

**BY ORDER OF THE  
SECRETARY OF THE AIR FORCE**

**AIR FORCE INSTRUCTION 51-505**

**4 APRIL 2019**



**Law**

**COMPLAINTS OF WRONGS UNDER  
ARTICLE 138, UNIFORM CODE OF  
MILITARY JUSTICE**

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This instruction implements Air Force Policy Directive 51-5, Administrative Law, Gifts, and Command *Relationships*. It explains how to prepare, submit, and review both the informal complaint under Article 138, Uniform Code of Military Justice, and the subsequent formal complaint under Article 138. This Air Force Instruction applies to all Regular Air Force military personnel, members of the United States Air Force Reserve while in federal service on active duty and in federal service on inactive-duty training, and members of the Air National Guard when activated under Title 10, United States Code. The authorities to waive wing/unit level requirements in this publication are identified with a Tier (“T-0, T-1, T-2, T-3”) number following the compliance statement. See Air Force Instruction (AFI) 33-360, *Publications and Forms Management*, for a description of the authorities associated with the Tier numbers. Submit requests for waivers through the chain of command to the appropriate Tier waiver approval authority, or alternately, to the requestor’s commander for non-tiered compliance items. Ensure all records created as a result of processes prescribed in this publication are maintained in accordance with Air Force Manual 33-363, *Management of Records*, and disposed of in accordance with the Air Force Records Disposition Schedule located in the Air Force Records Information Management System. Refer recommended changes and questions about this publication to the Office of Primary Responsibility using Air Force Form 847, *Recommendation for Change of Publication*; route Air Force Forms 847 from the field through the appropriate functional chain of command. This Air Force Instruction may be supplemented at any level, but all supplements that directly implement this instruction must be routed to the Air Force Administrative Law Directorate (AF/JAA) for coordination prior to certification and approval. This Instruction requires the collection and/or

maintenance of information protected by the Privacy Act of 1974. The authority to collect and maintain this information is set forth in various applicable Privacy Act system of record notices, to include F051 AF JA I, *Military Justice and Magistrate Court Records*; F051 AF JA K, *Commander Directed Inquiries*; and F036 AF PC C, *Military Personnel Records System*.

### ***SUMMARY OF CHANGES***

This document has been substantially revised and needs to be completely reviewed. Major changes include: renumbering the instruction to align with the newly controlling Air Force Policy Directive 51-5, *Administrative Law, Gifts, and Command Relationships*; clarifying that defense counsel may file an Article 138 complaint on behalf of his/her client; describing the appropriate general court-martial convening authority when jurisdiction over the respondent commander is shared; and other minor administrative changes.

## Chapter 1

### OVERVIEW

**1.1. Purpose.** This Instruction provides an outline of the process used when pursuing an Article 138 complaint. Article 138, Uniform Code of Military Justice, states: “Any member of the armed forces who believes himself wronged by his commanding officer, and who, upon due application to that commanding officer, is refused redress, may complain to any superior commissioned officer, who shall forward the complaint to the officer exercising general court-martial jurisdiction over the officer against whom it is made. The officer exercising general court-martial jurisdiction shall examine into the complaint and take proper measures for redressing the wrong complained of; and he shall, as soon as possible, send to the Secretary concerned a true statement of that complaint, with the proceedings had thereon.”

#### **1.2. Article 138 Applicability.**

1.2.1. All Regular Air Force members, members of the Air Force Reserve on active duty and in inactive-duty training status, and members of the Air National Guard activated under Title 10, United States Code, are eligible to seek relief under Article 138. A member seeking Article 138 relief is referred to as the “petitioner” in this Instruction.

1.2.2. Article 138 allegations are submitted against commanders or commanding officers only. The person alleged to have committed wrongdoing is referred to as the “respondent commander” in this Instruction.

1.2.3. A respondent commander is not able to provide relief for individuals who are no longer in active status. If an individual files an Article 138 complaint after separating or retiring from the Air Force, the commander shall refer the individual to the Air Force Board for the Corrections of Military Records or to other appropriate avenues of relief, such as the Discharge Review Board, the Evaluation Reports Appeals Board, etc. (T-1).

#### **1.3. Scope of Commander Actions Eligible for Article 138 Review.**

1.3.1. Although there may be many instances in which an Airman believes his/her commander has wronged him or her, not all such occasions are reviewable under Article 138. For many adverse actions, there exists a specific forum and procedure to ensure a member has an adequate opportunity to be heard and the right to appeal the action, such as the right to appeal nonjudicial actions under Article 15, Uniform Code of Military Justice, to a higher commander. Those specific procedures are generally more effective and efficient for resolving such matters. The procedures outlined in this Instruction should not be applied to substitute or duplicate them. (T-1). A petitioner has a statutory right to submit a complaint under Article 138 when his/her commander has taken action or failed to take action that is allegedly:

- 1.3.1.1. A violation of law or regulation;
- 1.3.1.2. Beyond the commander's legitimate authority;
- 1.3.1.3. Arbitrary and capricious, or an abuse of authority; or
- 1.3.1.4. Clearly unfair or unjust.

1.3.2. The following matters are also expressly eligible for Article 138 review:

1.3.2.1. Unlawful pretrial confinement;

1.3.2.2. Deferral of post-trial confinement; and

1.3.2.3. Administrative actions taken in lieu of court-martial or nonjudicial punishment under Article 15, Uniform Code of Military Justice.

1.3.3. The following matters are expressly not eligible for Article 138 review:

1.3.3.1. Acts or omissions that were not initiated, carried out, or approved by the petitioner's commander;

1.3.3.2. A request for reversal or modification of non-discretionary command actions. For example, mandatory adverse information filing in an Unfavorable Information File. See Air Force Instruction 36-2907, *Unfavorable Information File (UIF) Program*;

1.3.3.3. A challenge to a respondent commander's action on an Article 138 complaint. However, a submission alleging the respondent commander failed to act on or forward a formal complaint will be considered a new informal Article 138 complaint against that respondent commander;

1.3.3.4. A submission filed by one person on behalf of another. However, if the petitioner is represented by an attorney, the attorney may file on behalf of the petitioner;

1.3.3.5. A submission requesting disciplinary action be taken against another person;

1.3.3.6. A submission challenging an action taken by a board pursuant to the authority from an Air Force Instruction, such as an administrative discharge board or board of inquiry;

1.3.3.7. A submission related to an involuntary administrative separation;

1.3.3.8. A submission for which the petitioner may seek redress through other forums which provide the petitioner notice, opportunity to be heard, and review by an appellate authority (or reviewing authority) superior to the commander taking action. Direct questions regarding whether this provision applies to AF/JAA through the servicing legal office. Examples for these submissions include, but are not limited to submissions:

1.3.3.8.1. Related to disciplinary action under the Uniform Code of Military Justice, including nonjudicial punishment, and set aside actions of nonjudicial punishment;

1.3.3.8.2. Challenging any evaluation report required by Air Force Instruction (for example, Officer Performance Reports, Enlisted Performance Reports, Reenlistment Recommendation Forms, Promotion Recommendation Forms, etc.). Such submissions are addressed by the Evaluation Reports Appeals Board;

1.3.3.8.3. Challenging any decoration approving authority's decision not to award a military decoration (for example, decorations for acts of valor, exceptional service or achievement, and acts of heroism not involving actual combat). Refer to Air Force Instruction 36-2803, *The Air Force Military Awards and Decorations Program*, for the appropriate authority to act to these complaints;

1.3.3.8.4. Requesting relief from an assessment for pecuniary liability by accountable officials. Such submissions are addressed by the Secretary of the Air Force Remissions Board; and,

1.3.3.8.5. Challenging a suspension from flying status. Such submissions are addressed by a Flying Evaluation Board.

1.3.3.9. A submission challenging an action that is not yet final, such as a respondent commander's recommendation or initiation of an adverse administrative action.

**1.4. Article 138 Filing and Review Process Overview .** The Article 138 process is administrative, not punitive, in nature. Adverse actions, such as nonjudicial punishment and trial by court-martial, have their own specific procedures to ensure due process. The procedures outlined in this Instruction are only applicable to Article 138 complaints, not to other administrative or adverse actions.

1.4.1. An eligible Air Force petitioner must first submit a timely informal complaint under Article 138 requesting relief from the respondent commander (See Chapter 3). The informal complaint is submitted directly to the respondent commander.

1.4.2. The respondent commander receives the informal complaint and must personally take action (See Chapter 4). The respondent commander may:

1.4.2.1. Deny or dismiss the complaint in whole or in part;

1.4.2.2. Grant the complaint in whole or in part; or

1.4.2.3. Fail to respond to the petitioner in the required timeframe.

1.4.3. If the respondent commander denies, dismisses, or fails to respond to the complaint in a timely manner, the petitioner has a statutory right to submit a formal complaint to the officer exercising general court-martial convening authority over the respondent commander (See Chapters 5 and 6). The general court-martial convening authority must personally take action on the formal complaint (See Chapter 7). (T-0).

**1.5. Restriction and Acts of Reprisal Prohibited.** Submission of informal Article 138 complaints or subsequent formal Article 138 complaints shall not be restricted in any manner, nor shall any action be taken in retaliation or reprisal against members for such submissions. (T-0). Reprisal against members for submission of an Article 138 complaint where such complaint constitutes a protected communication (for example, when the petitioner complains the respondent commander's actions were a violation of law or regulation) is punishable under the Uniform Code of Military Justice.

**1.6. Article 138 Complaint Withdrawal.** A petitioner may voluntarily withdraw his/her submission under Article 138 at any time before either the respondent commander takes final action or the general court-martial convening authority takes final action. To withdraw the complaint, the petitioner makes a written request to the commander in possession of the complaint at the time.

**1.7. Standard of Proof.** The respondent commander is presumed to have acted lawfully. The standard of proof for the Article 138 complaint resolution process is proof by a preponderance of the evidence.

**1.8. Review by the Air Force Board for Correction of Military Records.** An Article 138 complaint is not considered improper simply because the Air Force Board for Correction of Military Records also has jurisdiction to hear the complaint.

## Chapter 2

### ROLES AND RESPONSIBILITIES

**2.1. Secretary of the Air Force.** When warranted, grants remedial action for petitioners when the preponderance of the evidence supports such relief.

**2.2. The Judge Advocate General of the Air Force.** Pursuant to the memorandum dated 14 March 2019, is delegated the authority given to the Secretary of the Air Force concerning Complaints of Wrongs filed under Article 138, Uniform Code of Military Justice, except the authority to grant remedial action.

**2.3. Director and Deputy Director, Administrative Law, Office of the Judge Advocate General of the Air Force (AF/JAA).** Is further delegated the authority given to the Secretary of the Air Force concerning Complaints of Wrongs filed under Article 138, Uniform Code of Military Justice, except the authority to grant remedial action.

**2.4. General Court-Martial Convening Authorities:**

2.4.1. Examine the complaint, investigate as necessary, and take proper measures for redressing the wrong complained of. **(T-0).**

2.4.2. Shall, within 7 calendar days of taking action, forward to AF/JAA the petitioner's complaint. **(T-0).**

**2.5. Respondent Commanders:**

2.5.1. Examine the complaint, investigate as necessary, and take proper measures for redressing the wrong complained of. **(T-0).**

2.5.2. Shall inform the petitioner of his/her decision on the complaint. **(T-1).**

**2.6. Superior Commissioned Officers.** Forwards complaints of wrong under Article 138, Uniform Code of Military Justice, to the officer exercising general court-martial convening authority over the respondent commander. **(T-0).**

**2.7. General Court-Martial Convening Authority Office of the Staff Judge Advocate:**

2.7.1. Advise the general court-martial convening authority. **(T-1).**

2.7.2. Forward the general court-martial convening authority's action and the complaint to AF/JAA. **(T-1).**

**2.8. Wing-Level Office of the Staff Judge Advocate:** Advise respondent commanders on how to respond to informal and formal Article 138 complaints. **(T-1).**

## Chapter 3

### PETITIONER RESPONSIBILITIES IN INITIATING THE ARTICLE 138 PROCESS

**3.1. Informal complaint.** To begin the Article 138 process, an Air Force member must submit an informal complaint to the respondent commander.

3.1.1. If the respondent commander is no longer in command of the petitioner, the petitioner must still submit the informal complaint to the respondent commander, regardless of the respondent commander's or the petitioner's current position or duty location.

3.1.2. If the respondent commander is no longer in the service (for example, separated or retired), then the petitioner must submit the informal complaint to the successor commander occupying the original commander's billet at the time the informal complaint is submitted.

**3.2. Timeliness of the Informal Complaint.** The deadline for the petitioner to submit the informal complaint to the respondent commander is 90 days from the petitioner's discovery of the alleged wrong, unless the respondent commander waives the time requirement for good cause shown. For purposes of this Instruction, days means "calendar days." It is the petitioner's responsibility to establish good cause for untimely submissions. Informal complaints found to be untimely should be dismissed without a decision on the merits of the informal complaint and returned to the petitioner in accordance with paragraph 4.2.2.

**3.3. Form of the Informal Complaint.** When submitting the informal complaint, the petitioner must state the informal complaint is being submitted pursuant to Article 138. **(T-2)**. For guidance, Attachment 2 contains a sample format for the informal complaint. The informal complaint must be submitted in writing. **(T-1)**. E-mail submissions are preferred; however, hard-copy submissions will also be accepted. Submissions must contain the following information:

3.3.1. The petitioner's current military unit and the petitioner's military unit at the time of the alleged wrong, if different. If the informal complaint is from a member of the Air National Guard or Air Force Reserve, include information to establish the alleged wrong was done in connection with service under Title 10, United States Code; **(T-1)**.

3.3.2. The petitioner's current personal mailing address. The petitioner should notify the respondent commander of any changes in his/her unit of assignment or personal mailing address while the informal complaint is pending; **(T-1)**.

3.3.3. The name and grade of the respondent commander; **(T-1)**.

3.3.4. The name and contact information for any counsel representing the petitioner (see notice requirements in paragraph 3.5); **(T-1)**.

3.3.5. A description of the facts and circumstances of the alleged wrong; **(T-1)**.

3.3.6. A statement of the relief sought to correct the alleged wrong; **(T-1)**.

3.3.7. All supporting evidence; **(T-1)**. and

3.3.8. The specific law or regulation the respondent commander violated, if applicable. **(T-1)**.

**3.4. Proof Requirements.** It is the petitioner's responsibility to establish a valid basis for a complaint. A valid basis for a complaint is one which alleges facts that, if true, would constitute

a wrong within the scope of Article 138 and provides sufficient evidence to properly review the petitioner's allegation against the respondent commander.

3.4.1. The petitioner should include all relevant facts and supporting evidence reasonably available with the submission. For example, a petitioner alleging a respondent commander violated a law should state which law or regulation he or she believes was violated, the actions the respondent commander took which allegedly constitute the violation, and provide any evidence available to the petitioner, such as providing relevant documents and the names of individuals with knowledge of the wrong alleged.

3.4.2. The responsibility to establish a valid basis for a complaint should not be considered a burden to prove that relief is warranted. While the petitioner must provide enough information to review the complaint, it is the respondent commander's duty to resolve whether relief is warranted under Article 138.

**3.5. Legal Representation.** The petitioner may consult a military defense counsel or special victims' counsel (if member qualifies for, and is appointed, a special victims' counsel) for advice and assistance in drafting submissions under Article 138. The petitioner may also consult civilian legal counsel at no expense to the Government. If the petitioner is represented by counsel and has provided written notice of representation, all notices provided to the petitioner will also be served on petitioner's counsel. **(T-1).**



## Chapter 4

### PROCESSING THE INFORMAL COMPLAINT UNDER ARTICLE 138

**4.1. Consultation Required.** The respondent commander must consult with his/her current servicing staff judge advocate before taking action on the petitioner's informal complaint. (T-1). However, a formal legal review of an informal complaint is not required.

**4.2. Determining Whether Dismissal or Transfer is Appropriate.**

4.2.1. If an informal complaint raises a matter outside the scope of Article 138 as outlined in paragraph 1.3.3, the informal complaint should be dismissed and the submission should be returned to the petitioner without a decision on the merits of the wrong alleged. The petitioner must be notified of the specific reason the informal complaint fails to meet the scope of Article 138. (T-1). If the informal complaint is found to be outside the scope of Article 138 because there is an alternate forum to address the alleged wrong, the respondent commander should dismiss the informal complaint and return the submission (including any supporting evidence) to the petitioner and direct the petitioner to the appropriate forum for reviewing the matter. For example, if the requested redress can only be resolved through the Air Force Board for the Correction of Military Records, the respondent commander should inform the petitioner of his/her right to file an application with the Board, in accordance with Air Force Instruction 36-2603, *Air Force Board for Correction of Military Records*.

4.2.2. If an informal complaint fails to meet the time requirements outlined in paragraph 3.2, the informal complaint should be dismissed and the submission should be returned to the petitioner without a decision on the merits of the wrong alleged. The petitioner must be notified that the petition was dismissed because it was untimely and, if appropriate, whether a requested waiver of the time requirement for good cause was considered. (T-1).

4.2.3. If the materials submitted are deficient in meeting the requirements for an informal complaint outlined in paragraph 3.3 or if the petitioner fails to establish a valid basis for a complaint as outlined in paragraph 3.4, the informal complaint should be dismissed and the materials should be returned to the petitioner without a decision on the merits of the wrong alleged. The petitioner must be notified of the specific reasons the materials were returned and what steps, if any, may be taken to correct the deficiencies. (T-1). The petitioner will receive an additional 10 days from the date of receipt to correct the noted deficiencies. Extension requests must be submitted prior to the expiration of the 10 days and will be granted for good cause shown.

4.2.4. If a commander who receives an informal complaint is not the respondent commander, the commander in receipt of the informal complaint must forward the petitioner's matters to the respondent commander, and the petitioner must be notified in writing that the informal complaint has been forwarded to the respondent commander. (T-1). If the respondent commander to whom the informal complaint was submitted is a major command, direct reporting unit, or field operating agency commander, that commander's notice to the petitioner shall identify for the petitioner the appropriate general court-martial convening authority over the commander. (T-1).

**4.3. Inquiry.**

4.3.1. The respondent commander may conduct, direct or request an inquiry necessary to evaluate an informal complaint. The petitioner may be asked to provide a statement, furnish additional information, or otherwise assist in resolving the matter.

4.3.2. The respondent commander may consider evidence in addition to matters attached to the informal complaint before responding to the petitioner. If the respondent commander considers additional evidence, it will be attached to the file and provided to the petitioner or otherwise made available for review by petitioner or counsel, if applicable.

**4.4. Respondent Commander's Notice to the Petitioner.** Within 30 days after receipt of the informal complaint, the respondent commander must provide written notice to the petitioner or petitioner's counsel, if any, that, as applicable (**T-1**):

4.4.1. A decision regarding the requested relief has been deferred to allow for the completion of further fact gathering. Such notice of a deferral shall be sent every 30 days until such fact gathering is completed. (Such notice prohibits the petitioner from requesting general court-martial convening authority review, as provided in paragraph 5.1.3, until 90 days have elapsed from the date petitioner submitted the informal complaint;

4.4.2. The informal complaint is dismissed because:

4.4.2.1. The submission is outside the scope of Article 138 (see paragraphs 1.3.2 and 4.2.1);

4.4.2.2. The submission is untimely (see paragraphs 3.2 and 4.2.2);

4.4.2.3. The submission is deficient (see paragraphs 3.3 and 4.2.3); or,

4.4.2.4. The submission fails to establish a valid basis for a complaint (see paragraphs 3.4 and 4.2.3).

4.4.3. The requested relief is granted; or

4.4.4. The requested relief is denied, in whole or in part, because the requested relief is not warranted.

**4.5. Forwarding.** The respondent commander may, but is not required to, forward a copy of the Notice to the Petitioner, along with any evidence obtained during the respondent commander's review, to the respondent commander's general court-martial convening authority. Forwarding matters to the general court-martial convening authority does not constitute the filing of a formal complaint under Chapter 4 of this Instruction.

## Chapter 5

### PROCEDURES FOR FILING A FORMAL COMPLAINT UNDER ARTICLE 138

#### 5.1. Eligibility and Time Requirements for Filing a Formal Complaint.

5.1.1. If the respondent commander dismisses or denies (in whole or in part) an informal Article 138 complaint, the deadline for petitioner to request general court-martial convening authority review is 30 days after receiving the respondent commander's written response dismissing or denying, in whole or in part, the informal complaint. (See paragraph 5.3.2.)

5.1.2. If the petitioner has received no response from the respondent commander after 30 days from the submission of the informal complaint, the deadline for petitioner to request general court-martial convening authority review is 60 days from the date the petitioner submitted the original informal complaint. (See paragraph 5.3.2.)

5.1.3. If the respondent commander has notified the petitioner that a decision regarding the requested relief has been deferred (See paragraph 4.4.1), the petitioner may only request the general court-martial convening authority review after 90 days from respondent commander's receipt of the informal complaint. (See paragraph 5.3.2.). If respondent commander defers making a decision but does not act on the submission within 90 days of receiving the informal complaint, petitioner must submit the formal complaint to the general court-martial convening authority within 30 days (for example, no later than 120 days from the respondent commander's receipt of the informal complaint). If the respondent commander acts on the informal complaint between days 90 and 120, the petitioner will have 30 days from that response to submit a formal complaint to the general court-martial convening authority.

#### 5.2. Formal Complaint Requirements and Limitations.

5.2.1. When submitting a formal complaint, the petitioner must state that the formal complaint is being submitted pursuant to Article 138. (T-2). For guidance, Attachment 3 contains a sample format of a formal Article 138 complaint. The formal complaint must be submitted in writing. (T-1). E-mail submissions are preferred; however, hard-copy submissions will also be accepted. In addition to the information described in paragraphs 3.3.1 through 3.3.7, formal complaints must contain the following information (T-1):

5.2.1.1. The date on which the informal Article 138 complaint was submitted to the respondent commander;

5.2.1.2. The date on which the requested relief was dismissed or denied, in whole or in part; a statement that the respondent commander failed to respond within the required timeframe; or a statement that the respondent commander has deferred decision and more than 90 days have passed since respondent commander's receipt of the informal complaint.

5.2.2. The petitioner may not add new allegations of wrongdoing or submit additional evidence without first submitting the new allegation(s) or evidence to the respondent commander who allegedly wronged the petitioner.

#### 5.3. Formal Complaint.

5.3.1. The petitioner may submit the formal Article 138 complaint directly to the general court-martial convening authority exercising jurisdiction over the respondent commander, or through any superior commissioned officer. (See paragraph 6.1.)

5.3.2. The general court-martial convening authority should dismiss untimely Article 138 complaints without a determination on the merits of the submission and return to the petitioner in accordance with paragraph 7.3.2, unless the general court-martial convening authority decides to waive the time requirement for good cause. For instance, if a petitioner submits an untimely request to the respondent commander, who denies the complaint because it is untimely, the general court-martial convening authority should also dismiss the complaint as being untimely. If a petitioner submits a timely request to the respondent commander, but then submits an untimely request to the general court-martial convening authority, the general court-martial convening authority should dismiss this complaint as untimely. When a petitioner submits an untimely complaint, it is the petitioner's responsibility to establish good cause for the untimely submission.

5.3.3. If the respondent commander is a general court-martial convening authority, the petitioner should submit the subsequent formal complaint to the general court-martial convening authority exercising jurisdiction over the general court-martial convening authority respondent commander.

## Chapter 6

### FORWARDING THE FORMAL COMPLAINT UNDER ARTICLE 138

**6.1. Duty to Forward Complaint.** If an intermediate commander or superior commissioned officer receives a formal complaint where the requested relief has been dismissed or denied, in whole or in part, he or she must forward the submission to the general court-martial convening authority who currently exercises general court-martial convening authority jurisdiction over the respondent commander. **(T-0)**. The petitioner's submission constitutes the filing of a formal Article 138 complaint even if the format and content have not changed from the informal Article 138 complaint.

**6.2. Determining Appropriate Respondent Commander.** If an intermediate commander or superior commissioned officer receives a formal complaint, but determines the petitioner has not submitted an informal complaint to the appropriate respondent commander, the intermediate commander or superior commissioned officer will forward the petitioner's matters to the appropriate respondent commander. **(T-1)**. The petitioner will be notified in writing that his/her Article 138 complaint has been forwarded to the respondent commander. **(T-1)**. The petitioner may be asked to furnish additional information to assist in identifying the appropriate respondent commander.

**6.3. Determining Appropriate General Court-Martial Convening Authority.** The principal responsibility for acting on a formal complaint lies with the officer exercising general court-martial jurisdiction over the respondent commander. Identifying the appropriate general court-martial convening authority helps to correct wrongs committed under command authority while providing the general court-martial convening authority with oversight over subordinate commanders.

6.3.1. If more than one general court-martial convening authority has jurisdiction over the respondent commander, the primary general court-martial convening authority will normally act on the formal complaint.

6.3.1.1. The primary general court-martial convening authority is the general court-martial convening authority who is in the respondent commander's direct chain of command. However, that general court-martial convening authority may agree to defer to another general court-martial convening authority who has shared administrative command or who exercises authority through a host-tenant support agreement.

6.3.1.2. In a joint command, if the general court-martial convening authority for the command is an Air Force general officer, that officer will be the primary general court-martial convening authority. If the general court-martial convening authority of a joint command is not an Air Force general officer, the Air Force District of Washington Commander will be the primary general court-martial convening authority.

6.3.1.3. The appropriate general court-martial convening authority may be determined by consulting the servicing Air Force legal office.

6.3.2. If the primary general court-martial convening authority is not acting on the formal complaint, the general court-martial convening authority who is acting on the formal complaint will coordinate with the primary prior to taking final action on the complaint.

6.3.3. If the respondent commander is assigned to a unit commanded by an officer senior in grade to the general court-martial convening authority for the installation, the complaint should be forwarded to the next senior general court-martial convening authority in the chain of command.

## Chapter 7

### PROCESSING THE FORMAL COMPLAINT UNDER ARTICLE 138

**7.1. Personal Action Required.** A general court-martial convening authority who receives a written submission to correct an alleged wrong committed by a subordinate commander may rely on his/her staff for assistance to investigate and/or document findings, but shall not delegate authority to act on formal complaints filed pursuant to Article 138 or to respond to petitioners. **(T-0).**

**7.2. Consultation Required.** The general court-martial convening authority must obtain a written legal review from the servicing staff judge advocate before responding to the petitioner's formal complaint. **(T-1).** The legal review should include a summary of the relevant facts, a determination of the legal sufficiency of the proceedings, and a recommended action. The servicing staff judge advocate should also ensure that all underlying evidence relevant to the complaint is attached to the file. (The staff judge advocate legal review is privileged attorney work product and is not releasable to the petitioner or other individuals under the Freedom of Information Act and should be marked accordingly.)

**7.3. Determining Whether Dismissal or Transfer is Appropriate.**

7.3.1. If a complaint raises a matter outside the scope of Article 138 as outlined in paragraph 1.3.3, the complaint should be dismissed and returned to the petitioner without a decision on the merits of the wrong alleged. The petitioner must be notified of the specific reason the complaint fails to meet the scope of Article 138. **(T-1).** If the complaint is found to be outside the scope of Article 138 because there is a specific forum to address the matter complained of, the general court-martial convening authority should dismiss the complaint and return the submission (including any supporting evidence) to the petitioner and petitioner's counsel, if any, and direct the petitioner to the appropriate forum to review the matter. For example, if the requested redress can only be resolved through the Air Force Board for the Correction of Military Records, the general court-martial convening authority should inform the petitioner of his/her right to file an application with the Board, in accordance with Air Force Instruction 36-2603.

7.3.2. If a complaint fails to meet the time requirements outlined in paragraph 5.1, the complaint should be dismissed and returned to the petitioner without a decision on the merits of the wrong alleged. The petitioner must be notified that the complaint was dismissed because it was untimely and, if appropriate, whether a requested waiver of the time requirement for good cause was considered. **(T-1).**

7.3.3. If a complaint is deficient in meeting the requirements outlined in paragraph 5.2 or fails to establish a valid basis for a complaint as outlined in paragraph 3.4, the complaint should be dismissed and returned to the petitioner without a decision on the merits of the wrong alleged. The petitioner and petitioner's counsel, if any, must be notified of the specific reasons the complaint was dismissed and what steps, if any, may be taken to correct the deficiencies. **(T-1).** The petitioner will receive an additional 10 days from the date of receipt to correct the noted deficiencies. Extension requests will be submitted prior to the expiration of the 10 days and will be granted for good cause shown. **(T-1).**

7.3.4. If the petitioner submits a formal Article 138 complaint to the general court-martial convening authority without first submitting an informal complaint to the respondent commander, the general court-martial convening authority will forward the submission to the respondent commander and notify the petitioner and petitioner's counsel, if any, accordingly.

7.3.5. If the petitioner submitted an informal complaint to the respondent commander, but adds new allegations of wrongdoing or new evidence (which has not been submitted to the subordinate commander) in the formal complaint to the general court-martial convening authority, those new allegations or evidence will be returned to the respondent commander for initial review and appropriate action. (T-0). The general court-martial convening authority may defer final action on the complaint until all allegations have been dealt with by the respondent commander. If the general court-martial convening authority defers final action on the complaint until the respondent commander addresses all allegations, he or she will inform the petitioner of the deferment. (T-1).

#### **7.4. Inquiry.**

7.4.1. The general court-martial convening authority may conduct, direct or request any inquiry, including an investigation, necessary to respond to the submission. The petitioner may be asked to provide a statement, furnish additional information, or otherwise assist in resolving the matter.

7.4.2. The general court-martial convening authority may consider evidence in addition to matters attached to the formal complaint before responding to the petitioner. If the general court-martial convening authority considers additional evidence, it will be attached to the file and provided to the petitioner or otherwise made available for review by petitioner or counsel, if applicable.

**7.5. Consideration of Collateral Matters.** If a matter collateral to the formal complaint has been reviewed or is pending review by another authority (for example, Inspector General or Military Equal Opportunity programs), the general court-martial convening authority may consider that authority's findings and action to determine whether overlap exists with the Article 138 process before taking action. If overlap does exist, the general court-martial convening authority may defer action on the formal Article 138 complaint until the related collateral inquiry has been resolved to avoid duplicative processing. The general court-martial convening authority may take into account such collateral inquiries in evaluating, acting on, and responding to a formal complaint, unless otherwise prohibited by law or policy.

**7.6. General Court-Martial Convening Authority's Notice to the Petitioner.** Within 60 days after receipt of the formal complaint, the general court-martial convening authority must provide written notice to the petitioner and petitioner's counsel, if any, that, as applicable **(T-1)**:

7.6.1. A decision regarding the requested relief has been deferred to allow for the completion of an inquiry (as provided in paragraph 7.4) or completion of a review by another authority (as provided in paragraph 7.5). Such notice should be sent every 30 days until such inquiry or review is completed. Once the inquiry or review is completed, the general court-martial convening authority must notify the petitioner of his/her decision within 60 days **(T-1)**;

7.6.2. The complaint is dismissed because:



7.6.2.1. The submission is outside the scope of Article 138 (See paragraphs 1.3.3 and 7.3.1);

7.6.2.2. The submission is untimely (See paragraphs 5.1 and 7.3.2);

7.6.2.3. The submission is deficient (See paragraphs 5.2 and 7.3.3); or

7.6.2.4. The submission fails to establish a valid basis for a complaint (See paragraphs 3.4 and 7.3.3).

7.6.3. The requested relief is granted;

7.6.4. The requested relief is warranted, but the authority to grant the relief requested resides with another general court-martial convening authority, major command, or the Secretary of the Air Force. In such instances, the general court-martial convening authority must also forward the complaint and the recommendation to grant the requested relief to the appropriate authority (**T-1**); or

7.6.5. The requested relief is denied, in whole or in part, because the requested relief is not warranted.

## Chapter 8

### FORWARDING THE FINAL ACTION FOR SECRETARY OF THE AIR FORCE REVIEW

#### **8.1. Forwarding the Case File to AF/JAA.**

8.1.1. The general court-martial convening authority will send, through the general court-martial convening authority's legal office, a complete file directly to AF/JAA in all cases where the general court-martial convening authority has acted on a formal complaint, including dismissal for failure to timely file or deficient contents, as well as where the relief requested has been granted in full. (T-1).

8.1.2. When forwarding the file to AF/JAA for review, the general court-martial convening authority includes the petitioner's personal mailing address.

**8.2. Remedial Action.** If AF/JAA determines remedial action is appropriate, AF/JAA will route the request to the Secretary of the Air Force for action.

**8.3. Final Notice to the Petitioner.** AF/JAA will provide the petitioner and petitioner's counsel, if any, written notification of the completion of the review process, any further action taken on the formal complaint, and, if applicable, the reasons for that action. AF/JAA sends a copy of the final action memorandum to the petitioner via his/her personal mailing address. AF/JAA also sends a copy of the final action memorandum to the petitioner's counsel, if any, as well as to the general court-martial convening authority and the general court-martial convening authority's legal office.

## Chapter 9

### MISCELLANEOUS MATTERS

**9.1. Other Reporting Requirements.** When a submission pursuant to Article 138 involves allegations against a commissioned officer, reporting both the allegation of wrongdoing and the resolution of a complaint may be required. Refer to Air Force Instruction 90-301, *Inspector General Complaints Resolution*, for specific reporting requirements.

**9.2. Release of Information.** Any information released outside of official channels must comply with the provisions of Department of Defense Manual (DODM) 5400.07\_Air Force Manual (AFMAN) 33-302, *Freedom of Information Act Program* and Air Force Instruction 33-332, *Air Force Privacy and Civil Liberties Program*. **(T-0)**.

JEFFREY A. ROCKWELL  
Lieutenant General, USAF  
The Judge Advocate General

## Attachment 1

### GLOSSARY OF REFERENCES AND SUPPORTING INFORMATION

#### *References*

Title 5, United States Code, Section 552a (Privacy Act)

Title 10, United States Code, Section 101 Title 10, United States Code, Section 938 Title 10, United States Code, Section 8062

Air Force Policy Directive 51-5, *Administrative Law, Gifts, and Command Relationships*, 31 August 2018

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

AFI 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, 18 September 2017

AFI 36-2803, *The Air Force Military Awards and Decorations Program*, 13 December 2013

AFI 36-2907, *Unfavorable Information File (UIF) Program*, 26 November 2014

AFI 51-509, *Appointment to and Assumption of Command*, 14 January 2019

AFI 90-301, *Inspector General Complaints Resolution*, 28 December 2018

AFMAN 33-363, *Management of Records*, 1 March 2008

DoDM 5400.07\_AFMAN 33-302, *Freedom of Information Act Program*, 26 April 2018

#### *Prescribed Forms*

None

#### *Adopted Forms*

Air Force Form 847, *Recommendation for Change of Publication Terms*

**Abuse of Authority**— An arbitrary and capricious exercise of power by an employee or military member that adversely affects the rights of any person or that results in personal gain or advantage to himself or herself or to preferred other persons.

**Accountable Officials**—The class of officers or employees of an agency who are pecuniarily liable for repayment of losses or deficiencies of public money, vouchers, checks, securities, or records.

**Application for Redress under Article 138, Uniform Code of Military Justice**—A member's written submission to the respondent commander requesting redress. This application is also referred to as the informal complaint. An informal complaint (initial application for redress) under Article 138 begins the Article 138 process. Before submitting a formal Article 138 complaint, the petitioner must submit the informal complaint (initial application for redress) to the respondent commander.

**Arbitrary and Capricious**—The absence of a rational connection between the facts found and the choice made, constituting a clear error of judgment. The action does not appear to be supported by fair, solid, and reasonable cause, or based upon relevant factors.

**Commander or Commanding Officer**—A commissioned officer occupying a command billet as defined by Air Force Instruction 51-509, *Appointment to and Assumption of Command*, which includes Element commanders and section commanders. Officers occupying “command-like” staff positions are not commanders. Likewise, civilian directors and leaders of Air Force organizations are not commanders.

**Formal Complaint under Article 138, Uniform Code of Military Justice**—A member’s written formal Article 138 complaint which is submitted to the general court-martial convening authority only after the respondent commander dismisses or denies, in whole or in part, the petitioner’s informal Article 138 complaint or fails to respond within 30 days (or 90 days if the respondent commander notified the petitioner that a decision was being deferred).

**Good Cause**—An excusable reason for failing to perform a required act. A finding of “good cause” is largely dependent on the facts of a particular case. As used in this Instruction, “good cause” may be shown, for example, when the reason for noncompliance was outside the petitioner’s control.

**General Court-Martial Convening Authority**—The officer currently exercising general court-martial convening authority over the respondent commander.

**Informal Complaint under Article 138, Uniform Code of Military Justice**—A member’s written submission to the respondent commander requesting redress. This informal complaint is also referred to as the initial application for redress. An informal complaint (initial application for redress) under Article 138 begins the Article 138 complaint process. Before submitting a formal Article 138 complaint the petitioner must submit the informal complaint (initial application for redress) to the respondent commander.

**Member of the Armed Forces**—A member of the United States Army, Navy, Air Force, Marine Corps, or Coast Guard, as defined in Title 10 United States Code Section 101(a)(4). The Air Force is further defined in Title 10 United States Code Section 8062 as members of the Regular Air Force, the Air National Guard of the United States, the Air National Guard while in service of the United States, and the Air Force Reserve. A retired member is not considered a member of the Armed Forces for purposes of this instruction.

**Notice of Representation**—A Notice of Representation shall include the counsel’s full name, grade and duty title (as applicable), office phone number; e-mail and mailing address, and the jurisdiction(s) in which the counsel is admitted to practice.

**Pecuniary Liability**—Personal financial liability for fiscal irregularities of accountable officials, as an incentive to guard against errors and theft by others, as well as to protect the government against errors and dishonesty by the officers themselves.

**Petitioner**—A member of the Armed Forces (as defined above) who has filed an informal Article 138 complaint. Submissions from members of the Air National Guard and Air Force Reserve are limited to allegations arising from a discretionary act or omission by a commander that was done in connection with a period of the petitioner’s federal service on active duty or the period of federal service on inactive-duty training. (**Note:** The Air Force Board for the Correction of Military Records identifies members seeking redress as “Applicants.”)

**Preponderance of the Evidence**—The standard of proof used in Article 138 complaints. The preponderance standard means: When it is more likely than not that events have occurred as alleged, there is a preponderance of the evidence.

**Protected Communication**—

1. Any lawful communication to a Member of Congress or an Inspector General;
2. A communication in which a member of the Armed Forces communicates information that the member reasonably believes evidences a violation of law or regulation, including a law or regulation prohibiting rape, sexual assault, or other sexual misconduct in violation of Articles 120 through 120c of the Uniform Code of Military Justice, sexual harassment, or unlawful discrimination, gross mismanagement, a gross waste of funds or other resources, an abuse of authority, or a substantial and specific danger to public health or safety, or a threat by another member of the armed forces or employee of the federal government that indicates a determination or intent to kill or cause serious bodily injury to members of the armed forces or civilians or damage to military, federal, or civilian property, when such communication is made to any of the following):
  - a. Member of Congress or a member of their staff.
  - b. An Inspector General or a member of the Inspector General's staff.
  - c. Personnel assigned to DoD audit, inspection, investigation, law enforcement, equal opportunity, safety, sexual assault prevention and response designees, and equal opportunity personnel, or family advocacy organizations.
  - d. Any person in the member's chain of command.
  - e. The Chief Master Sergeant of the Air Force, Command Chiefs, Group/Squadron Superintendents, and First Sergeants.
  - f. A courts-martial proceeding.
  - g. Any other person or organization designated pursuant to regulations or other established administrative procedures for such communications;
3. Testimony, or otherwise participating in or assisting in an investigation or proceeding related to a communication under part 1 or 2 above, or filing, causing to be filed, participating in, or otherwise assisting in an inquiry/investigation of a reprisal and/or restriction complaint; or
4. A communication described in part 2 above shall not be excluded from the protections provided in this definition because—
  - a. The communication was made to a person who participated in an activity that the member reasonably believed to be covered by part 2 above;
  - b. The communication revealed information that had been previously disclosed;
  - c. Of the member's motive for making the communication;
  - d. The communication was not made in writing;
  - e. The communication was made while the member was off duty; and
  - f. The communication was made during the normal course of duties of the member.

**Redress**—Any lawful action which restores to the petitioner any rights, privileges, property, or status to which the petitioner would have been entitled had the alleged wrong not occurred, unless the petitioner requests less than full restoration.

**Reprisal**— Taking or threatening to take an unfavorable personnel action, or withholding or threatening to withhold a favorable personnel action, for making, preparing to make, or being perceived as making or preparing to make a protected communication.

**Respondent Commander**—The commander who is alleged to have wronged a member of his command. The respondent commander should be identified in a petitioner's informal Article 138 complaint.

**Restriction**— Preventing or attempting to prevent a current Service member from making or preparing to make a lawful communication to a member of Congress and/or an Inspector General.

**Retaliation**—An action requested, directed, initiated, or conducted for the primary purpose of punishing, harassing, or ostracizing a member of the armed forces for making a protected communication.

**Superior Commissioned Officer**—Any member of the armed forces who believes himself wronged by his commanding officer may submit a complaint against that commander to any superior commissioned officer, who shall forward the complaint to the officer exercising general court-martial convening authority over the respondent commander.

**Valid Basis**—As used in this Instruction, a valid basis is one which: (1) alleges facts that, if true, would constitute a wrong within the scope of Article 138; and (2) provides sufficient evidence to properly conduct a complaint analysis of the alleged wrong.

**Wrong**—A discretionary act or omission by a commander that adversely affects the petitioner personally and is: (1) in violation of law or regulation; (2) beyond the legitimate authority of that commander; (3) arbitrary and capricious, or an abuse of authority; or (4) clearly unfair or unjust.

**Attachment 2****SAMPLE INFORMAL COMPLAINT UNDER ARTICLE 138, UNIFORM CODE OF  
MILITARY JUSTICE**

(Date)

MEMORANDUM FOR 123 ABW/CC

FROM: 1st Lt John Doe  
(Current Personal Mailing Address)

SUBJECT: Informal complaint under Article 138, Uniform Code of Military Justice

1. I, (name), am currently assigned to (unit). On 1 Jan XX, while assigned to (unit), you committed the following wrong(s) against me:

a. Describe the alleged wrong(s). Include:

(1) What the commander did or did not do that constitutes the alleged wrong(s);

(2) Any alleged violations of law or regulation; or

(3) Why you believe the action was arbitrary and capricious, or an abuse of authority; beyond the legitimate authority of the commander; or clearly unfair; and

(4) What the adverse impact was on you.

b. Describe the next alleged wrong, if there is more than one alleged wrong, consistent with Step 1.a. above

c. Members of the Air National Guard or Air Force Reserve include information to establish the alleged wrong was done in connection with a period of the petitioner's federal service on active duty or federal service on inactive-duty training.

2. I have attached all the evidence available to me. (For example, memoranda for record, e-mails, list of witnesses, or any documentary materials relevant to the complaint.)

3. I request the following relief under Article 138, Uniform Code of Military Justice:

a. Describe the relief requested.

b. Continue if more than one form of relief is requested.

JOHN E. DOE, 1st Lt, USAF



Attachment(s):  
Supporting evidence

**Attachment 3****SAMPLE FORMAL COMPLAINT UNDER ARTICLE 138, UNIFORM CODE OF MILITARY JUSTICE**

(Da

te) MEMORANDUM FOR 64 AF/CC (the general court-martial convening authority)

FROM: 1st Lt John Doe  
(Current Personal Mailing Address)

SUBJECT: Formal Article 138, Uniform Code of Military Justice, Complaint

1. I, (name), am currently assigned to (unit). On 1 Jan XX, 123 ABW/CC, committed the following wrong(s) against me:

a. Describe the alleged wrong(s). Include:

- (1) The name and grade of the respondent commander;
- (2) What the commander did or did not do that constitutes the alleged wrong;
- (3) Any alleged violations of law or regulation; or
- (4) Why you believe the action was arbitrary and capricious, or an abuse of authority; beyond the legitimate authority of the commander; or clearly unfair; and
- (5) What the adverse impact was on you.

b. Describe the next alleged wrong, if there is more than one alleged wrong, consistent with Step

1.a. above.

c. Members of the Air National Guard or Air Force Reserve include information to establish the alleged wrong was done in connection with a period of the petitioner's federal service on active duty or federal service on inactive-duty training.

d. If the respondent commander has been reassigned, then insert: 123 ABW/CC is now a member of (insert unit) for which you are the general court-martial convening authority.

2. I submitted my informal complaint under Article 138, Uniform Code of Military Justice, on (date), but my commander did not grant the requested relief in that (specify why the respondent commander's response was unsatisfactory).
  
3. I therefore respectfully request that you (insert relief requested to correct the alleged wrong).
  
  
  
  
  
  
  
  
  
  
4. I have attached all the supporting evidence available to me. (For example, memoranda for record, e-mails, or any documentary materials relevant to the complaint.)

JOHN E. DOE, 1st Lt, USAF

Attachments:

1. Informal Complaint under Article 138, Uniform Code of Military Justice (with all attachments)
2. Respondent Commander's Response to the Informal Complaint under Article 138, Uniform Code of Military Justice (with all attachments)