

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

Meeting Materials

September 17, 2024

**Defense Advisory Committee on Investigation, Prosecution, and Defense of
Sexual Assault in the Armed Forces (DAC-IPAD)
37th Public Meeting**

**September 17, 2024
Preparatory Materials**

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- Tab 3** **Draft Minutes of the DAC-IPAD’s 36th Public Meeting on June 27, 2024 (6 pages)**
- Tab 4** **Materials relevant to the DAC-IPAD’s study of the ability of military crime victims to independently assert and enforce their rights under Article 6b, UCMJ**
- Tab 4a** Policy Subcommittee’s Initial Draft *Report on Enforcing Article 6b, UCMJ, Victims’ Rights (21 pages)*
- *This draft report proposes 5 substantive recommendations and line-by-line edits to the text of Article 6b addressing the following issues:*
1. 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 a victim’s petition for a writ of mandamus;
3. The timeframe for appellate review of a victim’s petition for a writ of mandamus; and
4. The standard of review for a victim’s petition for a writ of mandamus.
- Tab 4b** UCMJ Article 6b, Rights of a victim of an offense under this chapter (2 pages)
- *Full text of Article 6b, UCMJ, (2024 MCM) provided for reference.*
- Tab 4c** Crime Victim’s Rights Act, 18 U.S.C. § 3771 (3 pages)
- *Full text of the federal crime victims’ rights statute provided for reference.*
- Tab 5** **Staff-prepared guide for the DAC-IPAD’s initial deliberations on issues emerging from site visits**
- *Purpose: This list highlights common issues and concerns raised during the site visits and should assist the Committee in identifying and prioritizing subjects for further review by the DAC-IPAD. (2 pages)*

Tab 6

Materials relevant to the DoD General Counsel's request to the DAC-IPAD regarding support systems available to Service Members charged with court-martial offenses

Tab 6a Letter from the DoD General Counsel to the DAC-IPAD Chair (August 3, 2024), requesting a report by June 2, 2025, on improvements to support systems for Service members charged with court-martial offenses (*1 page*)

Tab 6b *Suicide Risk Following Criminal Arrest*, Psychiatric Times, December 30, 2020 (*3 pages*)

- *Purpose: This article is cited in the DoD General Counsel's letter to support the concern that in the civilian criminal justice system, being charged with a criminal offense is associated with a higher prevalence of suicide and suicide attempts.*

Tab 6c Summary, Recommendations of the DoD Suicide Prevention and Response Independent Review Committee (*2 pages*)

- *Purpose: This staff-prepared summary highlights a DoD advisory committee's concerns regarding suicidal behavior among Service members charged with select UCMJ offenses involving child victims.*

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

PUBLIC MEETING AGENDA

Location: Virtual

Tuesday, September 17, 2024

11:00 a.m. – 12:00 p.m.

Administrative Session (Closed)

12:00 p.m. – 12:05 p.m.

Welcome and Introduction to Public Meeting

12:05 p.m. – 1:15 p.m.

Committee deliberations on recommendations for enforcing victims' Article 6b rights
(70 minutes)

Purpose: To deliberate on the Policy Subcommittee's proposed findings and recommendations regarding provisions under Article 6b, UCMJ, for enforcing victims' rights.

1:15 p.m. – 2:00 p.m.

Lunch
(45 minutes)

2:00 p.m. – 3:00 p.m.

Committee deliberations on emerging issues identified on military installation site visits
(60 minutes)

Purpose: To identify themes and issues arising out of the Committee's military installation site visits. This discussion will involve issues, not specific site visit feedback, and is intended as a preliminary discussion to identify possible areas of future studies prior to full deliberations in December.

3:00 p.m. – 3:10 p.m.

Break
(10 minutes)

3:10 p.m. – 3:30 p.m.

Committee deliberations on emerging issues identified on military installation site visits (continued)
(20 minutes)

Purpose: To identify themes and issues arising out of the Committee's military installation site visits. This discussion will involve issues, not specific site visit feedback, and is intended as a preliminary discussion to identify possible areas of future studies prior to full deliberations in December.

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

PUBLIC MEETING AGENDA

- | | |
|------------------------------|--|
| 3:30 p.m. – 4:00 p.m. | Public Comment
<i>(30 minutes)</i> |
| 4:00 p.m. – 4:30 p.m. | Subcommittee Updates & Meeting Wrap-up
<i>(30 minutes)</i> |
| 4:30 p.m. | Public Meeting Adjourned |



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

MINUTES OF JUNE 11-12, 2024 PUBLIC MEETING

AUTHORIZATION

The Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (“the Committee” or “DACIPAD”) 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-fifth public meeting on June 11-12, 2024.

LOCATION

The meeting was held at Convene Hamilton Square, 600 14th Street NW, Washington, DC. 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
Ms. Martha Bashford
Mr. William E. Cassara
Ms. Margaret Garvin
Ms. Suzanne Goldberg
Mr. A.J. Kramer
Ms. Jennifer Gentile Long
Dr. Jennifer Markowitz

Sergeant Major Ralph Martinez, U.S. Army,
Retired
The Honorable Jennifer O'Connor
Brigadier General James R. Schwenk,
U.S. Marine Corps, Retired
Detective Lisa M. Shepperd
Dr. Cassia Spohn
Ms. Meghan A. Tokash
Honorable 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
Ms. Janelle McLaughlin-Ali, Paralegal
Mr. Blake Morris, Paralegal
Ms. Stayce Rozell, Senior Paralegal
Ms. Terri Saunders, Attorney-Advisor
Ms. Kate Tagert, Attorney-Advisor
Dr. William Wells, Committee Consultant

Other Participants

Mr. Dwight Sullivan, Designated Federal Officer (DFO)
Mr. William Sprance, Alternate Designated Federal Officer (DFO)

MEETING MINUTES

The public meeting was held over two days and had seven public sessions, including four panels of invited presenters (military justice and civilian practitioners); and three sessions led by staff.

Day One – June 11, 2024

Quorum was established and Mr. Dwight Sullivan, Designated Federal Officer, opened the meeting at 1:35 p.m. Mr. Sullivan 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.

Panel: Government Appellate Counsel from each Military Department

The panel included the following presenters:

COL Christopher B. Burgess, U.S. Army
Col Matthew D. Talcott, U.S. Air Force
Col Joseph “Mac” Jennings, U.S. Marine Corps
Mr. Ted R. Fowles, U.S. Coast Guard

Chair Smith began by asking the panel to provide their perspectives on the U.S. Court of Appeals for the Armed Forces (CAAF) having jurisdiction to review a victim’s petition for a writ of mandamus following a denial by a Court of Criminal Appeals (CCA). The panel agreed that it would provide uniformity in the application of rules across the Service courts, including the applicability of Military Rule of Evidence (M.R.E.). 513. They stated that the negatives are that it could lead to longer delay in cases pending trial or post-conviction appellate review. The panelists agreed that it takes approximately twelve months for a case to move through the Service court of criminal appeals and CAAF.

The panel agreed that it would not be reasonable to place a requirement like the Crime Victims’ Rights Act (CVRA) which requires a decision to be made within 72 hours, because it could place a strain on resources and potentially impact the quality of the decision.

The panel discussed Article 6b rights and standing for a victims’ counsel to exercise 6b rights at the trial court. It was agreed that in some Services, judges routinely don’t permit victims’ counsel to have standing on all Article 6b issues. The panel expressed that as judges become more comfortable with Article 6b victims’ rights litigation, it could create an efficiency for the record for the appellate level.

The panelists considered whether the standard of review of Article 6b writ petitions should be amended to the lower standard in the CVRA and agreed that writs should be a rare occurrence and a high review standard should be maintained. It was expressed that although a high review standard discourages appeals it also discourages development of clarity in the law. On whether giving victims’ counsel standing would lessen appellate action, the panelists had differing opinions. Concerns expressed included the victims’ counsel potentially disagreeing with the Government’s prosecution strategy, and the complications inherent in cases where there are

multiple victims, each of whom have a victims' counsel. It was expressed that if victims' counsel had standing at trial, it could potentially create better writ decisions by the CCAs.

Next, the panel discussed the impact the recent CAAF decision in *U.S. v Mellette*, 82 M.J. 374, has had on their trial practice in sexual offense cases. The *Mellette* decision addressed the M.R.E. 513 privilege that covers confidential communications made to a psychotherapist. The decision found the plain language of the rule excludes information about treatment and diagnosis of a mental health condition from that privilege. The panelists agreed that in some Services, it has caused confusion in how to apply it practically at the trial level. The panelists stated that for clarity, it would be helpful to get refinement on the decision. They noted with concern that it can take a long time for the courts to provide clarity, and offered as an example the Services have had, for several years now, different interpretations of the exceptions to the privilege in M.R.E. 513. There is also concern about applying the M.R.E. 513 privilege and how that will work with the medical system within each of the Services, and how to sort out what is confidential communications from the treatment and diagnosis, and what procedures are in place to produce those records that then become part of a public record.

The panelists then discussed their perspectives regarding the establishment of conviction integrity units within the military justice system. Currently there are protections in place through the post-conviction review provided by the CCAs' factual sufficiency review, the parole and clemency boards, the CAAF, and Article III courts. The panelists agreed that there could be value in studying the establishment of Service-specific conviction review units but expressed concern regarding resources to support a separate unit dedicated to conviction reviews. The panel expressed support for exploring a good-cause exception to the Rules for Courts-Martial that would allow a new trial petition if more than three years have passed since the original trial.

Panel: Defense Appellate Counsel from each Military Department

The panel included the following presenters:

Mr. Jonathan F. Potter, U.S. Army
Ms. Megan P. Marinos, U.S. Air Force
Ms. Rebecca S. Snyder, U.S. Navy
Mr. Thomas D. Cook, U.S. Coast Guard

The Panel discussed the positives and negatives of CAAF having jurisdiction to review a victim's petition for a writ of mandamus following a denial by a Court of Criminal Appeals. They agreed that there would be no positives to extending additional benefits to the victim from the defense bar's perspective and explained that after an unfavorable ruling from the CCA, the victim could then appeal that to the CAAF and potentially receive a favorable ruling. Additionally, the status quo balances the rights of the victim and the accused by not allowing victims to delay the trial process by filing routine writ appeals at CAAF. The panel agreed that the current process of allowing the alleged victim to directly seek one layer of appellate review is sufficient to challenge the judge's ruling. The panel agreed that their case load significantly increased due to the Article 66 amendment which gave all those with a conviction by general or special court-martial the right to appeal their case.

The panel provided their perspectives regarding the standard of review for a victim's petition for a writ of mandamus compared to the CVRA's higher standard of review of "clear and

indisputable error” currently applied by the appellate courts. They agreed that the standard should be the same for all parties, and they should meet the higher standard of review. Additionally, they agreed that a lower standard of review would create an imbalance between the parties, and cause delays due to an increase in writ filings.

The panel discussed the distinction between civilian rights and military rights. They stated that in the military victims have the right to challenge 412, 513, and 514 rulings, but civilian victims don’t have those same rights.

Next the panel provided their perspectives on the impact of CAAF’s decision in *U.S. v. Mellette* on their trial practice in sexual offense cases. The panel stated that it was too early to see the implications of the decision because cases are still going through the appeal process. It was noted that judges are doing in camera reviews to address the issue at the trial level.

The panelists opined, regarding the state of the military’s psychotherapist-patient privilege and the need to balance the public good, victim privacy, and the search for the truth in sexual offense cases, that diagnosis and treatment seems to be relatively narrow, factual information. The panelists agreed that a system for how the information is extracted from the protected and privileged information needs to be uniformly adopted by the Services. It was noted that not all mental health information is provided by a psychotherapist, but also could be found in primary healthcare records.

In response to a Member’s question regarding the CCAs’ factual sufficiency review powers, the Navy panelist commented that due to the NMCCA’s interpretation of this standard of review, factual sufficiency review is no longer available for Navy and Marine Corps cases involving convictions after the effective date of the change to Article 66. The Army, Air Force and Coast Guard courts’ interpretation is that it’s up to the appellant to raise the issue to call into question the factual sufficiency of a conviction before the court, so factual sufficiency review is still available.

Panel: Comparative Perspectives on Victims’ Rights Litigation

The panel included the following presenters:

Mr. Ryan Guilds, Survivors United
Ms. Meg Garvin, Executive Director, National Crime Victim Law Institute

After brief introductions and opening remarks by the panelists, the panel provided their perspectives on the scope of M.R.E. 513, psychotherapist patient privilege, and on mechanisms to enforce Article 6b rights during the pretrial and trial phase of a case.

Mr. Guilds stated that he recognizes the defense counsel’s obligation to seek the information. He noted that in his experience, trial counsel are collectively failing to adequately inform victims or respect victims’ counsel as part of the process. He added that CAAF’s refusal to hear victims’ petitions for a writ of mandamus is an example of the military courts abandoning victims’ rights. He stated that in his experience, post *Mellette*, under R.C.M. 701, which pertains to pretrial discovery, military judges are now requiring victims’ information be made available. Because the judge is likely to turn over the victim’s information, he provides the diagnosis and treatment information in advance. He acknowledged that there is a constitutional issue, and some measure

of production is necessary, but in his opinion, military judges aren't equipped or best positioned as a potential trier of fact, to go through a victim's medical history. He explained that in the context of the therapy privilege, his perspective is that the *Mellette* decision should be overturned and the rule's language should be modified with exceptions built-in for the defense.

Ms. Garvin provided her perspectives on the Crime Victims' Rights Act (CVRA) and the Committee's study of Article 6b enforcement mechanisms. She stated that the CVRA passed into law in 2004 and remains an emerging area of law which is relevant to the standard of review for writ petitions. She explained that she believes there is not as much robust case law and discussion on the civilian side as there is on the military side because there has not been an order to stand up a victim counsel program on the civilian side. She explained that when representing a crime victim in the civilian court, the first step is to proactively assert your rights by filing a notice of appearance. This practice puts all parties on notice that the victim is a represented person and communications need to go through the victim counsel. She explained that most of the civilian victim lawyer's practice is pretrial motion filings. Since the evidentiary burden lies with the government, the victim's lawyer's job is to make sure their client's rights are protected in procedural moments leading up to and after trial. Additionally, victims have standing in Article III courts any time there is an injury, causation, and redressability. She stated that historically victims have had standing on a myriad of issues. They become a party to the case and have standing around their rights.

With regards to the 72-hour response rule to a writ of mandamus, it also allows litigants to move the court to suspend the 72 hours usually by stipulation of the parties. Ms. Garvin explained that the rule was put in place to ensure that there was not delay that would negatively impact the accused and to resolve victims' issues expeditiously.

Ms. Garvin considered the question of whether the military prosecutor is able to assert a crime victim's rights inside the trial court. She stated that upon request the prosecutor should do so, with the understanding that the victim should get to choose whether, when, and how to assert, or with the intention to knowingly and voluntarily waive their rights. If the victim doesn't have counsel, or if they've chosen not to have counsel, and it does not conflict with a prosecutor's obligations, and ethics, then a prosecutor could, upon request, assert those rights.

On the civilian side, the standard of review for victims' petitions changed to regular appellate review, and Ms. Garvin stated that the military often follows in terms of protecting victims' rights. She added that she supports the military to consider ordinary appellate review because the clear and indisputable standard will not get clear case law from appellate courts when there is an extraordinary writ as the only device for an emerging area of law. Ms. Garvin noted that it should not be an extraordinary moment that you protect victims' rights, it should be an ordinary moment where you analyze the facts, and the law. With regards to delays, she stated that on the civilian side they are not observing delays of significance in the proceedings. Ms. Garvin added that with an understanding of this area of law through an ordinary standard of review of appeal, the law will evolve.

Day Two – June 12, 2024

Quorum was established and Mr. William Sprance, Alternate Designated Federal Officer, opened the meeting at 9:00 a.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 Petters, DAC-IPAD Deputy Director, who provided opening remarks and introduced the first session.

Panel: Conviction Integrity Units: Best Practices in Sexual Assault Cases

The speaker discussed best practices for establishing conviction integrity units and unique considerations in sexual assault cases.

The following presenter spoke with the Committee members:

Ms. Marissa Boyers Bluestine, Assistant Director, Quattrone Center for the Fair Administration of Justice, University of Pennsylvania Carey Law School

Ms. Boyers Bluestine began by explaining that the Quattrone Center for the Fair Administration of Justice doesn't represent individuals in court, or take a position in an adversarial proceeding, but rather uses data and evidence-based solutions to address error in the criminal justice system. She explained that they work with conviction integrity units (CIU) or conviction review units (CRU) around the country and serve as a hub for information and training for those units to develop best practices to ensure flexibility, transparency, independence, and avoidance of bias. Ms. Boyers Bluestine stated that the CIUs or CRUs look for new evidence to call into question the integrity of the conviction. Currently, there are approximately 125 units in the country and have been put in place by the prosecutors who have embraced the units as part of their prosecutorial function. She added that briefing the prosecution on the root cause analysis is important to learn from errors and improve the system. She presented metrics on exonerations and explained the units look also for case corrections that hold a person responsible at a lower level of accountability, such as reducing the offense from first to third-degree homicide. She stated that when a CIU and CRU are properly working they inform the entire criminal legal system in terms of error prevention.

Ms. Boyers Bluestine discussed with the panel unique issues specific to sexual assault cases. In cases where consent is a large part of the case, she stated that it is much harder, potentially due to lack of evidence or no corroborating forensic evidence. But when a case is reviewed, it is handled similarly to others by interviewing witnesses, doing a fact-based investigation, and looking for consistencies. She added that taking on adult sexual assault cases involving a lack of consent is problematic because of the difficulty getting new evidence on these types of cases. With regards to the standard of review, she explained that it varies but some follow a preponderance of the evidence standard since it's required in court. If the goal is to establish innocence, then some will use a clear and convincing standard of review. She stated that depending on the complexity of the case, a review can take up to three to five years due to the difficulty gaining access to evidence and the lack of resources.

Panel: Demographics of Courts-Martial Panel Members for FY22: Presentation and Deliberations

A staff prepared presentation was briefed on the demographics of panel members detailed and impaneled in courts-martial completed in FY 2021 and FY 2022.

The panel included the following presenters:

Ms. Kate Tagert, DAC-IPAD Attorney-Advisor
Ms. Nalini Gupta, DAC-IPAD Attorney-Advisor
Ms. Stacy Boggess, Senior Paralegal
Dr. Bill Wells, Criminologist

The panel provided the Committee with the Case Review Subcommittee's potential findings and recommendations for the DAC-IPAD's pending report. Ms. Tagert reviewed with the Committee the research questions, the purpose of the study and the background for the DAC-IPAD undertaking the study to produce the report. She explained that the format of the report allows for the results of the study to be presented alongside the Case Review Subcommittee findings and recommendations.

The Committee was briefed on the detailing and the rate of empanelment data by Dr. Wells who provided an overview of the data and explained each of the data tables, graphs, and charts. He explained the approach to measurement and the categories that were created for racial and ethnic minority servicemembers. Based on the core question that was asked, two categories of servicemembers were created – detailed and impaneled. He stated that the data excluded cases with missing data and included contested Article 120 cases with a panel for Fiscal Year 2021 and Fiscal Year 2022.

Following the briefing, the Committee deliberated on the data for each of the Services and the comparative analysis. They provided feedback to the staff for additional edits to the draft report and agreed unanimously to adopt the proposed findings and recommendations, with the modifications discussed on the record during the public meeting. Ms. Gupta summarized the schedule for providing a final draft of the report to the members for their review and any additional input. She stated that a meeting to deliberate and vote on the final report would be held on June 27, 2024.

After briefings from the Special Projects Subcommittee and the Policy Subcommittee, the Committee heard from three speakers from the public who provided their experiences with the military justice system.

Ms. Meghan Peters provided closing remarks and with no further business, the DFO closed the second and final day of the public meeting at 3:54 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 Public Meeting Agenda, June 11-12, 2024
2. Staff-Prepared table comparing Military and Federal Victims' Rights Statutes (7 pages)
UCMJ Article 6b, Rights of a victim of an offense under this chapter (2 pages)
3. Crime Victims' Rights Act, 18 U.S.C. Sec. 3771 (3 pages)
4. UCMJ Article 67, Review by the Court of Appeals for the Armed Forces (2 pages)
5. Staff-Prepared white paper on CIUs (5pages)
6. Staff-Prepared Minutes of the DAC-IPAD Case Review Subcommittee Meeting in September 2023 on the topic of Conviction Integrity Units (7 pages)
7. Military Service Responses to DAC-IPAD Request for Information (RFI) Set 2.11, Integrity Units (74 pages)
Staff-Prepared background and methodology for the study conducted by the DAC-IPAD's Case Review Subcommittee (12 pages)
United States v. Keago, 2024 CAAF LEXIS 256 (May 9, 2024) (19 pages)
8. Executive Summary, Findings and Recommendations from the DAC-IPAD's *Report on Randomizing Court-Martial Panel Member Selection (December 2023)* (5 pages)
9. Presenter Biographies (7 pages)
10. Proposed Questions for Presenters (6 pages)
11. Staff-Prepared Presentation: Exploring the Race, Ethnicity, and Gender of Military Panels at Courts-Martial (59 pages)
12. Staff-Prepared Deliberations for Panel Member Selection (6 pages)
13. Public Comments (2 pages)
14. Staff-Prepared Site Visit Attendance Roster (1 page)



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

MINUTES OF THE JUNE 27, 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-sixth public meeting on June 27, 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
Ms. Martha Bashford
Mr. William E. Cassara
Ms. Margaret Garvin
Mr. A.J. Kramer
Ms. Jennifer Gentile Long

Sergeant Major Ralph Martinez, U.S. Army,
Retired
Ms. Jennifer O'Connor
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. Mya Koffie, Intern
Ms. Marguerite McKinney, Analyst
Mr. Blake Morris, Paralegal
Ms. Stayce Rozell, Senior Paralegal
Ms. Abigail Sackett, Intern
Ms. Terri Saunders, Attorney-Advisor
Ms. Kate Tagert, Attorney-Advisor

Other Participants

Mr. William Sprance, Designated Federal Officer (DFO)

MEETING MINUTES

Quorum was established and Mr. William Sprance, the DFO, opened the meeting at 3:08 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.

DAC-IPAD Deliberations and Vote on the draft DAC-IPAD Report: *Exploring the Race, Ethnicity, and Gender of Military Panels at Courts-Martial*

Ms. Nalini Gupta provided the Committee with an overview of the report's development process noting that at the recent June 12, 2024, public meeting of the DAC-IPAD, members deliberated and voted on the report's 14 findings and four recommendations.

The Committee considered the following edits for incorporation into the report:

Finding 3 for final Committee review: (***on data limitations***): The DAC-IPAD concurs with the Government Accountability Office's recent finding that data limitations hinder the Department of Defense's ability to understand potential racial and ethnic disparities in the military justice system

Amendment to Finding 3: Add this sentence - The DAC-IPAD faced challenges in obtaining standardized and complete racial and ethnic data from the Services.

Recommendation 2 for final Committee review: (***on data collection***): The DAC-IPAD reiterates its previous recommendations that the Secretary of Defense direct the Military Departments to record the race and ethnicity of the accused, victim, military police and criminal investigators, trial counsel, defense counsel, victims' counsel, staff judge advocates, special and general convening authorities, preliminary hearing officers, military court-martial panels, military magistrates, and military trial and appellate court judges involved in every case investigated by military law enforcement in which a Service member is the subject of an allegation of a contact or penetrative sexual offense.

Amendment to Recommendation 2: this sentence to include "using standardized categories" - The DAC-IPAD reiterates its previous recommendations that the Secretary of Defense direct the Military Departments to record, using standardized categories, the race and ethnicity of ...

Recommendation 3 for final Committee review: (***on future study***): To further understand the potential impacts of *United States v. Jeter*, as well as future randomization practices, the Department of Defense should conduct a comprehensive study within the next five years, using the same methodology as the DAC-IPAD's, to assess the diversity of panel members detailed and impaneled on all courts-martial. The Services should provide the race and ethnicity for all Service members included in that study. In addition, to understand the potential underrepresentation of specific racial and/or ethnic groups, the Department of Defense should

conduct a parallel study in which it does not aggregate racial and/or ethnic minorities into one category.

Add this sentence - In addition, to understand the potential underrepresentation of specific racial and/or ethnic groups, the Department of Defense should conduct a parallel study in which it does not aggregate racial and/or ethnic minorities into one category.

Specify that the population of cases analyzed were sexual assault courts-martial.

Include an explanation of the scope and limitations of the data received from the services.

Include additional information to the individual results on race and ethnicity.

Include an explanation to clarify the analysis of the minority groups in aggregate and that perceptions of diversity were not a measurement in the study.

Chair Smith asked the members to voice their vote for adopting the report as drafted and edited for publication. The report was unanimously adopted.

Deliberations on the proposed draft Letter to the Department of Defense General Counsel on Staffing Issues Regarding the Offices of Special Trial Counsel (OSTC) and Trial Defense Services (TDS)

Ms. Peters introduced the deliberations by reminding the Committee of the DoD General Counsel's tasking the DAC-IPAD with assessing the implementation of the Offices of Special Trial Counsel and the Committee delegated the task to the Special Projects Subcommittee. She then introduced DAC-IPAD member and Special Projects Subcommittee Chair, Ms. Meghan Tokash to brief the Committee on the draft letter to the General Counsel.

Ms. Tokash explained that the issues raised in the letter stem from the non-attribution feedback from the military justice stakeholders at 11 military installations the DAC-IPAD visited so far in 2024. For context, she stated that the letter provides only initial feedback and that the DAC-IPAD has not had time to study the issues in-depth to make recommendations.

The Committee considered the following edits for incorporation into the letter:

First paragraph: Include all stakeholders.

Second paragraph, second sentence: Edit to read "Although we have not yet had the opportunity to study, in depth, the information received, military justice stakeholders are reporting that some OSTC, TDS, victims' counsel, and military criminal investigative organizations have not been resourced or staffed appropriately to function at optimal levels."

Fourth paragraph: Include all stakeholders previously mentioned.

Chair Smith asked the members to voice their vote for adopting the letter as drafted and edited for issuance. The letter was unanimously adopted.

Ms. Meghan Peters provided closing remarks and with no further business, the DFO closed the second and final day of the public meeting at 4:01 p.m.

CERTIFICATION

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

Judge Karla N. Smith
Chair

DRAFT

MATERIALS

Materials Provided Prior to and at the Public Meeting

1. DAC-IPAD 36th Public Meeting Agenda, June 27, 2024,
2. Draft DAC-IPAD Report: *Exploring the Race, Ethnicity, and Gender of Military Panels at Courts-Martial* (72 pages)
3. Draft DAC-IPAD Letter to DoD General Counsel on Staffing Issues Regarding the Offices of Special Trial Counsel and Trial Defense Services (3 pages)

DRAFT

Article 6b, UCMJ, Enforcement 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 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.

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:

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.

Draft 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.

Draft 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].

Draft 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."

Proposed Amendments to Article 6b(e)

(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.

(3) 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.

(4)(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) 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 for consideration. 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 chapter *[this section]*.

(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. 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 for consideration.

(D) The Courts of Criminal Appeals and the Court of Appeals for the Armed Forces shall apply the ordinary standard of appellate review 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

*Draft prepared by the DAC-IPAD Policy Subcommittee.
Not reviewed or approved by the DAC-IPAD*

shall continue to apply to review of alleged violations of Military Rules of Evidence 412, 513, 514, and 615

Or include the following:

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

(5) 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 and related issues:

1. 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 victims' petitions for writs of mandamus;
3. The timeframe for the Courts of Criminal Appeals (CCAs) of the Military Departments and the CAAF to rule on a victim's petition for a writ of mandamus;
4. The appellate standard of review for a 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; 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 largely 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 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 NDAA Congress added enforcement mechanisms to Article 6b, 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 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 pointed out that Article 3 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.

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* (June 11, 2024) 162–63 (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 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 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 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

The CVRA, by contrast, requires a victim to first assert their rights at the district court in which the defendant is being prosecuted, or if there is not prosecution ongoing, at the district court in the district in which the crime occurred.¹⁰ If the district court judge denies the victim's requested relief, the victim may then petition the appellate court for a writ of mandamus.¹¹

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 scope for CCA petitions to 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.¹²

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.¹³ One exception to this requirement is that Article 6b(a)(4) gives victims the right to be heard at sentencing.¹⁴ Other statutes or rules that allow victims to be heard at the trial court level include the following:

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

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

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

¹⁰ 18 U.S.C. §3771(d)(3).

¹¹ *Id.*

¹² Art. 6b(e)(1).

¹³ *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.

¹⁴ Art. 6b(a)(4), UCMJ.

court-martial.¹⁵ These pre-referral proceedings include pre-referral matters under subsections (c) or (e) of Article 6b.¹⁶ Subsection (c) of Article 6b relates to appointment of an individual to assume the rights of certain victims. Subsection (e) of Article 6b 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. 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. 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 trial courts to hear and make rulings on violations of a

¹⁵ See 10 U.S.C. § 830a (2024) (Art. 30a), Proceedings conducted before referral.

¹⁶ Art. 30a(a)(1)(D).

¹⁷ See Art. 6b(c) and (e).

¹⁸ Manual for Courts-Martial, United States (2024 ed.) [2024 MCM], Rule for Courts-Martial [R.C.M.] 309.

¹⁹ 2024 MCM, R.C.M. 309(b)(6).

²⁰ *Id.*

²¹ 2024 MCM, *supra* note 14, Military Rule of Evidence [Mil. R. Evid.] 412(c)(2).

²² *Id.*

²³ 2024 MCM, *supra* note 14, Mil. R. Evid. 513(e)(2).

²⁴ *Id.*

²⁵ *H.V.Z. v. United States*, __ 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 her rights should be enforced rather than asking the CCA for a remedy after the military judge has already violated her 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 are fighting for the right to have access to motions filed in the Navy and Marine Corps case management system.³³ In addition, Marine Corps victims' counsel frequently have to chase down information on a range of matters important to their clients, including scheduling and discovery.³⁴ Air Force victims' counsel have access to their electronic filing system, so they are able to see all motions.³⁵ Counsel expressed concern about how information is provided to victims who do not have victims' counsel.³⁶

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); see 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 63 (testimony of LtCol Allen).

³⁵ *Id.* at 68–69 (testimony of Major Alexandria McCrary-Dennis, U.S. Air Force).

³⁶ *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.³⁷ 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 civilian victims.³⁸ 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.³⁹ 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.⁴⁰

Appellate Defense

Some counsel stated that many military judges are already allowing victims to assert their Article 6b rights at the trial court.⁴¹ 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.⁴² 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.⁴³ 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.⁴⁴ 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.⁴⁵

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. 513.⁴⁶ 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.⁴⁷

³⁷ *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).

³⁸ *Id.* at 23 (testimony of Col Talcott).

³⁹ *Id.* at 24 (testimony of Colonel Joseph Jennings, U.S. Marine Corps); 28 (testimony of COL Burgess); 29 (testimony of Mr. Fowles).

⁴⁰ *Id.* at 40 (testimony of Col Talcott).

⁴¹ *Id.* at 77 (testimony of Ms. Rebecca Snyder, U.S. Navy).

⁴² *Id.*

⁴³ *Id.* at 78 (testimony of Ms. Megan Marinos, U.S. Air Force).

⁴⁴ *Id.* at 78–79.

⁴⁵ *Id.* at 79.

⁴⁶ *Id.* (testimony of Ms. Snyder).

⁴⁷ *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.⁴⁸ He stated that victims often forgo their rights “because the alternative is a delayed or abated trial.”⁴⁹

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.⁵⁰

C. Analysis and Recommendations

[Staff will draft the analysis following Committee deliberations at the September 17, 2024, public meeting.]

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

(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.

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.

⁴⁸ *Id.* at 129 (testimony of Mr. Ryan Guilds, Protect Our Defenders and Survivors United).

⁴⁹ *Id.* at 130.

⁵⁰ *Id.* at 128.

IV. JURISDICTION OF THE COURT OF APPEALS FOR THE ARMED FORCES TO REVIEW 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 victim's petition for a writ of mandamus, at the request of a victim of an offense.⁵¹ 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.⁵² At the time of this opinion, Article 6b did not reference CAAF.⁵³

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."⁵⁴

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.⁵⁵ The Court held that the additional language in Article 6b requires CAAF to give priority to cases in which it reviews a petition for a writ of mandamus, but does not confer jurisdiction to review petitions filed by victims.⁵⁶ 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.⁵⁷ 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.⁵⁸

⁵¹ *E.V. v. United States*, 75 M.J. 331, 332 (C.A.A.F. 2016).

⁵² *Id.*

⁵³ 10 U.S.C. § 806b (2016) (Art. 6b).

⁵⁴ National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91 [FY18 NDAA], §531, 131 Stat. 1283 (2017).

⁵⁵ *M.W. v. United States*, 83 M.J. 361, 365 (C.A.A.F. 2023).

⁵⁶ *Id.*

⁵⁷ *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).

⁵⁸ *Id.*

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.⁵⁹ 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."⁶⁰

The JPP's concern about lack of uniformity across the CCAs has been justified in at least one major issue—whether constitutional due process 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.⁶¹ 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.⁶² 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.

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.⁶³ One counsel noted that CAAF is the only court that can provide "singularity and unity across the Services."⁶⁴ The Navy victims' legal counsel representative described her experience working on a victim's petition to CAAF.⁶⁵ She told the Committee that but for the Navy Judge

⁵⁹ See JUDICIAL PROCEEDINGS PANEL REPORT ON VICTIMS' APPELLATE RIGHTS (June 2017), *available at* <https://dacipad.whs.mil/reports/judicial-proceedings-panel>. The Judicial Proceedings Panel was the predecessor of the DAC-IPAD.

⁶⁰ *Id.* at 29.

⁶¹ 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).

⁶² See *B.M. v. United States*, ___ M.J. ___ (C.A.A.F. 2024).

⁶³ 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).

⁶⁴ *Transcript of DAC-IPAD Policy Subcommittee Meeting 13* (June 11, 2024) (testimony of CDR DeGroot).

⁶⁵ *Id.* at 27 (testimony of CDR DeGroot). See *B.M. v. United States*, 2024 CAAF LEXIS 201 for procedural posture of CAAF's review.

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 JAG at the time.”⁶⁶

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.⁶⁷ 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.⁶⁸ 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.⁶⁹ 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.⁷⁰ Counsel noted that whether the military judge is willing to allow continued processing of the case—such as 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.⁷¹

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.⁷² 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.⁷³ 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.⁷⁴

⁶⁶ *Id.* at 27 (testimony of CDR DeGroot).

⁶⁷ *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).

⁶⁸ *Id.* at 12 (testimony of Col Jennings); 13 (testimony of COL Burgess); 13 (testimony of Mr. Fowles); 13–14 (testimony of Col Talcott).

⁶⁹ *Id.* at 14–15 (testimony of Col Jennings); 16 (testimony of COL Burgess); 17 (testimony of Mr. Fowles); 16 (testimony of Col Talcott).

⁷⁰ *Id.* at 16–17 (testimony of Col Talcott).

⁷¹ *Id.* at 19 (testimony of Col Talcott).

⁷² *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).

⁷³ *Id.* at 71–72 (testimony of Ms. Snyder).

⁷⁴ *Id.* at 71.

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.⁷⁵

Victim Advocacy Organizations

Mr. Ryan Guilds argued that review by CAAF is “critical” to ensuring that the rights of victims are not ignored.⁷⁶

D. Analysis and Recommendation

Draft 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.

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

A. Background

Article 6b(e)(3)(B) provides that “to the extent practicable,” a 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

⁷⁵ *Id.* at 73 (testimony of Mr. Potter).

⁷⁶ *Id.* at 130 (testimony of Mr. Guilds).

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.

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 based on the 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 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

⁸⁰ JRAP, Rule 19(e).

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

⁸² 18 U.S.C. §3771(d)(3).

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Transcript of DAC-IPAD Public Meeting* (June 11, 2024) 167 (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).

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 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

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).

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

⁹⁴ *Id.* at 27 (testimony of Lt Col Dilworth).

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).

C. Analysis and Recommendation

Draft 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.

VI. STANDARD OF REVIEW UNDER ARTICLE 6b, UCMJ

A. Background

Congress amended Article 6b in the FY15 and FY16 NDAA’s to provide 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

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.

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 “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 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 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

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*, __ 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).

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).

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. 412, 513, 514, or 615, 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

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.

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).

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 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

C. Analysis and Recommendation

Draft 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].

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).

¹²⁴ *Id.* at 130–31.

APPENDIX 2

(2) The Secretary of Defense, and the Secretary of Homeland Security with respect to the Coast Guard when it is not operating as a service in the Navy, shall prescribe regulations providing that reimbursement may be a condition of assistance by judge advocates assigned or detailed under section 973(b)(2)(B) of this title.

§806a. Art. 6a. Investigation and disposition of matters pertaining to the fitness of military judges

(a) The President shall prescribe procedures for the investigation and disposition of charges, allegations, or information pertaining to the fitness of a military appellate judge, military judge, or military magistrate to perform the duties of the position involved. To the extent practicable, the procedures shall be uniform for all armed forces.

(b) The President shall transmit a copy of the procedures prescribed pursuant to this section to the Committee on Armed Services of the Senate and the Committee on Armed Services of the House of Representatives.

§806b. Art. 6b. Rights of the victim of an offense under this chapter

(a) RIGHTS OF A VICTIM OF AN OFFENSE UNDER THIS CHAPTER.—A victim of an offense under this chapter has the following rights:

(1) The right to be reasonably protected from the accused.

(2) The right to reasonable, accurate, and timely notice of any of the following:

(A) A public hearing concerning the continuation of confinement prior to trial of the accused.

(B) A preliminary hearing under section 832 of this title (article 32) relating to the offense.

(C) A court-martial relating to the offense.

(D) A post-trial motion, filing, or hearing that may address the finding or sentence of a court-martial with respect to the accused, unseal privileged or private information of the victim, or result in the release of the accused.

(E) A public proceeding of the service clemency and parole board relating to the offense.

(F) The release or escape of the accused, unless such notice may endanger the safety of any person.

(3) The right not to be excluded from any public hearing or proceeding described in paragraph (2) unless the military judge or preliminary hearing officer, as applicable, after receiving clear and convincing evidence, determines that testimony by the victim of an offense under this chapter would be materially altered if the victim heard other testimony at that hearing or proceeding.

(4) The right to be reasonably heard at any of the following:

(A) A public hearing concerning the continuation of confinement prior to trial of the accused.

(B) A sentencing hearing relating to the offense.

(C) A public proceeding of the service clemency and parole board relating to the offense.

(5) The reasonable right to confer with the counsel representing the Government at any proceeding described in paragraph (2).

(6) The right to receive restitution as provided in law.

(7) The right to proceedings free from unreasonable delay.

(8) The right to be informed in a timely manner of any plea agreement, separation-in-lieu-of-trial agreement, or non-prosecution agreement relating to the offense, unless providing such information would jeopardize a law enforcement proceeding or would violate the privacy concerns of an individual other than the accused.

(9) The right to be treated with fairness and with respect for the dignity and privacy of the victim of an offense under this chapter.

(b) VICTIM OF AN OFFENSE UNDER THIS CHAPTER DEFINED.—In this section, the term “victim of an offense under this chapter” means an individual who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of an offense under this chapter.

(c) APPOINTMENT OF INDIVIDUALS TO ASSUME RIGHTS FOR CERTAIN VICTIMS.—In the case of a victim of an offense under this chapter who is under 18 years of age (but who is not a member of the armed forces), incompetent, incapacitated, or deceased, the legal guardians of the victim or the representatives of the victim’s estate, family members, or any other person designated as suitable by the military judge, may assume the rights of the victim under this section. However, in no event may the individual so designated be the accused.

(d) RULE OF CONSTRUCTION.—Nothing in this section (article) shall be construed—

(1) to authorize a cause of action for damages;

(2) to create, to enlarge, or to imply any duty or obligation to any victim of an offense under this chapter or other person for the breach of which the United States or any of its officers or employees could be held liable in damages; or

(3) to impair the exercise of discretion under sections 830 and 834 of this title (articles 30 and 34).

(e) ENFORCEMENT BY COURT OF CRIMINAL APPEALS.—

(1) If 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 the rights of the victim afforded by a section (article) or rule specified in paragraph (4), 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 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 petition the Court of Criminal Appeals for a writ of mandamus to quash such order.

(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.

(4) Paragraph (1) applies with respect to the protections afforded by the following:

(A) This section (article).

(B) Section 832 (article 32) of this title.

UNIFORM CODE OF MILITARY JUSTICE

(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.

(f) COUNSEL FOR ACCUSED INTERVIEW OF VICTIM OF ALLEGED OFFENSE.—

(1) Upon notice by counsel for the Government to counsel for the accused of the name of an alleged victim of an offense under this chapter who counsel for the Government intends to call as a witness at a proceeding under this chapter, counsel for the accused shall make any request to interview the victim through the Special Victim's Counsel or other counsel for the victim, if applicable.

(2) If requested by an alleged victim who is subject to a request for interview under paragraph (1), any interview of the victim by counsel for the accused shall take place only in the presence of the counsel for the Government, a counsel for the victim, or, if applicable, a victim advocate.

SUBCHAPTER II—APPREHENSION AND RESTRAINT

Sec.	Art.
807.	7. Apprehension.
808.	8. Apprehension of deserters.
809.	9. Imposition of restraint.
810.	10. Restraint of persons charged.
811.	11. Reports and receiving of prisoners.
812.	12. Prohibition of confinement of members of the armed forces with enemy prisoners and certain others.
813.	13. Punishment prohibited before trial.
814.	14. Delivery of offenders to civil authorities.

§807. Art. 7. Apprehension

(a) Apprehension is the taking of a person into custody.

(b) Any person authorized under regulations governing the armed forces to apprehend persons subject to this chapter or to trial thereunder may do so upon reasonable belief that an offense has been committed and that the person apprehended committed it.

(c) Commissioned officers, warrant officers, petty officers, and noncommissioned officers have authority to quell quarrels, frays, and disorders among persons subject to this chapter and to apprehend persons subject to this chapter who take part therein.

§808. Art. 8. Apprehension of deserters

Any civil officer having authority to apprehend offenders under the laws of the United States or of a State, Commonwealth, possession, or the District of Columbia may summarily apprehend a deserter from the armed forces and deliver him into the custody of those forces.

§809. Art. 9. Imposition of restraint

(a) Arrest is the restraint of a person by an order, not imposed as a punishment for an offense, directing him to remain within certain specified limits. Confinement is the physical restraint of a person.

(b) An enlisted member may be ordered into arrest or confinement by any commissioned officer by an order, oral or written, delivered in person or through other persons subject to this chapter. A commanding officer may authorize warrant officers, petty officers, or noncommissioned officers to order enlisted members of his command or subject to his authority into arrest or confinement.

(c) A commissioned officer, a warrant officer, or a civilian subject to this chapter or to trial thereunder may be ordered into arrest or confinement only by a commanding officer to whose authority he is subject, by an order, oral or written, delivered in person or by another commissioned officer. The authority to order such persons into arrest or confinement may not be delegated.

(d) No person may be ordered into arrest or confinement except for probable cause.

(e) Nothing in this article limits the authority of persons authorized to apprehend offenders to secure the custody of an alleged offender until proper authority may be notified.

§810. Art. 10. Restraint of persons charged

(a) IN GENERAL.—

(1) Subject to paragraph (2), any person subject to this chapter who is charged with an offense under this chapter may be ordered into arrest or confinement as the circumstances require.

(2) When a person subject to this chapter is charged only with an offense that is normally tried by summary court-martial, the person ordinarily shall not be ordered into confinement.

(b) NOTIFICATION TO ACCUSED AND RELATED PROCEDURES.—

(1) When a person subject to this chapter is ordered into arrest or confinement before trial, immediate steps shall be taken—

(A) to inform the person of the specific offense of which the person is accused; and

(B) to try the person or to dismiss the charges and release the person.

(2) To facilitate compliance with paragraph (1), the President shall prescribe regulations setting forth procedures relating to referral for trial, including procedures for prompt forwarding of the charges and specifications and, if applicable, the preliminary hearing report submitted under section 832 of this title (article 32).

§811. Art. 11. Reports and receiving of prisoners

(a) No provost marshal, commander of a guard, or master at arms may refuse to receive or keep any prisoner committed to his charge by a commissioned officer of the armed forces, when the committing officer furnishes a statement, signed by him, of the offense charged against the prisoner.

(b) Every commander of a guard or master at arms to whose charge a prisoner is committed shall, within twenty-four hours after that commitment or as soon as he is relieved from guard, report to the commanding officer the name of the prisoner, the offense charged against him, and the name of the person who ordered or authorized the commitment.

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Current through Public Law 118-51, approved April 24, 2024, with a gap of Public Law 118-50.

United States Code Service > TITLE 18. CRIMES AND CRIMINAL PROCEDURE (§§ 1 — 6005) > Part II. Criminal Procedure (Chs. 201 — 238) > CHAPTER 237. Crime victims' rights (§ 3771)

§ 3771. Crime victims' rights

(a) Rights of crime victims. A crime victim has the following rights:

- (1) The right to be reasonably protected from the accused.
- (2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.
- (3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.
- (4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.
- (5) The reasonable right to confer with the attorney for the Government in the case.
- (6) The right to full and timely restitution as provided in law.
- (7) The right to proceedings free from unreasonable delay.
- (8) The right to be treated with fairness and with respect for the victim's dignity and privacy.
- (9) The right to be informed in a timely manner of any plea bargain or deferred prosecution agreement.
- (10) The right to be informed of the rights under this section and the services described in section 503(c) of the Victims' Rights and Restitution Act of 1990 ([42 U.S.C. 10607\(c\)](#)) [now [34 USCS § 20141\(c\)](#)] and provided contact information for the Office of the Victims' Rights Ombudsman of the Department of Justice.

(b) Rights afforded.

- (1) In general. In any court proceeding involving an offense against a crime victim, the court shall ensure that the crime victim is afforded the rights described in subsection (a). Before making a determination described in subsection (a)(3), the court shall make every effort to permit the fullest attendance possible by the victim and shall consider reasonable alternatives to the exclusion of the victim from the criminal proceeding. The reasons for any decision denying relief under this chapter shall be clearly stated on the record.
- (2) Habeas corpus proceedings.
 - (A) In general. In a Federal habeas corpus proceeding arising out of a State conviction, the court shall ensure that a crime victim is afforded the rights described in paragraphs (3), (4), (7), and (8) of subsection (a).
 - (B) Enforcement.
 - (i) In general. These rights may be enforced by the crime victim or the crime victim's lawful representative in the manner described in paragraphs (1) and (3) of subsection (d).
 - (ii) Multiple victims. In a case involving multiple victims, subsection (d)(2) shall also apply.

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(C) Limitation. This paragraph relates to the duties of a court in relation to the rights of a crime victim in Federal habeas corpus proceedings arising out of a State conviction, and does not give rise to any obligation or requirement applicable to personnel of any agency of the Executive Branch of the Federal Government.

(D) Definition. For purposes of this paragraph, the term “crime victim” means the person against whom the State offense is committed or, if that person is killed or incapacitated, that person’s family member or other lawful representative.

(c) Best efforts to accord rights.

(1) Government. Officers and employees of the Department of Justice and other departments and agencies of the United States engaged in the detection, investigation, or prosecution of crime shall make their best efforts to see that crime victims are notified of, and accorded, the rights described in subsection (a).

(2) Advice of attorney. The prosecutor shall advise the crime victim that the crime victim can seek the advice of an attorney with respect to the rights described in subsection (a).

(3) Notice. Notice of release otherwise required pursuant to this chapter [this section] shall not be given if such notice may endanger the safety of any person.

(d) Enforcement and limitations.

(1) Rights. The crime victim or the crime victim’s lawful representative, and the attorney for the Government may assert the rights described in subsection (a). A person accused of the crime may not obtain any form of relief under this chapter [this section].

(2) Multiple crime victims. In a case where the court finds that the number of crime victims makes it impracticable to accord all of the crime victims the rights described in subsection (a), the court shall fashion a reasonable procedure to give effect to this chapter [this section] that does not unduly complicate or prolong the proceedings.

(3) Motion for relief and writ of mandamus. The rights described in subsection (a) shall be asserted in the district court in which a defendant is being prosecuted for the crime or, if no prosecution is underway, in the district court in the district in which the crime occurred. The district court shall take up and decide any motion asserting a victim’s right forthwith. If the district court denies the relief sought, the movant may petition the court of appeals for a writ of mandamus. The court of appeals may issue the writ on the order of a single judge pursuant to circuit rule or the Federal Rules of Appellate Procedure. The court of appeals shall take up and decide such application forthwith within 72 hours after the petition has been filed, unless the litigants, with the approval of the court, have stipulated to a different time period for consideration. In deciding such application, the court of appeals shall apply ordinary standards of appellate review. In no event shall proceedings be stayed or subject to a continuance of more than five days for purposes of enforcing this chapter [this section]. If the court of appeals denies the relief sought, the reasons for the denial shall be clearly stated on the record in a written opinion.

(4) Error. In any appeal in a criminal case, the Government may assert as error the district court’s denial of any crime victim’s right in the proceeding to which the appeal relates.

(5) Limitation on relief. In no case shall a failure to afford a right under this chapter [this section] provide grounds for a new trial. A victim may make a motion to re-open a plea or sentence only if—

(A) the victim has asserted the right to be heard before or during the proceeding at issue and such right was denied;

(B) the victim petitions the court of appeals for a writ of mandamus within 14 days; and

(C) in the case of a plea, the accused has not pled to the highest offense charged.

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This paragraph does not affect the victim's right to restitution as provided in title 18, United States Code.

(6) No cause of action. Nothing in this chapter [this section] shall be construed to authorize a cause of action for damages or to create, to enlarge, or to imply any duty or obligation to any victim or other person for the breach of which the United States or any of its officers or employees could be held liable in damages. Nothing in this chapter [this section] shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction.

(e) Definitions. For the purposes of this chapter [this section]:

(1) Court of Appeals. The term “court of appeals” means—

(A) the United States court of appeals for the judicial district in which a defendant is being prosecuted; or

(B) for a prosecution in the Superior Court of the District of Columbia, the District of Columbia Court of Appeals.

(2) Crime victim.

(A) In general. The term “crime victim” means a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia.

(B) Minors and certain other victims. In the case of a crime victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardians of the crime victim or the representatives of the crime victim's estate, family members, or any other persons appointed as suitable by the court, may assume the crime victim's rights under this chapter [this section], but in no event shall the defendant be named as such guardian or representative.

(3) District court; court. The terms “district court” and “court” include the Superior Court of the District of Columbia.

(f) Procedures to promote compliance.

(1) Regulations. Not later than 1 year after the date of enactment of this chapter [enacted Oct. 30, 2004], the Attorney General of the United States shall promulgate regulations to enforce the rights of crime victims and to ensure compliance by responsible officials with the obligations described in law respecting crime victims.

(2) Contents. The regulations promulgated under paragraph (1) shall—

(A) designate an administrative authority within the Department of Justice to receive and investigate complaints relating to the provision or violation of the rights of a crime victim;

(B) require a course of training for employees and offices of the Department of Justice that fail to comply with provisions of Federal law pertaining to the treatment of crime victims, and otherwise assist such employees and offices in responding more effectively to the needs of crime victims;

(C) contain disciplinary sanctions, including suspension or termination from employment, for employees of the Department of Justice who willfully or wantonly fail to comply with provisions of Federal law pertaining to the treatment of crime victims; and

(D) provide that the Attorney General, or the designee of the Attorney General, shall be the final arbiter of the complaint, and that there shall be no judicial review of the final decision of the Attorney General by a complainant.

History

HISTORY:

DAC-IPAD

Site Visit Emerging Issues - Initial Deliberations September 17, 2024

Purpose: The purpose of this initial site visit deliberation session is to highlight common issues and concerns raised during the site visits and to start identifying and prioritizing subjects for further review by the DAC-IPAD.

Way Ahead: The information received from the site visits is being compiled into a format that will preserve the non-attributional nature of the roundtable sessions, with a view towards sending this detailed information to the DAC-IPAD in November 2024. A final deliberation session is scheduled to occur during the December 3-4 DAC-IPAD meeting to determine what topics to review over the next year. The staff will use information from this initial session to prepare deliberation documents for the December meeting.

I. Recruitment, growth and retention of litigators with special victim expertise

- Length of tours and early departures due to promotion
- Career effects of remaining in defense and victims' counsel billets
- Disparity in availability of prosecution and defense billets for senior counsel
- Loss of experience and mentoring for newer counsel
- STCs insufficient time spent litigating cases
- Perception of victims' counsel job as undesirable

II. Optimal structure, staffing, and resourcing of MCIO, STC, DC, and VC offices to prioritize litigator and investigator work

- Facilities, equipment, and technology challenges and disparity
- Crushing administrative workload, including data entry and reporting requirements
- Experience/rank disparity between STC and DC
- STC/TC workload divisions are inefficient and ineffective
- Sexual harassment caseload expected to be overwhelming
- Domestic violence cases taking significant STC bandwidth
- STC/MCIO policies not aligned for investigative assistance after issuance of report or for cases not within MCIO investigative purview
- Lack of access to defense investigators
- Lack of embedded victim liaison support at OSTC and MCIOs
- Lack of paralegal support for STC/DC/VC

III. Processing of cases

- Lack of agent discretion in cases
- Inability of MCIOs to conduct limited scope investigations
- STC deferrals – significant work and time, lack uniformity, SJA/TC re-assessing cases

- Related offenses – exercise of authority delays command action for minor offenses
- Significant backlog of cases
- Delayed victim interviews negatively affecting investigations
- Administrative discharge policies – workload disparity, VC presence, evidentiary issues
- Entire process takes too long

IV. Reporting sexual misconduct

- Members don't differentiate sexual assault and sexual harassment for reporting purposes
- Lack of awareness among Service members of options for confidential advice (VCs)
- Lack of privacy for reporters
- Loss of VAs ("collaterals) within units
- Uncertainty about who is a mandatory reporter inhibits disclosure

V. Accountability

- Service members do not associate reports and outcomes (timely/visible consequences)
- Significant increase in sexual misconduct in the deployed/afloat environment
- No accountability for false allegations
- Declined accusations and acquittals leave lasting effects on accuseds' careers
- Disparity in support for victims v. support for accuseds
- Junior members feel unsafe in the barracks – need for visibility and CCTV
- Body cameras for first responders



GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE

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AUG 03 2024

GENERAL COUNSEL

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

¹ See, e.g., Jennifer Piel, *Suicide Risk Following Criminal Arrest*, PSYCHIATRIC TIMES, Dec. 30, 2020, <https://www.psychiatristimes.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>.

Advertisement

Suicide Risk Following Criminal Arrest

December 30, 2020

By Jennifer Piel, MD, JD

Article



The period following arrest can be particularly dangerous, both in custody and in the community.



BortN66/AdobeStock

More attention should be paid to reducing suicide following criminal arrest. A recent report from *Reuters* titled "[Dying Inside: The Hidden Crisis in America's Jails](#)" sheds light on deaths among individuals with criminal justice involvement.¹ *Reuters* investigated deaths in 523 of the largest jails in the country. Of 7571 deaths between 2008 and 2019, 4998 individuals were in pre-trial detention, meaning they had been arrested but have not yet gone to trial. They have not been found guilty. They are in jail because they have not been able to post bail or are otherwise denied release by a judge while awaiting their case, sometimes pending placement in a state psychiatric hospital for treatment to render them mentally fit to continue with their legal case.

According to the report, over 2000 deaths in jail were because of suicide. Of these, 1500 deaths were among individuals who were pre-trial or awaiting indictment. For example, *Reuters* surveyed 11 jails in Washington State between [2009 and 2019](#).² During this period 10-year period, the average inmate population across the state's jails was 8442 and there were 160 deaths overall. There were 61 deaths by suicide in the 10-year period, which was the leading cause of death during the study interval. An additional 24 deaths were because of drugs or alcohol.



Although these numbers of deaths by suicide are shocking, they are not surprising. Past studies have found that suicide is the leading cause of death in jails and makes up more than [one-third of all deaths in jails](#).³ Studies have also found that the initial pre-trial lockup period, which is the interval immediately following arrest and booking, is associated with [a particularly high rate of suicide](#).⁴

Additionally, a recent study from researchers at the University of Washington looked at suicide among individuals with criminal justice involvement, but who were out of custody and living in the community (eg, on probation or parole).⁵ Community justice involvement included parole, probation, or arrest within the past 12 months. The study reveals that recent arrest status is associated with higher prevalence of suicide attempts than parole, probation, or no involvement with the criminal justice system. In this population, the highest prevalence of suicide (ie, the group with recent arrest) also had the highest prevalence of substance use disorders. Earlier studies have identified an increased risk of drug-related death following release from correctional facilities.^{6,7}

These studies reveal that the period after recent arrest may be a particularly vulnerable time for suicide. Although more research is needed, a hypothesis for this is that a recent arrest is a unique stressor that contributes to suicide risk.

Correctional facilities like jails have a constitutional responsibility to provide necessary mental health services to individuals in their custody.⁸ Despite increased attention to suicide and efforts to bolster suicide awareness in correctional facilities, the numbers remain too high. Similarly, despite growing attention to crisis response teams and substance use treatment resources, individuals with recent arrest who are in the community may not have reliable access to these resources.

These studies have important public health implications. They suggest the need for heightened attention to suicide risk among individuals with a recent arrest. They also suggest the need to consider arrest status when developing and implementing programming aimed to reduce suicide risk. With recent attention to alternatives to traditional policing, now is an ideal time to think about the ways that arrest can impact an individual psychologically.

Clinicians and policy makers should consider ways to bolster suicide risk reduction measures at multiple points of contact within the criminal justice system, ensuring that those at elevated risk for suicide are appropriately identified and

directed to suitable services. All participants in the criminal justice system (from law enforcement to legal counsel to correctional staff to psychiatrists) should be aware of suicide risk in this vulnerable population and understand ways that they can help individuals get screening, support, and the services they need.

Dr Piel is a clinical and forensic psychiatrist, and the Director of the UW Center for Mental Health, Policy, and the Law.

References

1. Eisler P, So L, Szep J, et al. Why 4,998 died in U.S. jails without getting their day in court. Dying inside: the hidden crisis in America's jails. *Reuters*. October 16, 2020. Accessed December 9, 2020. <https://www.reuters.com/investigates/special-report/usa-jails-deaths/>
2. Smith G. Jail deaths in America: data and key findings of *Dying Inside*. *Reuters*. October 16, 2020. Accessed December 9, 2020. <https://www.reuters.com/investigates/special-report/usa-jails-graphic/>
3. Noonan M, Hohloff H, Ginder S. Mortality in local jails and state prisons, 2000–2013 - statistical tables. Bureau of Justice Statistics. August 4, 2015. Accessed December 9, 2020. <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=5341>
4. Mumula CJ. Suicide and homicide in state prisons and local jails. U.S. Department of Justice. Bureau of Justice Statistics. August 4, 2015. Accessed December 9, 2020. <https://www.bjs.gov/content/pub/pdf/shsplj.pdf>
5. Bryson WC, Piel J, Thielke S. Associations between parole, probation, arrest, and self-reported suicide attempts. *Community Ment Health J*. 2020.
6. Binswanger IA, Stern MF, Deyo RA, et al. Release from prison--a high risk of death for former inmates. *N Engl J Med*. 2007;356(2):157-65.
7. Merrall EL, Kariminia A, Binswanger IA, et al. Meta-analysis of drug-related deaths soon after release from prison. *Addiction*. 2010;105(9):1545-54.
8. *Estelle v. Gamble*, 429 U.S. 97 (1976).

Recent Videos



Preventing Suicide in the U.S. Military: Recommendations from the Suicide Prevention and Response Independent Review Committee (2022)¹

Background

In the FY22 NDAA, Congress directed the Secretary of Defense to establish the Suicide Prevention and Response Independent Review Committee (SPRIRC) to conduct a comprehensive review of clinical and non-clinical suicide prevention and response programs in the military. In December 2022, the SPRIRC presented Secretary Austin with ten recommendations addressing overarching issues that the SPRIRC believe will improve service member well-being by improving operations and infrastructure, along with an additional 117 recommendations within the four strategic directions of the Defense Strategy for Suicide Prevention: Healthy and Empowered Individuals, Families, and Communities; Clinical and Community Preventive Services; Treatment and Support Services; and Surveillance, Research, and Evaluation.

Excerpts Relevant to General Counsel's Request to the DAC-IPAD

Recommendation 4.6: If DoD program evaluation and research find that some investigations and offenses are associated with especially increased risk of suicide, the DoD should develop policies requiring a specially trained behavioral health professional to be present at the initial notification of the subject. Military investigators, lawyers, and law enforcement personnel at many installations said that crimes against children, specifically child sexual assault and child pornography, anecdotally, were the types of charges most associated with suicidal behavior among service members under investigation. These informants were unaware of any DoD databases or tracking systems that could provide quantitative data to confirm their impressions. If DoD program evaluation and research identifies specific types of charges and offenses that significantly increase the risk of suicide among service members (see Recommendation 7.5 in Chapter 7), the DoD should require specially-trained behavioral health professionals to be present when a service member is first notified that they are under investigation for one of these offenses. Co-response models in which behavioral health professionals accompany law enforcement to certain types of events such as those mentioned above are becoming increasingly common in the United States. Such models could help to de-escalate incidents (and thus police use of force) and link those at risk to available resources. The behavioral health professional could conduct a suicide risk assessment, provide targeted interventions like Crisis Response Planning to reduce acutely elevated risk, and provide consultation to unit leadership and investigators to connect the service member to indicated support agencies and resources.

Recommendation 7.5: Conduct research to clarify the types of offenses and charges that confer increased suicide risk among service members. Current DoDSER data provide information about the percentage of suicide decedents who were currently or recently under administrative or legal investigation, but no details are available about the types of charges or offenses this category includes, hindering efforts to develop targeted preventative strategies for this group of service members. The DoD should use existing data to calculate and report the types of offenses and charges for which service members were being investigated; the number and percentage of service members

¹ Available at <https://www.defense.gov/News/Releases/Release/Article/3309738/suicide-prevention-and-response-independent-review-committee-sprirc-releases-re/>.

Staff-prepared summary relevant to the DoD GC's request to study support services for Service members charged with UCMJ offenses

under investigation who die by suicide, separated by offense or charge type; and how these numbers and rates vary by rank. The DoD should specifically examine suicide risk among those under investigation for crimes against children, including child sexual assault and child pornography.