

Airman First Class (E-3))	BRIEF OF AIR FORCE TRIAL DEFENSE
██████████ USAF)	DIVISION AS AMICUS CURIAE IN
<i>Petitioner,</i>)	SUPPORT OF AIRMAN FIRST CLASS
)	(E-3) NICHOLAS E. DANIELS, USAF,
v.)	REAL PARTY IN INTEREST
)	
Lieutenant Colonel (O-5))	
JOSHUA E. KASTENBERG, USAF)	
<i>Respondent,</i>)	Misc. Dkt. No. 2013-05
)	
&)	
)	
Airman First Class (E-3))	
NICHOLAS E. DANIELS, USAF)	
<i>Real Party in Interest.</i>)	

COMES NOW the Air Force Trial Defense Division (JAJD), by and through its undersigned counsel, and pursuant to its contemporaneously filed motion for leave to appear as amicus curiae and Rule 15.1 of this Honorable Court's Rules of Practice and Procedure, and files this brief as amicus curiae in support of A1C Nicholas E. Daniels.

**WHETHER THIS HONORABLE COURT HAS THE
AUTHORITY TO ADDRESS THE SUBJECT PETITION AND
WHETHER A WRIT SHOULD BE ISSUED WHEN [REDACTED]
WAS NOT DENIED ANY COGNIZABLE RIGHTS.**

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II.

WHETHER THE AIR FORCE SPECIAL VICTIMS' COUNSEL PROGRAM FUNDAMENTALLY ALTERS THE MILITARY JUSTICE SYSTEM AND PREJUDICES THE RIGHTS OF AIRMEN ACCUSED OF SEXUAL OFFENSES UNDER THE UNIFORM CODE OF MILITARY JUSTICE.

History of the Case and Statement of Facts

JAJD accepts Petitioner's statement of the facts and history of the case.

ARGUMENT

I.

THIS HONORABLE COURT SHOULD DENY THE PETITION FOR A WRIT OF MANDAMUS.

As outlined by the Air Force Appellate Defense Division (JAJA) in its persuasive brief, an extraordinary writ is a drastic tool to be invoked only in truly extraordinary situations when there is a clear and indisputable right to the requested relief. Petitioner utterly fails to meet this standard, no additional argument in that regard is required, and her petition must be denied. As articulated by Lt Col Kastenberg, the military judge in the subject court-martial, Petitioner simply has no standing as a third party and she has not been denied any rights. However, the issues at stake are far greater than the application of well-established law to a single case. The Air Force Special Victims' Counsel Program (AFSVCP) in only its first month of existence has wreaked havoc across the military justice landscape and threatens to irrevocably disrupt the already precarious balance of our adversary system.

II.

THE AFSVCP FUNDAMENTALLY ALTERS THE MILITARY JUSTICE SYSTEM AND PREJUDICES THE CONSTITUTIONAL RIGHTS OF AIRMEN.

A. The AFSVCP is an ultra vires trial advocacy program born of political pressure that should be limited strictly to legal assistance.

As this Honorable Court considers the subject petition, it is critical for each judge to be aware of how and why the AFSVCP came into being. This unprecedented trial advocacy program is not rooted in statute, the MCM, or any lawful federal regulation—it is a legal fiction. The only authority cited to justify this seismic shift in our justice system is an advisory opinion from DoD/GC vaguely referencing legal assistance sections of Title 10, United States Code, which was then transposed in an equally vague manner under the guise of an Air Force Guidance Memorandum even though there was no immediate risk to life, safety, property, or mission as required by AFI 33-360, *Publications and Form Management*. This hastily assembled concept of operations is loosely based on one or two state programs that were presumably the product of careful debate and legislation, and which exist in a civilian world free of the inherently coercive environment of the military, where unlawful command influence treads precariously close at every turn in the process. The deck is already stacked against military members accused of an offense (e.g., convening authorizes control the entire process from start to finish, to include referral of charges against the accused, handpicking the court members, controlling defense access to expert assistance, funding defense witness travel, and the hiring of investigators—the defense has no independent budget for experts nor its own investigative staff) and this ultra vires program is a wild card that threatens to completely upend the entire system of justice.

JAJD first became aware of the AFSVCP in late 2012 when it was clear the idea had not been fully vetted but was already in the final stages of approval. Our military justice system is firmly rooted in the Anglo-American adversary tradition and until the advent of this program, the parties to a court-martial were well-defined and each knew their role. The fact that JAJD was completely cut out of the process until it was too late to provide meaningful input except,

ironically, to protect the rights of complaining witnesses (CWs) suspected of misconduct, is a clear indicator special victims' counsel (SVCs) were never intended to be neutral players but rather they were created to align with prosecutors and secure convictions.

From what little JAJD saw of the program's creation, due process concerns about an accused having to face not only a prosecution team but also an SVC juggernaut were summarily dismissed. Similarly, every rational question raised, to include SVC standing in court, their participation in interviews, the mechanics of how they should appear at trial, and the potential impacts on appeal were brushed aside without adequate resolution. A three-day training course was thrown together in short order even while the SVC standards and rules were still being changed on what seemed a daily basis. It was readily apparent that having a program in place was more important than having a program that worked fairly or coherently; this aircraft was intended to be built in flight without a destination.

The timing and haste with which the AFSVCP was put together is evidence it is a reaction to political pressure from a very small, very vocal constituency who believe sexual assault is out of control in the military. It is a solution to a problem that does not exist anywhere near the levels carelessly repeated by our senior leaders, and inflated estimates of sexual assault have greatly exacerbated this misperception. Sound problem-solving requires a dispassionate analysis of the facts to determine the size and scope of the issue at hand. The issue of sexual assault and how best to address it should not get a pass on this fundamental requirement simply because it involves a highly emotional subject. To the contrary, its emotional nature demands the most dispassionate factual analysis possible.

This Honorable Court must not lose sight of the fact that the U.S. Air Force Academy underwent a similar frenzied pitch of scrutiny more than a decade ago. Yet when all of the

hundreds of cases were forensically dissected, only a mere handful had merit. Over the past year, senior leaders and the media have repeated the grossly inaccurate estimate that 19,000 sexual assaults could have been perpetrated against military members in 2011, which is far more than the approximately 3,000 reported violations. This inaccurate number came from an overly-broad, anonymous Gallup poll rather than from sound, dispassionate investigation. Repeating an unsubstantiated number that equates an off-color remark or an unwelcome proposition with rape does a disservice to our system of justice, and the AFSVCP propagates a myth that prejudices the rights of every accused.

This program should be relegated to its proper place: advising CWs about their role in the process, educating them about the military justice system and the host of benefits the United States has authorized, and referring them to JAJD when they become suspected of misconduct or face adverse action so that we can protect their rights, just like we would with any Airman authorized to receive the benefit of our counsel. Denying Petitioner's request is the first step in restoring sanity and turning the tide of injustice that has washed over the judiciary in only the first month of the program's existence.

B. The AFSVCP has prejudiced the rights of the accused in courts-martial worldwide, and it will further subvert the course of justice over time.

As announced in the TJAG online news service (ONS) dated 9 Jan 13, and trumpeted in several national media outlets as well as by the Chief of Staff of the Air Force (CSAF) in his testimony before Congress two weeks later, the AFSVCP officially launched on 28 Jan 13. Subsequently, the ONS dated 27 Feb 13 assessed the program's inaugural month through some very rose-colored glasses. The signature piece gravely noted the SVCs were there to "protect [CWs] from questions the only purpose of which is to degrade, humiliate or intimidate." Such an allusion to unethical conduct by defense counsel is completely unfounded. JAJD is not aware of

any ethics complaints filed or pending against our personnel related to the treatment of these witnesses, whom we treat with dignity and respect as we uncover the truth. In this same ONS edition, TJAG stated SVCs had made a “profound and positive difference...without negatively impacting the rights of the accused.” Contrary to what TJAG may have been told by his staff, JAJD’s experience reveals a much different on-the-ground truth about the very real harm this program has wrought in only one month. SVCs are slowing down the process, prejudicing the accused’s access to full discovery, distracting the parties from their critical duties, throwing the serious business of trial work into a state of disarray, and turning courts into carnivals. The following examples foreshadow the three-ring circuses headed the Air Force’s way, and perhaps beyond, if Petitioner’s request is granted.

US v. Summerfield, a GCM convened at Peterson AFB on 26 Feb 13, illustrates the wide-ranging wreckage the SVC program can cause to the fair and effective administration of justice as it spawns unnecessary and time-consuming trials within trials that have nothing to do with the guilt or innocence of the accused. The judge in this case granted the SVC standing. The CW did not appear for any hearings but the SVC was present for the entire trial, including closed sessions. The SVC was asked by the judge to address the court several times from the gallery, lending the proceedings a talk show atmosphere. One such instance was to invoke the spousal privilege for a witness who had taken the stand repeatedly. More shocking, during a 10 minute recess while the CW was still testifying and in the middle of cross-examination (she became flustered when confronted with an email from her government account that she had just denied ever sending), the TC, ATC, and SVC together met with the CW in TC’s office, consoled the witness, asked her questions about the matter she was just cross-examined about, and then developed her redirect. The MJ denied any relief when DC found out about this improper

contact and even allowed the attorney-client privilege to be invoked to prevent cross-examination of the matters discussed between the SVC and CW during the break. Fortunately for the client and for justice, the CW's lie about her email (the defense was able to find the person who the CW claimed had sent the email from her account) resulted in an acquittal after the members repudiated the CW's perjured testimony after deliberating a mere 25 minutes.

In US v. Barker, a SPCM convened at Nellis AFB on 6 Feb 13, an SVC moved for limited participant standing. The defense moved to deny standing and the judge wisely granted the oral motion. The case is currently in a continuance, however, the judge was going to reconsider his MRE 412 ruling and allow the SVC to speak on behalf of the CW, and there is an appearance the judge could have been influenced by the pending petition before this Honorable Court. Critically, the SVC did not start making requests or filing pleadings until the day of trial, and this type of last-minute chaos invites delay and causes unnecessary distractions from substantive matters, most notably our clients' due process rights.

In US v. Davis, a GCM convened at JBSA-Lackland on 28 Jan 13, the SVC requested to attend the defense interview of the CW. During the interview, the ADC asked the CW questions regarding victim impact evidence, to which the witness had a very minimal response. The SVC then interrupted the interview, reminding the CW of what they had previously discussed. The CW maintained that she had suffered little to no impact. The SVC then requested a break. Upon returning to the interview, the CW said she wanted to supplement her response to the question on victim impact and then provided a lengthy response. This caused the ADC to ask what prompted the drastic change. The SVC then disclosed that they had discussed what she should say in response to that question. After the interview concluded, the ADC added the SVC to the witness

list, but the issue never became ripe because the accused was acquitted of the relevant charge. It is evident SVCs are stepping outside their role of advisor to one of coaching witnesses.

In *US v. Soto*, another GCM convened at JBSA-Lackland on 28 Jan 13, the SVC requested to attend the defense interview. The defense counsel agreed with the SVC's attendance so long as the SVC agreed he wouldn't disclose any information obtained during the interview, similar to the restriction placed on victim advocates. He refused, indicating that he would disclose anything that he thought would help his client to the TC or anyone else. DC then refused to conduct the interview and filed a motion for appropriate relief requesting that either the SVC not be allowed to attend or that he be precluded from disclosing the details. The judge denied the request. Based on the SVC's attendance, DC was forced to refrain from discussing several matters previously planned to be discussed with the CW in order to protect the defense's trial strategy from disclosure to TC by the SVC. There should be no doubt in anyone's mind that with this type of SVC behavior, the program had morphed into the right hand of the prosecution in only its first official day of existence.

US v. O'Connor, a GCM convened at Grand Forks AFB on 25 Feb 13, involved an officer charged with aggravated sexual assault and fraternization. During a pretrial CW interview, the SVC coached the witness on how to respond to DC's questions and at one point, held up his hand and said the CW would not answer any more questions despite a grant of immunity and order to testify the SVC had requested. During a 39a session on the matter, the judge made it clear the case would not go forward unless she consented to be interviewed. The CW was ultimately interviewed, but the SVC's shenanigans caused the trial to be delayed by two full days. Once motions began, the SVC was "heard" at the 412 and 513 motions from the witness box about the CW's privacy in a case where OSI obtained the accused's mental health

records, summarized them in the ROI, and attached them as exhibits. The judge ultimately ordered the release of the CW's mental health records, and her order said that the trial counsel could "show" the CW her mental health records. TC took this to mean they could make a copy for the CW to keep and in doing so, copied mental health records of the accused (different from what OSI had already improperly disclosed) and gave those to the CW, along with her own mental health records. A motion for mistrial ensued, but was denied. An additional day was spent on the record dealing with the mistrial motion and this SVC-induced disaster.

Finally, trial began. DC made a motion to exclude the SVC from the gallery, which was denied. The SVC then filed a motion to have the judge reconsider her ruling, which didn't make any sense because she had denied the defense motion. The judge emphasized that the SVC had ethical obligations to follow and that she expected every attorney to exhibit integrity and follow the rules. The government's theory of the case was substantial incapacitation; the CW claimed she was drinking and couldn't remember being assaulted. As such, a lot of her testimony centered around the things she could remember versus the things she couldn't. The defense called witness A, who testified that the CW was in his room at one point in the night. The CW had previously testified she didn't remember anything, including being in witness A's room. After the witness testified, the defense rested. The government provided rebuttal witnesses and then rested again. After this, SVC went to STC and said, "the CW now remembers being in witness A's room. She says that witness A grabbed her butt and said 'you deserved what happened.'" This statement had never come up in any interviews, at the Article 32, or at trial; witness A had just testified and now the CW magically recovered her memory. The CW wasn't present in the courtroom, so it is probable the SVC told her about the testimony. The STC asked when the SVC found out this information and the SVC said he knew before trial. Thus, when the

CW testified at the motions hearing about what happened in witness A's room, she lied, and the SVC knew she lied. Then, the CW testified during findings and lied (said nothing happened) and the SVC knew she lied. This all came out after witness A testified and both parties had rested. Fortunately for the client, the CW's parade of lies resulted in a not guilty verdict for sexual assault despite the SVC's best efforts to sabotage the fair administration of justice.

In *US v. Schwartz*, a GCM pending at the Presidio of Monterey, the defense is expending valuable time to craft a motion to address why both the CW and her attorney should be excluded from the courtroom during findings and why the CW does not have standing to contest a ruling under MRE 615. The judge already granted the defense's MRE 615 motion to exclude the CW and SVC. However, after the SVC petitioned for reconsideration and invoked the possibility of an appeal and stay in the proceedings, the judge requested briefs from trial and defense counsel on the issue, causing a delay in the proceedings. Additionally, the SVC was present for a pretrial interview and advised her client not to answer defense questions about the CW's history of past blackouts, even though that information is clearly discoverable, material, and relevant.

In *US v. Jenkins*, an Article 32 hearing was held at Aviano Air Base on 30 Jan 13. The SVC was present during defense counsel's interview of the CW and also attended the Article 32 hearing. At the conclusion of the CW's testimony, the IO took a break to finish summarizing the CW's testimony. The IO then had the CW review the summary. Without officially making an appearance, the SVC went straight to the IO and informed him that several changes had to be made to the summary. The IO made the changes, which were never announced to either the DC or the TC and were only discovered after the fact. SVCs are doing more than protecting rights—they are shaping evidence, and that overreach is unacceptable.

US v. Jones involved another Article 32 hearing held at Aviano Air Base the following day, 31 Jan 13. Due to an SVC's schedule, the ADC was unable to interview a fact witness until two days before the hearing. (This particular fact witness is a complaining witness in another sexual assault case that occurred on the same night and in the same room as the incident alleged against Amn Jones.) As a result of the delayed interview, the ADC had to make last-minute adjustments to various cross-examinations that had already been prepared. Ultimately, the SVC's refusal to allow her client to be interviewed prior to two days before the hearing did not result in a delay, but it certainly impacted the defense's preparation and it is clear such blocking tactics are going to have a profound impact as delays become the rule.

Another case at the Article 32 stage, US v. White at Travis AFB, demonstrates how quickly the SVC mission has crept into the pretrial process. In response to a discovery request made to the government, the SVC detailed to assist the CW injected herself into the proceedings and filed a written objection to the IO regarding DC's request for the CW's medical and mental health records. It is not unreasonable to believe SVCs will next demand to be part of charging decisions and to even be consulted on investigative steps. The AFSVCP has already bled into areas outside of its charter and there is no telling where SVCs will next venture or who will have the courage to finally listen to the defense's warnings about this unchecked program.

In a case at Patrick AFB where the investigation is still pending, JAJD's worst nightmare about the denial of defense services is becoming reality. A CW was read her rights under Article 31 for misconduct directly related to the sexual assault allegation. She wisely obtained the assistance of an ADC, who requested immunity on her behalf. After the launch of the SVC program, the CW elected to also have an SVC detailed to assist her because the government was still prosecuting the male accused. The strategic interests and experience levels between the

ADC and the SVC are vastly different, and JAJD has tremendous concerns in this case and others involving suspected CW misconduct that clients risk following the legal advice of SVCs who know absolutely nothing about defending clients and who wish only to assist the prosecution in sexual assault cases. As a result, these CW's will suffer adverse consequences. SVCs are not defenders and they should never have been put in JAJD's area of expertise.

Finally and most important, the accused in the case at bar, A1C Daniels, may be forced to wait many more months to get to trial if the SVC is given standing to intervene further with his right to a speedy and fair trial. A1C Daniels' day in court has already been delayed by five weeks due to the inability of TC to provide discovery in the possession of OSI, and JAJD has every reason to believe further delays are on the horizon if Petitioner is successful. We have been given a glimpse into the future of what the military justice system will look like in the Air Force and beyond if SVCs are given free rein to act as third parties in courts-martial, and it is a charred landscape littered with the remnants of what used to be the constitutional rights of the accused. It is a future that does not have to be, but unless this Honorable Court takes a stand to stop it, this inversion of justice will become the new normal.

C. The AFSVCP is the latest and boldest step in the continuing erosion of the constitutional rights of America's Airmen.

When considering the full context the AFSVCP, it is necessary to pause and ask why the ample resources of the Air Force Judge Advocate General's School (AFJAGS) have been brought to bear to represent Petitioner against A1C Daniels. AFJAGS is supposed to be the neutral center for education and training of the entire JAG Corps, and it should not take an advocacy role in any pending trial by court-martial. JAJD would note that the AFJAGS Commandant himself is acting as "Appellate Special Victims' Counsel" in Petitioner's brief and we are not privy to what authority is being relied upon to allow such representation. Like the

AFSVCP itself, we can only assume AFJAGS involvement is at the behest of The Judge Advocate General. Thus, A1C Daniels has had to face OSI investigators, senior trial counsel, assistant trial counsel, the legal office staff, the Number Air Force legal office staff, the MAJCOM legal office staff, all of AFJAGS, the SVC, the SARC, a victim advocate, AF/JA, as well as the full weight of the resources of the United States. We can only brace ourselves for what unknown horrors are coming next. The AFSVCP, however, is only the latest iteration of the slow but steady dissolution of our Airmen's constitutional rights, which began in earnest in only the last decade.

As this Honorable Court is well aware, the Code has been amended numerous times in recent years in what appears to be the result of a political effort to make convictions easier to obtain in a manner that would offend our Founding Fathers. Rape, as defined by Article 120, UCMJ, prior to 1 Oct 07 was clearly understood by trial practitioners and well-developed by case law. The wholesale changes enacted since then have thrown the military justice system into a state of turmoil. On top of changes to the law, the Air Force at the same time completely restructured the well-rooted balance of our military justice system by dismantling the judicial circuits that were the envy of our sister services. Circuit defense counsel, now known as senior defense counsel, in particular were tasked with additional administrative responsibilities that detracted from their in-court representation of clients. Similarly, chief circuit defense counsel, today called chief senior defense counsel, were reduced from five down to only three positions for worldwide coverage. These concurrent changes, however, were only the tip of the iceberg.

Over the past few years, the prevalence of sexual assault in the military became vastly overinflated, culminating in the unsubstantiated figure of 19,000 unreported offenses becoming "fact." The Congress became energized as a result of the misplaced reliance on these unreliable

numbers, which in turn put senior military leaders in a defensive position to display they were doing everything within their power to stop all sexual assaults, real or imagined. Unlawful command influence (UCI) is the mortal enemy of military justice and it is an easy line to cross. CSAF has made a number of statements that risk veering into the realm of UCI. He has said words to the effect that lower-level sexual offenses need to be punished more harshly, that no matter the extenuating or mitigating circumstances an instructor sexually involved with a trainee in any manner should be kicked out of the service, and that he supports legislation making certain sexual offenses strict liability crimes. At the same time, JAJD is not aware of any public statements by CSAF being tempered with the importance of looking at the facts of each case individually, the right to a fair trial, and the presumption of innocence. There is a very real danger that commanders at every level will be influenced to make decisions divorced from any factual basis. For example, the Air Force routinely takes cases to trial despite Article 32, UCMJ, investigating officer recommendations to the contrary. The Catch-22 that results is that more cases without merit bring about a greater number of acquittals, which in turn makes it appear the Air Force cannot properly prosecute cases, which leads to more pressure to take any accusation, no matter how lacking in credible evidence, to court. Building the AFSVCP on top of this imbalanced publicity campaign greatly increases the risk of UCI seeping into the deliberative process.

The AFSVCP is also part of the larger, ill-conceived effort to incentivize victimhood, which in turn harms real victims of crime. Rather than fostering an environment that protects victims of sexual assault, the Air Force's approach to the issue has created powerful incentives for individuals who consented to sexual activity to later claim to have been victims. Subordinates who use sex to advance their careers and get caught can now easily claim they felt

compelled to participate in trysts. Airmen in technical training who violate restrictions against drinking alcohol can now easily claim they don't remember sex to escape disciplinary action. Troops who are unsure of what they did the night before are convinced to believe that because they cannot remember, they must have been raped without any factual basis. Airmen who do not like being stationed at a particular base need only claim they were assaulted to be moved, and they may then join one of several lawsuits aimed at the world's deepest pockets, the Department of Defense. This is on top of the longstanding motives of regret, revenge, and infidelity which are oftentimes present in sexual assault cases. Overall, these incentives both increase the number of false claims and hurt real victims.

Compounding the problem even further, the Air Force has fallen behind the Army, Navy, and Marine Corps' defense services. We are the only service without a Defense Counsel Assistance Program (DCAP), and JAJD is the only division within the Air Force Judiciary that does not have a senior civilian position, who would be perfectly suited for the important DCAP function. Furthermore, JAJD does not have the proper number of O-5 chief senior defense counsel positions to lead and mentor defense attorneys and paralegals in the field, and the division needs two more of these authorizations to pull even with the other services in that regard. Finally, although our 19 senior defense counsel positions are supposed to be pinned-on majors, nearly half of them are still captains. JAJD has made these deficiencies known without success and we are now at a point where the Air Force's defense capabilities are in danger of being permanently degraded. JAJD, which is tasked with defending the constitutional rights of America's Airmen, has been relegated to the role of neglected red-headed stepchild. Giving the AFSVCP and its new legion of SVCs standing in court would irrevocably tip the scales in favor

of the prosecution. This Honorable Court is the only bulwark against preventing such a colossal adverse change to our military justice system.

It is not too late to close this Pandora's Box.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that copies of the foregoing was sent via email to the Court, Petitioner's counsel, Judge Kastenberg, the Appellate Defense Division and the Appellate Government Division on 4 Mar 13.

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