the release authorities for official, unclassified factual information in private litigation, to the extent it involves the release of medical and other records and information within the custody, control or knowledge of their permanent station hospital and its personnel.

9.3.3. For official information to be used in litigation before the Armed Services Board of Contract Appeals, contracting officers, in consultation with the appropriate servicing SJA, are authorized to release such information per the *Federal Acquisition Regulation* (FAR), subpart 5.4., and applicable DoD directives and Air Force instructions. Responses to such requests must be coordinated with the assigned trial attorney at the AFMC LO/JAB, Wright-Patterson AFB OH 45433-5000.

9.3.4. The responsible AFLSA civil litigation division or HQ USAF/JAI (for official information to be released to, or used in, foreign courts) releases all official, unclassified Air Force information in cases in which the United States is a party or has a direct or indirect interest; they also make all such release decisions for cases in which the information could be used in a claim or litigation against the United States.

9.4. Applicability to Former and Retired Air Force Personnel. Former and retired Air Force personnel who have possession of or access to official Air Force information, including classified information, are also required to follow the procedures in this section to obtain permission from the Air Force to release such information.

9.5. Factors in Releasing Official Information or Testimony. Release authorities ensure requesters state in writing the nature and relevance of the official information they want and include as much detail as possible. The appropriate release authority then uses this information to evaluate the request in light of DoDD 5405.2 (32 C.F.R., Part 97) and *United States, ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951). Before releasing official information, release authorities consider these questions:

9.5.1. Is the demand or request unduly burdensome or otherwise irrelevant?

9.5.2. Does the demand or request specify remedial information that is inadmissible under the rules of evidence, or is the information otherwise inappropriate under the applicable court rules?

9.5.3. Would disclosing this information (including release in camera) be appropriate under the rules of procedure governing the case and under the relevant substantive law concerning the appropriate privilege?

9.5.4. Would disclosing the information violate any statute, executive order, regulation, or directive? Release documents subject to the Privacy Act only with consent of the individual or under a court order or subpoena specifically signed by a judge of a court of competent jurisdiction. Because an order against the United States is an order against the sovereign, what is considered to be a court of competent jurisdiction under the Privacy Act is subject to interpretation. [*See* 5 U.S.C. 552a(b)(11); *Doe v. DiGenova*, 779 F.2d 74 (D.C. Cir 1985); *Bosaw v. NTEU*, 887 F. Supp. 1199 (S.D. Ind. 1995);

and *Boron Oil Co. v. Downie*, 873 F. 2d 67 (4th Cir. 1989).] Please refer any questions to the appropriate civil litigation division.

9.5.5. Would disclosing the information, except in camera to assert a claim of privilege, reveal classified or other restricted information? Particularly, would it reveal:

9.5.5.1. Data under DoD 5200-1-R, *Information Security Program*, January 1997 or AFI 31-401, *Information Security Program Management*?

9.5.5.2. Unclassified technical data withheld from public release pursuant to DoD Directive 5230.25, *Withholding of Unclassified Technical Data From Public Disclosure*, November 6, 1984 (including Change 1, August 18, 1995)?

9.5.5.3. Privileged safety information or documents contained in safety investigation board (SIB) reports conducted under AFI 91-204*, Safety Investigations And Reports*, and restricted from public release by DoD Instruction 6055.7, *Accident Investigation, Reporting and Recordkeeping*, October 3, 2000?

9.5.5.4. Other matters exempt from unrestricted disclosure?

9.5.6. Would disclosure interfere with ongoing enforcement proceedings, compromise constitutional rights, reveal the identity of an intelligence source or confidential informant, disclose trade secrets or similarly confidential commercial or financial information, or otherwise be inappropriate under the circumstances?

9.6. Classified Information. No one, including release authorities, shall release classified official information to courts or unauthorized persons under any circumstances, unless proper authority first declassifies the material.

9.6.1. When requesters ask for classified information that classification authorities cannot declassify at lower levels, Air Force personnel, through their SJAs, shall notify the appropriate civil litigation division of AFLSA or HQ USAF/JAI (if a foreign court is involved).

9.6.2. Pending a final decision, the servicing SJA (or SAF/GC) shall ensure the requester, court, or other authority is furnished with a copy of Title 32, C.F.R., Part 97 (DoD Directive 5405.2) and this chapter and shall inform the requester that the request is under review. If necessary, SJAs will work to obtain a stay of the request or demand pending a final determination.

9.7. Defending Denials. For decisions denying official information within the authority of SJAs, SJAs are authorized to consult directly with local United States attorneys or DoJ litigation attorneys to defend such decisions from subpoenas, court orders, or other legal challenges before local, state or federal courts, administrative bodies or other tribunals. Before any such consultation, however, SJAs are first required to notify the appropriate civil litigation division of AFLSA or HQ USAF/JAI of the need to consult, providing a brief factual background of the case and giving the reasons for such consultation.

9.8. Releasing Official Information to DoJ. DoJ and its US Attorneys represent the government's interest in judicial proceedings involving the Air Force.

9.8.1. SJAs may release unclassified official information that is not privileged to DoJ or the US Attorney on request.

9.8.2. SJAs must send DOJ or US Attorney requests for classified information that cannot be declassified at lower levels, or for other privileged official information, to the responsible AFLSA civil litigation division or HQ USAF/JAI for a decision.

9.9. Fees. Persons releasing copies of records and other documentary material collect fees from the requester according to the fee schedule in Chapter 6 of DoD 5400.7-R/AF Supplement, *DOD Freedom of Information Act Program*, or 32 C.F.R. 97. 6(d).

9.10. Sending Requests. When an SJA requests a decision on releasing official information from an AFLSA civil litigation division or HQ USAF/JAI, he or she should provide the following information:

9.10.1. Name of litigation and parties.

9.10.2. Name and location of the court or tribunal.

9.10.3. Date the litigation began and date of requested appearance.

9.10.4. Name and address of requester and of party who has the requested official information.

9.10.5. Type of action, subject matter, and a statement of the relevancy of the requested information.

9.10.6. Copies of documents requested, or a complete description of them if they are bulky or numerous.

9.10.7. Recommendations on release and any other pertinent information.

9.11. Complying With Subpoenas.

9.11.1. SJAs give legal advice to Air Force personnel under subpoena to appear and testify concerning official information.

9.11.1.1. When the proper release authority prohibits releasing the subpoenaed information, and the information does not include Privacy Act (5 U.S.C. 552a) material, the person receiving the subpoena, with the assistance of the appropriate legal office, attempts to resolve the matter with the attorney requesting the information or issuing the subpoena, or appears and explains the matter to the court. When Privacy Act material is involved, the SJA's office should assist the subpoenaed person to:

9.11.1.1.1. Determine if a judge of a court of competent jurisdiction personally issued the subpoena; and

9.11.1.1.2. Make or negotiate an adequate response, or appear before the court, as appropriate.

9.11.1.1.3. Where another release authority has been involved, SJAs should also consult with that authority, as necessary or appropriate.

9.11.1.2. If the court or requesting attorney is not satisfied and persists in requesting the information, the witness respectfully asks for time to send the request to the appropriate AFLSA civil litigation division or HQ USAF/JAI for a final Air Force decision and possible assistance from DoJ.

9.11.1.3. Judge advocates may accompany and advise the witness concerning a problem on release of official information.

9.11.2. When a subpoena calls for classified or otherwise unreleasable information outside of their release authority, SJAs, after the approval of the appropriate AFLSA civil litigation division or HQ USAF/JAI, may:

9.11.2.1. Communicate with the counsel requesting the subpoena.

9.11.2.2. Explain the restrictions on release.

9.11.2.3. Give the attorney releasable information.

9.11.2.4. Suggest withdrawing the subpoena.

9.11.3. Promptly report any subpoenas from foreign courts requiring records, files, or documents to HQ USAF/JAI.

9.12. Authenticating Documents. Authenticate official Air Force documents for civil litigation, rather than requiring the custodian to personally appear and testify. The authentication procedure in **Chapter 8** meets the requirements of federal courts and of most state courts and administrative bodies. Use the simplest authentication procedure permissible.

Section 9C— Witness Testimony by Former and Current Air Force Personnel

9.13. Release Authorities for Witness Testimony. The following personnel are the release authorities to allow witness testimony by former, retired and current Air Force personnel in the following litigation situations:

9.13.1. SJAs are the release authorities for individuals who may appear for witness testimony, depositions, or interviews or make declarations on factual matters within their personal knowledge when it involves private litigation. In lieu of an available SJA, Secretariat personnel should consult with SAF/GC.

9.13.2. MLCs are the release authorities for medical providers and other hospital personnel assigned to the MLC's permanent station hospital who may appear for witness testimony, depositions, or interviews or make declarations on factual matters within their personal knowledge when it involves private litigation.

9.13.3. The chief of the appropriate civil litigation division of AFLSA or the chief of HQ USAF/JAI, in coordination with DoJ litigation attorneys, decides if Air Force personnel may appear and testify as witnesses in contemplated or pending litigation where the United States is a party or has a direct or indirect interest. They also determine what conditions to impose on such appearance or testimony, or on the release of official information related to it.

9.13.4. The chief of the responsible AFLSA civil litigation division or the chief of HQ USAF/JAI (for cases in foreign courts) are denial authorities for expert or opinion testimony. AFLSA/JAC is the release authority for expert or opinion testimony. (See paragraph **9.20.** below.)

9.14. Voluntariness of Testimony in Private Litigation. When a release authority grants permission to Air Force personnel to provide statements or testify for prospective or actual private litigation, such statements and depositions are voluntary with the individual concerned, unless required by valid legal process or the order of competent military authority.

9.15. Limitations After the Testimony of Air Force Personnel Is Approved. When the release of official information is involved, Air Force personnel may produce, disclose, release, comment upon, or testify concerning only those matters that the requester specifies in writing and which the Air Force specifically approves, except under court order, by a court of competent jurisdiction. Air Force personnel do not give opinion or expert testimony without specific approval (see paragraph **9.20.**).

9.16. Witnesses in Private Litigation.

9.16.1. Air Force personnel may appear and testify in their nonofficial capacity in private litigation in which the United States has no interest if:

9.16.1.1. This chapter does not prohibit releasing the requested information.

9.16.1.2. The government incurs no expense.

9.16.2. Except as noted below, Air Force personnel testifying in their nonofficial capacity in private litigation may do so only in other than a duty status. Examples of such status during what would otherwise be official duty hours include:

9.16.2.1. Air Force military personnel receive a leave or a pass from their commanders.

9.16.2.2. Air Force civilian personnel take annual leave or leave without pay, or receive court leave in accordance with 5 U.S.C. 6322 and *DOD Financial Management Regulation*, Volume 8, Chapter 5, § 0513.

9.16.3. Air Force military personnel testifying in a nonofficial or private capacity shall not wear their uniform.

9.16.4. Air Force personnel testifying in private litigation in their official capacity are in a duty status.

9.16.4.1. The Air Force allows travel and transportation costs only to the extent authorized by the *Joint Federal Travel Regulations* (JFTR) [for uniformed personnel] and the *Joint Travel Regulations* (JTR) [for civilian personnel].

9.16.4.2. The witness must turn over any payment by requester for attendance and expenses to their Accounting and Finance Office.

9.17. Witnesses in Civilian Criminal Proceedings.

9.17.1. Air Force military personnel under subpoena to appear and testify in state criminal proceedings that do not directly involve the Air Force or its interests may receive permissive temporary duty per AFI 36-3003, *Military Leave Program*, at no expense to the government.

9.17.2. Military personnel returning from an overseas area to appear as a witness may use space available military transportation per DoD 4515.13-R, *Air Transportation Eligibility*, November 1994.

9.17.3. Air Force military personnel who must appear and testify in criminal proceedings that are directly related in some way to the Air Force or the member, and in which the Air Force has a particularly strong compelling and genuine interest may receive a temporary duty status per JFTR, paragraph U7062.

9.17.3.1. Installations receiving such requests should report the request to AFLSA/JACL.

9.17.3.2. In addition to those items in paragraph **9.9.**, the report should include these items of information:

9.17.3.2.1. If defendants or victims are military members or associated with the military community.

9.17.3.2.2. If the crime occurred on a military installation.

9.17.3.2.3. If military personnel helped investigate or referred the matter to state officials for prosecution.

9.17.3.2.4. Recommendations whether to grant temporary duty travel.

9.17.3.3. AFLSA/JACL approves any temporary duty travel for such witnesses.

9.17.3.4. The unit issuing orders pays travel expenses.

9.18. Witnesses in Litigation Involving the United States.

9.18.1. When DoJ attorneys, including US Attorneys and DoJ counsel request witnesses, honor the request if the appearance requires no temporary duty. Advise the appropriate AFLSA civil litigation division or HQ USAF/JAI of all such requests.

9.18.2. When DoJ attorneys request witnesses and the appearance requires temporary duty, the attorney must request the witness directly through DoJ Management Division's Special Authorizations Unit to ensure proper funding according to Title 28, C.F.R., Section 21.1. AFLSA/JACL or JACT directs travel, preferably by priority message or fax, with a telephone or other follow-up. The message or other documentation directing the travel should:

9.18.2.1. Give the name and social security number of the witness.

9.18.2.2. Indicate that the witness is essential.

9.18.2.3. Explain the witness' role and why the witness is essential.

9.18.2.4. Provide the necessary travel and reporting instructions.

9.18.2.5. Provide the regulatory authority for the direction.

9.18.2.6. Indicate how the witness will be funded.

9.18.2.7. At minimum, provide an action officer point of contact name and telephone number at the relevant AFLSA civil litigation division. Use of e-mail or other communications are authorized to the extent any necessary privileges can be maintained.

9.18.3. In hospital recovery litigation, honor requests by counsel when the request requires no temporary duty. Otherwise, comply with AFI 51-502, *Personnel and Government Recovery Claims*, paragraph 5.18.

9.18.4. When DoJ foreign counsel request witnesses in foreign litigation and the request requires temporary duty, refer the request to HQ USAF/JAI.

9.18.5. When a private party in litigation with the United States requests or subpoenas Air Force personnel to testify, promptly report it to the SJA.

9.18.5.1. Before the witness testifies, the SJA advises HQ USAF/JAI or the appropriate AFLSA civil litigation division.

9.18.5.2. When the Armed Services Board of Contract Appeal requests or subpoenas Air Force personnel to testify, report it to the AFMC LO/JAB, Wright-Patterson AFB OH 45433-5000.

9.18.5.3. Air Force military personnel testifying in a nonofficial capacity must ensure they are not in a duty status while appearing and testifying.

9.18.5.4. Air Force civilian personnel testifying in a judicial proceeding in a nonofficial capacity may receive court leave per 5 U.S.C. 6322 and *DOD Financial Management Regulation*, Volume 8, Chapter 5, § 0513. Otherwise, they must use annual leave or leave without pay.

9.19. Appearing at State or Local Legislative Hearings. Air Force personnel appearing or testifying, personally or in writing, before state and local legislative bodies for the Air Force on legislative issues must obtain prior approval from Headquarters United States Air Force, General Law Division (HQ USAF/JAG), 1420 Air Force Pentagon Rm 5E409, Washington DC 20330-1420, telephone (703) 614-4075 or (DSN) 224-4075.

9.19.1. Submit approval requests through command channels. Detail the proposed testimony. HQ USAF/JAG normally approves this type of request only:

9.19.1.1. To serve a significant Air Force interest.

9.19.1.2. When no conflict of interest exists.

9.19.2. Unless serving an Air Force or DoD objective, the witness and the legislative body will pay the expenses.

9.20. Expert or Opinion Testimony of Air Force Personnel.

9.20.1. Air Force personnel do not provide opinion or expert testimony concerning official Air Force or DoD information, subjects, or activities, except on behalf of the United States or for a party that DoJ represents.

9.20.1.1. Under unique circumstances and when testimony will not adversely affect the interests of the Air Force or the United States, special authorization for Air Force personnel to appear and testify as an expert witness in private litigation at no expense to the United States may be granted. Requests for such special authorization must be coordinated, via the appropriate organization SJA, with the responsible AFLSA civil litigation division (including JACC for hospital recovery actions) or, in foreign jurisdiction cases, HQ USAF/JAI. The responsible AFLSA civil litigation division or HQ USAF/JAI or may deny the request, or forward it with a recommendation for approval, through AFLSA/JACL, to AFLSA/JAC. AFLSA/JAC is the approval authority for requests for special authorization to provide expert or opinion testimony.

9.20.1.2. If, despite a negative final determination by AFLSA/JAC, judicial or other appropriate governmental authorities order Air Force personnel to appear and testify, notify AFLSA/JAC.

9.20.1.2.1. If AFLSA/JAC decides not to seek further legal review or challenge to the court's order, Air Force personnel comply.

9.20.1.2.2. The Air Force may direct Air Force personnel not to testify, in which case affected Air Force personnel must respectfully decline to comply with the demand. See *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951).

9.20.1.3. The Air Force must maintain strict impartiality in private litigation. If Air Force personnel provide expert or opinion testimony in private litigation, such testimony frequently requires discussing their current position and duty experience. This can easily create the impression that

the Air Force favors a particular finding, even though it has no official interest in the outcome of the litigation. Furthermore, the efforts of the litigants to obtain such testimony may interfere with the normal functions of Air Force personnel.

9.20.2. Civilian counsel who want Air Force personnel to give expert or opinion testimony submit requests to the servicing SJA.

9.20.2.1. The SJA reviews the request and sends it with a recommendation for approval or disapproval to the responsible AFLSA civil litigation division or, in foreign jurisdiction cases, HQ USAF/JAI. For hospital recovery actions, coordinate the request with AFLSA/JACC. The responsible AFLSA civil litigation division, AFLSA/JACC, or HQ USAF/JAI may deny the request, or forward it with a recommendation for approval, through AFLSA/JACL, to AFLSA/JAC. AFLSA/JAC is the approval authority for these requests.

9.20.2.2. The request should include:

9.20.2.2.1. Name of litigation and parties.

9.20.2.2.2. Name and location of the court or tribunal.

9.20.2.2.3. Date the litigation began and date of the requested appearance.

9.20.2.2.4. Party for whom the request is made.

9.20.2.2.5. Name, grade, position, and organization of the witness.

9.20.2.2.6. Type of action, subject matter, and nature of testimony.

9.20.2.2.7. Detailed statement showing why the Air Force should grant an exception.

9.20.3. Air Force personnel in a nonofficial capacity may not provide expert review of evidence in private litigation where one of the parties in the litigation may request expert or opinion testimony from Air Force personnel.

9.20.3.1. SJAs will keep Air Force personnel aware of this provision.

9.20.3.2. After receiving approval of AFLSA/JAC to testify as an expert, Air Force personnel may then engage in such expert review.

9.20.4. The Air Force does not usually consider course of treatment testimony by a treating physician to be expert or opinion testimony. A treating physician may testify as to his or her examination, treatment, and prognosis for a patient. However, if the scope or direction of the physician's testimony is expected or likely to go beyond these areas into others involving the physician's professional opinion or specialized knowledge, the physician must be treated as providing expert or opinion testimony that would require permission per the requirements of paragraph **9.20.1.** and **9.20.2.**

9.21. Expert or Opinion Testimony by Former Air Force Personnel. Former Air Force personnel may not provide expert or opinion testimony about any matter in which they had a direct involvement while employed by the government or serving on active duty, unless they first obtain special authorization via the procedures outlined in paragraph **9.20.**

9.22. Travel of Witnesses to Overseas Areas. Report requests for travel of witnesses to overseas areas to testify in foreign criminal cases to HQ USAF/JAI.

9.22.1. The Air Force does not usually fund such travel.

9.22.2. The requester must prove that the trip serves official purposes.

9.22.3. The requesting command usually funds necessary official travel of witnesses in foreign criminal courts.

9.23. Travel Expenses for Witnesses.

9.23.1. 28 U.S.C. 1821 and the JFTR/JTR govern travel allowances for Air Force personnel appearing as witnesses in litigation.

9.23.2. JFTR paragraphs U7060 and U7061 apply to military personnel, and JTR paragraph C4502 applies to Air Force civilian personnel employed by appropriated fund activities.

9.23.3. The Air Force pays travel expenses for Air Force personnel assigned to Air Force activities who are appearing as witnesses for the United States. The unit issuing orders funds travel.

9.23.4. Air Force personnel appearing as necessary witnesses for a party asserting the government's claim for medical care expenses are witnesses for the United States if the government's claim is large enough to justify the expenditure, as determined by the responsible SJA.

9.23.5. When Air Force personnel appear as witnesses for the United States, but the Air Force is not involved in the litigation, AFLSA/JACL, or JACT (in cases arising under AFI 51-501), instructs the unit issuing the orders on how to obtain travel reimbursement.

9.23.6. When Air Force military personnel are under subpoena to appear as witnesses for a committee of the Congress, private individual, or a corporation, they do not receive any allowances for travel from the Air Force. The party requesting testimony arranges payment in advance.

9.23.7. When Air Force civilian personnel employed by appropriated fund activities must testify in their official capacity or produce official records on behalf of a party other than the United States, the other party pays allowable travel expenses.

9.23.8. Since trials are frequently postponed or canceled after a witness receives orders, a witness must not begin travel (except when common carrier scheduling requires it) more than 1 day before the date on which the witness must report to the requesting US Attorney. Similarly, witnesses may not take temporary duty leave immediately before testifying.

9.23.9. Civilian employees under subpoena to testify in civilian criminal proceedings or on behalf of a private party in connection with any judicial proceeding to which the United States, a state, or local government is a party, may receive court leave per 5 U.S.C. 6322. They may not receive government travel expenses.

9.23.10. Witnesses frequently receive payment (witness fee) for testifying and reimbursement for expenses. Air Force personnel on active duty and civilians on court leave must turn in any witness fees to their Accounting and Finance Office.

9.23.10.1. They may keep any reimbursements that they receive from a court or party, unless they are on temporary duty and are receiving government travel expenses, in which case they must turn in reimbursements to their accounting and finance office.

Section 9D—Serving on State and Local Juries by Members of the Air Force

9.24. Terms.

9.24.1. State. Includes the 50 United States, US Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

9.24.2. Active Duty. Full-time duty in the active military service of the United States. This includes:

9.24.2.1. Full-time training duty.

9.24.2.2. Annual training duty.

9.24.2.3. Active duty for training.

9.24.2.4. Attending a service school while on active military service.

9.24.3. Operating Forces. Forces whose primary missions are participating in and supporting combat.

9.25. Legal Authority for Exemption. Under 10 U.S.C. 982, Air Force members are exempt from jury duty under certain circumstances. In implementing 10 U.S.C. 982, DOD Directive 5525.8, *Service By Members of the Armed Forces on State and Local Juries*, June 13, 1988, paragraph 6.3. categorically exempts all general officers, commanders, operating forces personnel in training, and personnel stationed outside the United States from serving on a state or local jury. Also, 10 U.S.C. 982 generally exempts military members from jury duty when:

9.25.1. Such duty unreasonably interferes with their military duties; or

9.25.2. Adversely affects the readiness of a unit, command, or activity to which the member is assigned.

9.26. Delegation of Decision Authority. The Secretary of the Air Force has delegated the authority under 10 U.S.C. 982 to determine such exemptions to commanders. Exemption denial authority has been delegated to immediate or higher level commanders. Exemption approval authority has been delegated to special court-martial convening authority or higher level commanders. The approval decision of the special court-martial convening authority acting as the designee of the Secretary is final. Additionally, notification authority to state and local officials of exemption from jury duty pursuant to DODD 5525.8, paragraph 6.3. has been further delegated to immediate commanders or their designees.

9.27. Procedures For Obtaining an Exemption From Jury Duty. When an Air Force member on active duty receives a summons to state or local jury duty, the member immediately informs his or her immediate commander.

9.27.1. If the member is categorically exempt under DODD 5525.8, paragraph 6.3., the immediate commander or designee notifies the issuing state or local official.

9.27.2. If the member is not categorically exempt under DODD 5525.8, paragraph 6.3., the immediate commander decides if the exemption under 10 U.S.C. 982 applies. If the immediate commander decides that exemption is inappropriate, the member must serve jury duty.

9.27.3. If the immediate commander decides the 10 U.S.C. 982 exemption applies to the member, the immediate commander forwards a request for approval of such exemption to the special court-martial convening authority, who makes the decision using the statutory criteria outlined in paragraph **9.25.** A special court-martial convening authority may request the advice and assistance of her or his servicing SJA in making decisions about these requests.

9.27.3.1. The special court-martial convening authority may decide that:

9.27.3.1.1. Exemption is inappropriate and instructs the member to comply with the jury duty summons.

9.27.3.1.2. Exemption is appropriate and tells the immediate commander to send a written notice of the exemption to the issuing state or local official.

9.27.4. Include these items of information in a written notice of exemption:

"(Grade and Name), a member of the United States Air Force on active duty, has been summoned to perform jury duty (when, where, and on what jury). Under 10 U.S.C. 982, DoDD 5525.8, and Air Force Instruction 51-301, this member has been determined by the Secretary of the Air Force or an authorized designee as exempt from duty on the jury in question because such jury service would unreasonably interfere with the performance of the member's military duties or would adversely affect the readiness of the unit, command, or activity to which the member is assigned. Under 10 U.S.C. 982(b), this determination is conclusive."

9.27.5. Do not charge jury duty service against leave or deduct pay or entitlements for the period of service.

9.27.6. All fees to members for jury service are payable to the US Treasury.

9.27.7. Members may receive, and keep, reimbursement from the state or local jury authority for expenses incurred in the performance of jury duty, such as transportation costs or parking fees.

9.28. Forms Prescribed. AF Form 44, **Certificate of Records**.

WILLIAM A. MOORMAN, Major General, USAF
The Judge Advocate General

Attachment 1

GLOSSARY OF REFERENCES AND SUPPORTING INFORMATION

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AFI 36-3003, *Military Leave Program*

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AFI 91-204, *Safety Investigations and Reports*

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Terms

AAFES—Army and Air Force Exchange Service

AFI—Air Force Instruction

AFLSA—Air Force Legal Services Agency

AFMC LO/JAB—Air Force Materiel Command Directorate of Contract Appeals

AFSC—Air Force Specialty Code

ASBCA—Armed Services Board of Contract Appeals

CFR—Code of Federal Regulations

CLLO—Central Labor Law Office

DoD—Department of Defense

DOHA—Defense Office of Hearing Appeals

DoJ—Department of Justice

DRU—Direct Reporting Unit

EEO—Equal Employment Opportunity

EEOC—Equal Employment Opportunity Commission

FAR—Federal Acquisition Regulations

FLRA—Federal Labor Relations Authority

FM—Financial Management Office or Officer

FOA—Field Operating Agency

FOIA—Freedom of Information Act

FRCP—Federal Rules of Civil Procedure

FTCA—Federal Tort Claims Act

GAO—General Accounting Office

HQ USAF/JAG—Headquarters United States Air Force, General Law Division

HQ USAF/JAI—Headquarters United States Air Force, International and Operations Law Division

IL—Information Litigation Branch

JACC—General Claims Division

JACE—Environmental Law and Litigation Division

JACL—General Litigation Division

JACN—Commercial Litigation Division

JACT—Tort Claims and Litigation Division

JFTR—Joint Federal Travel Regulations

JTR—Joint Travel Regulations

MAJCOM—Major Command

MAJCOM/JA—Major Command Legal Office

MLC—Medical Law Consultant

NAF—Numbered Air Force

NAF/JA—Numbered Air Force Legal Office

PA—The Privacy Act

RFPA—Right to Financial Privacy Act

SAF/GC—Office of the General Counsel, Secretary of the Air Force

SIB—Safety Investigation Board

SJA—Staff Judge Advocate

TJAG—The Judge Advocate General

TRO—Temporary Restraining Order

ULT—Utilities Litigation Team

U.S.C.—United States Code