Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces

Meeting Materials

December 3-4, 2024

Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD)
38th Public Meeting

December 3-4, 2024
Preparatory Materials

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- *Purpose: To inform the Q & A session with Lead Special Trial Counsel and support the Committee's deliberations on concerns raised during the DAC-IPAD's installation site visits.*

Tab 6 ***United States v. Mendoza*, 2024 CAAF LEXIS 590 (Oct. 7, 2024)**

Tab 6a Staff-prepared summary of the issues, holding, and analysis *(2 pages)*

Tab 6b Decision by the U.S. Court of Appeals for the Armed Forces in *United States v. Mendoza*, 2024 CAAF LEXIS 590 (Oct. 7, 2024) *(42 pages)*

- *Purpose: This recent decision by the CAAF provides guidance on charging and prosecuting sexual assault crimes under Article 120, UCMJ. The Court held that sexual assault without consent is a distinct theory of criminal liability that cannot be conflated with the separate crime of sexual assault when a person is incapable of consenting.*

Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD)

PUBLIC MEETING AGENDA

December 3-4, 2024

Location:

United States District Court for the District of Columbia

E. Barrett Prettyman United States Court House, 333 Constitution Ave. NW
Washington, DC 20001

Tuesday, December 3, 2024	**Day 1**
8:45 a.m. – 9:30 a.m.	**Administrative Session** *(Closed)*

9:30 a.m. – 9:45 a.m. **Break** *(15 minutes)*

9:45 a.m. – 9:50 a.m. **Welcome and Introduction to Public Meeting** *(5 minutes)*
Deputy Director: Ms. Meghan Peters
Designated Federal Officer: Mr. Bill Sprance

9:50 a.m. – 10:30 a.m. **Committee deliberations on DAC-IPAD *Draft Report on Enforcement of Military Crime Victims' Rights*** *(40 minutes)*

Purpose: To review and approve the draft report regarding provisions for enforcing victims' rights in Article 6b, UCMJ.

Staff Attorney: Ms. Terri Saunders

10:30 a.m. – 11:30 a.m. **Healthcare providers' perspectives on Military Rule of Evidence 513, Psychotherapist-patient privilege, in the Manual for Courts-Martial** *(60 minutes)*

Presenters:

CAPT Adam Saperstein, U.S. Navy
Uniformed Services University, Vice Chair of Education, Department of Family Medicine
LCDR Johnathan Heller, U.S. Navy
Program Director, NCC Forensic Psychiatry Fellowship

Purpose: To discuss mental health treatment practices that inform the Committee's consideration of whether to make recommendations concerning the scope of the military's psychotherapist-patient privilege.

Staff Attorney: Ms. Terri Saunders

Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD)

PUBLIC MEETING AGENDA

Day 1 agenda, continued

11:30 a.m. – 12:40 p.m.	**Lunch** *(70 minutes)*
12:40 p.m. – 2:00 p.m.	**Chief, Trial Defense Services Organizations for each Military Service** *(80 minutes)* *Presenters:* *COL Sean McGarry, U.S. Army* *CAPT Brian Korn, U.S. Navy* *Col Jonathan H. Vaughn, U.S. Marine Corps* *Lt Col Elgin Dane Horne, U.S. Air Force* *CDR Jason Roberts, U.S. Coast Guard* *Purpose: To hear perspectives on a range of issues under consideration by the DAC-IPAD, including topics highlighted during the Committee's installation site visits, the support services available to military defendants, and the Committee's study of conviction integrity units.* *Staff Attorney: Ms. Nalini Gupta*
2:00 p.m. – 2:15 p.m.	**Break** *(15 minutes)*
2:15 p.m.- 3:35 p.m.	**Lead Special Trial Counsel for each Military Service and the Chief Prosecutor for the U.S. Coast Guard** *(80 minutes)* *Presenters:* *BG Christopher A. Kennebeck, U.S. Army* *RDML Jonathan T. Stephens, U.S. Navy* *BGen Kevin S. Woodard, U.S. Marine Corps* *Brig Gen Christopher A. Brown, U.S. Air Force* *CAPT Ben S. Gullo, U.S. Coast Guard* *Purpose: To hear perspectives on a range of issues under consideration by the DAC-IPAD, including topics highlighted during the Committee's installation site visits such as resourcing issues, independence from the command, and the process for deferral decisions.* *Staff Attorney: Ms. Lauren Torczynski*
3:35 p.m. – 3:50 p.m.	**Break** *(15 minutes)*

Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD)

PUBLIC MEETING AGENDA

Day 1 agenda, continued

3:50 p.m. – 5:00 p.m. **Conviction Integrity Units: A holistic approach to ensuring conviction integrity** *(70 minutes)*

Presenters:

Ms. Katie Monroe, Healing Justice
Ms. Patricia D. Powers, AEquitas
Mr. John F. Wilkinson, AEquitas

Purpose: To discuss best practices for ensuring conviction integrity on the front end and supporting sexual assault victims during review of a wrongful conviction.

Staff Attorney: Ms. Nalini Gupta

5:00 p.m. **Public Meeting Adjourned**

Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD)

PUBLIC MEETING AGENDA

<table>
<tr><th>Wednesday, December 4, 2024</th><th colspan="2">Day 2</th></tr>
<tr><td>8:30 a.m. – 10:00 a.m.
(90 minutes)</td><td colspan="2">Subcommittee Meeting: Policy (Closed)
BGen(R) James Schwenk (Chair)
MG(Ret) Marcia Anderson
HON Suzanne Goldberg
HON Jennifer O'Connor
Judge Karla Smith (Committee Chair)
ADFO: Mr. Dave Gruber</td></tr>
<tr><td></td><td colspan="2"></td></tr>
<tr><td>10:15 a.m. – 11:45 a.m.
(90 minutes)</td><td>Subcommittee Meeting:
Case Review (Closed)
Ms. Martha Bashford (Chair)
Ms. Meg Garvin
Ms. Jennifer Long
BGen(R) James Schwenk
ADFO: Mr. Dave Gruber</td><td>Subcommittee Meeting:
Special Projects (Closed)
Ms. Meghan Tokash (Chair)
Judge Paul Grimm
Mr. A.J. Kramer
Dr. Jenifer Markowitz
Dr. Cassia Spohn
Judge Reggie Walton
ADFO: Mr. Bill Sprance</td></tr>
</table>

11:45 a.m. – 1:00 p.m. **Lunch** *(75 minutes)*

1:00 p.m. – 1:05 p.m. **Welcome and Overview of Public Meeting Day 2** *(5 minutes)*
Deputy Director: Ms. Meghan Peters
Designated Federal Officer: Mr. Dave Gruber

1:05 p.m. – 3:30 p.m. **Site Visit Deliberations** *(2.5 hours)*

Purpose: To provide a comprehensive overview of site visit feedback so that Committee Members can discuss impressions and determine the path forward on-site visit information.

Staff Attorney: Ms. Terry Gallagher

3:30 p.m. – 3:45 p.m. **Break** *(15 minutes)*

3:45 p.m. – 4:15 p.m. **Public Comment** *(30 minutes)*

4:15 p.m. – 5:00 p.m. **Subcommittee updates and meeting wrap-up** *(45 minutes)*

5:00 p.m. **Public Meeting Adjourned**

THE DEFENSE ADVISORY COMMITTEE ON
INVESTIGATION, PROSECUTION, AND DEFENSE OF
SEXUAL ASSAULT IN THE ARMED FORCES

MINUTES OF THE SEPTEMBER 17, 2024, PUBLIC MEETING

AUTHORIZATION

The Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces ("the Committee" or "DAC-IPAD") is a federal advisory committee established by the Secretary of Defense in February 2016 in accordance with section 546 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2015 and section 537 of the NDAA for FY 2016. The Committee is tasked to advise the Secretary of Defense on the investigation, prosecution, and defense of allegations of rape, sexual assault, and other sexual misconduct involving members of the Armed Forces based on its review of such cases on an ongoing basis.

EVENT

The Committee held its thirty-seventh public meeting on September 17, 2024.

LOCATION

The meeting was held virtually. Details were provided to the public in the Federal Register and on the DAC-IPAD's website.

MATERIALS

A verbatim transcript of the meeting and preparatory materials provided to the Committee members prior to and during the meeting are incorporated herein by reference and listed individually below. The meeting transcript and materials received by the Committee are available on the website at https://dacipad.whs.mil.

PARTICIPANTS

Participating Committee Members

Honorable Karla N. Smith, Chair
Major General Marcia Anderson, U.S. Army, Retired
Mr. William E. Cassara
Ms. Margaret Garvin
Ms. Suzanne Goldberg
Mr. A.J. Kramer
Ms. Jennifer Gentile Long
Dr. Jenifer Markowitz
Sergeant Major Ralph Martinez, U.S. Army, Retired
Brigadier General James R. Schwenk, U.S. Marine Corps, Retired
Detective Lisa M. Shepperd
Dr. Cassia Spohn
Ms. Meghan A. Tokash
Judge Reggie B. Walton

Committee Staff

Mr. L. Peter Yob, Director
Ms. Meghan Peters, Deputy Director
Mr. Jennifer Campbell, Chief of Staff
Ms. Stacy Boggess, Senior Paralegal
Ms. Alice Falk, Technical Writer-Editor
Ms. Breyana Franklin, Communication Specialist
Ms. Theresa Gallagher, Attorney-Advisor
Ms. Nalini Gupta, Attorney-Advisor
Ms. Marguerite McKinney, Analyst
Mr. Blake Morris, Paralegal
Ms. Stayce Rozell, Senior Paralegal
Ms. Terri Saunders, Attorney-Advisor
Ms. Rebekah Stuyvesant, Administrative Officer
Ms. Kate Tagert, Attorney-Advisor
Ms. Lauren Torczynski, Attorney-Advisor

Other Participants

Mr. William Sprance, Designated Federal Officer
Mr. Dave Gruber, Designated Federal Officer

MEETING MINUTES

Quorum was established and Mr. William Sprance, DFO, opened the meeting at 12:01 p.m. Mr. Sprance introduced the Honorable Karla N. Smith, DAC-IPAD Chair, who provided opening remarks welcoming those in attendance; explained the purpose of the meeting; outlined the agenda; and introduced Ms. Meghan Peters, DAC-IPAD Deputy Director, who provided opening remarks and introduced the first session.

Session 1: Committee Deliberations on Recommendations for the draft *DAC-IPAD Report on Enforcing Victims' Article 6b Rights*.

Ms. Terri Saunders, Attorney-Advisor, opened the Committee's discussion of the draft Article 6b report and explained that the report contains six recommendations for their deliberation and vote. The four issues under Article 6b that were reviewed by the Policy Subcommittee are victims' standing to assert their rights at the trial court; jurisdiction of the Court of Appeals for the Armed Forces to review victim petitions; the time frame for appellate review to review these petitions; and the standard of review that the appellate court should use when reviewing victim petitions. In reviewing the issues, the Committee and Subcommittee heard from the victims' counsel program managers or their designees from the Army, Navy, Marine Corps, Air Force, and Coast Guard; appellate government and appellate defense counsel from each of the Military Departments and the Coast Guard; as well as representatives from a victim advocacy organization and the Crime Victim Law Institute.

Issue 1: Victim standing to assert Article 6b rights at court-martial.

The Committee discussed the issue of whether a victim should have the ability to assert their enumerated rights at the trial court level and that Article 6b does not have a provision allowing the victim to initially assert those rights at the trial court level. The Committee previously heard from stakeholders who, for the most part, agreed that providing victim standing to assert their rights at the trial court may be beneficial. Two proposed recommendations on this issue were deliberated.

Recommendation 1:
Congress should amend Article 6b(e) (1) and (2) UCMJ:
(e) Enforcement
(1) The victim of an offense under this chapter may assert the rights of the victim afforded by a section (article) or rule specified in paragraph (5) at the court-martial in which the accused is being tried or may assert these rights with a military judge pursuant to section 830a (article 30a) if charges have not yet been referred to a court-martial. The court-martial, or military judge if pre-referral, shall take up and decide any motion asserting a victim's right forthwith. If the relief sought is denied, the victim may petition the Court of Criminal Appeals for a writ of mandamus.
(2) If the victim of an offense under this chapter is subject to an order to submit to a deposition, notwithstanding the availability of the victim to testify at the court-martial trying the accused for the offense, the victim may file a motion with the court-martial, or with a military judge if pre-referral, to quash such order. If the court-martial or military judge denies the relief sought, the victim may petition the Court of Criminal Appeals for a writ of mandamus to quash such order.

Recommendation 2:

The Joint Service Committee on Military Justice draft an amendment to Rule for Courts-Martial 309(b) to provide that a victim may file a motion pre-referral with a military judge to assert their rights under Article 6b(a), UCMJ.
Recommendation 1, paragraph (1): With one member opposed, the Committee voted to adopt the recommendation.

Recommendation 1, paragraph (2): With one member opposed, the Committee voted that recommendation one should be redrafted to reflect that the victim be heard prior to an order for a deposition is entered.

Recommendation 2: With one member opposed, the Committee voted to adopt recommendation two.

Issue 2: CAAF jurisdiction to review a victim's petition for writ of mandamus.

For background the Committee reviewed the development of the current UCMJ provisions establishing the CAAF's jurisdiction, and the previous recommendation of the Judicial Proceedings Panel that Congress provide jurisdiction for CAAF to review victim petitions. The Committee considered how the proposed recommendation would promote uniformity in the development of the law across the Services. Members also considered the potential effects of a delay in courts-martial as a result of the recommendation and the potential effects of an increase in the appellate caseload on the timeline for appellate review in general.

Recommendation 3:
Congress amend Article 6b(e) to add a new subparagraph (3), as follows:
The Court of Appeals for the Armed Forces shall review the record in any matter decided by a Court of Criminal Appeals under this section in which, upon petition of the victim and on good cause shown, the Court of Appeals for the Armed Forces grants a review. For any petition of review granted, the Court of Appeals for the Armed Forces may act on any issues specified in their grant of review.

The majority of the Committee voted to adopt recommendation three with the following edits:

"…upon petition of the victim and on good cause shown, the Court of Appeals for the Armed Forces may grant review of any matter decided by a Court of Criminal Appeals under this section."

For any petition of review granted, the Court of Appeals for the Armed Forces may act on any issues specified in "its" grant of review.

Issue 3: Timeframe for review of victims' petitions.

The Committee discussed the issue of the length of time it takes the appellate courts to review and decide on a victim's petition for a writ of mandamus, and that Article 6b provides that the appellate court should give a victim's petition priority over other proceedings before the court to the extent practicable. In comparison, the federal Crime Victims' Rights Act (CVRA) requires that the court of appeals provide a decision on a victim's petition for writ of mandamus within 72 hours unless the litigants, with the court's approval, stipulate to a different time period. The Committee heard testimony that a petition filed with the military Courts of Criminal Appeal

average between two and four months with an additional six months at CAAF if a review is granted. Additionally, testimony from stakeholders agreed that a 72-hour requirement in the military system would not be feasible.

Recommendation 4a:
Congress amend Article 6b(e)(3)(A)–(C), UCMJ, by renumbering the subsections as Article 6b(e)(4)(A)–(C).

Recommendation 4b:
The new subparagraph (4)(B) should be amended as follows:
A petition for a writ of mandamus described in this subsection shall have priority over all proceedings before the Court of Criminal Appeals. The Court of Criminal Appeals shall review and decide on a victim's petition for a writ of mandamus *[within 30 days] [within 60 days] [another time period]* after the petition has been filed with that court, unless the litigants, with the approval of the court, have stipulated to a different time period. To the extent practicable, court-martial proceedings shall not be stayed or subject to a continuance of more than five days for purposes of enforcing this section.

Recommendation 4c:
The new subparagraph (4)(C) should be amended as follows:

Review of any decision of the Court of Criminal Appeals on a petition for a writ of mandamus described in this subsection shall have priority in the Court of Appeals for the Armed Forces, as determined under the rules of the Court of Appeals for the Armed Forces. The Court of Appeals for the Armed Forces shall review and decide on a victim's writ-appeal *[within 30 days] [within 60 days] [another time period]* after the writ-appeal has been filed with that court, unless the litigants, with the approval of the court, have stipulated to a different time period.
Or should this paragraph remain unchanged? Current language:
Review of any decision of the Court of Criminal Appeals on a petition for a writ of mandamus described in this subsection shall have priority in the Court of Appeals for the Armed Forces, as determined under the rules of the Court of Appeals for the Armed Forces.

After deliberating the issue of whether to set a specific time period for the courts to make a decision on a victim's writ-appeal, or to retain the current language, the majority of the Committee voted that the current language in the (4)(B) and (4)(C) statute remain as written.

Issue 4: Standard of Review.

The Committee discussed the standard of review of both Article 6b and the CVRA. In comparison, Article 6b does not specify a standard of review for a victim's petition for a writ of mandamus, and the CVRA requires the appellate courts to use "the ordinary standard of review". Additionally, the Committee and Subcommittee heard some stakeholder perspectives that supported a lower standard of review to allow appellate courts to develop the law, clarify issues, and bring military law in line with the federal standard. Other stakeholders thought writs should be rare, so the higher standard should apply.

The Committee considered the following recommendations:

Recommendation 5:

Congress amend Article 6b(e), UCMJ, to add a new subparagraph 4(D):
The Courts of Criminal Appeals and the Court of Appeals for the Armed Forces shall apply the ordinary standard of appellate review, legal error or abuse of discretion, in reviewing a victim's petition for a writ of mandamus asserting their *[enumerated rights under Article 6b(a). However, the higher standard of review, clear and indisputable error, shall continue to apply to review of alleged violations of Military Rules of Evidence 412, 513, 514, and 615.]*
Or

[enumerated rights under Article 6b, including for alleged violations of Military Rules of Evidence 412, 513, 514, and 615].

After a lengthy discussion and deliberation, the majority of the Committee voted that the ordinary standard of appellate review should apply to the enumerated rights under Article 6b(a), and that the higher standard of review, clear and indisputable error, should continue to apply to review of alleged violations of Military Rules of Evidence 412, 513, 514, and 615.

Recommendation 6:
Congress amend Article 6b(e), UCMJ, to add the following conforming changes:
a. Strike the words "by Court of Criminal Appeals" in the title of Article 6b(e).
b. Renumber what is currently Article 6b(e)(4) to be Article 6b(e)(5).
c. In renumbered paragraph (e)(5), strike the words "Paragraph (1)" and substitute the words "This subsection."

The Committee voted to accept recommendation six.

Session 2: Committee Deliberations on Emerging Issues Identified on Military Installation Site Visits.

Ms. Theresa Gallagher, Attorney-Advisor, provided a brief overview of the purpose of the deliberative session. She stated that the site visits highlighted common issues and concerns that will allow the DAC-IPAD to identify and prioritize subjects for further review. The next steps for the Committee include comprehensive site visit deliberations at their December public meeting; the incorporation of site visit information in follow-on studies; and the incorporation of site visit information in the March 2025 DAC-IPAD Annual Report.

DAC-IPAD member BG(R) James Schwenk explained that the issues list means the DAC-IPAD heard from a number of people at a number of different sites that this was a concern, but it doesn't mean that the DAC-IPAD has looked at the issue or has any opinion on the issue. He noted that a vast majority of the military justice practitioners from MCIOs, trial counsel, special trial counsel, defense counsel and victims' counsel across the services stated that the STCs are experienced and beneficial to case processing.

There were 38 potential issues identified in five categories:

1. Recruitment, growth, and retention of litigators with special victim expertise
2. Optimal structure, staffing, and resourcing of MCIO, STC, DC, and VC offices to prioritize litigator and investigator work
3. Case processing
4. Reporting sexual misconduct

5. Accountability

The Committee deliberated the issues in each category and identified those that are similar and could be consolidated for their consideration at the December meeting.

Public Comment:

The Committee heard from three public speakers who spoke on matters of military justice specific to their personal experiences.

Deputy Director Update:

Ms. Meghan Peters provided a briefing to the Committee regarding a letter to the DAC-IPAD from the General Counsel requesting the DAC-IPAD evaluate programs in the civilian sector that address suicide risks associated with being charged with a criminal offense. The report is due June 2, 2025. The Committee agreed that the Case Review Subcommittee would take the issue for additional study and provide the full Committee, at the December meeting, with a proposal on next steps.

DAC-IPAD Subcommittee Updates:

Ms. Lauren Torczynski, Attorney-Advisor, provided the Committee with an update of the Special Projects Subcommittee's planning schedule that will address OSTC issues highlighted in the recent site visits.

Ms. Nalini Gupta, Attorney-Advisor, provided the Committee with an update on the Case Review Subcommittee's recent activities. She reminded the Committee that following Members' unanimous approval of the DAC-IPAD report, *Exploring the Race, Ethnicity, and Gender of Military Panels at Courts-Martial,* this report was published to Congress and the Secretary of Defense in August 2024. Additionally, the subcommittee continues the analysis of the FY2022 Air Force data that will supplement this report and be provided in the DAC-IPAD Annual Report in March. The subcommittee continues their study of conviction integrity units and plans to have civilian sector speakers at the December meeting.

Ms. Meghan Peters provided an overview of the December meeting agenda and additional closing remarks. With no further business, the DFO closed the public meeting at 4:05 p.m.

CERTIFICATION

I hereby certify, to the best of my knowledge, the foregoing minutes are accurate and complete.

Judge Karla N. Smith
Chair

MATERIALS

Materials Provided Prior to and at the Public Meeting

1. DAC-IPAD 37th Public Meeting Agenda, September 17, 2024, (2 pages)
2. Draft Minutes of the DAC-IPAD's 35th Public Meeting on June 11-12, 2024 (9 pages)
3. Draft Minutes of the DAC-IPADS 36th Public Meeting on June 27, 2024 (6 pages)
4. Policy Subcommittee's Initial Draft *Report on Enforcing Article 6b, UCMJ, Victims' Rights (21 pages)*
5. UCMJ Article 6b, Rights of a victim of an offense under this chapter (2 pages)
6. Crime Victims' Rights Act, 18 U.S.C. § 3771 (3 pages)
7. Staff-prepared guide for the DAC-IPAD's initial deliberations on issues emerging from site visits (2 pages)
8. Letter from the DoD General Counsel to the DAC-IPAD Chair (August 3, 2024) (1 page)
9. Article, *Suicide Risk Following Criminal Arrest*, Psychiatric Times, December 30, 2020 (3 pages)
10. Summary, Recommendations of the DoD Suicide Prevention and Response Independent Review Committee (2 pages)

DEFENSE ADVISORY COMMITTEE ON INVESTIGATION, PROSECUTION, AND DEFENSE OF SEXUAL ASSAULT IN THE ARMED FORCES

ENFORCEMENT OF CRIME VICTIMS' RIGHTS

DECEMBER 2024

Enforcement of Crime Victims' Rights

Draft Recommendation 1: Congress amend Article 6b(e)(1) and (2), UCMJ, as follows:

(1) The victim of an offense under this chapter may assert the rights of the victim afforded by a section (article) or rule specified in paragraph (5) at the court-martial in which the accused is being tried or may assert these rights with a military judge pursuant to section 830a (article 30a) if charges have not yet been referred to a court-martial. The court-martial, or military judge if pre-referral, shall take up and decide any motion asserting a victim's right forthwith. If the relief sought is denied, the victim may petition the Court of Criminal Appeals for a writ of mandamus.

(2) If the victim of an offense under this chapter is subject to a request to submit to a deposition, notwithstanding the availability of the victim to testify at the court-martial trying the accused for the offense, before the military judge or convening authority orders a deposition, the court-martial, or military judge if pre-referral, must afford the victim a reasonable opportunity to be heard. If the court-martial or military judge denies the relief sought, the victim may petition the Court of Criminal Appeals for a writ of mandamus.

Draft Recommendation 2: The Joint Service Committee on Military Justice draft an amendment to Rule for Courts-Martial 309(b) to provide that a victim may file a motion pre-referral with a military judge to assert their rights under Article 6b(a), UCMJ.

Draft Recommendation 3: Congress amend Article 6b(e) to add a new subparagraph (3), as follows:

Upon petition of the victim and on good cause shown, the Court of Appeals for the Armed Forces may grant review of any matter decided by a Court of Criminal Appeals under this section. For any petition of review granted, the Court of Appeals for the Armed Forces may act on any issues specified in its grant of review.

Draft Recommendation 4: Congress amend Article 6b(e), UCMJ, to add a new subparagraph 4(D):

The Courts of Criminal Appeals and the Court of Appeals for the Armed Forces shall apply the ordinary standard of appellate review, legal error or abuse of discretion, in reviewing a victim's petition for a writ of mandamus asserting their enumerated rights under Article 6b(a). However, the higher standard of review, clear and indisputable error, shall continue to apply to review of alleged violations of Military Rules of Evidence 412, 513, 514, and 615.

Draft Recommendation 5: Congress amend Article 6b(e), UCMJ, to add the following conforming changes:

a. Strike the words "by Court of Criminal Appeals" in the title of Article 6b(e).
b. Renumber what is currently Article 6b(e)(3)(A)–(C) to be Article 6b(e)(4)(A)–(C).
c. Renumber what is currently Article 6b(e)(4) to be Article 6b(e)(5).
d. In renumbered paragraph (e)(5), strike the words "Paragraph (1)" and substitute the words "This subsection."

Proposed Amendments to Article 6b(e)

(e) ENFORCEMENT ~~BY COURT OF CRIMINAL APPEALS~~.—

(1) ~~If t~~The victim of an offense under this chapter ~~believes that a preliminary hearing ruling under section 832 of this title (article 32) or a court-martial ruling violates~~ may assert the rights of the victim afforded by a section (article) or rule specified in paragraph (54) at the court-martial in which the accused is being tried or may assert these rights with a military judge pursuant to section 830a (article 30a) if charges have not yet been referred to a court-martial. The court-martial, or military judge if pre-referral, shall take up and decide any motion asserting a victim's right forthwith. If the relief sought is denied, the victim may petition the Court of Criminal Appeals for a writ of mandamus. ~~to require the preliminary hearing officer or the court-martial to comply with the section (article) or rule.~~

(2) If the victim of an offense under this chapter is subject to ~~an order~~ a request to submit to a deposition, notwithstanding the availability of the victim to testify at the court-martial trying the accused for the offense, before the military judge or convening authority orders a deposition, the court-martial, or military judge if pre-referral, must afford the victim a reasonable opportunity to be heard. If the court-martial or military judge denies the relief sought, the victim may petition the Court of Criminal Appeals for a writ of mandamus.

(3) Upon petition of the victim and on good cause shown, the Court of Appeals for the Armed Forces may grant review of any matter decided by a Court of Criminal Appeals under this section. For any petition of review granted, the Court of Appeals for the Armed Forces may act on any issues specified in its grant of review.

(~~4~~3)(A) A petition for a writ of mandamus described in this subsection shall be forwarded directly to the Court of Criminal Appeals, by such means as may be prescribed by the President, subject to section 830a of this title (article 30a).

(B) To the extent practicable, a petition for a writ of mandamus described in this subsection shall have priority over all proceedings before the Court of Criminal Appeals.

(C) Review of any decision of the Court of Criminal Appeals on a petition for a writ of mandamus described in this subsection shall have priority in the Court of Appeals for the Armed Forces, as determined under the rules of the Court of Appeals for the Armed Forces.

(D) The Courts of Criminal Appeals and the Court of Appeals for the Armed Forces shall apply the ordinary standard of appellate review, legal error or abuse of discretion, in reviewing a victim's petition for a writ of mandamus asserting their enumerated rights under Article 6b(a). However, the higher standard of review, clear and indisputable error, shall continue to apply to review of alleged violations of Military Rules of Evidence 412, 513, 514, and 615.

(54) ~~Paragraph (1)~~This subsection applies with respect to the protections afforded by the following:

(A) This section (article).
(B) Section 832 (article 32) of this title.
(C) Military Rule of Evidence 412, relating to the admission of evidence regarding a victim's sexual background.
(D) Military Rule of Evidence 513, relating to the psychotherapist-patient privilege.
(E) Military Rule of Evidence 514, relating to the victim advocate-victim privilege.
(F) Military Rule of Evidence 615, relating to the exclusion of witnesses.

I. INTRODUCTION

Congress enacted Article 6b of the Uniform Code of Military Justice (UCMJ) in the National Defense Authorization Act for Fiscal Year 2014 (FY14 NDAA), codifying crime victims' rights under the UCMJ and incorporating many of the provisions of the federal Crime Victims' Rights Act (CVRA).[1] Since its enactment, Congress has amended Article 6b to provide additional rights and to add some enforcement mechanisms, among other changes. The CVRA has also undergone change during this time.

Given the decade of changes since the enactment of Article 6b, as well as recent appellate opinions defining how and where a crime victim may assert their rights, the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD) elected to study Article 6b enforcement mechanisms and how they compare to enforcement mechanisms under the CVRA. Where there are differences between the two statutes, the Committee looked at whether there are military-specific reasons why some of the enforcement provisions in the CVRA have not been incorporated into Article 6b and whether incorporating these provisions would benefit victims in the military justice system without undermining the rights of the accused.

In this report, the DAC-IPAD reviews the following Article 6b enforcement issues:

1. Crime victims' standing to assert their Article 6b rights at the trial court;
2. Jurisdiction of the Court of Appeals for the Armed Forces (CAAF) over crime victims' petitions for writs of mandamus;
3. The time frame for the Courts of Criminal Appeals (CCAs) of the Military Departments and the CAAF to rule on a crime victim's petition for a writ of mandamus; and
4. The appellate standard of review applicable to a crime victim's petition for a writ of mandamus.

In reviewing these issues, the Committee heard testimony from victims' counsel from each of the Military Services, as well as Service government and defense appellate counsel; from Mr. Ryan Guilds, who provides pro bono representation of civilian and military victims and who spoke as a representative of victim advocacy organizations; and from one of our Committee members—Ms. Meg Garvin, in her capacity as the executive director of the Crime Victim Law Institute and a nationally recognized expert on victims' rights and the CVRA.

II. BACKGROUND

Both Article 6b and the CVRA provide crime victims with enumerated rights, including the right to reasonable, accurate, and timely notice of certain proceedings involving the accused; the right to be heard regarding pretrial confinement of the accused, at sentencing proceedings, and

[1] National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66 [FY14 NDAA], §1701, 127 Stat. 672 (2013).

regarding clemency and parole of the accused; and the right to be treated with fairness and with respect for the victim's privacy and dignity.[2]

While the enumerated rights in Article 6b and the CVRA are substantially the same, the two statutes differ on how these rights are enforced. The CVRA specifies that a victim must initially assert their rights at the district court, and only if the victim is not able to obtain relief at this level may they petition the appellate court for a writ of mandamus.[3] A writ of mandamus in the context of crime victims' rights is an order from the appellate court requiring a lower court or a government official either to take an action to ensure that the victim's rights are lawfully recognized or to refrain from taking an action that would violate a victim's rights.[4]

Article 6b was initially silent regarding enforcement mechanisms, but in the FY15 and FY16 NDAAs Congress added enforcement mechanisms to it, providing victims the ability to petition a CCA for a writ of mandamus for an alleged violation of any of the rights set out in Article 6b(a), as well as other listed rights.[5] Unlike the CVRA, Article 6b does not explicitly allow a victim to assert their rights at the trial court.

One significant difference between the CVRA and Article 6b is that Article 6b explicitly allows a victim to petition a CCA for a writ of mandamus not just for an alleged violation of the enumerated rights in Article 6b(a) but also for an alleged violation of Article 32 regarding preliminary hearings; Military Rule of Evidence (M.R.E.) 412, the military's rape shield law; M.R.E. 513, the psychotherapist–patient privilege; M.R.E. 514, the victim advocate–victim privilege; and M.R.E. 615, excluding witnesses.[6] The CVRA explicitly mentions enforcement only of the enumerated rights under the CVRA. However, Ms. Garvin informed the Committee that Article III courts provide victims standing independent of the CVRA to assert their rights under rape shield, in instances involving psychotherapist–patient privilege, or in other situations in which they have suffered an injury.[7]

The following sections provide additional information regarding Article 6b enforcement issues for the topics listed in Section I.

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[2] *See* 10 U.S.C. § 806b (2024) (Art. 6b), Rights of the victim of an offense under this chapter; see also 18 U.S.C. § 3771, Crime victims' rights (CVRA). The additional enumerated rights in Article 6b(a) and the CVRA are the right to be reasonably protected from the accused; the right not to be excluded from listed proceedings; the right to confer with counsel representing the government; the right to receive restitution as provided in law; the right to proceedings free from unreasonable delay; and the right to be informed in a timely manner of any plea agreement, separation in lieu of court-martial, or non-prosecution agreement.

[3] 18 U.S.C. § 3771(d)(3).

[4] The purpose of a writ of mandamus is to "confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26, 63 S. Ct. 938, 87 L. Ed. 1185 (1943).

[5] National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291 [FY15 NDAA], § 535, 128 Stat. 3292 (2014); National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92 [FY16 NDAA], § 535, 129 Stat. 726 (2015).

[6] FY15 NDAA, *supra* note 5, at § 535; FY16 NDAA, *supra* note 5, at § 535.

[7] *Transcript of DAC-IPAD Public Meeting* 162–63 (June 11, 2024) (testimony of Ms. Meg Garvin). Transcripts of all DAC-IPAD public meetings are available at https://dacipad.whs.mil/.

III. VICTIM STANDING TO ASSERT ARTICLE 6b RIGHTS AT TRIAL COURT

A. Background

In the FY15 NDAA, Congress added an enforcement mechanism to Article 6b, providing crime victims the ability to petition a CCA for a writ of mandamus for an alleged violation of M.R.E. 412, the military's rape shield law, or M.R.E. 513, the psychotherapist–patient privilege.[8]

Congress expanded the scope of this provision in the FY16 NDAA, providing crime victims the ability to petition a CCA for a writ of mandamus for an alleged violation of any of the enumerated rights set out in Article 6b(a) or for an alleged violation of Article 32, M.R.E. 514, the victim advocate–victim privilege, or M.R.E. 615, excluding witnesses, in addition to M.R.E. 412 and M.R.E. 513.[9] This amendment to Article 6b also allowed a victim to petition the CCA to quash an order for the victim to submit to a deposition.[10]

The CVRA, by contrast, requires a crime victim to first assert their rights at the district court in which the defendant is being prosecuted, or, if there is no prosecution ongoing, at the district court in the district in which the crime occurred.[11] If the district court judge denies the victim's requested relief, the victim may then petition the appellate court for a writ of mandamus.[12]

While the CVRA provides an avenue for a victim to assert their rights in district court even when there is not an ongoing prosecution, Article 6b limits the circumstances in which a victim may petition a CCA regarding alleged violations of the victim's rights in court-martial rulings or Article 32 preliminary hearing rulings. Article 6b does not provide an avenue for a victim to petition a CCA for an alleged violation of a victim's rights that occurs prior to referral of charges, outside the context of an Article 32 preliminary hearing ruling.[13]

Unlike the CVRA, Article 6b, with some exceptions, does not give victims the right to be heard by the trial judge regarding a violation of their rights under Article 6b—the only course of action is to petition the CCAs.[14] One exception to this requirement is that Article 6b(a)(4) gives victims the right to be heard at sentencing.[15] Other statutes or rules that allow victims to be heard at the trial court level include the following:

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[8] FY15 NDAA, *supra* note 5, at § 535.

[9] FY16 NDAA, *supra* note 5, at § 535.

[10] *Id*.

[11] 18 U.S.C. §3771(d)(3).

[12] *Id*.

[13] Art. 6b(e)(1).

[14] *See generally* Art. 6b, UCMJ. Note that Art. 6b(a)(4)(A)–(C) provides the victim the right to be heard at hearings related to the accused's sentencing or confinement.

[15] Art. 6b(a)(4), UCMJ.

1. Article 30a(a)(1)(D), UCMJ, requires the President to prescribe regulations providing for a military judge to review certain proceedings that occur prior to referral of charges to a court-martial.[16] These pre-referral proceedings include pre-referral matters under subsection (e) of Article 6b, which covers the enforcement of a victim's rights under Article 6b.[17] Rule for Court-Martial 309 implements Article 30a and lists the pre-referral matters for which a military judge may conduct proceedings.[18]

2. Rule for Courts-Martial (R.C.M.) 309(b)(9) provides that a victim may file a motion pre-referral requesting that the military judge require an Article 32 preliminary hearing officer to comply with Articles 6b and 32, R.C.M. 405, and M.R.E.s 412, 513, 514, and 615.[19] The rule provides that the military judge may grant or deny this motion, which is subject to further review by the CCA pursuant to Article 6b(e).[20] R.C.M. 309 does not provide for other pre-referral enforcement proceedings under Article 6b(e).

3. M.R.E. 412(c)(2) provides that if a party to a trial seeks to admit evidence of the victim's sexual behavior or predisposition, the military judge must hold a closed hearing to determine whether the evidence should be admissible at trial.[21] At this hearing, the victim must be "afforded a reasonable opportunity to attend and be heard."[22]

4. M.R.E.s 513(e)(1) and (2) provide that when the production or admission of a patient's mental health records or communications is in dispute, the military judge must hold a closed hearing.[23] The patient must be "afforded a reasonable opportunity to attend and be heard."[24] In the July 18, 2024, opinion of *H.V.Z v. United States*, CAAF held that these provisions of M.R.E. 513 apply not only to privileged material under the rule but also to non-privileged records, such as those containing diagnoses and treatments.[25]

B. Stakeholder Perspectives

Victims' Counsel

The victims' counsel program representatives from the Military Services all agreed that Congress should amend Article 6b to require courts-martial to hear and make rulings on violations of a

[16] *See* 10 U.S.C. § 830a (2024) (Art. 30a), Proceedings conducted before referral.

[17] Art. 30a(a)(1)(D); Art. 6b(e).

[18] MANUAL FOR COURTS-MARTIAL, UNITED STATES (2024 ed.) [2024 MCM], Rule for Courts-Martial [R.C.M.] 309.

[19] 2024 MCM, *supra* note 18, R.C.M. 309(b)(6).

[20] *Id*.

[21] 2024 MCM, *supra* note 18, Military Rule of Evidence [M.R.E.] 412(c)(2).

[22] *Id*.

[23] 2024 MCM, *supra* note 18, M.R.E. 513(e)(2).

[24] *Id*.

[25] *H.V.Z. v. United States*, 2024 CAAF LEXIS 410, __ M.J. __ (C.A.A.F. 2024).

victim's Article 6b rights.[26] They argued that civilian victims who fall under the CVRA should not have greater rights to be heard at the trial court level than military victims have.[27] Several counsel stated that while some military judges are willing to allow victims' counsel to be heard on issues regarding their clients' rights—even when not explicitly allowed under Article 6b or other provisions of law—this practice is inconsistent across and within the Services.[28]

Counsel argued that if the victim could be heard at the trial court level and if the victim appealed the ruling, the CCA would have a record with judicial rulings to review, rather than just the briefs of the parties.[29] One counsel noted that requiring a victim to go to the CCA to enforce their rights removes the remedy from the right—a victim should be able to argue to the military judge why their rights should be enforced rather than asking the CCA for a remedy after the military judge has already violated ~~her~~ their rights.[30] Having standing at the trial court would enable victims' counsel to argue against violations of their clients' rights and allow those violations to be remedied on the spot by the military judge, perhaps thereby removing the need to seek a remedy at the CCA and alleviating some of the delay.[31]

Counsel also argued that in order to assert the victim's rights, they must first have access to the information necessary to seek enforcement of those rights. In some Services, victims' counsel do not have access to a shared electronic filing system and do not uniformly receive motions from the government or defense, except when the trial counsel determines that the motions pertain to the victim.[32] Victims' counsel in the Navy currently do not have access to motions filed in the Navy and Marine Corps case management system.[33] Air Force victims' counsel have access to their electronic filing system, so they are able to see all motions.[34] Counsel expressed concern about how information is provided to victims who do not have victims' counsel.[35]

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[26] *See Transcript of DAC-IPAD Policy Subcommittee Meeting* 12 (June 11, 2024) (testimony of Commander Sara DeGroot, U.S. Navy); 13 (testimony of Colonel Iain Pedden, U.S. Marine Corps); 19–20 (testimony of Colonel Evah McGinley, U.S. Army); s*ee also Transcript of DAC-IPAD Public Meeting* 26–27 (Mar. 12, 2024) (testimony of Commander Sara DeGroot, U.S. Navy); 27 (testimony of Lieutenant Colonel Stacy Allen, U.S. Marine Corps).

[27] *Transcript of DAC-IPAD Policy Subcommittee Meeting* 14, 18 (June 11, 2024) (testimony of Col Pedden).

[28] *Id*. at 10, 20 (testimony of Lieutenant Colonel Seth Dilworth, U.S. Air Force); 22 (testimony of CDR DeGroot).

[29] *Id*. at 12 (testimony of CDR DeGroot); 15 (testimony of Col Pedden).

[30] *Id*. at 13–14 (testimony of Col Pedden).

[31] *Id*. at 22–23 (testimony of CDR DeGroot); 23 (testimony of Col Pedden); 25 (testimony of Mr. Paul Markland, U.S. Coast Guard).

[32] *Transcript of DAC-IPAD Public Meeting* 59–61 (Mar. 12, 2024) (testimony of LtCol Allen); 61, 64 (testimony of CDR DeGroot); 71–72 (testimony of Commander Rebecca Shults, U.S. Coast Guard).

[33] *Id*. at 61 (testimony of CDR DeGroot).

[34] *Id*. at 68–69 (testimony of Major Alexandria McCrary-Dennis, U.S. Air Force).

[35] *Id*. at 61 (testimony of CDR DeGroot); 63 (testimony of LtCol Allen).

Appellate Government
Counsel agreed that victims should have standing at the trial court level to assert their rights under Article 6b.[36] One counsel noted that victims' not having standing to assert their rights at the trial court has resulted in military victims having fewer rights and having more trouble exercising them than do civilian victims.[37] Several counsel noted that often military judges are willing to allow the victim to be heard at the trial court, even in the absence of formal standing.[38] One counsel noted that if victims had standing at the trial court, the result might be better decisions at the appellate courts, because the courts would have a more robust record to use in making their decisions.[39]

Appellate Defense
Some counsel stated that many military judges already allow victims to assert their Article 6b rights at the trial court.[40] One counsel noted that there may be reasons to allow victim standing at the trial court, but she believes that doing so will not alleviate delay as the victim will appeal adverse rulings to the CCA.[41] In the view of the Air Force representative, allowing a victim to assert their rights at the trial court may alleviate delay, as either the matter could be resolved at that level or the CCA would have a complete record upon which to make its decision.[42] She noted that of the eight petitions filed by victims to the Air Force Court of Criminal Appeals in the previous year, three implicated Article 6b enumerated rights and the rest asserted the victims' rights regarding M.R.E. 513, M.R.E. 412, or other issues.[43] She argued that if victims are given standing to assert their rights at the trial court, they should be given only one level of appellate review—to the CCAs—to mirror the procedures in the CVRA.[44]

The Navy representative told the Committee that she has never seen a victim's petition asserting an enumerated Article 6b right; the few she has seen have related to M.R.E. 412 or M.R.E. 513.[45] She also argued that Article 6b provides more expansive rights for victims than does the CVRA, as Article 6b allows victims to petition for alleged violations of M.R.E. 412 or 513 and the CVRA does not allow anything similar.[46]

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[36] *Transcript of DAC-IPAD Public Meeting* 22–23 (June 11, 2024) (testimony of Colonel Matt Talcott, U.S. Air Force); 28–29 (testimony of Colonel Christopher Burgess, U.S. Army); 29 (testimony of Mr. Ted Fowles, U.S. Coast Guard).

[37] *Id*. at 23 (testimony of Col Talcott).

[38] *Id*. at 24 (testimony of Colonel Joseph Jennings, U.S. Marine Corps); 28 (testimony of COL Burgess); 29 (testimony of Mr. Fowles).

[39] *Id*. at 40 (testimony of Col Talcott).

[40] *Id*. at 77 (testimony of Ms. Rebecca Snyder, U.S. Navy).

[41] *Id*.

[42] *Id*. at 78 (testimony of Ms. Megan Marinos, U.S. Air Force).

[43] *Id*. at 78–79.

[44] *Id*. at 79.

[45] *Id*. (testimony of Ms. Snyder).

[46] *Id*.

Victim Advocacy Organizations
Mr. Guilds noted that in his experience, trial judges often do not want to hear from victims or do not believe that Article 6b gives victims standing outside of M.R.E. 513, M.R.E. 412, and sentencing.[47] He stated that victims often forgo their rights "because the alternative is a delayed or abated trial."[48]

Regarding victim access to information, Mr. Guilds recounted a court-martial in which he asked to be included on communications with the parties and to receive non-privileged filings. He told the Committee that the judge denied his request and informed him he would have to seek that information from the special trial counsel.[49]

C. Analysis and Recommendations

The DAC-IPAD recommends that Congress amend Article 6b to allow crime victims to assert their rights with a military judge. This change will align Article 6b with the CVRA on this issue and will afford victims in military courts-martial proceedings with substantially the same right to be heard as victims in federal court. The DAC-IPAD could find no military-specific reason why victims in military courts should not have the same opportunity as victims in federal court to assert their rights at the trial court level.

Allowing a victim to assert their rights initially with the military judge provides an opportunity for the military judge to address the issue in a timely manner and potentially correct or prevent a violation of the victim's rights. This change may reduce delays in courts-martial proceedings if the victim is able to get relief through a military judge rather than having to petition the CCA. If the victim does not get the relief requested at this level, the victim may still petition the CCA for a writ of mandamus and the CCA will have the benefit of reviewing the record and judicial ruling prior to ruling on the issue, rather than relying solely on the briefs and filings of counsel. Having the benefit of the judicial ruling will also allow victims and their counsel to make better-informed choices whether to petition the CCAs. For unrepresented victims, asserting their rights with the military judge may be more feasible than trying to determine how to petition a CCA.

Victims already are authorized to assert their rights at the trial court or with a military judge, if pre-referral, in some circumstances. In addition, several stakeholders pointed out that even when not explicitly authorized by a statute or rule, often military judges will allow a victim to be heard at the trial court. Amending Article 6b as the DAC-IPAD recommends would make this practice uniform.

Draft Recommendation 1: Congress amend Article 6b(e)(1) and (2), UCMJ, as follows:

(e) Enforcement

[47] *Id*. at 129 (testimony of Mr. Ryan Guilds, Protect Our Defenders and Survivors United).

[48] *Id*. at 130.

[49] *Id*. at 128.

(1) The victim of an offense under this chapter may assert the rights of the victim afforded by a section (article) or rule specified in paragraph (5) at the court-martial in which the accused is being tried or may assert these rights with a military judge pursuant to section 830a (article 30a) if charges have not yet been referred to a court-martial. The court-martial, or military judge if pre-referral, shall take up and decide any motion asserting a victim's right forthwith. If the relief sought is denied, the victim may petition the Court of Criminal Appeals for a writ of mandamus.

(2) If the victim of an offense under this chapter is subject to a request to submit to a deposition, notwithstanding the availability of the victim to testify at the court-martial trying the accused for the offense, before the military judge or convening authority orders a deposition, the court-martial, or military judge if pre-referral, must afford the victim a reasonable opportunity to be heard. If the court-martial or military judge denies the relief sought, the victim may petition the Court of Criminal Appeals for a writ of mandamus.

Draft Recommendation 2: The Joint Service Committee on Military Justice draft an amendment to Rule for Courts-Martial 309(b) to provide that a victim may file a motion pre-referral with a military judge to assert their rights under Article 6b(a), UCMJ.

IV. JURISDICTION OF THE COURT OF APPEALS FOR THE ARMED FORCES TO REVIEW CRIME VICTIMS' PETITIONS

A. Background

In *E.V. v. United States*, a 2016 decision, CAAF held that it did not have jurisdiction to review a decision by a CCA on a crime victim's petition for a writ of mandamus.[50] The Court held that the plain language of Article 6b, as well as the lack of any other explicit or implied congressional intent, failed to provide CAAF jurisdiction over a crime victim's petition.[51] At the time of this opinion, Article 6b did not reference CAAF.[52]

In the FY18 NDAA, following CAAF's *E.V.* opinion, Congress amended Article 6b(e)(3) by adding a new subparagraph (C), which states: "Review of any decision of the Court of Criminal Appeals on a petition for a writ of mandamus described in this subsection shall have priority in the Court of Appeals for the Armed Forces, as determined under the rules of the Court of Appeals for the Armed Forces."[53]

However, in a July 2023 decision, CAAF again held that it does not have jurisdiction to review a victim's petition for a writ of mandamus.[54] The Court stated that the additional language in Article 6b only requires CAAF to give priority to cases in which it reviews a petition for a writ

[50] *E.V. v. United States*, 75 M.J. 331, 332 (C.A.A.F. 2016).

[51] *Id*.

[52] 10 U.S.C. § 806b (2016) (Art. 6b).

[53] National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91 [FY18 NDAA], §531, 131 Stat. 1283 (2017).

[54] *M.W. v. United States*, 83 M.J. 361, 365 (C.A.A.F. 2023).

of mandamus, but does not confer jurisdiction to review petitions filed by victims.[55] The Court interpreted the additional language in Article 6b as meaning that if CAAF otherwise has jurisdiction to review a petition—such as when a Judge Advocate General directs review under Article 67(a)(2) or after granting the accused's petition under Article 67(a)(3)—then it must give the review priority.[56] The Court elaborated that the language in Article 6b(e)(1) explicitly provides jurisdiction to the CCAs to review victims' petitions, but the language in Article 6b(e)(3)(C) does not mirror this language regarding CAAF.[57]

B. Recommendations of Other Advisory Committees

In a June 2017 report on victims' appellate rights, the Judicial Proceedings Panel (JPP)—the predecessor to the DAC-IPAD—recommended that Congress amend Article 6b to provide CAAF jurisdiction to review a CCA's denial of a victim's petition for a writ of mandamus.[58] The JPP made this recommendation because of its concern that victims' lack of access to CAAF under Article 6b "prevents civilian oversight of CCA decisions affecting victims' rights and creates the potential for lack of uniformity across the Services."[59]

The JPP's concern about lack of uniformity across the CCAs has been justified in at least one major issue—whether constitutional issues must be considered when raised in the context of the psychotherapist–patient privilege under M.R.E. 513 in determining when the privilege should be pierced. The Navy-Marine Corps Court of Criminal Appeals has taken the position that they must be considered, but the Army Court of Criminal Appeals has taken the opposite position, holding that Congress removed the "constitutionally required" exception to M.R.E. 513 and this change must be given effect.[60] While the Navy Judge Advocate General certified this issue to CAAF in 2023, CAAF was not able to resolve the question, as it held that the victim did not have standing to object to the military judge's abatement of the court-martial proceedings in the case at issue.[61] However, any future case seeking to have CAAF resolve this split between the CCAs will require that the issue again be certified by a Judge Advocate General.

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[55] *Id*.

[56] *Id*.; *see* 10 U.S.C. § 867(a) (Art. 67(a)), which provides CAAF authority to review three categories of cases:

1) all cases in which the sentence, as affirmed by a CCA, extends to death;
2) all cases reviewed by a CCA that the Judge Advocate General orders sent to CAAF; and
3) all cases reviewed by a CCA in which, upon petition of the accused and for good cause shown, CAAF grants jurisdiction.

An amendment to Article 67(c) in the FY17 NDAA allowed CAAF to exercise jurisdiction to review a writ-appeal petition filed by an accused seeking review of a decision by a CCA on a victim's petition for a writ of mandamus under Article 6b. See *Fink v. Y.B.*, 83 M.J. 222, 225 (C.A.A.F. 2023); National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328 [FY17 NDAA], §5331, 130 Stat. 2000 (2016).

[57] *Id*.

[58] *See* JUDICIAL PROCEEDINGS PANEL REPORT ON VICTIMS' APPELLATE RIGHTS (June 2017), *available at* https://dacipad.whs.mil/reports/judicial-proceedings-panel.

[59] *Id*. at 29.

[60] *See J.M. v. Payton-O'Brien*, 76 M.J. 782 (NMCCA 2017); *see also United States v. McClure*, 2021 CCA LEXIS 454 *; 2021 WL 4065525 (A. Ct. Crim. App. 2021) and *United States v. Tinsley*, 81 M.J. 836 (A. Ct. Crim. App. 2021).

[61] *See B.M. v. United States*, 84 M.J. 314 (C.A.A.F. 2024).

C. Stakeholder Perspectives

Victims' Counsel

The victims' counsel program representatives from the Military Services all agreed that Congress should amend Article 6b to explicitly provide CAAF jurisdiction to review writ petitions from victims.[62] One counsel noted that CAAF is the only court that can provide "singularity and unity across the Services."[63] The Navy victims' legal counsel representative described her experience working on a victim's petition to CAAF.[64] She told the Committee that but for the Navy Judge Advocate General's willingness to certify the issue to CAAF, CAAF would not have been able to review the CCA's denial of the victim's petition for a writ of mandamus. She also noted "that is not a good look for victims who are looking for transparency and clarity in the military justice system—that we have to depend on the graces of whoever is the [Judge Advocate General] at the time."[65]

Appellate Government

According to the government appellate counsel for all Services, giving CAAF jurisdiction over victim petitions would provide uniformity in how the rules are applied across the Service appellate courts.[66] But doing so would also cause further delay in courts-martial processing, especially in those cases in which the court-martial is stayed pending a decision from the appellate courts.[67] Counsel estimated that although victim petitions are given priority at the appellate courts, a decision at the CCA level may take anywhere from two to six months and perhaps another six months for those cases that go to CAAF.[68] The Air Force counsel stated, however, that because they typically litigate motions—and because the CCA often issues an opinion on the petition—prior to the trial date, there is often no delay in the trial.[69] Counsel noted that whether the military judge is willing to allow continued processing of the case—such as

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[62] *See Transcript of DAC-IPAD Policy Subcommittee Meeting* 13 (June 11, 2024) (testimony of CDR DeGroot); 15 (testimony of Col Pedden); 65 (testimony of Lt Col Dilworth); 66 (testimony of COL McGinley); *see also Transcript of DAC-IPAD Public Meeting* 26–27 (Mar. 12, 2024) (testimony of CDR DeGroot); 27 (testimony of LtCol Allen).

[63] *Transcript of DAC-IPAD Policy Subcommittee Meeting* 13 (June 11, 2024) (testimony of CDR DeGroot).

[64] *Id*. at 27 (testimony of CDR DeGroot). *See B.M. v. United States*, 2024 CAAF LEXIS 201 for procedural posture of CAAF's review.

[65] *Id*. at 27 (testimony of CDR DeGroot).

[66] *Transcript of DAC-IPAD Public Meeting* 12 (June 11, 2024) (testimony of Col Jennings); 12 (testimony of COL Burgess); 13 (testimony of Mr. Fowles); 13 (testimony of Col Talcott).

[67] *Id.* at 12 (testimony of Col Jennings); 13 (testimony of COL Burgess); 13 (testimony of Mr. Fowles); 13–14 (testimony of Col Talcott).

[68] *Id.* at 14–15 (testimony of Col Jennings); 16 (testimony of COL Burgess); 17 (testimony of Mr. Fowles); 16 (testimony of Col Talcott).

[69] *Id.* at 16–17 (testimony of Col Talcott).

allowing continued discovery, deposition, and other aspects of pretrial or trial processes not related to the victim's writ—or instead stays the entire proceedings while awaiting a decision from the appellate court can be up to the individual judge.[70]

Appellate Defense
Several of the defense appellate counsel told the Committee that there is no need for CAAF jurisdiction over victim petitions, as victims already have one layer of appellate review to challenge a judge's order.[71] One counsel noted that the process for a petition to go through the CCA and CAAF is lengthy, during which time the trial is delayed, witnesses' memories fade, and the accused undergoes significant stress, especially if in pretrial confinement.[72] She pointed out that there is already a process for a victim to seek review of a petition by CAAF, which is to request that the Judge Advocate General certify the issue to CAAF; moreover, because many of the issues for which victims file petitions are meritless or lack wide-ranging impact and are relatively simple to resolve, there is often little litigation on the issue at the CCA level.[73]

The Army defense appellate representative stated that in the past two years he had not seen one Article 6b petition filed with the Army CCA. He believes this is because counsel are working out these issues at the trial level.[74]

Victim Advocacy Organizations
Mr. Ryan Guilds argued that review by CAAF is "critical" to ensuring that the rights of victims are not ignored.[75]

D. Analysis and Recommendation

The DAC-IPAD recommends Congress amend Article 6b to provide CAAF jurisdiction to review crime victims' petitions. Currently crime victims can reach CAAF only if a Judge Advocate General is willing to certify an issue to CAAF. As one victims' counsel stated, a victim should not have to rely on the good graces of the Judge Advocate General in order to be heard at CAAF.[76] Providing CAAF jurisdiction to review victims' petitions will enable CAAF to clarify legal issues and ensure uniformity among the CCAs without victims having to rely on a Judge Advocate General to certify the issue to CAAF.

The Committee acknowledges that in those cases that CAAF grants review of a victim's writ-petition, there may be delays in the case. It is likely, however, that on the infrequent occasions that CAAF grants review of a victim's petition, the Court's review will aid in the development of

[70] *Id.* at 19 (testimony of Col Talcott).

[71] *Id.* at 69–70 (testimony of Mr. Thomas Cook, U.S. Coast Guard); 72 (testimony of Ms. Snyder); 73 (testimony of Ms. Marinos); 74 (testimony of Mr. Jonathan Potter, U.S. Army).

[72] *Id*. at 71–72 (testimony of Ms. Snyder).

[73] *Id*. at 71.

[74] *Id*. at 73 (testimony of Mr. Potter).

[75] *Id*. at 130 (testimony of Mr. Guilds).

[76] *Transcript of DAC-IPAD Policy Subcommittee Meeting* 27 (June 11, 2024) (testimony of CDR DeGroot).

the law and will establish precedent for future cases. The Committee believes that the benefits of providing for CAAF jurisdiction over victim petitions outweigh the negatives.

Draft Recommendation 3: Congress amend Article 6b(e) to add a new subparagraph (3), as follows:

Upon petition of the victim and on good cause shown, the Court of Appeals for the Armed Forces may grant review of any matter decided by a Court of Criminal Appeals under this section. For any petition of review granted, the Court of Appeals for the Armed Forces may act on any issues specified in its grant of review.

V. TIMING OF APPELLATE COURT REVIEW OF ARTICLE 6b PETITIONS

A. Background

Article 6b(e)(3)(B) provides that "to the extent practicable," a crime victim's petition for a writ of mandamus "shall have priority over all proceedings before the Court of Criminal Appeals."[77] Article 6b(e)(3)(C) provides that review of a CCA's decision on a victim's petition for a writ of mandamus "shall have priority" in CAAF, as determined by CAAF's rules.[78]

The Joint Rules of Appellate Procedure for Courts of Criminal Appeals (JRAP) provide uniform procedures for the CCAs, pursuant to Article 66(h). Rule 19 of the JRAP covers processing of petitions for extraordinary relief, including timelines for filing petitions and responses with the CCAs and actions that the CCAs may take after receiving a petition.[79] Rule 19(e) states that upon receipt of a petition, the CCAs may dismiss or deny the petition without answer, order the respondent to show cause and file an answer, or take whatever other action it deems appropriate.[80] If the CCA orders the respondent to file an answer, the respondent "may file an answer within 20 days of the receipt of the order and the petitioner may file a reply to the answer within 7 days of receipt of the answer." Rule 19 further provides that the CCA may set the matter for oral argument or may grant or deny the requested relief on the basis of pleadings alone.

According to CAAF's rules, a writ-appeal petition for extraordinary relief must be filed no later than 20 days after the date the CCA's decision is served on the appellant or the appellant's counsel. An appellee's answer must be filed no later than 10 days after the filing of the writ-appeal petition and a reply may be filed by an appellant no later than 5 days after receipt of the answer.[81] The rules provide that CAAF may deny a petition without answer or may order the

[77] Art. 6b(e)(3)(B), UCMJ. Note that Article 62, UCMJ, which governs government interlocutory appeals, also states that government appeals under this article shall, "whenever practicable, have priority over all other proceedings before that court." Art. 62(b).

[78] Art. 6b(e)(3)(C), UCMJ.

[79] Joint Rules of Appellate Procedure for Courts of Criminal Appeals [JRAP], Rule 19.

[80] JRAP, Rule 19(e).

[81] The Rules for Practice and Procedure for the Court of Appeals for the Armed Forces, Rule 19(e).

respondents to answer. CAAF may set the matter for hearing or may grant or deny the requested relief on the basis only of the pleadings.

The CVRA provides that the delineated victims' rights shall be asserted in the district court in which the defendant is being prosecuted.[82] The district court must take up and decide a motion asserting a victim's right "forthwith."[83] If the district court denies the requested relief, the movant may petition the court of appeals for a writ of mandamus, which the court of appeals must decide within 72 hours after the petition was filed, unless the litigants stipulate to a different time period.[84] The CVRA further provides that "in no event shall proceedings be stayed or subject to a continuance of more than five days for purposes of enforcing this chapter."[85] Ms. Garvin clarified that litigants frequently stipulate to a time period longer than 72 hours for appellate court decision.[86] She also noted that this provision was included in the CVRA in order to resolve issues expeditiously to prevent a delay in the trial from harming the accused.[87]

B. Stakeholder Perspectives

Victims' Counsel

When asked about the CVRA requirement that the appellate courts decide on a victim's petition within 72 hours, several presenters agreed that this requirement might not work well in the military system. They agreed that it is more important to have a more thoughtful decision from the appellate courts, even at the cost of taking more time.[88] Counsel agreed that there could be ways to make the system more efficient and that shorter timelines may be beneficial, especially when a judge's ruling at issue comes close to trial.[89] One counsel noted that it may be important to have a tighter time requirement if the court-martial proceeding is stayed pending the appellate decision.[90]

According to the counsel, the CCAs are deciding victim writ petitions relatively quickly. The Coast Guard representative said they had not had a writ petition in the previous year, but the one petition from the year before that was decided by the CCA in 30 days.[91] The Marine Corps representative noted that in the one petition from the previous year, the CCA returned a decision in five weeks.[92] The Navy representative reported that in one case the CCA took 105 days to

[82] 18 U.S.C. §3771(d)(3).

[83] *Id*.

[84] *Id*.

[85] *Id*.

[86] *Transcript of DAC-IPAD Public Meeting* 167 (June 11, 2024) (testimony of Ms. Garvin).

[87] *Id*.

[88] *Transcript of DAC-IPAD Policy Subcommittee Meeting* 48 (June 11, 2024) (testimony of Mr. Markland); 48 (testimony of Col Pedden); 51 (testimony of COL McGinley).

[89] *Id*. at 48–49 (testimony of Col Pedden); 49–50 (testimony of CDR DeGroot).

[90] *Id*. at 50–51 (testimony of Lt Col Dilworth).

[91] *Id*. at 25 (testimony of Mr. Markland).

[92] *Id*. at 26 (testimony of Col Pedden).

return a decision; in the other case, a pretrial motion, the CCA's decision didn't affect the trial start date.[93] The Air Force representative stated they had eight petitions filed within the previous year; six of them did not affect the docketing, either because they were decided before the trial date or because the military judge stayed the order rather than staying the proceedings.[94] One of the remaining two petitions resulted in the court-martial being stayed for over a year pending CAAF's decision.[95] The Army representative noted that they had not had a petition filed in the previous year, but in the past they had received a decision from the CCA within a few weeks.[96]

Appellate Government
The appellate government representatives agreed that imposing a 72-hour requirement, similar to the CVRA's, might strain resources and that providing more time often results in better decisions.[97]

Appellate Defense
One counsel noted that it would be logistically difficult for the CCAs to provide a decision on a victim's petition within 72 hours.[98]

Victim Advocacy Organizations
Mr. Guilds argued that victims have the right to have petitions decided in a timely manner and that often victims forgo the opportunity to file a petition with the appellate court because they know that filing will result in trial delays.[99]

C. Analysis

The DAC-IPAD recommends no change to the current language of Article 6b(e)(3)(B) or (C) regarding timelines for appellate review of victims' petitions. The Committee believes that the current language requiring the CCAs to give priority to victim petitions "to the extent practicable," and for CAAF to give victim petitions priority in accordance with CAAF rules is adequate. Committee members with experience in the federal court system stated that victims' petitions filed under CVRA typically take much longer for the appellate courts to resolve than the 72-hour limit imposed by the CVRA.

Service victims' counsel and appellate counsel indicated that CCA review of victims' petitions typically causes either no delay or relatively minor delay in courts-martial proceedings. The Air Force saw the highest number of victim petitions in the previous year—8 petitions versus 1, 2, or

[93] *Id*. at 26 (testimony of CDR DeGroot).

[94] *Id*. at 27 (testimony of Lt Col Dilworth); *see also Transcript of DAC-IPAD Public Meeting* 16-17 (June 11, 2024) (testimony of Col Talcott).

[95] *Id*. CAAF issued an opinion in this case—*H.V.Z. v. United States*—on July 18, 2024, about a month after these comments were made.

[96] *Transcript of DAC-IPAD Policy Subcommittee Meeting* 28 (June 11, 2024) (testimony of COL McGinley).

[97] *Transcript of DAC-IPAD Public Meeting* 18 (June 11, 2024) (testimony of Col Jennings).

[98] *Id*. at 75 (testimony of Mr. Cook).

[99] *Id*. at 130 (testimony of Mr. Guilds).

even none in the other Services—and Air Force appellate counsel stated that in 6 of the 8 petitions there were no trial delays, owing to the Air Force's practice of holding motions hearings prior to the trial date.

The Committee's consensus is that it is more important that victims' counsel, appellate practitioners, and the appellate courts continue to have the time they need to properly review crime victims' petitions, rather than trying to meet an arbitrary deadline. As noted for the previous issue, providing crime victim's standing to assert their rights at the trial court or with a military judge, if pre-referral, may lead to fewer instances in which victims choose to petition the CCAs.

VI. STANDARD OF REVIEW UNDER ARTICLE 6b, UCMJ

A. Background

Congress amended Article 6b in the FY15 and FY16 NDAAs to provide crime victims the right to petition a CCA for a writ of mandamus for an alleged violation of the enumerated rights under Article 6b(a), M.R.E. 412, M.R.E. 513, M.R.E. 514, or M.R.E. 615.[100] Congress did not, however, specify the burden of proof that the victim must establish to obtain a writ of mandamus.[101] On the issue of writs, CAAF has held that a writ of mandamus is a "drastic instrument which should be invoked only in truly extraordinary situations."[102] In the absence of a particular standard in the statute, CAAF has applied the standard used for other writ petitioners, which is "clear and indisputable" error.[103] This standard applies to petitions filed by the accused, as well as for those filed by victims. CAAF recently affirmed this standard in the case of *H.V.Z. v. United States*, on a victim's writ petition taken up by CAAF following the Air Force Judge Advocate General's certifying several issues to CAAF.[104]

While the CVRA did not initially specify a standard of review for a victim's writ petition, in May 2015, Congress amended the CVRA to state that appellate courts shall use the "ordinary standards of appellate review" to review a victim's petition for a writ of mandamus.[105] Senator Diane Feinstein explained in the *Congressional Record* that this standard was added to resolve a split within the federal appellate circuits and to set a uniform standard by codifying "the more

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[100] *See* FY15 NDAA, *supra* note 5, at § 535; *see also* FY16 NDAA, *supra* note 5, at § 535. The FY16 NDAA was signed into law on November 25, 2015.

[101] FY15 NDAA, *supra* note 5, at § 535; FY16 NDAA, *supra* note 5, at § 535.

[102] *Howell v. United States,* 75 M.J. 386, 390 (C.A.A.F. 2016) (quoting *United States v. Labella*, 15 M.J. 228, 229 (C.M.A. 1983)).

[103] In order to prevail on a petition for a writ of mandamus, the petitioner "must show that: (1) there is no other adequate means to attain relief; (2) the right to issuance of the writ is clear and indisputable; and (3) the issuance of the writ is appropriate under the circumstances." *Hasan v. Gross,* 71 M.J. 416, 418 (C.A.A.F. 2012) (citing *Cheney v. United States Dist. Court,* 542 U.S. 367, 380–81, 124 S. Ct. 2576, 159 L.Ed. 2d 459 (2004)).

[104] *See H.V.Z. v. United States*, 2024 CAAF LEXIS 410, __ M.J. __ (C.A.A.F. 2024), in which the court held: "We must give effect to, not nullify, Congress's choice to include a lower burden in the CVRA, but not in Article 6b, UCMJ."

[105] Justice for Victims of Trafficking Act of 2015, Pub. L. 114–22, § 113(c)(1), 129 Stat. 227 (May 29, 2015).

victim-protecting rule": the appellate court "shall apply ordinary standards of appellate review," which is legal error or abuse of discretion, rather than the "especially high standard" of "clear and indisputable error."[106]

As previously noted, a significant difference between Article 6b and the CVRA is that the alleged violations for which a crime victim may petition a CCA for a writ of mandamus under Article 6b are more expansive than those covered under the CVRA. The violations covered under Article 6b extend not only to the enumerated rights under Article 6b(a) but also to violations involving the Article 32 preliminary hearing and several evidentiary rules—M.R.E. 412, the military's rape shield law; M.R.E. 513, the psychotherapist–patient privilege; M.R.E. 514, the victim advocate–victim privilege; and M.R.E. 615, excluding witnesses.[107] While the CVRA explicitly requires appellate courts to apply the ordinary standard of review, the standard of review for a petition for a writ of mandamus that does not fall under the CVRA is "clear and indisputable error."[108]

B. Stakeholder Perspectives

Victims' Counsel

The victims' counsel representatives agreed that Congress should amend Article 6b to require appellate courts to use the ordinary standard of review—as required by the CVRA—rather than the extraordinary standard.[109] Counsel opined that using the ordinary standard of review would not result in an excessive number of additional petitions, as the standard of review is only one factor influencing the decision of whether to file a petition.[110] They said, however, that this should not matter—if the victim's rights have been violated, they should have the ability to petition the courts.[111] One counsel argued that any initial increase in the number of petitions filed would likely abate over time as the appellate courts established precedent and clarified issues related to Article 6b.[112] He also pointed out that applying the ordinary standard of review would bring the military in line with federal practice under the CVRA.[113]

Speaking to whether the ordinary standard of review should apply only to the enumerated rights under Article 6b(a) or more broadly to include petitions involving M.R.E.s 412, 513, 514, or 615,

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[106] 160 CONG. REC. S6149, 6150 (daily ed. Nov. 19, 2014).

[107] Art. 6b(e)(1) and (4), UCMJ.

[108] *Cheney v. United States Dist. Court*, 542 U.S. 367, 380–81, 124 S. Ct. 2576, 159 L.Ed. 2d 459 (2004).

[109] *Transcript of DAC-IPAD Policy Subcommittee Meeting* 12 (June 11, 2024) (testimony of CDR DeGroot); 16 (testimony of Col Pedden); 38 (testimony of Mr. Markland); 43 (testimony of Lt Col Dilworth); 45 (testimony of COL McGinley); *see also Transcript of DAC-IPAD Public Meeting* 26 (Mar. 12., 2024) (testimony of CDR DeGroot); 27 (testimony of LtCol Allen).

[110] *Transcript of DAC-IPAD Policy Subcommittee Meeting* 40 (June 11, 2024) (testimony of Col Pedden); 42 (testimony of CDR DeGroot); 43–44 (testimony of Lt Col Dilworth); 45 (testimony of COL McGinley).

[111] *Id*. at 41 (testimony of Col Pedden); 42–43 (testimony of Lt Col Dilworth).

[112] *Id*. at 45–46 (testimony of COL McGinley).

[113] *Id*. at 44.

one counsel argued that Congress and the military should lead by taking a more expansive view.[114]

Appellate Government
Several appellate government counsel argued against a lower standard of review, declaring that writ petitions should be rare—the government and defense use them rarely—and thus they should not be used by victims who simply don't like the trial judge's ruling.[115] However, one counsel pointed out that having a high standard for writ appeals is bad for the development of the law. Noting that many counsel and military judges are unclear on the law surrounding victims' rights, he also observed that military victims shouldn't have fewer rights than civilian victims.[116]

Appellate Defense
The appellate defense counsel agreed that the standard of review should be the same for all parties—clear and indisputable error.[117] One counsel stated that allowing victims to meet a lower standard of review would enable them to second-guess the military judge and would give them too much leverage.[118] Counsel noted that victims already have a right not possessed by the accused, who unlike victims do not have the right to appeal evidentiary rulings directly to the CCA.[119] Regarding the difference between the rights of civilian victims under the CVRA and the rights of military victims, one counsel noted that they are different systems with different rights for the parties.[120]

Counsel also pointed out that Article 6b affords broader rights to victims than does the CVRA—including the ability to challenge rulings on M.R.E. 412, 513, 514, and 615 issues—so it is only appropriate that the standard of review be higher.[121] One counsel said that she thought that for the enumerated rights under Article 6b, the results will be the same no matter what the standard is.[122]

Victim Advocacy Organizations
Mr. Guilds argued that it is essential for victims at the appellate level to have the ordinary standard of review.[123] He stated that until the standard is changed, victims will continue to be ignored and will be vulnerable to a system that does not adequately protect them.[124]

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[114] *Id*. at 68 (testimony of Col Pedden).

[115] *Transcript of DAC-IPAD Public Meeting* 31–32 (June 11, 2024) (testimony of Col Jennings); 32 (testimony of COL Burgess); 32 (testimony of Mr. Fowles).

[116] *Id*. at 33–34 (testimony of Col Talcott).

[117] *Id*. at 97–98 (testimony of Ms. Snyder); 98 (testimony of Mr. Cook); 99 (testimony of Mr. Potter); 99 (testimony of Ms. Marinos).

[118] *Id*. at 98 (testimony of Ms. Snyder).

[119] *Id*. at 98 (testimony of Mr. Cook).

[120] *Id*. at 100 (testimony of Ms. Marinos).

[121] *Id*. at 100–101 (testimony of Ms. Marinos); 102 (testimony of Ms. Snyder).

[122] *Id*. at 102 (testimony of Ms. Snyder).

[123] *Id*. at 130 (testimony of Mr. Guilds).

C. Analysis and Recommendation

The DAC-IPAD recommends that Congress amend Article 6b to mirror the CVRA by adding a provision stating that the appellate courts shall apply the "legal error or abuse of discretion" standard of review in reviewing a crime victim's petition for a writ of mandamus. The Committee can see no military-specific reason that crime victim petitions in military courts-martial should be required to meet a higher standard of appellate review than crime victim petitions filed in federal court.

The Committee recommends, however, that the ordinary standard of appellate review apply only to the enumerated rights under Article 6b(a) and that the higher standard of review of "clear and indisputable error" continue to apply to victims' petitions asserting victims' rights under the evidentiary rules. In this way, Article 6b will more closely emulate the CVRA.

Draft Recommendation 4: Congress amend Article 6b(e), UCMJ, to add a new subparagraph 4(D):

The Courts of Criminal Appeals and the Court of Appeals for the Armed Forces shall apply the ordinary standard of appellate review, legal error or abuse of discretion, in reviewing a victim's petition for a writ of mandamus asserting their enumerated rights under Article 6b(a). However, the higher standard of review, clear and indisputable error, shall continue to apply to review of alleged violations of Military Rules of Evidence 412, 513, 514, and 615.

VII. CONFORMING AMENDMENTS

In addition to the substantive recommendations in this report, the DAC-IPAD recommends several nonsubstantive conforming amendments to Article 6b.

Draft Recommendation 5: Congress amend Article 6b(e), UCMJ, to add the following conforming changes:

a. Strike the words "by Court of Criminal Appeals" in the title of Article 6b(e).
b. Renumber what is currently Article 6b(e)(3)(A)–(C) to be Article 6b(e)(4)(A)–(C).
c. Renumber what is currently Article 6b(e)(4) to be Article 6b(e)(5).
d. In renumbered paragraph (e)(5), strike the words "Paragraph (1)" and substitute the words "This subsection."

VIII. CONCLUSION

The DAC-IPAD's recommendations, if adopted, will align Article 6b enforcement rights more closely with enforcement rights under the CVRA and ensure that military crime victims have the same right to be heard at the trial court as their civilian counterparts in the federal court system. Article 6b has evolved since its passage in the FY14 NDAA, and passage of these

[124] *Id*. at 130–31.

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GENERAL COUNSEL

AUG 6 3 2024

The Honorable Karla N. Smith
Chair
Defense Advisory Committee on Investigation, Prosecution, and
Defense of Sexual Assault in the Armed Forces
One Liberty Center
875 N. Randolph Street, Suite 150
Arlington, VA 22203

Dear Judge Smith:

I am writing to ask the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD) to study and prepare a report on support systems currently available to Service members charged with court-martial offenses and potential improvements to those systems.

Being charged with a court-martial offense may severely affect accused Service members' mental health. In the civilian context, being charged with a criminal offense is associated with a heightened prevalence of suicide.[1] A recent report by the Suicide Prevention and Response Independent Review Committee indicates a similar risk in the military context.[2]

Available support systems should address and mitigate these risks for accused Service members. To that end, I request that, as part of its study, the DAC-IPAD evaluate programs in civilian criminal justice systems that provide support for individuals facing criminal charges and assess whether similar programs might be appropriate in a military context. To facilitate the submission of any legislative proposals resulting from the study during the FY 2027 legislative cycle, I request that the DAC-IPAD submit its report to the DoD General Counsel, through the Deputy General Counsel for Personnel and Health Policy, no later than June 2, 2025.

Thank you for the DAC-IPAD's work to improve the military investigative and justice systems. By generously donating your time and expertise, you and the other DAC-IPAD members have significantly improved the systems that serve our Nation's warfighters.

Caroline Krass

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1 *See, e.g.*, Jennifer Piel, *Suicide Risk Following Criminal Arrest*, PSYCHIATRIC TIMES, Dec. 30, 2020, https://www.psychiatrictimes.com/view/suicide-risk-following-criminal-arrest.

2 Report, Suicide Prevention & Response Independent Review Committee, *Preventing Suicide in the U.S. Military: Recommendations from the Suicide Prevention and Response Independent Review Committee*, at 46, 93 (2023), https://media.defense.gov/2023/Feb/24/2003167430/-1/-1/0/SPRIRC-FINAL-REPORT.PDF.

SUMMARY OF TRIAL DEFENSE SERVICES' SUICIDE POLICIES

1. U.S. Army.

Policy: USATDS (Army Trial Defense Services) Policy[1] 2024-01 addresses Suicide prevention within the trial defense organization.

a. During the intake or initial meeting with a client who is pending a special or general court-martial, DC will provide and discuss with the client a memorandum (mandatory for courts martial clients; discretionary to others) that includes resources on suicide prevention and acts as a starting point for conversations on the topic.

b. Counsel are required to notify Senior Defense Counsel and Regional Defense Counsel and to take action to prevent suicide when the counsel believes a client is suicidal.

c. The policy includes a Prevention tip card with warning signs and risk factors and the "ASK" card: Ask; Care; Escort.

d. All defense counsel receive instruction on suicide awareness at the defense counsel orientation course, upon onboarding at the duty station, and during regional trainings throughout the year.

2. U.S. Air Force[2].

Policy: The Air Force Trial Defense Division (JAJD) Operating Instruction (OI) 51-204, paragraph 1.9.4 contains suicide prevention training and guidance on responding to suicidal clients.

a. The Air Force Trial Defense Division (JAJD) Defense Orientation Course (DOC) provides a block of instruction on suicide prevention.

b. All JAJD personnel are required to review the JAJD Suicide Prevention slides upon assuming their respective positions.

c. All JAJD personnel must also utilize the JAJD Suicide Prevention Memorandum (Tools to Cope with Stress) with every client which includes a list of resources.

d. ADCs or DPs must immediately seek the counsel of their supervising Senior Defense Counsel and/or Chief Division Defense Counsel concerning suicidal or potentially suicidal clients.

3. U.S. Marine Corps.

Policy: CDC (Chief Defense Counsel) Policy 2.4B addresses suicide awareness and response to clients in crisis. It includes enclosures of a "Coping with Stress" resource memorandum; the Columbia Suicide Severity Rating Scale with questions and assessment tools; and a mnemonic reference: IS PATHWAY WARM? (ideation; substance abuse; purposelessness; anger; trapped; hopelessness; withdrawing; anxiety; recklessness; and mood change). The policy is founded on trust, training, and risk assessment.

a. Suicide training is required at the defense counsel Military Justice Orientation Course; regionally twice a year; and annually at the Chief Defense Counsel's Worldwide training.

b. All counsel are required to read the suicide policy as part of their onboarding procedures.

c. Reporting is required to the Chief Defense Counsel of all suicidal ideations, gestures, attempts, and completions of clients.

d. Assessment is mandatory of all clients at the initial meeting using the provided mnemonic and throughout the attorney client relationship.

e. All clients are directed to add the suicide hotline 988 number to their cell phone.

f. Detailed guidance is provided in how to respond to a suicidal client or a client that successfully commits suicide.

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[1] Though not the focus of this OGC tasker, vicarious trauma is an issue for defense counsel and is also addressed in each organization's policy or guidance.

[2] Outside of the Trial Defense Services but for the benefit of justice-involved Airmen and Guardians, the Air Force has instituted a checklist for members under investigation requiring a warm handoff after notification of investigation or charges and a Limited Privilege Suicide Prevention program. Both of these initiatives were recommended to be instituted DoD-wide by the Suicide Prevention IRC.

SUMMARY OF TRIAL DEFENSE SERVICES' SUICIDE POLICIES

4. U.S. Navy (and Coast Guard)

Policy: JAG/CNLSCINST 1720.1, includes Office of Judge Advocate General (OJAG) suicide prevention crisis response plan and OJAG suicide-related behavior response checklist, and emergency phone numbers.

a. Defense training: Navy provides training on suicide awareness/prevention to all new defense counsel at the Military Justice Orientation Course[3], and annually. Training is specific to suicide prevention and is also addressed in classes on handling clients.

b. Defense Specific guidance: Defense Counsel Assistance Program Newsletter publication March of 2024 addressed ethical considerations, questions to ask, and actions to take as well as guidance for counsel after a client commits suicide.

[3] The Navy's Military Justice Orientation course is also attended by Coast Guard and Marine Corps defense counsel.

Required Office of Special Trial Counsel (OSTC) Reports and Briefings

NDAA	Source	Due Date(s)	Frequency	Contents
2022	Sec 531(c)	27 Dec 2023	1x	A. Plan for: (1) Staffing billets for: a) STCs, and b) DCs, and (2) Professional development of MJ B. Estimate of resources required for implementation C. Explanation of other staffing required for implementation D. Description of how us of STCs will affect MJ system E. How Svc Sec will emphasize litigation F. Add'l resources required
2022	Sec 532(c)	27 Jun 2023	Qtrly until OSTCs est'd	SECDEF and Svc Sec's brief SASC and HASC on progress to get OSTCs established and fully operational
2022	Sec 539F	1 Mar 2022	1x	Briefing and Report to HASC, SASC, Transportation Committees: 1. Number of additional personnel and personnel authorizations to implement OSTC 2. Basis for number, including: A. Org structure B. Nature of duties and functions C. Optimum caseload goal for investigators, lab personnel, DCs, STCs, MDCs, MJs, and magistrates D. Any req'd increase to end strength 3. Nature and scope of any req'd contracts 4. Amt and types of add'l funding req'd 5. Add'l authorities req'd 6. Add'l Info as determined by Svc Sec
2022	Sec 547(c)	27 Dec 2023	1x	Plan to assess effects of changes in the law [Result: Performance Measures developed by the DLSA]
2023	Sec 541(e)	23 Jun 2023	1x	Briefing to HASC and SASC 1. Duties to be transferred from CAs to STCs or MJs 2. Positions to which duties will be transferred 3. Any law or RCM which requires amendment or modification
2023	Sec 541(e)	1 Feb 2025	Annually for 5 years	Report to HASC and SASC: Assessing the holistic effect of reforms including:

				1. Overall assessment of effect on mil jus system and GOAD 2. Percentage of caseload and C-Ms assessed as meeting or potentially meeting "covered offense" (by service) 3. Prevalence and data re disposition of cases by commanders after deferral by STC (by offense and service) 4. Assessment of effect on NJP re covered and non-covered offenses 5. Description of resources and personnel required for maintenance of reforms 6. Description of other factors considered to be important by SECDEF
2023	Sec 549A	NLT 1 Mar 2023 Last Brief: Aug 2024	Every 180 days until 31 Dec 2024	Briefing and report to HASC, SASC, Transportation Committees: 1. Number of personnel and personnel authorizations req'd (mil and civ) 2. Basis for numbers, including: A. Org structure B. Nature of duties C. Optimum caseload for investigators, lab personnel, DCs, STCs, MDCs, MJs, magistrates, and paralegals D. Any req'd increase to end strength 3. Nature of scope of req'd contracts 4. Add'l funding req'd 5. Add'l authorities req'd 6. Add'l info as determined by Svc Sec

Department of the Army

FY23 NDAA § 549A Briefing

Resourcing Required for
Implementation of Military Justice Reform

POC: COL Chris Martin
Chief, Criminal Law Division, OTJAG
571-256-8131

As of 2 AUG 2024

Additional Personnel Required

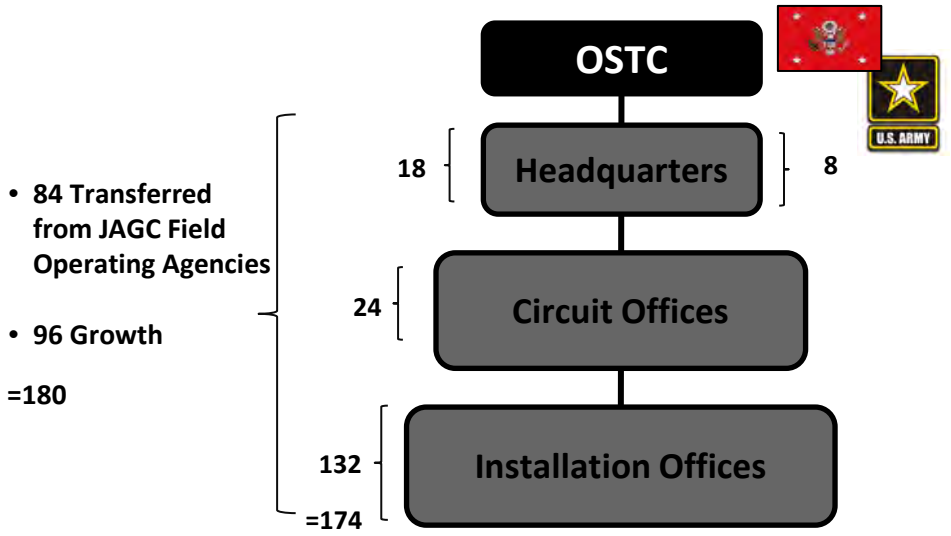
- The SA approved targeted personnel growth for the OSTC. Its structure will include 159 personnel in FY24 and will grow to 180 personnel in FY25. Each total reflects a combination of transferred existing personnel and new growth and includes both uniformed and civilian personnel. The JAG Corps has transferred 84 existing billets to this structure from other JAG Corps Field Operating Agencies.

- The Army will grow an additional 96 billets to complete the structure, including billets to provide direct support in areas such as human resources, budget, and information technology.

- To ensure parity and fairness in the military justice system, resourcing for the Trial Defense Service will grow by approximately 60 billets across FY25.

OSTC Structure and Growth

Tier 1: Required Structure	Tier 2: Direct Support	Tier 3: Enablers



OTJAG

USALSA

TJAGLCS

- **172 Previously Approved**
  - 17 HQs personnel
  - 8 Circuit Special Trial Counsel
  - 8 Circuit Special Trial NCO
  - 64 Special Trial Counsel
  - 39 Special Trial NCOs
  - 30 Special Victim Witness Liaisons
- **2 Removed**
- **3 Transferred from JAGC**
- **1 Added - STC Alaska**

- **8 Additions**
  - Communication Director
  - Operations Attorney
  - Admin Officer
  - IT Officer
  - Financial Manager
  - Budget Analyst
  - HQ Civilian Paralegal (2)

- **1 Previously Approved**
  - Wellness Coordinator
- **11 Additions**
  - 3 Advocacy Center
  - 3 Recruiting
  - 1 Retention
  - 1 Military Justice Data Analyst
  - 3 Rehearing Center

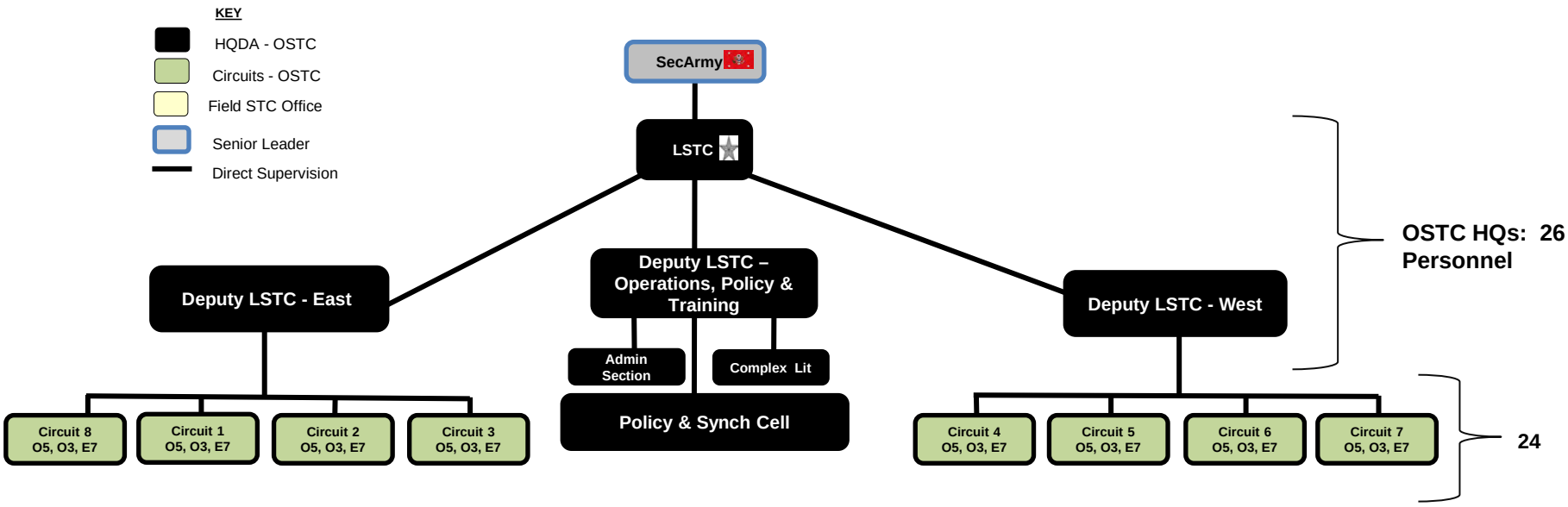
180 Total Billets

12 Total Billets

Required Structure is ***The Cost of Independence***

Direct Support and Enablers provide Capabilities Required for ***Sustained Success***

OSTC Organizational Structure



Special Trial Counsel Teams Spread Across Installations
Phased Approach
Current billets = 43 Special Trial Counsel, 39 Special Trial NCOs, 30 Special Victim Liaisons

FY25 total billets = 57 Special Trial Counsel (O4/O3), 45 Special Trial NCOs, 30 Special Victim Liaisons

132

Total = 180

180 Total Billets
- **84 Transferred from JAGC Field Operating Agencies**
- **96 Growth**

TDS Structure and Growth

Tier 1: Required Structure	Tier 2: Direct Support	Tier 3: Enablers

- 206 Current TDS billets
- 62 Approved Growth

= 268

Trial Defense

- 22 — **Headquarters**
- 24 — **Circuit Offices**
- 222 — **Installation Offices**

= 268

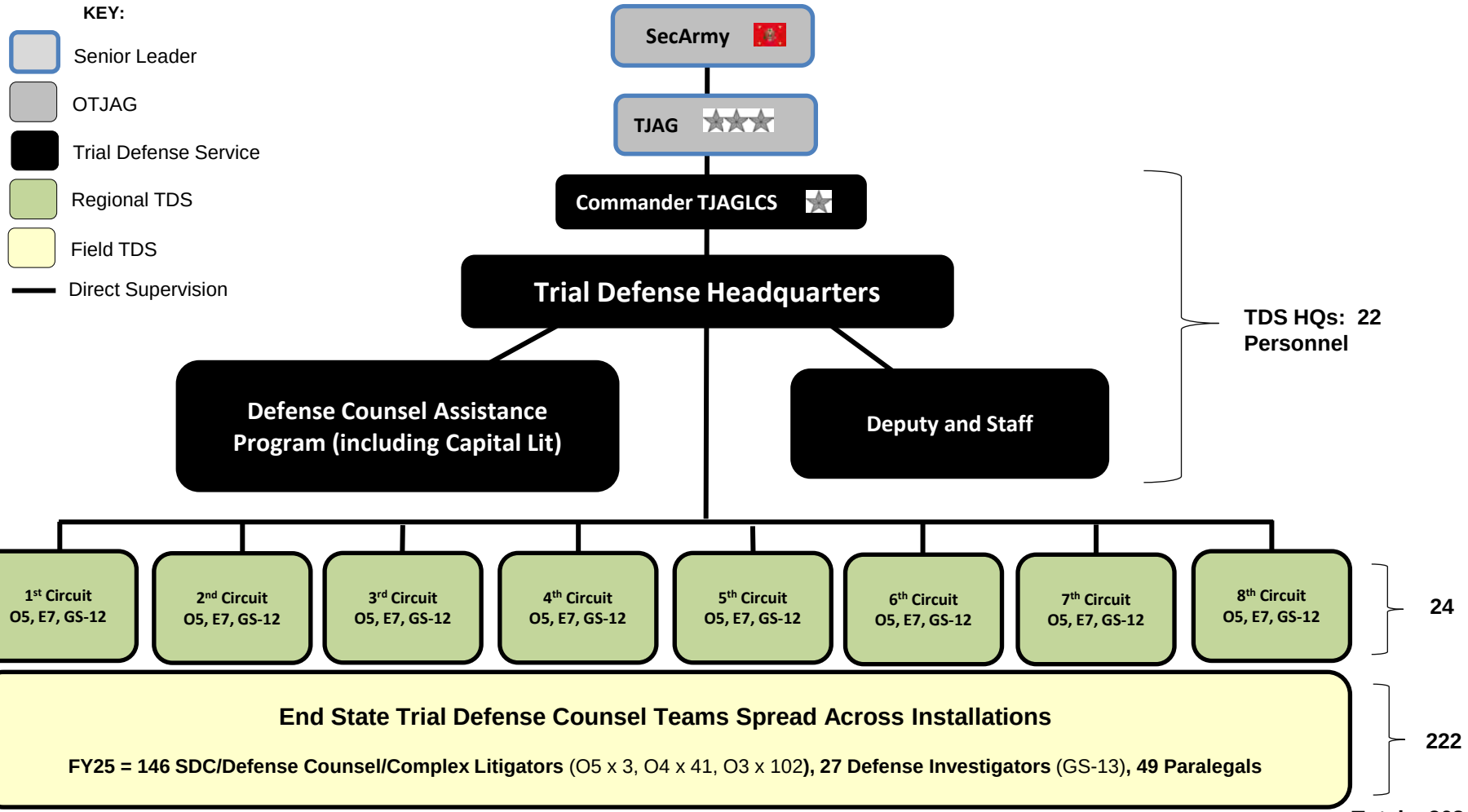
OTJAG

USALSA

TJAGLCS

Tier 1: Required Structure	Tier 2: Direct Support	Tier 3: Enablers
• 62 Previously Approved • 04/05 Complex Litigation Attorneys supporting Career Litigation Billets (IRC 1.4) • 28 Previously Approved Defense Investigators (FY20 NDAA) • Paralegal Manpower Study Complete (IRC 1.7.e.)	• Pending independent funding of Expert/Lay Witnesses	• TJAGLCS as the parent FOA currently provides limited personnel, budget, operations, and logistical support
268 Total Billets		**0 Additional Total Billets**

TDS Structure



268 Total Billets – *covered and noncovered offenses*

- **56 Growth Approved by SECARMY - supports Career Litigation Billets (IRC 1.4)**
- **28 Defense Investigators - previously approved by SECARMY (FY20 NDAA)**
- **6 Billets to provide Direct Support**
- **SECARMY directed manpower study complete (IRC 1.7.e)**

Optimal Caseload - Attorneys

Personnel Category	Caseload Goal
Special Trial Counsel	50-75 Law Enforcement Reports/Year* (7-10 Courts-Martial/Year)
Special Victim Paralegal	50-75 Law Enforcement Reports/Year* (7-10 Courts-Martial/Year)
Defense Counsel	30 clients per counsel at any one time (8-16 Courts-Martial/Year)
Defense Paralegal	30 clients per counsel at any one time (8-16 Courts-Martial/Year)
Special Victim Counsel	25 clients per counsel at any one time (FY 20 NDAA, Sec. 541)
Military Judge	30-50 Courts-Martial/Year**
Military Magistrate	The Army does not currently utilize full time military magistrates

*The addition of sexual harassment as a covered offense will require additional special trial counsel to maintain an optimal case load based on reports of covered offenses.

**Additional evaluation of the optimal caseload goal and military judge personnel authorizations may be required if military judges are given additional pre-referral authorities.

Optimal Caseload – Law Enforcement

The nature of laboratory examinations make identifying an "optimal" case load difficult. Each case is different and involves varying laboratory branches depending on the type of evidence involved. Cases are processed sequentially to minimize duplicative efforts.

- A single case may involve one or multiple laboratory forensic disciplines
- When several forensic services are involved a priority of testing is based on the needs of the case
- Laboratory processing times vary based on the number of evidentiary items submitted in the case
- All Case Submissions: FY23 Average Turn Around Time was 22 Days
- Sexual Assault Case Submissions: FY23 Average Turn Around Time was 36 Days

Category of Personnel	Caseload Goal
CID Special Agents Note: An open case means an active full investigation and does not include preliminary inquiries or open cases pending adjudication that may require investigative efforts.	
Covered Offense Special Agent	The optimum caseload average for the covered offenses is 6-8 open cases per CID agent at any one time.
Laboratory Personnel *Note This optimum average considers a caseload to be a small to medium size case with 1-5 items of evidence	
Forensic Case Management	3-4 Open cases at any one time
Latent Prints	2 Open cases at any one time
Drug Chemistry	3-4 Open cases at any one time
Trace Evidence	2 Open cases at any one time
Firearms	2 Open cases at any one time
CODIS	Not applicable
DNA	3 Open cases at any one time
Digital Evidence	1 Open case at any one time
Forensic Documents	1 Open case at any one time

Department of the Air Force

FY23 NDAA § 549A Briefing

Resourcing Required for Implementation of Military Justice Reform

Special Trial Counsel

- **FY23 OSTC Staffing at 1 headquarters office & 6 district field offices:**
  - 34 active component judge advocates
  - 6 reserve component judge advocates
  - 2 senior enlisted paralegals
  - 6 enlisted paralegals

- **Additional OSTC personnel will be added each year based on:**
  - Projected increase of cases over which OSTC has authority
  - Meeting optimal caseload goals for attorneys overseeing investigations and prosecutions
  - Advancing investigation and prosecution timelines

- **By FY27, anticipate 82 OSTC billets, including:**
  - 67 judge advocate billets
  - 15 paralegal and civilian support billets

Other Personnel

- **OSTC Additional Personnel:**
  - 2 OSI agents at OSTC HQ (FY23)

- **Outside OSTC:**
  - 2 additional AF/JA Resource Advisors (FY24)
  - 1 OSI agent at JAG School (FY23-24)
  - 3 additional Defense Counsel (FY26-27)
  - 3 additional Victims' Counsel (FY26-27)
  - 3 additional Military Judges (FY26-27)

OSTC Structure & Duties

- **Leadership:**
  - Lead Special Trial Counsel with subordinate judge advocates and paralegals at regional Districts, serving the Air and Space Forces
  - Establishes prosecution priorities for cases with covered offenses
  - Leads policy-making, assessment, and oversight efforts within OSTC
  - Teams with Air Force JAG Corps in recruitment, retention, training, and development for OSTC personnel

- **Offense Triage & Administration:**
  - Assess incoming cases and oversee covered offenses
  - Execute OSTC's exclusive and discretionary authority (i.e., right of first refusal) by triaging initial reports of new cases
  - Projected # of total investigations for OSTC to triage per year: approx. 11k-13k*

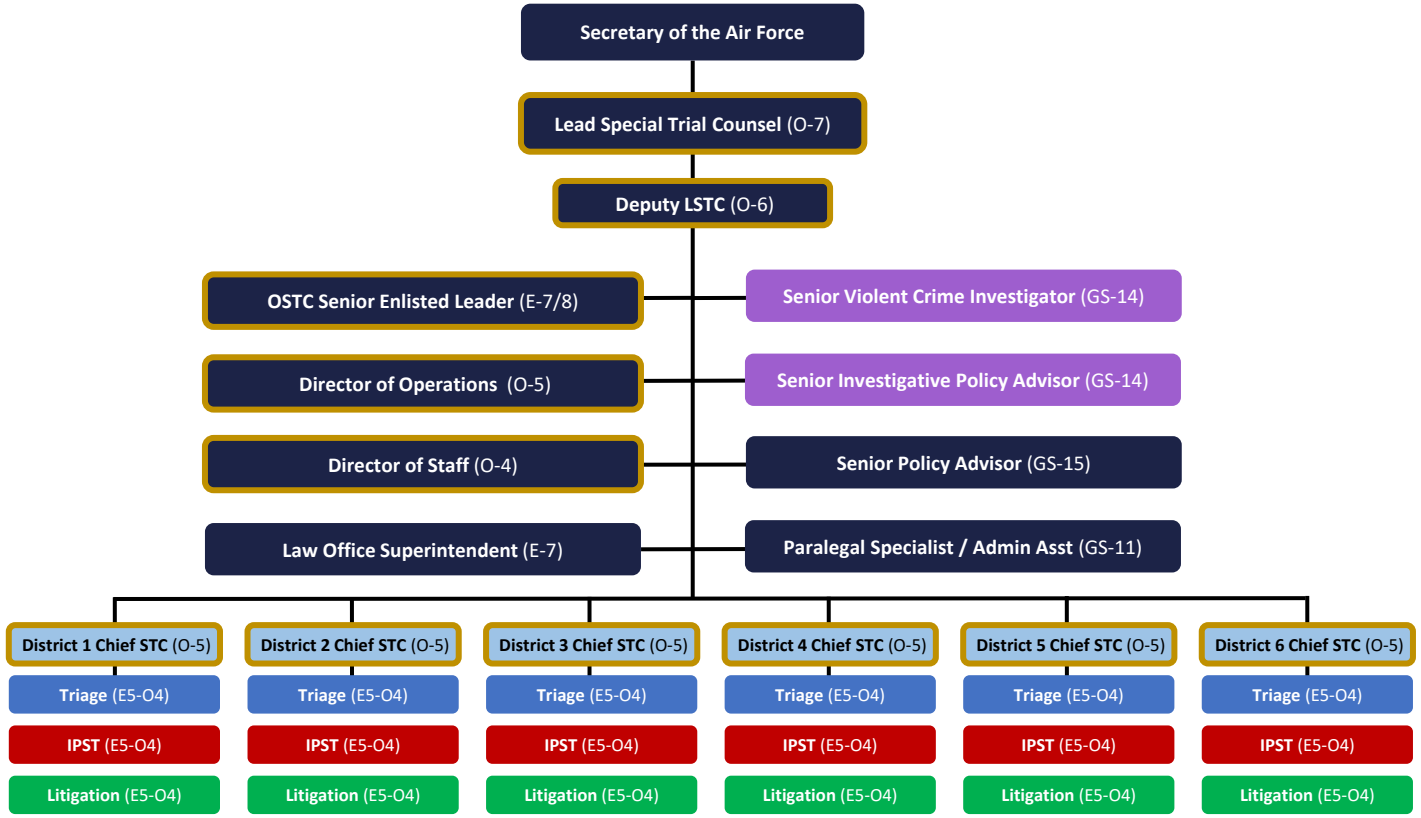
- **Investigation & Prosecution Support Teams:**
  - Integrate with base level investigators, prosecutors, and support agencies
  - Provide substantive guidance throughout the course of an investigation, including support for subject/victim/witness interviews, search and seizure authorization, and evidence collection
  - Projected # of covered offense investigations per year: approx. 1,500-1,800*

- **Litigation:**
  - Serve as lead counsel in all covered, known, and related offense cases OSTC refers to court-martial
  - Execute and oversee key prosecutorial and disposition decisions in cases involving covered offenses
  - Projected # of covered offense courts-martial per year based on historical data: approx. 130-140*

*Based on a 6-year review of historical data

Organizational Structure

OSTC is comprised of a Headquarters office and six District locations



Other Personnel Duties & Functions

- **Defense Counsel**
  - Serve as lead counsel on felony level complex courts-martial including, but not limited to covered offenses
  - Lead and mentor junior defense personnel to develop advocates capable of filling senior litigation positions
  - Provide advocacy training at 2-3 conferences per year

- **Victims' Counsel**
  - Advise, advocate for, and empower crime victims worldwide
  - Lead and mentor junior victims' counsel personnel to develop advocates capable of filling senior litigation positions
  - Represent victims during the investigative, military justice, and disciplinary process

- **Military Judges**
  - Preside over General Courts-Martial and Special Courts-Martial
  - Serve as preliminary hearing officer in Article 32 hearings
  - Act on applications filed under Article 30a

Annual Caseload Goals

- **Special Trial Counsel:** 8-12 courts-martial per Special Trial Counsel
- **Military Judges:** 25-30 courts-martial per military judge
- **Military Defense Counsel:** 8-12 courts-martial per Defense Counsel
- **Victims' Counsel:** 20-25 cases per Victims' Counsel
- **Paralegals:** 100-150 investigations per paralegal
- **Air Force Office of Special Investigations:**
  - Approx. 10 felony level SVIP offenses each year
  - 20+ other investigations
- **Security Forces Investigators:**
  - 60-100 cases per installation IAW AFI 71-101
  - Ex: domestic violence, drug use and possession, larceny, etc.
- **Laboratories:**
  - 3 forensic laboratories for evidence examination
  - Caseloads vary based on the type of forensic examination performed

Department of the Navy
FY23 NDAA § 549A(a)(1) Briefing

Resourcing Required for
Implementation of Military Justice Reform
U.S. Navy
August 2024

Additional Personnel and Personnel Authorizations (Military and Civilian) Required

Sec. 549A(b)(1) – ***The number of personnel and personnel authorizations (military and civilian) required by the United States Navy to implement and execute the provisions of the NDAA, Subtitle D by 27 Dec 2023.***

- The United States Navy previously projected personnel growth of 49 additional military and civilian personnel to successfully implement and execute Subtitle D.
- With the new requirements of the FY23 NDAA becoming effective, specifically the addition of sexual harassment as a covered offense and the expansion of appellate jurisdiction, the Navy JAG Corps is assessing the impact of these provisions to determine whether additional resourcing will be necessary. These new requirements may generate additional manpower (officer, enlisted & civilian) needs that could also impact equipping, training and facility costs.

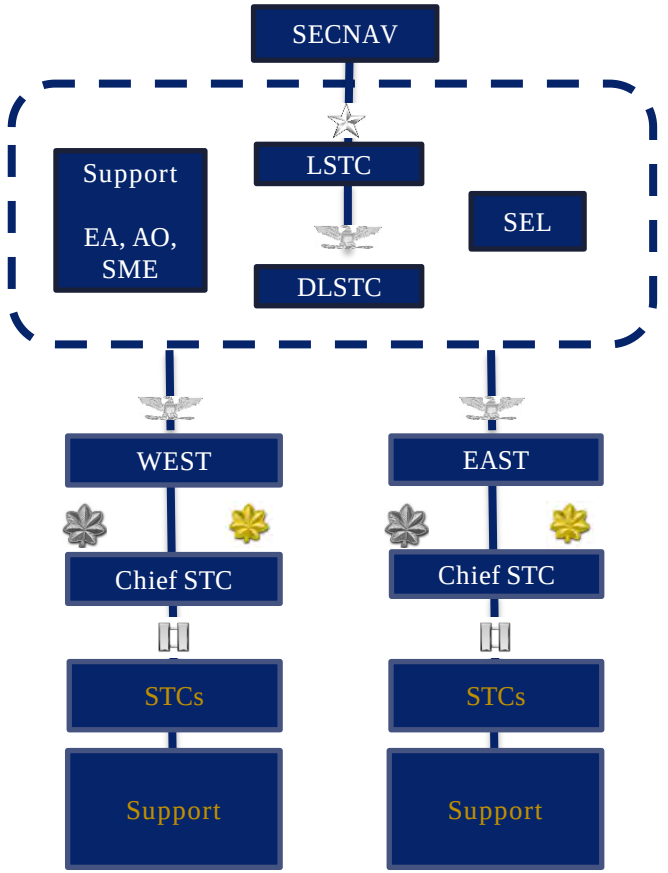
Basis for number of additional personnel and personnel authorizations

Sec. 549A(b)(2)(A) – *A description of the organizational structure in which such personnel or groups of personnel are or will be aligned.*

The United States Navy established a lean OSTC headquarters element with primary policy and oversight responsibilities.

Senior O-6 litigators supervise two main regional offices (Norfolk and San Diego) and eight other area offices located in Navy Fleet concentration areas and will provide oversight, coordination, decision-making, and prosecution. Special Trial Counsel are supported by full-time legal and administrative support personnel, including non-STC judge advocates serving in "under instruction" and training roles. OSTC offices are in the following locations: Washington Navy Yard/Joint Base Anacostia-Bolling, Norfolk, Groton, Mayport, Great Lakes, San Diego, Bremerton, Pearl Harbor, Yokosuka, and Naples.

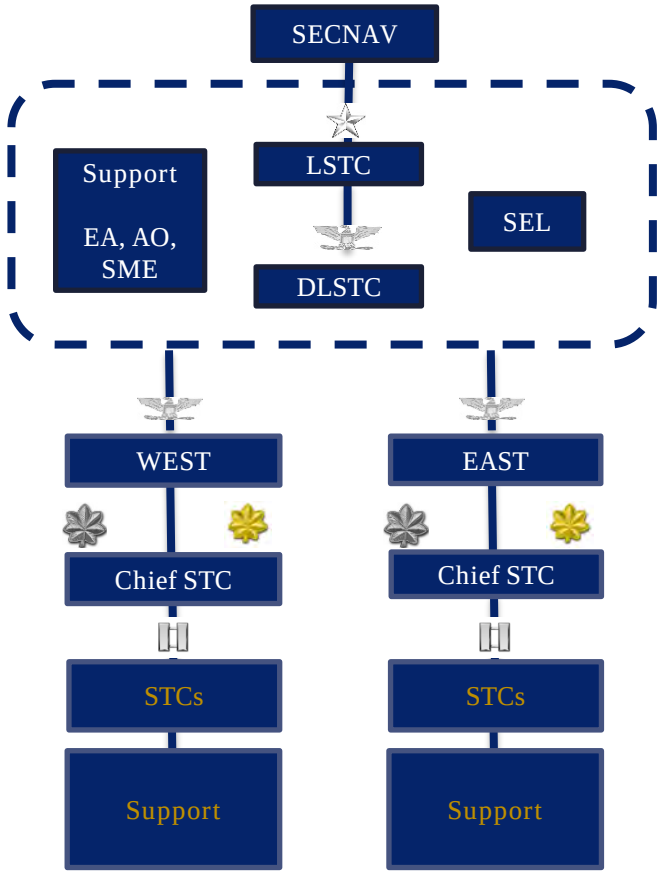
Total OSTC manning is approximately 90 personnel, many of these billets are supported through shifting current resources. Accordingly, the United States Navy projects an *increase* of up to 49 personnel to implement and execute the provisions of the FY22 NDAA.

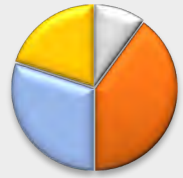


Proposed OSTC Organizational Diagram

Basis for number of additional personnel and personnel authorizations (cont'd)

Sec. 549A(b)(2)(B) – The nature of the duties and functions to be performed by any such personnel or groups of personnel across the domains of policy-making, execution, assessment, and oversight.



Lead STC (O-7) creates OSTC policy, supervises, and makes disposition decisions and refers the most significant allegations including capital cases.	
Regional Lead STC (O-6) are the direct supervisor to line STCs. They make disposition determinations and refer most serious offenses. They may be detailed to courts-martial when appropriate.	
Line Chief STC (O-5/O-4) manage local teams, oversee investigations; mentor junior counsel; refer remaining offenses; and try courts-martial.	
Non-STC judge advocates and paralegals assist with case reviews and provide legal research and analysis; operate under instruction with STC.	

Basis for number of additional personnel and personnel authorizations

Sec. 549F(b)(2)(C) – *The optimum caseload goal assigned to personnel who are or will participate in the military justice process.*

The United States Navy used the following initial estimates for determining optimum military justice workload, recognizing that every case is unique and presents its own factors contributing to personnel workload:

- Special Trial Counsel: Lead counsel on approximately 50 cases per year resulting in 8 completed courts-martial per year.
- Military Defense Counsel: Approximately 8 completed courts-martial per year, in addition to support provided for administrative separation, personal representation, and advice provided in conjunction with NCIS interviews.
- Victims' Legal Counsel: As identified by 10 U.S. Code § 1044e, ensuring that the average caseload for each VLC is no more than 25 clients at any given time.
- Paralegals:
    - Trial Paralegals: Approximately 50 cases per year, commensurate with their assigned lead counsel as part of a trial team.
    - VLC Paralegals: Approximately 150 cases per year, commensurate with the caseload across their AOR. The paralegal role with VLCP is developing, but they expect varying levels of involvement with each case for the paralegals.
    - DSO Paralegals: Approximately 8 completed courts-martial per year, in addition to support provided for the DSO's administrative separation, PERSREP, and administrative support missions.
- Military Judges: Presiding over approximately 25-35 courts-martial per year.
- Magistrates: The United States Navy does not currently utilize magistrates. The United States Navy is cognizant of the authorities granted to magistrates, and continues to evaluate the positions potential usefulness as requirements develop.
- Laboratory personnel: Generally, the U.S. Army Criminal Investigation Laboratory (USACIL) provides all laboratory support for United States Navy covered offenses.
- NCIS: Maintaining no more than 10 cases per investigator at any time.

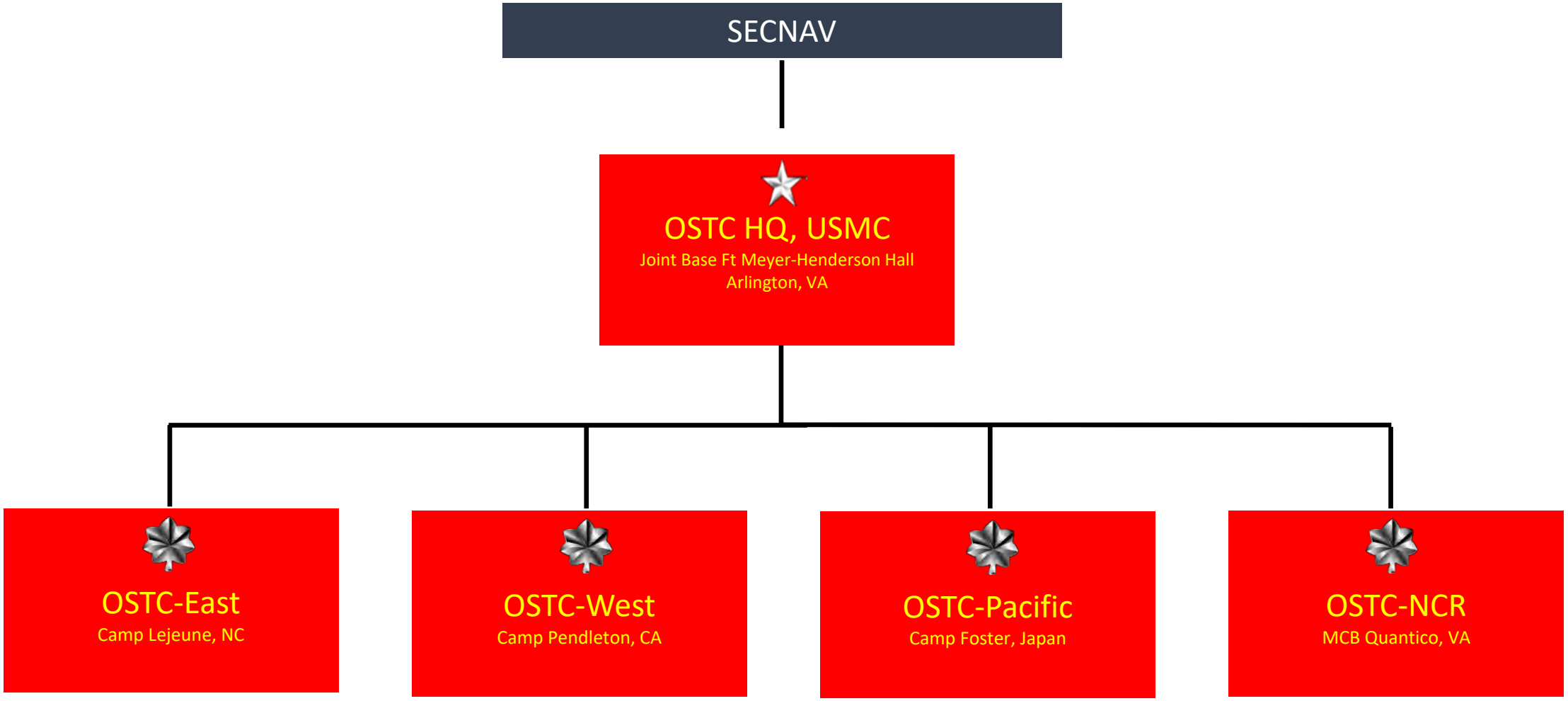
These caseload goals inform the United States Navy planning contained herein. These goals are subject to change, however, based on the results of any Department of Defense study undertaken pursuant to IRC Recommendation 1.8.

Department of the Navy
FY23 NDAA § 549A Briefing
U.S. Marine Corps
August 2024

Resourcing Required for

Implementation of Military Justice Reform

USMC OSTC Structure



USMC OSTC HQ

SECNAV

Lead STC

Deputy Lead STC

Senior Enlisted Advisor

OPSO (STC)

Deputy OPSO (STC)

OSTC SNCO

GS-15

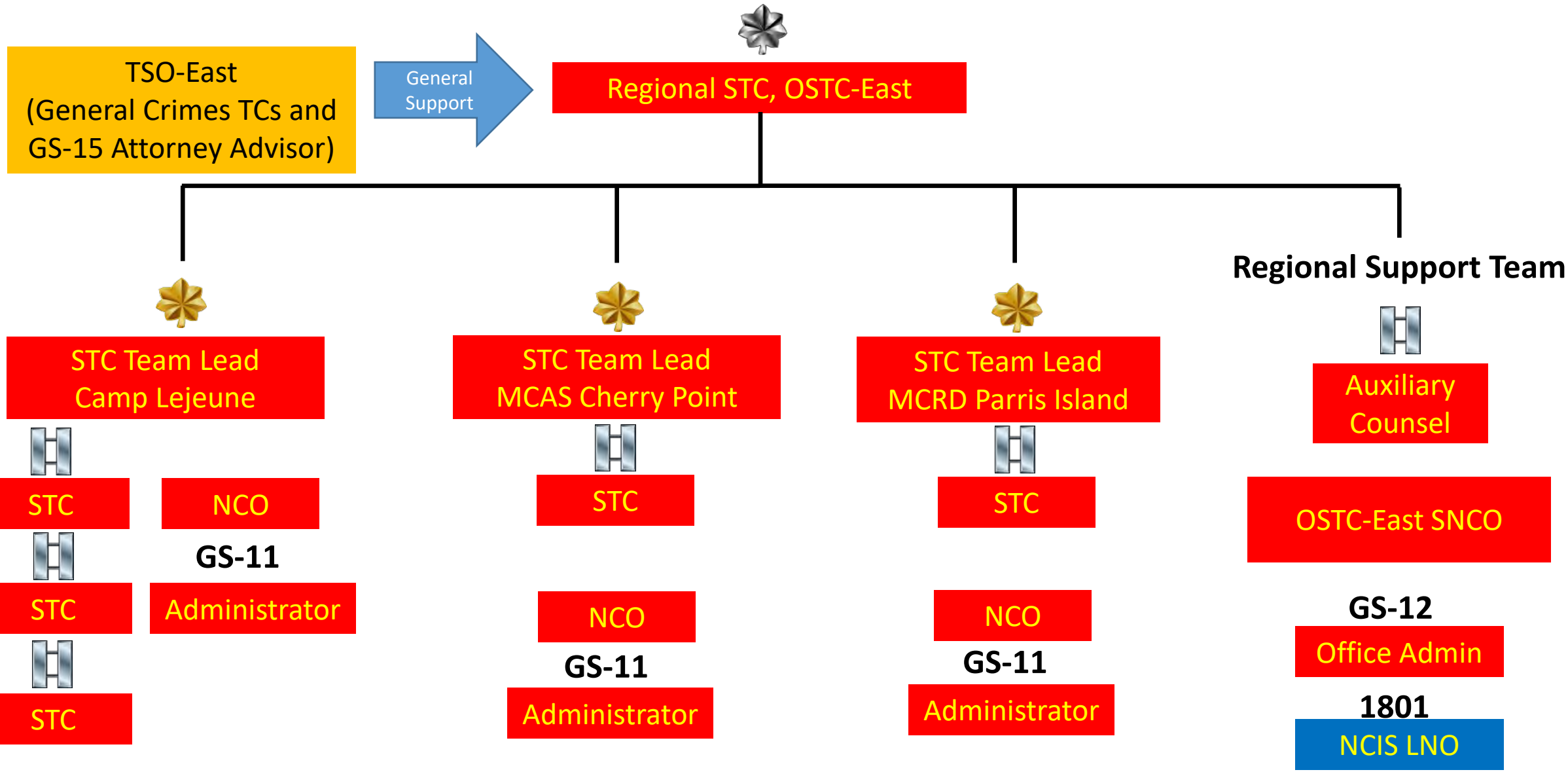
Training and Policy Attorney Advisor

GS-13

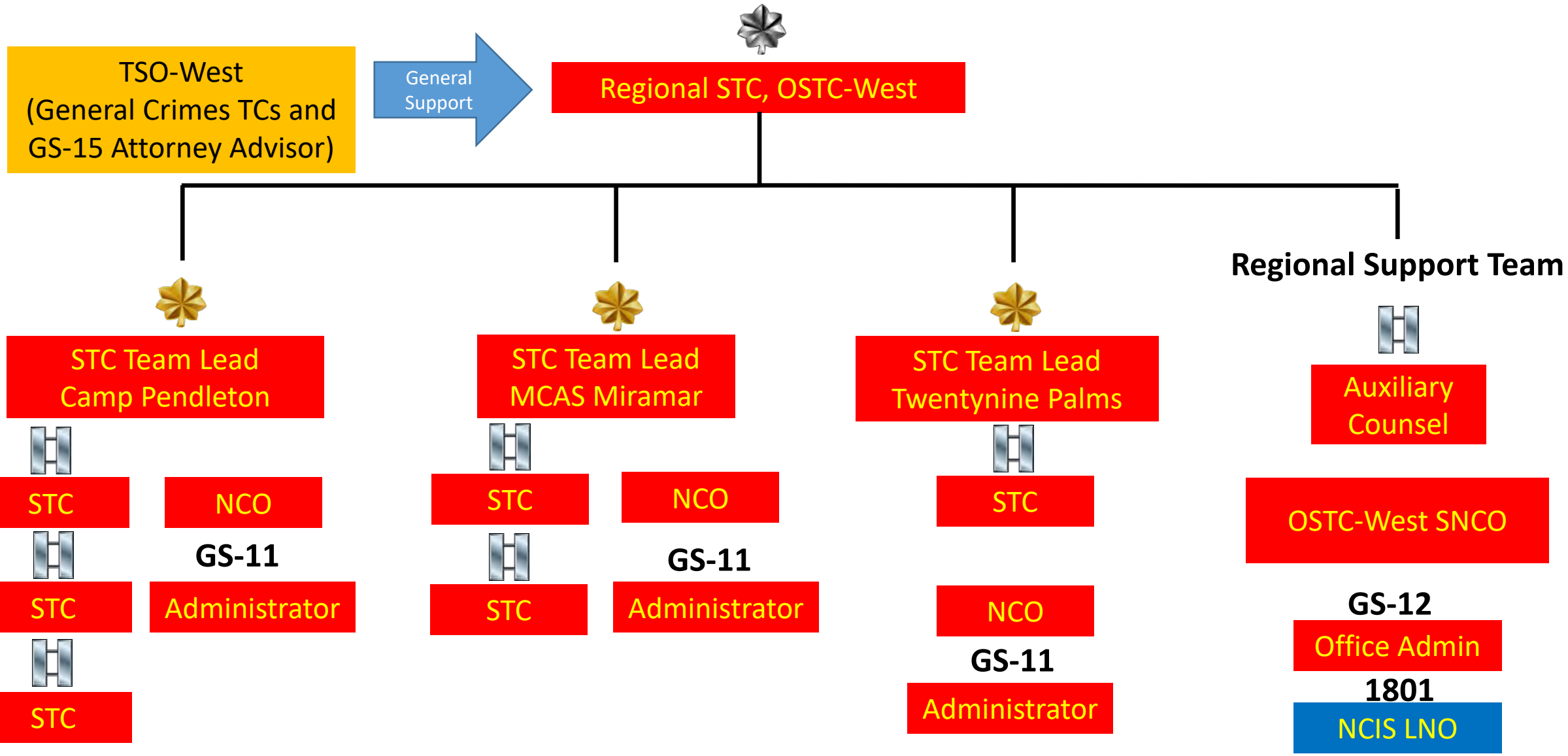
Office Administrator

OSTC NCO

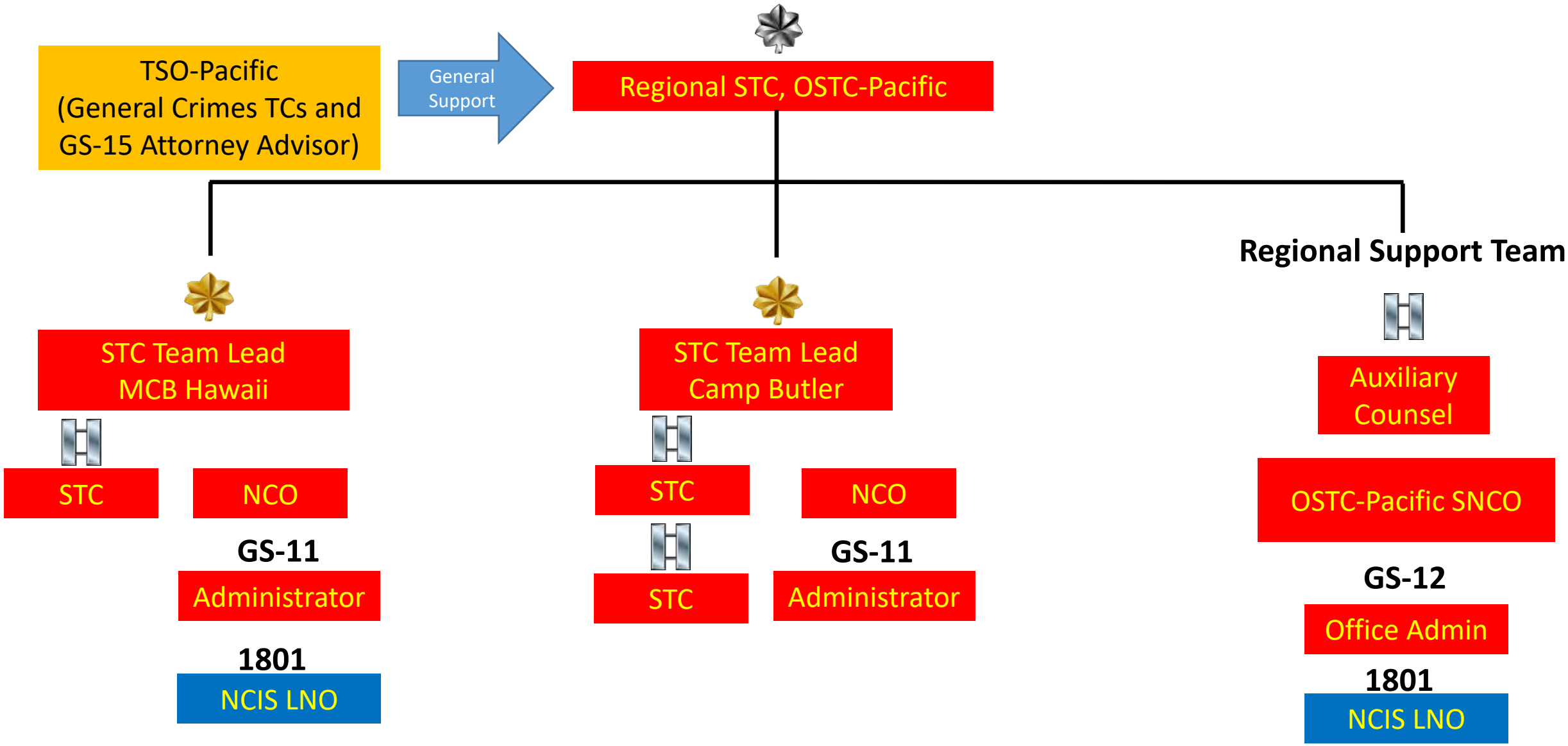
USMC OSTC-East



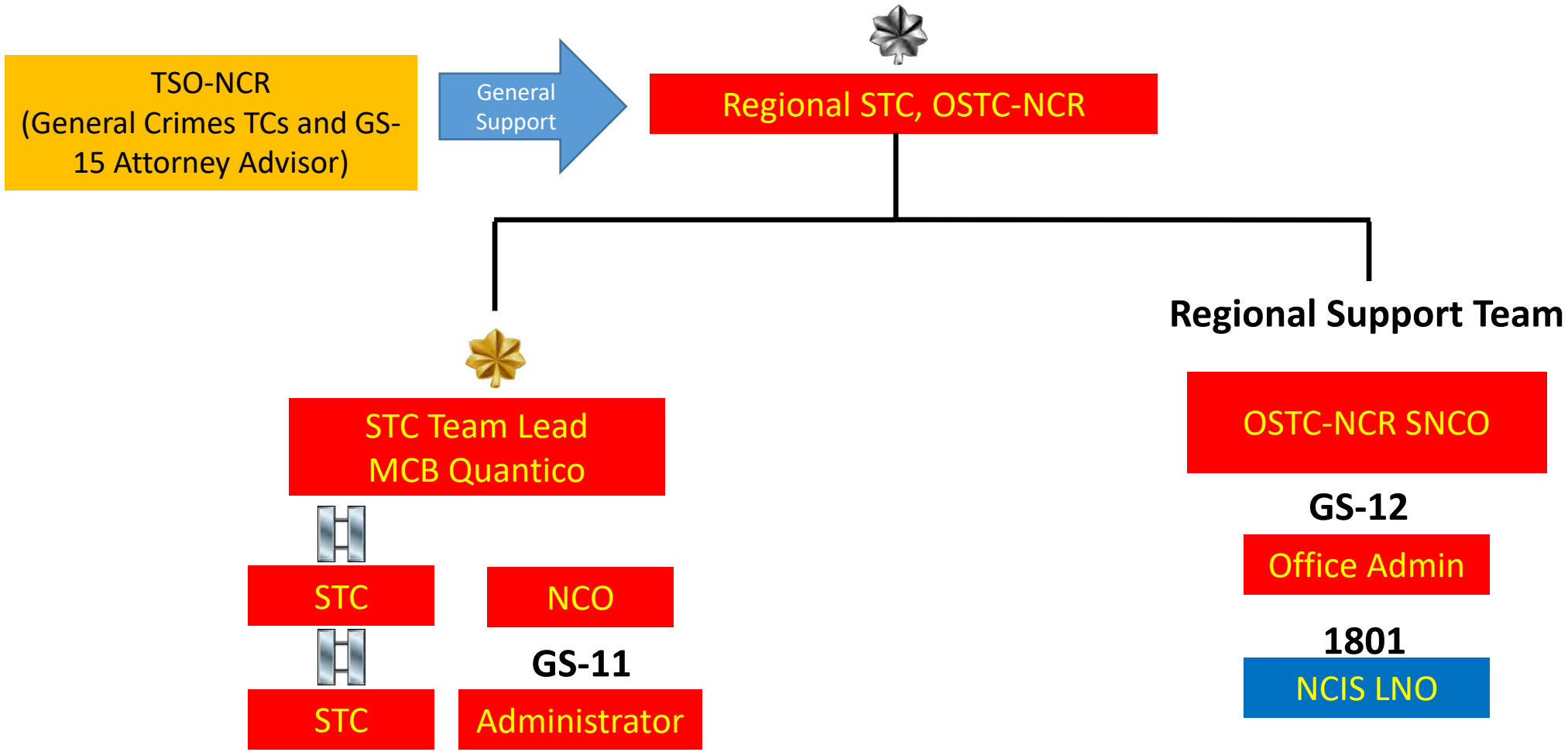
USMC OSTC-West



USMC OSTC-Pacific



USMC OSTC-NCR



Basis for Number of Additional Personnel and Personnel Authorizations (cont'd)

Sec. 549A(b)(2)(B) – ***The nature of the duties and functions to be performed by any such personnel or groups of personnel across the domains of policy-making, execution, assessment, and oversight.***

OSTC HQ, USMC	Duties include establishing policy, providing oversight, facilitating the execution of the mission, and assessing the effectiveness of OSTC operations. May be detailed to covered offense courts-martial when appropriate.	
Regional STC	As authorized, establish regional policy. Direct supervisors of OSTC Teams providing primary oversight of the disposition of covered offense allegations. Mentor, train, and assess junior counsel, provide case-specific input and guidance, and are detailed to courts-martial when appropriate. Assess effectiveness of the region.	
STC Team Lead	Support investigations and pretrial review. Mentor and train line STCs. Execute litigation responsibilities by representing the government at preliminary hearings and courts-martial.	
STC	Support investigations and pretrial review. Execute litigation responsibilities by representing the government at preliminary hearings and courts-martial.	

Basis for Number of Additional Personnel and Personnel Authorizations (cont'd)

Sec. 549A(b)(2)(C) – *The optimum caseload goal assigned to personnel who are or will participate in the military justice process*.

Recognizing that every case is unique and presents its own factors contributing to personal workload, the Marine Corps believes the following are the optimum military justice workloads:

- Special Trial Counsel: Lead counsel on approximately 50 cases per year resulting in 8-10 completed courts-martial per year.
- Defense Counsel: No more than 15 clients at any time.
- Victims' Legal Counsel: Pursuant to 10 U.S. Code § 1044e, supporting no more than 25 clients at any time.
- Paralegals: Commensurate with the type of counsel they support.
- Military Judges: Presiding over approximately 25-35 courts-martial per year.
- Military Magistrates: The Marine Corps does not currently utilize military magistrates. The Marine Corps is cognizant of the authorities granted to magistrates and has requested and received structure to support the establishment of a military magistrate program.
- Laboratory Personnel: Generally, the U.S. Army Criminal Investigation Laboratory (USACIL) provides all laboratory support for Marine Corps covered offenses.
- NCIS: Maintaining no more than 10 active case investigations per investigator at any time.

Basis for Number of Additional Personnel and Personnel Authorizations (cont'd)

Sec. 549A(b)(2)(D) – ***Any required increase in the number of personnel currently authorized in law to be assigned to the Marine Corps****.*

- In 2022, the Marine Corps legal community's structure grew by 133 military and civilian personnel through a Military Justice Reform TOECR. To fill this structure, the Marine Corps is pursuing recruiting and retention efforts, such as Judge Advocate Continuation Pay (JACP). The Marine Corps continues to assess the impact of the additional FY23 and FY24 NDAA requirements, particularly the expansion of OSTC authority to cover sexual harassment cases, and whether this will require additional increases in personnel and resources.

Army LSTC Response to DACIPAD Questions

1. *How do you define independence for the OSTC?*
   OSTC independence is defined as the ability to make all decisions (deferral, preferral, referral) free from actual, apparent, or perceived influence from any outside entity, to include commanders, senior leaders, civilian leaders, media, or other legal advisors. Independence also should ensure that all decisions are based only on qualitative and quantitative analysis of the evidence and the unique facts and circumstances of a case by the STC, unfettered by outside sources. The Army OSTC is operating independently.

2. *What guardrails do you have in place to ensure you are operating independently*?
   There are numerous guardrails to ensure OSTC's independent operation. First, I report directly to the Secretary of the Army without intervening authority. Second, all STCs report to me within an insulated rating chain and organization. Third, all OSTC leadership routinely, frequently, and meaningfully engage with STCs and OSTC paralegals to ascertain whether the OSTC's authority and independence are negatively impacted in any way. Fourth, I am visiting every STC location in the Army (28) and to assess STC resourcing, independence, and support. I have observed no such instances affecting independent decision-making within the OSTC organization.

3. *What were your challenges when you initially stood up and became fully operational?*
   The challenges were primarily administrative in nature, inherent to standing up a new organization, and included resourcing, personnel assignment, establishing facilities and support, and refining procedural processes to efficiently manage criminal cases. Although Army policy was amended to account for OSTC statutory authority during implementation, the initial OSTC stand-up revealed, and continues to reveal, the need for additional policy refinement.

4. *Were you able to address any of those challenges? If so, how*?
   Yes. We fully addressed resourcing, personnel, and workspace challenges. We have provided, and continue to provide, policy refinement suggestions to Army OTJAG to further improve the processing of covered offenses and that further integrate OSTC requirements into military justice operations.

5. *One year later, how have things changed?*
   The operation of OSTC and its integration in the broader ecosystem of military justice is going well. I am primarily focused on refining policy and processes to integrate holistically OSTC authorities and autonomy into the broader military justice process.

6. *Please identify any issues that you recognize now as a challenge that you had not originally anticipated.*
   Currently, there are no significant unanticipated challenges to the operations of OSTC. We have identified a few unanswered or untested questions regarding OSTC authority as it relates to traditional command authority. For example, whether a Resignation In Lieu of Court-Martial can be processed over the objection of the OSTC or whether a STC can bind the command in the terms of a plea agreement to take or not take certain actions, such as deferment or waiver of forfeitures, deferral of confinement, initiation of administrative separation proceedings, etc. Also, whether a STC should be authorized to either require or prohibit pretrial confinement remains an unresolved question, mainly because pretrial confinement impacts speedy trial.

DEPARTMENT OF THE NAVY
MARINE CORPS OFFICE OF SPECIAL TRIAL COUNSEL
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ARLINGTON, VA 22214-5001

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OSTC/ksw
14 Nov 24

From: Lead Special Trial Counsel, USMC
To: Judge Karla N. Smith, Chair, DAC-IPAD

Subj: USMC OSTC's Responses for DAC-IPAD's 38th Public Meeting

Ref: (a) DAC-IPAD Email, dtd 9 October 2024

Thank you for the opportunity to present to the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD) regarding the Office of Special Trial Counsel (OSTC). Below are the USMC OSTC's responses to the questions posed by the DAC-IPAD contained in reference (a) in preparation of our presentation.

1. **How do you define independence for the OSTC?**

Independence for the USMC OSTC is its ability, free from improper influences or pressures, to exercise the authorities granted the OSTC by statute and applicable regulation and policy. This independence enables the OSTC to make disposition decisions based solely upon the individual facts and law for those offenses over which the OSTC must exercise authority (post-27 Dec 2023 covered offenses) and those offenses over which the OSTC chooses to exercise its discretionary authority (pre-28 Dec 2023 covered offenses), as well as known and related offenses as defined in statute.

2. **What guardrails do you have in place to ensure you are operating independently?**

Numerous guardrails exist in statute, regulation, and policy which ensure the OSTC operates independently. Foremost amongst these is the direct reporting, without any intervening authority, of the Lead Special Trial Counsel to the Secretary of the Navy. This OSTC's reporting chain is further insulated from any unauthorized influence by limiting the evaluation reporting of those serving within the OSTC to only supervisors within the OSTC. Having this reporting and evaluation chain contained entirely within the OSTC ensures the decisions made on the disposition of the offenses over which the OSTC exercises authority are not inappropriately influenced by those outside the OSTC. In addition to this separate reporting and evaluation chain, the USMC OSTC also has a seat at the table to provide input on any proposed Service or Departmental regulatory policy or guidance that impacts or may impact military justice. This ability to review and provide input is designed to propagate the OSTC's continued independence.

Even though the OSTC operates independently, the USMC OSTC, like our sister-Service counterparts, purposefully maintains a strong collaborative relationship with our Service and Departmental leadership, stakeholder organizations (such as SAPR, FAP, MCIOs, and Victim Counsel organizations), and resources providers. Without fail, USMC and Department of the Navy senior leadership have respected the OSTC's independence and have been supportive partners in ensuring the OSTC is provided with the resources needed to fulfill our statutory mission.

3. **What were your challenges when you initially stood up and became fully operational?**

The initial challenges faced were: (1) further development and refinement of the OSTC's internal policies and procedures as defined in our initial Standing Operating Procedures (SOP) to account for the addition of new covered offenses in the FY23 NDAA and the discretionary authority over pre-28 December 2023 covered offenses granted by the FY24 NDAA; (2) educating the military justice stakeholders in the USMC on the statutory role and responsibilities of the OSTC and our SOP; (3) evaluating whether the OSTC's personnel resources would be sufficient given the impact of the FY23 and FY24 NDAAs on OSTC operations.

4. **Were you able to address any of those challenges? If so, how?**

Yes, these challenges were addressed.

Further SOP development and refinement: To address needed changes to the SOP resulting from both the FY23 and FY24 NDAA changes, as well as capture needed changes based upon lessons learned captured from daily operations, the OSTC conducted numerous working groups to identify the areas of the SOP needing further development, modification, and refinement.

Educating USMC stakeholders: Working with Judge Advocate Division and Fleet Staff Judge Advocates, OSTC personnel have been able to brief and answer questions from nearly every convening authority in the Marine Corps regarding our role, responsibility, and procedures. The Lead Special Trial Counsel has conducted one-on-one sessions with senior USMC commanders and the leadership of stakeholder organizations such as NCIS, CID, SAPR, FAP, and Headquarters Marine Corps (HQMC) leadership to further their understanding of our operations. These one-on-one briefings have been replicated by our Regional Special Trial Counsel and Team Leads at the installation-level across the Marine Corps.

Evaluation of personnel staffing: Having closely tracked OSTC personnel workloads since 15 October 2023, on 1 May 2024, the Lead Special Trial Counsel requested staffing increases for the OSTC. Since that request, HQMC has staffed the OSTC with 13 additional legal services specialists (E1-E3); three additional Article 27(b) certified judge advocates (non-STC auxiliary counsel); and 11 additional trial counsel on detail to various OSTC Installation Offices from the Trial Services Organization (TSO). Further, NCIS investigators are currently detailed to five (5) OSTC Installation Offices as liaisons and the OSTC is working with NCIS leadership to further expand, when conditions permit, the number of liaisons to nine (9). Finally, the OSTC has received approval to hire five (5) additional GS employees who will focused on data management and analysis.

5. **One year later, how have things changed?**

We have learned and grown. All OSTC counsel are in place, trained, and are reducing case processing times. Our organization continues to assess manning and resources on a monthly basis.

Since becoming fully operational, the OSTC has filled all 33 STC billets and received an additional 14 judge advocates working in non-STC billets in support of OSTC operations. While these attorneys, unless STC-certified, cannot act as lead counsel in any investigation into or prosecution of covered offense cases, their assistance has proven to be critical in effectively processing cases and managing caseloads.

Although the OSTC does not have a Reserve OSTC Detachment that directly supports OSTC operations, actions are underway to establish and staff a Reserve OSTC Detachment. To prepare for the establishment of that detachment, two (2) reserve judge advocates have already been certified as STCs with plans to certify an additional six (6) Reserve STCs in 2025.

NCIS has also embedded liaison investigators in five OSTC field offices (Quantico, Lejeune, Pendleton, Hawaii, and Okinawa) to assume the role of participating agents in cases for which NCIS is the primary Military Criminal Investigative Organization.

Through education and repetition over the last year, Commanders, SJAs, and law enforcement have quickly adapted to the significant changes to the military justice system resulting from the FY22-24 NDAAs. This has allowed the OSTC to pivot from educational outreach to reviewing and improving our internal processes, which, in turn, has resulted in greater operational effectiveness which has led to greater efficiencies in our processes.

6. **Please identify any issues that you recognize now as a challenge that you had not originally anticipated.**

The number of domestic violence offenses reported has been far more than anticipated. Through purposeful engagement with FAP and local civilian law enforcement agencies, many instances of domestic violence that would have never been reported to a commander are now being reported to the OSTC. Attendant to this underestimated challenge is a secondary challenge that has presented related to domestic violence. That secondary challenge is the lack of a dedicated MCIO to assist in investigating domestic violence incidents.

When Article 134 (Sexual Harassment) was made a covered offense in the FY23 NDAA, we anticipated that the necessary Department of Defense, Department of the Navy, and USMC regulations addressing the necessary framework for substantiating formal complaints would be in place far enough in advance of the effective date of 1 January 2025, to allow the OSTC to establish and test its processes and procedures related to Sexual Harassment. The challenge currently presented it that we have had to plan and test processes and procedures in the absence of these necessary regulations.

7. The point of contact for this matter is LtCol Geoffrey Shows who can be reached at (703) 614-6105 or geoffrey.shows@usmc.mil.

K. S. WOODARD
BGen, USMC

DEPARTMENT OF THE AIR FORCE
OFFICE OF SPECIAL TRIAL COUNSEL
JOINT BASE ANACOSTIA-BOLLING

13 November 2024

Brigadier General Christopher A. Brown
Lead Special Trial Counsel
Office of Special Trial Counsel
1306 Luke Avenue SW
Joint Base Anacostia-Bolling 20032

Judge Karla N. Smith, Chair
Defense Advisory Committee on Investigation, Prosecution,
and Defense of Sexual Assault in the Armed Forces
875 N. Randolph Street, Suite 150
Arlington, VA 22203

Dear Judge Smith,

Thank you for the inquiry from the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD) for information regarding the Office of Special Trial Counsel (OSTC). The questions posed by the DAC-IPAD are italicized below. I am responding on behalf of the Department of the Air Force's (DAF) OSTC.

1. How do you define independence for the OSTC? Independence in the DAF OSTC refers to the ability of our office to operate free from improper external influences or pressures. An independent OSTC makes evidence-based disposition decisions on individual cases after thorough investigation and consideration of the merits of each case. An independent OSTC's decision-making authority is limited only by applicable law, policy, and ethical considerations. The DAF OSTC is operating independently.

2. What guardrails do you have in place to ensure you are operating independently? The DAF OSTC has many guardrails in place to ensure independent operations. Most importantly, the Lead Special Trial Counsel reports directly to the Secretary of the Air Force without intervening authority, creating a reporting chain outside of both command authority and the Secretary's politically appointed staff. While DAF OSTC solicits command input prior to making disposition decisions on any offense that falls under Special Trial Counsel authority, this input is non-binding upon OSTC's disposition decision. Having a separate reporting chain directly to a superior civilian authority ensures that final decisions on the disposition of these offenses remains in the hands of trained prosecutors as directed by Congress. To maintain that independence, DAF OSTC personnel are not imbedded with command or with judge advocates who serve as legal advisors for commanders. Similarly, having the LSTC report directly to the Secretary as opposed to reporting to any of the Secretary's appointed staff members ensures the OSTC is free from any appearance of political influence on disposition decisions.

In addition to utilizing a separate reporting chain direct to civilian authority, Headquarters DAF OSTC has been empowered to independently review all proposed changes to DAF regulatory guidance that are expected to impact military justice. Our reviews are designed to ensure that any new regulation preserves OSTC independence in all stages of the investigation and prosecution of covered, known, and related offenses.

Finally, despite our separate reporting chains, DAF OSTC maintains a strong relationship with the DAF JAG Corps (AF/JA). Since the passage of the FY22 NDAA that directed each service to create an Office of the Special Trial Counsel, AF/JA has respected the independence of DAF OSTC while being a partner in resourcing the OSTC mission.

3. What were your challenges when you initially stood up and became fully operational?

The most significant challenge DAF OSTC faced upon reaching full operational capability was designing processes to handle discretionary, reach-back authority over victim-based offenses as authorized by Congress in the FY24 NDAA. The DAF worked with AF/JA and certain personnel tasked to stand-up this office to an initial operational capability state to allocate manpower necessary for the OSTC to accomplish its mission. To avoid suddenly stripping other DAF units responsible for military justice, such as our trial defense and victims counsel divisions, of experienced and capable litigators, it was determined that OSTC would be allocated new billets over the course of several fiscal years with full end-state manning projected for FY27. Initial manning needs and projected out year increases were based on studies reviewing annual numbers of reports of covered offenses and the number of courts-martial within the DAF.

These initial manning numbers were calculated and budgeted for prior to Congress providing discretionary authority to special trial counsel to make disposition decisions over certain offenses that were alleged to have occurred prior to 28 December 2023. To ensure consistency in disposition decisions, DAF OSTC exercised this new authority over a significant number of cases. This resulted in an unexpected increase to workload that threatened to overwhelm our capabilities upon stand-up.

4. Were you able to address any of those challenges? If so, how?

With the assistance of AF/JA, DAF OSTC was able to utilize the services of Air Reserve Component (ARC) personnel who were tasked to DAF OSTC for extended active duty tours utilizing Military Personnel Appropriations (MPA). These reserve JAGs were prior active duty litigators who had significant military justice experience. They possessed the requisite litigation experience and completed the qualification training required prior to being certified as STC. OSTC leveraged these Reserve STC to allow us to investigate and prosecute the surge of discretionary authority cases. OSTC will continue to utilize Reserve STC to fill any gaps and seams until we reach our end-state personnel levels.

5. One year later, how have things changed?

One year later, we are already getting to a point where the significant changes to the military justice system are being internalized by commanders, law enforcement, and judge advocates DAF-wide. This has allowed us to pivot from educational outreach that has been going on since DAF OSTC reached initial operating capability, to reviewing our internal processes to identify improvement areas and where we can achieve greater operational efficiencies.

6. Please identify any issues that you recognize now as a challenge that you had not originally anticipated.

At this time, there is nothing that I would classify as a significant challenge to effective OSTC operations that was not originally anticipated at full operational capability. I am grateful for the support of our Secretary as well as the collaborative efforts of HAF commanders department-wide, AF/JA, and our law enforcement partners as we began to exercise authorities that marked the most significant change to military justice since the Uniform Code became effective in 1951. While we have identified ways that we can become more effective and efficient in operations, such as utilizing new procedures to more quickly triage and return certain offenses to command which can quickly be ascertained as inappropriate for referral to court-martial, I am pleased to say that we have not found any structural deficiencies that will prevent us from accomplishing our important mission. The DAF OSTC is well-equipped to handle new challenges as they arise.

Thank you for your continued support and advocacy on behalf of our Airmen and Guardians. I trust this information is helpful.

Sincerely,

CHRISTOPHER A. BROWN
Brigadier General, USAF
Lead Special Trial Counsel

DEPARTMENT OF THE NAVY
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5800
Ser N00/398
November 14, 2024

Judge Karla N. Smith, Chair
Defense Advisory Committee on Investigation, Prosecution,
and Defense of Sexual Assault in the Armed Forces
875 N. Randolph Street, Suite 150
Arlington, VA 22203

Dear Judge Smith,

Thank you for the opportunity to respond to your recent inquiry pertaining to the respective Offices of Special Trial Counsel (OSTC). Please see my responses below.

1. *How do you define independence for the OSTC?*

The OSTC is independent when its case-related decision-making is wholly unfettered by outside influences, such as pressure from the suspect's command, victim's command, convening authorities, or other senior leaders outside of OSTC.

2. *What guardrails do you have in place to ensure you are operating independently?*

The OSTC reports directly to the Secretary of the Navy with no intervening authority. Although the Lead Special Trial Counsel (LSTC) has routine interactions with senior JAG Corps leadership and with the Judge Advocate General's (JAG) staff, the LSTC does not report to the JAG or the Deputy JAG.

Fitness reports, enlisted evaluations, and civilian evaluations of OSTC members are completed within the OSTC chain of command and the LSTC is assessed by the Secretary of the Navy.

3. *What were your challenges when you initially stood up and became fully operational?*

The initial challenges were related to logistics associated with setting up a 90-person worldwide operation in a resource-constrained environment while adapting to the late-breaking FY24 NDAA change that allowed OSTC to exercise discretionary authority over offenses that predate the original FY22 NDAA effective date.

4. *Were you able to address any of those challenges? If so, how?*

Yes. The Secretary of the Navy, Chief of Naval Operations, and the JAG addressed logistical and resourcing needs and are continuing to support any ongoing needs – including manpower, equipment, facilities, and technology. From a staffing perspective all OSTC billets are manned. By analyzing case metrics throughout the year and in anticipation of formal, substantiated Article

134 UCMJ sexual harassment cases becoming covered offenses on 1 January 2025, OSTC requested and received additional manpower support to meet the mission. We will continue to assess case metrics on a monthly basis and address future resourcing needs as necessary. We have worked with installation commanders and JAG leadership to secure sufficient office spaces for all 11 offices, and will continue to work closely with leadership to procure long-term facility upgrades for OSTC operations in our large fleet concentration areas. I am happy to report that all of our counsel and paralegals have the necessary equipment to complete the mission.

In response to the FY24 NDAA, OSTC asserted authority over all covered offenses that pre-dated 27 Dec 23 that had not yet been acted upon by a commander to streamline the case disposition process.

5. *One year later, how have things changed?*

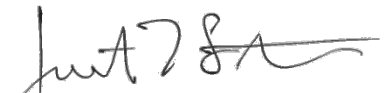
OSTC counsel are in place, trained, engaged with NCIS, and effectively reviewing allegations of covered, known, and related offenses. OSTC trial teams have adapted to the increased caseloads resulting from adding domestic violence as a covered offense and are preparing to do the same when sexual harassment becomes a covered offense on 1 January 2025.

6. *Please identify any issues that you recognize now as a challenge that you had not originally anticipated.*

We did not fully anticipate the extent of the increase in domestic violence cases. Previously, many of these cases had been handled at the unit level, now these cases are statutorily obligated to be referred to OSTC for review and action. As detailed above, we carefully assess case metrics on an ongoing basis to determine manpower needs. The JAGC and Navy Leadership have been supportive of – and responsive to – our requirements.

Thank you for your continued support of our office and its mission. I look forward to discussing these and any additional questions you and your committee may have when we meet in December.

Sincerely,



Jonathan T. Stephens
RDML, JAGC, USN
Lead Special Trial Counsel

U.S. Department of Homeland Security
United States Coast Guard

Commandant
United States Coast Guard
Office of the Chief Prosecutor

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5810
November 13, 2024

Judge Karla N. Smith, Chair
Defense Advisory Committee on Investigation, Prosecution,
and Defense of Sexual Assault in the Armed Forces
875 N. Randolph Street, Suite 150
Arlington, VA 22203

Dear Judge Smith:

Thank you for the inquiry from the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD) for information regarding the Office of the Chief Prosecutor (OCP). The questions posed by the DAC-IPAD are italicized below.

1. How do you define independence for the OSTC?

Answer. Independence is the ability to make decisions, based on law, policy, ethics, and my team's experience and training to perform military justice duties, free from real or apparent influence from senior leadership, convening authorities, command personnel, or their staff judge advocates. Equally, independence, particularly those relating decisions to referral and deferral, is the ability to make decisions despite external factors or scrutiny.

2. What guardrails do you have in place to ensure you are operating independently?

Answer. The OCP is a direct report to the U.S. Coast Guard's Vice Commandant, a four-star admiral who does not serve as a convening authority per Service regulations. The rating chain for my Deputy and I go directly to the Vice Commandant, and the remainder of the OCP's personnel have internal ratings only to OCP supervisors.

While the OCP maintains routine interactions with the Coast Guard's The Judge Advocate General (TJAG) and his staff for purposes of manning, equipping, and giving newer judge advocates initial legal training, the OCP neither reports to the Coast Guard's TJAG, nor is the OCP ever required or expected to seek counsel or direction for any matter the OCP investigates or prosecutes.

3. What were your challenges when you initially stood up and became fully operational?

Answer. In response to the second part of this question, the OCP is not expected to become fully operational until 2027, since unlike the Offices of Special Trial Counsel, the OCP is responsible for prosecuting all of the Service's courts-martial, i.e., both covered and non-covered offenses. However, for purposes of establishing and creating Special Trial Counsel (STC) and ensuring an

STC is assigned to every covered offense prosecution, the OCP became fully operational prior to 28 December 2023.

The OCP has had three challenges when it initially stood up and as it matures from Initial Operating Capability (IOC) to Full Operating Capability (FOC). Specifically, education and training of the Service was and continues to remain a challenge to ensure a collective understanding of how the Fiscal Year 2022 National Defense Authorization Act reformed the Service's delivery of military justice provisions.

Second, the OCP had initial challenges of establishing its infrastructure and consolidating its footprint. Notably, the OCP entered into a lease with the Department of State in September 2023 to occupy space in Charleston, South Carolina. The leased space needed necessary office renovations. Additionally, the leased space needed a dedicated, smart courtroom where the majority of the Service's courts-martial will be convened.

Finally, the OCP's staffing model has been challenged. At present, the OCP maintains forty (40) positions on its personnel allowance list. To better execute its mission, the OCP must add additional paralegal support, court reporters, a forensic psychologist, budget-trained support, information technology support, and a courtroom security detachment. This is all being done at a time of historic challenges with recruiting and retention.

4. Were you able to address any of those challenges? If so, how?

Answer. Yes. To the first challenge, my team and I routinely provide training throughout the Service, not just senior leadership, but the entire fleet. In the past year, my team and I have easily trained over 2,000 Coast Guard men and women. I have made extensive efforts to personally engage in two-way dialogue with traditional convening authorities. I am getting their buy-in and support of the new system and cultivating their trust that the right decisions are now in the right hands. I have directed my staff to ensure staff judge advocates are getting the information they need to advise convening authorities on their suite of options for cases on which the OCP has deferred. Finally, I continue to advocate for a centrally funded system of court-martial expenses.

To the second challenge, the OCP secured funding and contracted to complete most of the office renovations, and construction for a multi-million dollar courtroom will begin in January 2025. The expected completion date for the courtroom is December 2025.

To the third challenge, the OCP has hired a training specialist, two additional paralegals, received three new judge advocate positions, recently onboarded a federal agent, and is in the process of soliciting for a forensic psychologist. To address the remainder of the OCP's staffing needs, the OCP has submitted resource proposal requests for Fiscal Years 2026 and 2027 that pend in various stages of the Planning, Programming, Budgeting, and Execution Process.

5. One year later, how have things changed?

Answer. Internal to the OCP, the OCP has: grown from 28 positions to 40 positions to better allocate caseloads and provide support to litigation teams; improved its training curriculum; bolstered its investigative capacity with an embedded special agent; and established routine

training and best practice sharing with the Offices of Special Trial Counsel. All of these improvements have allowed the OCP's senior leadership to revise or provide additional clarity to internal processes and business rules it established with the fleet.

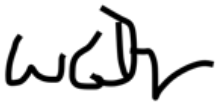
External to the OCP, the Service has a better understanding of how the OCP can support the Service's efforts to gain accountability of offenders where appropriate.

6. *Please identify any issues that you recognize now as a challenge that you had not originally anticipated.*

Answer. Certain external scrutiny through social media has become an increasing challenge. Earlier this year, one of the OCP attorneys was named on social media after deferring on a matter where the statute of limitations tolled. As a consequence, the OCP's O-5 Division Chief is now deferring on all matters to protect more junior attorneys from unnecessary scrutiny, which leads to additional stress and potentially less focus on their casework. Additionally, as my team is focused solely on serious crime, their long term mental health and the vicarious trauma is a concern. My leadership team is closely monitoring the team to ensure they have the proper tools and outlets to ensure work-life balance.

Beyond my answers above, thank you again for your continued support and advocacy on behalf of our Coast Guard men and women. To the extent you have additional questions, my point of contact is Captain Ben Gullo at 843.952.0140, or via e-mail at benedict.s.gullo@uscg.mil. Captain Gullo will also appear on my behalf at your next hearing on December 3, 2024.

Sincerely,



W. G. DWYER
Rear Admiral, U.S. Coast Guard
Chief Prosecutor

Copy: CAPT Anita Scott (CG-LMJ)

US v. Mendoza, 2024 CAAF LEXIS 590, decided 7 October 2024

Charge: The government charged the appellant with sexual assault without consent (Art. 120(b)(2)(A)), and did not charge sexual assault when the other person is incapable of consenting (Art. 120(b)(3)(A)).

Government Proof: The government presented evidence that the victim was extremely intoxicated and argued that the victim was incapable of consent due to her high level of intoxication.

Issues and Holdings:

1. Held: Direct evidence of a victim's lack of consent is not necessary for the conviction to be legally sufficient.

    a. Analysis: The court cited R.C.M. 918(c), which states that guilt "may be based on direct or circumstantial evidence," and there is no exception for certain offenses.

2. Held: Art 120(b)(2)(A) and Art 120(b)(3)(A) create separate theories of liability for sexual assault—without consent, and incapable of consenting—and the government may not charge under one theory and argue under another. The Government cannot prove sexual assault "without the consent" of the victim by establishing that the victim was incapable of consenting.

    The decision of ACCA affirming appellant's conviction is set aside. The ACCA should reconsider the factual and legal sufficiency of Appellant's conviction under Art.120(b)(2)(A), UCMJ, in light of this decision. Remanding to the ACCA will also give the parties a full and fair opportunity to be heard on the legal and factual sufficiency of appellant's conviction.

    a. Analysis:
        i. In order to achieve a conviction under (b)(3)(A), the government has to prove both that 1) the victim was incapable of consenting, and 2) that the appellant knew or reasonably should have known the victim was incapable of consenting. Allowing the government to show the absence of consent under (b)(2)(A) by showing the victim was incapable of consenting would relieve the government of its burden to prove the *mens rea* requirement that Congress specifically added to (b)(3)(A). This would render every sexual assault offense other than (b)(2)(A) superfluous.

        ii. ACCA did not articulate how intoxication factored into its legal and factual sufficiency analysis of the conviction under (b)(2)(A).

        iii. The majority points out that the government may still charge in the alternative, and the factfinder can determine whether or not the victim was

capable of consenting. However, if charged under (b)(2)(A), argument that a victim "could not consent" is improper argument. Further, the court clarified that the finder of fact may consider evidence of the victim's intoxication in determining whether the victim consented, in accordance with Art 120(g)(7)(C) ("All the surrounding circumstances are to be considered in determining whether a person gave consent.").

Judge Sparks, concurring in part, dissenting in part, and dissenting in the judgement:

1. Concurrence in Part II(B)(1) – Judge Sparks concurs that the two sections create separate theories of criminal liability and the conflation of the two raised due process concerns related to lack of fair notice.
2. Dissent – Judge Sparks would hold in the appellant's favor with respect to issue 1, and find the evidence legally insufficient to affirm the conviction and would dismiss the case with prejudice.
3. Judge Sparks further finds the theories of lack of consent and incapacity to be contradictory and disagrees that evidence of incapacity by intoxication can be evidence of lack of consent. Further, he argues that in cases where the government has charged in the alternative, military judges should, at the close of evidence, make a determination of which is supported and then send only one to the trier of fact.

Judge Maggs, concurring in part, and dissenting in part:

Judge Maggs concurs in the majority's interpretation that in a case charged under Art 120(b)(2)(A), evidence that the victim was incapable of consenting due to intoxication generally cannot prove lack of consent. However, Judge Maggs would find the evidence legally sufficient and remand the case only for a new factual sufficiency review.

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES
Appellee

v.

Isac D. MENDOZA, Staff Sergeant
United States Army, Appellant

No. 23-0210
Crim. App. No. 20210647

Argued March 5, 2024—Decided October 7, 2024

Military Judges: Steven C. Henricks and Ryan W. Rosauer

For Appellant: *Captain Matthew S. Fields* (argued); *Colonel Philip M. Staten*, *Major Bryan A. Osterhage*, and *Jonathan F. Potter,* Esq. (on brief); *Captain Carol K. Rim*.

For Appellee: *Captain Anthony J. Scarpati* (argued); *Colonel Christopher B. Burgess*, *Lieutenant Colonel Jacqueline J. DeGaine*, and *Major Chase C. Cleveland* (on brief).

Judge HARDY delivered the opinion of the Court, in which Chief Judge OHLSON and Judge JOHNSON joined. Judge SPARKS filed a separate opinion, concurring in part and dissenting in part and in the judgment. Judge MAGGS filed a separate opinion, concurring in part and dissenting in part.

Judge HARDY delivered the opinion of the Court.

After a night of socializing and heavy drinking with other soldiers, JW blacked out, leaving her with no further memories until the following morning. An investigation by the United States Army Criminal Investigation Division (CID) established that later that night, JW and Appellant went to Appellant's barracks room where Appellant performed a sexual act upon JW. Under the theory that JW did not consent to the act, the Government charged Appellant with sexual assault in violation of Article 120(b)(2)(A), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920(b)(2)(A) (2018).[1] Notably, the Government did not charge Appellant with a sexual assault under Article 120(b)(3)(A), UCMJ, which would have required the Government to prove both that Appellant committed a sexual act on JW when JW was incapable of consenting to the sexual act due to impairment by any drug, intoxicant, or other similar substance and that Appellant knew or should have known that JW was incapable of consenting.

At trial, the Government presented evidence of JW's extreme intoxication and argued to the military judge sitting alone both that JW would not have consented to sexual intercourse with Appellant and that she was incapable of consenting to sexual intercourse due to her high level of intoxication. The military judge found Appellant guilty, contrary to his plea, of one specification of sexual assault in violation of Article 120, UCMJ, and the United States Army Court of Criminal Appeals (ACCA) affirmed. *United States v. Mendoza*, No. ARMY 20210647, 2023 CCA LEXIS 198, at *10, 2023 WL 3540415, at *4 (A. Ct. Crim. App. May 8, 2023) (unpublished).

Before this Court, Appellant challenges the legal sufficiency of his conviction on the grounds that the Government failed to introduce affirmative evidence of the lack of

[1] Appellant was also charged with and acquitted of a second specification of abusive sexual contact in violation of Article 120, UCMJ.

consent beyond a reasonable doubt. We disagree with Appellant that direct evidence of JW's lack of consent was necessary for his conviction to be legally sufficient, but we do agree with his secondary argument that Article 120(b)(2)(A), UCMJ, and Article 120(b)(3)(A), UCMJ, create separate theories of criminal liability. Article 120(b)(2)(A), UCMJ, criminalizes engaging in a sexual act with a person capable of consenting who did not consent, and Article 120(b)(3)(A), UCMJ, criminalizes engaging in a sexual act with a person who is incapable of consenting due to impairment by any drug, intoxicant, or other similar substance when the accused knows or should have known that the person was incapable of consenting.

In this case, the Government elected not to charge Appellant with sexual assault under Article 120(b)(3)(A), UCMJ (a sexual act upon a person incapable of consenting), and instead charged Appellant with sexual assault under Article 120(b)(2)(A), UCMJ (a sexual act upon a person capable of consenting who did not consent). Nevertheless, at trial the Government presented significant evidence of JW's extreme intoxication and argued that JW's inability to consent established the absence of consent. The Government's approach—which conflated two different and inconsistent theories of criminal liability—raises significant due process concerns. Because the ACCA's decision upholding Appellant's conviction does not explain how or why the evidence of JW's intoxication factored into its analysis, we reverse the decision of the ACCA and remand the case for the court to reconsider its legal and factual sufficiency analysis in light of this opinion.

I. Background

In July 2020, Appellant and JW were both stationed at Camp Casey, Korea. On July 11, 2020, JW went off-post to eat and drink with fellow soldiers. When the group returned to the barracks, they joined other soldiers, including Appellant, who were socializing outside. JW testified that she recalled coming back to the barracks, seeing the other soldiers outside, and continuing to drink with them before she eventually blacked out.

JW's next memory was waking up the following morning to Appellant knocking on her barracks room door to return her shoes. JW did not recognize Appellant and did not know why he was at her door. JW went back to sleep and woke up to Appellant again knocking at her door to ask if she was okay.

Afterwards, JW went to the bathroom and "realized something was wrong." JW noticed that she was not wearing the underwear she had been wearing the night before and that her tampon was pushed all the way inside her to the extent that she could not reach the string. JW testified that she had never inserted a tampon so far, and that she would never have sex with her tampon in or when she was on her period. Realizing that something was wrong and starting to panic, JW went to the barracks Charge of Quarters (CQ) desk to try to identify Appellant and learn what happened the night before.

The CQ noncommissioned officer (NCO) testified that JW was crying and was very upset when she came to the CQ desk. The CQ NCO contacted a Sexual Harassment/Assault Response and Prevention (SHARP) program representative, who later met with JW and arranged for her to file a report and to receive a sexual assault forensic examination (SAFE) at the troop medical clinic.

While she was waiting to be taken to the medical clinic, JW went to her friend, Specialist (SPC) RL, to ask what had happened the night before. SPC RL testified that JW was upset, crying, and confused when they spoke. After JW left for the clinic, SPC RL and his NCO spoke to Appellant after hearing reports of his interactions with JW the previous night. Appellant told SPC RL and his NCO that JW had fallen asleep in his bed. During their conversation, JW called SPC RL, who handed the phone to Appellant. JW asked Appellant what happened, and he replied that nothing happened, and that she had locked herself in his bathroom. Appellant then requested to accompany SPC RL and his NCO to the clinic to see JW. On the way, Appellant told SPC RL that JW had taken a shower in his room and then put her shirt on backwards. At the parking lot of the clinic,

Appellant told a CID agent who was conducting canvassing interviews that JW had been in his room the night before.

During a later interview with the CID agent, Appellant admitted to having sexual intercourse with JW in his bedroom. He acknowledged that JW was extremely intoxicated at the time and that she was incapable of consenting because of her intoxication. Appellant also admitted that he "was in control the whole time" during intercourse; however, he never admitted that JW verbally or physically withheld consent. U.S. Army Criminal Investigation Laboratory testing of cervical swabs taken from JW during her SAFE exam confirmed the presence of semen matching Appellant's DNA profile.

Evidence collected by CID during its investigation, including CCTV footage from the barracks, helped reconstruct the events at the barracks during the period when JW blacked out. Witnesses testified that they saw JW drink and socialize with other soldiers, including Appellant, while displaying symptoms of intoxication, including slurred speech and unsteady movements. Some soldiers also noted JW's flirtatious behavior with Appellant and others. The CCTV footage from the barracks showed that JW walked unsteadily with Appellant to his room while Appellant grabbed her crotch. Later, the footage captured JW and Appellant exiting his room with JW's arms seemingly draped over Appellant's shoulders for support. JW testified that she remembered nothing of her encounter with Appellant.

A military judge sitting as a general court-martial convicted Appellant of one specification of sexual assault in violation of Article 120(b)(2)(A), UCMJ, and sentenced him to a dishonorable discharge, thirty months of confinement, and reduction to the grade of E-1. The convening authority approved the sentence and waived automatic forfeitures of all pay and allowances for six months for the benefit of Appellant's wife.

On appeal before the ACCA, Appellant argued that the evidence was factually insufficient because the

Government "produced no evidence that the victim did not consent to sexual intercourse." *Mendoza*, 2023 CCA LEXIS 198, at *8, 2023 WL 3540415, at *3. The ACCA rejected this argument, explaining that several factors led it to find Appellant's conviction factually sufficient, "including but not limited to: the victim's high level of intoxication, [A]ppellant's statement to CID, eyewitness testimony, and the CCTV footage." *Id.*, 2023 WL 3540415, at *3. Because the ACCA was "convinced of [A]ppellant's guilt beyond a reasonable doubt," it affirmed his conviction. *Id.* at *10, 2023 WL 3540415, at *3-4 (citation omitted) (internal quotation marks omitted).

We granted review to determine whether Appellant's conviction for sexual assault without consent was legally sufficient. *United States v. Mendoza*, 84 M.J. 105 (C.A.A.F. 2023) (order granting review).

II. Discussion

In most legal sufficiency cases, which we review de novo, the Court asks "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Smith*, 83 M.J. 350, 359 (C.A.A.F. 2023) (citations omitted) (internal quotation marks omitted). Because the Court draws every reasonable inference from the evidence in favor of the prosecution, "[t]he standard for legal sufficiency involves a very low threshold to sustain a conviction." *United States v. King*, 78 M.J. 218, 221 (C.A.A.F. 2019) (alteration in original) (citations omitted) (internal quotation marks omitted). This deferential standard impinges upon the factfinder's discretion " 'only to the extent necessary to guarantee the fundamental protection of due process of law.' " *Id.* (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

This case, however, departs from the usual "reasonable trier of fact" analysis because Appellant challenges the legal sufficiency of his sexual assault conviction on two unusual grounds. First, Appellant argues that the evidence

was legally insufficient because the Government relied solely on circumstantial evidence to prove that JW did not consent to the sexual activity. In Appellant's view, the Government's failure to present any "affirmative" evidence of JW's lack of consent means that no rational factfinder could legally find him guilty under Article 120(b)(2)(A), UMCJ.

In the alternative, Appellant argues that his conviction was legally insufficient because the Government violated his due process rights by conflating two different theories of criminal liability under Article 120, UCMJ, during his court-martial. Appellant asserts that Article 120(b)(2)(A), UCMJ, and Article 120(b)(3)(A), UCMJ, establish separate theories of liability, and that the Government robbed him of his due process right to fair notice by arguing that JW was incapable of consenting due to alcohol intoxication without charging Appellant with sexual assault under Article 120(b)(3)(A), UCMJ. In Appellant's view, because the Government charged him under Article 120(b)(2)(A), UCMJ, (sexual assault without consent), he had no notice that he needed to defend himself from the Government's allegation that JW was incapable of consenting. We consider each of Appellant's arguments in turn.

A. Article 120(b)(2)(A) does not require "affirmative" evidence

This Court has repeatedly held that the Government may meet its burden of proving an accused's guilt beyond a reasonable doubt with circumstantial evidence. *United States v. Long*, 81 M.J. 362, 368 (C.A.A.F. 2021); *see also King*, 78 M.J. at 221 (first citing *United States v. Kearns*, 73 M.J. 177, 182 (C.A.A.F. 2014); then citing *United States v. Young*, 64 M.J. 404, 407 (C.A.A.F. 2007)). Nevertheless, Appellant argues that this principle works differently in sexual assault cases, which—in Appellant's view—require "at least *a single* fact related to affirmative non-consent in order to deem a conviction for sexual assault without consent legally sufficient." Reply Brief of Appellant at 13, *United States v. Mendoza*, No. 23-0210 (C.A.A.F. Jan. 12, 2024) (emphasis in original).

We disagree. The President has instructed that findings of guilt "may be based on direct or circumstantial evidence," without mention of any exception for certain offenses. Rule for Court Martial (R.C.M.) 918(c). And in *Long*—a case involving rape and other sex offenses—we recognized that "the government is free to meet its burden of proof with circumstantial evidence." 81 M.J. at 368 (alteration in original removed) (internal quotation marks omitted) (quoting *King*, 78 M.J. at 221). The President's instructions and our case law are consistent with the Supreme Court's guidance that circumstantial evidence "is intrinsically no different from testimonial evidence." *Holland v. United States*, 348 U.S. 121, 140 (1954); *see also Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100 (2003) ("we have never questioned the sufficiency of circumstantial evidence in support of a criminal conviction, even though proof beyond a reasonable doubt is required"). Accordingly, we reiterate once again that the absence of direct evidence of an element of an offense does not prevent a finding of guilty for that offense from being legally sufficient.

B. Article 120(b)(2)(A) and Article 120(b)(3)(A) establish separate theories of liability[2]

Appellant's alternative argument requires us to examine Article 120(b)(2)(A), UCMJ, to determine whether the Government can prove sexual assault "without the consent" of the victim by establishing that the victim was incapable of consenting. This Court reviews questions of statutory interpretation de novo. *United States v. Lopez de Victoria*, 66 M.J. 67, 73 (C.A.A.F. 2008). The first step in statutory interpretation cases "is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *United States v. McPherson*, 73 M.J. 393, 395 (C.A.A.F. 2014) (citation omitted) (internal quotation marks omitted). "[I]f

[2] All statutory references in this part of the opinion are to Article 120, UCMJ, 10 U.S.C. § 920 (2018), unless otherwise indicated. For readability purposes, we refer to "subsection (b)(2)(A)" and "subsection (b)(3)(A)" for Article 120(b)(2)(A), UCMJ, and Article 120(b)(3)(A), UCMJ, respectively.

the statutory language is unambiguous and the statutory scheme is coherent and consistent," the inquiry is done. *Id.* "Whether the statutory language is ambiguous is determined 'by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.' " *Id.* (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)).

When we engage in this analysis, the Court " 'typically seeks to harmonize independent provisions of a statute.' " *United States v. Kelly*, 77 M.J. 404, 407 (C.A.A.F. 2018) (quoting *United States v. Christian*, 63 M.J. 205, 208 (C.A.A.F. 2006)). To this end, this Court employs the surplusage canon, which requires "that, if possible, every word and every provision is to be given effect and that no word should be ignored or needlessly be given an interpretation that causes it to duplicate another provision or to have no consequences." *United States v. Sager*, 76 M.J. 158, 161 (C.A.A.F. 2017).

1. Text of Article 120(b), UCMJ

Article 120(b), UCMJ, criminalizes sexual assault in the military and defines multiple ways in which the Government may prove the offense. Article 120(b), UCMJ, provides in relevant part:

> (b) SEXUAL ASSAULT.—Any person subject to this chapter who—
>
> (1) commits a sexual act upon another person by—
>
> (A) threatening or placing that other person in fear;
>
> (B) making a fraudulent representation that the sexual act serves a professional purpose; or
>
> (C) inducing a belief by any artifice, pretense, or concealment that the person is another person;
>
> (2) commits a sexual act upon another person—

> (A) without the consent of the other person; or
>
> (B) when the person knows or reasonably should know that the other person is asleep, unconscious, or otherwise unaware that the sexual act is occurring; or
>
> (3) commits a sexual act upon another person when the other person is incapable of consenting to the sexual act due to—
>
> (A) impairment by any drug, intoxicant, or other similar substance, and that condition is known or reasonably should be known by the person; or
>
> (B) a mental disease or defect, or physical disability, and that condition is known or reasonably should be known by the person;
>
> is guilty of sexual assault and shall be punished as a court-martial may direct.

The article defines "consent" as "a freely given agreement to the conduct at issue by a competent person" and explicitly states that "[a]ll the surrounding circumstances are to be considered in determining whether a person gave consent." Article 120(g)(7)(A), (C), UCMJ. The article separately defines "incapable of consenting" as meaning that a person is "incapable of appraising the nature of the conduct at issue" or "physically incapable of declining participation in, or communicating unwillingness to engage in, the sexual act at issue." Article 120(g)(8), UCMJ.

In this case, the Government charged Appellant under Article 120(b)(2)(A), UCMJ, which criminalizes sexual assault "without the consent" of a victim. The Government defends its choice by arguing that the plain language of subsection (b)(2)(A) permits it to meet its burden of proof with evidence of JW's *lack of capacity* to consent due to her level of intoxication. The Government dismisses Appellant's due process concerns, arguing that he was convicted of precisely the crime with which he was charged—sexual assault without consent—and that nothing prevents

Congress from enacting overlapping criminal statutes that provide the Government with multiple theories of liability.

Our analysis begins, as it must, with the text of the statute. It is true, as the Government argues, that the language of subsection (b)(2)(A) does not expressly foreclose the Government from proving that JW did not consent by presenting evidence that she was incapable of consenting. But it is also true, as Appellant argues, that nothing in the language of subsection (b)(2)(A)—or in any other part of the article—forecloses Appellant's interpretation that subsection (b)(2)(A) presumes that the victim was capable of consenting. However, when we look beyond the specific language of subsection (b)(2)(A) and examine the "the specific context in which that language is used, and the broader context of the statute as a whole," we do not believe that subsection (b)(2)(A) can be read as broadly as the Government suggests. *McPherson*, 73 M.J. at 395 (internal quotation marks omitted) (quoting *Robinson*, 519 U.S. at 341).

Our analysis is guided by this Court's decision in *Sager*, 76 M.J. 158. There, the Court examined the language of Article 120(b)(2)(B), UCMJ, which criminalized a sexual act upon another person "when the person knows or reasonably should know that the other person is asleep, unconscious, or otherwise unaware that the sexual act is occurring." *Id.* at 161. The Court rejected the Government's argument that the phrase "asleep, unconscious, or otherwise unaware" created a single theory of criminal liability. *Id.* at 161-62. Noting Congress's use of the disjunctive "or" and applying the "ordinary meaning" canon of statutory construction, the Court held that "asleep," "unconscious," and "otherwise aware" reflected separate theories of liability. *Id.* ("In ordinary use the word 'or' . . . marks an alternative which generally corresponds to the word 'either.' " (alteration in original) (internal quotation marks omitted) (quoting Earl T. Crawford, *The Construction of Statutes* § 188 (1940))). The Court further noted that the Government's theory would violate the canon against surplusage, by stripping the words "asleep," "unconscious," and "or" of any meaning. *Id.* at 162 ("[T]he canon against surplusage

is strongest when an interpretation would render superfluous another part of the same statutory scheme." (quoting *Yates v. United States*, 574 U.S. 528, 543 (2015))).

The same logic applies to the Government's argument in this case. Under the Government's theory, every sexual act committed upon a victim who is incapable of consenting under subsection (b)(3)(A) would also qualify as a sexual assault under subsection (b)(2)(A) because the victim did not consent. The Supreme Court, however, has repeatedly instructed that courts must "give effect, if possible, to every word of a statute." *See, e.g., Roberts v. Sea-Land Services, Inc.*, 566 U.S. 93, 111 (internal quotation marks omitted) (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)). The Government's preferred approach would defy this guidance by rendering subsection (b)(2)(A) "practically devoid of significance," *Leocal v. Ashcroft*, 543 U.S. 1, 12 (2004), and relegating subsection (b)(3)(A) to mere surplusage without any purpose or effect.

Rendering subsection (b)(3)(A) as surplusage would be especially problematic because it would allow the Government to circumvent the mens rea requirement that Congress specifically added to the offense of sexual assault of a victim who is incapable of consenting. To achieve a conviction under subsection (b)(3)(A), the Government must prove not only that the victim was incapable of consenting *but also* that the victim's condition was known or reasonably should have been known by the accused. However, because subsection (b)(2)(A) only requires that the sexual act be performed "without the consent" of the victim (regardless whether the accused knew or should have known of that condition), if the Government can establish the absence of consent by proving that the victim was incapable of consenting, then the Government can obtain an incapable-of-consent conviction under subsection (b)(2)(A) without proving the accused's mens rea beyond a reasonable doubt. Indeed, this is exactly what may have happened in Appellant's case. The military judge may have convicted Appellant of sexual assault on the theory that JW was incapable of consenting without the Government proving

that Appellant knew or should have known that she was incapable. We agree with Appellant that this possibility raises serious due process concerns.

To avoid these concerns, and consistent with the language and structure of Article 120, UCMJ, we hold that subsection (b)(2)(A) and subsection (b)(3)(A) establish separate theories of liability. Subsection (b)(2)(A) criminalizes the performance of a sexual act upon a victim who is capable of consenting but does not consent. Subsection (b)(3)(A) criminalizes the performance of a sexual act upon a victim who is incapable of consenting to the sexual act due to impairment by any drug, intoxicant, or other similar substance when the victim's condition is known or reasonably should be known by the accused. Of course, nothing prevents the Government from charging a defendant with both offenses under inconsistent factual theories and allowing the trier of fact to determine whether the victim was capable or incapable of consenting. *See United Staes v. Elespuru*, 73 M.J. 326, 330 (C.A.A.F. 2014) (recognizing that the "complexity of Article 120, UCMJ, . . . make[s] charging in the alternative an unexceptional and often prudent decision"). But what the Government cannot do is charge one offense under one factual theory and then argue a different offense and a different factual theory at trial. Doing so robs the defendant of his constitutional "right to know what offense and under what legal theory he will be tried and convicted." *United States v. Riggins*, 75 M.J. 78, 83 (C.A.A.F. 2016) (citation omitted) (internal quotation marks omitted).

2. Legal Sufficiency of Appellant's Conviction

To convict Appellant of sexual assault in violation of Article 120(b)(2)(A), UCMJ, the Government was required to prove beyond a reasonable doubt that Appellant: (1) committed a sexual act upon JW, and (2) that Appellant did so "without the consent" of JW. Here, it is undisputed that Appellant committed a sexual act upon JW. And even though there is no direct evidence that Appellant engaged in sexual intercourse "without the consent" of JW, the Government presented significant circumstantial evidence on

the point.[3] Nevertheless, we agree with Appellant that some of the Government's arguments at trial raise significant due process concerns about his conviction.[4]

To prove the absence of consent, trial counsel:

- Argued not only that JW would not have consented but also that JW was incapable of consenting due to alcohol intoxication.
- Presented the testimony of an expert witness who estimated that JW's blood alcohol level was between 0.175 and 0.19 at the time of the sexual act and opined that JW would have had diminished mental capacity.
- Pointed to the testimony of multiple witnesses, saying "[e]veryone who had any interaction with [JW] knew she was too intoxicated to function that night," and that their testimony confirmed that JW "met the definition of an incompetent person before the accused took her to his room."
- Argued that the barracks CCTV footage showed that when JW went to Appellant's room, she

[3] This evidence includes: (1) testimony that JW had no prior relationship with Appellant; (2) testimony that JW would never have sex while on her period; (3) testimony that JW would not have pushed a tampon so far inside of herself; (4) testimony that JW made a morning-after report to the CQ desk after she realized something was wrong; (5) testimony that JW was upset; (6) testimony that Appellant initially denied that he had engaged in any sexual acts with JW; and (7) testimony that JW locked herself in Appellant's bathroom.

[4] In his supplement to his petition for review, Appellant asked this Court to decide whether his "conviction for sexual assault without consent should be reversed?" Appellant argued both that his conviction was legally insufficient and that there had been a constructive amendment to the charged offense. This Court granted review only of the legal sufficiency issue. *Mendoza*, 84 M.J. at 105 (order granting review). Accordingly, we consider any due process concerns only through the narrow lens of legal sufficiency.

"was completely out of it. She's stumbling. She's walking into the walls, bumping into objects, and she has no idea what's going on here."

- Pointed to Appellant's own statements in which Appellant admitted that JW was "really drunk" and that "she wasn't able to give consent."

The Government's arguments before this Court also make clear that the Government presented this evidence at trial to establish that JW was incapable of consenting and therefore there was an absence of consent.[5] But as we explained above, that is a different theory of criminal liability and a different offense than the one the Government charged.

Under the actual charged offense, Article 120(b)(2)(A), UCMJ, it is not clear how the evidence of JW's intoxication factored into either the decision of the military judge or the opinion of the ACCA. With respect to the military judge, the Government states: "Whether Ms. JW was completely incapacitated by alcohol or whether she was merely intoxicated to a point that her resistance was significantly reduced was a question of fact properly before the military judge for consideration." But nothing in the record indicates whether the military judge found that JW was capable of consenting but did not, or that JW was incapable of consenting and thus could not. Similarly, in upholding the factual sufficiency of Appellant's conviction, the ACCA relied on several factors, including "the victim's high level of intoxication." *Mendoza*, 2023 CCA LEXIS 198, at *8, 2023

[5] *See* Brief of Appellee at 8, *United States v. Mendoza*, No. 23-0210 (C.A.A.F. Dec. 26, 2023) ("evidence that a victim could not consent, is also evidence that they did not consent"); *id.* at 12 ("The service courts of criminal appeals (CCAA) [sic] agree that the government may meet its burden of proving 'without consent' by relying mainly on evidence of extreme intoxication" (footnote omitted)); *id.* at 20 ("the direct evidence of incapacitation through intoxication, on its own, is overwhelming evidence that Ms. JW did not consent"); *id.* at 21 ("If someone is incapable of giving consent, clearly this is a factor in determining whether there was consent.").

WL 3540415, at *3. The ACCA's express reliance on the evidence of JW's intoxication—without any explanation of how or why that evidence factored into its analysis—raises serious questions about the legal and factual sufficiency of Appellant's conviction.

Of course, we are mindful that the ACCA did not have the benefit of our decision holding that Article 120(b)(2)(A), UCMJ, and Article 120(b)(3)(A), UMCJ, establish separate theories of liability. This likely explains the lack of clarity in the ACCA's decision with respect to how it viewed and used the evidence of JW's intoxication. And although this Court does not review the factual sufficiency of convictions when we review cases under Article 67, UCMJ, 10 U.S.C. § 867 (2018), we "retain the authority to review factual sufficiency determinations of the CCAs for the application of 'correct legal principles,' but only as to matters of law."[6] *United States v. Clark*, 75 M.J. 298, 300 (C.A.A.F. 2016) (quoting *United States v. Leak*, 61 M.J. 234, 241 (C.A.A.F. 2005)). Indeed, in the past we have remanded cases when there is an "open question" whether the CCA's factual sufficiency analysis applied correct legal principles. *United States v. Thompson*, 83 M.J. 1, 5 (C.A.A.F. 2022) (quoting *United States v. Nerad*, 69 M.J. 138, 147 (C.A.A.F. 2010)).

In our view, the ACCA's opinion presents an open question whether it improperly considered the evidence of JW's intoxication as proof of JW's inability to consent and therefore proof of the absence of consent. To be clear, our holding—that subsection (b)(2)(A) and subsection (b)(3)(A) create separate theories of liability—does not bar the trier of

[6] Congress amended Article 67(c), UCMJ, in 2021, but that amendment only applies to offenses that occurred on or after January 1, 2021. William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, § 542(e)(2), 134 Stat. 3388, 3612-13. Because the alleged offense in this case occurred in July 2020, the amended article does not apply to this case. This opinion makes no comment on what changes, if any, that amendment had on this Court's authority to review the factual sufficiency of offenses committed after January 1, 2021.

fact from considering evidence of the victim's intoxication when determining whether the victim consented. *See* Article 120(g)(7)(C), UCMJ ("All the surrounding circumstances are to be considered in determining whether a person gave consent."). Nothing in the article bars the Government from offering evidence of an alleged victim's intoxication to prove the absence of consent.[7] Conversely, nothing bars the defense from offering the same evidence to sow reasonable doubt.[8] But what the Government cannot do is prove the absence of consent under Article 120(b)(2)(A), UCMJ, by merely establishing that the victim was too intoxicated to consent.

In this case, the Government argued that the evidence established both that JW would not have consented to the sexual act and that she was incapable of consenting to the sexual act. The ACCA's opinion affirming Appellant's conviction did not specify whether the ACCA found that JW was capable of consenting, stating only that the evidence established that Appellant engaged in sexual intercourse with a victim whom he knew to be "highly intoxicated." *Mendoza*, 2023 CCA LEXIS 198, at *10, 2023 WL 3540415,

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[7] In this case, the Government argues that evidence of a victim's intoxication may be used to show that alcohol was used "to reduce a victim's resistance." Brief of Appellee at 17 n.12, *United States v. Mendoza*, No. 23-0210 (C.A.A.F. Dec. 26, 2023) (citation omitted) (internal quotation marks omitted).

[8] *See United States v. Mendoza*, __ M.J. __, __ (20) (C.A.A.F. 2024) (Sparks, J. concurring in part and dissenting in part and in the judgment) ("Given the expert and lay testimony presented at trial, evidence of [the victim's] intoxication provides more basis for reasonable doubt than it does circumstantial evidence that she did not consent."); *see also* Christine Chambers Goodman, *Protecting the Party Girl: A New Approach for Evaluating Intoxicated Consent*, 2009 B.Y.U. L. Rev. 57, 76 (2009) (recognizing "that men as well as women can become more aggressive after consuming alcohol" (citation omitted)); Lori E. Shaw, *Title IX, Sexual Assault, and the Issue of Effective Consent: Blurred Lines—When Should "Yes" Mean "No"?*, 91 Ind. L.J. 1363, 1372 (2016) (noting that alcohol can lead to escalatory sexual contact and an ultimate feeling that something went "terribly wrong").

at *3. Recognizing the significance of our holding with respect to Article 120(b)(2)(A), UCMJ, and the prominent role intoxication evidence played in Appellant's trial, we believe that the ACCA should reconsider the factual and legal sufficiency of Appellant's conviction in light of this opinion. Remanding to the ACCA will also give the parties a full and fair opportunity to be heard on the legal and factual sufficiency of Appellant's conviction under Article 120(b)(2)(A), UCMJ.

We therefore set aside the ACCA's decision and remand the case for a new review under Article 66, UCMJ, 10 U.S.C. § 866 (2018). We express no view on whether the evidence is factually or legally sufficient to support Appellant's conviction for a violation of Article 120(b)(2)(A), UCMJ, and instead leave that question for the ACCA to decide.

III. Conclusion

The decision of the United States Army Court of Criminal Appeals is set aside. The record of trial is returned to the Judge Advocate General of the Army for remand to the United States Army Court of Criminal Appeals for a new factual and legal sufficiency review under Article 66, UCMJ, 10 U.S.C. § 866 (2018).

Judge SPARKS, concurring in part and dissenting in part and in the judgment.

I join part II(B)(1) of the majority opinion because I agree with the majority that Article 120(b)(2)(A), UCMJ, and Article 120(b)(3)(A), UCMJ, create separate theories of criminal liability. 10 U.S.C. § 920 (2018). The majority acknowledges, correctly in my opinion, that "[t]he Government's approach—which conflated two different and inconsistent theories of criminal liability—raises significant due process concerns." *United States v. Mendoza*, __ M.J. __, __ (3) (C.A.A.F. 2024). And I am in complete agreement with the majority that:

> what the Government cannot do is charge one offense under one factual theory and then argue a different offense and a different factual theory at trial. Doing so robs the defendant of his constitutional "right to know what offense and under what legal theory he will be tried and convicted."

Id. at __ (13) (quoting *United States v. Riggins*, 75 M.J. 78, 83 (C.A.A.F. 2016)). The majority even goes so far as to explain that in this case "[t]he military judge may have convicted Appellant of sexual assault on the theory that JW was incapable of consenting without the Government proving that Appellant knew or should have known that she was incapable." *Id.* at __ (12-13). Again, I agree.

It is in deciding where we go from this point that the majority and I disagree. Instead of finding that the evidence is legally insufficient or that Government violated Appellant's due process right to fair notice by arguing an uncharged factual and legal theory of liability at trial and testing the error for prejudice, the majority instead concludes that the appropriate remedy in this case is to remand the case to the United States Army Court of Criminal Appeals (ACCA) for a new legal and factual sufficiency review in which the ACCA can explain "how or why the evidence of JW's intoxication factored into its analysis." *Id.* at __ (3). With this I cannot agree.

First, I believe that the majority misconstrues Appellant's argument when it claims that he "argues that the evidence was legally insufficient because the Government

relied solely on circumstantial evidence." *Id.* at __ (6-7). Appellant does not argue that the Government can never prove lack of consent by circumstantial evidence. Rather, he argues that when the Government charges "without consent" the burden of proof rests upon the Government to present legally sufficient evidence that affirmatively points to a lack of consent vice evidence that points to a lack of capacity to consent—a separate factual and legal theory. Brief of Appellant at 19-20, *United States v. Mendoza*, No. 23-0210 (C.A.A.F. Nov. 27, 2023).[1] In short, Appellant argues that the Government failed to present legally sufficient evidence that the victim did not consent, despite the evidence presented that she may have been incapable of consent. He further argues that to affirm his conviction using evidence of an uncharged factual and legal theory would violate his due process right to fair notice. I agree—and I believe the majority does as well.

Nevertheless, the majority concludes that the correct result here is to remand this case to the ACCA for a new legal and factual sufficiency review in light of this opinion. Just how the ACCA's review must change is not entirely clear. On the one hand, the majority states, "[u]nder the actual charged offense, Article 120(b)(2)(A), UCMJ, it is not clear how the evidence of JW's intoxication factored into either the decision of the military judge or the opinion of the ACCA." *Mendoza*, __ M.J. at __ (15). However, the majority later explains that its holding "does not bar the trier of fact from considering evidence of the victim's

[1] Similarly, in dissenting from the ACCA opinion in this case, Senior Judge Walker explained, "[t]he charged offense requires the government to affirmatively prove the victim *did not consent* and the government failed to satisfy its burden on this essential element." *United States v. Mendoza*, No. ARMY 20210647, 2023 CCA LEXIS 198, at *14, 2023 WL 3540415, at *5 (A. Ct. Crim. App. May 8, 2023) (unpublished) (Walker, S.J., dissenting). Senior Judge Walker further explained, "[t]he government cannot rely exclusively on the victim's lack of memory due to intoxication as a proxy for satisfying its burden to prove a lack of consent, which is what occurred in this case." *Id.* at *15, 2023 WL 3540415, at *6.

intoxication when determining whether the victim consented." *Id.* at __ (16-17) ("All the surrounding circumstances are to be considered in determining whether a person gave consent." (internal quotation marks omitted) (quoting Article 120(g)(7)(C))). To that end, the majority does not appear concerned that the ACCA considered evidence of JW's intoxication, but only "whether it *improperly considered* the evidence of JW's intoxication as proof of JW's inability to consent and therefore proof of the absence of consent." *Id.* at (16) (emphasis added).

The majority's focus on whether the ACCA properly considered evidence of JW's intoxication in determining whether the Government presented sufficient evidence to convict Appellant of the charged crime ignores the real issue in this case—the Government's violation of Appellant's due process right to fair notice by charging Appellant with sexual assault without consent, but arguing at trial that he was guilty because JW was incapable of consent. This does not merely raise serious due process concerns. This is a violation of Appellant's due process right to fair notice. No explanation from the ACCA about how it considered the evidence of JW's intoxication will change the fact that Appellant's due process rights were violated at trial, long before this case reached the ACCA.

For the reasons explained below, I believe that the only options in this case are for this Court to find the evidence legally insufficient or, if the evidence is legally sufficient, to find that the Government violated Appellant's due process right to fair notice. Both routes require reversal. Neither leads to a second legal and factual sufficiency review by the ACCA. After reviewing the record in this case, I find the evidence is legally insufficient to affirm Appellant's conviction and would dismiss this case with prejudice. I therefore respectfully dissent.

I. Background

Given the nature of legal sufficiency review and the low bar to uphold a conviction, I believe it is necessary to explain the facts in detail. I apologize for restating facts already addressed by the majority, but I believe it is

necessary to paint the complete picture of this case before reviewing the legal question at issue.

Appellant and JW were both stationed at Camp Casey, in South Korea. On the evening of July 11, 2020, JW went out to dinner with friends. She testified about what she remembers from that night after getting back from dinner as follows: "I remember getting back to the barracks, there's a whole bunch of people out front drinking and whatnot, and I remember seeing Sergeant [B] from S2, and he had a bottle of vodka. I remember drinking that and that's the last thing I remember from that night."

She testified that her final memories from that evening were around 11:00 p.m. The next thing she remembered was waking up to a knock on her barrack's room door the following morning.

It is undisputed that JW was intoxicated that evening. It is also undisputed that JW has no memory of having sex with Appellant and could not testify whether she consented to having sex with Appellant. Instead, her testimony consisted of claims that she would not have consented to sex with Appellant under the circumstances, including her lack of a social relationship with Appellant and the fact that she was menstruating at the time.

Video evidence presented at trial clearly shows Appellant and JW entering Appellant's room at approximately 2:08 a.m. on July 12, 2020. Before entering the room, JW appeared to be intoxicated, but seemed aware of what was happening and was able to walk on her own. As they approached Appellant's room, Appellant touched JW's crotch. This touching constituted the basis for the abusive sexual contact specification of which Appellant was found not guilty.

Appellant and JW remained in the room for slightly more than one hour, leaving the room at 3:11 a.m. At that point, JW was leaning on Appellant as they walked back to her room. While JW was not walking on her own, she was walking with Appellant's assistance and not simply being carried by Appellant, who is smaller in stature than JW.

JW awoke the following morning to a knock on her door. She answered the door and was greeted by Appellant, who returned her shoes to her. According to JW, she did not recognize Appellant and had no prior social interaction with him. She went back to sleep but awoke again to Appellant knocking. This time he asked if she was sure she was okay. It was at this point that JW realized she was no longer wearing her underwear from the previous night, despite still wearing her pants from the previous night.[2] She went to the bathroom and discovered that her tampon had been pushed all the way inside her body. JW began to panic and eventually went to the hospital and underwent a sexual assault forensic examination, which included obtaining DNA swabs from her vagina. According to her testimony at trial, JW "filed a report just to figure out what had happened." The DNA test confirmed that she and Appellant engaged in sexual intercourse.

A. Appellant's Confession

Appellant was interviewed by Army Criminal Investigation Division Special Agent (SA) Dereck Williams. SA Williams first spoke to Appellant when he was canvassing the barracks. During this informal interview in the parking lot, Appellant told SA Williams that JW had been in his room the prior night. After later identifying Appellant as a suspect, SA Williams formally interrogated Appellant in a recorded interview.

During the interview Appellant admitted that JW was extremely intoxicated, but he initially denied having sexual relations with her. After being confronted with the

[2] JW admitted at trial that the sports bra and underwear she had been wearing the previous night were located on the floor of her room. JW's testimony also suggests that she had been wearing a pad rather than a tampon on the night of the assault, because she describes the photo showing her underwear as "that is a photo of the underwear I was wearing with the pad I had been wearing." JW also admitted that she could not recall when she put her tampon in, claiming "it would have been the day prior," which suggests it happened during the period of time for which she has no memory.

CCTV footage of them entering his room, Appellant admitted that they had sex, but claimed it was consensual. He then admitted that he knew she was too intoxicated to consent and made a written confession. In his written confession, Appellant explained that he and JW began to flirt while they were drinking in the day room:

> She leaned in and was whispering in my ear and kissing my neck and I pulled away initially however, became overwhelmed with emotion to give in and ignore all the signs and my own words [warning SGT RC that she was intoxicated]. I invited her down to my room and she followed in the process [I] groped her groin and thigh in the hallway. When we came into the room she initially sat on the bed and I the couch after a bit of conversation I got up to get a beer and we kissed, while kissing I asked her "is this okay?" she replied "show me what you got." We both began to remove clothing individually and I proceeded to lie down on the bed, she proceeded to give me oral sex and then I asked her to lie on her back. I then asked her to get ontop [sic] of me, then I asked her to once again lie on her back. . . . She then went into the bathroom and closed the door and turned the shower on while she went to throw up. She did not throw up and [I] knocked on the door asking if she was ok twice both time [sic] she said she was ok. She opened the door the second time and fell back onto the toilet and I had to help her up, she then fell back again and I then helped her up out of the bathroom and onto my sink.

In response to specific questions from SA Williams, Appellant admitted that JW was "[o]verly intoxicated," that she was not capable of giving consent when they had sex, and that he knew "it was wrong to conduct sex acts on SPC [JW] when she was incapable of giving consent."

B. The Charge

The Government charged Appellant with committing a sexual act upon JW, by penetrating her vulva with his penis, without her consent, in violation of Article 120(b)(2)(A), UCMJ. Appellant was not charged with sexual assault while the victim was incapable of consenting due to

impairment by an intoxicant, in violation of Article 120(b)(3)(A), UCMJ.[3]

C. Trial

At trial, the Government argued that the evidence would show that Appellant committed the charged sexual acts without JW's consent. JW testified that she did not remember having sex with Appellant, but that she would never have had sex while on her period, nor would she have had sex with her tampon in.

The Government presented expert testimony from Dr. RW, an expert in forensic biology with an emphasis on the effects of alcohol on behavior. Dr. RW testified that a "blackout" from drinking can involve either partial or total memory loss for a portion of the drinking episode. He explained that blackouts typically occur at a blood alcohol content (B.A.C.) of .14 of higher, with total memory loss typically occurring at .2 or higher. Dr. RW estimated the victim's B.A.C. on the night in question was between .175 and .19.

Additionally, Dr. RW testified that individuals in a state of blackout can still engage in voluntary behavior. Dr. RW explained that after a blackout individuals attempt to piece together what happened during that period of time:

> And oftentimes they're doing that based on their own personal values. So oftentimes it's, you know, I typically do this, but, you know, so that must be what happened kind of situation. So that's how a person often tries to put together the pieces of the memory. And then oftentimes they may find out from another person, when finding out what exactly happened during that memory, that it might not be what they expected because of alcohol.

Dr. RW also explained that "as the blood alcohol level increases, a person may become more reckless, acts in

[3] The Government also charged Appellant with one specification of abusive sexual contact without consent, in violation of Article 120(d), UCMJ, for touching JW's groin without her consent. Appellant was found not guilty of that specification.

sexually provocative ways or aggressive, and it also impairs a person's reaction time, comprehension, and motor movements."

Dr. RW viewed the CCTV footage in this case and commented upon JW's demeanor before and after she entered Appellant's room:

> So in reviewing the CCTV footage, I noticed there's a significant difference when [JW] left her room, I guess it was at about 1:47 and started to walk with—to [Appellant's] actual room. She was much more—she didn't appear to have a solid gait. So she had an uneven gait. She seemed a little bit staggery, but she was in stark contrast to what you saw once she left [Appellant's room], where she appeared to be much more sedated, where she was hanging on him and kind of being dragged along a little bit more. So that was just a stark difference between the two. And with that, it just made me think, you know, it's very much like the biphasic effects of alcohol . . . we call it the biphasic effects because you actually see a rise in the B.A.C., and during that rise, that's usually called the ascending limb, that's more stimulating. That's the more outgoing, the more talkative. And each person's slope can be different depending on what they're drinking or their weight. A lot of different factors.
>
> And then once a person stops drinking, there's about 30 to 45 minutes where the alcohol is being absorbed just to a person to reach their peak. That's their peak B.A.C. And then at that point, the body starts to, you know—really the liver, starts to process and get rid of all that alcohol in the system. And that's when you start to see some of those withdrawal. Essentially, your body's going into alcohol withdrawal, the sedating effects. So you see a lot more of the person nodding off. A person really, really just looking sedated compared to what they were like when they were actually consuming alcohol.

Finally, Dr. RW testified that JW had Benadryl in her system, which could explain her steep decline from the point of entering Appellant's room to the time she left, if

she took it during the time she was in her own room around 1:45 a.m.

D. Government's Closing Argument

During closing argument trial counsel argued, "[w]ith regard to consent, as you heard, [the victim] would not consent. *She could not.* She did not consent." (Emphasis added.) Trial counsel also argued, the victim "testified that she would not consent under those circumstances." As trial counsel continued, he seemed to conflate blacking out with an inability to consent, claiming, JW "could not consent under the circumstances. As she testified, she blacked out before 0145, while she was still outside, before Specialist [L] went to retrieve her."

When he discussed the legal definition of consent, trial counsel focused on the definition of "competent person" and all the evidence the military judge should consider to conclude that JW was not competent to consent to the sexual acts in question. "In other words," he concluded, "every eyewitness confirmed that Specialist [JW] was [sic] clearly—met the definition of an incompetent person before the accused took her to his room. And most importantly is that the accused knew it too."

For all intents and purposes, the Government's argument at trial was that JW did not consent to the charged sexual acts *because* she was not competent to consent given her state of intoxication. The Government never argued, nor did JW testify, that JW ever gave any indication to Appellant that her participation in the sexual acts was not voluntary. Rather, the Government's sole theory of the case was that JW "could not consent under the circumstances."

II. Discussion

A. Standard of Review

This Court reviews questions of legal sufficiency de novo. *United States v. King*, 78 M.J. 218, 221 (C.A.A.F. 2019). " 'The test for legal sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the

essential elements of the crime beyond a reasonable doubt.' "[4] *United States v. Gutierrez*, 73 M.J. 172, 175 (C.A.A.F. 2014) (quoting *United States v. Bennitt*, 72 M.J. 266, 268 (C.A.A.F. 2013)). "This legal sufficiency assessment draw[s] every reasonable inference from the evidence of record in favor of the prosecution." *King*, 78 M.J. at 221 (alteration in original) (internal quotation marks omitted) (quoting *United States v. Robinson*, 77 M.J. 294, 298 (C.A.A.F. 2018)). As such, "[t]he standard for legal sufficiency involves a very low threshold to sustain a conviction." *Id.* (quoting *United States v. Navrestad*, 66 M.J. 262, 269 (C.A.A.F. 2008) (Effron, C.J., joined by Stucky, J., dissenting)). "The criterion thus impinges upon 'jury' discretion only to the extent necessary to guarantee the fundamental protection of due process of law." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

In order to meet its low burden of establishing legal sufficiency in this case, the Government relies on evidence that JW was incapable of consenting to prove that she did not consent. As the majority opinion acknowledges, "there is no direct evidence that Appellant engaged in sexual intercourse 'without the consent' of JW." *Mendoza*, __ M.J. at __ (13-14). Nonetheless, the Government interprets the theories of sexual assault without consent and sexual assault while the victim is incapable of consent under Article

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[4] The majority claims that this case "departs from the usual 'reasonable trier of fact' analysis because Appellant challenges the legal sufficiency of his sexual assault conviction on two unusual grounds." *Mendoza*, __ M.J. at __ (6). However, the majority fails to explain what different standard we must now use. I disagree on this point and note that Appellant's arguments are not so unusual. Appellant simply argues that the evidence used by the Government in this case is not legally relevant because it supports an uncharged theory of liability and is therefore insufficient to support a finding of guilty. The fact that we must determine whether Appellant is correct that the Government cannot use evidence of an uncharged legal theory to prove a charged legal theory does not change the ultimate question of whether the Government did, in fact, present legally sufficient evidence for a rational trier of fact to find every element of the charge beyond a reasonable doubt.

120 as overlapping. Like the majority, I reject this interpretation for a number of reasons.

First, the Government's argument that proof of incapacity necessarily means proof of a lack of consent violates the statutory interpretation canon against surplusage by rendering all theories of sexual assault other than without consent superfluous. Second, contrary to the Government's argument, the legal theories of lack of consent and incapacity are legally contradictory rather than overlapping. And third, the Government violates a defendant's due process right to fair notice when it convicts him using a legal theory that was not charged.

B. The Government Argued at Trial That the Victim Was Incapable of Consenting

In this case, Appellant argues that there is no evidence in the record that JW did not consent to the sexual activity. On the other hand, the Government argues that "there was ample direct evidence that [JW] was incapable of consent and strong circumstantial evidence that [JW] did not consent." Brief of Appellee at 11, *United States v. Mendoza*, No. 23-0210 (C.A.A.F. Dec. 26, 2023). However, as explained above, the Government's argument to this Court that there is strong circumstantial evidence that JW did not consent was never made at trial. Rather, the Government's entire argument at trial was that JW was incompetent and therefore could not consent to sex.

The Government now argues to this Court that "evidence that a victim could not consent, is also evidence that [she] did not consent." *Id.* at 8. Therefore, we must determine whether evidence of a victim's incompetence necessarily proves a lack of consent in the context of Article 120(b)(2)(A) before we can determine whether the Government presented enough evidence to reach the low threshold of legal sufficiency for a charge of sexual assault without consent. For the reasons explained below, I believe that that evidence of a victim's incompetence is not evidence of a lack of consent.

C. Canon Against Surplusage

I agree with the majority that the Government's interpretation of Article 120, UCMJ, violates the canon against surplusage. While I wish to avoid repeating the majority opinion's analysis, I still find it necessary to examine the statutory scheme of Article 120, UCMJ, before moving on to the next portion of my opinion in order to be clear about what relevance, if any, evidence of JW's intoxication has to proving a charge of without consent.

Congress has articulated multiple legal theories of sexual assault. These can be broken down into three basic categories: (1) sexual assault when a victim is physically capable of consent but not legally capable of consent due to circumstances created by the accused;[5] (2) sexual assault when the victim is capable of consenting and does not consent;[6] and (3) sexual assault when the victim is physically incapable of consent and that condition is known or reasonably should be known by the accused.[7]

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[5] Article 120(b)(1)(A), UCMJ—"threatening or placing that other person in fear;" Article 120(b)(1)(B), UCMJ—"making a false representation that the sexual act serves a professional purpose;" or Article 120(b)(1)(C), UCMJ—"inducing a belief by any artifice, pretense, or concealment that the person is another person."

[6] Article 120(b)(2)(A), UCMJ—"without . . . consent."

[7] Article 120(b)(2)(B), UCMJ—"when the person knows or reasonably should know that the other person is asleep, unconscious, or otherwise unaware"; Article 120(b)(3)—

> commits a sexual act upon another person when the other person is incapable of consenting to the sexual act due to—
>
> > (A) impairment by any drug, intoxicant, or other similar substance, and that condition is known or reasonably should be known by the person; or
> >
> > (B) a mental disease or defect, or physical disability, and that condition is known or reasonably should be known by the person.

According to the Government's interpretation of Article 120, all theories of sexual assault committed when the victim is legally or physically incapable of consent could be charged under the single theory that the victim did not consent. If, as the Government argues, evidence of an inability to consent is evidence of a lack of consent, the government could prove a lack of consent by proving that the victim was legally or physically incapable of consenting to the alleged conduct. Were this the case, there would be no need for the government to ever charge sexual assault when a victim is incapable of consent because it could simply prove a charge of sexual assault without consent using evidence of legal or physical incapacity.

Because the Government's interpretation would make every part of the statute articulating a theory of criminality except "without consent" unnecessary, the majority correctly rejects this interpretation.

Furthermore, as the majority opinion points out, allowing the government to charge sexual assault without consent and to argue an incapacity theory would allow the government to avoid the obligation of proving beyond a reasonable doubt that the victim was actually incapable of consenting, and that the accused knew or reasonably should have known of the victim's incapacity, which I will address in the next section.

D. Lack of Consent and Incapacity Are Contradictory Theories of Criminality

The majority and I agree that Articles 120(b)(2)(A) and 120(b)(3)(A) present distinct factual and legal theories of sexual assault. However, as the majority points out, "nothing prevents the Government from charging a defendant with both offenses under inconsistent factual theories and allowing the trier-of-fact to determine whether the victim was capable or incapable of consenting." *Mendoza*, __ M.J. at __ (13) (citing *United States v. Elespuru*, 73 M.J. 326, 330 (C.A.A.F. 2014)). Therefore, I find it necessary to examine the distinctions between these separate factual and legal theories of liability to determine the legal and logical relevance of the evidence presented in this case. As the

majority points out, the majority's holding "does not bar the trier of fact from considering evidence of the victim's intoxication when determining whether the victim consented." *Id.* at __ (16-17) (citing Article 120(g)(7)(C), UCMJ). Given this permissible use of circumstantial evidence, we must examine whether direct evidence of JW's intoxication constitutes logically and legally relevant circumstantial evidence that JW did not, in fact, consent to the sexual activity in this case.

To prove a charge of sexual assault without consent the government is required to prove that (1) the accused committed a sexual act upon the victim; and (2) the victim did not consent to the sexual act. *Manual for Courts-Martial, United States* pt. IV, para. 60.b.(2)(d) (2019 ed.) (*MCM*). In order to prove a charge of sexual assault while the victim is incapable of consent the government must prove that (1) the accused committed a sexual act upon the victim; (2) while the victim is incapable of consenting; and (3) the accused knew or reasonably should have known the victim was incapable of consenting. *MCM* pt. IV, para. 60.b.(2)(e).

According to Article 120(g)(7), UCMJ:

> (A) The term "consent" means a freely given agreement to the conduct at issue by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance does not constitute consent. Submission resulting from the use of force, threat of force, or placing another person in fear also does not constitute consent. A current or previous dating or social or sexual relationship by itself or the manner of dress of the person involved with the accused in the conduct at issue does not constitute consent.
>
> (B) A sleeping, unconscious, or incompetent person cannot consent. A person cannot consent to force causing or likely to cause death or grievous bodily harm or to being rendered unconscious. A person cannot consent while under threat or in fear or under the circumstances described in subparagraph (B) or (C) or subsection (b)(1).

> (C) All the surrounding circumstances are to be considered in determining whether a person gave consent.

Furthermore, the term "incapable of consenting" means the person is:

> (A) incapable of appraising the nature of the conduct at issue; or
>
> (B) physically incapable of declining participation in, or communicating unwillingness to engage in, the sexual act at issue.

Article 120(g)(8), UCMJ.

In his articulation of the elements of these offenses, the President has explained that legal incapacity offenses require proof of the specific circumstances (e.g., placing the victim in fear) that result in the legal incapacity to consent. *MCM* pt. IV, para. 60.b.(2)(a)-(c). He has also explained that physical incapacity offenses require specific proof that the victim was incapable of consent. *MCM* pt. IV, para. 60.b.(2)(e)-(f). In contrast, a charge of sexual assault without consent does not require the government to prove that the victim was capable of consenting. *MCM* pt. IV, para. 60.b.(2)(d). The Government acknowledges this in its brief when it admits "the government had no requirement to prove that the victim was competent; only that she did not, in fact, consent." Brief of Appellee at 28, *United States v. Mendoza*, No. 23-0210 (C.A.A.F. Dec. 26, 2023) (alterations in original removed) (internal quotation marks omitted) (quoting *United States v. Motsenbocker*, No. 201600285, 2017 CCA LEXIS 539, *17 (N-M. Ct. Crim. App. Aug 10, 2017) (unpublished)).

While it may at first blush appear logical to argue that proving the victim was incapable of consenting necessarily proves that the victim did not consent—or that evidence of JW's intoxication constitutes circumstantial evidence that she did not consent—we need look no further than the majority's explanation of the two offenses to reject this argument. "Article 120(b)(2)(A), UCMJ, criminalizes engaging in a sexual act with a person capable of consenting who did not consent, and Article 120(b)(3)(A), UCMJ, criminalizes

engaging in a sexual act with a person who is incapable of consenting . . . ." *Mendoza,* __ M.J. at __ (3). If this is so, and I believe it is, then evidence establishing the victim's incapacity necessarily disproves an allegation of sexual assault without consent. Thus, a closer look reveals that these two theories of criminality are legally contradictory rather than overlapping. Indeed, if Articles 120(b)(2)(A) and 120(b)(3)(A) constitute different and inconsistent theories of liability, as the majority claims, they must be different in the proof required and not in name only if the canon against surplusage is to mean anything.

Any incapacity theory of sexual assault requires the government to prove beyond a reasonable doubt the victim's legal or physical incapacity. When charged under an incapacity theory the accused could offer proof of the victim's competence as a defense. For example, in *Riggins*, the appellant was able to disprove what the government charged in the original sexual assault specifications "by demonstrating that, at the time of the sexual activity, [the victim] was not in fear." 75 M.J. at 82. On appeal, this Court explained that incapacity and lack of consent are different legal theories of liability because "the fact that the Government was required to prove a set of facts that resulted in [the victim]'s *legal inability to consent* was not the equivalent of the Government bearing the affirmative responsibility to prove that [the victim] *did not, in fact, consent*." *Id.* at 84.

In contrast, as the Government acknowledges, when it charges sexual assault without consent it has no obligation to prove that the victim was competent. Unlike an incapacity theory of criminality, evidence of the victim's competency would offer no defense under a without consent theory. In other words, a charge of sexual assault without consent is equivalent to the government stipulating that the victim was competent to consent under the circumstances alleged. This is the root of the due process problem in this case. The Government charged the only theory of sexual assault for which proof of the victim's competency to consent is not a defense, then argued at trial that the victim was incapable of consenting.

Consistent with the Government's acknowledgment that a charge of sexual assault without consent does not require the Government to prove the victim's competency, it seems apparent to me that the Government would be unable to charge both theories of sexual assault—without consent and incapacity—in the alternative without necessarily disproving one charge at trial in order to prove the other. This is precisely what Appellant is getting at when he argues that the government is required to present direct evidence of a lack of consent in order to prove sexual assault under Article 120(b)(2)(A). If the government seeks to meet its burden using circumstantial evidence, it is the government's burden to demonstrate the logical relevance of such evidence to prove an element of the charge—e.g., that evidence of intoxication makes it less likely that the victim would consent.

The majority alludes to the long-standing practice of allowing the government to plead in the alternative to accommodate any contingencies of proof. *Mendoza*, __ M.J. at __ (13) (citing *Elespuru*, 73 M.J. at 330).[8] On this point, I would simply provide a cautionary note to military judges. Should they encounter such pleadings, at the close of the evidence they should make a careful determination as to which offense is supported by the evidence and which one may not be supported. Then only one of these contingent offenses should be sent to the trier of fact. After all, "[i]t is the Government's responsibility to determine what offense to bring against an accused. Aware of the evidence in its possession, the Government is presumably cognizant of which offenses are supported by the evidence and which are not." *United States v. Morton*, 69 M.J. 12, 16 (C.A.A.F. 2010).

Having explained the distinct and inconsistent nature of without consent and incapacity theories of liability, I

[8] In *Elespuru*, this Court evaluated the appellant's argument that his convictions for abusive sexual contact and wrongful sexual contact were multiplicious, not whether conflicting theories of liability violate the due process right to fair notice. 73 M.J. at 327.

now turn to the evidence in this case and examine whether the Government presented legally sufficient evidence of JW's lack of consent.

E. The Government Failed to Prove Sexual Assault Without Consent

First, it has been well established that the Government argued at trial and on appeal that JW was legally incapable of consent on the night in question. If that is the case, the Government is legally incapable of proving Appellant's guilt under Article 120(b)(2)(A), UCMJ. However, despite the Government's argument on this point, no court has found as a matter of law that JW was incapable of consent. Therefore, we must now examine whether the evidence presented at trial is sufficient to prove that JW did not, in fact, consent.

It bears restating that there is no direct evidence that JW did not consent to the sexual activity that took place. The Government argues, however, that there is "strong circumstantial evidence that [JW] did not consent." Brief of Appellee at 11, *United States v. Mendoza*, No. 23-0210 (C.A.A.F. Dec. 26, 2023). Similarly, the majority, despite not reaching the question of legal sufficiency, claims that there is "significant circumstantial evidence on this point." *Mendoza*, __ M.J. at __ (13-14). According to the majority:

> This evidence includes: (1) testimony that JW had no prior relationship with Appellant; (2) testimony that JW would never have sex while on her period; (3) testimony that JW would not have pushed a tampon so far inside of herself; (4) testimony that JW made a morning-after report to the CQ desk after she realized something was wrong; (5) testimony that JW was upset; (6) testimony that Appellant initially denied that he had engaged in any sexual acts with JW; and (7) testimony that JW locked herself in Appellant's bathroom.

Id. at __ (14 n.3).

In making this assertion, the majority neglects important facts and makes much of evidence that is subject to multiple explanations. For example, Appellant's initial

denial of engaging in sexual acts with JW could be interpreted as evidence of consciousness of guilt for engaging in sex with someone he believed was not capable of consenting—as he explained in his confession and the Government argued at trial—or it could be interpreted as evidence that he did not want to confess to extramarital sexual conduct. But it is not enough for the Government to prove that Appellant had a guilty conscience, it must prove the specific elements of the crime for which Appellant feels guilty.

Appellant did admit that he knew JW was incapable of consenting. But at no point during the interview was Appellant provided with a legal definition of incapacity. While Appellant's confession provides strong evidence that JW may have been too intoxicated to consent, it does not establish that she did not consent. Indeed, his confession describes JW as actively engaging in the sexual acts, rather than being unable to appreciate the nature of the conduct or unable to decline participation therein. *See* Article 120(g)(7) (" 'incapable of consenting' means the person is (A) incapable of appraising the nature of the conduct at issue; or (B) physically incapable of declining participation in, or communicating unwillingness to engage in, the sexual act at issue").

Similarly, evidence that JW and Appellant lacked a prior relationship, testimony from JW that she would never have sex on her period and would never push a tampon so far inside herself, and evidence that JW seemed upset all ignore the overwhelming evidence that JW was intoxicated on the night in question and acting in ways uncharacteristic of her normal behavior.

Nor does JW's immediate report provide any evidence that JW did not consent to the sexual acts in question. Rather than reporting a sexual assault, JW testified at trial that she "filed a report just to figure out what had happened." It is precisely because of JW's inability to testify that she was sexually assaulted that the Government must prove its case by circumstantial evidence.

The Government argues that the JW's intoxication is simply part of "all [the] surrounding circumstances [that]

are to be considered in determining whether a person gave consent." Brief of Appellee at 17, *United States v. Mendoza*, No. 23-0210 (C.A.A.F. Dec. 26, 2023) (internal quotation marks omitted) (quoting Article 120(g)(8)). To that end, the ACCA pointed to "the victim's high level of intoxication" as evidence supporting a finding of guilty. *Mendoza*, 2023 CCA LEXIS 198, at *8, 2023 WL 3540415, at *3. However, this conclusion is at best questionable and at worst contradicted by the expert testimony presented in this case. Specifically, the Government's expert witness Dr. RW testified that "as the blood alcohol level increases, a person may become more reckless, acts in sexually provocative ways or aggressive, and it also impairs a person's reaction time, comprehension, and motor movements." Dr. RW did not testify that an increased B.A.C. makes a person less likely to consent to sexual activity.

Dr. RW also estimated that JW's B.A.C. was between .175 to .19, which would result in her not acting like her "usual self." Indeed, Sergeant RC testified that on the night in question JW "wasn't acting like herself. Most of the encounters I've had with her she's more of just kind of an introverted, more to herself type person. This time she was more outgoing [and] started becoming flirtatious in a way." Given the expert and lay testimony presented at trial, evidence of JW's intoxication provides more basis for reasonable doubt than it does circumstantial evidence that she did not consent.

While the Government points to testimony from JW that she would not have consented under these circumstances, the video evidence in this case shows she and Appellant entered his room together while they appear to be flirting, both intoxicated. In fact, the military judge—the sole fact-finder in this case—found Appellant not guilty of the charge of abusive sexual contact alleged to have occurred just before they entered Appellant's barracks room. The CCTV footage and Appellant's admissions leave no doubt that the touching took place, so we are left to conclude that the military judge did not believe JW did not consent to the touching in the hallway, nor that she was

incapable of consenting as she entered Appellant's room (as the Government argued at trial).

Despite this finding by the military judge that necessarily finds that JW consented to sexual contact moments before entering Appellant's room, the Government would have us conclude that the evidence is sufficient for a rational trier of fact to conclude beyond a reasonable doubt that she did not consent to sexual acts that took place at some point after entering the room. Given JW's lack of memory regarding whether or not she consented, the expert testimony from Dr. RW regarding the effects of alcohol and JW's level of intoxication, and the substance of Appellant's confession, I cannot conclude that the evidence supports a finding that JW did not consent.

In sum, after viewing the evidence in the light most favorable to the prosecution, I cannot conclude that any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

III. Conclusion

Without consent and incapacity to consent are two separate theories of criminal liability. The Government made the decision to charge Appellant with sexual assault without consent and therefore could not prove Appellant's guilt by proving that JW was incapable of consent. The fact of the matter is the Government charged Appellant with the wrong offense and proceeded to trial with evidence that supported a different uncharged offense. A due process violation occurred at trial that a remand to the lower court simply cannot cure. Further, having reviewed the record in this case, I cannot conclude that a rationale trier of fact could be satisfied beyond a reasonable doubt that JW did not consent to the sexual acts that took place after she entered Appellant's room.

For these reasons, I respectfully dissent from the decision to remand and would dismiss Appellant's conviction with prejudice.

Judge MAGGS, concurring in part and dissenting in part.

I concur with the Court's interpretation of Article 120(b)(2)(A), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920(b)(2)(A) (2018). I disagree, however, with one aspect of the Court's disposition of this appeal. Specifically, while the Court remands the case for both a new legal and factual sufficiency review, I would hold that the evidence is legally sufficient and remand solely for a new factual sufficiency review. I therefore respectfully concur in part and dissent in part.

I. Background

In the supplement to his petition for review, Appellant asked this Court to decide "[w]hether [his] conviction for sexual assault without consent should be reversed?" He asserted that this Court should set aside the decision of the United States Army Court of Criminal Appeals (ACCA) because the evidence was legally insufficient. In the alternative, Appellant contended that allowing his conviction to stand based on the evidence admitted at trial would amount to a constructive amendment of the charged offense.

This Court granted review of a modified version of the question that Appellant presented in his supplement, namely, "[w]hether Appellant's conviction for sexual assault without consent was legally sufficient." *United States v. Mendoza*, 84 M.J. 105 (C.A.A.F. 2023) (order granting review). The parties' briefs, accordingly, focus on the legal sufficiency of the evidence of lack of consent under Article 120(b)(2)(A), UCMJ. The Court, however, does not answer the granted question but instead remands the case so that the ACCA may perform both a new legal sufficiency review and a new factual sufficiency review.

II. Legal Sufficiency

Questions of legal sufficiency are reviewed de novo. *United States v. Brown*, 84 M.J. 124, 127 (C.A.A.F. 2024) (citing *United States v. Wilson*, 76 M.J. 4, 6 (C.A.A.F. 2017)). Accordingly, this Court has the ability and authority to decide whether the evidence is legally sufficient

without any further review by the ACCA. I see no prudential reason not to do so in this case given that we specified the issue of legal sufficiency and that the parties thoroughly briefed this issue.

As the Court correctly explains, the bar for finding the evidence to be legally sufficient is "very low." *United States v. King*, 78 M.J. 218, 221 (C.A.A.F. 2019) (internal quotation marks omitted) (citation omitted). We must consider "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Smith*, 83 M.J. 350, 359 (C.A.A.F. 2023) (internal quotation marks omitted) (quoting *United States v. Robinson*, 77 M.J. 294, 297-98 (C.A.A.F. 2018)).

The Court properly holds in this case that evidence that the victim was incapable of consenting because of intoxication generally cannot prove lack of consent in a case charged under Article 120(b)(2)(A), UCMJ. This holding implicates the legal sufficiency of the evidence for finding Appellant guilty because, as one of the ACCA judges observed, the "government's primary evidence of *lack of consent* in this case was the victim's lack of memory due to intoxication and outward manifestation of intoxication." *United States v. Mendoza*, No. ARMY 20210647, 2023 CCA LEXIS 198, at *12, 2023 WL 3540415, at *4 (A. Ct. Crim. App. May 8, 2023) (Walker, S.J., dissenting) (unpublished). But even if all of the intoxication evidence must be put aside, the record in this case still contains other evidence potentially relevant to the issue of consent. This Court may determine whether this other evidence is legally sufficient to sustain the finding that Appellant is guilty. *United States v. Long*, 81 M.J. 362, 364 (C.A.A.F. 2021) (assessing legal sufficiency in this manner).

The other evidence in this case includes: (1) testimony that JW (the alleged victim) had no prior relationship with Appellant; (2) testimony that JW would never have sex while on her period; (3) testimony that JW would not have pushed a tampon so far inside of herself; (4) testimony that JW made a morning-after report to the Charge of Quarters (CQ) desk after she realized something was wrong; (5)

testimony that JW was upset; (6) testimony that Appellant initially denied that he had engaged in any sexual acts with JW; and (7) testimony that JW locked herself in Appellant's bathroom. Based on this other evidence, I would hold that a rational trier of fact *could have found* that the element of lack of consent under Article 120(b)(2)(A), UCMJ, was proven beyond a reasonable doubt. Accordingly, I would answer the granted question in the affirmative, and I would not remand the case to the ACCA for further review of the legal sufficiency of the evidence.

III. Factual Sufficiency

While I would decide that the evidence was legally sufficient, I concur with the Court's decision to remand the case for a new factual sufficiency review. Although the granted question and the briefs in this appeal do not address factual sufficiency, our new clarification of the relationship between Article 120(b)(2)(A), UCMJ, and Article 120(b)(3)(A), UCMJ, raises the question of whether the ACCA may have erred in its factual sufficiency analysis. Because this Court cannot review questions of factual sufficiency de novo, Appellant is entitled to have the ACCA perform a proper factual sufficiency review in the first instance.