

**Defense Advisory Committee on the Investigation, Prosecution, and Defense
Of Sexual Assault in the Military
(DAC-IPAD)**

**Request for Information
Feasibility and Advisability of Conviction Integrity Units
6 February 2024**

I. Purpose: The DAC-IPAD requests the below input to facilitate its analysis of the advisability and feasibility of establishing Conviction Integrity Units (CIUs) in the Department of Defense.

II. Background:

As the Judicial Proceedings Panel (JPP) reported in September 2017,¹ since 2012, Congress, the Department of Defense, and the White House have all worked to reform the military justice system to ensure that sexual assault cases are effectively prosecuted and that sexual assault victims are treated with dignity and compassion. The JPP noted that “[a]s constructive and important as these changes have been, they appear to have also produced an unintended negative consequence...they appear to have raised questions about the fundamental fairness of the military justice process when it comes to the treatment of the accused.”

Since the JPP issued its report in 2017, Congress has made subsequent amendments to the Uniform Code of Military Justice, including establishing independent Offices of Special Trial Counsel and revising the Service Courts of Criminal Appeals’ factual sufficiency review standard. These amendments, combined with a convicted service members limited avenues to obtain post-conviction review and relief, support exploring the advisability and feasibility of establishing a CIU(s) within the Department of Defense.

In the past two decades, dozens of jurisdictions across the United States have established CIUs or conviction review units. These units, generally housed within a district attorney’s office, review convictions whose integrity has been questioned, often due to newly discovered evidence, claims of prosecutorial malfeasance, or ineffective assistance of counsel. Even when an investigation does not lead to an exoneration, an independent reinvestigation of the case can settle doubts that have called the integrity of the process into question. In this way, CIUs serve two important purposes. First, on the case level, they work to correct miscarriages of justice and free wrongly incarcerated individuals or correct consequences of a conviction for those who have already served out their sentences. Second, on the structural level, CIUs help increase and reinforce trust in a criminal justice system.

The below RFIs are submitted in furtherance of the DAC-IPAD’s consideration of the advisability and feasibility of establishing CIUs within the Department of Defense.

III. Point of Contact: The POC for this RFI is Ms. Kate Tagert, available at kate.tagert.civ@mail.mil.

IV. Suspense:

Suspense	RFI	Proponent – Military Services
1 Mar 2024	Substantive Responses	Please provide a narrative response to each of the questions in Section V and VI below.

¹ Judicial Proceedings Panel, *Panel Concerns Regarding the Fair Administration of Military Justice in Sexual Assault Cases* (Sept. 2017), available at https://dacipad.whs.mil/images/Public/10-Reading_Room/04_Reports/01_JPP_Reports/10_JPP_Concerns_Fair_MJ_Report_Final_20170915.pdf

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V. The DAC-IPAD respectfully requests that the Judge Advocate Headquarters answer the below questions:

1. Has your Service ever considered establishing a CIU? If so, please explain what type of review, research, studies, and analysis occurred on the topic.
2. Does your service support establishing a CIU test program, either within each service or centrally located within the Department of Defense, to better assess their potential utility and feasibility? Please explain your response including any recommendations as to the construct, scope, and duration of the test program.
3. What, if any, processes are currently available within your service for convicted servicemembers to challenge their convictions besides appellate review? By way of example, the U.S. Army recently overturned the convictions of 110 servicemembers dating back to 1917 through the Army Board for Correction of Military Records. Are similar processes available in your service and if so, how frequently are they used by convicted servicemembers? How many convictions in the last ten years have been overturned through the same or similar process? Are there limitations in terms of the actions these boards can or will take as it relates to courts-martial convictions?

VI. The DAC-IPAD respectfully requests narrative responses to the below questions from a knowledgeable representative of each of the following organizations within each service: (1) Judge Advocate Headquarters, (2) Service Court of Criminal Appeals (CCA), (3) Service Trial Judiciary, (4) Office of the Special Trial Counsel, (5) Trial Services Organization, (6) Defense Services Organization, (7) Victim Legal Services Organization. Please provide responses based on each organization's perspectives.

1. Please comment generally on the advisability and feasibility of establishing CIUs to review cases in the military justice system that resulted in convictions.
2. Military sexual assault cases often involve issues of consent where the victim and accused's credibility are a central issue in the case. What role, if any, can CIUs serve in cases in which consent or credibility are at issue, rather than the identity of the accused?
3. If established, should a single CIU be created for the Department of Defense, or should a separate CIU be created for each Service?
4. If created for each Service, in which organization should the CIU be located (e.g., Office of Special Trial Counsel, Judge Advocate Headquarters Agency, Inspector General, other)?
5. What capabilities/ expertise should the CIU be comprised of (e.g., experienced trial and defense counsel, military criminal investigations personnel, victim liaisons, victim advocates, and victim legal counsel)?

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6. What would be an appropriate standard for CIUs to accept and review cases? Some possibilities may include: assertion of actual innocence; newly discovered evidence that would likely have resulted in a different result at trial; insufficiency of evidence.
7. Should a CIU have jurisdiction to review only cases of a certain type (e.g., covered offenses) or cases that meet a minimum threshold (e.g., cases resulting in a more than one year of confinement or a discharge)?
8. Should a CIU have jurisdiction to review convictions that resulted from a guilty plea?
9. If a CIU were to conclude that a case met the applicable criteria to investigate, what should be the scope of the CIU's authority and responsibility? Should it be limited to investigation? Petitioning for a new trial? Representation of the convicted service member at re-hearing?
10. Is the 3-year period for an accused to petition for a new trial on the grounds of newly discovered evidence or fraud on the court under Article 73, UCMJ a sufficient amount of time? Should there be any limitation?
11. Do any programs exist that review cases to determine if DNA analysis could demonstrate innocence? If so please provide further information.
12. Are there other steps the Services should take to ensure the integrity of convictions in the military justice system?

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

Request for Information, Set 2.11

Conviction Integrity Units

Date of Request: February 6, 2024

I. Background:

As the Judicial Proceedings Panel (JPP) reported in September 2017,¹ since 2012, Congress, the Department of Defense, and the White House have all worked to reform the military justice system to ensure that sexual assault cases are effectively prosecuted and that sexual assault victims are treated with dignity and compassion. The JPP noted that “[a]s constructive and important as these changes have been, they appear to have also produced an unintended negative consequence...they appear to have raised questions about the fundamental fairness of the military justice process when it comes to the treatment of the accused.”

Since the JPP issued its report in 2017, Congress has made subsequent amendments to the Uniform Code of Military Justice, including establishing independent Offices of Special Trial Counsel and revising the Service Courts of Criminal Appeals’ factual sufficiency review standard. These amendments, combined with a convicted service members limited avenues to obtain post-conviction review and relief, support exploring the advisability and feasibility of establishing Conviction Integrity Units (CIUs) within the Department of Defense.

In the past two decades, dozens of jurisdictions across the United States have established CIUs or conviction review units. These units, generally housed within a district attorney’s office, review convictions whose integrity has been questioned, often due to newly discovered evidence, claims of prosecutorial malfeasance, or ineffective assistance of counsel. Even when an investigation does not lead to an exoneration, an independent reinvestigation of the case can settle doubts that have called the integrity of the process into question. In this way, CIUs serve two important purposes. First, on the case level, they work to correct miscarriages of justice and free wrongly incarcerated individuals or correct consequences of a conviction for those who have already served out their sentences. Second, on the structural level, CIUs help increase and reinforce trust in a criminal justice system.

The below RFIs are submitted in furtherance of the DAC-IPAD’s consideration of the advisability and feasibility of establishing CIUs within the Department of Defense.

¹ Judicial Proceedings Panel, *Panel Concerns Regarding the Fair Administration of Military Justice in Sexual Assault Cases* (Sept. 2017), available at https://dacipad.whs.mil/images/Public/10-Reading_Room/04_Reports/01_JPP_Reports/10_JPP_Concerns_Fair_MJ_Report_Final_20170915.pdf

II. Response from Judge Advocate Headquarters:²

1. Has your Service ever considered establishing a CIU? If so, please explain what type of review, research, studies, and analysis occurred on the topic.

USA JA HQ (Q1): All of the Services, through the Joint Service Committee, studied the possibility of a conviction integrity unit in coordination with the Military Justice Review Group (MJRG), an 18-month long comprehensive review of the UCMJ that resulted in the Military Justice Act of 2016. The MJRG Part II Report, MCM Recommendations (Discussion Draft) (Pre-decisional and Deliberative Work Product), included a recommendation regarding a Conviction Integrity Unit (CIU) through changes to the Rules for Courts-Martial. The MJRG draft discussion recommendation regarding a CIU was not adopted by Congress or the Secretary of Defense.

In addition, the Army has engaged with Congress through the National Defense Authorization Act legislative cycle on issues related to reassessment of evidence and finality of convictions, the primary concerns underlying CIU. In these engagements, Congress has expressed an intent to limit the authority of individuals and courts to overturn convictions.

Dating back to 2013, Congress strictly limited the Article 60, UCMJ post-conviction clemency powers of convening authorities to set aside findings or sentence adjudged at trial. More recently, Congress amended the Article 66, UCMJ standard for factual reviews by appellate courts, elevating the standard for setting aside findings for factual insufficiency. Both significant changes to the UCMJ followed two cases in which a sexual assault conviction was set aside, in one case by a convening authority pursuant to Article 60, UCMJ and in the other by a Service Court of Criminal Appeals applying the de novo factual insufficiency review in Article 66, UCMJ which drew intense scrutiny and immediate action by Congress in the subsequent legislative cycle. Notably, the Department unsuccessfully argued against the changes to Article 60 and Article 66, UCMJ providing both data indicating how rarely convening authorities used Article 60, UCMJ to set aside findings and how rarely Service Courts of Criminal Appeals set aside findings due to factual insufficiency. The Services unsuccessfully argued that these protections were vital to the rights of convicted servicemembers and to prevent wrongful convictions, particularly in light of non-unanimous verdicts.

In addition to the changes to Article 60 and 66, UCMJ Congress rejected a legislative proposal in FY22 to amend Article 73, UCMJ to allow convicted servicemembers who assert actual innocence to petition The Judge Advocate Generals for DNA testing or re-testing of evidence.³

Simultaneously, Congress has expressed a clear intent to expand appellate jurisdiction in the FY23-24 NDAA's, expanding jurisdiction for both direct appeals and access to the Supreme Court of the United States. These changes suggest that Congress sees the appellate courts as best positioned to address legal and factual errors in courts-martial convictions.

² The first set of 3 questions required responses by Judge Advocate Headquarters only.

³ S. 2792, FY2022 NDAA proposed by Senator Hirono, member of SASC

While responding to the most recent post-conviction DNA testing legislative proposal, OTJAG examined current avenues of relief and the scope of requests for relief to determine if there were significant gaps and demands for relief outside appellate review.

First, OTJAG determined that between robust appellate jurisdiction, factual sufficiency appellate review, Article 73, UCMJ petitions for new trials, Article 74 UCMJ remission or suspension, habeas petitions and collateral review in federal courts, the presidential pardon process, the Army Clemency and Parole Board, and the Army Board for Correction of Military Records, there are multiple avenues of relief that have allowed for the setting aside of convictions or sentence relief based on legal reviews, factual reviews, clemency, and injustice.

Next, OTJAG pulled data on the demand for additional relief outside the military appellate courts. The data indicated that a very small percentage of eligible Soldiers sought to overturn their conviction outside the appellate process. Updated data below.

For context, from FY2020-FY2023, 1,814 Soldiers were convicted at a general or special court-martial.

Article 73, UCMJ: Since 2020, OTJAG has received 18 petitions for a new trial from 15 individuals. The petitions are assigned for review to reserve Judge Advocates attached to OTJAG who are all current attorneys with the Department of Justice. None of the petitions were determined to have alleged newly discovered evidence or fraud on the court, but instead typically reiterated the evidence admitted at trial.

Collateral Review in Federal District Courts: Convicted servicemembers may seek collateral review in federal district courts under extraordinary writs of habeas corpus or coram nobis. Over the past four years, 40 Soldiers have challenged their court-martial conviction in federal district courts. Only one case has resulted in relief and that case involved a guilty plea, not an assertion of actual innocence.

Presidential Pardons: Since January 2020, OTJAG has processed 24 applications for a presidential pardon. Applications are forwarded to the Office of the Pardon Attorney, Department of Justice without recommendation. Servicemembers convicted at a court-martial may apply for a presidential pardon five years after release from confinement or, if no confinement was adjudged, the date of sentencing.

Army Clemency and Parole Board: Under authority of 10 USC 1552, DoDI 1325.7, and AR 15-130, the Army Clemency and Parole Board conducts a timely review of Soldiers convicted at court-martial and sentenced to any term of confinement. The board has authority to remit or suspend the unexecuted part of a court-martial sentence to confinement, upgrade an executed punitive discharge to an administrative discharge, upgrade an unexecuted dishonorable discharge to a bad conduct discharge and reduce or set aside another type of punishment. The ACPB consists of five members, including a civilian chairperson with extensive experience in criminal justice, an attorney from the Army Review Board legal office, and three active-duty field grade officers. In FY2020-2023, ACPB received 999 requests for sentencing clemency and granted 40.

USN JA HQ (Q1): The Navy has not formally considered establishing a CIU and has accordingly conducted no review, research, study, or analysis regarding the topic.

USMC JA HQ (Q1): We are unaware of formal consideration by the Marine Corps of establishing a CIU.

USAF JA HQ (Q1): To date, the Department of the Air Force (DAF) has not considered establishing a CIU. The DAF remains committed to a fair, transparent system at each stage of the court-martial process, including appellate and post-trial review.

USCG JA HQ (Q1): The Coast Guard, as an institution, has not. However, as a member of the Joint Service Committee on Military Justice and with membership on the Military Justice Review Group Part II, the Coast Guard did study the possibility circa 2015 through Rule for Courts-Martial. It was not adopted.

2. Does your service support establishing a CIU test program, either within each service or centrally located within the Department of Defense, to better assess their potential utility and feasibility? Please explain your response including any recommendations as to the construct, scope, and duration of the test program.

USA JA HQ (Q2): Army welcomes discussion of a CIU but believes that any CIU test program should require statutory authorization. In addition to the concerns regarding rejection of the MJRG proposal in 2015 and continued Congressional intent discussed above, Army believes that amendments to Article 76, UCMJ addressing the finality of a court-martial, amendments to Article 44, UCMJ addressing former jeopardy, and sufficient authorities for the Service Judge Advocate Generals to act on CIU findings may be advisable.

USN JA HQ (Q2): The Navy does not support a CIU test program within either the Department of the Navy or the Department of Defense. In our view, such a program is not necessary considering the following protections that Congress and the President afford an accused in the military justice system: under Article 66, UCMJ and R.C.M. 1203, automatic appeal of many convictions and the right to file a direct appeal of any conviction; the right to additional appellate review under Articles 67 and 67a, UCMJ, and R.C.M. 1204 and 1205; the right to petition for a new trial under Article 73 and R.C.M. 1210; and the right to request a Presidential pardon under Article 74. Further, unlike most jurisdictions, a military appellant is provided an independent appellate defense counsel at no cost.

USMC JA HQ (Q2): We do not support a CIU test program within either the Department of the Navy or the Department of Defense given the already broad—and recently expanded—rights and protections afforded to convicted servicemembers. Particularly noteworthy are the right to direct review of any conviction by the Court of Criminal Appeals, including a factual sufficiency review, and the right to representation by appellate defense counsel at no cost and without a showing of indigency..

USAF JA HQ (Q2): Recognizing that CIUs may offer an additional safeguard against wrongful convictions in certain jurisdictions, the DAF does not support establishing a CIU test program within the DAF or the DoD. The DAF has concerns about resourcing, funding, and utility of such a program. The DAF would suggest prior to a test program, a process be used wherein we study the efficacy of these programs in a system like the military justice system. For example, unlike many state and federal courts, the vast majority of our convictions do not rely solely upon forensic evidence. From a review of the information collected by the DAC-IPAD in their subcommittee, this appears a significant difference that is worth exploring. Also, it is possible the more robust appellate practice, to include representation and an ability to appeal all convictions, provides the protections one might see in a CIU.

USCG JA HQ (Q2): The Coast Guard does not endorse a CIU test program. The military provides multiple avenues to test the integrity of a conviction including robust appellant rights, appellate courts uniquely qualified to conduct factual sufficiency (a capacity beyond the right of civilian judicial systems), and other mechanisms to be further discussed. In addition, the Departments have Offices of Inspector General with broad authority to investigate abuses of civil rights and civil liberties and serious management problems within the department which could pertain to detecting and rectifying wrongful convictions. As such, the idea to test or initiate such a program has not been substantiated. Establishing a test program without a substantial basis is problematic and presents unclear use of limited resources.

3. What, if any, processes are currently available within your service for convicted servicemembers to challenge their convictions besides appellate review? By way of example, the U.S. Army recently overturned the convictions of 110 servicemembers dating back to 1917 through the Army Board for Correction of Military Records. Are similar processes available in your service and if so, how frequently are they used by convicted servicemembers? How many convictions in the last ten years have been overturned through the same or similar process? Are there limitations in terms of the actions these boards can or will take as it relates to courts-martial convictions?

USA JA HQ (Q3): In addition to the provisions of the UCMJ:

Army Clemency and Parole Board: Under authority of 10 USC 1552, DoDI 1325.7, and AR 15-130, the Army Clemency and Parole Board conducts a timely review of cases in which Soldiers were convicted at court-martial and sentenced to any term of confinement. The board has authority to adjust significant disparities in approved sentences, modify sentences when consistent with maintenance of good order and discipline and in the best interest of society and the prisoner, direct parole and mandatory supervised release, and restore to duty or re-enlist individuals who have demonstrated potential for military service. ACPB does not have authority to overturn convictions.

Army Board for Correction of Military Records (ABCMR): While 10 USC 1552 prohibits the ABCMR from setting aside convictions obtained under the UCMJ, this constraint does not apply to convictions obtained prior to May 4, 1950, under the Articles of War. In 2008, 28 convictions obtained in 1944 for African American Soldiers involved in a deadly confrontation at Fort Lawton were overturned as the courts-martial were deemed fundamentally unfair. In November

2023, the Secretary of the Army approved the ABCMR recommendation to set aside 110 convictions that resulted from the 1917 Houston Riots under a similar analysis.

ABCMR does have authority to upgrade punitive discharges adjudged at courts-martial under the UCMJ upon application of the former Servicemember.

Presidential Pardons: As discussed above, any Servicemember can apply for a Presidential pardon five years after release from confinement, or, if no confinement, the date of sentencing.

USN JA HQ (Q3): Like the Army, the Department of the Navy has established a corrections board pursuant to 10 U.S.C. § 1552, the Board for Correction of Naval Records (BCNR). For any records pertaining to courts-martial that were tried or reviewed under the UCMJ, that statute limits board authority only to either “correction of a record to reflect actions taken by reviewing authorities” or “action on the sentence of a court-martial for purposes of clemency.” 10 U.S.C. § 1552(f). Therefore, while the BCNR can change a record for clemency purposes or to accurately reflect actions taken by convening and reviewing authorities, the BCNR has no authority to act directly upon a conviction under the UCMJ. Given its limited authority on court-martial review, BCNR has not overturned a conviction within the last 10 years. The BCNR has, however, routinely acted upon clemency requests with respect to a court-martial sentence.

USMC JA HQ (Q3): Information on the Board for Correction of Naval Records is available here:

<https://www.secnav.navy.mil/mra/bcncr/Pages/default.aspx>

Information on the Naval Discharge Review Board is available here:

<https://www.secnav.navy.mil/mra/CORB/pages/ndrb/default.aspx>

Information on the Naval Clemency and Parole Board is available here:

<https://www.secnav.navy.mil/mra/CORB/Pages/NCPB/default.aspx>

USAF JA HQ (Q3): The Board for Correction of Military Records (BCMR) does not have authority to reverse, set aside, or otherwise expunge a court-martial conviction arising from the Uniform Code of Military Justice (UCMJ). In accordance with Title 10, United States Code, §1552(f), actions by the BCMR are limited to corrections to the record to reflect actions taken by the reviewing officials and action on the sentence of the court-martial for the purpose of clemency.⁴ The U.S. Army’s recent overturning of the 110 convictions was possible only because those convictions predated the 1951 implementation of the UCMJ.

Presently, convicted DAF members have several avenues for potential post-conviction relief outside of the typical appellate process. These include a presidential pardon, upgrade of discharge characterization by the Discharge Review Board (DRB) or BCMR, clemency, restoration to duty/reenlistment, parole and mandatory supervised release by the Department of the Air Force Clemency and Parole Board (AFC&PB), substitution of an administrative

⁴ 10 U.S.C.S. § 1552 (LexisNexis, Lexis Advance through Public Law 118-34, approved December 26, 2023)

discharge for a punitive discharge or dismissal by the Secretary under Article 74(b), UCMJ, and relief by the U.S. Court of Federal Claims (CFC)⁵.

USCG JA HQ (Q3): Besides appellate review, the Coast Guard has residual clemency authority derived from Article 74(a), UCMJ. Except for adjudged dismissals, the Secretary of Homeland Security has delegated to the Commandant the authority to remit or suspend any part or amount of the executed part of any sentence. Residual clemency may not be granted while a case is being reviewed by the Coast Guard Criminal Court of Appeals, U.S. Court of Appeals for the Armed Forces, or the U.S. Supreme Court. The Coast Guard's governing instruction is here:

https://media.defense.gov/2024/Mar/01/2003403282/-1/-1/0/CI_5814_1A.PDF.

A Memorandum of Understanding between the Coast Guard and the Navy provides that Navy Clemency and Parole Board (NC&PB) reviews and makes determinations concerning clemency for Coast Guard members in confinement in Navy correctional facilities.

Furthermore, a servicemember may collaterally attack their conviction in federal district court. See *Bergdahl v. United States*, No. 1:21-cv-0418, ECF No. 25 at *3 (D.D.C. July 25, 2023) (citing *Schlesinger v. Councilman*, 420 U.S. 738, 745 (1975)). They can also request a Presidential pardon.

1. Please comment generally on the advisability and feasibility of establishing CIUs to review cases in the military justice system that resulted in convictions.

USA JA HQ (Q1): Conviction integrity is critical to fairness and trust in the military justice system. Hallmarks of the military justice system – including skilled defense at no cost to all accused, robust jurisdiction for appellate review, factual sufficiency review by appellate courts, additional avenues of collateral review in federal courts, rights to petition for a new trial, and multiple avenues for clemency - provide strong protections against wrongful convictions, but of course cannot ensure perfect results.

Finality of convictions is also critical to fairness and trust in the military justice system, for both victims and accused Soldiers. Reassessments of evidence outside the rules of court-martial, especially for offenses that rely on credibility determinations, would undermine faith in the process and could inhibit reporting and cooperation from victims.

Balancing these concerns, with an awareness of prior Congressional intent, requires that any CIU be narrowly limited to address actual gaps in current relief and scoped to reflect existing data on the demand for relief based on claims of factual innocence, not insufficiency of evidence.

⁵ See Tucker Act, 28 U.S.C. § 1491; *Bowling v. United States*, 823 F.2d 1558, 1561 (Fed Cir. 1983)

USN JA HQ (Q1): The Navy does not generally favor the creation of a CIU within the Department of Defense. Many of the reasons that have led prosecution offices to create a CIU simply do not exist in a military jurisdiction. First, in comparison to those other jurisdictions, military caseloads are light enough that defense counsel have the ability to devote relatively more time to the preparation and presentation of each case. Second, military convictions arising from a guilty plea—which are most convictions—are accompanied by a robust colloquy between the accused and judge to ensure the accused is pleading guilty because they are in fact guilty. Third, recent changes to the UCMJ entitle the accused to appeal any guilty finding to the Service’s Court of Criminal Appeals upon request. Fourth, and finally, that appeal before the Service’s Court of Criminal Appeals may include a claim that facts developed at trial were insufficient to sustain a conviction. This factual sufficiency review is, at least at the federal level, unique to the military and serves as a powerful tool to ensure the integrity of any conviction.

USMC JA HQ (Q1): We do not support establishing a CIU within the Department of Defense. Convicted servicemembers enjoy appellate rights that are generally broader in many respects to those afforded in civilian jurisdictions. Additionally, most convictions in the Marine Corps follow a plea of guilty by the accused. Prior to accepting a plea of guilty, the military judge must engage in an extensive colloquy with the accused, under oath, to ensure that the plea is voluntary and that there is a factual basis for the plea. This drastically reduces the probability of wrongful convictions. Lastly, wherever housed, the CIU must be comprised of personnel with significant military justice experience. The services recently built Offices of Special Trial Counsel while also attempting to maintain parity in other organizations. An additional demand for personnel with significant military justice experience, who take years to develop, would necessarily drain talent from other organizations, including—ironically in this context—the Defense Services Organizations.

USAF JA HQ (Q1): As noted above, the JAG Headquarters does not support the establishment of a CIU to review military convictions. The DAF’s key concerns involve the nature of military cases, which often do not hinge on forensic evidence or identity and thus would not benefit as much from re-examination. The DAF is concerned with resource allocation, given the specialized personnel and expertise required for a CIU. The Air Force JAG Corps Career Litigation Development Plan sustains a pipeline of experienced military justice practitioners across every aspect of the court-martial process; however, the stand-up of a CIU could pose resourcing constraints on the equitable development of personnel required for the fair administration of military justice. The establishment of a CIU could also create the appearance of diminishing trust in the fairness and impartiality of the military justice system, impacting morale and discipline. Finally, the military justice process (through appeals and administrative avenues) is differently situated than the civilian sector and is an effective avenue to safeguard against wrongful convictions. These factors collectively suggest that a CIU, while beneficial in a civilian context for rectifying wrongful convictions, may not align well with the operational, cultural, and legal frameworks of the services.

USCG JA HQ (Q1): It is neither feasible nor advisable for the Coast Guard to establish its own CIU. However, should DoD establish a CIU, the Coast Guard could assess whether and how to participate in what would be anticipated to be sparse occasions where review may be appropriate.

Among the concerns generally, CIUs would have unclear legal authority to grant relief. As such, it would serve to duplicate and question the military justice system's already strong protections to prevent wrongful convictions buttressed by the federal courts. These protections include, but are not limited to, defense counsel at no cost to the accused (even for offenses which other jurisdictions would qualify as an infraction or a petty offense); certain procedural rights to mount a defense without incurring costs which are solely available to indigent defendants in other jurisdictions (e.g., necessary expert assistance at government expense); robust jurisdiction for appellate review; factual sufficiency by appellate courts, additional avenues for collateral attack in federal courts; and avenues for clemency.

In contrast, the testimony presented to the DAC-IPAD highlights state cases involving wrongful convictions attributable to mistaken identity from police lineups and reliance on forensic evidence, particularly DNA. Such issues are rare in the military justice system; this observation includes military sexual assault cases, where the occurrence of sexual activity and the identities of the victims and accused are typically undisputed, shifting the focus to questions of consent.

The testimony concerning CIUs pertained to operation within state jurisdictions and the proposal seems to exclusively derive its rationale from state practices. To the Coast Guard's knowledge, it would be unprecedented for the military justice system to implement a procedure primarily rooted in state practices. Such deliberation therefore risks unknown hazards and unneeded complication. Of note, since 1949, as reflected in Article 36(a), UCMJ, Congress has intended that military justice procedures emulate the federal criminal justice system to the extent "practicable" and not inconsistent with UCMJ. This approach enables the military to select and adapt procedures that are "capable of being put into practice, done, or accomplished," considering the military's need for justice considering unique practical and logistics concerns.⁶ Congress has reaffirmed this intent in Article 33 and Article 46, which again directs the military to look to federal procedure.⁷ Accordingly, should DAC-IPAD wish to further explore the CIU concept, it is imperative that it consider the practices of the federal government and the Department of Justice.

In addition to being unfeasible, the proposal, as it stands, is inadvisable. Congress has recently enacted comprehensive legislation, supported by a wide-ranging Executive Order. The President's Executive Order noted the need to enhance the handling of sexual assault cases, referencing the work of the Independent Review Commission, which espoused the need to build

⁶ Cf. *Hamdan v. Rumsfeld*, 548 U.S. 557, 640 – 641 (2006) (Kennedy J, concurring) (citations omitted) (discussing the term "practicable" as used in Article 36(b) which is also used in Article 36(a)) ("Practicable means 'feasible,' that is, 'possible to practice or perform' or 'capable of being put into practice, done, or accomplished.' Congress' chosen language, then, is best understood to allow for the selection of procedures based on logistics constraints, the accommodation of witness, the security of proceedings, and the like.")

⁷ See Article 33, UCMJ (requiring Secretary of Defense to issue disposition guidance with appropriate consideration of the Principles of Federal Prosecution). See also Article 46(b), UCMJ (requiring subpoenas and other processes be similar to federal system).

confidence and trust in the system.⁸ Introducing a CIU immediately would divert limited government resources and energy from implementing the new law effectively. It is prudent to allow the system time to stabilize, enabling material issues to crystallize through litigation. These issues can then be addressed with appropriate solutions, whether that involves a CIU or an alternative approach..

2. Military sexual assault cases often involve issues of consent where the victim and accused’s credibility are a central issue in the case. What role, if any, can CIUs serve in cases in which consent or credibility are at issue, rather than the identity of the accused?

USA JA HQ (Q2): A CIU should not have any role in reassessing evidence of consent or credibility outside the court-martial process. The court-martial process is governed by rules of evidence and allows fact finders to adjudge credibility. A standard of factual innocence, which is appropriate for a CIU, does not involve a reassessment of evidence presented at trial. Instead, a claim of factual innocence must assert the complete innocence of any criminal responsibility for the offense for which the person was convicted and for any other reduced level of criminal responsibility relating to the crime, and requires some credible, verifiable evidence of innocence that has not previously been presented at trial or considered by a hearing granted in the course of appellate review or other postconviction relief.

USN JA HQ (Q2): As you note, most military sexual assault cases involve questions of credibility, vice questions of the assailant’s identity. Credibility seems most closely tied to issues of the factual sufficiency of the conviction. As discussed above, appellate courts will review the factual sufficiency of the conviction upon a challenge from the accused, which would limit the role of the CIU to cases that involve the identity of an offender. While recent changes in the law have removed the appellate court’s de novo review of factual sufficiency, an accused may still raise the issue on appeal. They need only specify to the court the area or areas, where they believe the evidence presented at trial was not sufficient to support a finding of guilt beyond a reasonable doubt. With this incredibly powerful tool already available to an accused it is unclear what benefit a CIU could offer in cases of factual sufficiency, or where the credibility of witnesses was the central issue. Presumably, a case would not be raised at the CIU until at least one, if not two, appellate courts had reviewed the case and had an opportunity to review the accused’s claims of factual insufficiency. There would appear to be no real role for the CIU on

⁸ See The Office of the President, Fact Sheet: President Biden to Sign Executive Order Implementing Bipartisan Military Justice Reforms (July 28, 2023), [https://www.whitehouse.gov/briefing-room/statements-releases/2023/07/28/fact-sheet-president-biden-to-sign-executive-order-implementing-bipartisan-military-justice-reforms/#:~:text=The%20Executive%20Order%20transfers%20key,of%20Military%20Justice%20\(UCMJ\)](https://www.whitehouse.gov/briefing-room/statements-releases/2023/07/28/fact-sheet-president-biden-to-sign-executive-order-implementing-bipartisan-military-justice-reforms/#:~:text=The%20Executive%20Order%20transfers%20key,of%20Military%20Justice%20(UCMJ).). (“The historic reforms announced today will better protect victims and ensure prosecutorial decisions are fully independent from the chain of the command. They follow decades of tireless efforts by survivors, advocates, and Members of Congress, to strengthen the military justice system’s response to gender-based violence and build on recommendations from the Independent Review Commission on Sexual Assault in the Military (IRC), which Secretary Austin established at President Biden’s direction as one of his earliest acts in office.”); see also U.S. Department of Defense, Independent Review Commission, Hard Truths and the Duty to Change, <https://media.defense.gov/2021/Jul/02/2002755437/-1/-1/0/IRC-FULL-REPORT-FINAL-1923-7-1-21.PDF/IRC-FULL-REPORT-FINAL-1923-7-1-21.PDF> (“Taken as a whole, the IRC’s recommendations will present a comprehensive view of the problem, and offer targeted solutions for commanders of all ranks, the Services, and the Department to build trust and restore confidence in the military’s ability to prevent and respond to sexual assault and sexual harassment.”).

an issue of witness credibility or factual sufficiency in a case under the UCMJ where a trial court and at least one, if not two, appellate courts had already reviewed the evidence and the credibility of the witnesses and determined the conviction was supported by evidence beyond a reasonable doubt.

USMC JA HQ (Q2): Should Congress or the President direct the establishment of a CIU, it should be limited to reviewing claims of factual innocence, supported by newly discovered, credible, and verifiable evidence. Re-litigating issues of consent and credibility does not meet this standard. In some instances, such as an admission by the victim of providing false testimony at trial and in the absence of other direct evidence of the accused's guilt, investigation by the CIU may be warranted. A CIU should not be used, however, to merely scrutinize a victim's character.

USAF JA HQ (Q2): CIUs are most known for their work in re-examining cases where new forensic evidence can conclusively prove innocence or guilt, typically in contexts where the identity of the perpetrator is in question. However, the dynamics of military sexual assault cases present unique challenges to this model.

In these cases, the question is often not about identifying the accused, as both the victim and the accused are usually known persons, but rather about the complexities surrounding consent and the credibility of those involved. These are inherently subjective issues, deeply influenced by personal perceptions, memories, and interpretations of events. The assessment of consent and credibility relies heavily on witness testimony. Over time, witnesses' memories can fade, and their recollections can become less reliable due to factors such as coaching, bias, mistakes, or confusion. This inherent potential unreliability of witness testimony over time poses a significant challenge for CIUs in the context of sexual assault cases.

Moreover, the fact-finding process in such cases is often conducted by a trial judge or jury, who make determinations based on the credibility of the witnesses and the weight of their testimony, usually observed firsthand during the trial. This direct observation plays a crucial role in assessing the veracity and reliability of witness accounts, something that a CIU reviewing case files and records years later cannot replicate. Without the ability to observe witnesses in person and assess their demeanor, a CIU's ability to re-evaluate the credibility aspects of a case is severely limited.

USCG JA HQ (Q2): The CIU cannot properly serve a role in such cases. As previously noted, in military sexual assault cases, the occurrence of sexual activity and the identities of the victims and accused are typically undisputed, shifting the focus to questions of consent. Such issues are inherently subjective, and the American justice system has elected an adversarial system which placed its confidence in finders of facts who personally hear and observe the witnesses who are subject to cross examination.

3. If established, should a single CIU be created for the Department of Defense, or should a separate CIU be created for each Service?

USA JA HQ (Q3): Army recommends establishment of a CIU within each Service.

USN JA HQ (Q3): Should Congress or other authority require the Services create a CIU, the Navy's recommendation would be to create a single CIU within the Department of Defense. As detailed in our response to question 8 below, we do not believe a CIU should have authority or jurisdiction to review convictions resulting from a guilty plea. Within the Navy, most convictions result through a plea agreement. In FY21, 130 of 154 convictions involved a plea agreement. In FY22, it was 134 of 157 convictions, and in FY23, 124 of 143. The Navy's three-year average of 22 annual convictions without plea agreements would be insufficient to justify a Service-level CIU, and suggests that any CIU should be based at the DoD level versus the individual Service.

USMC JA HQ (Q3): Should Congress or the President direct the establishment of a CIU, there should be a single CIU in the Department of Defense to promote uniformity and consolidate resourcing.

USAF JA HQ (Q3): Although the DAF does not support a CIU, if established we believe a single CIU within the DoD could enjoy advantages of uniformity and standardization, resource efficiency, and broader oversight..

USCG JA HQ (Q3): The Coast Guard defers to the Department of Defense but if a single CIU were established, it could be empowered to review Coast Guard courts-martial. In this scenario, the Coast Guard may seek a provision for DHS/Coast Guard representation for Coast Guard cases. A single CIU would streamline resources and ensure consistency in review. Should the DoD services establish separate CIUs, the Coast Guard could engage the Navy with the same caveats.

4. If created for each Service, in which organization should the CIU be located (e.g., Office of Special Trial Counsel, Judge Advocate Headquarters Agency, Inspector General, other)?

USA JA HQ (Q4): Army recommends that the Judge Advocate Generals establish a separate independent organization at the Judge Advocate Headquarters Agency.

USN JA HQ (Q4): Should Congress or other authority require the Services create a CIU, our recommendation would be that such an organization be a part of the Judge Advocate Headquarters Agency, in the case of the Navy, within the Office of the Judge Advocate General, to assume the CIU functions of both the Navy and Marine Corps. In our view, such an organization should be independent of the prosecution functions of the Navy, to include the Office of Special Trial Counsel.

USMC JA HQ (Q4): Should Congress or the President direct the establishment of a CIU at the military department or service level, it should be established within the Office of the Judge Advocate General to assume cognizance over Navy and Marine Corps cases. This aligns with the Department of the Navy's combined appellate function.

USAF JA HQ (Q4): If created for each Service, the JAG Headquarters recommends positioning the CIU within the Air Force Judge Advocate General's (JAG) Corps, and providing the resources and funding necessary to meet the CIU requirements. The JAG Corps has a demonstrated history of providing oversight, resourcing, independence, and neutrality across the many actors in a court-martial, to include trial counsel, defense counsel, victims' counsel, trial judges, and appellate judges. The JAG Corps has the ultimate statutory authority for military justice within the service and any CIU would be appropriately housed within the JAG Corps.

USCG JA HQ (Q4): Considering the Coast Guard's response in # 3 and its limited case size, CIU functions could be carried out by collateral duty judge advocates and former commander(s) (in concert with the Inspector General if investigative assistance was needed) as part of a DoD construct.

5. What capabilities/expertise should the CIU be comprised of (e.g., experienced trial and defense counsel, military criminal investigations personnel, victim liaisons, victim advocates, and victim legal counsel)?

USA JA HQ (Q5): Army recommends that a CIU shall be composed of members with distinguished experience in military criminal law as military trial and appellate judges, investigators, prosecutors, defense counsel, appellate Government and defense counsel, and victim counsel. The members of a CIU shall serve a specified term as determined by regulations of the Secretary concerned. The Judge Advocate General shall designate a Director of the CIU. A member of the CIU shall not participate in the review of a claim if the member has prior involvement with the claimant or facts and circumstances surrounding the particular claim of factual innocence.

USN JA HQ (Q5): Should Congress or other authority require the DoD or the Services to create a CIU, our recommendation would be any CIU be staffed by experienced legal counsel with access to trained investigators and a sufficient budget to allow for forensic testing as needed and the retention of experts to review and ultimately opine on the results of those tests.

USMC JA HQ (5): Should Congress or the President direct the establishment of a CIU, it should be well-resourced and comprised of personnel with significant military justice and criminal investigation experience. Administrative support personnel are also required.

USAF JA HQ (Q5): The JAG Headquarters recommends that the CIU be staffed with lawyers with significant criminal trial experience (>10 years). If the CIU undertakes the function of deciding cases instead of merely investigating and making recommendations, it should be staffed with experienced practitioners who have served in commensurate justice roles, such as trial or appellate judges, who might constitute voting panels.

USCG JA HQ (Q5): Any CIU would reasonably be staffed with experienced criminal investigators and lawyers with significant and diverse experience in the military justice and former commanders who have demonstrated leadership excellence. Investigators should present diverse skills (e.g., digital evidence extraction and interview techniques). The presence of former commanders would be necessary to present viewpoints on the needs of the military to ensure good order and discipline, operational/fighting effectiveness, and fairness.

6. What would be an appropriate standard for CIUs to accept and review cases? Some possibilities may include: assertion of actual innocence; newly discovered evidence that would likely have resulted in a different result at trial; insufficiency of evidence.

USA JA HQ (Q6): The Army recommends that the appropriate standard is factual innocence. The term ‘claim of factual innocence’ means a claim on behalf of a living person convicted by trial by court-martial asserting the complete innocence of any criminal responsibility for the offense for which the person was convicted and for any other reduced level of criminal responsibility relating to the crime, and for which there is some credible, verifiable evidence of innocence that has not previously been presented at trial or considered by a hearing granted in the course of appellate review or other postconviction relief.

The Army also recommends a requirement for a claimant’s waiver. No formal inquiry into a claim of innocence shall be made by the CIU unless the CIU first obtains a signed agreement from the claimant in which the claimant waives the procedural safeguards and privileges that would be applicable in a court-martial with regard to matters related to the claimant’s claim of innocence, agrees to cooperate with the CIU, and agrees to provide full disclosure regarding all the CIU requirements. The claimant shall have the right to advice of defense counsel prior to the execution of the agreement and throughout the inquiry. Unless the claimant is otherwise expressly entitled to Government furnished counsel or related assistance, any representation by counsel, including related investigative or expert assistance, shall be at the claimant’s own expense. If, at any point during a formal inquiry, a claimant refuses to comply with requests of the CIU or is otherwise deemed to be uncooperative by the CIU, the CIU shall discontinue the inquiry.

The CIU shall endeavor to locate and notify any victim in the case and explain the formal inquiry process. The CIU shall advise the victim that he or she has the right to present his or her views to the CIU.

USN JA HQ (Q6): Should Congress or other authority require the DoD or the Services create a CIU, our recommendation would be that acceptance of cases by the CIU be limited to those cases where there is newly discovered evidence that (1) could not have been discovered at the time of trial and (2) is reasonably likely to have led to a different outcome at trial. In our view, an assertion of innocence, on its own, should not be sufficient to trigger a CIU review. As expressed in the answer to question 8 below, a military accused can raise the issue of factual sufficiency on appeal before the Service’s Criminal Court of Appeals. The CCA’s review of the factual sufficiency of the conviction – or CAAF’s review in cases where CAAF grants review – should be final. In instances where the accused does not raise the issue of factual sufficiency on

appeal, the issue should be considered forfeited in the absence of newly discovered evidence, not discoverable at the time of trial.

USMC JA HQ (Q6): Should Congress or the President direct the establishment of a CIU, an appropriate standard for the CIU to accept and review cases would be: (1) a case has completed or otherwise exhausted appellate review; (2) there is newly discovered evidence that is credible, verifiable, and that could not have been discovered at the time of the trial; and (3) the newly discovered evidence tends to show that the convicted person is factually innocent of the offense for which the person was convicted and any lesser included offenses.

USAF JA HQ (Q6): The JAG Headquarters would recommend the appropriate standards to be modeled substantially after successful civilian CIUs, notably requiring 1) assertion of actual innocence from the convicted (to include innocence of any lesser-included offenses); 2) newly discovered evidence that would likely have resulted in a different result at trial; and 3) the standard for a determination of innocence be clear and convincing evidence.

USCG JA HQ (Q6): The CIU would need a standard of actual innocence. There would need to be a credible threshold showing to prevent undue questioning of the justice system and the courts.

7. Should a CIU have jurisdiction to review only cases of a certain type (e.g., covered offenses) or cases that meet a minimum threshold (e.g., cases resulting in a more than one year of confinement or a discharge)?

USA JA HQ (Q7): Jurisdiction should be limited to cases in which appellate and Article 73, UCMJ relief has been exhausted or is time barred, in which the Soldier plead not guilty, and in which a punitive discharge and confinement over one year was adjudged. Priority should be given to any convicted Soldier still serving a term of imprisonment.

USN JA HQ (Q7): Should Congress or other authority require the DoD or the Services create a CIU, our recommendation would be that all convictions be reviewable, but that priority be given to those convictions where the accused is currently serving a sentence to confinement or received a punitive discharge as a part of their sentence. Given the relatively few convictions within the Navy (approximately 150 per year over the past three fiscal years) there would appear no reason to limit reviews to felony-type convictions. However, priority should be given to those currently experiencing the impacts of their conviction and sentence in terms of being currently confined or living with the effects of a punitive discharge.

USMC JA HQ (Q7): Should Congress or the President direct the establishment of a CIU, there is no logical basis to limit its authority to only specific types of cases, though priority should be given to cases in which the claimant remains confined. Availability of relief should not hinge on what type of offense a servicemember is convicted of or the resulting sentence. Most importantly, care should be taken not to exacerbate a divide between two classes: those accused of covered offenses, and those accused of non-covered offenses.

USAF JA HQ (Q7): Depending on the staffing and resources provided to the CIU, it may be necessary and appropriate to limit the number of eligible CIU cases to a certain class of serious offenses, whether determined by subject-matter or by length of confinement. Parameters for the CIU should be tailored to avoid unintended negative impacts to the timely and fair administration of military justice.

USCG JA HQ (Q7): A properly functioning CIU would need to at least address covered offenses, including culpable homicide, representing a broader category than sex offenses which is the focus of this Committee. The CIU could adversely and needlessly impact confidence in the military justice system and the need for finality. The principles of obedience, discipline, and duty are issues which concern the military justice system. These interests necessitate judicious consideration of the CIU's scope.

8. Should a CIU have jurisdiction to review convictions that resulted from a guilty plea?

USA JA HQ (Q8): No, the CIU should not have jurisdiction to review convictions that resulted from a guilty plea. The extensive colloquy required for a guilty plea in a court-martial provides confidence in actual guilt and should exclude jurisdiction over cases in which a guilty plea was accepted.

USN JA HQ (Q8): Should Congress or other authority require the DoD or the Services create a CIU, our recommendation would be that the CIU not be granted jurisdiction to review convictions that result from a guilty plea. In reaching this recommendation, it is important to note the extensive guilty plea inquiry necessitated by *United States v. Care*, 40 C.M.R. 247 (1969), which requires the military judge to explain the elements of each offense to the accused, as well as personally question the accused about what he or she did or did not do and what he or she intended in order to make a clear determination on the record that the accused's acts or omissions constitute the offense to which he or she is pleading guilty. Additionally, under the Uniform Code of Military Justice an accused is entitled to appellate review of his or her conviction as a matter of right and may raise allegations of factual sufficiency on appeal before the service's Court of Criminal Appeals. With that in mind, collateral review of a plea of guilty would not appear to be necessary or a reasonable use of limited resources.

USMC JA HQ (Q8): Should Congress or the President direct the establishment of a CIU, consistent with R.C.M. 1210(a) (see response to VI.9. below), the CIU should not have jurisdiction to review convictions that resulted from a guilty plea. As discussed above, prior to accepting a guilty plea, the military judge must engage in an extensive colloquy with the accused, under oath, to ensure that the plea is voluntary and that there is a factual basis for the plea. With the additional layer of protection of appellate review by right, to include assertions of factual insufficiency, this reasonably forecloses a later demonstration of actual innocence.

USAF JA HQ (Q8): No. To accept a guilty plea, the military judge is required to ensure there is a factual basis for the plea as elicited from facts provided by the accused. An accused is counseled during the guilty plea that they can only plead guilty if they are in fact guilty of the offenses to which they are pleading guilty. A CIU would not be the appropriate avenue for review of cases where an accused pled guilty.

USCG JA HQ (Q8): If the CIU has a standard of actual innocence, then a guilty plea should not preclude the review. If the standard is something lower, it should preclude the review considering the extensive colloquy for a military judge to accept an accused's plea of guilt and the accused's avenue for appellate review and clemency.

9. If a CIU were to conclude that a case met the applicable criteria to investigate, what should be the scope of the CIU's authority and responsibility? Should it be limited to investigation? Petitioning for a new trial? Representation of the convicted service member at re-hearing?

USA JA HQ (Q9): Army recommends that a claim of factual innocence may be referred to the CIU by any court, agency, a claimant, or a claimant's counsel or other person or entity identified in regulations of the Secretary concerned. A CIU should determine which cases shall be accepted for preliminary and formal inquiry under standards established jointly by the Judge Advocates General; inquire into claims of factual innocence, with priority to be given to those cases in which the convicted person is currently incarcerated for the crime for which the person claims factual innocence; coordinate the investigation and review of cases accepted for preliminary and formal inquiry; maintain records of case investigations; and prepare written reports outlining CIU investigations and recommendations at the completion of each inquiry as to the claim of factual innocence. The CIU shall make recommendations to the Joint Services Committee on Military Justice or other appropriate entity regarding best practices and recurring or evolving issues in the area of wrongful convictions.

If, at the conclusion of the formal inquiry, the CIU concludes that there is clear and convincing evidence of the claimant's innocence, the CIU shall recommend appropriate relief with respect to the applicable portions of the findings and sentence. If the CIU determines relief is warranted, the CIU's opinion shall be documented and the opinion, findings of fact, and record of the CIU's inquiry shall be forwarded by the Director to the Judge Advocate General concerned or the Judge Advocate General's designee. In the event the CIU determines relief is not warranted, the CIU's opinion, findings of fact, and record of the inquiry will be maintained in accordance with regulations of the Secretary concerned. The claimant, claimant's counsel, and any victim shall be notified as soon as practicable of the CIU's decision. Evidence of criminal acts, professional misconduct, or other wrongdoings uncovered by the CIU shall be referred to the proper authority. The Director shall forward the CIU's recommendations on preventing wrongful convictions or other matters through the Judge Advocate General to the Joint Services Committee on Military Justice or other appropriate entity.

Upon a determination of the CIU there is clear and convincing evidence of the claimant's innocence the Judge Advocate General or his designee shall promptly take all necessary and appropriate action to effectuate the CIU's determination unless the Judge Advocate General

determines in writing that the decision of the CIU is incorrect in fact or law under standards jointly prescribed by the Judge Advocates General.

The Army recommends clarification of additional statutory authorities for The Judge Advocate Generals to take appropriate action on CIU recommendations.

USN JA HQ (Q9): Should Congress or other authority require the Services create a CIU, our recommendation would be that CIU have authority and responsibility to investigate the claims and file a petition (and argue in support of that petition) for a new trial. Should the accused be granted a new trial, we would recommend the accused be assigned a military defense counsel in accordance with standard practice. This would be consistent with current appellate practice where an appellate defense counsel who successfully argues for a new trial for their client, their representation comes to an end and the accused is assigned a trial defense counsel for the re-trial.

USMC JA HQ (Q9): Should Congress or the President direct the establishment of a CIU, the CIU's authority should be limited to investigating claims, and for cases meeting the requisite standard, filing a petition for a new trial in accordance with Article 73 and R.C.M. 1210, and as appropriate, arguing in support of that petition. Should the accused be granted a new trial, the accused should be detailed a military defense counsel consistent with existing requirements.

USAF JA HQ (Q9): If a CIU were to be established with appropriate statutory authority, it should investigate, review, and decide outcomes for cases that meet the most stringent criteria. Such authority would keep the CIU process entirely separate from the military justice system, thereby preserving continuity and eliminating conflicts of interest within each respective adjudicative function.

USCG JA HQ (Q9): Consideration should be given to the CIU have investigatory authority derived from being part of the Inspector General. This could ensure adequate investigative powers while avoiding duplication and inefficiency. The CIU would be able to advocate to the Secretary or other relevant authorities for clemency or alternative relief.

10. Is the 3-year period for an accused to petition for a new trial on the grounds of newly discovered evidence or fraud on the court under Article 73, UCMJ a sufficient amount of time? Should there be any limitation?

USA JA HQ (Q10): Addition of language waiving the three-year period "for good cause shown" would provide additional protections against wrongful convictions in which new evidence is discovered more than three years after entry of judgment.

USN JA HQ (Q10): The current 3-year period is a sufficient amount of time in which an accused can petition for a new trial under Article 73. At some point, convictions must be final. The potential addition of language allowing for the waiver of that 3-year period for "good cause shown" would allow for convictions to be presumed final, while still allowing an accused an avenue to contest a potentially wrongful conviction.

USMC JA HQ (Q10): Three years is an appropriate limitation after which there is a strong presumption of finality. However, adding an exception “for good cause shown,” would be reasonable and consistent with the concepts discussed in this RFI.

USAF JA HQ (Q10): The three-year period for an accused to petition for a new trial on the grounds of newly discovered evidence or fraud on the court is sufficient. Convicted service members have broad appellate options, for example a petition for an extraordinary writ, in the rare case new evidence or fraud on the court is discovered after the expiration of the three-year period to petition for a new trial.

USCG JA HQ (Q10): The 3-year period is employed by Federal Rule of Criminal Procedure 33 which serves as the basis for Article 73, UCMJ. The Coast Guard lacks any information or data warranting challenging Congress’ legislative judgment about this long-standing standard.

11. Do any programs exist that review cases to determine if DNA analysis could demonstrate innocence? If so please provide further information.

USA JA HQ (Q11): Recommend referral of this question to the Inspector General of the Department of Defense (DoD IG). DoD IG has broad oversight and audit authorities over the Military Criminal Investigative Services.

USN JA HQ (Q11): The Navy is unaware of any existing programs within the Department of Defense to conduct DNA analysis post-conviction. Obviously, DNA analysis is conducted in many cases prior to trial with the results of said testing being made available to counsel for the accused in accordance with the Military Rules of Evidence regarding discovery.

USMC JA HQ (Q11): We are unaware of any existing programs within the Department of Defense to conduct post-conviction DNA analysis.

USAF JA HQ (Q11): The JAG Headquarters is not aware of any current programs that review cases to determine if DNA analysis could demonstrate innocence. However, these cases would be rare given the nature of DAF practice in courts-martial.

USCG JA HQ (Q11): The Coast Guard is not. Of note, in military sexual assault cases, which are the purview of this Committee, the identities of the accused and victims, along with the occurrence of sexual activity, are not typically contested. Consequently, these cases seldom hinge upon DNA evidence.

12. Are there other steps the Services should take to ensure the integrity of convictions in the military justice system?

USA JA HQ (Q12): Ongoing implementation of recommendations of the Internal Review Team on Racial Disparities in the Military Justice System will provide additional due process protections, oversight and transparency, and training and education across the investigative, administrative, non-judicial and judicial systems. Implementation of these recommendations will provide additional protections against wrongful convictions.

USN JA HQ (Q12): Each Service takes extensive steps to ensure the integrity of convictions under the UCMJ. These start with the appointment of military defense counsel and continue through the pretrial phase and ultimately through trial until a verdict and sentence are reached. Protections necessary to ensure the integrity of a conviction then continue with an appeal by right under Article 66, petition rights under Article 67 and 67a, and additional review authorities under Articles 73 and 74. Additionally, the Service's Board for Correction of Naval Records offers an additional opportunity for clemency. Given these extensive protections inherent within the military justice system, we do not believe additional protections are warranted.

USMC JA HQ (Q12): No. As previously discussed, broad rights, protections, and avenues of relief are afforded to servicemembers that are convicted of offenses under the UCMJ.

USAF JA HQ (Q12): The JAG Headquarters believes its appellate review process and other post-trial review functions are sufficiently fair, robust, and provide adequate opportunities for members to receive consideration.

USCG JA HQ (Q12): Yes. As highlighted in paragraph #1, Congress has enacted comprehensive legislative reforms which are buttressed by an extensive Executive Order. Introducing additional mechanisms risks diverting resources and energy best used in pursuing justice and effectively assessing what cases to prosecute. It is important to give the system time to stabilize and for material issues to crystalize through the litigation process. This would better inform the necessity of additional steps needs to ensure the integrity of convictions whether that be a CIU or alternative measures.

III. Response from Service Court of Criminal Appeals:

The Services did not provide a response from their Court of Criminal Appeals.

IV. Response from Service Trial Judiciary:

The Services did not provide a response from their Service Trial Judiciary.

V. Response from Office of Special Trial Counsel⁹:

1. Please comment generally on the advisability and feasibility of establishing CIUs to review cases in the military justice system that resulted in convictions.

USA OSTC (Q1): The military justice system has many safeguards, many of which are unique to the military, to protect against and identify wrongful convictions: Skilled defense counsel at no cost to all accused, robust jurisdiction for appellate review, factual sufficiency review by appellate courts, additional avenues of collateral review in federal courts, rights to petition for a new trial, and multiple avenues for clemency. Based on the robust safeguards already in place, there do not appear to be significant gaps in current avenues of relief that would justify or necessitate the creation of CIUs.

USN OSTC (Q1): The protections secured by Conviction Integrity Unit (CIU) are already ingrained in the post-trial and appellate procedures provided by the Uniform Code of Military Justice (UCMJ).

Article 73, UCMJ, permits any convicted Sailor to petition the Judge Advocate General for a new trial on the grounds of newly discovered evidence or fraud on the court within three years of the date of entry of judgment. If the Sailor's case is pending appeal, then the petition is forwarded to the appropriate appellate court. (*Id.*) Otherwise, the Judge Advocate General acts upon the petition. (*Id.*) In either case, the Sailor is entitled to, and will be provided, appellate defense counsel.

The Article 73, UCMJ, requirement of "newly discovered evidence" mirrors the threshold standard for many CIUs, including those in Georgia,¹⁰ Illinois,¹¹ Pennsylvania,¹² Maryland,¹³

⁹ Please note that, in the Coast Guard, the Office of the Chief Prosecutor performs the functions of the Office of the Special Trial Counsel and Trial Services Organization.

¹⁰ "The investigation must lead to the discovery of new information or evidence that was not considered by the trier of fact"

(<https://www.gwinnettcountry.com/web/gwinnett/departments/districtattorney/convictionintegrityunit>)

¹¹ "[T]here now exists credible, new evidence to support [the] claim of innocence"

(<https://www.lcsao.org/306/Conviction-Integrity-Unit>)

¹² "Facts, evidence or information supporting the claim must meet the definition of 'new evidence'"

(<https://www.attorneygeneral.gov/criminal-law-division/conviction-integrity-section/>)

¹³ "The claim must be supported by new evidence not previously litigated"

(<https://www.montgomerycountymd.gov/SAO/other/integritydivision.html>)

Michigan,¹⁴ New York,¹⁵ Ohio,¹⁶ and the District of Columbia,¹⁷ among others. Rule for Courts-Martial 1210(f) further defines the scope of “newly discovered evidence,” and the definition itself is an executive function that does not require legislation.¹⁸ In both the military and civilian systems, the burden is consistently on the accused to provide newly discovered evidence.

In addition to the avenue for post-trial relief under Article 73, UCMJ, the appellate procedures under Articles 66 and 67, UCMJ, also warrant highlighting. Under Article 66(b)(1), a Sailor is entitled to appeal any finding of guilt to the service Court of Criminal Appeals (CCA). This appellate right exists for all convictions and sentences awarded at general and special courts-martial. (*Id.*) Summary court-martial “convictions” are also eligible for appellate review by the CCA. (*Id.*) On appeal, the CCA “may affirm only such findings of guilty as the [Court] finds correct in law, and in fact.” (Article 66(d)(1)(A)). Thus, unlike civilian appellate courts, the CCAs already have the unique authority to conduct a factual sufficiency review.

Portions of the 18 September 2023 subcommittee testimony referenced a prior right to “*de novo*” review of findings of guilt. But earlier versions of Article 66, UCMJ, did not provide for *de novo* review of factual sufficiency. Rather, case law directed the CCAs to apply the test of “whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the members of the [CCA] are themselves convinced of the accused's guilt beyond a reasonable doubt.” (*United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987)). The current version of Article 66 codified language similar to the *Turner* standard, but it did not otherwise increase the standard of review from *de novo*. Further, the current “clear and convincing standard” under Article 66 is consistent with the standard outlined by American Bar Association Rule 3.8(h)¹⁹ as well as those applied by CIUs in California,²⁰ Pennsylvania,²¹ Michigan,²² New York,²³ North Carolina,²⁴ and the District of Columbia, among others.²⁵

Finally, the legal sufficiency of a conviction may be raised on appeal with CCA, under Article 66(d), and with the Court of Appeals for the Armed Forces (CAAF), under Article 67(c), UCMJ.

¹⁴ “The CIU investigates claims of factual innocence based on new evidence” (<https://www.michigan.gov/ag/initiatives/conviction-integrity/ciu-read-more>)

¹⁵ “New evidence has been discovered since the entry of a judgment” (<https://www.nysenate.gov/legislation/laws/CPL/440.10>)

¹⁶ “New and credible evidence of innocence must exist” (<https://www.ccprosecutor.us/who-we-are/divisions-and-units/>)

¹⁷ “[C]laimant must proffer new evidence of actual innocence capable of being investigated and potentially substantiated (<https://www.justice.gov/usao-dc/page/file/1585756/download>)

¹⁸ RCM 1210 adopted the criteria set forth in *United States v. Chadd*, 32 C.M.R. 438, 442 (C.M.A. 1963) and is generally consistent with Fed. R. Crim. P. 33. *United States v. Brooks*, 49 M.J. 64, 68 (C.A.A.F. 1998).

¹⁹ https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_3_8_special_responsibilities_of_a_prosecutor/

²⁰ <https://orangecountyda.org/wp-content/uploads/2024/01/OCDA-Conviction-Integrity-Unit-Policy-REVISED-10.4.23-Secured.pdf>

²¹ <https://www.attorneygeneral.gov/criminal-law-division/conviction-integrity-section/>

²² <https://www.michigan.gov/ag/initiatives/conviction-integrity/ciu-read-more>

²³ *People v. Williams*, 123 N.Y.S.3d 215 (N.Y., Aug.6, 2020)

²⁴ https://www.ncleg.gov/EnactedLegislation/Statutes/HTML/ByArticle/Chapter_15A/Article_92.html

²⁵ <https://www.justice.gov/usao-dc/page/file/1585756/download>

Collectively, the current post-trial and appellate standards under Articles 66, 67, and 73, UCMJ, give significant assurance as to the legal and factual basis for every conviction, and they are sufficient to provide the same protective function as a CIU.

USMC OSTC (Q1): The protections secured by Conviction Integrity Unit (CIU) are already ingrained in the post-trial and appellate procedures provided by the Uniform Code of Military Justice (UCMJ).

Article 73, UCMJ, permits any convicted service member to petition the Judge Advocate General for a new trial on the grounds of newly discovered evidence or fraud on the court within three years of the date of entry of judgment. If the convicted service member's case is pending appeal, then the petition is forwarded to the appropriate appellate court. (Id.) Otherwise, the Judge Advocate General acts upon the petition. (Id.) In either case, the convicted service member is entitled to, and will be provided, appellate defense counsel.

The Article 73, UCMJ, requirement of "newly discovered evidence" mirrors the threshold standard for many CIUs, including those in Georgia,²⁶ Illinois,²⁷ Pennsylvania,²⁸ Maryland,²⁹ Michigan,³⁰ New York,³¹ Ohio,³² and the District of Columbia,³³ among others. Rule for Courts-Martial 1210(f) further defines the scope of "newly discovered evidence," and the definition itself is an executive function that does not require legislation.³⁴ In both the military and civilian systems, the burden is consistently on the accused to provide newly discovered evidence.

In addition to the avenue for post-trial relief under Article 73, UCMJ, the appellate procedures under Articles 66 and 67, UCMJ, also warrant highlighting. Under Article 66(b)(1), a convicted service member is entitled to appeal any finding of guilt to the applicable Court of Criminal Appeals (CCA). This appellate right exists for all convictions and sentences awarded at general

²⁶ "The investigation must lead to the discovery of new information or evidence that was not considered by the trier of fact" (<https://www.gwinnettcountry.com/web/gwinnett/departments/districtattorney/convictionintegrityunit>)

²⁷ "[T]here now exists credible, new evidence to support [the] claim of innocence"

(<https://www.lcsao.org/306/Conviction-Integrity-Unit>)

²⁸ "Facts, evidence or information supporting the claim must meet the definition of 'new evidence'"

(<https://www.attorneygeneral.gov/criminal-law-division/conviction-integrity-section/>)

²⁹ "The claim must be supported by new evidence not previously litigated"

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³⁰ "The CIU investigates claims of factual innocence based on new evidence"

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and special courts-martial. (Id.) Summary court-martial “convictions” are also eligible for appellate review by the CCA. (Id.). On appeal, the CCA “may affirm only such findings of guilty as the [Court] finds correct in law, and in fact.” (Article 66(d)(1)(A)). Thus, unlike civilian appellate courts, the CCAs already have the unique authority to conduct a factual sufficiency review.

Portions of the 18 September 2023 subcommittee testimony referenced a prior right to “de novo” review of findings of guilt. But earlier versions of Article 66, UCMJ, did not provide for de novo review of factual sufficiency. Rather, case law directed the CCAs to apply the test of “whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the members of the [CCA] are themselves convinced of the accused's guilt beyond a reasonable doubt.” (United States v. Turner, 25 M.J. 324, 325 (C.M.A. 1987)). The current version of Article 66 codified language similar to the Turner standard, but it did not otherwise increase the standard of review from de novo. Further, the current “clear and convincing standard” under Article 66 is consistent with the standard outlined by American Bar Association Rule 3.8(h)³⁵ as well as those applied by CIUs in California,³⁶ Pennsylvania,³⁷ Michigan,³⁸ New York,³⁹ North Carolina,⁴⁰ and the District of Columbia, among others.⁴¹

Finally, the legal sufficiency of a conviction may be raised on appeal with CCA, under Article 66(d), and with the Court of Appeals for the Armed Forces (CAAF), under Article 67(c), UCMJ.

Collectively, the current post-trial and appellate standards under Articles 66, 67, and 73, UCMJ, give significant assurance as to the legal and factual basis for every conviction, and they are sufficient to provide the same protective function as a CIU.

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³⁵ https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_3_8_special_responsibilities_of_a_prosecutor/

³⁶ <https://orangecountyda.org/wp-content/uploads/2024/01/OCDA-Conviction-Integrity-Unit-Policy-REVISED-10.4.23-Secured.pdf>

³⁷ <https://www.attorneygeneral.gov/criminal-law-division/conviction-integrity-section/>

³⁸ <https://www.michigan.gov/ag/initiatives/conviction-integrity/ciu-read-more>

³⁹ *People v. Williams*, 123 N.Y.S.3d 215 (N.Y., Aug.6, 2020)

⁴⁰ https://www.ncleg.gov/EnactedLegislation/Statutes/HTML/ByArticle/Chapter_15A/Article_92.html

⁴¹ <https://www.justice.gov/usao-dc/page/file/1585756/download>

provided appellate defense counsel. (See Department of the Air Force Instruction 51-201, Administration of Military Justice, 24 January 2024, Section 24G).

The Article 73, UCMJ, requirement of “newly discovered evidence” mirrors the threshold standard for many CIUs, including those in Georgia,⁴² Illinois,⁴³ Pennsylvania,⁴⁴ Maryland,⁴⁵ Michigan,⁴⁶ New York,⁴⁷ Ohio,⁴⁸ and the District of Columbia,⁴⁹ among others. Rule for Courts-Martial 1210(f) further defines the scope of “newly discovered evidence,” and the definition itself is an executive function that does not require legislation. In both the military and civilian systems, the burden is consistently on the Accused to provide the newly discovered evidence.

In addition to the avenue for post-trial relief under Article 73, UCMJ, the appellate procedures under Articles 66 and 67, UCMJ, also warrant highlighting. Under Article 66(b)(1), an Accused is entitled to appeal any finding of guilt to the service Court of Criminal Appeals (CCA). For General and Special Courts-Martial, this appellate right is not tied to specified offenses, a minimum sentence, or any other jurisdictional limitations. (Id.) In fact, even summary court-martial “convictions” can be eligible for appellate review by the CCA. (Id.) On appeal, the CCA “may affirm only such findings of guilty as the [Court] finds correct in law, and in fact.” (Article 66(d)(1)(A)). Thus, unlike civilian appellate courts, the CCAs already have the unique authority to conduct a factual sufficiency review.

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by American Bar Association Rule 3.8(h)⁵⁰ as well as those applied by CIUs in California,⁵¹ Pennsylvania,⁵² Michigan,⁵³ New York,⁵⁴ North Carolina,⁵⁵ and the District of Columbia, among others.⁵⁶

Finally, the legal sufficiency of a conviction may be raised on appeal with CCA, under Article 66(d), and with the Court of Appeals for the Armed Forces (CAAF), under Article 67I, UCMJ.

Collectively, the current post-trial and appellate standards under Articles 66, 67, and 73, UCMJ, give significant assurance as to the legal and factual basis for every conviction, and they are sufficient to provide the same protective function as a CIU.

USCG OSTC (Q1): The collective current post-trial and appellate standards under Articles 66, 67, and 73, UCMJ, give significant assurance to the legal and factual basis for every conviction and are sufficient to provide the same protective function as a CIU.

Under Article 66(b)(1), an Accused may appeal any finding of guilt to the Service's Court of Criminal Appeals (CCA). For General and Specials Courts-Martial, this right is not tied to specified offenses, a minimum sentence, or any other jurisdictional limitations. The same legal requirements exist for Summary Courts-Martial. On appeal, the Appellate Court may affirm only such findings of guilty as it finds correct in law, and in fact. (Article 66(d)(1)(A)). Thus, unlike civilian appellate courts, the CCAs already have the authority to conduct a factual sufficiency review. Finally, the legal sufficiency of a conviction may be raised on appeal with CCA, under Article 66(d), and with the Court of Appeals for the Armed Forces (CAAF), under Article 67(c), UCMJ.

The Article 73, UCMJ, requirement of "newly discovered evidence" mirrors the threshold "claim of innocence" standard for many state-level CIUs, e.g., Georgia,⁵⁷ Illinois,⁵⁸ Pennsylvania,⁵⁹ Maryland,⁶⁰ Michigan,⁶¹ New York,⁶² Ohio,⁶³ and the District of Columbia.⁶⁴

⁵⁰ https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_3_8_special_responsibilities_of_a_prosecutor/

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⁵⁴ People v. Williams, 123 N.Y.S.3d 215 (N.Y., Aug. 6, 2020)

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⁵⁹ See <https://www.attorneygeneral.gov/criminal-law-division/conviction-integrity-section/>

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⁶³ See <https://www.ccprosecutor.us/who-we-are/divisions-and-units/>

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Finally, and of note, Rule for Courts-Martial 1210(f) defines the scope of “newly discovered evidence.” In both the military and civilian systems, the burden is consistently on the Accused (or Defendant) to provide the newly discovered evidence.

2. Military sexual assault cases often involve issues of consent where the victim and accused’s credibility are a central issue in the case. What role, if any, can CIUs serve in cases in which consent or credibility are at issue, rather than the identity of the accused?

USA OSTC (Q2): There is no role for CIUs in cases where consent and/or credibility are an issue for several reasons. First, these issues are determined by the trier of fact at the trial level. The factfinder, who can observe facial expressions and hear voice inflections of witnesses, is in the best position to assess credibility, resolve conflicts in testimony, weigh the evidence, and draw reasonable inferences from the evidence. Second, existing and robust military appellate processes already address a review of such issues.

Specifically, Article 66, UCMJ, provides all convicted offenders an avenue of appeal to litigate the factual sufficiency of issues such as consent and credibility. It should be noted that there is no equivalent appellate factual-sufficiency review corollary in civilian jurisdictions.

USN OSTC (Q2): As noted in the 18 September 2023 subcommittee testimony, CIUs are often focused on questions of identity. (See, e.g., Testimony of Mr. Shanies – “[A]ll of the cases that I’ve worked on that I can think of at this moment have been the wrong person.”).

Questions of consent and credibility relate to the factual and legal sufficiency of a conviction. As discussed, Article 66, UCMJ, already enables Sailors to appeal the legal and factual sufficiency of any finding of guilt to the CCA. Following CCA review, legal sufficiency may also be raised before CAAF under Article 67, UCMJ.

If there is new evidence relating to consent or credibility, the issue could be raised in a petition for a new trial under Article 73, UCMJ.

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If there is new evidence relating to consent or credibility, the issue could be raised in a petition for a new trial under Article 73, UCMJ.

USCG OSTC (Q2): Credibility should be assessed by the fact finder. As to issues of consent, the court-martial process is governed by military rules of evidence, which largely mirror the federal rules of evidence, to allow fact finders to adjudicate such issues. Consequently, adequate safeguards already exist; thus, CIUs should not review issues of consent or credibility.

Finally, as noted in the Question 1 response, convicted Coast Guardsmen may consider issues of legal sufficiency in accord with Articles 66, 67, and 73 where appropriate.

3. If established, should a single CIU be created for the Department of Defense, or should a separate CIU be created for each Service?

USA OSTC (Q3): Given the varying resourcing capabilities and mission objectives of each Service, allowing each Service to retain maximum flexibility in developing a Service-specific CIU would be optimal.

USN OSTC (Q3): If established, a single CIU should be created for the Department of Defense, to ensure consistency across services and to account for the likely limited number of cases eligible for consideration. Personnel assigned to this office could then work with service appellate defense programs to generate meritorious petitions under Article 73, UCMJ.

USMC OSTC (Q3): If established, a single CIU should be created for the Department of Defense, to ensure consistency across services and to account for the likely limited number of cases eligible for consideration. Personnel assigned to this office could then work with service appellate defense programs to generate meritorious petitions under Article 73, UCMJ.

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USCG OSTC (Q3): Yes. Though the U.S. Coast Guard is a subcomponent of the Department of Homeland Security, all of its personnel are equally subject to the Uniform Code of Military

Justice and the same rules for courts-martial, military rules of evidence, and appellate rights apply to the Coast Guard as its sister services.

Practically, establishing one CIU could also provide for additional objectivity and impartiality by personnel who are not assigned to the branch of the convicted member seeking CIU relief.

4. If created for each Service, in which organization should the CIU be located (e.g., Office of Special Trial Counsel, Judge Advocate Headquarters Agency, Inspector General, other)?

USA OSTC (Q4): If a Service CIU is mandated, Army OSTC recommends its placement in the Office of the Judge Advocate General.

USN OSTC (Q4): If created for each Service, the CIU should not be located under the Office of Special Trial Counsel (OSTC). These Offices are still in the first three months of full operational capability and are working to implement the sweeping military justice reforms provided by the Fiscal Year (FY) 2022, 2023, and 2024 National Defense Authorization Acts (NDAA). Adding additional responsibilities to OSTC would require redirecting resources and personnel away from the express mission to investigate and prosecute offenses under its authority.

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USAF OSTC (Q4): If created for each Service, the CIU should not be located under the Office of Special Trial Counsel (OSTC). These Offices are still in the first three months of full operational capability and are working to implement the sweeping military justice reforms provided by the Fiscal Year (FY) 2022, 2023, and 2024 National Defense Authorization Acts (NDAA). Adding additional responsibilities to OSTC would require redirecting resources and personnel away from the Office's express mission to investigate and prosecute offenses under its authority.

USCG OSTC (Q4): The CIU should be located outside the OCP's purview and prosecutorial mission. From a practical perspective, the OCP has already been tasked with executing a myriad of legislative mandates in the FY22, FY23, and FY24 NDAA's and will not attain Final Operating Capability until at least 2026.

The OCP is agnostic as to whether the Department of Homeland Security or some other entity at Coast Guard Headquarters establishes a CIU.

5. What capabilities/expertise should the CIU be comprised of (e.g., experienced trial and defense counsel, military criminal investigations personnel, victim liaisons, victim advocates, and victim legal counsel)?

USA OSTC (Q5): If CIUs are mandated, the Army OSTC recommends they consist of experienced investigators and military justice practitioners such as prosecutors, defense counsel, and appellate government and trial counsel.

USN OSTC (Q5): If established, personnel assigned to the CIU should have significant military justice experience, particularly in the investigation and prosecution/defense of felony-level offenses.

USMC OSTC (Q5): If established, personnel assigned to the CIU should have significant military justice experience, particularly in the investigation and prosecution/defense of felony-level offenses.

USAF OSTC (Q5): If established, personnel assigned to the CIU should have significant military justice experience, particularly in the investigation and prosecution/defense of felony-level offenses.

USCG OSTC (Q5): The CIU should be comprised of experienced military justice practitioners, regardless of status as trial, defense, or special victim's counsel, who have served in litigation assignments and have handled felony-level matters. Such a CIU should also maintain its own staff of Coast Guard Investigative Service Special Agents and victim advocates.

6. What would be an appropriate standard for CIUs to accept and review cases? Some possibilities may include: assertion of actual innocence; newly discovered evidence that would likely have resulted in a different result at trial; insufficiency of evidence.

USA OSTC (Q6): If required to establish a CIU, each Service should be permitted to determine its own standard for accepting cases for review. Army OSTC would recommend the following minimum requirements: actual/factual innocence claims (i.e., no role in the criminal act); direct appeal and post-conviction appellate relief avenues have been exhausted; claim is supported by new, credible, and material evidence which was previously unevaluated on the merits by a court or trier-of-fact; and claim is presently capable of being investigated and substantiated.

USN OSTC (Q6): As noted above, factual sufficiency of a conviction is already eligible for review by the Service CCAs under Article 66, UCMJ. Similarly, legal sufficiency is reviewable

by both the CCAs and the Court of Appeals for the Armed Forces under Articles 66 and 67, UCMJ, respectively.

Assertions of actual innocence on grounds of newly discovered evidence would fall squarely within the eligibility requirements under Article 73, UCMJ.

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Assertions of actual innocence on grounds of newly discovered evidence would fall squarely within the eligibility requirements under Article 73, UCMJ.

USCG OSTC (Q6): The appropriate standard for a CIU might be factual sufficiency. However, as noted in prior responses, UCMJ Articles 66, 67, and 73 already provide bases for a convicted member to assert innocence to gain relief.

7. Should a CIU have jurisdiction to review only cases of a certain type (e.g., covered offenses) or cases that meet a minimum threshold (e.g., cases resulting in a more than one year of confinement or a discharge)?

USA OSTC (Q7): Yes. The CIU's authority to review convictions should be limited to those falling within Service defined parameters such as, at a minimum, contested convictions in which avenues of appeal and any post-conviction relief have been exhausted and in which a punitive discharge and confinement over one year was adjudged.

USN OSTC (Q7): Articles 66, 67, and 73, UCMJ, do not have offense-specific or sentence-specific limitations for review, ensuring that all convicted Sailors are entitled to the same process, regardless of offense. Implementing a CIU with such a standard would create a higher bar for review.

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USCG OSTC (Q7): UCMJ Articles 66, 67, and 73 do not have offense-specific or sentence-specific limitations for review. Implementing a CIU with such thresholds would create a higher bar for review. If a certain type of case or threshold is sought, jurisdiction should be limited to cases in which appellate and Article 73 relief has been exhausted or is time barred.

8. Should a CIU have jurisdiction to review convictions that resulted from a guilty plea?

USA OSTC (Q8): No. Given the thoroughness of military providence inquiries as compared to the minimal factual allocutions common in federal and state civilian courts, knowing and voluntary pleas of guilty in military courts-martial should be exempted from the jurisdiction of a CIU.

USN OSTC (Q8): No. The military justice system does not permit Alford pleas. Rather, before accepting a guilty plea, the military judge must ensure there is a factual basis for the plea, elicited from the Sailor. (United States v. Moratalla, 82 M.J. 1, 3 (C.A.A.F. 2021) (United States v. Care, 40 C.M.R. 247, 253 (C.M.A. 1969))). In every guilty plea, the individual Sailor must describe why the Sailor's conduct meets each element of the charged offense. The Sailor must acknowledge their moral and legal right to plead not guilty, and then explain why they are in fact guilty.

USMC OSTC (Q8): No. The military justice system does not permit Alford pleas. Rather, before accepting a guilty plea, the military judge must ensure there is a factual basis for the plea, elicited from the Sailor. (United States v. Moratalla, 82 M.J. 1, 3 (C.A.A.F. 2021) (United States v. Care, 40 C.M.R. 247, 253 (C.M.A. 1969))). In every guilty plea, the individual service member must describe why the service member's conduct meets each element of the charged offense. The service member must acknowledge their moral and legal right to plead not guilty, and then provide a factually based explanation for why they are in fact guilty. Furthermore, the military judge must affirmatively find that, based upon the service member's factually based explanation, the explanation establishes each and every element of each and every offense to which the service member has plead guilty.

USAF OSTC (Q8): No. The military justice system does not permit Alford pleas. Rather, before accepting a guilty plea, the military judge must ensure there is a factual basis for the plea, elicited from facts provided by the Accused. (United States v. Moratalla, 82 M.J. 1 (C.A.A.F. 2021) (United States v. Care, 40 C.M.R. 247 (C.M.A. 1969))). In every guilty plea, the individual

Accused must describe why they believe they are guilty and why their conduct meets each element of the charged offense. The Accused must acknowledge their moral and legal right to plead not guilty, and then explain why they are in fact guilty.

USCG OSTC (Q8): No. The intent of a guilty plea is twofold: accused accountability and finality of a case. Vis-à-vis providency guides, stipulations of fact, and the military judge's benchbook (DA PAM 27-9), military judges engage accused members in lengthy colloquies. These colloquies ensure due process and normally far exceed similar inquiries conducted by federal and state civilian courts.

9. If a CIU were to conclude that a case met the applicable criteria to investigate, what should be the scope of the CIU's authority and responsibility? Should it be limited to investigation? Petitioning for a new trial? Representation of the convicted service member at re-hearing?

USA OSTC (Q9): If an Army CIU is mandated, Army OSTC recommends that the CIU's case-specific conclusions and recommendations be communicated to the Army TJAG for action.

USN OSTC (Q9): If established, the DoD-level CIU should serve an investigatory function and work with the service appellate defense programs to generate meritorious petitions under Article 73, UCMJ.

USMC OSTC (Q9): If established, the DoD-level CIU should only serve an investigatory function and work with the service appellate defense programs to generate meritorious petitions under Article 73, UCMJ.

USAF OSTC (Q9): If established, the DoD-level CIU should perform an investigatory function and work with the service appellate defense programs to generate meritorious petitions under Article 73, UCMJ.

USCG OSTC (Q9): If established, the CIU should perform an investigatory function and work with the appellate defense programs to generate meritorious petitions.

10. Is the 3-year period for an accused to petition for a new trial on the grounds of newly discovered evidence or fraud on the court under Article 73, UCMJ a sufficient amount of time? Should there be any limitation?

USA OSTC (Q10): Yes.

USN OSTC (Q10): An expansion of the 3-year jurisdiction limit under Article 73, UCMJ, may warrant consideration, but a definitive position requires additional data as to the current impact, if any, of this limit.

USMC OSTC (Q10): An expansion of the 3-year jurisdiction limit under Article 73, UCMJ, may warrant consideration, but a definitive position requires additional data as to the current impact, if any, of this limit.

USAF OSTC (Q10): An expansion of the three-year jurisdiction limit under Article 73, UCMJ, may warrant consideration, but a definitive position requires additional data as to the current impact, if any, of this limit.

USCG OSTC (Q10): A three-year period is a sufficient amount of time. However, if this initiative is advanced, a “for good cause shown” qualifier under Article 73 could cure this Committee’s concern about time bars.

11. Do any programs exist that review cases to determine if DNA analysis could demonstrate innocence? If so please provide further information.

USA OSTC (Q11): Army OSTC recommends this question be deferred to DoD IG for response.

USN OSTC (Q11): Although investigations and prosecutions may involve DNA evidence, this Office is unaware of any independent programs that review cases to determine if DNA analysis could demonstrate innocence.

USMC OSTC (Q11): Although investigations and prosecutions may involve DNA evidence, this Office is unaware of any independent programs that review cases to determine if DNA analysis could demonstrate innocence.

USAF OSTC (Q11): Although investigations and prosecutions may involve DNA evidence, this Office is unaware of any independent programs that review cases to determine if DNA analysis could demonstrate innocence.

USCG OSTC (Q11): There is no independent DNA review process within the Coast Guard. However, there is neither law nor policy that prohibits the Coast Guard’s appellate defense from seeking assistance in DNA review.

12. Are there other steps the Services should take to ensure the integrity of convictions in the military justice system?

USA OSTC (Q12): No. There are numerous existing procedures and processes which ensure the integrity of convictions in the military justice system. The new Army OSTC, dedicated to the expert and independent evaluation and prosecution of cases based on facts and evidence, provides yet another dimension of protection against wrongful convictions by applying a heightened standard for referral to courts-martial as compared to historic practice.

USN OSTC (Q12): The recent and ongoing military justice reforms, including the standup of OSTC, are clear steps forward in ensuring the integrity of convictions and trust in the military justice system. The true impact of these changes will likely take several years to confirm, but there are multiple Due Process performance measures in place to analyze the effect of reform. The Department of Defense established these measures in accordance with the requirements of Section 547 of the FY22 NDAA, and they will be reported annually.

USMC OSTC (Q12): The recent and ongoing military justice reforms, including the standup of OSTC, are clear steps forward in ensuring the integrity of convictions and trust in the military justice system. The true impact of these changes will likely take several years to confirm, but there are multiple Due Process performance measures in place to analyze the effect of reform. The Department of Defense established these measures in accordance with the requirements of Section 547 of the FY22 NDAA, and they will be reported annually.

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USCG OSTC (Q12): The Coast Guard has professionalized the prosecution of offenses through OCP's establishment, the creation of a full-time judiciary, directing that special victim's counsel are at least second-tour judge advocates, and creating and maintaining several, full-time Special Assistant U.S. Attorney positions—all efforts that vastly improve the Coast Guard's military justice ecosystem.

The OCP welcomes all future opportunities to update this Committee on its continued progress, which will further assure all subjects' due process rights; and as a result, those improvements will lessen any justification or effort to establish a CIU.

VI. Response from Trial Services Organization⁶⁵

1. Please comment generally on the advisability and feasibility of establishing CIUs to review cases in the military justice system that resulted in convictions.

USA TSO (Q1): The Army did not provide a response from their Trial Services Organization.

USN TSO (Q1): Recommend against creating CIUs to review military cases. Although it is critical to ensure the integrity of the military justice system, this is already accomplished through

⁶⁵ Please note that, in the Coast Guard, the Office of the Chief Prosecutor performs the functions of the Office of the Special Trial Counsel and Trial Services Organization.

the significant scope of appellate review at the Courts of Criminal Appeals, which now includes giving any convicted person the right to request review. CIUs are feasible, but would require additional manning of military justice experienced counsel in a system which has already been stretched through other mandated growth (e.g., creation of OSTC).

USMC TSO (Q1): The protections secured by Conviction Integrity Unit (CIU) are already ingrained in the post-trial and appellate procedures provided by the Uniform Code of Military Justice (UCMJ).

Article 73, UCMJ, permits any convicted service member to petition the Judge Advocate General for a new trial on the grounds of newly discovered evidence or fraud on the court within three years of the date of entry of judgment. If the convicted service member's case is pending appeal, then the petition is forwarded to the appropriate appellate court. (Id.) Otherwise, the Judge Advocate General acts upon the petition. (Id.) In either case, the convicted service member is entitled to, and will be provided, appellate defense counsel.

The Article 73, UCMJ, requirement of "newly discovered evidence" mirrors the threshold standard for many CIUs, including those in Georgia,⁶⁶ Illinois,⁶⁷ Pennsylvania,⁶⁸ Maryland,⁶⁹ Michigan,⁷⁰ New York,⁷¹ Ohio,⁷² and the District of Columbia,⁷³ among others. Rule for Courts-Martial 1210(f) further defines the scope of "newly discovered evidence," and the definition itself is an executive function that does not require legislation.⁷⁴ In both the military and civilian systems, the burden is consistently on the accused to provide newly discovered evidence.

In addition to the avenue for post-trial relief under Article 73, UCMJ, the appellate procedures under Articles 66 and 67, UCMJ, also warrant highlighting. Under Article 66(b)(1), a convicted service member is entitled to appeal any finding of guilt to the applicable Court of Criminal Appeals (CCA). This appellate right exists for all convictions and sentences awarded at general and special courts-martial. (Id.) Summary court-martial "convictions" are also eligible for

⁶⁶ "The investigation must lead to the discovery of new information or evidence that was not considered by the trier of fact" (<https://www.gwinnettcounty.com/web/gwinnett/departments/districtattorney/convictionintegrityunit>)

⁶⁷ "[T]here now exists credible, new evidence to support [the] claim of innocence"

(<https://www.lcsao.org/306/Conviction-Integrity-Unit>)

⁶⁸ "Facts, evidence or information supporting the claim must meet the definition of 'new evidence'"

(<https://www.attorneygeneral.gov/criminal-law-division/conviction-integrity-section/>)

⁶⁹ "The claim must be supported by new evidence not previously litigated"

(<https://www.montgomerycountymd.gov/SAO/other/integritydivision.html>)

⁷⁰ "The CIU investigates claims of factual innocence based on new evidence"

(<https://www.michigan.gov/ag/initiatives/conviction-integrity/ciu-read-more>)

⁷¹ "New evidence has been discovered since the entry of a judgment"

(<https://www.nysenate.gov/legislation/laws/CPL/440.10>)

⁷² "New and credible evidence of innocence must exist" (<https://www.ccprosecutor.us/who-we-are/divisions-and-units/>)

⁷³ "[C]laimant must proffer new evidence of actual innocence capable of being investigated and potentially substantiated (<https://www.justice.gov/usao-dc/page/file/1585756/download>)

⁷⁴ RCM 1210 adopted the criteria set forth in United States v. Chadd, 32 C.M.R. 438, 442 (C.M.A. 1963) and is generally consistent with Fed. R. Crim. P. 33. United States v. Brooks, 49 M.J. 64, 68 (C.A.A.F. 1998).

appellate review by the CCA. (Id.). On appeal, the CCA “may affirm only such findings of guilty as the [Court] finds correct in law, and in fact.” (Article 66(d)(1)(A)). Thus, unlike civilian appellate courts, the CCAs already have the unique authority to conduct a factual sufficiency review.

Portions of the 18 September 2023 subcommittee testimony referenced a prior right to “de novo” review of findings of guilt. But earlier versions of Article 66, UCMJ, did not provide for de novo review of factual sufficiency. Rather, case law directed the CCAs to apply the test of “whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the members of the [CCA] are themselves convinced of the accused's guilt beyond a reasonable doubt.” (United States v. Turner, 25 M.J. 324, 325 (C.M.A. 1987)). The current version of Article 66 codified language similar to the Turner standard, but it did not otherwise increase the standard of review from de novo. Further, the current “clear and convincing standard” under Article 66 is consistent with the standard outlined by American Bar Association Rule 3.8(h)⁷⁵ as well as those applied by CIUs in California,⁷⁶ Pennsylvania,⁷⁷ Michigan,⁷⁸ New York,⁷⁹ North Carolina,⁸⁰ and the District of Columbia, among others.⁸¹

Finally, the legal sufficiency of a conviction may be raised on appeal with CCA, under Article 66(d), and with the Court of Appeals for the Armed Forces (CAAF), under Article 67(c), UCMJ. Collectively, the current post-trial and appellate standards under Articles 66, 67, and 73, UCMJ, give significant assurance as to the legal and factual basis for every conviction, and they are sufficient to provide the same protective function as a CIU.

USAF TSO (Q1): The Government Trial and Appellate Operations division does not have adequate background information to comment about the feasibility of a CIU at this time, nor does it have sufficient knowledge concerning the manning required for a CIU. The Air Force does not generally have an excess of experienced active-duty military justice experts available for assignment to a CIU. There likely would be costs to the system if the position for a new military justice focused organization had to be staffed with experienced military justice personnel without additional billet allocations.

USCG TSO (Q1): The collective current post-trial and appellate standards under Articles 66, 67, and 73, UCMJ, give significant assurance to the legal and factual basis for every conviction and are sufficient to provide the same protective function as a CIU.

⁷⁵ https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_3_8_special_responsibilities_of_a_prosecutor/

⁷⁶ <https://orangecountyda.org/wp-content/uploads/2024/01/OCDA-Conviction-Integrity-Unit-Policy-REVISED-10.4.23-Secured.pdf>

⁷⁷ <https://www.attorneygeneral.gov/criminal-law-division/conviction-integrity-section/>

⁷⁸ <https://www.michigan.gov/ag/initiatives/conviction-integrity/ciu-read-more>

⁷⁹ *People v. Williams*, 123 N.Y.S.3d 215 (N.Y., Aug.6, 2020)

⁸⁰ https://www.ncleg.gov/EnactedLegislation/Statutes/HTML/ByArticle/Chapter_15A/Article_92.html

⁸¹ <https://www.justice.gov/usao-dc/page/file/1585756/download>

Under Article 66(b)(1), an Accused may appeal any finding of guilt to the Service’s Court of Criminal Appeals (CCA). For General and Specials Courts-Martial, this right is not tied to specified offenses, a minimum sentence, or any other jurisdictional limitations. The same legal requirements exist for Summary Courts-Martial. On appeal, the Appellate Court may affirm only such findings of guilty as it finds correct in law, and in fact. (Article 66(d)(1)(A)). Thus, unlike civilian appellate courts, the CCAs already have the authority to conduct a factual sufficiency review. Finally, the legal sufficiency of a conviction may be raised on appeal with CCA, under Article 66(d), and with the Court of Appeals for the Armed Forces (CAAF), under Article 67(c), UCMJ.

The Article 73, UCMJ, requirement of “newly discovered evidence” mirrors the threshold “claim of innocence” standard for many state-level CIUs, e.g., Georgia,⁸² Illinois,⁸³ Pennsylvania,⁸⁴ Maryland,⁸⁵ Michigan,⁸⁶ New York,⁸⁷ Ohio,⁸⁸ and the District of Columbia.⁸⁹

Finally, and of note, Rule for Courts-Martial 1210(f) defines the scope of “newly discovered evidence.” In both the military and civilian systems, the burden is consistently on the Accused (or Defendant) to provide the newly discovered evidence.

2. Military sexual assault cases often involve issues of consent where the victim and accused’s credibility are a central issue in the case. What role, if any, can CIUs serve in cases in which consent or credibility are at issue, rather than the identity of the accused?

USA TSO (Q2): The Army did not provide a response from their Trial Services Organization.

USN TSO (Q2): CIUs would have to assess consent and credibility issues based on a recording or transcript, a much worse position from which to make that assessment than the factfinder who actually observed the witness testimony. Again, the Courts of Criminal Appeals already perform this function.

USMC TSO (Q2): As noted in the 18 September 2023 subcommittee testimony, CIUs are often focused on questions of identity. (See, e.g., Testimony of Mr. Shanies – “[A]ll of the cases that I’ve worked on that I can think of at this moment have been the wrong person.”).

Questions of consent and credibility relate to the factual and legal sufficiency of a conviction. As discussed, Article 66, UCMJ, already enables convicted service members to appeal the legal and factual sufficiency of any finding of guilt to the CCA. Following CCA review, legal sufficiency may also be raised before CAAF under Article 67, UCMJ.

⁸² See <https://www.gwinnettcountry.com/web/gwinnett/departments/districtattorney/convictionintegrityunit>

⁸³ See <https://www.lcsao.org/306/Conviction-Integrity-Unit>

⁸⁴ See <https://www.attorneygeneral.gov/criminal-law-division/conviction-integrity-section/>

⁸⁵ See <https://www.montgomerycountymd.gov/SAO/other/integritydivision.html>

⁸⁶ See <https://www.michigan.gov/ag/initiatives/conviction-integrity/ciu-read-more>

⁸⁷ See <https://www.nysenate.gov/legislation/laws/CPL/440.10>

⁸⁸ See <https://www.ccprosecutor.us/who-we-are/divisions-and-units/>

⁸⁹ See <https://www.justice.gov/usao-dc/page/file/1585756/download>.

If there is new evidence relating to consent or credibility, this issue can be raised in a petition for a new trial under Article 73, UCMJ.

USAF TSO (Q2): The cases that benefit the most from the type of re-review that CIU-type organizations provide are cases that turn on the identification of the accused. Very few courts-martial involve a dispute about the identification of an assailant. It is true for nearly all crimes prosecuted by the military, to include drug offenses, uniquely military offenses, and violent offenses.

USCG TSO (Q2): Credibility should be assessed by the fact finder. As to issues of consent, the court-martial process is governed by military rules of evidence, which largely mirror the federal rules of evidence, to allow fact finders to adjudicate such issues. Consequently, adequate safeguards already exist; thus, CIUs should not review issues of consent or credibility.

Finally, as noted in the Question 1 response, convicted Coast Guardsmen may consider issues of legal sufficiency in accord with Articles 66, 67, and 73 where appropriate.

3. If established, should a single CIU be created for the Department of Defense, or should a separate CIU be created for each Service?

USA TSO (Q3): The Army did not provide a response from their Trial Services Organization.

USN TSO (Q3): A joint DoD-wide CIU would theoretically require less manning from each service than individual-service CIUs, and would therefore be preferable. It would, however, be important to staff the CUI with experienced, military justice judge advocates from each service vice civilian counsel.

USMC TSO (Q3): If established, a single CIU should be created for the Department of Defense, to ensure consistency across services and to account for the likely limited number of cases eligible for consideration. Personnel assigned to this office could then work with service appellate defense programs to generate meritorious petitions under Article 73, UCMJ.

USAF TSO (Q3): The Government Trial and Appellate Operations Division does not have an opinion on this matter because it is not familiar with how the CIU would be staffed. With that said, each service has its own appellate court and its own peculiarities. While efficiencies are occasionally gained from joint organizations, nuances are often lost.

USCG TSO (Q3): Yes. Though the U.S. Coast Guard is a subcomponent of the Department of Homeland Security, all of its personnel are equally subject to the Uniform Code of Military Justice and the same rules for courts-martial, military rules of evidence, and appellate rights apply to the Coast Guard as its sister services.

Practically, establishing one CIU could also provide for additional objectivity and impartiality by personnel who are not assigned to the branch of the convicted member seeking CIU relief.

4. If created for each Service, in which organization should the CIU be located (e.g., Office of Special Trial Counsel, Judge Advocate Headquarters Agency, Inspector General, other)?

USA TSO (Q4): The Army did not provide a response from their Trial Services Organization.

USN TSO (Q4): A CIU should be located outside the chain of command of the prosecutors, likely in the Office of the Judge Advocate General.

USMC TSO (Q4): If created for each Service, the CIU should not be located under the Office of Special Trial Counsel (OSTC). These Offices are still in the first three months of full operational capability and are working to implement the sweeping military justice reforms provided by the Fiscal Year (FY) 2022, 2023, and 2024 National Defense Authorization Acts (NDAA). Adding additional responsibilities to OSTC would require redirecting resources and personnel away from the express mission to investigate and prosecute offenses under its authority. Additionally, placing the CIU under the OSTC would, in effect, create a scenario where the OSTC would be checking its own work and would likely lead to distrust of any decision made by such an organization.

USAF TSO (Q4): The CIU should be in a JAG headquarters agency. Neither OSTC nor the IG has the personnel or breadth of focus to handle what a CIU office would be looking into. For example, appellate practice is not part of the authorization for the OSTC.

USCG TSO (Q4): The CIU should be located outside the OCP's purview and prosecutorial mission. From a practical perspective, the OCP has already been tasked with executing a myriad of legislative mandates in the FY22, FY23, and FY24 NDAA's and will not attain Final Operating Capability until at least 2026.

The OCP is agnostic as to whether the Department of Homeland Security or some other entity at Coast Guard Headquarters establishes a CIU.

5. What capabilities/expertise should the CIU be comprised of (e.g., experienced trial and defense counsel, military criminal investigations personnel, victim liaisons, victim advocates, and victim legal counsel)?

USA TSO (Q5): The Army did not provide a response from their Trial Services Organization.

USN TSO (Q5): A CIU should be staffed by experienced military justice litigators. The minimum requirements should be similar to those required for the Appellate Judicial Screening

Board (O-5 select; 12+ years practicing law, 2+ years in litigation billet; litigation leadership tour).

USMC TSO (Q5): If established, personnel assigned to the CIU should have significant military justice experience, particularly in the investigation and prosecution/defense of felony-level offenses.

USAF TSO (Q5): The Air Force Government Trial and Appellate Operations Division does not have sufficient background knowledge of CIUs to suggest the level of experience or capabilities the CIU should be comprised of. At a minimum, it should be comprised of persons with appellate practice experience.

USCG TSO (Q5): The CIU should be comprised of experienced military justice practitioners, regardless of status as trial, defense, or special victim's counsel, who have served in litigation assignments and have handled felony-level matters. Such a CIU should also maintain its own staff of Coast Guard Investigative Service Special Agents and victim advocates.

6. What would be an appropriate standard for CIUs to accept and review cases? Some possibilities may include: assertion of actual innocence; newly discovered evidence that would likely have resulted in a different result at trial; insufficiency of evidence.

USA TSO (Q6): The Army did not provide a response from their Trial Services Organization.

USN TSO (Q6): This should be a very high standard. Either evidence of demonstrable prosecutorial misconduct or the discovery of previously unavailable evidence that would likely have resulted in a different result at trial.

USMC TSO (Q6): As noted above, factual sufficiency of a conviction is already eligible for review by the Service CCAs under Article 66, UCMJ. Similarly, legal sufficiency is reviewable by both the CCAs and the Court of Appeals for the Armed Forces under Articles 66 and 67, UCMJ, respectively.

Assertions of actual innocence on grounds of newly discovered evidence would fall squarely within the eligibility requirements under Article 73, UCMJ.

USAF TSO (Q6): At a minimum, an assertion of actual innocence. The other grounds are already dealt with in the ordinary appellate process.

USCG TSO (Q6): The appropriate standard for a CIU might be factual sufficiency. However, as noted in prior responses, UCMJ Articles 66, 67, and 73 already provide bases for a convicted member to assert innocence to gain relief.

7. Should a CIU have jurisdiction to review only cases of a certain type (e.g., covered offenses) or cases that meet a minimum threshold (e.g., cases resulting in a more than one year of confinement or a discharge)?

USA TSO (Q7): The Army did not provide a response from their Trial Services Organization.

USN TSO (Q7): So long as the standard for CIU review is demonstrable prosecutorial misconduct or the discovery of previously unavailable evidence, then there should not be a minimum punishment threshold for CIU review. Alternatively, CIU could use the previous threshold for automatic CCA review under Article 66, UCMJ (includes a sentence of death, dismissal, DD, BCD, or confinement of 1+ years).

USMC TSO (Q7): Articles 66, 67, and 73, UCMJ, do not have offense-specific or sentence-specific limitations for review, ensuring that all convicted Sailors are entitled to the same process, regardless of offense. Implementing a CIU with such a standard would create a higher bar for review.

USAF TSO (Q7): It could be overwhelming if every Airman or Guardian claiming innocence were automatically granted a reconsideration of their case. It's important to consider what incentives could deter every convicted Airman or Guardian from exploiting this system. In the absence of such incentives, there should be procedural safeguards in place to manage the number of applicants effectively.

USCG TSO (Q7): UCMJ Articles 66, 67, and 73 do not have offense-specific or sentence-specific limitations for review. Implementing a CIU with such thresholds would create a higher bar for review. If a certain type of case or threshold is sought, jurisdiction should be limited to cases in which appellate and Article 73 relief has been exhausted or is time barred.

8. Should a CIU have jurisdiction to review convictions that resulted from a guilty plea?

USA TSO (Q8): The Army did not provide a response from their Trial Services Organization.

USN TSO (Q8): No. A guilty plea in the military already requires the accused to convince the Military Judge of his guilt and lack of defenses, thereby rendering CIU review unnecessary. While some guilty pleas are set aside on appeal for providency or other issues, they do not rise to the level of wrongful conviction requiring CIU review.

USMC TSO (Q8): No. The military justice system does not permit Alford pleas. Rather, before accepting a guilty plea, the military judge must ensure there is a factual basis for the plea, elicited from the Sailor. (United States v. Moratalla, 82 M.J. 1, 3 (C.A.A.F. 2021) (United States v. Care, 40 C.M.R. 247, 253 (C.M.A. 1969)). In every guilty plea, the individual service

member must describe why the service member's conduct meets each element of the charged offense. The service member must acknowledge their moral and legal right to plead not guilty, and then provide a factually based explanation for why they are in fact guilty. Furthermore, the military judge must affirmatively find that, based upon the service member's factually based explanation, the explanation establishes each and every element of each and every offense to which the service member has plead guilty.

USAF TSO (Q8): No. The military system is uniquely meritorious for removing the risks of "innocent" guilty pleas. The providence inquiry, the comparatively light sentences, the lack of sentencing guidelines, the cumbersome plea agreement tools, the lack of repeat offenders, the types of cases handled, the case load for defense counsel—all work together to minimize the risk of an innocent guilty plea.

USCG TSO (Q8): No. The intent of a guilty plea is twofold: accused accountability and finality of a case. Vis-à-vis providency guides, stipulations of fact, and the military judge's benchbook (DA PAM 27-9), military judges engage accused members in lengthy colloquies. These colloquies ensure due process and normally far exceed similar inquiries conducted by federal and state civilian courts.

9. If a CIU were to conclude that a case met the applicable criteria to investigate, what should be the scope of the CIU's authority and responsibility? Should it be limited to investigation? Petitioning for a new trial? Representation of the convicted service member at re-hearing?

USA TSO (Q9): The Army did not provide a response from their Trial Services Organization.

USN TSO (Q9): A CIU should be limited to investigating whether a conviction was unjust and recommending appropriate action.

USMC TSO (Q9): If established, the DoD-level CIU should only serve an investigatory function and work with the service appellate defense programs to generate meritorious petitions under Article 73, UCMJ.

USAF TSO (Q9): The Government Trial and Appellate Operations Division does not have sufficient background information or experience with CIUs to render an opinion.

USCG TSO (Q9): If established, the CIU should perform an investigatory function and work with the appellate defense programs to generate meritorious petitions.

10. Is the 3-year period for an accused to petition for a new trial on the grounds of newly discovered evidence or fraud on the court under Article 73, UCMJ a sufficient amount of time? Should there be any limitation?

USA TSO (Q10): The Army did not provide a response from their Trial Services Organization.

USN TSO (Q10): There should be no limitation in cases dealing with the discovery of previously unavailable evidence that would likely have resulted in a different result at trial. For other issues, Article 73 provides a sufficient period.

USMC TSO (Q10): An expansion of the 3-year jurisdiction limit under Article 73, UCMJ, may warrant consideration, but a definitive position requires additional data as to the current impact, if any, of this limit.

USAF TSO (Q10): It is sufficient. This Division has not seen compelling evidence of innocence claims being raised and rejected because their new evidence is too old.

USCG TSO (Q10): A three-year period is a sufficient amount of time. However, if this initiative is advanced, a “for good cause shown” qualifier under Article 73 could cure this Committee’s concern about time bars.

11. Do any programs exist that review cases to determine if DNA analysis could demonstrate innocence? If so please provide further information.

USA TSO (Q11): The Army did not provide a response from their Trial Services Organization.

USN TSO (Q11): No such programs currently exist.

USMC TSO (Q11): Although investigations and prosecutions may involve DNA evidence, this Office is unaware of any independent programs that review cases to determine if DNA analysis could demonstrate innocence.

USAF TSO (Q11): For decades, the current military justice has routinely used DNA. Military members accused of crimes with DNA evidence have both access to the evidence and to the experts necessary to utilize that evidence. To the knowledge of this Division, there are no specific programs to determine if DNA analysis could demonstrate innocence post-conviction.

USCG TSO (Q11): There is no independent DNA review process within the Coast Guard. However, there is neither law nor policy that prohibits the Coast Guard’s appellate defense from seeking assistance in DNA review.

12. Are there other steps the Services should take to ensure the integrity of convictions in the military justice system?

USA TSO (Q12): The Army did not provide a response from their Trial Services Organization.

USN TSO (Q12): There are no additional steps the services should take, as the Courts of Criminal Appeals adequately ensure the integrity of convictions in the military justice system.

USMC TSO (Q12): The recent and ongoing military justice reforms, including the standup of OSTC, are clear steps forward in ensuring the integrity of convictions and trust in the military justice system. The true impact of these changes will likely take several years to confirm, but there are multiple Due Process performance measures in place to analyze the effect of reform. The Department of Defense established these measures in accordance with the requirements of Section 547 of the FY22 NDAA, and they will be reported annually.

USAF TSO (Q12): No. The military justice process is exceptionally fair to those accused of crimes.

USCG TSO (Q12): The Coast Guard has professionalized the prosecution of offenses through OCP's establishment, the creation of a full-time judiciary, directing that special victim's counsel are at least second-tour judge advocates, and creating and maintaining several, full-time Special Assistant U.S. Attorney positions—all efforts that vastly improve the Coast Guard's military justice ecosystem.

The OCP welcomes all future opportunities to update this Committee on its continued progress, which will further assure all subjects' due process rights; and as a result, those improvements will lessen any justification or effort to establish a CIU.

VII. Response from Defense Services Organization⁹⁰

1. Please comment generally on the advisability and feasibility of establishing CIUs to review cases in the military justice system that resulted in convictions.

USA DSO (Q1): (1) Feasibility: Establishing CIUs to review convictions is certainly feasible. If Congress or DoD wants to spend the required funds, investigative units could be established either under DoD or within individual services. When established, the criteria for the scope of their authority could also be established. It appears that the intent is that the CIUs will have no authority to provide relief but only to investigate and assist in seeking relief under existing statutes and regulations.

⁹⁰ The Coast Guard has a Memorandum of Understanding with the Navy that states the Navy Defense Service Offices will provide defense representation and services to Coast Guard members and in exchange the Coast Guard will provide the Navy Defense Service Offices with Coast Guard judge advocates to serve in defense roles. As such, the Coast Guard largely relies on the Navy to respond to these questions, with the exception of questions 3, 4, and 7.

(2) Advisability: However, establishing CIUs is not advisable. First, we must step back to see the reason for this proposal and its purpose. The RFI, dated 6 February 2024, explains the background for this proposal. The Judicial Proceedings Panel issued a report in 2017 that acknowledged that, after 5 years of reforms to ensure effective prosecutions and better treatment for alleged victims, the changes resulted in questions about the fairness of the military justice system. These doubts about the fairness of the military justice system are even greater now after more changes over the 7 years since the JPP report, including the establishment of OSTC and changes to the legal standard for the factual sufficiency review by the CCAs. The suggestion that a CIU would “help increase and reinforce trust” in the military justice system is dubious under the circumstances of the last two decades of mostly one-sided changes. Criminal justice systems must strike a difficult balance between competing interests. However, when such a system goes through 12 years of apparently one-sided (emphasis on victim’s rights to the detriment of the military Accused) changes, the result is a system that is not only seen as unfair but is unfair. The only way to rebuild trust is to make structural changes that resets the balance in a way that is fair. There are a few ways to accomplish that: repeal some of the recent changes; make new changes that promote the defense at a level equal to the promotion of the prosecution over the past 12 years; or a combination of both. Acknowledging it will be difficult for Congress to repeal recent changes they made, this will likely require more of the second option – changes promoting the defense.

(3) Alternative Reforms to Prevent Wrongful Convictions: One of the possible changes would be to correct the trend of sending judge advocates with limited or even no military justice experience to USATDS. Thirty years ago, when cases were less complicated, mature leaders in the Army JAG Corps, including SJAs, knew that the continued existence of the military justice system required defense counsel who were experienced and competent. The level of military justice experience by defense counsel is not what it used to be; for example, in Fall 2022, 42 out of 125 defense counsel had no military justice experience before coming to USATDS, including 20 who came straight from the Judge Advocate Officer Basic Course. This is a disturbing trend at a time when Congress has directed the services to increase the experience level of not only trial counsel but also defense counsel. A simple and effective change would be to require military justice experience for anyone to be assigned to USATDS, with the Chief of USATDS having the authority to approve exceptions based on other criminal justice experience. Another change that is even more monumental – but less monumental than the creation of OSTC – is the creation of an independent USATDS in the services, corresponding to the level of independence afforded to OSTC. If there is a continued belief that independence within the overall military justice enterprise is necessary, TDS positions in each of the services could similarly fall under one Chief in the grade of O-7 under the Service Secretary or Secretary of Defense. The American public has a more nuanced understanding of military justice than some government perspectives might suggest. When looking at a criminal justice system in the military, independence is most important (1) for the judiciary, (2) next most important for defense, and (3) least important for prosecution. While the actual need for an independent OSTC or TDS might be debated, when that decision was made with some level of independence created for the prosecution but not the judiciary or defense, that was not lost on the American public or military justice practitioners.

(4) Future Considerations: The creation of a CIU could be seen by some to be an attempt to give something de minimis to Defense which offers those with conflicting interests a nominal reference to demonstrate their purported assistance to accused servicemembers. Such a demonstration could be used to the detriment of the Defense to later justify further disproportionate resourcing of the prosecution side. USATDS does not support this, and it would be better not to have it, so the American public can see and feel the appropriate level of concern about the fairness of the military justice system.

USN DSO (Q1): The Navy, Marine Corps, and Coast Guard Defense Services Organizations believe CIUs should be instituted at the service-level to ensure the military justice system, at all levels, is effectively protecting the rights of service members accused of violations of the Uniform Code of Military Justice (UCMJ). CIUs are feasible as the yearly number of contested courts-martial yields a manageable load of cases for each CIU to review.

The declining number of contested courts-martial also makes CIUs advisable. As the number of courts-martial continues to decrease, the experience of military criminal investigators (MCI), military counsel, and the military judges involved in each case, will decrease. The reduced experience will create opportunities for mistakes at every level which would be prejudicial to the accused and result in unjust convictions. While legal errors not recognized and remedied at the trial level could be cured by the service courts of appeal or the Court of Appeals for the Armed Forces (CAAF), CIUs could identify errors in the investigative process which tainted the rest of the military justice process.

USMC DSO (Q1): This is certainly advisable given how many military sexual assault cases rely upon whether the members believe the testimony of the complaining witness. It may not be feasible for that very same reason, though, as it likely means detailed investigations into the persona character and circumstances of complaining witnesses.

USAF DSO (Q1): The Department of the Air Force Trial Defense Division: In an ideal world, it would be difficult to oppose introducing CIUs to help ensure the validity of courts-martial convictions and to increase faith in the military justice system overall. However, resources are fixed and the creation of CIUs, though theoretically feasible, would likely pull resources from an existing capability. Therefore, while the proposal is laudable, whether it is “advisable” depends on the opportunity costs. Without significant additional personnel and funding to introduce CIUs, the Department of the Air Force’s Trial Defense Division would recommend utilizing existing resources to continue to improve trial and appellate defense capabilities.

The Department of the Air Force Appellate Defense Division: It is advisable and feasible to establish a CIU or CIUs to review cases in the military justice system that resulted in convictions. Other jurisdictions demonstrate feasibility, with the National Registry of Exonerations counting 101 CIUs nationwide administered by both state and federal prosecuting authorities as of 7 November 2023. Advisability arises from recent changes to the military justice

system. Courts-martial have historically been subject to uniquely robust appellate review under Article 66 of the Uniform Code of Military Justice (UCMJ), examining a fresh look at each convicted offense to determine whether the judges of the Courts of Criminal Appeals are convinced of an appellant's guilt beyond a reasonable doubt. This heightened scrutiny is not found in other criminal appeals in the United States. However, it cannot be assessed by the civilian judges of the United States Court of Appeals for the Armed Forces, and recent legislative changes have also limited it to only cases where, based on the record of what happened at the trial itself, a specifically identified deficiency of proof is identified. This narrowing of appellate review creates potential gaps in the post-trial examination of convictions' integrity in light of facts that are not available in a case's appellate record. As such, no other office in the DoD offers the review that a CIU would.

USCG DSO (Q1): The Navy, Marine Corps, and Coast Guard Defense Services Organizations believe CIUs should be instituted at the service-level to ensure the military justice system, at all levels, is effectively protecting the rights of service members accused of violations of the Uniform Code of Military Justice (UCMJ). CIUs are feasible as the yearly number of contested courts-martial yields a manageable load of cases for each CIU to review.

The declining number of contested courts-martial also makes CIUs advisable. As the number of courts-martial continues to decrease, the experience of military criminal investigators (MCI), military counsel, and the military judges involved in each case, will decrease. The reduced experience will create opportunities for mistakes at every level which would be prejudicial to the accused and result in unjust convictions. While legal errors not recognized and remedied at the trial level could be cured by the service courts of appeal or the Court of Appeals for the Armed Forces (CAAF), CIUs could identify errors in the investigative process which tainted the rest of the military justice process.

2. Military sexual assault cases often involve issues of consent where the victim and accused's credibility are a central issue in the case. What role, if any, can CIUs serve in cases in which consent or credibility are at issue, rather than the identity of the accused?

USA DSO (Q2): This question demonstrates that the creation of CIUs is not really intended to correct injustices but rather to provide an argument that the military justice system is now substantially fairer. The category of cases in which the most injustices occur are those sexual assault cases that should never have been referred to trial and fall between the cracks and result in a conviction. Those will be contentious cases that probably have a very vocal alleged victim, and it is unlikely that a CIU would recommend setting aside a conviction based on insufficient evidence. There are legitimate concerns that CIU will lack the autonomy to effectively address justice in those cases, especially if they under the direct supervision of OSTC/SECARMY or OTJAG Criminal Law. Avoiding those cases in CIU review will be an admission that the purpose of the CIUs is not to correct injustices, but rather to give an incorrect appearance that changes have been made to help the defense as much as the prosecution.

USN DSO (Q2): CIUs would be particularly valuable to upholding justice in cases where the central issue is consent. As recognized by the question, the credibility of the complaining witness is the key issue in “consent” cases. However, MCIs regularly do not take any investigative steps to gather evidence which might corroborate, or contradict, the complaining witness’s allegations. In most cases, MCIs do not attempt to gather security camera footage, electronic key access logs, phone records, or other readily available evidence which might confirm the accused’s presence at the scene or accurately reflect communication between parties. The absence of this evidence at the time of trial is often not considered a discovery violation by the trial court and can be explained away by a savvy trial counsel or ignored by a members. A CIU could provide relief to the accused in such cases by ordering a new trial and serve as a sharp rebuke to MCIs that do not conduct thorough investigations designed to find the truth in sexual assault cases.

USMC DSO (Q2): As stated above, this would require detailed investigations into the circumstances surrounding the alleged sexual assault that sometimes are not available during the criminal investigation. For example, in many cases, the complaining witness refuses to a consent search of a personal cell phone even though it may have some evidentiary value though falling short of the relevant legal standard at trial. Would a CIU conduct such searches? Under what authority?.

USAF DSO (Q2): The Department of the Air Force Trial Defense Division: This would depend on whether the standard is “actual innocence” or “a lack of evidence establishing proof beyond a reasonable doubt.” Where the evidence at trial was limited to the recollections of the convicted service member and the alleged victim and whatever ancillary evidence was available to prosecutors, “actual innocence” would likely be an impossible standard in the majority of DAF cases which do not generally hinge on DNA evidence or other immutable factors. However, if permitted, a CIU could evaluate the evidence admitted regarding the nature of the allegation and credibility and assess whether the evidence was sufficient to establish guilt beyond a reasonable doubt.

The Department of the Air Force Appellate Defense Division: Assuming CIUs have a broad scope for review, CIUs can provide independent and transparent assessment of cases. The Service Courts of Criminal Appeals have been required to do this sort of fresh look at evidence for decades, even in cases where consent and credibility are at issue. CIUs can do the same and, even in cases where convictions are ultimately left undisturbed, provide a fresh look at cases that bolsters the underlying fairness—and perception of fairness—of the military justice process in a manner that at least parallels counterpart civilian systems.

USCG DSO (Q2): CIUs would be particularly valuable to upholding justice in cases where the central issue is consent. As recognized by the question, the credibility of the complaining witness is the key issue in “consent” cases. However, MCIs regularly do not take any investigative steps to gather evidence which might corroborate, or contradict, the complaining witness’s allegations. In most cases, MCIs do not attempt to gather security camera footage, electronic key access logs, phone records, or other readily available evidence which might confirm the accused’s presence at the scene or accurately reflect communication between parties. The absence of this evidence at

the time of trial is often not considered a discovery violation by the trial court and can be explained away by a savvy trial counsel or ignored by a members. A CIU could provide relief to the accused in such cases by ordering a new trial and serve as a sharp rebuke to MCIs that do not conduct thorough investigations designed to find the truth in sexual assault cases.

3. If established, should a single CIU be created for the Department of Defense, or should a separate CIU be created for each Service?

USA DSO (Q3): If CIUs are established, then there should be multiple CIUs that fall under the DoD. Maintaining independence from the services is important to ensure the integrity of each CIU. Also, if CIUs do not produce results within a set timeframe, they should be discontinued. There is legitimate concern that, without proper oversight, these units could be staffed inadequately, leading to inefficiency and a lack of tangible results. There is little institutional incentive for the services to fill them with the best and brightest military justice has to offer, which is what would be needed for the CIU to be effective. Independence gained from organization under the DoD would more likely lead to perceptions of proper oversight, which would positively impact the quality of the personnel and the ultimate outcome of the effort to assist the wrongfully convicted and their advocates.

USN DSO (Q3): Separate CIUs should be created for each service to allow each CIU to focus on a smaller number of cases. Establishing the CIUs at the service level would mirror Congress's mandate that each service create their own independent organization to prosecute covered offenses. Additionally, this would allow each CIU to learn and appreciate the distinct cultures of their respective service, which would assist them in understanding how that unique service culture may have led to an unjust conviction.

USMC DSO (Q3): A single CIU for the entire DoD is the only reasonable solution. Otherwise, a Service would simply be investigating itself. In truth, though this is not feasible, it would be better for the Department of Justice, or some other entity wholly outside the DoD, to run the CIU.

USAF DSO (Q3): The Department of the Air Force Trial Defense Division: We recommend a single CIU for the Department of Defense. This would reduce any concerns about the appearance of institutional or cultural service biases that might affect the CIU's work and would place the financial and administrative burdens on the DoD, rather than the Judge Advocate General's Corps of the individual services.

The Department of the Air Force Appellate Defense Division: A single CIU should be created for the DoD, if feasible. Though statutory changes would be required to ensure such a CIU had authority to take action on convictions, such a construct would foster a one-stop shop for petitioners seeking review, establish uniformity across the DoD, and mitigate against any Service-specific root causes, such as cultural blind spots or deficiencies fostering prosecutorial misconduct or ineffective assistance by trial defense counsel.

USCG DSO (Q3): A single CIU should serve members from all services. First, a single CIU would be able to identify shortfalls and best practices across the services, streamlining aspects of the military justice system across the armed forces. Secondly, combining the services under one central CIU would enable a permanent standing CIU, whereas the Coast Guard's small docket would not be able to support a fully staffed CIU. Lastly, a single permanent civilian based CIU would also provide continuity over case review.

4. If created for each Service, in which organization should the CIU be located (e.g., Office of Special Trial Counsel, Judge Advocate Headquarters Agency, Inspector General, other)?

USA DSO (Q4): If in each service, CIUs should fall under the Defense Appellate Division of that service. The missions are parallel, and their collaboration will make them both more effective. The resources for a CIU would have been better used to strengthen the Defense Appellate Divisions or more investigators for defense counsel in USATDS. If limited to the three options in the parentheses, the overwhelming recommendation for the CIU location would be with the Inspector General.

USN DSO (Q4): CIUs should be staffed by civilians and must be separate and distinct entities from any Office of Special Trial Counsel, JAG Corps or MCI units. By ensuring the CIUs are not a part of the JAG Corps or MCI units, it ensures there is no actual or apparent influence on the CIU in an effort to protect its reputation. Similar to the covered offense prosecution units, CIUs should report directly to each service Secretary.

USMC DSO (Q4): If each Service had its own CIU, it is at least an appearance of a conflict of interest that the CIU reside within or under the control of OSTC.

USAF DSO (Q4): The Department of the Air Force Trial Defense Division: The CIU is somewhat like the Board of Corrections of Military Records (BCMR), which appears to be an effective legal and equitable safety net for (mostly) administrative errors or injustices. It resides in the Air Force Review Boards Agency. Therefore, if the CIU is created in the Air Force, it should be assigned to a version of that agency that would be expanded to take on this important duty.

The Department of the Air Force Appellate Defense Division: If created for each Service, the CIU should be separate from the Office of Special Trial Counsel and Judge Advocate Headquarters, in particular separate from the Judge Advocate Headquarters' government appellate unit. This would ensure unbiased reviews of the cases and would require the CIU to report to either the Inspector General or Service secretary. Regardless of where located, an effective CIU would require authority to scrutinize prosecution and investigative files that may otherwise be subject to privilege. Though this would ordinarily be feasible by locating the CIU within the Judge Advocate Headquarters Agency, doing so now would not necessarily suffice in light of the independent prosecutorial authority of the Office of Special Trial Counsel. These files must be subject to examination because, notwithstanding the military justice system's

robust discovery rules requiring disclosure to the defense, files or key disclosures, such as those arising from a witness interview, may have been omitted and that omission may go undiscovered absent scrutiny from an entity like a CIU.

USCG DSO (Q4): Not applicable per response to Question 3.

5. What capabilities/expertise should the CIU be comprised of (e.g., experienced trial and defense counsel, military criminal investigations personnel, victim liaisons, victim advocates, and victim legal counsel)?

USA DSO (Q5): The CIUs should be comprised of mostly experienced criminal investigations personnel and some experienced defense trial and appellate counsel. They should have access to experts in many of the fields commonly seen in Courts-Martial. The inclusion of experienced trial counsel or representatives from victim support services may not be necessary for the CIU's primary functions.

USN DSO (Q5): CIUs should be comprised of civilians with significant practical experience as military and civilian criminal trial and defense counsel and military and civilian criminal investigators. It is important for the CIU members to have several years of practical experience to draw from in reviewing convictions. What might appear to be proof beyond a reasonable doubt or a substantially complete investigation to a novice would be considered inadequate to an expert. Further, the CIUs should be staffed by attorneys and criminal investigators to ensure a broader viewpoint than would be provided by a unit comprised solely of attorneys. As stated above, the criminal investigations which precede courts-martial are rife with skipped investigative steps which result in missing evidence.

USMC DSO (Q5): A CIU should have experienced trial and defense counsel and criminal investigators with a heavy emphasis on investigators. Victim advocates and liaisons and victims legal counsel should have no role whatsoever in a CIU, aside from experienced trial and defense counsel who have merely served in a victims' legal counsel billet. It is an appearance of a conflict of interest to have victim advocates in a CIU that is primarily tasked with undermining victim' allegations of sexual assault.

USAF DSO (Q5): The Department of the Air Force Trial Defense Division: The CIU should include attorneys with significant experience as trial and defense counsel. Former victims' counsel would also be appropriate. The CIU should also include at least one non-lawyer who is not an advocate for any person or group. The goal is to create a group focused on evaluating the validity of the conviction in a particular case without regard to the outside implications or collateral consequences that might result from reaching any particular decision.

The Department of the Air Force Appellate Defense Division: The CIU should have full-time staff comprised of experienced litigators, particularly those individuals with significant defense counsel experience, which is a recognized best practice according to both the Innocence Project

and the University of Pennsylvania Carey Law School's Conviction Review/Integrity Units Resource Center. It should also be comprised of experienced criminal investigators. Necessary capabilities would include the staffing and budget to timely assess and, as warranted, conduct further investigation of cases, an easy-to-navigate public-facing interface for cases to be brought to the CIU's attention, and the ability to scrutinize prosecution and investigative files that might otherwise be subject to privilege.

USCG DSO (Q5): CIUs should be comprised of civilians with significant practical experience as military and civilian criminal trial and defense counsel and military and civilian criminal investigators. It is important for the CIU members to have several years of practical experience to draw from in reviewing convictions. What might appear to be proof beyond a reasonable doubt or a substantially complete investigation to a novice would be considered inadequate to an expert. Further, the CIUs should be staffed by attorneys and criminal investigators to ensure a broader viewpoint than would be provided by a unit comprised solely of attorneys. As stated above, the criminal investigations which precede courts-martial are rife with skipped investigative steps which result in missing evidence.

6. What would be an appropriate standard for CIUs to accept and review cases? Some possibilities may include: assertion of actual innocence; newly discovered evidence that would likely have resulted in a different result at trial; insufficiency of evidence.

USA DSO (Q6): This is another demonstration of why this proposal is not advisable. Requiring the assertion of actual innocence is a must, but it would not weed out many cases. Newly discovered evidence is already covered by RCM 1210. Understanding that the CIU may simply find the evidence to seek a new trial, the problem with requiring newly discovered evidence is that the evidence is already found and the CIU may not be needed any more. Insufficiency of evidence is already covered within the appellate process. USATDS strongly recommends repealing the recent change to Article 66 that limited the legal standard for factual sufficiency. That is the most honest and effective way to correct injustices and restore the trust in the military justice system that has been lost.

USN DSO (Q6): The appropriate standard for CIUs to accept and review cases should be as low as an assertion by the accused of insufficiency of evidence to sustain a conviction. While this would be the minimum assertion needed for CIU review, an accused could also assert actual innocence or the discovery of new evidence which would likely have resulted in a different result at trial. By setting the bar to entry low, it would correct the FY21 NDAA change to Article 66.

Cases should also be referred to the CIU from appellate defense counsel who are already reviewing the case and may be in the best position to identify an issue that merits CIU review.

USMC DSO (Q6): The vast majority of sexual assault convictions allege Assignments of Error at the Services' Courts of Criminal Appeals for "actual innocence" or "insufficiency of the evidence." The only feasible standard would be a "newly discovered" evidence standard which is already addressed in requesting a new trial by the Judge Advocate General. Insufficiency of the evidence is the best standard, but some quantum of evidence would have to trigger such a review. Would that be before or after appellate review? Such an investigation could just prolong an Accused's appellate process. I also do not believe the court-martial system is structured to properly handle a Certificate of Innocence, see *In re Gilpin*, 81 M.J. 702 (N-M. Ct. Crim. App. 2021).

USAF DSO (Q6): The Department of the Air Force Trial Defense Division: The CIU should accept review over cases where the applicant asserts actual innocence; new evidence that may have resulted in a different result at trial; decriminalization of the offense for which the applicant was convicted (e.g., abusive sexual contact based on a non-sexual touching); and under an umbrella standard of "when justice so demands in the discretion of the CIU," which would allow for review under unanticipated circumstances (e.g., glaring insufficiency of the evidence leading to an unjust result).

The Department of the Air Force Appellate Defense Division: A CIU should accept and review cases presenting (1) any plausible assertion of actual innocence, (2) newly discovered evidence that would likely have resulted in a different result at trial, or (3) insufficiency of evidence.

USCG DSO (Q6): The appropriate standard for CIUs to accept and review cases should be as low as an assertion by the accused of insufficiency of evidence to sustain a conviction. While this would be the minimum assertion needed for CIU review, an accused could also assert actual innocence or the discovery of new evidence which would likely have resulted in a different result at trial. By setting the bar to entry low, it would correct the FY21 NDAA change to Article 66.

Cases should also be referred to the CIU from appellate defense counsel who are already reviewing the case and may be in the best position to identify an issue that merits CIU review.

7. Should a CIU have jurisdiction to review only cases of a certain type (e.g., covered offenses) or cases that meet a minimum threshold (e.g., cases resulting in a more than one year of confinement or a discharge)?

USA DSO (Q7): Because of the lasting effect of collateral consequences, limiting to covered offenses is more effective than length of confinement. There are wrongful convictions of sexual assault with low confinement (some with no confinement), which is actually a red flag for a bad conviction.

USN DSO (Q7): CIUs should have jurisdiction to review all cases that were referred to a Special Court-Martial. While the majority of current contested courts-martial are covered offenses, trial departments focused solely on good order and discipline crimes will likely result in an increase in contested courts-martial convened by traditional convening authorities. These cases will be vastly investigated by uniformed law enforcement officers, i.e. Masters-at-Arms or Criminal Investigative Division. They will all be prosecuted by junior, inexperienced trial counsel who do not have the recognized training and skill to be members of the covered offense prosecution units, i.e. OSTC. Accordingly, these cases will carry the same, if not higher, danger of unjust convictions as covered offenses. While they may not result in the harsh burden of sex offender registration, they do end military careers, disqualify accused from their hard-earned veterans' benefits, and have long-term employment benefits.

USMC DSO (Q7): A CIU should have jurisdiction to review some, but not all the covered offenses. Covered offenses resulting in more than one year of confinement and a punitive discharge and all offenses resulting in sex-offender registration in any jurisdiction should be eligible for CIU investigation.

USAF DSO (Q7): The Department of the Air Force Trial Defense Division: Unlike civilian convictions, court-martial convictions necessarily result in the termination of employment and preclude future service. In addition, they generally result in a loss of earned veteran benefits. Therefore, CIU should have jurisdiction over all convictions at Special or General Courts-Martial.

The Department of the Air Force Appellate Defense Division: A CIU should have jurisdiction to review all convictions that present either (1) any plausible assertion of actual innocence, (2) newly discovered evidence that would likely have resulted in a different result at trial, or (3) insufficiency of evidence.

USCG DSO (Q7): In addition to the Navy's response, CIUs should have jurisdiction over both general and special courts-martial. A guilty finding at either of these levels represents a federal conviction and warrants such review.

8. Should a CIU have jurisdiction to review convictions that resulted from a guilty plea?

USA DSO (Q8): No, the appellate process in the military already scrutinizes guilty pleas sufficiently and much more than in the civilian systems.

USN DSO (Q8): CIUs should have jurisdiction to review convictions that resulted from a guilty plea only in circumstances where there is an assertion of newly discovered evidence that would have reasonably changed the accused's decision to plead guilty or that the accused suffered from the ineffective assistance of counsel in making the decision to plead guilty.

USMC DSO (Q8): Only in the instance of newly discovered Evidence and probably only in limited circumstances. It is not unheard of for an Accused to take a plea to escape potential consequences of a more serious allegation. However, if that would result in the voiding of the Plea Agreement, then an Accused might find himself facing other charges that he wanted to avoid by entering into the Plea Agreement. A CIU should not place someone in a worse legal position.

USAF DSO (Q8): The Department of the Air Force Trial Defense Division: This would be appropriate under the above standard of “when justice so demands in the discretion of the CIU.” This is because, generally, the protections afforded a military accused should preclude a guilty plea absent the actual guilt of the accused. However, it is impossible to foresee all situations so a guilty plea should not automatically preclude review though such review would likely be very rare.

The Department of the Air Force Appellate Defense Division: A CIU should have jurisdiction to review convictions that resulted from a guilty plea but under more limited circumstances than contested allegations that resulted in a conviction. Because of the heightened inquiry in the military justice system before a guilty plea will be accepted, the colloquy by the military judge and subsequent review by the Service Court of Criminal Appeals would adequately address sufficiency of the evidence. Similarly, claims of actual innocence would ordinarily be raised in the course of appellate review, albeit under the hard-to-meet rubric of ineffective assistance of counsel in advising the member to plead guilty. A CIU should be able to still consider guilty pleas for plausible claims of newly discovered evidence under appropriate circumstances. If Article 73, UCMJ, remains unchanged, newly discovered evidence that would likely have resulted in a different result should also be considered because it likely would have changed whether the member entered a guilty plea at the outset.

USCG DSO (Q8): CIUs should have jurisdiction to review convictions that resulted from a guilty plea only in circumstances where there is an assertion of newly discovered evidence that would have reasonably changed the accused’s decision to plead guilty or that the accused suffered from the ineffective assistance of counsel in making the decision to plead guilty.

9. If a CIU were to conclude that a case met the applicable criteria to investigate, what should be the scope of the CIU’s authority and responsibility? Should it be limited to investigation? Petitioning for a new trial? Representation of the convicted service member at re-hearing?

USA DSO (Q9): The scope of responsibility should include investigation. If the appellate process is done, it should also include assisting in submitting a petition for a new trial. It should not include representation at a rehearing, which is provided by trial defense counsel in USATDS.

USN DSO (Q9): The CIU's authority and responsibility should be limited to reviewing the case, conducting any needed investigation to evaluate the assertion of actual innocence or the reliability of newly discovered evidence, and order a new trial. The CIU would be the appropriate authority to order a new trial as they would review the case under a different jurisdiction and mandate than the service appellate courts and CAAF. The CIU should not be responsible for representing the accused at a new trial.

USMC DSO (Q9): CIU should be limited to an investigation and some process for mandating that the Service Secretary dismiss the conviction with prejudice or potentially remand for additional proceedings. Where the matter fits in with Article 76, UCMJ, finality is an open question.

USAF DSO (Q9): The Department of the Air Force Trial Defense Division: Similar to the BCMR, the CIU should be vested with plenary authority to ensure justice. This could include setting aside a finding of guilt and dismissing charges with or without prejudice, directing the Clemency and Parole Board to take some specified action, or other actions required to correct an unjust conviction. If this plenary authority is deemed too broad, vesting the CIU with power to order a mandatory DuBay hearing to find facts related to the concerns raised by the CIU for consideration by the appropriate court of criminal appeals for purposes of determining whether a new trial is justified could be a suitable compromise solution.

The Department of the Air Force Appellate Defense Division: A CIU should be authorized to investigate convictions that meet applicable criteria. A CIU should also be authorized to vacate convictions where there is clear and convincing evidence of actual innocence, where discovered evidence would likely have resulted in a different result at trial, and where evidence is insufficient to support the conviction beyond a reasonable doubt. If a conviction is vacated, rehearings should be authorized, with prosecuting authorities taking into consideration the disposition guidance prescribed by Article 33, UCMJ, and presently located in Appendix 2.1 of the Manual for Courts-Martial. A CIU should not provide representation of the convicted service member, as doing so would call into question the CIU's function as providing an impartial second look at convictions.

USCG DSO (Q9): The CIU's authority and responsibility should be limited to reviewing the case, conducting any needed investigation to evaluate the assertion of actual innocence or the reliability of newly discovered evidence, and order a new trial. The CIU would be the appropriate authority to order a new trial as they would review the case under a different jurisdiction and mandate than the service appellate courts and CAAF. The CIU should not be responsible for representing the accused at a new trial.

10. Is the 3-year period for an accused to petition for a new trial on the grounds of newly discovered evidence or fraud on the court under Article 73, UCMJ a sufficient amount of time? Should there be any limitation?

USA DSO (Q10): It must be considered that evidence does not last forever, so some general rule for a time limitation makes sense, but there could be an exception for when justice requires that would require the approval of TJAG. A period of 5 years would match the default statute of limitations, making it a better standard for an accused.

USN DSO (Q10): The 3-year period provided by Article 73 is sufficient time. However, extending it to 5 years would provide more time to each convicted accused to discover new evidence without unnecessarily extending the time period.

USMC DSO (Q10): There should be no limitation on a CIU action if someone could be actually innocent.

USAF DSO (Q10): The Department of the Air Force Trial Defense Division: There should not be a time limitation based on when the member was convicted. It would be reasonable to require the convicted member to timely submit the petition for review after the discovery of the new evidence or fraud on the court.

The Department of the Air Force Appellate Defense Division: There should not be any time limitation for a petition under Article 73, UCMJ; however, that deficiency might be mitigated with the creation of a CIU.

USCG DSO (Q10): The 3-year period provided by Article 73 is sufficient time. However, extending it to 5 years would provide more time to each convicted accused to discover new evidence without unnecessarily extending the time period.

11. Do any programs exist that review cases to determine if DNA analysis could demonstrate innocence? If so please provide further information.

USA DSO (Q11): USATDS is not aware of any such programs.

USN DSO (Q11): No programs, outside review by appellate defense counsel, currently exist to review cases to determine if DNA analysis could demonstrate innocence.

USMC DSO (Q11): The Innocence Project seems to be the most well-known advocacy group.

USAF DSO (Q11): The Department of the Air Force Trial Defense Division: To the knowledge of current DAF Trial Defense Division leadership, there are no programs of this sort that review convictions in the military justice system.

The Department of the Air Force Appellate Defense Division: The Appellate Defense Division is not aware of any DoD or Department of the Air Force programs that exist that review cases to determine if DNA analysis could demonstrate innocence.

USCG DSO (Q11): No programs, outside review by appellate defense counsel, currently exist to review cases to determine if DNA analysis could demonstrate innocence.

12. Are there other steps the Services should take to ensure the integrity of convictions in the military justice system?

USA DSO (Q12): Some have already been listed but will be reiterated here and propose additional steps to ensure the integrity of convictions. First, there must be a requirement for military justice experience before being assigned as a defense counsel in USATDS. Second, USATDS and OSTC should have a similar level of independence. Third, Article 52 should be amended to require a unanimous finding for guilt, with a vote below three-fourths resulting in a finding of not guilty. If a non-unanimous vote is three-fourths or greater, then additional votes are permitted, until there is a finding of guilty or not guilty or until it becomes clearly futile and a mistrial as to that offense is declared. After such a mistrial, the offense can be referred for another trial. In summary, upon the first vote, unanimous = guilty, less than three-fourths = not guilty, and anything else results in further discussion and votes until it results in a unanimous or less than three-fourths vote or a hung jury and mistrial. Fourth, a change that has been discussed for a long time and should not be controversial is making the probable cause determination of the preliminary hearing officer binding. If there is new evidence, another Article 32 may be ordered. This is even more appropriate with OSTC prosecutors rather than commanders making the decisions to prefer and refer covered offenses. Something meaningful must stand between prosecutors and a case going to trial. Fifth, integrity of convictions would be enhanced if the trial and appellate judiciary was more independent. With the judiciary being filled with senior judge advocates hopefully with military justice experience, it should not be difficult making the move to trial and appellate judiciary a one-way street (available on for assignments within the trial or appellate judiciary), so judges do not have to worry about future assignments. Finally, fixing current flaws in the system which arise pre-conviction would enhance the integrity of convictions, as they would prevent many wrongful convictions which appellate review occasionally remedies 12-24 months after conviction. Flaws include discovery practices and accountability related to discovery violations, the need for more defense investigators, and post-trial processing, which if done inefficiently delays appellate review of potential wrongful convictions and would similarly interfere with the goals of the CIUs.

USN DSO (Q12): Yes, there are two things:

Restore a Robust Factual Sufficiency Review: It is important for military justice to produce convictions in which the public can have confidence. In that regard, conviction integrity units, at least in theory, are a step in the right direction. But that step should not be viewed as taking the place of continued, robust factual sufficiency review, given the role such review has historically played, and should continue to play, in maintaining the public’s confidence in the military justice system.

Factual sufficiency and the convening authority’s clemency powers were historically meant to serve as checks on the military justice system. Those checks were deemed necessary in a process where (1) the person who selects the charges also selects the members and initially grants or denies the defense’s requests for expert assistance and witnesses; (2) unanimous verdicts are not required; and (3) the military is an inherently coercive environment. See *United States v. Anderson*, 83 M.J. 291 (C.A.A.F. 2022) (justifying the lack of unanimous verdicts, in part, due to “factual sufficiency review on appeal, ensuring panel verdicts are subject to oversight”); *United States v. Finch*, 64 M.J. 118, 129 (C.A.A.F. 2006) (recognizing “the military environment is inherently coercive”).

Both of these checks have been eroded in recent years. The clemency power has essentially been removed from sexual assault cases. And the factual sufficiency standard, with which court-martial convictions are reviewed by the service courts of criminal appeals, was amended by the National Defense Authorization Act for Fiscal Year 2021. While the old factual sufficiency standard was fair—requiring “a fresh, impartial look at the evidence”—the new factual sufficiency standard has been interpreted as a “presumption . . . that an appellant is, in fact, guilty,” *United States v. Harvey*, 83 M.J. 685, 693 (N-M. Ct. Crim. App. 2023), which is a far more difficult burden for any convicted servicemember to overcome on appeal.

Although this interpretation is currently being reviewed by the Court of Appeals for the Armed Forces, what remains of factual sufficiency review should not be curtailed further [sic]. Notably, we have recently seen convictions for making false sexual assault allegations in cases on Article 66 review. See, e.g., *United States v. Daugherty*, No. 202000133, 2021 CCA LEXIS 417 (N-M. Ct. Crim. App. Aug. 18, 2021) (unpublished) (appellant admitted that to avoid getting in trouble for missing a training class after a night of drinking, she fabricated a rape allegation, during the investigation of which a military suspect was identified and interrogated and his car and cell phone were searched). The fact that false allegations occur points to the importance of preserving the already curtailed Article 66 factual sufficiency powers.

Properly Resource Defense Counsel: In an adversarial system it is critical to properly resource both sides of the aisle. Government investigators, including a CIU, may have a limited perspective on how to view the evidence. It is essential that the defense is provided appropriate resources at the trial level to make sure they can properly represent the accused and challenge the government’s theory. Section 549D of the FY-22 NDAA require each secretary of a military

department to ensure that military defense counsel have timely and reliable access to and funding for defense investigators, expert witnesses, trial support, pre-trial and post-trial support, paralegal support, counsel travel, and other necessary resources. It also requires military defense counsel to be well-trained, experienced and highly skilled.

The services must continue to recruit, train, and develop military defense counsel to ensure the integrity of the military justice system. Several years ago, the services stood up the Victims' Legal Counsel Program, aimed at providing alleged victims of covered offenses their own military attorneys. This effort resulted in experienced military justice attorneys being detailed to this program. At present, the services' focus is on the establishment of prosecution units to handle covered offenses. These units have been staffed with many of the most experienced counsel in each service, leaving the defense bar to be staffed with less experienced counsel, especially at the junior officer level. This has created an uneven playing field. The services must recognize that the rights of the accused must never take second place to the desire to secure more convictions or protect victims' rights. The defense must also be properly resourced with investigators and other expert consultants to properly counter the government investigator's theory of the case.

USMC DSO (Q12): Ensuring that the Services have enough defense investigators would help. A thorough investigation is integral to the process. Additional Government criminal investigators would probably also help, too. The NCIS caseload is generally too high and the investigators too inexperienced. Making Article 32 Preliminary Hearings binding would also prevent bad cases from going to trial. Finally, ensure that the Government adheres to the standards in R.C.M. 701 and 703 for discovery practices. The R.C.M. 707 clock should also only stop when the Government has certified that it has met its initial discovery obligation. Lax discovery practice is a breeding ground for cases lacking factual sufficiency or cases where an accused is actually innocent.

USAF DSO (Q12): The Department of the Air Force Trial Defense Division: The creation of the Office of Special Trial Counsel has the potential of instilling increased legal rigor in the prosecution of offenses at courts-martial, which should further reduce the likelihood of wrongful convictions. Though additional post-trial review through a CIU might be feasible, outside of that we recommend taking time to allow the myriad recent changes time to play out before making additional, substantive changes to the military justice system.

The Department of the Air Force Appellate Defense Division: One potential change is to require unanimous panel verdicts to convict in general and special courts-martial, which is presently the subject of study by the DoD pursuant to the Fiscal Year 2024 National Defense Authorization Act. The Services should focus on fostering neutral investigations by Military Criminal Investigative Organizations, assessing the alleged offense without any orientation towards proving the offense, and adopting best practices to mitigate the risk of unreliable confessions, to include limiting interview duration, prohibiting the presentation of false evidence employed to persuade the subject to confess, and training investigators to avoid what studies call

“minimization” meant to lessen the anxiety associated with confessing or implying leniency. A process to expunge fingerprint and DNA data in cases of actual innocence would further reinforce the integrity of those convictions that are upheld.

USCG DSO (Q12): Yes, there are two things:

Restore a Robust Factual Sufficiency Review: It is important for military justice to produce convictions in which the public can have confidence. In that regard, conviction integrity units, at least in theory, are a step in the right direction. But that step should not be viewed as taking the place of continued, robust factual sufficiency review, given the role such review has historically played, and should continue to play, in maintaining the public’s confidence in the military justice system.

Factual sufficiency and the convening authority’s clemency powers were historically meant to serve as checks on the military justice system. Those checks were deemed necessary in a process where (1) the person who selects the charges also selects the members and initially grants or denies the defense’s requests for expert assistance and witnesses; (2) unanimous verdicts are not required; and (3) the military is an inherently coercive environment. See *United States v. Anderson*, 83 M.J. 291 (C.A.A.F. 2022) (justifying the lack of unanimous verdicts, in part, due to “factual sufficiency review on appeal, ensuring panel verdicts are subject to oversight”); *United States v. Finch*, 64 M.J. 118, 129 (C.A.A.F. 2006) (recognizing “the military environment is inherently coercive”).

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Properly Resource Defense Counsel: In an adversarial system it is critical to properly resource both sides of the aisle. Government investigators, including a CIU, may have a limited perspective on how to view the evidence. It is essential that the defense is provided appropriate resources at the trial level to make sure they can properly represent the accused and challenge the government's theory. Section 549D of the FY-22 NDAA require each secretary of a military department to ensure that military defense counsel have timely and reliable access to and funding for defense investigators, expert witnesses, trial support, pre-trial and post-trial support, paralegal support, counsel travel, and other necessary resources. It also requires military defense counsel to be well-trained, experienced and highly skilled.

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VIII. Response from Victim Legal Services Organization

1. Please comment generally on the advisability and feasibility of establishing CIUs to review cases in the military justice system that resulted in convictions.

USA VLSO (Q1): Army SVC concurs with the OTJAG response.

USN VLSO (Q1): Outside concerns from 2017, as cited in the Conviction Integrity Unit (CIU) Request for Information (RFI) Background, Navy Victims' Legal Counsel (VLCP) is not aware of a demonstrated need for CIUs in the military justice system. In the alternative, Navy VLCP recommends a Department of Defense (DoD) Best Practices Committee to identify and correct issues upstream, thereby avoiding the potential for a downstream wrongful conviction. Navy VLCP supports best practices that promote confidence and integrity in the military justice system for victims, parties, and the public. The CIU RFI Background referenced a 2017 Judicial Proceedings Panel report noting concerns related to the fairness of the accused. The RFI Background listed changes since 2017, specifically the establishment of Offices of Special Trial Counsel (OSTC) and revision of Service Courts of Criminal Appeals' factual sufficiency review standard and concluded convicted service members have "limited avenues to obtain post-conviction review and relief."

From a victims' rights perspective, the appellate process is robust and defense-friendly; adding in a CIU to the limited number of convictions in the military justice system would only further create uncertainty for victims by extending the finality of their case.⁹¹ Navy VLCP observes the current military justice system supports integrity in convictions with a generous appellate process that ensures a conviction has met all legal requirements. Several sufficient avenues of relief for convicted service members already exist; several distinct options are available to convicted service members. In general, Navy VLCP supports CIUs in civilian jurisdictions (e.g. jurisdictions with a large volume of convictions and/or politically sensitive District Attorney's Offices). Without showing a true need in the military justice system, instituting a CIU could be an imprudent use of resources with the detrimental consequence of harming victims by prolonging the uncertainty of their case.

USMC VLISO (Q1): Conviction Integrity Units (CIUs) are neither advisable nor feasible. Establishing CIUs is inadvisable because CIUs would add both delay and complexity to an already lengthy, uncertain, and traumatizing investigation, trial, and post-trial process for victims. In addition, the factfinding function of CIUs duplicates both the appellate authority and obligations of military courts of criminal appeals under Article 66 of the UCMJ, and the obligations of trial counsel under Rule 3.8 of the rules of professional responsibility⁹² for judge advocates.

From a feasibility perspective, the structure of our counsel, courts, and appellate review processes does not lend itself to the creation of CIUs. There are, however, other limited means by which an accused can bring new evidence to bear in support of a request for a new trial. For example, Article 73 of the UCMJ limits the right of an accused to petition the Judge Advocate General for a new trial to the three-year period following entry of judgment. Thus, if established, a CIU may require additional statutory authority for the Courts of Criminal Appeals, Court of Appeals for the Armed Forces, or both.

USAF VLISO (Q1): The Air Force Victims' Counsel Division would not recommend implementing CIUs in the military justice system. Implementation of CIUs would prolong the conclusion of the military justice process for victims of crime; legal and factual sufficiency reviews are conducted at our appellate level. Additionally, for the most part, the cases we handle do not involve questions of the accused's identity. The majority of AF cases center on consent or credibility, therefore, we do not believe a CIU would serve its purpose.

USCG VLISO (Q1): Establishing Conviction Integrity Units (CIUs) is contrary to efforts to encourage victims to participate in the military justice process. The CIU adds length and uncertainty to the post-trial process and prolongs the stress and uncertainty of case finality. A

⁹¹ See Laurie L. Levenson, *Symposium Article: Searching for Injustice: The Challenge of Postconviction Discovery, Investigation, and Litigation*, 87 S. Cal. L. Rev. 545, 553 (2014) ("Victims want to move on with their lives and a criminal judgment can provide some closure to help with that process. Although victims rarely can be made whole, a final resolution can assist them to put a criminal experience behind them.")

⁹² JAGINST 5803.1E (PROFESSIONAL CONDUCT OF ATTORNEYS PRACTICING UNDER THE COGNIZANCE AND SUPERVISION OF THE JUDGE ADVOCATE GENERAL).

CIU will create another hurdle for victims to overcome when trying to hold their assailant accountable.

The military is beginning a large-scale effort to professionalize the military justice process by consolidating prosecutors in a single supervisory structure. The new Office of the Chief Trial Counsel will provide increased scrutiny and expertise over how cases are prosecuted. There is no demonstrated need for another layer of review for the small number of cases in the military.

2. Military sexual assault cases often involve issues of consent where the victim and accused’s credibility are a central issue in the case. What role, if any, can CIUs serve in cases in which consent or credibility are at issue, rather than the identity of the accused?

USA VLSO (Q2): Army SVC concurs with the OTJAG response.

USN VLSO (Q2): Navy VLCP submits a Best Practices Committee is the proper forum rather than a CIU to address these factors. A CIU should focus on the factors that contribute to wrongful convictions, “eyewitness misidentification, invalidated/improper forensic science, false confessions, informants/snitches, government misconduct, and ineffective legal counsel.”⁹³ In a Department of Justice (DOJ), National Institute of Justice (NIJ) study, eyewitness misidentification was a contributing factor in [sic]⁹⁴

USMC VLSO (Q2): Determinations related to consent and credibility rest properly with the finder of fact at trial—whether by military judge or members—and, in the case of review by the Courts of Criminal Appeals pursuant to Article 66 of the UCMJ, with the appellate judges reviewing a case. This is especially true in light of the fact that credibility and consent in sexual assault cases almost always involve litigation of the sexual predisposition and mental health of victims—both of which are the subject of substantial statutory and regulatory protections for victims under Article 6b of the UCMJ, rules 412 and 513 of the Military Rules of Evidence, and other law. A CIU is not the proper forum for evaluating these matters.

A CIU could also impair the work of the Service appellate courts. Even in instances where Appellate Defense Counsel assigned to represent an accused identify no specific assignments of error for a particular case, the service-level courts still receive a brief on the merits of the case and review the record of trial for legal and factual sufficiency. These reviews are automatic in all cases in which the punishment imposed includes a bad-conduct or dishonorable discharge, or greater than six months of confinement. Beyond the service-level courts, appellants have an additional opportunity to petition the Court of Appeals for the Armed Forces for further legal sufficiency review on issues raised at the Service appellate courts. These forums present sufficient protection for the accused.

⁹³ See Seri Irazola, Erin Williamson, Julie Stricker, & Emily Niedzwiecki, ICF Inc., *Study of Victim Experiences of Wrongful Conviction* (Sept. 2013), available at <https://www.ojp.gov/pdffiles1/nij/grants/244084.pdf> [hereinafter *Study of Victim Experiences of Wrongful Convictions*].

⁹⁴ *Id.*

USAF VLSO (Q2): The Air Force Victims' Counsel Division does not believe it would have a role.

USCG VLSO (Q2): The CIU should not have any role in assessing credibility of sexual assault and domestic violence victims after a conviction. Credibility and consent are properly determined within the legal protections of a courtroom. It is the fact finder's responsibility, and the accused should not have the opportunity to relitigate these issues outside the courtroom. The types of evidence allowed in these cases is controlled by complex caselaw that protect the victim's privacy and litigation of these issues should remain within the established judicial system.

3. If established, should a single CIU be created for the Department of Defense, or should a separate CIU be created for each Service?

USA VLSO (Q3): Army SVC concurs with the OTJAG response.

USN VLSO (Q3): Navy VLCP submits a Best Practices Committee is the better alternative than a CIU to address issues and concerns within the military justice system. However, if a CIU were created, then Navy VLCP notes a single DoD CIU would be sufficient due to the relatively small number of convictions. Additionally, having a sole CIU avoids disparity among service CIUs and the resultant conflicts among the services.

USMC VLSO (Q3): If established, CIUs should exist at the Department of Defense level to ensure uniform fairness across the Services in the review process, and in establishing rules and procedures to safeguard victim rights.

USAF VLSO (Q3): The Air Force Victims' Counsel Division does not believe a CIU should be created, but if it is, there should be a single CIU created for the Department of Defense. This would ensure uniformity and fairness across the services.

USCG VLSO (Q3): If a CIU were created, a single DoD CIU would be sufficient due to the relatively small number of convictions. Additionally, having a sole CIU avoids disparity among service.

4. If created for each Service, in which organization should the CIU be located (e.g., Office of Special Trial Counsel, Judge Advocate Headquarters Agency, Inspector General, other)?

USA VLSO (Q4): Army SVC concurs with the OTJAG response.

USN VLSO (Q4): Please see the answer to Question 3 above.

USMC VLSO (Q4): Any entity established to review the integrity of convictions should fall under either the Department of Defense General Counsel, or the Department of Defense Office of the Inspector General to ensure appropriate oversight and autonomy.

USAF VLSO (Q4): The Victims' Counsel Division has no opinion on where a CIU should be located if created for each Service.

USCG VLSO (Q4): The Department of Defense General Counsel.

5. What capabilities/expertise should the CIU be comprised of (e.g., experienced trial and defense counsel, military criminal investigations personnel, victim liaisons, victim advocates, and victim legal counsel)?

USA VLSO (Q5): Army SVC concurs with the OTJAG response.

USN VLSO (Q5): Navy VLCP supports a Best Practices Committee over establishment of a CIU. For either model, CIU or Best Practices Committee, victim counsel representation would be critical. Including representatives from victims' counsel programs allows for the inclusion of victims' rights in the process.

When a CIU evaluates a case, victim notification should be mandatory. A DOJ NIJ study found the impact of a wrongful conviction might equal or be worse than the original victimization.⁹⁵ This highlights the need for a victims' rights perspective on the CIU, ideally a representative from various services' victims' counsel programs. Victims' counsel would be particularly cognizant of issues like privacy and notification. In a CIU, victims' privacy can be maintained through protective orders and the utilization of a privilege or redaction log.⁹⁶ NIJ further recommends if the final determination is a wrongful conviction, then victim notification should be made by officials in the original case and with a victim service provider.⁹⁷ Additionally, the study recommends all victims receive access to independent legal counsel.⁹⁸

⁹⁵ *Id.*

⁹⁶ *Guidelines for Collaboration and Engagement: Prosecutors and Defense Counsel Working Together in Joint Post-Conviction Investigations*, Quattrone Ctr. for the Fair Admin. of Justice, Univ. of Pennsylvania Carey L. Sch. (Mar. 2022) available at <https://www.law.upenn.edu/institutes/quattronecenter/guidelines-for-collaboration-and-engagement.php> [hereinafter *Guidelines for Collaboration and Engagement*].

⁹⁷ Study of Victim Experiences of Wrongful Conviction, *supra* note 93.

⁹⁸ *Id.*

USMC VLISO (Q5): Establishment of a CIU should be guided in principle by the best practices recommended by the Innocence Project⁹⁹, particularly to include its recommendations related to cases involving allegations of prosecutorial misconduct, appropriate standards of review, staffing, and periodic auditing and reporting on results. In the military justice system, that staffing should be comprised of a civilian director; a military attorney deputy with substantial military justice litigation experience; several staff attorneys with experience as trial counsel, defense counsel, and victims' legal counsel; sufficient administrative and paralegal support to assist with administration, research, preparation, and case docketing; and sword and duly authorized investigative and law enforcement personnel to advise on and oversee necessary investigative follow-up. Any actual follow-on investigations should be conducted by the cognizant military criminal investigative organization with oversight and advice by the three CIU members described. The CIU staff should also be a civilian Victim-Witness Assistance Coordinator assigned to the unit to notify victims of the commencement of such a review, coordinate with cognizant victims' legal counsel, and enable participation and input from the victim of the crime for which the accused was convicted.

USAF VLISO (Q5): The Victims' Counsel Division does not believe a CIU should be created, but if it is, victims' counsel should be part of the unit and the CIUs should have established victim protections, notice requirements, and an ability to be heard.

USCG VLISO (Q5): A CIU in DoD should include a forensic psychiatrist who specializes in victimology and Victim Advocates to assist with the trauma of having a conviction reviewed, yet again.

6. What would be an appropriate standard for CIUs to accept and review cases? Some possibilities may include: assertion of actual innocence; newly discovered evidence that would likely have resulted in a different result at trial; insufficiency of evidence.

USA VLISO (Q6): Army SVC concurs with the OTJAG response.

USN VLISO (Q6): Navy VLCP supports a Best Practices Committee over establishment of a CIU. For a case to be accepted by a CIU, Navy VLCP recommends some new evidence of innocence be required. This position aligns with a NIJ research study where to proceed with a CIU case, all prosecutors required some new evidence of innocence (including the consideration of non-forensic evidence).¹⁰⁰

⁹⁹ <https://www.innocenceproject.org/wp-content/uploads/2016/09/Conviction-Integrity-Unit.pdf>.

¹⁰⁰ Elizabeth Webster, *Postconviction Innocence Review in the Age of Progressive Prosecution*, 83 Alb. L. Rev. 898, (2019-2020).

USMC VLCO (Q6): The mere assertion of actual innocence, without more, should not constitute a sufficient basis for review by a CIU. However, actual innocence should be an essential element of any claim presented to a CIU. Where there is newly-discovered evidence, that evidence should be viewed through the lens of a well-established evidentiary and processional standard similar, for example, to that cited by the CIU of the State of Michigan, which anchors its evaluations in the Rules of Professional Responsibility:

“(f) When a prosecutor knows of new, credible, and material evidence creating a reasonable likelihood that a convicted defendant is innocent of the crime for which the defendant was convicted, the prosecutor shall:

1. promptly disclose that evidence to an appropriate court or authority, and;
2. if the conviction was obtained in the prosecutor’s jurisdiction,
 - i. promptly disclose that evidence to the defendant unless a court authorizes delay, and;
 - ii. undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant is innocent of the crime.

(g) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor’s jurisdiction is innocent of the crime for which defendant was prosecuted, the prosecutor shall seek to remedy the conviction.”

The Marine Corps VLCO also concurs substantially with the submission of our Navy colleagues on this matter and adopts their recommendations here. As indicated in the Navy submission, the creation of any CIU should include careful consideration of the best practices of existing CIUs and organizations frequently litigating matters before those units.

Insufficiency of evidence should not be entitled to further review because that standard has already been applied during routine appellate litigation in the Service Courts of Criminal Appeals.

USAF VLCO (Q6): The Victims’ Counsel Division does not believe a CIU is needed in the military justice system.

USCG VLCO (Q6): The USCG SVC Program recommends that some newly discovered evidence that would likely have resulted in a different result at trial be required.

7. Should a CIU have jurisdiction to review only cases of a certain type (e.g., covered offenses) or cases that meet a minimum threshold (e.g., cases resulting in a more than one year of confinement or a discharge)?

USA VLCO (Q7): Army SVC concurs with the OTJAG response.

USN VLSO (Q7): Navy VLCP supports a Best Practices Committee over establishment of a CIU. For a Best Practices Committee, Navy VLCP recommends modeling the District Attorneys Association of the State of New York’s (DAASNY) Best Practices Committee with the addition of victims’ rights counsel to mirror the unique inclusion of victims’ counsel in the military justice system. Established in 2009, the DAASNY’s Best Practices Committee has become a national model for “developing innovative strategies aimed at improving the criminal justice system and preventing wrongful convictions.”¹⁰¹ Additionally, the Prosecutors’ Center for Excellence has a National Best Practices Committee that supports best practices committees across the country.¹⁰² See the answer to Question 12 for additional information on Best Practices Committees.

USMC VLSO (Q7): If established, a CIU should be able to review any case, regardless of the nature of charges or quantum of punishment authorized or awarded.

USAF VLSO (Q7): The Victims’ Counsel Division does not believe a CIU is needed in the military justice system.

USCG VLSO (Q7): The USCG SVC Program recommends only cases involving murder or manslaughter, where a case of mistaken identity is much more likely, and sentences are significantly longer.

8. Should a CIU have jurisdiction to review convictions that resulted from a guilty plea?

USA VLSO (Q8): Army SVC concurs with the OTJAG response.

USN VLSO (Q8): Navy VLCP supports a Best Practices Committee over establishment of a CIU. However, if a CIU was instituted, Navy VLCP would not support a CIU having jurisdiction to review convictions from guilty pleas. The military justice system currently ensures the veracity of guilty prior to accepting a guilty plea. Accepted CIU cases for review should be narrowly tailored in criteria.

¹⁰¹ David Hoovler, *District Attorneys Association of the State of New York letter to Governor Cuomo* (Nov. 4, 2019) available at https://www.nysenate.gov/sites/default/files/submitted_testimony_-_district_attorneys_association_of_the_state_of_new_york.pdf; See also Kristine Hamann, *Statewide Best Practices Committees for Prosecutors: Leveraging Experience and New Evidence to Benefit the Criminal Justice System*, The Prosecutor (Oct./Nov./Dec. 2013) available at http://ndaa.org/wp-content/uploads/Oct-Nov-Dec13_Statewide_best_practices.pdf [hereinafter *Statewide Best Practices*].

¹⁰² PROSECUTORS’ CENTER FOR EXCELLENCE, *National Best Practices Committee*, <https://pceinc.org/national-best-practices-committee/> (last visited Feb. 29, 2024).

USMC VLSO (Q8): Yes. A plea of guilty should not be a bar to a claim of actual innocence. However, CIU of a case involving a plea of guilty should include assessment of the evidence to determine whether any newly-discovered evidence would likely have resulted in a different result at trial.

USAF VLSO (Q8): No, accused are afforded extra protections in this area by the military justice system under R.C.M. 910(e); “military judge shall not accept a plea of guilty without making such inquiry of the accused as shall satisfy the military judge that there is a factual basis for the plea.”

USCG VLSO (Q8): The only time a guilty plea should be reviewed is if there is significant evidence of coercion or prosecutorial misconduct that likely impacted the accused decision to enter a plea deal.

9. If a CIU were to conclude that a case met the applicable criteria to investigate, what should be the scope of the CIU’s authority and responsibility? Should it be limited to investigation? Petitioning for a new trial? Representation of the convicted service member at re-hearing?

USA VLSO (Q9): Army SVC concurs with the OTJAG response.

USN VLSO (Q9): See answer to Question 7 above.

USMC VLSO (Q9): The scope of CIU authority to investigate should be coextensive with that of the agencies which investigated and prosecuted the accused. If established, a CIU should be authorized to investigate and, if a case meets applicable standards, to recommend remedy to an appropriate authority (for example, the Judge Advocate General). Any investigations incident to the work of a CIU should be conducted by either CIU or MCIO personnel not connected with the original case or the personnel who investigated and prosecuted that case.

In cases where these investigations result in newly discovered evidence or other fatal flaw in a case which shows by clear and convincing evidence that a conviction is unjust or would likely have led to a different result at trial, an appropriate court or officer should have statutory authority to set aside a conviction and, if necessary, forward a case for an independent prosecutorial determination by the relevant service trial services organization or office of special trial counsel on whether a rehearing or retrial is appropriate.

USAF VLSO (Q9): The Victims’ Counsel Division does not believe a CIU is needed in the military justice system.

USCG VLSO (Q9): The CIU should be limited to referring the case back to the service Judge Advocate Generals.

10. Is the 3-year period for an accused to petition for a new trial on the grounds of newly discovered evidence or fraud on the court under Article 73, UCMJ a sufficient amount of time? Should there be any limitation?

USA VLSO (Q10): Army SVC concurs with the OTJAG response.

USN VLSO (Q10): The 3-year period is a sufficient amount of time for an accused to petition for a new trial. Extending the time period contributes to prolonged uncertainty for crime victims and ultimately delays the finality of the case for the victim.

USMC VLSO (Q10): The three-year period for requesting a new trial is not sufficient. Where newly-discovered evidence or fraud on the court meets an appropriate threshold placing the validity of a conviction in substantial doubt, that period should be extended. This is especially true in cases where the evidence discovered is dispositive (e.g. DNA evidence which conclusively excludes the accused as the perpetrator).

USAF VLSO (Q10): Generally, yes, the three-year rule is sufficient. It gives the convict an opportunity for redress while allowing reasonable finality for the crime victim. However, this time-period should not apply in the event newly discovered evidence becomes available that would likely have resulted in a different result at trial.

USCG VLSO (Q10): Extending or eliminating the time limitation for an accused to petition for a new trial is certainly easier to implement than creating a CIU. The processes, personnel and authority already exist. However, extending the time contributes to prolonged uncertainty for crime victims and ultimately delays the finality of the case.

11. Do any programs exist that review cases to determine if DNA analysis could demonstrate innocence? If so please provide further information.

USA VLSO (Q11): Army SVC concurs with the OTJAG response.

USN VLSO (Q11): Not that Navy VLCP is aware of, therefore we defer to other entities in the military justice system.

USMC VLSO (Q11): The VLCO is unaware of any such programs. This question is better suited for the cognizant Military Criminal Investigative Organizations.

USAF VLSO (Q11): The Victims' Counsel Division is not aware of any such post-conviction programs.

USCG VLSO (Q11): Not that the USCG SVC Program is aware.

12. Are there other steps the Services should take to ensure the integrity of convictions in the military justice system?

USA VLSO (Q12): Army SVC concurs with the OTJAG response.

USN VLSO (Q12): “Crime victims are the first to get hurt...but often the last to be remembered.”¹⁰³ While the focus on wrongful convictions centers on the convicted service member, victims’ rights cannot be set aside and forgotten.

Establishing an inclusive DoD Best Practices Committee would address problems upstream by taking a “front-end approach to prevent future problems” while CIUs “address failures on the back-end.”¹⁰⁴ A DoD Best Practices Committee ideally would include trial counsel and victims’ counsel from across the services. The power in a Best Practices Committee is its ability to address specific matters, both emergent and ongoing; draft new model policy and procedural recommendations through calculated assessment; collaborate in a meaningful way with law enforcement; share information among services; and learn from wrongful convictions.¹⁰⁵ To date, the national Prosecutors’ Center for Excellence (PCE) lists 20 statewide prosecutor-led Best Practices Committees.¹⁰⁶ The PCE acknowledges, “The most reliable way to reduce wrongful convictions is to conduct a proper investigation and prosecution in the first instance.”¹⁰⁷

Specific examples of Best Practices Committees work:

- Colorado – advised on body-worn cameras, interrogation recordings, proffer agreements. Collaborated with Innocence Project on the issue of identification procedures¹⁰⁸
- Missouri – adopted best practices and policies for DWI, Identification, Custodial Interrogations, Victims’ Rights, and Forensics¹⁰⁹
- New York - developed identification procedures and protocols for video recording interrogations adopted by NY police departments, and created a prosecutor’s ethics guide later adopted by other states¹¹⁰

¹⁰³ Guidelines for Collaboration and Engagement, *supra*, note 96.

¹⁰⁴ Daniel Kroepsch, *Prosecutorial Best Practices Committees and Conviction Integrity Units: How Internal Programs Are Fulfilling the Prosecutor’s Duty to Serve Justice*, 29 Geo. J. Legal Ethics 1095 (2016) [hereinafter *Prosecutorial Best Practices Committees*].

¹⁰⁵ Statewide Best Practices Committees *supra* note 101.

¹⁰⁶ PROSECUTORS’ CENTER FOR EXCELLENCE, *The Role of the Modern Prosecutor: Spearheading Innovation* (Oct. 2020) available at <https://pceinc.org/wp-content/uploads/2020/10/20201013-National-Report-Final.pdf>.

¹⁰⁷ *Id.*

¹⁰⁸ Prosecutorial Best Practices Committees, *supra* note 104.

¹⁰⁹ Kristine Hamann & Rebecca Rader Brown, *Best Practices for Prosecutors, A National Movement*, A.B.A. Criminal Justice Journal (Spring 2016) available at <https://pceinc.org/best-practices-prosecutors-nationwide-movement/>.

¹¹⁰ Prosecutorial Best Practices Committees, *supra* note 104.

- North Carolina – developed an ethics manual, guidelines for post-trial relief motions and police use of force case, trained on open-file discovery, advised on body-worn cameras¹¹¹
- Pennsylvania – drafted statewide guidelines on the disclosure of potential credibility issues involving police witnesses¹¹²

USMC VLISO (Q12): Any steps taken within the Department of Defense to ensure conviction integrity should necessarily include careful consideration of the best practices in place across civilian jurisdictions in which CIUs are authorized. Those practices must incorporate clear and coherent means by which victims are notified and heard during any investigation, recommendation, or result incident to the work of the CIU.

USAF VLISO (Q12): The services have sufficient appellate processes to ensure the integrity of convictions.

USCG VLISO (Q12): If CIUs are adopted robust resources will be needed to ensure victim support throughout the process. Additional funding should be provided to ensure victims and their legal counsel can participate in person at any hearing. Victims should be provided SAPRR, mental health, and SVC services.

¹¹¹ *Id.*

¹¹² *Id.*