

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



REPORT ON  
ENFORCEMENT OF CRIME VICTIMS' RIGHTS

January 2025



# Defense Advisory Committee

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

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January 6, 2025

The Honorable Roger Wicker  
Chairman  
Committee on Armed Services  
United States Senate  
Washington, DC 20510

The Honorable Jack Reed  
Ranking Member  
Committee on Armed Services  
United States Senate  
Washington, DC 20510

The Honorable Mike Rogers  
Chairman  
Committee on Armed Services  
U.S. House of Representatives  
Washington, DC 20515

The Honorable Adam Smith  
Ranking Member  
Committee on Armed Services  
U.S. House of Representatives  
Washington, DC 20515

The Honorable Lloyd J. Austin III  
Secretary of Defense  
1000 Defense Pentagon  
Washington, DC 20301

Dear Chairs, Ranking Members, and Mr. Secretary:

We are pleased to provide you with our report *Enforcement of Crime Victims' Rights* in accordance with section 546 of the National Defense Authorization Act for Fiscal Year 2015 (Public Law 113-291), as amended. This report and our recommendations are the culmination of the DAC-IPAD's 2024 review of the enforcement of crime victims' rights in the military judicial system.

The DAC-IPAD provides a legislative proposal in this report with recommendations that will, in several crucial respects, appropriately align the enforcement mechanisms in Article 6b of the Uniform Code of Military Justice with the federal Crime Victims' Rights Act. These recommendations reflect the DAC-IPAD's belief that military crime victims should have access to the same enforcement mechanisms as do their counterparts in the federal judicial system.

The members of the DAC-IPAD would like to express our sincere gratitude and appreciation for the opportunity to make use of our collective experience and expertise in this field to develop recommendations to improve the military justice system.


Respectfully submitted,

  
Karla N. Smith, Chair

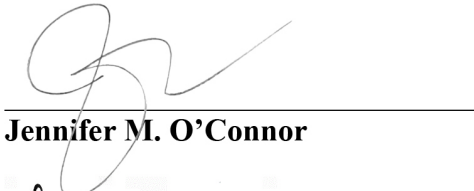
  
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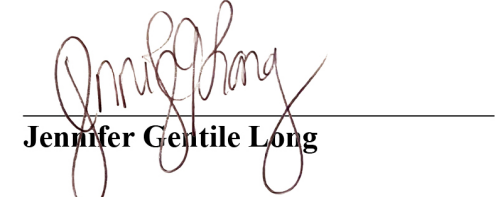
  
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## Executive Summary

The Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD) studied the enforcement of crime victims' rights in the military, as codified in Article 6b of the Uniform Code of Military Justice (UCMJ). The DAC-IPAD's study focused on four issues: (1) a crime victim's standing to assert their Article 6b rights at the trial court, (2) jurisdiction of the Court of Appeals for the Armed Forces (CAAF) over a crime victim's petition for a writ of mandamus, (3) the time frame for the Courts of Criminal Appeals (CCAs) of the Military Departments and the CAAF to rule on a crime victim's petition for a writ of mandamus, and (4) the appellate standard of review applicable to a crime victim's petition for a writ of mandamus.

As part of its review, the DAC-IPAD compared the enforcement mechanisms in Article 6b with those in the federal Crime Victims' Rights Act (CVRA), the statute upon which Article 6b is based. In doing so, the DAC-IPAD identified several differences between the enforcement mechanisms of the two statutes and considered whether there were military-specific reasons why the rights of crime victims in military courts-martial proceedings should be less robust than the rights of crime victims in federal courts. To help evaluate these differences, the DAC-IPAD heard the perspectives of military government and defense appellate counsel, military victims' counsel, and civilian victims' rights experts.

The DAC-IPAD recommendations include a legislative proposal incorporating several amendments to Article 6b. These amendments would provide crime victims new standing to assert their rights initially at the trial court and would provide a new standard for appellate review of a victim's petition for a writ of mandamus that is similar to the standard directed by the CVRA in federal court review of victims' petitions. In addition, the DAC-IPAD recommends that Congress amend Article 6b to provide CAAF discretionary jurisdiction to review a victim's petition for a writ of mandamus without the need for the victim to rely on certification from the Judge Advocate General of a Military Service to establish jurisdiction.

Adopting these reforms will bring much-needed clarity and meaningful effect to victims' rights established by Congress ten years ago and will more closely align the rights of crime victims in military courts-martial with the rights of victims in federal court.

## Recommendations

**Recommendation 70:** Congress amend Article 6b(e)(1) and (2), UCMJ, as follows:

(e) Enforcement

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

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

**Recommendation 71:** The Joint Service Committee on Military Justice draft an amendment to Rule for Courts-Martial 309(b) to provide that a victim may file a motion pre-referral with a military judge to assert their rights under Article 6b(a), UCMJ.

**Recommendation 72:** Congress amend Article 6b(e) to add a new subparagraph (3), as follows:

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

**Recommendation 73:** Congress amend Article 6b(e), UCMJ, to add a new subparagraph 4(D):

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

**Recommendation 74:** Congress amend Article 6b(e), UCMJ, to add the following conforming changes:

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

## Proposed Legislative Changes to Article 6b(e), UCMJ

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

- (1) ~~If~~ The victim of an offense under this chapter believes that a preliminary hearing ruling under section 832 of this title (article 32) or a court-martial ruling violates ~~may assert~~ the rights of the victim afforded by a section (article) or rule specified in paragraph ~~(4)5~~ at the court-martial in which the accused is being tried or may assert these rights with a military judge pursuant to section 830a (article 30a) if charges have not yet been referred to a court-martial. The court-martial, or military judge if pre-referral, shall take up and decide any motion asserting a victim's right forthwith. If the relief sought is denied, the victim may petition the Court of Criminal Appeals for a writ of mandamus to require the preliminary hearing officer or the court-martial to comply with the section (article) or rule.
- (2) If the victim of an offense under this chapter is subject to ~~an order~~ a request to submit to a deposition, notwithstanding the availability of the victim to testify at the court-martial trying the accused for the offense, ~~before the military judge or convening authority orders a deposition, the court-martial, or military judge if pre-referral, must afford the victim a reasonable opportunity to be heard. If the court-martial or military judge denies the relief sought,~~ the victim may petition the Court of Criminal Appeals for a writ of mandamus.
- (3) Upon petition of the victim and on good cause shown, the Court of Appeals for the Armed Forces may grant review of any matter decided by a Court of Criminal Appeals under this section. For any petition of review granted, the Court of Appeals for the Armed Forces may act on any issues specified in its grant of review.
- (~~3~~ 4) (A) A petition for a writ of mandamus described in this subsection shall be forwarded directly to the Court of Criminal Appeals, by such means as may be prescribed by the President, subject to section 830a of this title (article 30a).
- (B) To the extent practicable, a petition for a writ of mandamus described in this subsection shall have priority over all proceedings before the Court of Criminal Appeals.
- (C) Review of any decision of the Court of Criminal Appeals on a petition for a writ of mandamus described in this subsection shall have priority in the Court of Appeals for the Armed Forces, as determined under the rules of the Court of Appeals for the Armed Forces.
- (D) The Courts of Criminal Appeals and the Court of Appeals for the Armed Forces shall apply the ordinary standard of appellate review, legal error or abuse of discretion, in reviewing a victim's petition for a writ of mandamus asserting their enumerated rights under Article 6b(a). However, the higher standard of review, clear and indisputable error, shall continue to apply to review of alleged violations of Military Rules of Evidence 412, 513, 514, and 615.
- (~~4~~ 5) Paragraph ~~(1)~~ This subsection applies with respect to the protections afforded by the following:
  - (A) This section (article).
  - (B) Section 832 (article 32) of this title.
  - (C) Military Rule of Evidence 412, relating to the admission of evidence regarding a victim's sexual background.
  - (D) Military Rule of Evidence 513, relating to the psychotherapist-patient privilege.
  - (E) Military Rule of Evidence 514, relating to the victim advocate-victim privilege.
  - (F) Military Rule of Evidence 615, relating to the exclusion of witnesses.

## I. Introduction

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

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

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

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

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

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<sup>1</sup> National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, §1701, 127 Stat. 672 (2013).

## II. Background

Both Article 6b and the CVRA provide crime victims with enumerated rights, including the right to reasonable, accurate, and timely notice of certain proceedings involving the accused; the right to be heard regarding pretrial confinement of the accused, at sentencing proceedings, and regarding clemency and parole of the accused; and the right to be treated with fairness and with respect for the victim's privacy and dignity.<sup>2</sup>

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

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

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

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

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

3 18 U.S.C. § 3771(d)(3).

4 The purpose of a writ of mandamus is to “confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.” *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943).

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

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

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

### III. Victim Standing to Assert Article 6b Rights at Court-Martial

#### A. Background

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

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

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

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

Unlike the CVRA, Article 6b does not enable victims to assert their rights under Article 6b at the trial court—the only course of action is to petition the CCAs.<sup>14</sup> Other statutes or rules that allow victims to be heard at the trial court level include the following:

1. Article 30a(a)(1)(D), UCMJ, requires the President to prescribe regulations providing for a military judge to review certain proceedings that occur prior to referral of charges to a court-martial.<sup>15</sup> These pre-referral proceedings include pre-referral matters under subsection (e) of Article 6b, which covers the enforcement of

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

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

10 *Id.*

11 18 U.S.C. §3771(d)(3).

12 *Id.*

13 10 U.S.C. § 806b(e)(1) (Art. 6b(e)(1), UCMJ).

14 *See generally* 10 U.S.C. § 806b (Art. 6b, UCMJ). Note that Art. 6b(a)(4)(A)–(C) provides the victim the right to be heard at hearings related to the accused's sentencing or confinement.

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



a victim's rights under Article 6b.<sup>16</sup> Rule for Court-Martial 309 implements Article 30a and lists the pre-referral matters for which a military judge may conduct proceedings.<sup>17</sup>

2. Rule for Courts-Martial (R.C.M.) 309(b)(9) provides that a victim may file a motion pre-referral requesting that the military judge require an Article 32 preliminary hearing officer to comply with Articles 6b and 32, R.C.M. 405, and M.R.E.s 412, 513, 514, and 615.<sup>18</sup> The rule provides that the military judge may grant or deny this motion, which is subject to further review by the CCA pursuant to Article 6b(e).<sup>19</sup> R.C.M. 309 does not provide for other pre-referral enforcement proceedings under Article 6b(e).
3. M.R.E. 412(c)(2) provides that if a party to a trial seeks to admit evidence of the victim's sexual behavior or predisposition, the military judge must hold a closed hearing to determine whether the evidence should be admissible at trial.<sup>20</sup> At this hearing, the victim must be "afforded a reasonable opportunity to attend and be heard."<sup>21</sup>
4. M.R.E. 513(e)(1) and (2) provide that when the production or admission of a patient's mental health records or communications is in dispute, the military judge must hold a closed hearing.<sup>22</sup> The patient must be "afforded a reasonable opportunity to attend and be heard."<sup>23</sup> In the July 18, 2024, opinion of *H.V.Z. v. United States*, CAAF held that these provisions of M.R.E. 513 apply not only to privileged material under the rule but also to non-privileged records, such as those containing diagnoses and treatments.<sup>24</sup>

## B. Stakeholder Perspectives

### *Victims' Counsel*

The victims' counsel program representatives from the Military Services all agreed that Congress should amend Article 6b to require courts-martial to hear and make rulings on violations of a victim's Article 6b rights.<sup>25</sup> They argued that civilian victims who fall under the CVRA should not have greater rights to be heard at the trial court level than military victims have.<sup>26</sup> Several counsel stated that while some military judges are willing to allow victims' counsel to be heard on issues regarding their clients' rights—even when not explicitly allowed under Article 6b or other provisions of law—this practice is inconsistent across and within the Services.<sup>27</sup>

16 10 U.S.C. § 830a(a)(1)(D) (Art. 30a(a)(1)(D), UCMJ); 10 U.S.C. § 806b(e) (Art. 6b(e), UCMJ).

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

18 2024 MCM, *supra* note 17, R.C.M. 309(b)(6).

19 *Id.*

20 2024 MCM, *supra* note 17, Military Rule of Evidence [M.R.E.] 412(c)(2).

21 *Id.*

22 2024 MCM, *supra* note 17, M.R.E. 513(e)(2).

23 *Id.*

24 *H.V.Z. v. United States*, 2024 CAAF LEXIS 410, \_\_ M.J. \_\_ (C.A.A.F. 2024).

25 See *Transcript of DAC-IPAD Policy Subcommittee Meeting* 12 (June 11, 2024) (testimony of Commander Sara DeGroot, U.S. Navy); 13 (testimony of Colonel Iain Pedden, U.S. Marine Corps); 19–20 (testimony of Colonel Evah McGinley, U.S. Army); 20–21 (testimony of Lt Col Seth Dilworth, U.S. Air Force); 25 (testimony of Mr. Paul Markland, U.S. Coast Guard); see also *Transcript of DAC-IPAD Public Meeting 26–27* (Mar. 12, 2024) (testimony of Commander Sara DeGroot, U.S. Navy); 27 (testimony of Lieutenant Colonel Stacy Allen, U.S. Marine Corps).

26 *Transcript of DAC-IPAD Policy Subcommittee Meeting* 14, 18 (June 11, 2024) (testimony of Col Pedden); 34 (testimony of Lt Col Dilworth).

27 *Id.* at 10, 20 (testimony of Lt Col Dilworth); 22 (testimony of CDR DeGroot).

Counsel argued that if the victim could be heard at the trial court level and if the victim appealed the ruling, the CCA would have a record with judicial rulings to review, rather than just the briefs of the parties.<sup>28</sup> One counsel noted that requiring a victim to go to the CCA to enforce their rights removes the remedy from the right—a victim should be able to argue to the military judge why their rights should be enforced rather than asking the CCA for a remedy after the military judge has already violated their rights.<sup>29</sup> Having standing at the trial court would enable victims' counsel to argue against violations of their clients' rights and allow those violations to be remedied on the spot by the military judge, perhaps thereby removing the need to seek a remedy at the CCA and alleviating some of the delay.<sup>30</sup>

Counsel also explained that in order to assert the victim's rights, they must first have access to the information necessary to seek enforcement of those rights. In some Services, victims' counsel do not have access to a shared electronic filing system and do not uniformly receive motions from the government or defense, except when the trial counsel determines that the motions pertain to the victim.<sup>31</sup> Victims' counsel in the Navy currently do not have access to motions filed in the Navy and Marine Corps case management system.<sup>32</sup> Air Force victims' counsel have access to their electronic filing system, so they are able to see all motions.<sup>33</sup> Counsel expressed concern about how information is provided to victims who do not have victims' counsel.<sup>34</sup>

### *Appellate Government*

Counsel agreed that victims should have standing at the court-martial to assert their rights under Article 6b.<sup>35</sup> One counsel noted that victims' not having standing to assert their rights at the trial court has resulted in military victims having fewer rights and having more trouble exercising them than do civilian victims.<sup>36</sup> Several counsel noted that often military judges are willing to allow the victim to be heard at the trial court, even in the absence of formal standing.<sup>37</sup> One counsel noted that if victims had standing at the trial court, the result might be better decisions at the appellate courts, because the courts would have a more robust record to use in making their decisions.<sup>38</sup>

### *Appellate Defense*

Some counsel stated that many military judges already allow victims to assert their Article 6b rights at the trial court.<sup>39</sup> One counsel noted that there may be reasons to allow victim standing at the trial court, but she believes that

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28 *Id.* at 12 (testimony of CDR DeGroot); 15 (testimony of Col Pedden).

29 *Id.* at 13–14 (testimony of Col Pedden).

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

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

32 *Id.* at 61 (testimony of CDR DeGroot).

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

34 *Id.* at 61 (testimony of CDR DeGroot); 63 (testimony of LtCol Allen).

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

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

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

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

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

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

The Navy representative told the Committee she has never seen a victim's petition asserting an enumerated Article 6b right; the few she has seen have related to M.R.E. 412 or M.R.E. 513.<sup>44</sup> She also argued that Article 6b provides more expansive rights for victims than does the CVRA, as Article 6b allows victims to petition for alleged violations of M.R.E. 412 or 513 and the CVRA does not allow anything similar.<sup>45</sup>

#### *Victim Advocacy Organizations*

Mr. Guilds noted that in his experience, trial judges often do not want to hear from victims or do not believe that Article 6b gives victims standing outside of M.R.E. 513, M.R.E. 412, and sentencing.<sup>46</sup> He stated that victims often forgo their rights "because the alternative is a delayed or abated trial."<sup>47</sup>

Regarding victim access to information, Mr. Guilds recounted a court-martial in which he asked to be included on communications with the parties and to receive non-privileged filings. He told the Committee that the judge denied his request and informed him he would have to seek that information from the special trial counsel.<sup>48</sup>

### **C. Analysis and Recommendations**

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

Allowing a victim to assert their rights initially with the military judge provides an opportunity for the military judge to address the issue in a timely manner and potentially correct or prevent a violation of the victim's rights. This change may reduce delays in courts-martial proceedings if the victim is able to get relief through a military judge rather than having to petition the CCA. If the victim does not get the relief requested at this level, the victim may still petition the CCA for a writ of mandamus and the CCA will have the benefit of reviewing the record and

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40 *Id.*

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

42 *Id.* at 78–79.

43 *Id.* at 79.

44 *Id.* (testimony of Ms. Snyder).

45 *Id.*

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

47 *Id.* at 130.

48 *Id.* at 128.

judicial ruling prior to ruling on the issue, rather than relying solely on the briefs and filings of counsel. Having the benefit of the judicial ruling will also enable victims and their counsel to make better-informed choices regarding whether to petition the CCAs. For unrepresented victims, asserting their rights with the military judge may be more feasible than trying to determine how to petition a CCA.

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

**Recommendation 70:** Congress amend Article 6b(e)(1) and (2), UCMJ, as follows:

(e) Enforcement

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

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

**Recommendation 71:** The Joint Service Committee on Military Justice draft an amendment to Rule for Courts-Martial 309(b) to provide that a victim may file a motion pre-referral with a military judge to assert their rights under Article 6b(a), UCMJ.

## IV. Jurisdiction of the Court of Appeals for the Armed Forces to Review Crime Victims' Petitions

### A. Background

In *E.V. v. United States*, a 2016 decision, CAAF held that it did not have jurisdiction to review a decision by a CCA on a crime victim's petition for a writ of mandamus.<sup>49</sup> The Court held that the plain language of Article 6b, as well as the lack of any other explicit or implied congressional intent, failed to provide CAAF jurisdiction over a crime victim's petition.<sup>50</sup> At the time of this opinion, Article 6b did not reference CAAF.<sup>51</sup>

In the FY18 NDAA, following CAAF's *E.V.* opinion, Congress amended Article 6b(e)(3) by adding a new subparagraph (C), which states: "Review of any decision of the Court of Criminal Appeals on a petition for a writ of mandamus described in this subsection shall have priority in the Court of Appeals for the Armed Forces, as determined under the rules of the Court of Appeals for the Armed Forces."<sup>52</sup>

However, in a July 2023 decision, CAAF again held that it does not have jurisdiction to review a victim's petition for a writ of mandamus.<sup>53</sup> The Court stated that the additional language in Article 6b only requires CAAF to give priority to cases in which it reviews a petition for a writ of mandamus, but does not confer jurisdiction to review petitions filed by victims.<sup>54</sup> The Court interpreted the additional language in Article 6b as meaning that if CAAF otherwise has jurisdiction to review a petition—such as when a Judge Advocate General directs review under Article 67(a)(2) or after granting the accused's petition under Article 67(a)(3)—then it must give the review priority.<sup>55</sup> The Court elaborated that the language in Article 6b(e)(1) explicitly provides jurisdiction to the CCAs to review victims' petitions, but the language in Article 6b(e)(3)(C) does not mirror this language regarding CAAF.<sup>56</sup>

### B. Recommendations of Other Advisory Committees

In a June 2017 report on victims' appellate rights, the Judicial Proceedings Panel (JPP)—the predecessor to the DAC-IPAD—recommended that Congress amend Article 6b to provide CAAF jurisdiction to review a CCA's

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

50 *Id.*

51 10 U.S.C. § 806b (Art. 6b, UCMJ) (2016).

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

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

54 *Id.*

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

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

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

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

denial of a victim's petition for a writ of mandamus.<sup>57</sup> The JPP made this recommendation because of its concern that victims' lack of access to CAAF under Article 6b "prevents civilian oversight of CCA decisions affecting victims' rights and creates the potential for lack of uniformity across the Services."<sup>58</sup>

The JPP's concern about lack of uniformity across the CCAs has been justified concerning at least one major issue—whether constitutional issues must be considered when raised in the context of the psychotherapist–patient privilege under M.R.E. 513 in determining when the privilege should be pierced. The Navy-Marine Corps Court of Criminal Appeals has taken the position that they must be considered, but the Army Court of Criminal Appeals has taken the opposite position, holding that Congress removed the "constitutionally required" exception to M.R.E. 513 and this change must be given effect.<sup>59</sup> While the Navy Judge Advocate General certified this issue to CAAF in 2023, CAAF was not able to resolve the question, as it held that the victim did not have standing to object to the military judge's abatement of the court-martial proceedings in the case at issue.<sup>60</sup> However, any future case seeking to have CAAF resolve this split between the CCAs will require that the issue again be certified by a Judge Advocate General.

### C. Stakeholder Perspectives

#### *Victims' Counsel*

The victims' counsel program representatives from the Military Services all agreed that Congress should amend Article 6b to explicitly provide CAAF jurisdiction to review writ petitions from victims.<sup>61</sup> One counsel noted that CAAF is the only court that can provide "singularity and unity across the Services."<sup>62</sup> The Navy victims' legal counsel representative described her experience working on a victim's petition to CAAF.<sup>63</sup> She told the Committee that but for the Navy Judge Advocate General's willingness to certify the issue to CAAF, CAAF would not have been able to review the CCA's denial of the victim's petition for a writ of mandamus. She also noted that "that is not a good look for victims who are looking for transparency and clarity in the military justice system—that we have to depend on the graces of whoever is the [Judge Advocate General] at the time."<sup>64</sup>

#### *Appellate Government*

According to the government appellate counsel for all Services, giving CAAF jurisdiction over victim petitions would provide uniformity in how the rules are applied across the Service appellate courts.<sup>65</sup> But doing so would also cause further delay in courts-martial processing, especially in those cases in which the court-martial is stayed

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

58 *Id.* at 29.

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

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

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

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

63 *Id.* at 27 (testimony of CDR DeGroot). See *B.M. v. United States*, 84 M.J. 314 (C.A.A.F. 2024) for procedural posture of CAAF's review.

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

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

pending a decision from the appellate courts.<sup>66</sup> Counsel estimated that although victim petitions are given priority at the appellate courts, a decision at the CCA level may take anywhere from two to six months and perhaps another six months for those cases that go to CAAF.<sup>67</sup> The Air Force counsel stated, however, that because they typically litigate motions—and because the CCA often issues an opinion on the petition—prior to the trial date, there is often no delay in the trial.<sup>68</sup> Counsel noted that whether the military judge allows continued processing of the case—such as allowing continued discovery, deposition, and other aspects of pretrial or trial processes not related to the victim's writ—or instead stays the entire proceedings while awaiting a decision from the appellate court can be up to the individual judge.<sup>69</sup>

### *Appellate Defense*

Several of the defense appellate counsel told the Committee that there is no need for CAAF jurisdiction over victim petitions, as victims already have one layer of appellate review to challenge a judge's order.<sup>70</sup> One counsel noted that the process for a petition to go through the CCA and CAAF is lengthy, during which time the trial is delayed, witnesses' memories fade, and the accused undergoes significant stress, especially if in pretrial confinement.<sup>71</sup> She pointed out that there is already a process for a victim to seek review of a petition by CAAF, which is to request that the Judge Advocate General certify the issue to CAAF; moreover, because many of the issues for which victims file petitions are meritless or lack wide-ranging impact and are relatively simple to resolve, there is often little litigation on the issue at the CCA level.<sup>72</sup>

The Army defense appellate representative stated that in the past two years he had not seen one Article 6b petition filed with the Army CCA. He believes this is because counsel are working out these issues at the trial level.<sup>73</sup>

### *Victim Advocacy Organizations*

Mr. Ryan Guilds argued that review by CAAF is “critical” to ensuring that the rights of victims are not ignored.<sup>74</sup>

## **D. Analysis and Recommendation**

The DAC-IPAD recommends that Congress amend Article 6b to provide CAAF jurisdiction to review crime victims' petitions. Currently crime victims can reach CAAF only if a Judge Advocate General is willing to certify an issue to CAAF. As one victims' counsel stated, a victim should not have to rely on the good graces of the Judge Advocate General in order to be heard at CAAF.<sup>75</sup> Providing CAAF jurisdiction to review victims' petitions will enable CAAF to clarify legal issues and ensure uniformity among the CCAs without victims having to rely on a Judge Advocate General to certify the issue to CAAF.

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

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

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

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

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

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

72 *Id.* at 71.

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

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

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

The Committee acknowledges that in those cases in which CAAF grants review of a victim's writ-petition, there may be delays in the case. It is likely, however, that on the infrequent occasions in which CAAF grants review of a victim's petition, the Court's review will aid in the development of the law and will establish precedent for future cases. The Committee believes that the benefits of providing for CAAF jurisdiction over victim petitions outweigh the negatives.

**Recommendation 72:** Congress amend Article 6b(e) to add a new subparagraph (3), as follows:

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



## V. Timing of Appellate Court Review of Article 6b Petitions

### A. Background

Article 6b(e)(3)(B) provides that “to the extent practicable,” a crime victim’s petition for a writ of mandamus “shall have priority over all proceedings before the Court of Criminal Appeals.”<sup>76</sup> Article 6b(e)(3)(C) provides that review of a CCA’s decision on a victim’s petition for a writ of mandamus “shall have priority” in CAAF, as determined by CAAF’s rules.<sup>77</sup>

The Joint Rules of Appellate Procedure for Courts of Criminal Appeals (JRAP) provide uniform procedures for the CCAs, pursuant to Article 66(h). Rule 19 of the JRAP covers processing of petitions for extraordinary relief, including timelines for filing petitions and responses with the CCAs and actions that the CCAs may take after receiving a petition.<sup>78</sup> Rule 19(e) states that upon receipt of a petition, the CCAs may dismiss or deny the petition without answer, order the respondent to show cause and file an answer, or take whatever other action it deems appropriate.<sup>79</sup> If the CCA orders the respondent to file an answer, the respondent “may file an answer within 20 days of the receipt of the order and the petitioner may file a reply to the answer within 7 days of receipt of the answer.” Rule 19 further provides that the CCA may set the matter for oral argument or may grant or deny the requested relief on the basis of pleadings alone.

According to CAAF’s rules, a writ-appeal petition for extraordinary relief must be filed no later than 20 days after the date the CCA’s decision is served on the appellant or the appellant’s counsel. An appellee’s answer must be filed no later than 10 days after the filing of the writ-appeal petition and a reply may be filed by an appellant no later than 5 days after receipt of the answer.<sup>80</sup> The rules provide that CAAF may deny a petition without answer or may order the respondents to answer. CAAF may set the matter for hearing or may grant or deny the requested relief on the basis only of the pleadings.

The CVRA provides that the delineated victims’ rights shall be asserted in the district court in which the defendant is being prosecuted.<sup>81</sup> The district court must take up and decide a motion asserting a victim’s right “forthwith.”<sup>82</sup> If the district court denies the requested relief, the movant may petition the court of appeals for a writ of mandamus, which the court of appeals must decide within 72 hours after the petition was filed, unless the litigants stipulate to a different time period.<sup>83</sup> The CVRA further provides that “in no event shall proceedings be stayed or subject to a continuance of more than five days for purposes of enforcing this chapter.”<sup>84</sup> Ms. Garvin clarified that litigants frequently stipulate to a time period longer than 72 hours for appellate court decision.<sup>85</sup> She also noted that this

76 10 U.S.C. § 806b(e)(3)(B) (Art. 6b(e)(3)(B), UCMJ). Note that Article 62, UCMJ, which governs government interlocutory appeals, also states that government appeals under this article shall, “whenever practicable, have priority over all other proceedings before that court.”

77 10 U.S.C. § 806b(e)(3)(C) (Art. 6b(e)(3)(C), UCMJ).

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

79 JRAP, Rule 19(e).

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

81 18 U.S.C. § 3771(d)(3).

82 *Id.*

83 *Id.*

84 *Id.*

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

provision was included in the CVRA in order to resolve issues expeditiously to prevent a delay in the trial from harming the accused.<sup>86</sup>

## **B. Stakeholder Perspectives**

### *Victims' Counsel*

When asked about the CVRA requirement that the appellate courts decide on a victim's petition within 72 hours, several presenters agreed that this requirement might not work well in the military system. They agreed that it is more important to have a more thoughtful decision from the appellate courts, even at the cost of taking more time.<sup>87</sup> Counsel agreed that there could be ways to make the system more efficient and that shorter timelines may be beneficial, especially when a judge's ruling at issue comes close to trial.<sup>88</sup> One counsel noted that it may be important to have a tighter time requirement if the court-martial proceeding is stayed pending the appellate decision.<sup>89</sup>

According to the counsel, the CCAs are deciding victim writ petitions relatively quickly. The Coast Guard representative said they had not had a writ petition in the previous year, but the one petition from the year before that was decided by the CCA in 30 days.<sup>90</sup> The Marine Corps representative noted that in the one petition from the previous year, the CCA returned a decision in five weeks.<sup>91</sup> The Navy representative reported that in one case the CCA took 105 days to return a decision; in the other case, a pretrial motion, the CCA's decision didn't affect the trial start date.<sup>92</sup> The Air Force representative stated they had eight petitions filed within the previous year; six of them did not affect the docketing, either because they were decided before the trial date or because the military judge stayed the order rather than staying the proceedings.<sup>93</sup> One of the remaining two petitions resulted in the court-martial being stayed for over a year pending CAAF's decision.<sup>94</sup> The Army representative noted that they had not had a petition filed in the previous year, but in the past they had received a decision from the CCA within a few weeks.<sup>95</sup>

### *Appellate Government*

The appellate government representatives agreed that imposing a 72-hour requirement, similar to the CVRA's, might strain resources and that providing more time often results in better decisions.<sup>96</sup>

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86 *Id.*

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

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

89 *Id.* at 50–51 (testimony of Lt Col Dilworth).

90 *Id.* at 25 (testimony of Mr. Markland).

91 *Id.* at 26 (testimony of Col Pedden).

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

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

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

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

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

*Appellate Defense*

One counsel noted that it would be logistically difficult for the CCAs to provide a decision on a victim's petition within 72 hours.<sup>97</sup>

*Victim Advocacy Organizations*

Mr. Guilds argued that victims have the right to have petitions decided in a timely manner and that often victims forgo the opportunity to file a petition with the appellate court because they know that filing will result in trial delays.<sup>98</sup>

**C. Analysis**

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

Service victims' counsel and appellate counsel indicated that CCA review of victims' petitions typically causes either no delay or relatively minor delay in courts-martial proceedings. The Air Force saw the highest number of victim petitions in the previous year—8 petitions versus 1, 2, or even none in the other Services—and Air Force appellate counsel stated that in 6 of the 8 petitions there were no trial delays, owing to the Air Force's practice of holding motions hearings prior to the trial date.

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

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97 *Id.* at 75 (testimony of Mr. Cook).

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

## VI. Standard of Review of Victims' Petitions Under Article 6b, UCMJ

### A. Background

Congress amended Article 6b in the FY15 and FY16 NDAA's to provide crime victims the right to petition a CCA for a writ of mandamus for an alleged violation of the enumerated rights under Article 6b(a), M.R.E. 412, M.R.E. 513, M.R.E. 514, or M.R.E. 615.<sup>99</sup> Congress did not, however, specify the burden of proof that the victim must establish to obtain a writ of mandamus.<sup>100</sup> On the issue of writs, CAAF has held that a writ of mandamus is a "drastic instrument which should be invoked only in truly extraordinary situations."<sup>101</sup> In the absence of a particular standard in the statute, CAAF has applied the standard used for other writ petitioners, which is "clear and indisputable" error.<sup>102</sup> This standard applies to petitions filed by the accused, as well as for those filed by victims. CAAF recently affirmed this standard in the case of *H.V.Z. v. United States*, on a victim's writ petition taken up by CAAF following the Air Force Judge Advocate General's certifying several issues to CAAF.<sup>103</sup>

While the CVRA did not initially specify a standard of review for a victim's writ petition, in May 2015, Congress amended the CVRA to state that appellate courts shall use the "ordinary standards of appellate review" to review a victim's petition for a writ of mandamus.<sup>104</sup> Senator Diane Feinstein explained in the *Congressional Record* that this standard was added to resolve a split within the federal appellate circuits and to set a uniform standard by codifying "the more victim-protecting rule": the appellate court "shall apply ordinary standards of appellate review," which is legal error or abuse of discretion, rather than the "especially high standard" of "clear and indisputable error."<sup>105</sup>

As previously noted, a significant difference between Article 6b and the CVRA is that the alleged violations for which a crime victim may petition a CCA for a writ of mandamus under Article 6b are more expansive than those covered under the CVRA. The violations covered under Article 6b extend not only to the enumerated rights under Article 6b(a) but also to violations involving the Article 32 preliminary hearing and several evidentiary rules—M.R.E. 412, the military's rape shield law; M.R.E. 513, the psychotherapist–patient privilege; M.R.E. 514, the victim advocate–victim privilege; and M.R.E. 615, excluding witnesses.<sup>106</sup> While the CVRA explicitly requires appellate courts to apply the ordinary standard of review, the standard of review for a petition for a writ of mandamus that does not fall under the CVRA is "clear and indisputable error."<sup>107</sup>

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

100 FY15 NDAA, *supra* note 5, at § 535; FY16 NDAA, *supra* note 5, at § 535.

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

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

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

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

105 160 CONG. REC. S6149, 6150 (daily ed. Nov. 19, 2014).

106 10 U.S.C. § 806b(e)(1) and (4) (Art. 6b(e)(1) and (4), UCMJ).

107 *Cheney v. United States Dist. Court*, 542 U.S. 367, 380–81 (2004).

## B. Stakeholder Perspectives

### *Victims' Counsel*

The victims' counsel representatives agreed that Congress should amend Article 6b to require appellate courts to use the ordinary standard of review—as required by the CVRA—rather than the extraordinary standard.<sup>108</sup> Counsel opined that using the ordinary standard of review would not result in an excessive number of additional petitions, as the standard of review is only one factor influencing the decision of whether to file a petition.<sup>109</sup> They said, however, that this should not matter—if the victim's rights have been violated, they should have the ability to petition the courts.<sup>110</sup> One counsel argued that any initial increase in the number of petitions filed would likely abate over time as the appellate courts established precedent and clarified issues related to Article 6b.<sup>111</sup> He also pointed out that applying the ordinary standard of review would bring the military in line with federal practice under the CVRA.<sup>112</sup>

Speaking to whether the ordinary standard of review should apply only to the enumerated rights under Article 6b(a) or more broadly to include petitions involving M.R.E.s 412, 513, 514, or 615, one counsel argued that Congress and the military should lead by taking a more expansive view.<sup>113</sup>

### *Appellate Government*

Several appellate government counsel argued against a lower standard of review, declaring that writ petitions should be rare—the government and defense use them rarely—and thus they should not be used by victims who simply don't like the trial judge's ruling.<sup>114</sup> However, one counsel pointed out that having a high standard for writ appeals is bad for the development of the law. Noting that many counsel and military judges are unclear on the law surrounding victims' rights, he also observed that military victims shouldn't have fewer rights than civilian victims.<sup>115</sup>

### *Appellate Defense*

The appellate defense counsel agreed that the standard of review should be the same for all parties—clear and indisputable error.<sup>116</sup> One counsel stated that allowing victims to meet a lower standard of review would enable them to second-guess the military judge and would give them too much leverage.<sup>117</sup> Counsel noted that victims already have a right not possessed by the accused, who unlike victims do not have the right to appeal evidentiary

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

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

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

111 *Id.* at 45–46 (testimony of COL McGinley).

112 *Id.* at 44.

113 *Id.* at 68 (testimony of Col Pedden).

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

115 *Id.* at 33–34 (testimony of Col Talcott).

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

117 *Id.* at 98 (testimony of Ms. Snyder).

rulings directly to the CCA.<sup>118</sup> Regarding the difference between the rights of civilian victims under the CVRA and the rights of military victims, one counsel noted that they are different systems with different rights for the parties.<sup>119</sup>

Counsel also pointed out that Article 6b affords broader rights to victims than does the CVRA—including the ability to challenge rulings on M.R.E. 412, 513, 514, and 615 issues—so it is only appropriate that the standard of review be higher.<sup>120</sup> One counsel said that she thought that for the enumerated rights under Article 6b, the results will be the same no matter what the standard is.<sup>121</sup>

### *Victim Advocacy Organizations*

Mr. Guilds argued that it is essential for victims at the appellate level to have the ordinary standard of review.<sup>122</sup> He stated that until the standard is changed, victims will continue to be ignored and will be vulnerable to a system that does not adequately protect them.<sup>123</sup>

## **C. Analysis and Recommendation**

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

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

**Recommendation 73:** Congress amend Article 6b(e), UCMJ, to add a new subparagraph 4(D):

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

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118 *Id.* at 98 (testimony of Mr. Cook).

119 *Id.* at 100 (testimony of Ms. Marinos).

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

121 *Id.* at 102 (testimony of Ms. Snyder).

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

123 *Id.* at 130–31.

## VII. Conforming Amendments

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

**Recommendation 74:** Congress amend Article 6b(e), UCMJ, to add the following conforming changes:

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

## **VIII. Conclusion**

The DAC-IPAD's recommendations, if adopted, will align Article 6b enforcement rights more closely with enforcement rights under the CVRA and ensure that military crime victims have the same right to be heard at the trial court level as their civilian counterparts in the federal court system. Article 6b has evolved since its passage in the FY14 NDAA, and passage of these recommendations will further develop crime victims' rights by giving victims access to the trial court and allowing victims to petition CAAF for review. Lowering the appellate standard for reviewing a victim's petition regarding rights under Article 6b(a) will bring to the military court-martial system an important change made to the CVRA in 2015.



## Appendix A. Committee Members



**Marcia Anderson** was the Clerk of Court for the Bankruptcy Court–Western District of Wisconsin starting in 1998 until her retirement in 2019. In this role she was responsible for the management of the budget and administration of bankruptcy cases for 44 counties in western Wisconsin. Major General Anderson retired in 2016 from a distinguished career in the U.S. Army Reserve after 36 years of service, which included serving as the Deputy

Commanding General of the Army’s Human Resources Command at Fort Knox, Kentucky. In 2011, she became the first African American woman in the history of the U.S. Army to achieve the rank of major general. Her service culminated with an assignment at the Pentagon as the Deputy Chief, Army Reserve (DCAR). As the DCAR, she represented the Chief, Army Reserve, and had oversight for the planning, programming, and resource management for the execution of an Army Reserve budget of \$8 billion that supported more than 225,000 Army Reserve soldiers, civilians, and their families. She is a graduate of the Rutgers University School of Law, the U.S. Army War College, and Creighton University.



**Martha Bashford** served in the New York County District Attorney’s Office starting in 1979 until her retirement in 2020. At the time of her retirement, she was the chief of the New York County District Attorney’s Office Sex Crimes Unit, which was the first of its kind in the country. She served in this role starting in 2011. Previously she was co-chief of the Forensic Sciences/Cold Case Unit, where she examined unsolved homicide cases that might now be solvable through DNA analysis. Ms. Bashford was also co-chief of the DNA

Cold Case Project, which used DNA technology to investigate and prosecute unsolved sexual assault cases. She indicted assailants identified through the FBI’s Combined DNA Index System (CODIS) and obtained John Doe DNA profile indictments to stop the statute of limitations where no suspect had yet been identified. She is a Fellow in the American Academy of Forensic Sciences. Ms. Bashford graduated from Barnard College in 1976 (summa cum laude) and received her J.D. degree from Yale Law School in 1979. She is a Fellow in both the American College of Trial Lawyers and the American Academy of Forensic Sciences.



**William Cassara** is a former Army prosecutor, defense counsel, and appellate counsel, with more than 30 years of military law experience. Mr. Cassara holds a law degree from the University of Baltimore and an undergraduate degree in business administration from Florida State University. He is a former professor at the University of Baltimore School of Law and the University of South Carolina School of Law. Mr. Cassara has been in private military law practice since 1996, focusing on court-martial appeals, discharge upgrades, security clearances, and all other administrative military law matters.



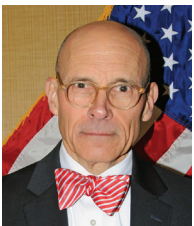
**Margaret “Meg” Garvin**, M.A., J.D., is the executive director of the National Crime Victim Law Institute (NCVLI), where she has worked since 2003. She is also a clinical professor of law at Lewis & Clark Law School, where NCVLI is located. In 2014, Ms. Garvin was appointed to the Victims Advisory Group of the United States Sentencing Commission, and during 2013–14, she served on the Victim Services Subcommittee of the Response Systems to Adult Sexual Assault Crimes Panel of the U.S. Department of Defense. She has served as co-chair of the American Bar Association’s Criminal Justice Section Victims Committee, as co- chair of the Oregon Attorney

General’s Crime Victims’ Rights Task Force, and as a member of the Legislative & Public Policy Committee of the Oregon Attorney General’s Sexual Assault Task Force. Ms. Garvin received the John W. Gillis Leadership Award from National Parents of Murdered Children in August 2015. Prior to joining NCVLI, Ms. Garvin practiced law in Minneapolis, Minnesota, and clerked for the Eighth Circuit Court of Appeals. She received her bachelor of arts degree from the University of Puget Sound, her master of arts degree in communication studies from the University of Iowa, and her J.D. from the University of Minnesota.



**Suzanne Goldberg** has served in the U.S. Department of Education’s Office for Civil Rights since day one of the Biden-Harris administration as Acting Assistant Secretary (January–October 2021) and Deputy Assistant Secretary for Strategic Operations and Outreach. Goldberg brings extensive experience in civil rights leadership, with expertise in gender and sexuality law, and many years as a university administrator and faculty member. Before joining the U.S.

Department of Education, Goldberg was the inaugural Executive Vice President for University Life at Columbia University and on the faculty of Columbia Law School, where she is on a public service leave from her role as the Herbert and Doris Wechsler Clinical Professor of Law at Columbia Law School. She founded the Law School’s Sexuality and Gender Law Clinic, the first of its kind in the nation, and was co-founder and co-director of the Law School’s Center for Gender and Sexuality Law. Goldberg earlier served as a senior staff attorney with Lambda Legal, a national legal organization committed to the full recognition of the civil rights of LGBTQ+ people and people living with HIV. Goldberg holds a law degree with honors from Harvard University and a bachelor’s degree with honors from Brown University and was a Fulbright Fellow at the National University of Singapore.



**Judge Paul W. Grimm** is a Professor of the Practice and Director of the Bolch Judicial Institute at Duke Law School. Prior to joining Duke Law School, Judge Grimm served as a federal judge for 25 years. In 2012 he was appointed as a District Judge for the United States District Court for the District of Maryland. Previously, he was appointed to the Court as a Magistrate Judge in February 1997 and served as Chief Magistrate Judge from 2006 through 2012. In September 2009, he was appointed by the Chief Justice of the United States to serve as a member of the Advisory Committee for the Federal Rules of Civil Procedure. Additionally, Judge Grimm is an

adjunct professor of law at the University of Maryland School of Law, where he teaches evidence, and also has taught trial evidence, pretrial civil procedure, and scientific evidence. He also has been an adjunct professor of law at the University of Baltimore School of Law, where he taught a course regarding the discovery of and pretrial practices associated with electronically stored evidence.

Before joining the Court, Judge Grimm was in private practice in Baltimore for 13 years, during which time he handled commercial litigation. He also served as an Assistant Attorney General for the State of Maryland, an Assistant State’s Attorney for Baltimore County, Maryland, and a Captain in the United States Army Judge Advocate General’s Corps. While on active duty in the Army, Judge Grimm served as a defense attorney and prosecutor while assigned to the JAG Office at Aberdeen Proving Ground, Maryland, and thereafter as an action

officer in the Office of the Judge Advocate General of the Army (Administrative Law Division), The Pentagon. In 2001, Judge Grimm retired as a Lieutenant Colonel from the United States Army Reserve.

Judge Grimm received his undergraduate degree from the University of California, Davis (summa cum laude), his J.D. from the University of New Mexico School of Law (magna cum laude, Order of the Coif), and his LL.M. from Duke Law School.



**A. J. Kramer** has been the Federal Public Defender for the District of Columbia since 1990. He was the Chief Assistant Federal Public Defender in Sacramento, California, from 1987 to 1990, and an Assistant Federal Public Defender in San Francisco, California, from 1980 to 1987. He was a law clerk for the Honorable Proctor Hug, Jr., U.S. Court of Appeals for the Ninth Circuit, Reno, Nevada, from 1979 to 1980. He received a B.A. from Stanford University in 1975, and a J.D. from Boalt Hall School of Law at the University of California at Berkeley in 1979. Mr. Kramer taught legal research and writing at Hastings Law School from 1983 to 1988. He is a permanent faculty member of the National Criminal Defense College in Macon, Georgia. He is a Fellow of the American College of Trial Lawyers. He is a member of the Judicial Conference of the United States' Advisory Committee on Evidence Rules and the ABA Criminal Justice System Council. He was a member of the National Academy of Sciences Committee on Scientific Approaches to Understanding and Maximizing the Validity and Reliability of Eyewitness Identification in Law Enforcement and the Courts. In December 2013, he received the Annice M. Wagner Pioneer Award from the Bar Association of the District of Columbia.



**Jennifer Gentile Long** (M.G.A., J.D.) is CEO and co-founder of AEquitas and an adjunct professor at Georgetown University Law School. She served as an Assistant District Attorney in Philadelphia specializing in sexual violence, child abuse, and intimate partner violence. She was a senior attorney at and then Director of the National Center for the Prosecution of Violence Against Women at the American Prosecutors Research Institute. She publishes articles, delivers trainings, and provides expert case consultation on issues relevant to gender-based violence and human trafficking nationally and internationally. Ms. Long serves as an Advisory Committee member of the American Law Institute's Model Penal Code Revision to Sexual Assault and Related Laws and as an Editorial Board member of the Civic Research Institute for the Sexual Assault and Domestic Violence Reports. She graduated from Lehigh University and the University of Pennsylvania Law School and Fels School of Government.



**Jenifer Markowitz** is a forensic nursing consultant who specializes in issues related to sexual assault, domestic violence, and strangulation, including medical-forensic examinations and professional education and curriculum development. In addition to teaching at workshops and conferences around the world, she provides expert testimony, case consultation, and technical assistance and develops training materials, resources, and publications. A forensic nurse examiner since 1995, Dr. Markowitz regularly serves as faculty and as an expert consultant for the Judge Advocate General's (JAG) Corps for the U.S. Army, Navy, Air Force, Marine Corps, and Coast Guard. Past national activities include working with the Army Surgeon General's office to develop a curriculum for sexual assault medical-forensic examiners working in military treatment facilities (subsequently adopted by the Navy and Air Force); with the U.S. Department of Justice Office on Violence Against Women (OVW) to develop a national protocol and training standards for sexual assault medical-forensic examinations; with the Peace Corps to assess the agency's multidisciplinary response to sexual assault; with the U.S. Department of Defense to revise the military's sexual assault evidence collection kit and corresponding documentation forms; and as an Advisory Board

member for the National Sexual Violence Resource Center. In 2004, Dr. Markowitz was named a Distinguished Fellow of the International Association of Forensic Nurses (IAFN); in 2012, she served as IAFN's President.



**SGM Ralph Martinez**, US Army, retired, completed 34 years of active duty in the U.S. Army. During his career SGM Martinez held several key leadership positions at major commands, which include the United States Army Forces Command, United States Central Command, United States European Command, and United States Army Africa Command. He completed five combat deployments in support of Operations Enduring Freedom and Iraqi Freedom and deployed in support of Operation Joint Forge. SGM Martinez's last assignment on active duty was to serve as the ninth U.S. Army Chaplain Corps Regimental Sergeant Major (RSGM).

During his tenure as the RSGM he played a significant role in the start of the Army's Spiritual Fitness Initiative. He is a graduate of the Executive Leaders Course, U.S. Army War College, and earned a Bachelor of Science in liberal studies with a concentration in leadership from Purdue University Global. Since retiring, SGM Martinez has been employed by CACI International as a Senior Advisor/Consultant currently supporting Department of the Army, G-6, and serves as Board Member on the U.S. Army Chaplain Corps Regimental Association.



**Jennifer O'Connor** was appointed as Vice President and General Counsel of Harvard University on July 29, 2024. In her previous role, she served as Vice President, Associate General Counsel, and Sector Counsel for Northrop Grumman's mission systems sector. Earlier in her career, she served in numerous positions and agencies throughout the federal government. Her past positions include service in the Obama administration as Deputy Assistant to the President and Deputy White House Counsel responsible for the litigation, oversight, and investigations portfolios; Senior Counsel at the Department of Health and Human Services; and Counselor to

the Commissioner of the Internal Revenue Service. Ms. O'Connor also worked in the Clinton administration as Deputy Assistant Secretary for Policy at the Department of Labor, Special Assistant to the President in the Office of the White House Deputy Chief of Staff, Special Assistant to the President in the Office of Cabinet Affairs, and Deputy Director of the White House Office of Management and Administration. Ms. O'Connor received a Bachelor of Arts degree from Harvard University, a Master's in Public Administration from Columbia University's School of International and Public Affairs, and a Juris Doctor degree from Georgetown University.



**BGen James (Jim) Schwenk** was commissioned as an infantry officer in the Marine Corps in 1970. After serving as a platoon commander and company commander, he attended law school at the Washington College of Law, American University, and became a judge advocate. As a judge advocate he served in the Office of the Secretary of Defense, the Office of the Secretary of the Navy, and Headquarters, Marine Corps; he served as Staff Judge Advocate for Marine Forces Atlantic, II Marine Expeditionary Force, Marine Corps Air Bases West, and several other commands; and he participated in several hundred courts-martial and administrative discharge

boards. He represented the Department of Defense on the television show *American Justice*, and represented the Marine Corps in a Mike Wallace segment on *60 Minutes*. He retired from the Marine Corps in 2000.

Upon retirement from the Marine Corps, BGen Schwenk joined the Office of the General Counsel of the Department of Defense as an associate deputy general counsel. He was a legal advisor in the Pentagon on 9/11, and he was the primary drafter from the Department of Defense of many of the emergency legal authorities used in Afghanistan, Iraq, the United States, and elsewhere since that date. He was the principal legal advisor for the repeal of "don't ask, don't tell," for the provision of benefits to same-sex spouses of military personnel, in the review of the

murders at Fort Hood in 2009, and on numerous DoD working groups in the area of military personnel policy. He worked extensively with the White House and Congress, and he retired in 2014 after 49 years of federal service.



**Sergeant Lisa Shepperd** is a 12-year veteran of the Prince George’s County Police Department, with 9 years of extensive investigative experience. During her tenure with the Prince George’s County Police Department, she has handled hundreds of investigations, among them investigations into sexual assault and child sexual abuse. This includes writing and obtaining legal authority for several hundred search warrants, obtaining and determining probable cause for more than 100 arrest warrants, and conducting countless victim, witness, and suspect interviews. Her experience extends to both patrol and investigative best practices and includes the handling of domestic violence, child abuse, sexual assault, serial rape, and homicide cases. Sergeant Shepperd has successfully worked with local prosecutors to prepare court cases and has testified in a wide variety of cases resulting in numerous convictions.



**Judge Karla Smith** was appointed to the Circuit Court for Montgomery County, Maryland, in December 2014 by Governor Martin O’Malley. Judge Smith served on the District Court of Maryland from August 2012 until her appointment to the Circuit Court. In addition, Judge Smith serves as the Judiciary’s representative on the State Council on Child Abuse and Neglect, and on the Operations Subcommittee of the Judiciary Committee on Equal Justice; and she represents the Circuit Court on the Montgomery County Domestic Violence Coordinating Council (DVCC).

Prior to her appointment, Judge Smith worked as a prosecutor for over 15 years. For five years, Judge Smith served as the Chief of the Family Violence Division of the Montgomery County State’s Attorney’s Office. Additionally, she sat on the Montgomery County Child Fatality Review Team; the Multidisciplinary Case Review Team for Child Abuse and Neglect; the Elder and Vulnerable Adult Abuse Task Force, which she chaired; the Interagency Sex Offender Management Team; the Domestic Violence Case Review Team; and the Montgomery County Teen Dating Taskforce. It was during this time that Judge Smith was integral to the development of the Montgomery County Family Justice Center and the drafting and passage of a criminal child neglect statute that was signed into law in 2011.

Judge Smith received her Bachelor of Arts degree from the University of Maryland and her J.D. from the University of Virginia. A lifelong resident of Montgomery County and a product of Montgomery County Public Schools, Judge Smith currently lives in Bethesda with her husband and three sons.



**Cassia Spohn** is a Regents Professor in the School of Criminology and Criminal Justice at Arizona State University and an Affiliate Professor of Law at ASU’s Sandra Day O’Connor College of Law. She is a Fellow of the American Society of Criminology, the Academy of Criminal Justice Sciences, and the Western Society of Criminology. She is the recipient of numerous academic awards, including the University of Nebraska Outstanding Research and Creative Activity Award, the W.E.B. Du Bois Award for Contributions to Research on Crime and Race/Ethnicity, the Lifetime Achievement Award from the American Society of Criminology’s Division on Corrections and Sentencing, and Arizona State University’s Faculty Achievement Award for Defining-Edge Research in the Social Sciences. Dr. Spohn’s research interests include the correlates of federal and state sentencing outcomes; prosecutorial decision making; the intersections of race, ethnicity, gender, crime, and justice; and sexual assault case processing decisions. She is the author of eight books, including *How Do Judges Decide: The*

Search for Fairness and Justice in Punishment and Policing and Prosecuting Sexual Assault: Inside the Criminal Justice System. She is the author of more than 140 peer-reviewed publications. She currently is working on a National Science Foundation–funded project evaluating the impact of Arizona’s recent ban on peremptory challenges and a series of papers on the imposition of life sentences in the U.S. district courts.



**Meghan Tokash** is a trial attorney with the Human Trafficking Prosecution Unit, Criminal Section, Civil Rights Division at Department of Justice. Prior to her current position, she served as an Assistant United States Attorney at the Department of Justice. Previously, she served as a special victim prosecutor in the U.S. Army Judge Advocate General’s Corps for eight years, litigating cases related to homicide, rape, sexual assault, domestic violence, and child abuse.

She worked in the Army’s first Special Victim Unit at the Fort Hood Criminal Investigation Division Office. She deployed to Iraq as the senior trial counsel for U.S. Forces Iraq, and prosecuted special victim cases across U.S. Army Europe and U.S. Army Central Command. Ms. Tokash was an attorney-advisor for the Judicial Proceedings Panel prior to her 2017 appointment by Secretary of Defense Ash Carter to serve on the Defense Advisory Committee on the Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces. In 2021, Ms. Tokash served on the 90-day Independent Review Commission on Sexual Assault in the Military that was established by Secretary of Defense Lloyd Austin at the direction of President Biden.



**Judge Walton** was born in Donora, Pennsylvania. In 1971, he graduated from West Virginia State University, where he was a three-year letterman on the football team and played on the 1968 nationally ranked conference championship team. Judge Walton received his law degree from the American University, Washington College of Law, in 1974.

Judge Walton assumed his current position as a U.S. District Judge for the District of Columbia in 2001. He was also appointed by President George W. Bush in 2004 as the Chair of the National Prison Rape Elimination Commission, a commission created by Congress to identify methods to reduce prison rape. The U.S. Attorney General substantially adopted the Commission’s recommendations for implementation in federal prisons; other federal, state, and local officials throughout the country are considering adopting the recommendations. U.S. Supreme Court Chief Justice William Rehnquist appointed Judge Walton in 2005 to the federal judiciary’s Criminal Law Committee, on which he served until 2011. In 2007, Chief Justice John Roberts appointed Judge Walton to a seven-year term as a Judge of the U.S. Foreign Intelligence Surveillance Court, and he was subsequently appointed Presiding Judge in 2013. He completed his term on that court on May 18, 2014. Upon completion of his appointment to the Foreign Intelligence Surveillance Court, Judge Walton was appointed by Chief Justice Roberts to serve as a member of the Judicial Conference Committee on Court Administration and Case Management.

Judge Walton traveled to Russia in 1996 to instruct Russian judges on criminal law in a program funded by the U.S. Department of Justice and the American Bar Association’s Central and East European Law Initiative Reform Project. He is also an instructor in Harvard Law School’s Advocacy Workshop and a faculty member at the National Judicial College in Reno, Nevada.

## **Appendix B. Committee Professional Staff**

Mr. Louis P. Yob, Director  
Ms. Meghan Peters, Deputy Director  
Ms. Jennifer D. Campbell, Chief of Staff  
Mr. Lanny Acosta, Attorney-Advisor  
Ms. Stacy A. Boggess, Senior Paralegal  
Ms. Valerie Danyluk, Attorney-Advisor  
Ms. Rachel Ferguson, Attorney-Advisor  
Ms. Breyana N. Franklin, Communication Specialist  
Ms. Theresa A. Gallagher, Attorney-Advisor  
Ms. Nalini Gupta, Attorney-Advisor  
Ms. Amanda L. Hagy, Senior Paralegal  
Ms. Marguerite McKinney, Management & Program Analyst  
Mr. Blake A. Morris, Paralegal  
Ms. Stayce D. Rozell, Senior Paralegal  
Ms. Terri A. Saunders, Attorney-Advisor  
Ms. Rebekah Stuyvesant, Administrative Officer  
Ms. Lauren Torczynski, Attorney-Advisor

### **COMMITTEE CONSULTANTS**

Dr. Alice Falk, Technical Editor  
Ms. Laurel Prucha Moran, Graphic Designer  
Dr. William “Bill” Wells, Criminologist





## Appendix C. Acronyms and Abbreviations

CAAF	Court of Appeals for the Armed Forces
CCA	Court of Criminal Appeals
CVRA	Crime Victims' Rights Act
DAC-IPAD	Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces
FY	fiscal year
JPP	Judicial Proceedings Panel (Judicial Proceedings Since Fiscal Year 2012 Amendments Panel)
JRAP	Joint Rules of Appellate Procedure for Courts of Criminal Appeals
MCM	Manual for Courts-Martial
M.R.E.	Military Rule of Evidence
NDAA	National Defense Authorization Act
R.C.M.	Rule for Courts-Martial
UCMJ	Uniform Code of Military Justice



## Appendix D. Sources Consulted

### 1. Legislative Sources—Enacted Statutes

10 U.S.C. § 806b (Uniform Code of Military Justice)

10 U.S.C. § 830a (Uniform Code of Military Justice)

10 U.S.C. § 867 (Uniform Code of Military Justice)

18 U.S.C. § 3771 (Crime victims' rights)

National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, 127 Stat. 672 (2013).

National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, 128 Stat. 3292 (2014)

National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92, 129 Stat. 726 (2015)

National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016)

National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, 131 Stat. 1283 (2017)

Justice for Victims of Trafficking Act of 2015, Pub. L. 114-22, 129 Stat. 227 (May 29, 2015)

### 2. Judicial Decisions

#### a. Supreme Court

*Roche v. Evaporated Milk Ass'n*, 319 U.S. 21 (1943)

*Cheney v. United States Dist. Court*, 542 U.S. 367 (2004)

#### b. Court of Appeals for the Armed Forces

*United States v. Labella*, 15 M.J. 228 (C.M.A. 1983)

*Hasan v. Gross*, 71 M.J. 416 (C.A.A.F. 2012)

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

*Howell v. United States*, 75 M.J. 386 (C.A.A.F. 2016)

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

*Fink v. Y.B.*, 83 M.J. 222 (C.A.A.F. 2023)

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

*H.V.Z. v. United States*, 2024 CAAF LEXIS 410, \_\_ M.J. \_\_ (C.A.A.F. 2024)

#### c. Military Department Courts of Criminal Appeals

*J.M. v. Payton-O'Brien*, 76 M.J. 782 (N-M. Ct. Crim. App. 2017)

*United States v. McClure*, 2021 CCA LEXIS 454 \*; 2021 WL 4065525 (A. Ct. Crim. App. 2021)

*United States v. Tinsley*, 81 M.J. 836 (A. Ct. Crim. App. 2021)

### **3. Rules and Regulations**

#### **a. Executive Orders**

Manual for Courts-Martial, United States (2024)

#### **b. Judicial Rules**

Joint Rules of Appellate Procedure for Courts of Criminal Appeals

The Rules for Practice and Procedure for the Court of Appeals for the Armed Forces

### **4. Meetings and Hearings**

#### **a. Public Meetings of the DAC-IPAD**

Transcript of DAC-IPAD Public Meeting (Mar. 12, 2024)

Transcript of DAC-IPAD Public Meeting (June 11, 2024)

Transcript of DAC-IPAD Policy Subcommittee Meeting (June 11, 2024)

#### **b. Congressional Record**

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

### **5. Official Reports—DoD Advisory Committee Reports**

Judicial Proceedings Panel, *Report on Victims' Appellate Rights* (June 2017)

