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

Meeting Materials

March 14, 2023

Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD)
27th Public Meeting

March 14, 2023
Public Meeting Read-Ahead Materials

Table of Contents

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

PUBLIC MEETING AGENDA

March 14, 2023
Arlington, Virginia (Virtual)

Tuesday, March 14, 2023

1:00 p.m. – 1:05 p.m.	**Welcome and Introduction to Public Meeting**
1:05 p.m. – 2:05 p.m.	**Discussion, Deliberations, and Voting** *(60 minutes)* *5th Annual Report* *Report on Victim Impact Statements* *Study on Appellate Review*
2:05 p.m. – 3:00 p.m.	**DAC-IPAD Subcommittee: Special Projects Update** *(55 minutes)*
3:00 p.m.	**Public Meeting Adjourned**

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

FIFTH ANNUAL REPORT

MARCH 2023

CONTENTS

Executive Summary

In section 546 of the National Defense Authorization Act for Fiscal Year 2015, enacted on December 23, 2014, Congress directed the Secretary of Defense to establish the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD or Committee). Its authorizing legislation, as amended in 2019, charges the Committee to execute three tasks over a 10-year term:

1. To advise the Secretary of Defense on the investigation, prosecution, and defense of allegations of rape, forcible sodomy, sexual assault, and other sexual misconduct involving members of the Armed Forces;

2. To review, on an ongoing basis, cases involving allegations of sexual misconduct for purposes of providing advice to the Secretary of Defense; and

3. To submit an annual report to the Secretary of Defense and to the Committees on Armed Services of the Senate and the House of Representatives describing the results of its activities during the preceding year no later than March 30 of each year.

This is the fifth annual report of the DAC-IPAD. It describes the Committee's activities since January 30, 2022, when the Committee was reconstituted following a zero-based review of all Department of Defense advisory committees. Between April 2022 and March 2023, the Committee held six public meetings and numerous preparatory meetings, during which it received presentations from dozens of stakeholders, including the General Counsel of the Military Departments, the Judge Advocates General of the Military Departments, civilian prosecutors, and military justice experts and practitioners, including military trial and defense counsel, military appellate counsel, and special victims' counsel and victims' legal counsel (SVCs/VLCs). In addition, Committee members observed courts-martial involving charges of sexual offenses and attended litigation courses held by the Services.

Since its reconstitution in April 2022, the Committee has deliberated and voted on three stand-alone reports. On August 10, 2022, the Committee transmitted to the General Counsel of the Department of Defense its first stand-alone report on tour lengths and rating chain structures for SVC/VLC programs. Two stand-alone reports, one on recurring issues in military appellate litigation and the other on victim impact statements at court-martial presentencing proceedings, will be released concurrently with this fifth annual report.

As the result of a zero-based review directed by the Secretary of Defense, the Committee's operations were suspended in January 2021; the Committee therefore did not publish an annual report in March 2021 describing its activities during the prior year (April 2020–March 2021). To ensure continuity of its recommendations and reports issued to date, in addition to a description of its reports and activities since the Committee's reconstitution in April 2022, this report also includes a summary of its reports and activities from April 2020 until its suspension in January 2021.

Summary of Findings, Observations, and Recommendations

Responses to the questions posed in the Joint Explanatory Statement (JES) accompanying section 535 of the National Defense Authorization Act for Fiscal Year 2020 (FY20 NDAA) and recommendations to the Joint Service Committee on Military Justice (JSC) to amend Rule for Courts-Martial 1001(c):

JES Question 1: Are military judges interpreting R.C.M. 1001(c) too narrowly and limiting what victims may say during sentencing such that the courts are not fully informed of the impact of the crime on the victims?

DAC-IPAD Response: In the vast majority of cases, military judges do not limit a victim's right to be heard at sentencing. Of the 173 FY21 sexual offense court-martial cases reviewed involving a victim impact statement, the military judge limited a victim's statement in 20 cases (12%). In the 151 cases in which the military judge was the sentencing authority, the judge limited a victim impact statement in 13 cases (9%). In those cases in which the judge took such action, they generally did so in accordance with R.C.M. 1001(c).

The Committee notes, however, that the standard in victim impact cases—that the impact must directly relate to or arise from the crime for which the accused was convicted—is not clear and appears to be applied differently by different military judges. For example, some judges permit victims to address only their experience specific to the crime for which the accused was convicted and other judges allow a victim to address the impact of their interaction with the accused, which includes the crime and the surrounding circumstances.

The Committee has determined that this standard is too narrow and should be clarified. Adoption of the DAC-IPAD's recommendations concerning Rule for Courts-Martial 1001(c) should clarify the standard, incorporate aspects of civilian practice, and allow crime victims to more fully inform the courts about how the accused's crimes have impacted them.

JES Question 2: Are military judges appropriately permitting other witnesses to testify about the impact of the crime?

DAC-IPAD response: Military judges generally do permit individuals who have suffered harm as a result of the crimes for which the accused has been convicted—not just those who are named victims in the convicted offenses—to provide victim impact statements.

Since Congress posed this question almost three years ago in the FY20 NDAA Joint Explanatory Statement, the Service appellate courts have adopted an expansive view of who may be considered a crime victim. In addition, the Committee's FY21 court-martial case review revealed that military judges generally apply a broad definition of crime victim in determining who may provide a victim impact statement at presentencing proceedings.

Recommendations:

Recommendation 41: The Joint Service Committee on Military Justice (JSC) draft an amendment to R.C.M. 1001(c)(2)(B) adding the words "or indirectly" to the definition of victim impact, amending the section as follows:

"For purposes of this subsection, victim impact includes any financial, social, psychological, or medical impact on the crime victim directly ***or indirectly*** relating to or arising from the offense of which the accused has been found guilty."

Recommendation 42: The JSC draft an amendment to R.C.M. 1001(c)(3) by adding a sentence stating that a victim impact statement may include a recommendation of a specific sentence except in capital cases.

Recommendation 43: The JSC draft an amendment to R.C.M. 1001(c)(5)(A) allowing submission of the unsworn victim impact statement by audiotape, videotape, or other digital media, in addition to (allowing) (providing) the statement orally, in writing, or both.

Recommendation 44: The JSC draft an amendment to R.C.M. 1001(c)(5)(B) to remove the "upon good cause shown" clause, in order to be consistent with the JSC's proposed change to R.C.M. 1001(c)(5)(A).

Recommendation 45: The JSC draft an amendment to R.C.M. 1001(c)(5)(B) to remove the requirement that the victim provide a written proffer of the matters addressed in their unsworn statement to trial and defense counsel after the announcement of findings.

Introduction

I. Committee Establishment and Mission

The Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD or Committee) was established by the Secretary of Defense in February 2016 pursuant to section 546 of the National Defense Authorization Act for Fiscal Year 2015 (FY15 NDAA), as amended.[1] The statutory mission of the DAC-IPAD is to advise the Secretary of Defense on the investigation, prosecution, and defense of allegations of rape, forcible sodomy, sexual assault, and other sexual misconduct involving members of the Armed Forces.[2] To provide that advice, the Committee is directed to review, on an ongoing basis, cases involving allegations of sexual misconduct.[3]

The DAC-IPAD is required by its authorizing legislation to submit an annual report to the Secretary of Defense and to the Committees on Armed Services of the Senate and the House of Representatives, no later than March 30 of each year, describing the results of its activities.[4] This fifth annual report of the DAC-IPAD summarizes the Committee's activities from April 2020 until their suspension in January 2021 and provides an update on the Committee's current status and activities.

For the original appointments, the statute required the Secretary of Defense to select a maximum of 20 Committee members with experience in investigating, prosecuting, and defending against allegations of sexual offenses.[5] In January 2017, the Secretary of Defense appointed 16 members to the DAC-IPAD, representing a wide range of perspectives and experience related to sexual offenses both within and outside the military.[6]

In 2017, the DAC-IPAD established three subcommittees to support its mission: the Case Review Subcommittee, the Data Subcommittee, and the Policy Subcommittee. The subcommittees were each composed of three to five members of the Committee.

The terms of all 15 DAC-IPAD members expired on January 18, 2021.

---

[1] National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291 [FY15 NDAA], § 546, 128 Stat. 3292 (2014). Pursuant to the authorizing statute and the Federal Advisory Committee Act of 1972 (FACA), the Department of Defense filed the charter for the DAC-IPAD with the General Services Administration on February 18, 2016. The National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92 [FY20 NDAA], § 535, 133 Stat. 1198 (2019), amended FY15 NDAA § 546 to extend the Committee's term from 5 to 10 years.

[2] FY15 NDAA, *supra* note 1, at § 546(c)(1).

[3] *Id.* at § 546(c)(2).

[4] *Id.* at § 546(d).

[5] *Id.* at § 546(b).

[6] Committee member Dean Keith M. Harrison, Associate Dean and Professor of Law, Savannah Law School, passed away unexpectedly in 2018.

II. Zero-Based Review

On January 30, 2021, the Secretary of Defense suspended all Department of Defense (DoD) advisory committee operations, including those of the DAC-IPAD, and directed a comprehensive "zero-based review" of each committee's purpose, mission, and alignment with the Department's strategic plan.[7] During the zero-based review, advisory committees were prohibited from undertaking any committee or subcommittee work until the reappointment of such committees, subcommittees, and members was approved and the members took their oath of office.

The Committee's suspension prevented its completion of two statutorily required annual reports due by March 30, 2021, and March 30, 2022. To notify Congress of the suspension of Committee activities, on March 26, 2021, the General Counsel of the Department of Defense (DoD GC) submitted interim report letters to the chairs of the Committees on Armed Services of the Senate and the House of Representatives (SASC and HASC),[8] explaining the suspension of the DAC-IPAD's continued operations and the need to renew its members.

On July 6, 2021, following the Zero-Based Review Board's recommendations, the Secretary of Defense authorized the DAC-IPAD to resume operations once its new members were duly appointed, written terms of reference were approved, and the new members were sworn in.[9]

By the annual reporting date of March 30, 2022, the newly reappointed DAC-IPAD had not held its first meeting; therefore, on March 31, 2022, the DoD GC submitted a second interim report to Congress describing the Committee's activities during the year prior to the zero-based review and providing an update on the status of the reconstituted DAC-IPAD.[10]

[7] Memorandum from Secretary of Defense to Senior Pentagon Leadership Regarding Department of Defense Advisory Committees – Zero-Based Review (Jan. 30, 2021). The Secretary directed this review to align DoD advisory committee efforts with the Department's most pressing strategic priorities.

[8] Letters from Acting General Counsel of the Department of Defense to the Honorable Adam Smith, Chairman of the Committee on Armed Services of the House of Representatives (Mar. 26, 2021) and to the Honorable Jack Reed, Chairman of the Committee on Armed Services of the Senate (Mar. 26, 2021).

[9] Memorandum from Secretary of Defense to General Counsel of the Department of Defense Regarding Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (July 6, 2021).

[10] Letters from Acting General Counsel of the Department of Defense to the Honorable Adam Smith, Chairman of the Committee on Armed Services of the House of Representatives (Mar. 31, 2022) and to the Honorable Jack Reed, Chairman of the Committee on Armed Services of the Senate (Mar. 31, 2022); U.S. Dept. of Def., Report of the Department of Defense on the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (Mar. 2022).

III. Reconstitution of the Committee and Appointment of Members

In January 2022, the Secretary of Defense appointed 17 new members to the DAC-IPAD.[11] The newly appointed Committee members represent a broad range of perspectives and experience related to sexual assault both within and outside the military.

The Committee members' areas of expertise include civilian sexual assault forensics, civilian and military prosecution of sexual assault, civilian and military defense of sexual assault, the federal and state court system, military command, criminology, and academic disciplines and legal policy.

Ten original DAC-IPAD members were reappointed to a second four-year term, and seven distinguished new members were appointed for a first term. The members' depth and breadth of experience will be extremely valuable in developing informed, authoritative assessments of the status of the military's response to sexual offenses within its ranks and providing thoughtful, well-considered recommendations to the Secretary of Defense that consider civilian best practices and the unique nature of the military criminal justice system.

The Secretary of Defense selected Judge Karla Smith to serve as the Chair of the DAC-IPAD. The DAC-IPAD held its first public meeting on April 21, 2022, via videoconference.

IV. Establishment of Subcommittees

On September 22, 2022, the DoD GC established three subcommittees of the DAC-IPAD:

1. The Case Review Subcommittee;
2. The Policy Subcommittee; and
3. The Special Projects Subcommittee.[12]

Each subcommittee comprises members of the full Committee, and each subcommittee has its own terms of reference (ToR) defining its mission, objectives, and scope.[13]

A. Case Review Subcommittee (CRSC)

The mission of the Case Review Subcommittee as defined in its ToR is to assess and provide independent advice to the DAC-IPAD related to the investigation, prosecution, and defense of allegations of sexual misconduct involving members of the Armed Forces based on its review of cases involving such allegations.

[11] The Committee currently has 15 members. The Secretary of Defense appointed 17 members; however, one member declined the appointment. Sixteen members took the oath of office in April 2022. Due to health concerns, one member resigned in September 2022.

[12] Memorandum from DoD General Counsel to the Chair of the DAC-IPAD, DAC-IPAD Subcommittee Establishment, Sept. 24, 2022.

[13] CRSC, PSC, and SPSC Terms of Reference

The objectives and scope of the CRSC, as set forth in its ToR, are the following:

1. Assessing the strengths and weaknesses of the investigation, prosecution, and defense of allegations of sexual misconduct involving members of the Armed Forces through the review of military justice cases from investigation through final disposition, including appellate review, if applicable.
2. Assessing the differences among the Military Departments (MILDEPs) in the investigation, prosecution, and defense of allegations of sexual misconduct.
3. Identifying best practices among the MILDEPs in the investigation, prosecution, and defense of allegations of sexual misconduct.
4. Assessing other matters within the scope of the DAC-IPAD Charter and ToR as referred to the Case Review Subcommittee in writing by the Secretary of Defense, the Deputy Secretary of Defense, or the DoD GC.

Ms. Martha Bashford is the CRSC Chair, and the other CRSC members are Ms. Margaret Garvin, Ms. Jennifer Long, Dr. Jenifer Markowitz, and BGen James Schwenk, USMC (Ret.).

In a January 28, 2022, memorandum to the DAC-IPAD Staff Director, the DoD GC requested that the DAC-IPAD study appellate decisions in military sexual assault cases.[14] The DAC-IPAD assigned this task to the CRSC at its September 2022 public meeting.

B. Policy Subcommittee (PSC)

The mission of the Policy Subcommittee is to assess and provide independent advice to the DAC-IPAD related to the investigation, prosecution, and defense of sexual misconduct involving members of the Armed Forces based on its review of DoD policies, MILDEP policies, and the Uniform Code of Military Justice (UCMJ).

The objectives and scope of the PSC, as set forth in its ToR, are the following:

1. Reviewing and assessing policies promulgated by DoD and the MILDEPS, and UCMJ provisions related to the investigation, prosecution, and defense of allegations of sexual misconduct in the Armed Forces.
2. Assessing other matters within the scope of the DAC-IPAD Charter and ToR as referred to the PSC in writing by the Secretary of Defense, the Deputy Secretary of Defense, or the DoD GC.

Brigadier General James Schwenk, USMC (Ret.), is the PSC Chair, and the other PSC members are Major General Marcia Anderson, U.S. Army (Ret.), Ms. Jennifer O'Connor, Ms. Suzanne Goldberg, and DAC-IPAD Chair Judge Karla Smith.

[14] Memorandum from Caroline Krass, DoD General Counsel, to Staff Director, DAC-IPAD, *Request to Study Appellate Decisions in Military Sexual Assault Cases* (Jan. 28, 2022) [Appellate Review Memo].

C. Special Projects Subcommittee (SPSC)

The mission of the Special Projects Subcommittee is to assess and provide independent advice to the DAC-IPAD related to the investigation, prosecution, and defense of sexual misconduct involving members of the Armed Forces based on its review and analysis of existing, developing, and proposed statutory requirements, DoD and MILDEP plans and policies, and the UCMJ and Manual for Courts-Martial (MCM) rules and provisions applicable to such requirements, plans, policies, and provisions.

The objectives and scope of the SPSC, as set forth in its ToR, are the following:

1. Reviewing and assessing existing, developing, and proposed statutory requirements related to the investigation, prosecution, and defense of allegations of sexual misconduct involving members of the Armed Forces and the DoD and MILDEPs' plans and policies related to those statutory requirements, including changes to the MCM.
2. Identifying significant trends and variances among the MILDEPs in the investigation, prosecution, and defense of allegations of sexual misconduct.
3. Identifying best practices and recommending standards and criteria for a uniform system of military justice within DoD.
4. Assessing other matters within the scope of the DAC-IPAD Charter and ToR as referred to the Special Projects Subcommittee in writing by the Secretary of Defense, the Deputy Secretary of Defense, or the DoD GC.

Ms. Meghan Tokash is the SPSC Chair, and the other SPSC members are Judge Paul Grimm, Mr. A.J. Kramer, Dr. Jenifer Markowitz, Dr. Cassia Spohn, and Judge Reggie Walton.

V. Fifth Annual Report – March 2023

This is the fifth annual report of the DAC-IPAD. It describes the Committee's activities since January 30, 2022, when the Committee was reconstituted following a zero-based review of all Department of Defense advisory committees. Between April 2022 and March 2023, the Committee held six public meetings and numerous preparatory meetings, during which it received presentations from dozens of stakeholders, including the General Counsel of the Military Departments, the Judge Advocates General of the Military Services, civilian prosecutors, and military justice experts and practitioners, including military trial and defense counsel, military appellate counsel, and special victims' counsel and victims' legal counsel (SVCs/VLCs). In addition, Committee members observed courts-martial involving charges of sexual offenses and attended litigation courses held by the Services.

Since its reconstitution in April 2022, the Committee has deliberated and voted on three stand-alone reports. On August 10, 2022, the Committee transmitted to the General Counsel of the Department of Defense its first stand-alone report on tour lengths and rating chain structures for SVC/VLC programs. Two stand-alone reports, one on recurring issues in military appellate litigation and the other on victim impact statements at court-martial presentencing proceedings, will be released concurrently with this fifth annual report.

VI. Summary of the Committee's Activities: April 2020 – January 2021

Although the DoD GC provided Congress an interim report describing the DAC-IPAD's activities between April 2020 and January 2021,[15] to ensure continuity in its reporting the DAC-IPAD provides the following summaries in this statutorily required annual report.

Between April 2020 and January 2021 (when the Committee's activities were suspended by the zero-based review), the Committee held five public meetings.[16] It also deliberated on and released three stand-alone reports: one on the advisability of a guardian ad litem appointment process for child victims of an alleged sex-related offense in the military, the second on investigative case file reviews for military adult penetrative sexual offense cases closed in fiscal year 2017, and the third on racial and ethnic data relating to disparities in the investigation, prosecution, and conviction of sexual offenses in the military. These reports are summarized below.

A. Guardian ad Litem Report (June 2020)

In June 2020, the DAC-IPAD submitted its *Report on the Advisability and Feasibility of Establishing a Guardian ad Litem Appointment Process for Child Victims of an Alleged Sex-Related Offense in the Military*.[17] This report was published in response to a request from the HASC that the DAC-IPAD evaluate the advisability and feasibility of establishing a process under which a guardian ad litem may be appointed in a court-martial to represent the interests of a child victim of an alleged sex-related offense.[18]

The Committee conducted comprehensive research on civilian and military court practices and rules regarding the appointment of guardians ad litem for child victims, including extensive interviews of experts in the area of child victims' rights. The report sets forth the Committee's 42 findings and eight recommendations resulting from this research.[19] The Committee concluded that while some gaps exist in services available to child victims of sexual offenses, it is neither advisable nor necessary to implement a designated guardian ad litem program in the military, provided that the Committee's recommendations or similar proposals to rectify these gaps are approved and implemented. The Committee determined that a trained child victim advocate working in collaboration with the SVC/VLC is the best option for ensuring that a child's interests are protected in the courtroom.[20]

---

[15] Letters from Caroline Krass, DoD General Counsel, to Chairman of Senate and House Armed Services Committees (Mar. 31, 2022).

[16] *See* Appendix E for a complete listing of DAC-IPAD meetings, preparatory sessions, and presenters since April 2020.

[17] DEFENSE ADVISORY COMMITTEE ON INVESTIGATION, PROSECUTION, AND DEFENSE OF SEXUAL ASSAULT IN THE ARMED FORCES REPORT ON THE ADVISABILITY AND FEASIBILITY OF ESTABLISHING A GUARDIAN AD LITEM APPOINTMENT PROCESS FOR CHILD VICTIMS OF AN ALLEGED SEX-RELATED OFFENSE IN THE MILITARY [DAC-IPAD GAL REPORT] (June 2020), *available* at https://dacipad.whs.mil/images/Public/08-Reports/06_DACIPAD_GAL_Report_20200617_Final_Web.pdf.

[18] H.R. REP. NO. 116-120, at 124–25 (2019). While this provision from the House Report was not part of the final FY20 NDAA, the DAC-IPAD followed the DoD policy of responding to all requests made by Congress for reports.

[19] DAC-IPAD GAL REPORT, *supra* note 17, at 6–13.

[20] *Id*. at 4.

B. Report on Investigative Case File Reviews (October 2020)

In October 2020, the DAC-IPAD submitted its *Report on Investigative Case File Reviews for Military Adult Penetrative Sexual Offense Cases Closed in Fiscal Year 2017*, the culmination of a three-year project that entailed in-depth quantitative and qualitative reviews of 1,904 criminal investigative cases and related court-martial cases involving adult penetrative sexual offenses.[21]

In the comprehensive review, the DAC-IPAD (1) recorded numerous objective data points for each case; (2) subjectively assessed whether the victim's statement(s), if any, contained sufficient evidence to establish probable cause to believe that the subject of the investigation had committed a penetrative sexual offense; (3) subjectively assessed whether the initial disposition authority's decision to prefer a penetrative sexual offense charge or to take no action in the case was reasonable; and (4) for those cases resulting in preferred penetrative sexual offense charges, subjectively assessed the evidence provided for review with a focus both on whether it was sufficient to establish probable cause to believe that the accused had committed a penetrative sexual offense and on whether the materials reviewed contained sufficient admissible evidence to obtain and sustain a conviction.[22]

The October 2020 case review report sets out 47 findings, one recommendation, and nine directives for further study, including the following two key findings:

- There is not a systemic problem with an initial disposition authority's decision either to prefer a penetrative sexual offense charge or to take no action. In 94.0% (486 of 517) and 98.5% (1,316 of 1,336) of cases examined, respectively, the reviewers found those decisions to be reasonable.
- There is a systemic problem with the referral of penetrative sexual offense charges to trial by general court-martial when there is not sufficient admissible evidence to obtain and sustain a conviction. In 31.1% (73 of 235) of cases reviewed that were tried to verdict on a penetrative sexual offense charge, the evidence in the materials reviewed did not meet that threshold.[23]

In the Committee's view, the decision to refer charges to trial by general court-martial in the absence of sufficient admissible evidence to obtain and sustain a conviction has significant negative implications for the accused, the victim, and the military justice process. Accordingly, the Committee recommended that Congress amend Article 34, UCMJ, to require that the staff judge advocate advise the convening authority in writing that there is sufficient admissible

[21] DEFENSE ADVISORY COMMITTEE ON INVESTIGATION, PROSECUTION, AND DEFENSE OF SEXUAL ASSAULT IN THE ARMED FORCES REPORT ON INVESTIGATIVE CASE FILE REVIEWS FOR MILITARY ADULT PENETRATIVE SEXUAL OFFENSE CASES CLOSED IN FISCAL YEAR 2017 (Oct. 2020), *available at* https://dacipad.whs.mil/images/Public/08-Reports/08_DACIPAD_CaseReview_Report_20201019_Final_Web.pdf.

[22] *Id*. at 26–27.

[23] *Id*. at 2–4.

evidence to obtain and sustain a conviction on the charged offenses before a convening authority may refer a charge and specification to trial by general court-martial.[24]

C. Report on Racial and Ethnic Data Disparity (December 2020)

In December 2020, as required by section 540I of the National Defense Authorization Act for Fiscal Year 2020, the Committee released its *Report on Racial and Ethnic Data Relating to Disparities in the Investigation, Prosecution, and Conviction of Sexual Offenses in the Military*.[25] This important report was undertaken at a time of heightened focus on racial discrimination in the United States, including within the military justice system. Pursuant to the congressional tasking, the Committee requested, and each Military Service reported, the race and ethnicity of (1) Service members accused of a penetrative or contact sexual offense, (2) Service members against whom such charges were preferred, and (3) Service members convicted of a penetrative or contact sexual offense for all cases completed in fiscal year 2019.[26]

The Committee found that the Military Services' FY19 data responses raised more questions than they answered, owing to persistent inadequacies in race and ethnicity data collection in DoD and the Military Services. The Committee's assessment of the FY19 data for this report was further hampered by inconsistencies across the Military Services in how they reported demographic data for Service members.[27] Because the Military Services do not report race and ethnicity in standardized categories, the Committee was limited in its ability to undertake the type of comprehensive assessment that is essential to identifying possible areas of racial and ethnic discrimination in sexual offense cases. In addition, no Military Service consistently recorded the race and ethnicity of victims of a sexual offense. Civilian criminologists consider the victim's demographic information to be a critical component of any assessment of racial disparities in a criminal justice system.[28]

The report's five findings and eight recommendations for improvement focused on comprehensive data collection, consistent terminology, and holistic assessments of racial disparities.[29] The report concluded that implementation of the Committee's recommendations, along with the Article 140a, UCMJ, standards and criteria, will enhance the administration of justice in the military.

---

[24] *Id*. at 16.

[25] DEFENSE ADVISORY COMMITTEE ON INVESTIGATION, PROSECUTION, AND DEFENSE OF SEXUAL ASSAULT IN THE ARMED FORCES REPORT ON RACIAL AND ETHNIC DATA RELATING TO DISPARITIES IN THE INVESTIGATION, PROSECUTION, AND CONVICTION OF SEXUAL OFFENSES IN THE MILITARY (Dec. 2020), *available at* https://dacipad.whs.mil/images/Public/08-Reports/09_DACIPAD_RaceEthnicity_Report_20201215_Web_Final.pdf.

[26] *Id*. at 18.

[27] *Id*. at 1.

[28] *Id*. at 8.

[29] *Id*. at 5–6.

Chapter 1. Special Projects Subcommittee

I. Introduction

The National Defense Authorization Act for Fiscal Year 2022 brought momentous change to the practice of military justice[30] when Congress transferred significant prosecutorial functions in sexual offense cases from military commanders to independent judge advocates,[31] removing the supervision of these military lawyers from their traditional military chains of command and placing them under the supervision of the civilian Secretaries of the Military Departments.[32] These changes create a bifurcated military justice system: If a Service member commits an offense under the jurisdiction of the new "special trial counsel," the military prosecutor will decide—independent of the accused's chain of command—whether to send charges to a court-martial. However, if a Service member commits an offense that is not within the special trial counsel's jurisdiction, then the traditional, command-driven system for charging and referring cases to court-martial will be followed.[33]

The DAC-IPAD is studying this historic change to the military's prosecution of sexual assault offenses. In a May 10, 2022, memorandum, the DoD GC tasked the DAC-IPAD with advising the Secretary of Defense and herself on policy development, workforce structure, and implementation of best practices for the Military Departments' Offices of Special Trial Counsel (OSTCs).[34] The Committee is uniquely positioned to provide this advice regarding the OSTCs, which are intended to function much like independent district attorneys' offices.[35]

The Special Projects Subcommittee (SPSC) will lead this effort and provide findings and recommendations for consideration by the full Committee. Initially, the SPSC identified topics foundational to the structure and independence of the OSTC. In November 2022, the SPSC reviewed and provided public comment on proposed Rules for Courts-Martial implementing the authorities of the OSTC. Finally, the SPSC met with members of an inter-Service working group coordinating the organization and business rules for their respective OSTCs. The discussion addressed the law and policies applicable to the special trial counsel's exclusive authority to dispose of charges involving covered offenses, as well as their ability to maintain independence and objectivity in the exercise of prosecutorial discretion.

---

[30] National Defense Authorization Act for Fiscal Year 2022, S. 1605 [FY22 NDAA], §§ 531–539C, Pub. L. No. 117-81, 135 Stat. 1541 (Dec. 27, 2021).

[31] The OSTC will be responsible for the disposition of "covered offenses," including 10 U.S.C. §§ 917a (article 117a), 918 (article 118), 919 (article 119), 919a (article 119a), 920 (article 120), 920a (article 120a), 920b (article 120b), 920c (article 120c), 925 (article 125), 928b (article 128b), 930 (article 130), 932 (article 132), or the stand-alone offense of child pornography punishable under § 934 (article 134). [add 3 more from FY32 NDAA here]. The OSTC exercises authority in cases in which all covered offenses occurred on or after December 27, 2023.

[32] FY22 NDAA, *supra* note 30, §§ 531–32.

[33] Military Criminal Justice: Practice and Procedure, § 8–1 (2022).

[34] *See* Memorandum from Ms. Caroline Krass, General Counsel for the Department of Defense, to Judge Karla Smith, DAC-IPAD Chair, *DAC-IPAD Advice on Policy Development, Workforce Structure, and Implementation of Best Practices for the Military Departments' Offices of Special Trial Counsel* (May 10, 2022).

[35] *See Transcript of DAC-IPAD Public Meeting* 84 (April 21, 2022) (comment by Ms. Megan Tokash, Committee member) (all DAC-IPAD public meeting transcripts are available at https://dacipad.whs.mil/).

II. Subcommittee Activities

In furtherance of the SPSC's specific focus on the new OSTC as described above, the full Committee has also received information on the establishment and development of the new offices, including the following:

A. Testimony from senior officials from the Military Departments on the establishment of their OSTC at the DAC-IPAD's 23rd Public Meeting on June 22, 2022.[36]

B. Testimony from senior officials from the Military Departments on the status of their OSTC at the DAC-IPAD's 25th Public Meeting on December 7, 2022.[37]

C. The DAC-IPAD requested and received numerous documents from the Military Departments regarding the policies for establishment of the OSTC and the competency and qualification standards for personnel serving in the OSTC.

III. The Way Ahead

In 2023, the SPSC will report on the processes by which special trial counsel prefer and refer charges, with particular focus on cases in which an Article 32 preliminary hearing is held. The SPSC will assess the current disposition guidance and legal standards for referring cases to court-martial and recommend uniform policies for the exercise of prosecutorial discretion. The SPSC will incorporate the previous DAC-IPAD's extensive review of penetrative sexual offense court-martial documents and observations from its investigative case file review.[38] The SPSC intends to report its analysis and findings to the Committee in mid-2023.

Future SPSC topics of study include developing metrics for evaluating the success of the special trial counsel program. Civilian criminal justice experts emphasize the importance of a holistic assessment of these new, independent prosecutors. An evaluation of the OSTC must account for a variety of perspectives about the fairness of the process as well as case outcomes; success cannot be gauged solely by the number of convictions obtained. Ultimately, the assessment will determine whether the goals of this historic change—including enhanced confidence in the military's ability to deliver justice and maintain good order and discipline—have been achieved.

Finally, the DAC-IPAD assigned the SPSC the task of developing information in support of the Committee's statutory task to study the sharing of information contained in investigative and prosecution files with victim's counsel. The DAC-IPAD received this task in the National Defense Authorization Act for Fiscal Year 2023, and must provide its findings and recommendations by December 23, 2023.[39] The DAC-IPAD will benefit from the SPSC's ability to draw on its current focus on pretrial matters in connection with the special trial counsel to undertake the research and provide the needed context for evaluating potential legislative or administrative action considered by the DAC-IPAD.

---

[36] *See Transcript of DAC-IPAD Public Meeting* 29-130 (June 22, 2022)

[37] *See Transcript of DAC-IPAD Public Meeting* 204-297 (December 6, 2022)

[38] DAC-IPAD reports can be found at https://dacipad.whs.mil/reports.

[39] National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117–263, § 549B, 136 Stat. 2395 (2022).

Chapter 2. Case Review Subcommittee

I. Introduction

After the Case Review Subcommittee (CRSC) was formed, the DAC-IPAD assigned the Appellate Review Study to it.[40] Over the course of several public meetings in 2022, the full Committee developed the parameters for the Appellate Review Study.[41] After reviewing appellate cases, analyzing the court decisions, and hearing public testimony, the CRSC drafted a stand-alone report for the full Committee's consideration and approval to be issued concurrently with this report.[42]

In December, CRSC Chair Martha Bashford made a motion, approved by the DAC-IPAD, that the CRSC study court-martial panel selection information and collect data on how panels are constituted from the pool of eligible personal, so that the DAC-IPAD can recommend appropriate changes to the military system.[43]To that end, the CRSC developed a strategic plan to analyze the race, ethnicity, and gender of military panel members, victims, the accused, trial and military defense counsel, and judges at courts-martial for sexual assault offenses.

II. Subcommittee Activities

As the CRSC Appellate Review Study progressed, the full Committee was briefed on court decisions challenging the convening authority's composition of an accused's court-martial panel,[44] including the pending decision in *United States v. Jeter*.[45] The DAC-IPAD expressed a strong interest in studying the court-martial member selection process, including how race and gender factor into the selection of panel members.[46]

At its September 2022 public meeting, the DAC-IPAD heard testimony from a subject-matter expert on the military panel selection process, including the statutory authority set forth in Article 25(e)(2), UCMJ, that provides that the convening authority "shall detail as members thereof such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experiences, length of service, and judicial temperament."[47]

---

[40] *See supra* note 14.

[41] The DAC-IPAD discussed and deliberated on the Appellate Project in June, September, and December 2022.

[42] [Stand-alone report title and link]

[43] *See Transcript of DAC-IPAD Public Meeting* 30–31 (Dec. 7, 2022) (comment of Ms. Martha Bashford, Committee member).

[44] These cases are addressed in depth in the Appellate Project Report.

[45] *United States v. Jeter,* 82 M.J. 355 (CAAF 2022) (considering whether a convening authority violated the appellant's equal protection rights when, over defense objection, he convened an all-white panel using a racially nonneutral members selection process and provided no explanation for the monochromatic result beyond a naked affirmation of good faith).

[46] *See generally Transcript of DAC-IPAD Public Meeting* (Sept. 21, 2022).

[47] *See also* R.C.M. 503(a)(1)(A) (providing that the convening authority shall detail qualified persons as members for courts-martial); R.C.M. 502(a)(1) (requiring that the "members detailed to a court-martial shall be those persons who in the opinion of the convening authority are best qualified for the duty by reason of their age, education, training, experience, length of service, and judicial temperament").

The expert stated that military panel selection criteria do not explicitly take into account race or gender, noting there is a human element in the convening authority's selection of eligible panel members.[48] The testimony suggested it would be difficult to show that a convening authority's selection of a panel was improper because of discrimination based on race or gender.[49]

At a later subcommittee meeting, the CRSC heard similar testimony on the human element in panel selection from a civilian defense attorney, who said that the convening authority "selects these individuals based on familiarity and trust rather than a specific reference to judicial temperament, which there is no way that a commanding general could know based on job position."[50] In addition, during public comment sessions of the DAC-IPAD's September and December 2022 meetings, the Committee heard from Black and Hispanic Service members convicted of sexual misconduct by all-white panels, or who chose trial by military judge alone because they were uncomfortable with the all-white panel detailed to their court-martial.[51]

After listening to the September 2022 testimony and testimony from staff judge advocates (SJAs) on the criteria used to select panel members, the Committee members raised questions about military panel demographics.[52] The full Committee focused on military panel composition,[53] and especially on how to change the composition procedurally and factually.[54] The Committee expressed concern about the public perception that women and minorities are underrepresented on court-martial panels, noting that this perception undermines the credibility of the military justice system.[55] Committee members also asked whether women are

[48] *See Transcript of DAC-IPAD Public Meeting* 44 (Sept. 21, 2022) (Major Steven Dray, professor of sentencing, post-trial, and appeals at The Judge Advocate Legal Center and School in Charlottesville, VA).

[49] *Id.* at 69 (In response to an inquiry of how an accused could show that minorities were being purposefully excluded Major Dray stated that "you'd have to be privy to probably some kind of, some of the conversations between the SJA and the command if you could get that, if anybody would admit it or subordinate commanders, very difficult.").

[50] *See Transcript of CRSC Meeting* 39 (Jan. 26, 2023) (Margaret Kurz, Owens and Kurz LLC).

[51] *Transcript of DAC-IPAD Public Meeting* 346–83 (Sept. 21, 2022). *See also Transcript of the DAC-IPAD Public Meeting* 76–77 (Sept. 12, 2022) (comment of Mr. William E. Cassara, Committee member: "The very first court-martial I ever tried in 1990, it was an African American accused, and there was not a single African American on the panel. The last case I tried in 2018, '16, the first one was an Army case, this last one was an Air Force case. I had an African American accused, and there was not a single African American on the panel. I would venture to say without a scientific analysis or any data, that in my empirical experience the overwhelming majority of my cases fell into that category.").

[52] *See Transcript of DAC-IPAD Public Meeting* 27 (Dec. 7, 2022) (comment of the Honorable Reggie Walton, Committee member, on the racial makeup of military panels: "I think the change needs to occur a lot sooner [than gathering data] because I think we're experiencing it now and I think it's detrimental to morale to have people feeling that they're being railroaded through a system that doesn't accurately or appropriately reflect their racial makeup.").

[53] *Transcript of the DAC-IPAD Public Meeting* 58 (Sept. 21, 2022) (comment of Ms. Jennifer O'Connor, Committee member: "Could you just talk a little bit more about is there—is everybody, you know, put on a list and it's randomly selected based on who's available? I am curious about how the panels are composed.")

[54] *Id.* at 67 (comment of Judge Karla Smith, Committee Chair: "If it's a scenario of an all white jury or panel, can an accused challenge that panel? And when the general is looking at the list, is there any consideration to having women, having minorities, et cetera?").

[55] *Transcript of DAC-IPAD Public Meeting* 63–64, 76–-78, 94 (Dec. 6, 2022).

disproportionately excluded from panels because of their experiences as victims of sexual assault or their additional duties as victim advocates.[56]

At a January 2023 CRSC meeting, two civilian defense counsel shared their perspectives on military panel selection practices,[57] raising concerns about the lack of transparency within the nomination process, although both observed that panel members took their duties seriously.[58] One of them compared the process to a tip of the iceberg: "By the time you get to the venire and you are in the courtroom, it is that top part of the iceberg, but there is a whole selection process that occurred . . . invisibly." He explained that any irregularities in the selection could never be discovered, because the conversations between the convening authority and the SJA regarding the selections are not put in writing.[59] If counsel were privy to how the venire was selected, he said, they could raise any issues to the military judge before trial and preserve the issue for appeal, increasing overall efficiency.[60] The counsel noted that there are often delays in receiving questionnaires or even knowing who the panel members are until the day of trial, resulting in delays.[61]

III. The Way Ahead

In 2023, the CRSC will study the issues of race, ethnicity, and gender in panel selection. On the basis of testimony already heard, the Committee believes that there is at least a public perception that military panels are not diverse and that a perception of conscious or unconscious bias may be introduced by the convening authority's ability to handpick the panel. Further, the Committee recognizes that the nomination process is not transparent and that if discrepancies exist in how the Article 25 criteria are applied, such deviations would be nearly impossible to successfully challenge.

Research has shown that diverse juries have broader deliberations.[62] The CRSC will collect demographic characteristics of panel members in courts-martial as well as the demographics of both the victims and accused. The study will include any case in which a sexual offense under

[56] *Id.* at 94 (comment of Ms. Suzanne Goldberg, Committee member: "And so, to the extent it's a common practice that it is assumed that someone who has been trained as a victims counsel cannot deliberate fairly as a panel member, that sort of amplifies or exacerbates the other issue, which is that more women will be excluded from panels because more women will report having experienced sexual assault.").

[57] Brian Pristera, Daniel and Conway Associates, and Margaret Kurz, Owens and Kurz LLC.

[58] *See Transcript of CRSC Meeting* 51–53 (Jan. 26, 2023)

[59] *Id.* at 40.

[60] *Id.* at 96 (testimony of Mr. Pristera: "And so, I circle that back around to my discovery ask, which I actually think is the most important change that we could make here. Regardless of what the *Jeter* court says for the decision on venire selection, and even regardless of a randomization, the imposition of a randomizer, this [the nomination process] has to be crystal clear and presented to the defense in a timely manner for the defense to be able to raise any issues it has or waive them before trial, and that would, in my opinion, increase the fairness to the accused and increase the efficiency of the process with panel selection issues[.]").

[61] *Id.* at 97.

[62] Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. OF PERS. AND SOC. PSYCH. 597, 606 (2006) ("Racial composition also had clear effects on deliberation content, supporting the prediction that diversity would lead to broader information exchange.").

Articles 120, 120b, or 120c, UCMJ, was referred to a general court-martial and a panel was seated in fiscal years 2021 and 2022.[63]

For this initial study, the CRSC intends to review the race, ethnicity, grade, age, and gender of members selected to serve on courts-martial and those detailed by the convening authority. After compiling and analyzing these data, the Committee will be able to describe panel composition in a number of ways, such as

- The proportion of panels that contain only white Service members;
- The proportion of panels that contain one, and only one, Hispanic Service member; and
- The proportion of panels that contain more than 50% Black Service members.

If feasible, the CRSC intends to collect demographic data on the victims and accused in these courts-martial to determine whether there are correlations between a panel's composition and the demographic characteristics of the victims and accused. In addition, the study will collect demographic information on judges and on trial and military defense counsel in each court-martial reviewed.

The CRSC is not aware of any other study, government or otherwise, that has compiled data on the race and gender of military panels. Data on jury pools are also scarce for civilian juries.[64] The initial phase of this study will focus on discovering the demographic makeup of courts-martial. These data will enable the Committee to determine whether perceptions that military panels are homogenous are accurate. The data results will also help inform policy recommendations on the nomination process.

After completing the panel composition study, the CRSC will begin assessing case attrition as well as court-martial outcomes in sexual assault cases. By studying case outcomes, the CRSC will attempt to discover why conviction rates in sexual assault cases are so much lower than those for other offenses.[65]

[63] Depending on the number of cases found for FY21 and FY22, the CRSC may also review cases under Article 120c, UCMJ.

[64] Mary R. Rose, Raul S. Casarez, and Carmen M. Gutierrez, *Jury Pool Underrepresentation in the Modern Era: Evidence from Federal Courts*, 15 J. EMPIRICAL LEGAL STUD. 378, 379 (2018) ("Remarkably, in the current legal and social science literature, we lack quality answers to even the most basic social science questions about jury pools: How often do disparities exist and how large are they? Are disparities larger for some groups than for others? How often are disparities likely to be deemed 'not fair and reasonable' under any one of the available legal tests of underrepresentation?").

[65] The DAC-IPAD staff reviewed court-martial documents and found that in fiscal years 2018–2020, not a single Service had more than a 50% conviction rate in adult penetrative sexual assault cases.

Chapter 3. Policy Subcommittee

I. Introduction

In the Joint Explanatory Statement (JES) accompanying section 535 of the FY20 NDAA, Congress requested that the DAC-IPAD study two issues: victim impact statements at presentencing proceedings and alternative justice programs.[66]

The DAC-IPAD received some initial information on these issues in November 2020;[67] however, as noted earlier in this report, the DAC-IPAD was suspended in January 2021. After its reconstitution, the DAC-IPAD assigned the victim impact statement and alternative justice projects to the Policy Subcommittee (PSC) at its June 2022 public meeting.[68] The PSC reported its findings and recommendations regarding victim impact statements to the DAC-IPAD at its December 2022 public meeting, and the DAC-IPAD adopted five proposed recommendations.[69]

II. Subcommittee Activities

The DAC-IPAD began studying the issue of victim impact statements in June 2022 and issued its *Report on Victim Impact Statements at Courts-Martial Presentencing Proceedings* (VIS Report) in March 2023.[70] The VIS Report responded to the following questions posed by Congress in the FY20 JES:

- Are military judges interpreting R.C.M. 1001(c) too narrowly and limiting what victims may say during sentencing such that the courts are not fully informed of the impact of the crime on the victims?
- Are military judges appropriately permitting other witnesses to testify about the impact of the crime?[71]

To respond to these questions, the Committee reviewed records of trial from court-martial cases tried in FY21 involving victim impact statements; spoke to Service victims' counsel program managers, Service trial defense organization chiefs, an attorney who represents victims in military and civilian court proceedings, former military judges, and members of Survivors United—a victim advocacy group that initially brought these issues to the attention of Congress; and reviewed federal and state laws and rules regarding victim impact statements.[72]

---

[66] The JES accompanies Sec. 535. Extension of Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces of the FY20 NDAA, *supra* note 1.

[67] *Transcript of DAC-IPAD Public Meeting* 163 (Nov. 6, 2020).

[68] *Transcript of DAC-IPAD Public Meeting* 157 (June 22, 2022).

[69] *See Transcript of DAC-IPAD Public Meeting* (Dec. 7, 2022).

[70] The VIS Report can be found at https://dacipad.whs.mil/reports.

[71] *See supra* note 70.

[72] *See Transcript of DAC-IPAD Public Meeting* 8 (Feb. 14, 2020); *Transcript of DAC-IPAD Public Meeting* 94, 126 (Dec. 6, 2022).

The Committee noted that in the three years since Congress requested that the DAC-IPAD review this issue, the procedures for implementing victim impact statements have matured, the appellate courts further defined and clarified the rules governing these statements, and Congress enacted an important change to court-martial sentencing that requires military judges to serve as the sentencing authority in all special and general courts-martial, except in capital cases.[73]

At the conclusion of its review, the Committee determined that it is the R.C.M. 1001(c) standards, not the decisions of military judges, that inappropriately limit victim impact statements. The Committee further concluded that military judges generally do permit individuals who have suffered harm resulting from the crimes for which the accused has been convicted—not just those who are named victims in the convicted offenses—to provide victim impact statements.

In its report on victim impact statements, the Committee made five recommendations to amend R.C.M. 1001(c) to provide victims wider latitude in their impact statements. In December 2022, the Committee provided these recommendations in a public comment to the Joint Service Committee on Military Justice requesting the JSC seek to amend R.C.M. 1001(c).[74] The Committee recommended amending the definition of victim impact to provide a broader standard; allowing the victim to make a specific sentence recommendation in noncapital cases; allowing submission of an unsworn victim impact statement by audiotape, videotape, or other electronic means; allowing the victims' counsel to deliver the victim impact statement without having to show good cause; and removing the requirement that the victim provide a proffer of their impact statement prior to delivery.[75]

The Committee concluded that R.C.M. 1001(c) should be broadened to allow crime victims to exercise their right of allocution without unnecessary limitation. The Committee members determined that with military judges soon to be serving as the sentencing authority, there is no reason that military practice in this area should confine the victim's right to be heard more strictly than does the practice in civilian jurisdictions.

III. The Way Ahead

A. Restorative Justice Programs

In the FY20 NDAA JES, Congress requested that the DAC-IPAD review "whether other justice programs (e.g., restorative justice programs, mediation) could be employed or modified to assist the victim of an alleged sexual assault or the alleged offender, particularly in cases in which the evidence in the victim's case has been determined not to be sufficient to take judicial, non-judicial, or administrative action against the perpetrator of the alleged offense."[76]

---

[73] This provision takes effect for cases in which the charged offenses are committed on or after Dec. 27, 2023. FY22 NDAA, *supra* note 1, § 539E.

[74] *See* DAC-IPAD public comment to the Joint Service Committee on Military Justice at Appendix xx.

[75] *See* DAC-IPAD Recommendations 41–45 in the Summary of Findings, Observations, and Recommendations, above.

[76] *See supra* note 73.

On February 26, 2021—while the DAC-IPAD was suspended as part of the zero-based review—the Secretary of Defense established the Independent Review Commission on Sexual Assault in the Military (IRC) and directed the IRC to conduct a 90-day independent assessment of the military's treatment of sexual assault and sexual harassment.[77] The IRC made numerous recommendations for improvements to the systems used to treat and respond to reports of sexual assault, among them that the DAC-IPAD "study the methods our Allies have used to make amends to survivors, including restorative engagement to acknowledge harm and potential victim compensation."[78]

In a September 2021 memo, the Secretary of Defense approved a road map for implementing the IRC's recommendations, including IRC Recommendation 4.3 e on restorative engagement programs, with an estimated completion date of fiscal year 2027.[79] The Secretary amended this recommendation to assign implementation responsibility to DoD, rather than the DAC-IPAD.

The DAC-IPAD intends to study the restorative engagement programs offered by our allies, as noted in the IRC report, and issue a report in the coming year as a means of offering the Committee's guidance to DoD as it develops a restorative engagement program.

B. Article 25, UCMJ, Panel Selection

In 2023, the PSC will conduct a comprehensive study to review and assess the criteria and processes used to nominate and select qualified members for detail to courts-martial, as well as to identify best practices for reforming the member selection system, including random selection.[80] This study will be coordinated with the related CRSC study on the demographic characteristics of panel members.[81] The results of both of these studies will inform DAC-IPAD recommendations for reforming the system for selecting court-martial members.

The PSC study will include issues identified by the DAC-IPAD concerning both the Article 25(e)(2), UCMJ, court-martial member selection criteria and the processes used by the Services

[77] This review began March 24, 2021 and concluded with the release of the IRC's report in July 2021. *See* INDEPENDENT REVIEW COMMISSION ON SEXUAL ASSAULT IN THE MILITARY STUDY, *Hard Truths and the Duty to Change: Recommendations from the Independent Review Commission on Sexual Assault in the Military* (July 2021) [IRC Report], *available at* https://media.defense.gov/2021/Jul/02/2002755437/-1/-1/0/IRC-FULL-REPORT-FINAL-1923-7-1-21.PDF/IRC-FULL-REPORT-FINAL-1923-7-1-21.PDF.

[78] IRC Report, *supra* note 77, IRC Recommendation 4.3 e.

[79] U.S. Dep't. of Def., Memorandum from the Secretary of Defense on Commencing DoD Actions and Implementation to Address Sexual Assault and Sexual Harassment in the Military (Sept. 22, 2021).

[80] *Transcript of DAC-IPAD Meeting* 163-164 (February 22, 2023) (the DAC-IPAD assigned the PSC to study court-martial member selection criteria and processes).

[81] *See supra* at pp. 19–20 (describing the CRSC study on panel member demographics).

to facilitate that selection.[82] Those issues include poorly defined selection criteria, subjective criteria, cognitive bias, lack of panel diversity, and the lack of transparency.[83]

The PSC study will also consider the implications of recent legislation on member selection criteria and processes. Beginning in December 2023, panel member duties in non-capital cases will no longer include determining an appropriate sentence; instead, their duties will be limited to determining findings.[84] Beginning in December 2024, an amendment to Article 25(e), UCMJ, will require convening authorities to detail members using randomized selection processes prescribed by the President, rather than the current processes by which specific Service members are intentionally selected for duty.[85]

[82] *Transcript of DAC-IPAD Meeting* 12–94 (Dec. 21, 2022) (describing the criteria and processes used by the Services to select court-martial members and identifying issues); Article 25(e)(2), UCMJ (the convening authority "shall detail as members thereof such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experiences, length of service, and judicial temperament.").

[83] *Transcript of DAC-IPAD Meeting* 355–56, 368, 381 (Sept. 21, 2022) (noting the lack of panel diversity); *Transcript of DAC-IPAD Meeting* 12–94 (Dec. 21, 2022) (describing the criteria and processes used by the Services to select court-martial members and identifying issues). *See also supra* at pp. 17–19 (noting panel member selection issues identified by the Committee).

[84] FY22 NDAA, *supra* note 30, § 539E.

[85] FY23 NDAA, *supra* note 39, § 543 (requiring randomized selection, to the maximum extent practicable, under regulations prescribed by the President); *Transcript of DAC-IPAD Public Meeting* 41–51 (Dec. 21, 2022) (describing the current selection processes as generally intentional rather than random).

Chapter 4. Report on Tour Lengths and Rating Chain Structure for Services' Special Victims' Counsel / Victims' Legal Counsel (SVC/VLC) Programs

I. Introduction

In October 2021, the DoD GC requested that the DAC-IPAD study and report on the issue of tour lengths of SVCs/VLCs, assess whether it is practical to adopt a minimum assignment length (with appropriate exceptions for operational concerns), and, if practical to adopt a minimum assignment length, recommend what the minimum should be.[86]

In November 2021, in conjunction with the minimum tour length tasking, the DoD GC asked the DAC-IPAD to study and report on the rating chains of Army SVCs, including

- An assessment of the rating chain for Army SVC officer evaluation reports.
- A comparison of that rating chain with those used in the other Military Services' SVC/VLC programs.
- An evaluation of whether the rating chain for Army SVCs creates an actual or apparent limitation on those SVCs' independence or ability to zealously represent their clients.
- Any recommendations for change based on the study's findings.[87]

In response to the DoD GC's request, during the period the DAC-IPAD was suspended due to the zero-based review the staff completed a draft report. The staff's study and draft report was based on a comprehensive review of detailed information provided by the Military Services in addition to literature, statutes, regulations, agency guidance, and reports relevant to SVC/VLC programs, as well as extensive interviews of SVC/VLC program managers, current and former SVCs/VLCs, victims represented by SVCs/VLCs, and civilian victim advocates who represent military sexual assault victims and work with SVCs/VLCs.

In April 2022, the DoD GC asked the DAC-IPAD to review the staff study and draft report on SVC/VLC tour lengths and Army SVC supervisory rating chains.[88]

II. Executive Summary

The DAC-IPAD submitted its *Report on Tour Lengths and Rating Chain Structure for Services' Special Victims' Counsel / Victims' Legal Counsel (SVC/VLC) Programs* in August 2022.[89]

SVC/VLC programs in the Military Services provide advice, critical protections, and advocacy for victims throughout the military justice process. The programs—and the dedicated judge

---

[86] *See* Memorandum from Caroline Krass, DoD General Counsel, to Staff Director, DAC-IPAD, *Request to Study the Tour Lengths of Special Victims' Counsel/Victims' Legal Counsel* (Oct. 5, 2021) [Tour Length Memo], *available at* Appendix A. See *infra* notes 7-10 and accompanying text for status of DAC-IPAD during this time period.

[87] *See* Memorandum from Caroline Krass, DoD General Counsel, to Staff Director, DAC-IPAD, *Request to Study Rating Chain of Army Special Victims' Counsel* (Nov. 2, 2021) [Rating Chain Memo], *available at* Appendix B.

[88] *See* Memorandum from Caroline Krass, DoD General Counsel, to Chair, DAC-IPAD, *Request to Review Report on Tour Lengths and Rating Chain Structure for Services' Special Victims' Counsel/Victims' Legal Counsel (SVC/VLC) Programs* (Apr. 21, 2022) [Request for Review Memo], *available at* Appendix C.

[89] The full report can be found at https://dacipad.whs.mil/reports.

advocates who implement them—are at the forefront of the Department of Defense's delivery of legal services to victims. Since the formal inception of the programs in 2013, SVCs/VLCs have represented more than 30,000 clients across all of the Military Services.

Over the past decade, the SVC/VLC programs have grown and expanded. While the Services have continually adapted and improved these programs to meet the needs of victims, two aspects of the programs have come under recent scrutiny: (1) the issue of SVC/VLC tour lengths, and whether it is practical to adopt a minimum assignment length, and (2) whether the Army should adopt an independent supervisory rating structure for Army SVCs outside of the Office of the Staff Judge Advocate (OSJA) and local command, thereby aligning Army practice with the SVC/VLC rating structure in the other Military Services.

The SVC/VLC report includes the results of a comprehensive review of the Services' SVC/VLC programs, authorities, agency guidance, and reports relevant to these programs. In addition, the study included 60 interviews with current and former SVCs/VLCs, victims represented by SVCs/VLCs, SVC/VLC program managers, and civilian victim advocates who represent military victims of sexual assault.

III. Findings and Recommendations

The SVC/VLC report finds that longer tours for SVCs/VLCs better serve victims, minimize delay and inefficiencies in the military justice process, and enable judge advocates to develop the skills and expertise necessary to effectively advocate for their clients. This report also finds that the current Army rating structure adversely affects the independence and zealous advocacy of Army SVCs.

On the basis of those findings and the comprehensive review, the DAC-IPAD recommends:

(1) An 18-month minimum assignment length for SVCs/VLCs serving in their first tour as a judge advocate, and a 24-month minimum for all other SVCs/VLCs, with appropriate exceptions for personal or operational reasons; and

(2) The establishment of an independent supervisory rating structure for Army SVCs outside of the OSJA and local command.

Chapter 5. Member Observations of Courts-Martial and Advanced Litigation Training

I. Court-Martial Observations

At its June 2022 public meeting, the DAC-IPAD approved a program for its members to attend and observe courts-martial involving charges of sexual offenses,[90] with a threefold purpose of (1) educating members on current courts-martial practice, (2) highlighting practice areas affected by recent or pending changes, and (3) identifying issues that may warrant further review.

Two former DAC-IPAD members and four current DAC-IPAD members attended a total of six courts-martial in their official DAC-IPAD capacity.[91] Members record their observations on topics including motion and objection practice, voir dire, expert and witness testimony, evidence, sentencing proceedings, and the performance of the trial counsel, defense counsel, SVC/VLC, and military judge.[92] Members share their observations during DAC-IPAD public meetings for discussion by the full Committee.

II. Advanced Litigation Courses

Following the June 2022 public meeting and testimony on the establishment of the Offices of Special Trial Counsel (OSTCs), the Air Force and the Army invited Committee members to attend advanced litigation training courses.[93] DAC-IPAD members attended an Air Force litigation course in August 2022 and an Army litigation course in September 2022.[94]

The Air Force advanced sexual assault litigation course was a joint training event attended by prosecutors, defense counsel, and victims' counsel. This training was developed for experienced litigators, and the trial counsel attending the course had been selected to be part of the OSTC. The training covered voir dire, preparation and presentation of expert and witness testimony, and argument in sexual assault and special victim cases. The instructors consisted of Air Force Judge Advocate General's school staff and experienced counsel from the field.[95]

The Army sexual assault trial advocacy course was limited to prosecutors, with approximately half projected to be assigned to the OSTC.[96] The training consisted of lectures and small group

---

[90] *Transcript of DAC-IPAD Public Meeting* 202–4 (June 22, 2022).

[91] Former members Ms. Kathleen Cannon attended a Marine Corps court-martial in January 2020, and Mr. James Markey attended a Marine Corps court-martial in November 2019 and an Army court-martial in January 2020. Dr. Cassia Spohn attended a Marine Corps court-martial in November 2019. Ms. Martha Bashford, Mr. A. J. Kramer, and MG (R) Marcia Anderson attended courts-martial from June 2022 through January 2023. In addition, several DAC-IPAD members have significant exposure to recent courts-martial practice in their personal capacity.

[92] Members record their observations on a form without attribution to any individual by name.

[93] *Transcript of DAC-IPAD Public Meeting* 7 (Sept. 21, 2022).

[94] *Id*. at 71, 74. The Air Force training was attended by Ms. Bashford, Ms. Suzanne Goldberg, and Dr. Spohn. Ms. Bashford also attended the Army training program.

[95] *Id*. at 71–73.

[96] *Id*. at 74–75. This course is being redesigned into a three-week Special Trial Counsel certification course with the first training scheduled for June 2023.

practical exercises covering motion practice, corroborating evidence, voir dire, opening statements, closing and rebuttal arguments, expert testimony, and direct and cross-examinations. The lectures were presented by military and civilian experts, with the civilian forensic psychologist and forensic biologist remaining to participate in the practical exercises and to provide feedback to the students. The practical exercise evaluators consisted of both experienced field-grade litigators and civilian highly qualified sexual assault experts, the latter from the Trial Counsel Assistance Program.[97]

Members who attended the litigation courses reported their observations to the full Committee at the September 2022 public meeting. Their observations covered the quality of the teaching and instructor feedback, the quality of the breakout sessions and group practical exercises, and the efficacy of joint training.

III. Conclusion

Committee members will continue to attend sexual offense courts-martial across the Military Services and report their observations to the full Committee. Committee members will also continue to monitor training as they review the OSTC implementation plans.

[97] *Id*. at 75–76.

Appendixes

Report on Victim Impact Statements at Courts-Martial Presentencing Proceedings

CONTENTS

APPENDIXES

Executive Summary

In the Joint Explanatory Statement (JES) accompanying Section 535 of the National Defense Authorization Act for Fiscal Year 2020 (FY20 NDAA), Congress expressed concern that military judges are interpreting Rule for Courts-Martial (R.C.M.) 1001(c) too narrowly and limiting what victims may say during sentencing such that the courts are not fully informed of the impact of the crime on the victims. Congress requested the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD or Committee) assess whether military judges are appropriately permitting victims to be heard at sentencing and whether military judges are appropriately permitting other witnesses to testify about the impact of the crime.

To respond to these questions, Committee members and staff reviewed records of trial from courts-martial cases tried in FY21 involving victim impact statements; spoke to Service victims' counsel program managers, Service trial defense chiefs, an attorney who represents victims in military and civilian court proceedings, former military judges, and members of Survivors United—a victim advocacy group that initially brought these issues to the attention of Congress; and reviewed federal and state laws and rules regarding victim impact statements.

The Committee noted that in the three years since Congress requested that the DAC-IPAD review this issue, the procedures for implementing victim impact statements have matured, the appellate courts further defined and clarified the rules governing these statements, and Congress enacted an important change to courts-martial sentencing that requires military judges to serve as the sentencing authority in all special and general courts-martial, except in capital cases.

At the conclusion of its review, the Committee determined that it is the R.C.M. 1001(c) standards, not the decisions of military judges, that inappropriately limit victim impact statements. The Committee further concluded that military judges generally do permit individuals who have suffered harm resulting from the crimes for which the accused has been convicted—not just those who are named victims in the convicted offenses—to provide victim impact statements.

The Committee makes five recommendations to amend R.C.M. 1001(c) to provide victims wider latitude in their impact statements. The Committee recommended amending the definition of victim impact to provide a broader standard; allowing the victim to make a specific sentence recommendation in noncapital cases; allowing submission of an unsworn victim impact statement by audiotape, videotape, or other electronic means; allowing the victims' counsel to deliver the victim impact statement without having to show good cause; and removing the requirement that the victim provide a proffer of their impact statement prior to delivery.

The Committee concluded that R.C.M. 1001(c) should be broadened to allow crime victims to exercise their right of allocution without unnecessary limitation. The Committee members determined that with military judges soon to be serving as the sentencing authority, there is no reason that military practice in this area should confine the victim's right to be heard more strictly than does the practice in civilian jurisdictions.

Reponses and Recommendations

Responses to the questions posed in the Joint Explanatory Statement (JES) accompanying section 535 of the National Defense Authorization Act for Fiscal Year 2020 (FY20 NDAA) and recommendations to the Joint Service Committee on Military Justice (JSC) to amend Rule for Courts-Martial 1001(c):

JES Question 1: Are military judges interpreting R.C.M. 1001(c) too narrowly and limiting what victims may say during sentencing such that the courts are not fully informed of the impact of the crime on the victims?

DAC-IPAD Response: In the vast majority of cases, military judges do not limit a victim's right to be heard at sentencing. Of the 173 FY21 sexual offense courts-martial cases reviewed involving a victim impact statement, the military judge limited a victim's statement in 20 (12%) cases. In the 151 cases in which the military judge was the sentencing authority, the judge limited a victim impact statement in 13 (9%) cases. In those cases in which the judge took such action, they generally did so in accordance with R.C.M. 1001(c).

The Committee notes, however, that the standard in victim impact cases—that the impact must directly relate to or arise from the crime for which the accused was convicted—is not clear and appears to be applied differently by different military judges. For example, some judges permit victims to address only their experience specific to the crime for which the accused was convicted and other judges allow a victim to address the impact of their interaction with the accused, which includes the crime and the surrounding circumstances.

The Committee has determined that this standard is too narrow and should be clarified. Adoption of the DAC-IPAD's recommendations concerning Rule for Courts-Martial 1001(c) should clarify the standard, incorporate aspects of civilian practice, and allow crime victims to more fully inform the courts about how the accused's crimes have impacted them.

JES Question 2: Are military judges appropriately permitting other witnesses to testify about the impact of the crime?

DAC-IPAD response: Military judges generally do permit individuals who have suffered harm as a result of the crimes for which the accused has been convicted—not just those who are named victims in the convicted offenses—to provide victim impact statements.

Since Congress posed this question in the FY20 NDAA Joint Explanatory Statement almost three years ago, the Service appellate courts have adopted an expansive view of who may be considered a crime victim. In addition, the Committee's FY21 courts-martial case review revealed that military judges generally apply a broad definition of crime victim in determining who may provide a victim impact statement at presentencing proceedings.

Recommendations:

Recommendation 41: The Joint Service Committee on Military Justice (JSC) draft an amendment to R.C.M. 1001(c)(2)(B) adding the words "or indirectly" to the definition of victim impact, amending the section as follows:

"For purposes of this subsection, victim impact includes any financial, social, psychological, or medical impact on the crime victim directly ***or indirectly*** relating to or arising from the offense of which the accused has been found guilty."

Recommendation 42: The JSC draft an amendment to R.C.M. 1001(c)(3) by adding a sentence stating that a victim impact statement may include a recommendation of a specific sentence except in capital cases.

Recommendation 43: The JSC draft an amendment to R.C.M. 1001(c)(5)(A) allowing submission of the unsworn victim impact statement by audiotape, videotape, or other digital media, in addition to (allowing) (providing) the statement orally, in writing, or both.

Recommendation 44: The JSC draft an amendment to R.C.M. 1001(c)(5)(B) to remove the "upon good cause shown" clause to be consistent with the JSC's proposed change to R.C.M. 1001(c)(5)(A).

Recommendation 45: The JSC draft an amendment to R.C.M. 1001(c)(5)(B) to remove the requirement that the victim provide a written proffer of the matters addressed in their unsworn statement to trial and defense counsel after the announcement of findings.

I. Introduction and Background

A. Introduction.

In the Joint Explanatory Statement (JES) accompanying section 535 of the National Defense Authorization Act for Fiscal Year 2020 (FY20 NDAA), Congress requested that the DAC-IPAD study the issue of victim impact statements at sentencing. The relevant JES provision states:

> [T]he conferees recognize the importance of providing survivors of sexual assault an opportunity to provide a full and complete description of the impact of the assault on the survivor during court-martial sentencing hearings related to the offense. The conferees are concerned by reports that some military judges have interpreted Rule for Courts-Martial (RCM) 1001(c) too narrowly, limiting what survivors are permitted to say during sentencing hearings in ways that do not fully inform the court of the impact of the crime on the survivor.
>
> Therefore, the conferees request that, on a one-time basis, or more frequently, as appropriate, and adjunct to its review of court-martial cases completed in any particular year, the DAC-IPAD assess whether military judges are according appropriate deference to victims of crimes who exercise their right to be heard under RCM 1001(c) at sentencing hearings, and appropriately permitting other witnesses to testify about the impact of the crime under RCM 1001.[1]

In January 2021, the DAC-IPAD was suspended pending the Secretary of Defense's zero-based review. The reconstituted DAC-IPAD held its first meeting on April 21, 2022, and assigned the victim impact statement project to the Policy Subcommittee (PSC) at the June 21-22, 2022 public meeting.[2] The PSC reported its findings and recommendations to the DAC-IPAD at the December 7, 2022, public meeting, and the DAC-IPAD voted to adopt five of the six proposed recommendations.[3]

In December 2021, Congress enacted an important change to courts-martial sentencing in the FY22 NDAA that requires military judges to serve as the sentencing authority in all special and general courts-martial, with the exception of capital cases, effective for cases in which the charged offenses are committed after December 27, 2023.[4]

B. Background

Congress enacted Article 6b of the Uniform Code of Military Justice (UCMJ) in the FY14 NDAA.[5] Article 6b codifies the rights of crime victims and incorporates many of the provisions

---

[1] The JES accompanies Sec. 535. Extension of Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces of the FY20 NDAA (Pub. L. No. 116-92).

[2] *Transcript of DAC-IPAD Public Meeting* 157 (June 22, 2022) (all DAC-IPAD public meeting transcripts are available at https://dacipad.whs.mil/).

[3] *See Transcript of DAC-IPAD Public Meeting* (Dec. 7, 2022).

[4] FY22 NDAA, Pub. L. No. 117-81, §539E, 135 Stat. 1541 (2021).

[5] FY14 NDAA § 1701, as amended in the FY15 NDAA § 531(f).

of the federal Crime Victims' Rights Act.[6] Among other rights, it provides a victim of an offense the right to be reasonably heard at a sentencing hearing relating to the offense.[7] A provision in the FY15 NDAA specifies that when a victim of a sexual offense has the right to be heard, the victim may exercise that right through counsel, including a victims' counsel.[8]

The Article 6b right for a victim to be heard at sentencing was initially implemented through Rule for Courts-Martial (R.C.M.) 1001A, effective June 17, 2015, which was subsequently incorporated into R.C.M. 1001(c).[9] Prior to Article 6b, there was no independent right of a victim in a military court-martial to provide a victim impact statement.

II. Legal Framework of Victim Impact Statements

A. Rule for Courts-Martial 1001(c)

R.C.M. 1001(c) provides the parameters for victim impact statements and lists specific limitations. Victim impact statements "may only include victim impact and matters in mitigation."[10] The discussion to R.C.M. 1001(c) states that a military judge may reasonably limit the form of the statement if there are numerous victims.[11] A crime victim's right to be heard is independent of whether the victim testifies during findings or sentencing. In non-capital cases, the victim may make a sworn or unsworn statement, or both, and the statement may be oral, in writing, or both.[12]

The rule defines a crime victim as "an individual who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of an offense of which the accused was found guilty or the individual's lawful representative or designee appointed by the military judge under these rules."[13] Victim impact is defined as including "any financial, social, psychological, or medical impact on the crime victim *directly relating to or arising from the offense of which the accused has been found guilty*"[14] (emphasis added).

If the victim makes an unsworn statement, the victim may not be cross-examined; however, the prosecution or defense may rebut any statements of fact.[15] A military judge may permit the victim's counsel to deliver an unsworn victim impact statement "upon good cause shown."[16]

---

[6] 18 U.S.C. § 3771.

[7] 10 U.S.C. § 806b (2021) (Art. 6b, UCMJ).

[8] FY 15 NDAA § 534(c); Special victims' counsel is the designation used by the Army and Air Force, while victims' legal counsel is the designation used by the Navy, Marine Corps, and Coast Guard.

[9] MANUAL FOR COURTS-MARTIAL, UNITED STATES (2019 ed.) [2019 MCM], Rule for Courts-Martial [R.C.M.] 1001(c).

[10] 2019 MCM, R.C.M. 1001(c)(3).

[11] 2019 MCM, R.C.M. 1001(c)(1) discussion.

[12] 2019 MCM, R.C.M. 1001(c)(2)(D)(ii). The victim is limited to a sworn statement in capital cases.

[13] 2019 MCM, R.C.M. 1001(c)(2)(A). This definition comes from Article 6b, UCMJ.

[14] 2019 MCM, R.C.M. 1001(c)(2)(B).

[15] 2019 MCM, R.C.M. 1001(c)(5)(A).

[16] 2019 MCM, R.C.M. 1001(c)(5)(B).

The discussion to R.C.M. 1001(c)(5) further states:

> A victim's statement should not exceed what is permitted under R.C.M. 1001(c)(3). A crime victim may also testify as a witness during presentencing proceedings in order to present evidence admissible under a rule other than R.C.M. 1001(c)(3). Upon objection by either party or *sua sponte*, a military judge may stop or interrupt a victim's statement that includes matters outside the scope of R.C.M. 1001(c)(3).[17]

B. Uses of and Limitations on Victim Impact Statements

1. Use of Unsworn Statements

In *United States v. Tyler*, the Court of Appeals for the Armed Forces (CAAF) clarified that victim impact statements not made under oath (unsworn statements) are not evidence and thus are not subject to the Military Rules of Evidence.[18] CAAF held that "either party may comment on properly admitted unsworn victim statements" in presentencing argument.[19] The Court further stated, however, that the military judge has an obligation to ensure that the contents of a victim impact statement comports with the definition of victim impact in R.C.M. 1001(c).[20]

For a court-martial with a panel of members as sentencing authority, the military judge provides the following standardized instruction regarding unsworn statements, including victim impact statements:

> The weight and significance to be attached to an unsworn statement rests within the sound discretion of each court member. You may consider that the statement is not under oath, its inherent probability or improbability, whether it is supported or contradicted by evidence in the case, as well as any other matter that may have a bearing upon its credibility. In weighing an unsworn statement, you are expected to use your common sense and your knowledge of human nature and the ways of the world.[21]

2. Definition of a Crime Victim

While not addressed by R.C.M. 1001(c) or the United States Court of Appeals for the Armed Forces (CAAF), the Military Department Courts of Criminal Appeals have held that a person does not need to be a named victim on the charge sheet or a named victim's designee under Article 6b to be considered a crime victim for purposes of R.C.M. 1001(c).[22] The individual

---

[17] 2019 MCM, R.C.M. 1001(c)(5) discussion.

[18] *United States v. Tyler*, 81 M.J. 108 (C.A.A.F. 2021).

[19] *Id.*

[20] *Id.*

[21] *Military Judges' Benchbook,* Dept. of the Army Pamphlet 27-9 at 90 (Feb. 29, 2020).

[22] *United States v. Miller*, NMCCA No. 201900234 (f rev) (N-M. Ct. Crim. App. 2022) citing *United States v. Hamilton*, 78 M.J. 335 (C.A.A.F. 2019) which found that the mother of a child pornography victim was a crime victim for purposes of R.C.M. 1001A in light of the crimes committed against her daughter and "the resulting financial and psychological hardships suffered by the family." In United States v. Miller, NMCCA held that the mother of a soldier who had died as a result of a drug overdose could properly be considered a victim and provide a victim impact statement, though the

must have suffered the requisite direct physical, emotional, or pecuniary harm and the court must not just look at the type of offense of which the accused was convicted but must further determine "whether that offense is the source of the harm discussed by the victim."[23]

3. Scope of Victim Impact Statements

R.C.M. 1001(c) provides that victim impact must directly relate to or arise from an offense of which the accused has been found guilty.[24]

In *United States v. Hamilton*, CAAF cautioned military judges, particularly in cases with panel members as the sentencing authority, to "be mindful of information that is not attributable to the offenses for which an accused is being sentenced."[25] The Military Departments' Courts of Criminal Appeals have further held that the scope of victim impact must relate to or arise from the offenses for which the accused has been convicted.[26]

In addition, if the victim impact statement can be interpreted more broadly than the rules allow, the judge must either limit the statement or instruct the members on how the statement should be interpreted to ensure that the accused is not sentenced for a crime for which they were not found guilty.[27]

4. Sentence Recommendation

R.C.M. 1001(c)(3) provides that a victim impact statement may not include a recommendation for a specific sentence.[28]

---

accused had not been convicted of an offense relating to the soldier's death, but had provided the soldier the needle he used to administer the fatal overdose. *See also United States v. Dunlap,* No. ACM 39567, 2020 CCA LEXIS 148 (A.F. Ct. Crim. App. May 4, 2020) holding that the spouse of the accused who had been convicted of adultery could properly be considered a victim under Article 6b, UCMJ, and provide a victim impact statement.

[23] *In re A.J.W.*, 80 M.J. 737 (N-M. Ct. Crim. App. 2021).

[24] 2019 MCM, R.C.M. 1001(c)(2)(B).

[25] *United States v. Hamilton*, 78 M.J. 335, 340 n. 6 (C.A.A.F. 2019).

[26] In determining the scope of proper victim impact, "the victim is not necessarily bound by the facts the accused admitted to during providency or in the stipulation of fact." However, victim impact statements are not unfettered and must be within the scope of "victim impact" as defined under R.C.M. 1001(c). *In re A.J.W.*, 80 M.J. 737, 743 (N-M. Ct. Crim. App. 2021); *United States v. Hamilton*, 77 M.J. 579, 585-86 (A. F. Ct. Crim. App. 2017), *aff'd*, 78 M.J. 335 (C.A.A.F. 2019); The right to be reasonably heard does not "transform the sentencing hearing into an open forum to express statements that are not otherwise permissible under R.C.M. 1001." *United States v. Roblero*, 2017 CCA LEXIS 168 at *18 (A.F. Ct. Crim. App. Feb. 17, 2017) (unpublished); *United States v. DaSilva*, 2020 CCA LEXIS 213 (A.F. Ct. Crim. App. June 25, 2020) (unpublished). A victim impact statement that was "well-focused on [the victim's] own general lack of trust in others as a result of appellant's maltreatment" was not outside the scope of victim impact though the accused was acquitted of the sexual assault specifications involving the victim. *United States v. Stanley,* 2020 CCA LEXIS 264, 269 (A.C.C.A. 2020). A statement that shows a victim's "state of mind…upon learning of the offense that Appellant committed" did not qualify as victim impact, as it "did not include direct 'financial, social, psychological, or medical impact' that [the victim] suffered and was therefore improper for consideration…." *United States v. McInnis,* 2020 CCA LEXIS 194 (A.F.C.C.A. 2020).

[27] *In re A.J.W.* at 744.

[28] 2019 MCM, R.C.M. 1001(c)(3). The NMCCA held that it was error for a military judge to allow a victim to state the accused "needs a significant amount of jail time" in her impact statement as it constituted a recommendation for a specific sentence. *United States v. Mellette,* 81 M.J. 681, 700 (N-M. Ct. Crim. App. 2021), *rev'd on other grounds*, *United States v. Mellette*, 2022 CAAF LEXIS 544 (C.A.A.F. 2022).

5. Form of the Victim Impact Statement

In *United States v. Edwards*, CAAF found that R.C.M. 1001 requires that unsworn statements be either oral, written, or both, and "a video including acoustic music and pictures is neither oral nor written and thus violates the rule."[29] CAAF did not address the question of whether a pre-recorded video of the victim providing an unsworn victim impact statement would violate R.C.M. 1001(c), though the lower court found that this would be permissible under the rule.[30] Further, because the trial counsel produced the video, it should not have been admissible at sentencing. CAAF clarified that "the right to make an unsworn statement solely belongs to the victim or the victim's designee and cannot be transferred to trial counsel."[31]

III. FY 2021 Courts-Martial Case Review

A. Introduction and Methodology

To help analyze whether military judges are interpreting R.C.M. 1001(c) too narrowly, the Committee reviewed courts-martial documents for cases resulting in a guilty verdict in FY21 for one of the following offenses:

- Article 120: rape, sexual assault, aggravated sexual contact, abusive sexual contact, or attempts to commit one of these offenses
- Article 120b: rape, sexual assault, or sexual abuse of a child under 16, or attempts to commit one of these offenses [not including cases with attempted conduct without any real child involved—e.g., sting operations undertaken by law enforcement]
- Article 120c: indecent viewing, visual recording, or broadcasting; forcible pandering; indecent exposure; or attempts to commit one of these offenses
- Article 93: sexual harassment offenses[32]
- Article 93a: abuse of training leadership position or recruiter position involving sexual activity with a trainee or recruit
- Article 117a: wrongful broadcast or distribution of intimate visual images
- Article 128: assault, but only in cases with a referred related specification of an Article 120, 120b, or 120c offense and either the accused was found not guilty of the Article 120, 120b, or 120c offense or this Article 120, 120b, or 120c offense was dismissed as part of a pretrial agreement

For cases with one or more victims providing a victim impact statement under R.C.M. 1001(c) during presentencing, the staff collected the following data: whether the sentencing authority was a military judge or panel of members, whether the military judge limited the victim impact statement in some way, and whether the victim, victims' counsel, or someone else delivered the victim impact statement, if it was read aloud.

---

[29] *See* *United States v. Edwards*, 82 M.J. 239, 241 (C.A.A.F. 2021).

[30] *Id*. at 241; *United States v. Edwards*, 2021 CCA LEXIS 106, 2021 WL 923079 (A.F.C.C.A., Mar. 10, 2021).

[31] *Id*. at 241, citing *United States v. Hamilton*, 78 M.J. 335, 342 (C.A.A.F. 2019); *United States v. Barker*, 77 M.J. 377, 378 (C.A.A.F. 2018).

[32] Sexual harassment has traditionally been charged under Article 93, Cruelty and Maltreatment. In the FY22 NDAA, Congress directed the President to proscribe regulations establishing sexual harassment as an offense punishable under Article 134 of the UCMJ. FY22 NDAA, Pub. L. No. 117-81, §539D 135 Stat. 1541 (2021).

For cases in which the military judge limited the victim impact statement in some way, the DAC-IPAD reviewed relevant portions of the record of trial to determine whether in that action the military judges in these cases acted in accordance with R.C.M. 1001(c).

Only two cases involved a sworn victim impact statement; all others were unsworn.

The following tables present data from the FY21 review of victim impact statements.

B. FY 2021 Courts-Martial Data

1. Cases with a victim impact statement (VIS). Victims provided impact statements in almost three quarters of the FY21 cases involving a conviction of one of the previously listed offenses. In another 30 cases (12%), a victim testified under oath in the government's sentencing case.

Service	VIS	No VIS
Army (N=140)	96 (69%)	44 (31%)
Navy (N=27)	18 (67%)	9 (33%)
Marine Corps (N=19)	15 (79%)	4 (21%)
Air Force (N=51)	40 (78%)	11 (22%)
Coast Guard (N=4)	4 (100%)	0 (0%)
Total (N=241)	173 (72%)	68 (28%) [a]

a. In 30 cases, one or more victims provided sworn testimony in the government's sentencing case pursuant to R.C.M. 1001(b)(4).

2. Form and delivery of victim impact statements. The majority of victim impact statements were provided orally or both orally and in writing. Of those impact statements provided orally, the majority were delivered by the victim, with smaller percentages delivered by the victims' counsel or another representative.

Service	Written	Oral or Both	Delivered By		
			Victim	VC	Other
Army (N=96)	5 (5%)	91 (95%)	74 (81%)	13 (14%)	4 (4%)
Navy (N=18)	4 (22%)	14 (78%)	12 (86)	1 (7%)	1 (7%)
Marine Corps (N=15)	2 (13%)	13 (87%)	11 (85%)	2 (15%)	0
Air Force (N=40)	8 (20%)	32 (80%)	30 (94%)	2 (6%)	0
Coast Guard (N=4)	1 (25%)	3 (75%)	2 (67%)	1 (33%)	0
Total (N=173)	20 (12%)	153 (88%)	129 (84%)	19 (12%)	5 (3%)

3. Sentencing forum. In the vast majority of cases reviewed, a military judge was the sentencing authority. As already mentioned, military judges will be the sentencing authority in all non-capital cases in which the offenses occurred on or after December 27, 2023.

Service	Judge Alone	Members
Army (N=96)	91 (95%)	5 (5%)
Navy (N=18)	14 (78%)	4 (22%)
Marine Corps (N=15)	13 (87%)	2 (13%)
Air Force (N=40)	31 (78%)	9 (22%)
Coast Guard (N=4)	2 (50%)	2 (50%)
Total (N=173)	151 (87%)	22 (13%)

4. Cases in which a military judge limited a victim impact statement. Military judges allowed victims to provide their victim impact statements uninterrupted in the vast majority of cases. Military judges were more likely to limit victim impact statements in cases with members as the sentencing authority.

Service	Judge Alone	VIS Limited	Members	VIS Limited
Army (N=96)	91	8 (9%)	5	0 (0%)
Navy (N=18)	14	1 (7%)	4	4 (100%)
Marine Corps (N=15)	13	1 (8%)	2	0 (0%)
Air Force (N=40)	31	3 (10%)	9	3 (33%)
Coast Guard (N=4)	2	0 (0%)	2	0 (0%)
Total (N=173)	151	13 (9%)	22	7 (32%)

C. Reviewer Comments

In 138 of the 151 cases (91%) with a military judge as sentencing authority, the military judge placed no limits on the victim impact statements.

- In most cases, the military judge did not ask if there were objections to the statements.
- In 27 cases, the defense objected and the military judge either overruled the objection or sustained the objection but allowed the victim to read the full statement, stating that they would consider only those portions allowed by the rule.
- In several cases, the record of trial indicated that victims' counsel or trial counsel worked with the victim to limit the statement before it was delivered to avoid a defense objection.

In 13 judge-alone sentencing cases, the military judge limited a victim impact statement.

- In 12 of the 13 cases, the military judge limited the statement because the military judge determined that it was outside the scope of victim impact. An example of this is a case in which the victim discussed her difficulty finding a job after leaving the military and her resulting financial problems in her victim impact statement. The military judge ruled that this information was outside the scope of victim impact.

- In four of the 13 cases, the military judge limited the statement because the military judge determined that it recommended a specific sentence. Some military judges seemed to interpret the restriction on victims from recommending a "specific" sentence as precluding any reference to sentencing. In one case, the victim's impact statement consisted only of one sentence stating he hoped the accused went to jail "for a very long time." The military judge in that case would not allow the victim impact statement on the view that it impermissibly recommended a sentence.
- In most cases, the military judge ruled in accordance with R.C.M. 1001(c), but some military judges applied the standard for victim impact more narrowly than others.

Conclusion: This data, coupled with the records of trial, indicate that it is the standards in R.C.M. 1001(c) rather than the decisions of military judges that inappropriately limit VIS.

IV. Stakeholder Input Regarding Victim Impact Statements

A. Survivors United

At the February 14, 2020, DAC-IPAD public meeting,[33] Ms. Jennifer Elmore, a representative from Survivors United—a nonprofit organization dedicated to assisting survivors in military sexual assault cases—provided a public comment regarding victim impact statements at sentencing. She told the Committee that restrictions placed on victim impact statements "severely limit" what a crime victim is allowed to say,[34] listing the following examples: victim impact statements are "redlined" prior to delivery; military judges cut off victims during the delivery of their statements; and victims are not permitted to state their preference for a sentence.[35] Survivors United members had earlier spoken to legislators about these restrictions, and their accounts were the impetus for the FY20 NDAA JES.[36]

At the December 6, 2022, DAC-IPAD public meeting, Dr. Breck Perry and Ms. Adrian Perry—founding members of Survivors United—together with Mr. Ryan Guilds, an attorney who has represented victims in military and civilian trials, provided information to the Committee regarding victim impact statements.[37] The Perrys recounted that during the trial of the officer accused of sexually abusing their young daughters, the military judge allowed only one parent to provide a victim impact statement, a limitation that caused them a great deal of pain.[38] Dr. Perry, who ultimately provided the statement, asserted that the military judge interrupted him on several occasions while he was delivering the statement to stop him from making certain statements, struck out some passages, told him to revise it; and later prevented him from delivering the

[33] This meeting was held prior to the reconstitution of the DAC-IPAD. See *supra* note 2.

[34] *Transcript of DAC-IPAD Public Meeting* 291 (Feb. 14, 2020) (all DAC-IPAD public meeting transcripts are available at https://dacipad.whs.mil/).

[35] *Id.*

[36] See *supra* note 1.

[37] *See generally Transcript of DAC-IPAD Public Meeting* (Dec. 6, 2022).

[38] *Id.* at 104, 108 (testimony of Ms. Adrian Perry) (the referenced trial took place September 2017).

remainder of his statement.[39] Dr. Perry also noted that the military judge told him he could not face the accused while delivering his statement, but instead had to face the jury.[40]

Ms. Perry strongly objected to limitations being placed on victim impact statements and stated it was "insulting for a victim to have that moment tarnished after everything that they have endured and the silence that they've had to face for so long throughout the duration of the investigation and the criminal proceedings leading up to sentencing."[41] As a positive example of how victim impact statements should be incorporated into trials, she pointed to the USA Olympics gymnastics sexual abuse case involving convicted , in which the judge allowed all of the victims to speak freely to the court in describing the impact of the defendant's crimes on them.[42]

Mr. Guilds stated that he believes the appellate courts have a broader interpretation of who may be considered a victim; in his view, parents or others in the Perrys' position would now be allowed to provide victim impact statements.[43] Some of victims he has represented felt limited in their ability to speak directly to the accused during their impact statement; unable to request an appropriate sentence; forbidden to express too much emotion; and blocked from describing the impact on them in detail "in ways that don't fit the defense narrative."[44] He noted that often these limitations are self-imposed by well-meaning victims' counsel or prosecutors to prevent the victim from being interrupted by defense objection.[45]

Mr. Guilds also expressed concern about the practice of military judges in "whittling down" victim impact statements in court.[46] He provided the example of an accused who pleads guilty to a physical assault rather than a sexual assault as part of a plea agreement and a victim who wishes to describe what she experienced—a sexual assault—and its impact, but cannot do so because the accused pled guilty only to the physical assault and under the rule the sexual assault is outside the scope of victim impact.[47] Mr. Guilds stated that these limitations "undermine the value and power of the victim impact statement and serve to reinforce the survivor sense of powerlessness, and they are not necessary to protect the accused[']s rights."[48]

Finally, Mr. Guilds commented that victims should be allowed to discuss the effects of the investigation, pretrial, and trial processes, topics currently not within the scope of victim impact under R.C.M. 1001(c).[49] In his view, there should be a presumption that unless a constitutional right is at stake, a victim should be allowed to say what they want in their impact statement.[50]

---

[39] *Id.* at 112 (testimony of Dr. Breck Perry).

[40] *Id.* at 111-112.

[41] *Id.* at 107 (testimony of Ms. Adrian Perry).

[42] *Id.*

[43] *Id.* at 130-131 (testimony of Mr. Ryan Guilds).

[44] *Id.* at 100.

[45] *Id.*

[46] *Id.*

[47] *Id.* at 121.

[48] *Id.* at 101.

[49] *Id.* at 122.

[50] *Id*. at 140-141

B. Victims' Counsel

At the December 6, 2022, DAC-IPAD public meeting, a panel of Service victims' counsel program managers presented information and answered questions regarding victim impact statements. The panel informed the Committee they supported changes that would broaden the scope of R.C.M. 1001(c) to allow crime victims to speak more fully about the impact of the crime and to recommend a specific sentence for the accused.[51] Some program managers agreed that the transition to judge-alone sentencing will likely result in fewer limitations on victim impact statements.

One program manager pointed out the irony that in the process of reviewing an impact statement, hearing argument over its contents, and ordering redaction of some portion of it, the military judge has reviewed the statement in full in order to rule on the defense objections, but the victim is not allowed to speak the redacted words.[52] He noted the presumption that military judges will apply the law and ignore those portions of the statement that are not permitted under the rules.[53]

The victims' counsel program managers provided follow up responses confirming that they assist their clients with editing their impact statements to ensure they comply with R.C.M. 1001(c) and to avoid objections from defense counsel and interruptions from the military judge.[54] All agreed that it was ultimately the victim's choice what to include in the impact statement, but it is the victims' counsel's role to ensure it is an informed choice.[55] In addition, most of the program managers indicated that, with the victim's permission and when it makes sense, they discuss potentially objectionable material in the victim impact statement with trial and defense counsel in order to prepare their clients. In some cases this may result in the victim editing objectionable material from the statement, but in other cases the victim and victims' counsel choose to keep the material in the statement and allow counsel to argue for its inclusion.[56]

C. Military Judges

At the February 14, 2020, DAC-IPAD public meeting, a panel of several former military judges provided information to the Committee regarding their experiences with victim impact statements, as well as other topics.[57] In general, the former judges stated that they limited a victim's impact statement when it contained information they previously ruled inadmissible,[58] as well as when the statement recommended a particular sentence for the accused.[59] One former judge stated that he did not recall ever limiting a victim impact statement and two judges

---

[51] *Id.* at 175-177 (testimony of COL Carol Brewer, Chief, Special Victims' Counsel Program, U.S. Army); 177-178 (testimony of LtCol Iain Pedden, Chief, Victims' Legal Counsel Program, U.S. Marine Corps).

[52] *Id.* at 178-179 (testimony of LtCol Pedden).

[53] *Id.*

[54] *See* Service Victims' Counsel Responses to DAC-IPAD Follow Up Questions (Jan. 31, 2023).

[55] *Id.*

[56] *Id.*

[57] *Transcript of DAC-IPAD Public Meeting* 142-149 (Feb. 14, 2020).

[58] *Id*. at 145, 149.

[59] *Id*. at 147, 148.

commented that victims' counsel did a good job helping to prepare the statement and modifying it so that it would comply with the rules.[60] Overall, the panel believed victims were allowed broad latitude in what they could say in their impact statements.[61]

A panel of former military judges also spoke at the February 22, 2023 DAC-IPAD public meeting and provided information on victim impact statements.[62] All of the former judges agreed that with judge-alone sentencing, there is no reason that victims should not have the ability to speak freely during their impact statements, though one judge cautioned that the victim's impact statement should relate only to the crimes for which the accused was convicted.[63] The military judges agreed that there is little to no risk of prejudice as the military judge can easily set aside information contained in the statement that is potentially unduly prejudicial to the accused and decide the sentence based only on admissible information.[64] One judge suggested that with judge-alone sentencing, there may no longer be a need to apply the rules of evidence in sentencing proceedings.[65] One judge also commented that with the forthcoming sentencing parameters, there is even less of a concern that a victim impact statement would affect the sentence.[66]

D. Military Defense Counsel

At the February 21, 2023 DAC-IPAD public meeting, the Committee asked the Services' trial defense organization chiefs to comment on the DAC-IPAD's recommendations regarding victim impact statements.[67] The defense representatives expressed that they have fewer concerns about what victims say in their impact statements with military judges serving as the sentencing authority than with panel sentencing.[68] However, several defense representatives were concerned about the recommendation that would allow victims to recommend a specific sentence because, in their view, victims are biased and typically do not fully understand the principles of sentencing and what would be an appropriate sentence in a particular case.[69] Several representatives expressed confidence in the ability of military judges to consider only the information permissible under the rules and to disregard information that is not permissible.[70] However, several representatives stressed the need for clear guidance on the process for

---

[60] *Id*. at 147.

[61] *Id*. at 147-148.

[62] *See Transcript of DAC-IPAD Public Meeting* (Feb. 22, 2023).

[63] *Id.* at 162 (testimony of LtCol (ret.) Michael Libretto, U.S. Marine Corps).

[64] *Id.*

[65] *Id.* at 123-24 (testimony of LTC (ret.) Stefan Wolfe, U.S. Army).

[66] *Id.* at 124-25 (testimony of Cmdr (ret.) Will Wieland, U.S. Navy).

[67] *See Transcript of DAC-IPAD Public Meeting* (Feb. 21, 2023).

[68] *Id.* at 102 (testimony of COL Sean McGarry, Chief, Trial Defense Service, U.S. Army); 109 (testimony of Col Brett Landry, Chief, Trial Defense Division, U.S. Air Force).

[69] *Id.* at 102 (testimony of COL McGarry); 102-03 (testimony of Capt Mark Holley, Director, Defense Service Office Operations, U.S. Navy); 109 (testimony of Col Landry).

[70] *Id.* at 109 (testimony of Col Landry).

objecting to information contained in the impact statement if defense counsel do not have an opportunity to review and object prior to its presentation.[71]

V. Federal and Select State Law Regarding Victim Impact Statements

The Committee compared federal and state law pertaining to victim impact statements with R.C.M. 1001(c). The most salient points included the following:

- Most civilian jurisdictions limit victim impact to financial, physical, psychological, or emotional harm to the victim related to the crimes of which the accused is convicted, but they do not explicitly require that it be "directly" related.
- Many states explicitly allow the victim to discuss a sentence or disposition.
- Some states require the victim impact statement to be sworn or only in writing. However, six states allow the victim to make a victim impact statement through audio or video recording or other digital media: Arizona, California, Georgia, Indiana, Iowa, and Utah.
- Fifteen states explicitly allow the victim impact statement to include the impact on the victim's family members: Alabama, Arizona, California, Delaware, Florida, Georgia, Louisiana, Massachusetts, Mississippi, New Jersey, North Dakota, Oklahoma, South Dakota, Tennessee, and Texas. Some other states allow such statements as a matter of practice, even though their rules do not specify this scope.

Several DAC-IPAD members relayed their experiences with victim impact statements in their jurisdictions with the consensus that federal and state jurisdictions allow victims much broader latitude in their statements than the military.[72] One member noted that civilian jurisdictions have largely discontinued the practice of "redlining" or restricting victim impact statements,[73] stating that the victim impact statement is recognized as the victim's right of allocution similar to the defendant's right of allocution.[74] Two members observed that many civilian jurisdictions allow the victim to speak to or recommend a sentence for the defendant.[75]

---

[71] *Id.* at 103 (testimony of Capt Holley); 105 (testimony of Col Valerie Danyluk, Chief Defense Counsel of the Marine Corps, U.S. Marine Corps); 110 (testimony of LCDR Jennifer Saviano, Chief of Defense Services, U.S. Coast Guard).

[72] *Transcript of DAC-IPAD Public Meeting* 78 (Dec. 7, 2022) (comment of Hon. Reggie Walton, U.S. District Judge, District of Columbia; DAC-IPAD member) ("I've never seen [these limitations] in a federal court proceeding."); 79-80 (comment of Hon. Paul Grimm, U.S. District Judge, District of Maryland; DAC-IPAD member); 81-82 (comment of Hon. Karla Smith, Circuit Court Judge, Montgomery County, MD; DAC-IPAD Chair); *Transcript of DAC-IPAD Public Meeting* 119 (Dec. 6, 2022) (comment of Ms. Martha Bashford, former Chief, New York County District Attorney's Office Sex Crimes Unit; DAC-IPAD member).

[73] *Transcript of DAC-IPAD Public Meeting* 75 (Dec. 7, 2022) (comments of Ms. Meg Garvin, Executive Director, National Crime Victim Law Institute; DAC-IPAD member).

[74] *Id.* at 74-75.

[75] Id. at 124-125 (comment of Hon. Reggie Walton); 127 (comments of Ms. Meg Garvin).

VI. Joint Service Committee Proposed Changes to R.C.M. 1001(c)

On October 19, 2022, the Joint Service Committee on Military Justice (JSC) of the Department of Defense released for public comment its draft executive order with numerous proposed changes to the Manual for Courts-Martial (MCM).[76] This draft included the following proposed changes to R.C.M. 1001(c) regarding victim impact statements:

1. R.C.M. 1001(c)(2)(D)(ii) would explicitly give the victim the right to be heard concerning any objections to the victim's unsworn statement;
2. the provision in R.C.M. 1001(c)(3) restricting a victim from making a recommendation for a specific sentence would be removed (except for capital cases);
3. R.C.M. 1001(c)(5)(A) would allow an unsworn victim impact statement to be made by the victim, the victim's counsel, or both, without a requirement to show "good cause" for the victims' counsel to make the statement; and
4. the following sentence would be removed from the discussion section to R.C.M. 1001(c)(5)(B): "Upon objection by either party or *sua sponte*, a military judge may stop or interrupt a victim's statement that includes matters outside the scope of R.C.M. 1001(c)(3)."

On December 12, 2022, the DAC-IPAD submitted a public comment to the JSC with five recommendations for amending R.C.M. 1001(c). These five recommendations are also included in this report as DAC-IPAD Recommendations 41–45.[77]

VII. Analysis, Response to Congress, and Recommendations

A. Analysis

> Being able to provide a statement to the court at sentencing can be extremely empowering and freeing for a victim, and it's a moment that can open the very first door to hopeful healing for survivors.
>
> —Adrian Perry, co-founder of Survivors United[78]

The DAC-IPAD heard from stakeholders about unnecessary limitations on victim impact statements and reviewed courts-martial cases completed in FY21 to determine how military judges are resolving issues with impact statements. The Committee found that victims are subject to routine editing of their impact statements before those statements are delivered. At times, this editing occurs in the courtroom, with defense counsel highlighting objectionable portions of the statement and the military judge ordering the statement to be redacted. More often, it appears, victims' counsel and trial counsel assist victims in pre-editing impact statements to avoid objections in court. The result is the same: crime victims are not able to fully describe the impact on them of the accused's crimes.

Committee members with experience with victim impact statements in sentencing proceedings in civilian jurisdictions noted that civilian courts rarely limit the victim impact statement prior to its

[76] Joint Service Committee on Military Justice draft Executive Order and Annex to the draft Executive Order, *available at* https://jsc.defense.gov/Military-Law/Current-Publications-and-Updates/

[77] *See* DAC-IPAD public comment to the Joint Service Committee on Military Justice at Appendix J.

[78] *Transcript of DAC-IPAD Public Meeting* 108-109 (Dec. 6, 2022) (testimony of Ms. Adrian Perry).

delivery and rarely are objections made to the statement during its delivery. More deference is provided to the victim in detailing the impact of the crime. The Committee was unable to identify any unique military concern that would justify the unduly limiting nature of RCM 1001(c). The Committee also noted that in the majority of cases reviewed by Policy Subcommittee members and staff, that military judges allowed victims to deliver their victim impact statements without interruption, noting that they would only consider those portions of the statement permitted by R.C.M. 1001(c).

The Committee believes it is the best practice for military judges to allow victims to provide their impact statements without interruption and to resolve objections by trial or defense counsel at the conclusion of the impact statement.

The Committee concluded that a primary source of the problem is the overly narrow scope of R.C.M. 1001(c) and the recommendations to amend R.C.M. 1001(c) reflect the DAC-IPAD's belief that a crime victim should have greater latitude in providing information to the court in their victim impact statement. The Committee also noted, based on the review of FY21 cases, that the restriction on victims from recommending a "specific" sentence may have been interpreted by some military judges and counsel to preclude any reference to sentencing.

The recommended changes coincide with the FY22 NDAA requirement that military judges serve as sentencing authorities in all but capital cases. Military judges, by virtue of their training, experience, and temperament, can be as trusted as their civilian counterparts to adhere to the rules in appropriately assessing and considering the information provided in victim impact statements. Adoption of these recommendations would more closely align military practice with the practice in most civilian jurisdictions for victim impact statements.

B. Response to Congress

The Committee provides the following responses to the two questions posed by Congress in the FY20 NDAA JES.

JES Question 1: Are military judges interpreting R.C.M. 1001(c) too narrowly and limiting what victims may say during sentencing such that the courts are not fully informed of the impact of the crime on the victims?

DAC-IPAD Response: In the vast majority of cases, military judges do not limit a victim's right to be heard at sentencing. Of the 173 FY21 sexual offense courts-martial cases reviewed involving a victim impact statement, the military judge limited a victim's statement in 20 (12%) cases. In the 151 cases in which the military judge was the sentencing authority, the judge limited a victim impact statement in 13 (9%) cases. In those cases in which the judge took such action, they generally did so in accordance with R.C.M. 1001(c).

The Committee notes, however, that the standard in victim impact cases—that the impact must directly relate to or arise from the crime for which the accused was convicted—is not clear and appears to be applied differently by different military judges. For example, some judges permit victims to address only their experience specific to the crime for which the accused was convicted and other judges allow a victim to address the impact of their interaction with the accused, which includes the crime and the surrounding circumstances.

The Committee has determined that this standard is too narrow and should be clarified. Adoption of the DAC-IPAD's recommendations concerning Rule for Courts-Martial 1001(c) should clarify the standard, incorporate aspects of civilian practice, and allow crime victims to more fully inform the courts about how the accused's crimes have impacted them.

JES Question 2: Are military judges appropriately permitting other witnesses to testify about the impact of the crime?

DAC-IPAD response: Military judges generally do permit individuals who have suffered harm as a result of the crimes for which the accused has been convicted—not just those who are named victims in the convicted offenses—to provide victim impact statements.

Since Congress posed this question in the FY20 NDAA Joint Explanatory Statement almost three years ago, the Service appellate courts have adopted an expansive view of who may be considered a crime victim. In addition, the Committee's FY21 courts-martial case review revealed that military judges generally apply a broad definition of crime victim in determining who may provide a victim impact statement at presentencing proceedings.

C. Recommendations

The Committee provided five recommendations to the JSC to amend R.C.M. 1001(c).

Recommendation 41: The Joint Service Committee on Military Justice (JSC) draft an amendment to R.C.M. 1001(c)(2)(B) adding the words "or indirectly" to the definition of victim impact, amending the section as follows:

"For purposes of this subsection, victim impact includes any financial, social, psychological, or medical impact on the crime victim directly ***or indirectly*** relating to or arising from the offense of which the accused has been found guilty."

This proposed change recognizes that victim impact statements are not presented for evidentiary purposes and allows the victim to discuss more attenuated impacts of the crime, as is permitted in many civilian jurisdictions.

Recommendation 42: The JSC draft an amendment to R.C.M. 1001(c)(3) by adding a sentence stating that a victim impact statement may include a recommendation of a specific sentence except in capital cases.

The JSC's draft change to R.C.M. 1001(c)(3) in the 2023 draft executive order removes the restriction against crime victims recommending a specific sentence for the accused in all but capital cases and appears to expand what victims may say in their impact statements; however, without an explicit provision allowing the victim to make a specific sentence recommendation, a military judge could reasonably prohibit a victim from doing so on the grounds that such a recommendation is not covered by "victim impact" or "matters in mitigation," as the rule requires. This additional language would mirror the wording in R.C.M. 1001(d)(2)(A).

Recommendation 43: The JSC draft an amendment to R.C.M. 1001(c)(5)(A) allowing submission of the unsworn victim impact statement by audiotape, videotape, or other digital media, in addition to (allowing) (providing) the statement orally, in writing, or both.

R.C.M. 1001(c)(5)(A) currently allows a victim to provide an unsworn victim impact statement orally, in writing, or both. Addition of the new language makes it clear that digital media are permissible means of submitting a victim impact statement; aligns courts-martial with proceedings in some states that allow victims to provide impact statements through audio or video recordings or other digital media; and, importantly, enables victims to submit impact statements when they cannot be physically present or do not wish to speak during the presentencing proceedings.

Recommendation 44: The JSC draft an amendment to R.C.M. 1001(c)(5)(B) to remove the "upon good cause shown" clause to be consistent with the JSC's proposed change to R.C.M. 1001(c)(5)(A).

R.C.M. 1001(c)(5)(A) states that a victim may provide an unsworn victim impact statement. The JSC's proposed change to this section adds a sentence specifying that the crime victim's unsworn statement "may be made by the crime victim, by counsel representing the crime victim, or both." However, R.C.M. 1001(c)(5)(B) still includes the previous limitation, as it reads "Upon good cause shown, the military judge may permit the crime victim's counsel, if any, to deliver all or part of the crime victim's unsworn statement." This requirement to show good cause is what the JSC's draft change was intended to remove.

Recommendation 45: The JSC draft an amendment to R.C.M. 1001(c)(5)(B) to remove the requirement that the victim provide a written proffer of the matters addressed in their unsworn statement to trial and defense counsel after the announcement of findings.

R.C.M. 1001(c)(5)(B) currently requires a crime victim who makes an unsworn statement to provide a written proffer of the matters to be addressed in the statement to trial counsel and defense counsel after the announcement of findings. The rule provides that the military judge may waive this requirement for good cause shown. Often, victims' written statements are edited by military judges or by victims' counsel or trial counsel before they are delivered. In most civilian jurisdictions, victims deliver their impact statements unedited.

This recommendation is consistent with the JSC's proposed change to R.C.M. 1001(c)(5)(B) that would remove the following sentence from the discussion section: "Upon objection by either party or *sua sponte*, a military judge may stop or interrupt a victim's statement that includes matters outside the scope of R.C.M. 1001(c)(3)." The proposed removal of this sentence is consistent with the pending change to judge-alone sentencing and will allow crime victims more latitude in their impact statements. Trial and defense counsel will still have the opportunity to rebut factual claims in the victim's unsworn statement and to object to information outside the scope of R.C.M. 1001(c)(2)(B).

VIII. Conclusion

The Committee concludes that R.C.M. 1001(c) should be broadened to allow crime victims to exercise their right of allocution without unnecessary limitation. There is no reason that military practice in this area should confine the victim's right to be heard more strictly than does the practice in civilian jurisdictions. The DAC-IPAD's proposed amendments to R.C.M. 1001(c), taken together with the Joint Service Committee's proposed amendments, will go a long way toward achieving such broadening. With judge-alone sentencing soon to be mandated in all but capital cases, it is the Committee's intent that military judges—as well as the appellate courts in their review of judicial rulings—will adopt a more expansive view, within constitutional limitations, of the victims' right to be heard at sentencing.

I. Appellate Review Study

In January 2022, the DoD GC requested that the DAC-IPAD study and report on appellate decisions in military sexual assault cases, focusing on "recurring" issues that arise in such cases and recommending reforms.[1] The DoD GC asked the Committee to consider the efficacy of the military appellate system's handling of those cases; to make recommendations for improving the training and education of military justice practitioners; and to examine the effects of recent legislative changes to the standards of appellate review of factual sufficiency and sentence appropriateness.[2]

In October 2022, the Case Review Subcommittee (CRSC), composed of four DAC-IPAD members,[3] was formed, and the Appellate Review Study was assigned to the CRSC. On December 7, 2022, following the DAC-IPAD's 25th Public Meeting, and on January 26, 2023, the CRSC held strategic planning sessions to discuss the Appellate Review Study and other projects.

This report provides an overview of the Appellate Review Study as briefed to the DAC-IPAD in June and September 2022; a summary of recurring appellate issues in the military sexual assault cases; and an outline of the next steps in the Appellate Review Study.

II. Methodology

In June 2022, the DAC-IPAD directed the review of military sexual assault (MSA) appellate cases decided in fiscal year 2021 (FY21) to establish a baseline for assessing the effect of the substantial changes ushered in by the Military Justice Act of 2016 ("MJA16"), including changes to the appellate standards of review of factual sufficiency and sentence appropriateness.[4]

To identify the relevant FY21 appellate decisions, the staff reviewed all decisions posted on the websites of the Courts of Criminal Appeals for each Military Department (CCAs) and the Court of Appeals for the Armed Forces (CAAF) published between October 1, 2020, and September 30, 2021, including rulings on writs and substantive motions. The staff identified 775 appellate decisions published during this time and the associated Entry of Judgment from trial to determine

---

[1] *See* Memorandum from Caroline Krass, DoD General Counsel, to Staff Director, DAC-IPAD, Request to Study Appellate Decisions in Military Sexual Assault Cases (Jan. 28, 2022) [Appellate Review Memo], available at Appendix A. At the time, the DAC-IPAD was suspended as the result of a zero-based review of all DoD advisory committees directed by the Secretary of Defense on January 30, 2021. On July 6, 2021, the Secretary authorized the DAC-IPAD to resume operations once its new members were duly appointed. In January 2022, the Secretary of Defense appointed 17 new members.

[2] Only the factual sufficiency standard will be addressed in this report. Sentence appropriateness will be further analyzed when the new standard takes effect in cases in which all finding of guilty are for offenses that occurred after December 27, 2023.

[3] The CRSC members are Ms. Martha Bashford (Chair), Ms. Meg Garvin, Ms. Jennifer Gentile Long, and Brigadier General James Schwenk, USMC (Ret.).

[4] Changes include jurisdiction, punitive articles, referral, and the trial process. National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, Division E, 130 State. 2000 (2016) [Military Justice Act of 2016].

whether the case involved a conviction on a qualifying MSA offense. Qualified cases, including both contested trials and guilty pleas, were selected for further review.

For this study, the DAC-IPAD defined "qualifying military sexual assault offenses" as those involving nonconsensual penetration or sexual contact, including child victims, under Articles 120 and 120b, 92, 93, 133, and 134 of the UCMJ, and any attempt, conspiracy, or solicitation to commit any of the designated offenses.[5] While Article 120 and 120b offenses constitute the majority of penetrative and contact sexual assault offenses, the additional UCMJ articles were included to capture cases involving inappropriate sexual acts with members of a junior rank or military-specific crimes such as maltreatment of a subordinate or conduct unbecoming an officer.[6] Based on this selection criteria, 212 cases were selected for further analysis.

The staff reviewed all 212 appellate opinions from the CCAs and CAAF,[7] with some cases associated with more than one appellate opinion. For example, a case may have involved a writ petition, thus generating more than one appellate decision, or a case may have returned to the appellate court for a second review after a partial reversal. Some cases had two opinions: one published by the CCA and then a subsequent CAAF opinion. Accordingly, although the study involved 212 cases, the staff reviewed all 262 appellate opinions issued in those 212 cases.[8] The overall data points collected on each case can be found in Appendix B.

Table 1. FY21 Cases with Qualifying Military Sexual Assault (MSA)

Military Service	Cases Reviewed	Identified as MSA cases	%
Army	289	99	34%
Navy	109	31	28%
Marine Corps	182	25	14%
Air Force	192	55	29%
Coast Guard	3	2	67%
Total	775	212	27%

[5] *See Transcript of DAC-IPAD Public Meeting* 31 (June 21, 2022; *Transcript of DAC-IPAD Public Meeting* 153 (June 22, 2022).

[6] Examples within the UCMJ include: violation of lawful general regulation by recruiter or trainer engaging in inappropriate sexual relationship with trainee or prospective applicant (Article 92); maltreatment consisting of sexual act or sexual contact (Article 92); inappropriate intimate relationship between officer and warrant officer Article 133; and assimilated offenses, like sex trafficking in violation of 18 U.S.C. § 1590 (Article 134).

[7] DAC-IPAD members also read a subset of the appellate opinions for this study, focusing on opinions addressing court-martial panel composition and member selection, factual sufficiency, evidentiary issues (specifically, Military Rules of Evidence [MRE] 412 and 513), and ineffective assistance of counsel.

[8] Because of the nature of appellate review of the 212 cases, the 262 opinions published in those cases often spanned a longer time frame than just FY21.

Table 2. Appellate Opinions in FY21 MSA Cases

Military Service	MSA Cases	Appellate Opinions in MSA Cases	Cases With More Than One CCA Opinion
Army	99	112	11
Navy	31	41	10
Marine Corps	25	29	3
Air Force	55	76	19
Coast Guard	2	4	2
Total	212	262	45

III. Descriptive Data from FY2021 Appellate Review

This section describes characteristics from the 212 cases with a MSA conviction, and the 262 appellate decisions associated with those 212 cases.

A. Descriptive Data for the 212 MSA Cases

Table 3. MSA Cases with and without Guilty Pleas

Military Service	Guilty Plea	%	Contested	%	Mixed Plea	%
Army (N=99)	34	34%	61	62%	4	4%
Navy (N=31)	10	32%	20	65%	1	3%
Marine Corps (N=25)	15	60%	10	40%	0	0%
Air Force (N=55)	10	18%	43	78%	2	4%
Coast Guard (N=2)	0	0%	2	100%	0	0%
Total (N=212)	69	33%	136	64%	7	3%

For the 212 MSA cases, the reviewer recorded whether the accused pled guilty or contested the MSA offense or offenses, as shown in the final entry of plea. The majority of cases (64%) resulted in a contested trial rather than a guilty plea (33%). In 3% of the cases, the plea was mixed—that is, that the accused pled guilty to some but not all offenses at trial; however, all cases involving mixed pleas included at least one contested MSA.

Table 4. Contested MSA Cases with Convictions by a Panel of Members or by Judge Alone

Military Service	Military Judge	%	Panel of Members	%
Army (N=60)*	21	35%	39	65%
Navy (N=20)	2	10%	18	90%
Marine Corps (N=10)	2	20%	8	80%
Air Force (N=43)	14	33%	29	67%
Coast Guard (N=2)	1	50%	1	50%
Total (N=135)	40	30%	95	70%

*In 1 Army case information was not available and is not represented

Of the 135 contested cases with convictions for a MSA offense, the majority (70%) were tried before a panel of members. Only 40 of those cases (30%) were tried by a military judge alone.

Table 5. MSA Cases with Adult or Child Victims

Military Service	Adult Victim	%	Child Victim	%	Both	%
Army (N=99)	67	68%	31	31%	1	1%
Navy (N=31)	16	52%	14	45%	1	3%
Marine Corps (N=25)	13	52%	12	48%	0	0%
Air Force (N=55)	35	64%	18	33%	2	4%
Coast Guard (N=2)	2	100%	0	0%	0	0%
Total (N=212)	133	63%	75	35%	4	2%

The UCMJ defines a child as any person who has not attained the age of 16,[9] with the child's specific age determining the severity of the offense.[10] For example, any sexual act upon a child who has not attained the age of 12 is considered rape. The majority of the 212 cases (63%) involved adult victims; 35% of the cases involved a child victim. Four cases (2%) involved both child and adult victims.

[9] 10 U.S.C. § 920b (Article 120b(h)(4), UCMJ) (2019)

[10] *See generally* 10 U.S.C. § 920b (Article 120b, UCMJ) (2019)

Table 6. Guilty Pleas in MSA Adult Victim Cases

Military Service	Guilty Plea	%
Army (N=67)	20	30%
Navy (N=16)	6	38%
Marine Corps (N=13)	5	38%
Air Force (N=35)	3	9%
Coast Guard (N=2)	0	0%
Total (N=133)	34	26%

Table 7. Guilty Pleas in MSA Child Victim Cases

Military Service	Guilty Plea	%
Army (N=31)	14	45%
Navy (N=14)	4	29%
Marine Corps (N=12)	10	83%
Air Force (N=18)	7	39%
Coast Guard (N=0)	0	0%
Total (N=75)	35	47%

Table 3 shows that the accused pled guilty in 69 cases (33%) in this study, with an even split between adult victim cases (34 – Table 6) and child victim cases (35 – Table 7); however, the accused pled guilty at a significantly higher rate in child victim case (47% - Table 7) compared to adult victim cases (26% - Table 6). The accused pled not guilty in all four cases with both a child and adult victim.

B. Descriptive data from the 262 Appellate Court Opinions

The appellate information described in this section is drawn from 262 appellate court opinions,[11] including: the type of opinion issued, the appellate authority, the disposition of the appellate opinion, and recurring substantive issues (with "recurring" as those issues discussed most frequently by the appellate courts in their written decisions).

[11] Most of these appellate opinions were decided in 2021 but some were published before or later based on the inclusion of all the lower court opinions in cases with a CAAF or CCA decision from FY21.

Table 8. Form of CCA Decisions

Military Service	Published	%	Summary Affirmance (unpublished)	%	Other Unpublished	%	Order	%
Army (N=112)	3	3%	45	40%	62	55%	2	2%
Navy (N=41)	12	29%	5	12%	22	54%	2	5%
Marine Corps (N=29)	6	21%	14	48%	9	31%	0	0%
Air Force (N=76)	2	3%	1	1%	69	91%	4	5%
Coast Guard (N=4)	3	75%	0	0%	1	25%	0	0%
Total (N=262)	26	10%	65	25%	163	62%	8	3%

This study reviewed four types of appellate court decisions: published opinions, unpublished opinions, summary affirmances, and orders.[12] A court's determination whether to publish an opinion is governed by the CCAs' Rules of Appellate Procedure.[13] Published opinions serve as precedent, while unpublished opinions are considered persuasive authority.[14] Both published and unpublished opinions provide an overview of the facts and legal reasoning within the appellate decision. Summary affirmances do not describe the issues that were raised in briefs or on the record, and do not present the court's analysis. Although summary affirmances are a subset of unpublished opinions, they are discussed separately in this report.

The majority of the 262 court decisions (62%) are unpublished. The Services differ widely in their use of summary affirmances: Air Force (one total for the cases reviewed in this study); Army (issued a summary affirmance in 40% of its cases); Navy (12%); and Marine Corps (48%) (even though the Navy and Marine Corps share a Service CCA).

Table 9. Statutory Authority for CCA Review

Military Service	Article 62	%	Article 66	%	Writs Act/Other	%
Army (N=112)	1	1%	110	98%	1	1%
Navy (N=41)	1	2%	35	85%	5	12%
Marine Corps (N=29)	0	0%	27	93%	2	7%
Air Force (N=76)	2	3%	71	93%	3	4%
Coast Guard (N=4)	0	0%	4	100%	0	0%
Total (N=262)	4	2%	247	94%	11	4%

The majority of the 262 decisions were reviewed at the CCAs pursuant to Article 66(b), UCMJ. Article 66(b) provides an automatic review by the CCA if the accused receives a punitive

[12] An order is a directive issued by a court. Orders may direct the parties to act in a certain manner, for example sending a record of trial back to the military judge or directing a resentencing.

[13] The Rules of Appellate Procedure for each CCA describe published opinions as "[t] hose that call attention to a rule of law or procedure that appears to be currently overlooked, misinterpreted, or which constitutes a significant contribution to military justice jurisprudence. Published opinions serve as precedent, providing the rationale of the Court's decision to the public, the parties, military practitioners, and judicial authorities." Each CCA's appellate procedures can be located on the individual CCA websites.

[14] *Id.*

discharge, a confinement sentence of two years or more (including when the accused pled guilty), or the sentence includes death.[15] In addition to automatic appeals, the CCA may, on appeal by the accused, review: (1) cases in which the sentence extended to more than six months' confinement; and (2) cases in which the government previously filed an interlocutory appeal on a specific issue,[16] and may consider the government's appeal of a court-martial sentence on the grounds that it violated the law or was "plainly unreasonable."[17]

The government filed an Article 62 appeal[18] in four cases (2% - Table 9) for the following issues:

- Whether the military judge abused their discretion in denying the government's motion to admit the accused's testimony from his prior court-martial.[19]
- Whether the military judge erred in declaring a mistrial owing to cumulative error, including a determination by the military judge that a panel member was selected despite implied bias.[20]
- Whether the military judge erred in suppressing DNA evidence that resulted from a search and seizure.[21]
- Whether the military judge erred in granting the appellant's motion to dismiss for a violation of the right to a speedy trial.[22]

In all but one interlocutory appeal, the government prevailed at the CCA and at CAAF.[23]

[15] Article 66(b)(3), UCMJ (2019); *See Transcript of DAC-IPAD* 108 (Sept. 21, 2022) (testimony that the vast majority of appeals are automatic reviews and that the accused does not need to file a notice of appeal for review).

[16] Article 66(b)(1), UCMJ (2021).

[17] Article 56(d)(1), UCMJ (2021).

[18] Article 62, UCMJ (2021) (permits the government to appeal an order or ruling which excludes evidence that is substantial proof of a fact material in the proceeding).

[19] *United States v. Pyron,* No. 201900296R, 2022 WL 2764366*,* at *5 (N-M. Ct. Crim. App. Jul. 15, 2022) (holding that previous trial testimony should have been admitted and that the military judge's conclusions of law were erroneous).

[20] *United States v. Badders*, Army MISC 20200735, 2021 WL 4498674, at *16 (A. Ct. Crim. App. Sept. 30, 2021) (holding that military judge abused discretion in post-trial finding of implied bias and in declaring mistrial based on cumulative error).

[21] *United States v. Garcia*, 80 M.J. 379, 389 (C.A.A.F. 2020) (holding that military judge abused discretion in suppressing evidence from search).

[22] *United States v. Harrington*, 81 M.J. 184, 191 (C.A.A.F 2021) (dismissing charge and specification with prejudice where service member's Sixth Amendment right to speedy trial was violated).

[23] *Id*.

Table 10. Dispositions at CCAs and CAAF

Military Service	Affirmed	%	Findings and Sentence Set Aside	%	Findings Set Aside in part, Sentence Set Aside or Reassessed	%	Findings Affirmed, Sentence Set Aside or Reassessed	%	Other	%
Army (N=112)	83	74%	7	6%	13	12%	6	5%	3	3%
Navy (N=41)	26	63%	4	10%	5	12%	0	0%	6	15%
Marine Corps (N=29)	21	72%	4	14%	2	7%	0	0%	2	7%
Air Force (N=76)	43	57%	3	4%	11	14%	4	5%	15	20%
Coast Guard (N=4)	2	50%	2	50%	0	0%	0	0%	0	0%
Total (N=262)	175	67%	20	8%	31	12%	10	4%	26	10%

The court affirmed the findings and sentence in 175 (67%) of the 262 appellate decisions reviewed. In 20 cases (8%), the appellate court set aside the findings and the sentence.[24] In 31 cases (12%), the findings were set aside in part, and the sentence was set aside or reassessed. In 10 cases (4%), the appellate court adjusted the sentence but not the findings.[25] The final category of dispositions, "other," includes 26 cases (10%) with decisions that did not alter the findings or sentence but affected the case in some other way, including dismissals owing to a lack of jurisdiction, new trial orders, remands, and cases in which the Record of Trial was returned to the military judge or convening authority for correction.

IV. Assessment of FY21 Appellate Issues

For this study, the DoD GC specifically requested that the DAC-IPAD "focus on recurring appellate issues."[26] For the 262 appellate decisions reviewed, the following five specific issues recurred with the highest frequency: (1) factual sufficiency; (2) post-trial processing and delay; (3) evidentiary issues; (4) prosecutorial misconduct or ineffective assistance of counsel; and (5) panel member selection.[27] The following section describes these errors, including a review of significant cases and data on the frequency with which error was found and relief was granted.

[24] The findings set aside were not limited to sexual assault offenses but included all offenses in the MSA cases.

[25] In the majority of these cases, the sentence was adjusted to remedy post-trial processing delay.

[26] The memorandum did not define the term "recurring issues." There may be "recurring" appellate issues that are briefed by the parties but not reported here, if the courts chose not to discuss those specific issues, decided the appeal by summary affirmance, or denied a petition for discretionary review. Finally, there were no appellate decisions on writ petitions filed by victims' counsel in the FY21 cases, and none of the opinions indicated that they considered arguments made by victims' counsel on appeal.

[27] The professional staff identified every issue discussed by the CCA and CAAF in their opinions, regardless whether relief was granted. After reviewing all 262 appellate decisions, the staff identified 33 appellate issues. The five issues most often discussed were factual and legal insufficiency (58); post-trial processing errors, including post-trial delay (70); ineffective assistance of counsel (33); and problems with various Military Rules of Evidence (50). Other frequently recurring appellate issues included instructional error, sentence inappropriateness, panel member selection, and prosecutorial misconduct. Among the CAAF decisions, the recurring issues differed slightly. While ineffective assistance of counsel, prosecutorial misconduct, and problems with Military Rules of Evidence

A. Factual Sufficiency

In FY21, one of the top recurring appellate issues at the CCAs was factual sufficiency.[28] Factual sufficiency review will be impacted by a recent legislative change affecting the appellate courts.

The "Old" Article 66 Factual Sufficiency Standard of Review

Before the FY21 NDAA amendments to Article 66, UCMJ, CCAs were required to review every case for the factual sufficiency of every conviction.[29] CCAs had plenary statutory authority to conduct a de novo review of the court-martial record, pursuant to Article 66, which provided that the CCAs

> may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as the Court finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, the Court may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.[30]

For decades, the CCAs' broad power of factual sufficiency review was reaffirmed through case law at CAAF and its predecessor, the Court of Military Appeals.[31] Under this "old" Article 66 standard of review, the CCA determined, after weighing all of the evidence in the record of trial and making allowances for not having personally heard or seen the witnesses, that it was convinced of the accused's guilt beyond a reasonable doubt.[32]

The "New" Article 66 Factual Sufficiency Standard of Review

In the FY21 NDAA, Congress amended Article 66 to modify the scope of the CCA's power to review the factual sufficiency of a court-martial.[33] For findings of guilt entered on or after January 1, 2021, the language of Article 66 now provides, in relevant part, that the CCA may consider

---

also were addressed at CAAF, other recurring issues included whether issues not raised at trial were waived (6); guilty pleas and pretrial agreements (6); and jurisdiction (5).

[28] *See supra* p. 8.

[29] Report of the Military Justice Review Group, Part I: UCMJ Recommendations, Military Justice Review Group 610 (Dec. 22, 2015) [MJRG Report].

[30] Excerpt from 10 U.S.C. § 866(d)(1) as in effect for findings of guilt entered before January 1, 2021.

[31] Walter B. Huffman, Richard D. Rosen, Military Law: Criminal Justice & Administrative Process § 11:14, 1675 (2018-19 ed.).

[32] CPT Christian L. Reismeier, Commentary: Awesome, Plenary, and De Novo: Appellate Review of Courts-Martial 27 Fed. Sent. R. 143 (Feb 2015).

[33] Pub. L. 116-283, div. A, title V, § 542(b) Jan. 1, 2021 amended subsec. (d)(1) generally.

> whether the finding is correct in fact upon request of the accused if the accused makes a specific showing of a deficiency of proof. After an accused has made such a showing, the Court may weigh the evidence and determine controverted questions of fact subject to—
>
> (I) appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence; and
>
> (II) appropriate deference to findings of fact entered into the record by the military judge.
>
> If, as a result of the review . . . , the Court is clearly convinced that the finding of guilty was against the weight of the evidence, the Court may dismiss, set aside, or modify the finding, or affirm a lesser finding.[34]

The Military Justice Review Group (MRJG) proposed these changes to Article 66 in its December 2015 Report[35] recommending that instead of requiring the CCA to review every conviction for factual sufficiency, the burden should be on the accused to raise the issue of factual sufficiency and to make a specific showing of deficiencies in proof.[36] Upon such a showing, the CCA would be authorized to set aside a finding if the court was clearly convinced that the finding was against the weight of the evidence. Under the MJRG proposal, the CCA would weigh the evidence and determine controverted questions of fact, but it would be required to give deference to the fact that the trial court saw and heard the witnesses and other evidence.[37]

Although Congress did not change the factual sufficiency review standard when it passed the Military Justice Act of 2016, it did so five years later in the FY21 NDAA, essentially adopting the MJRG proposal.

Assessment of FY21 Appellate Opinions Discussing Factual Sufficiency

This study identified 58 cases in which the CCA discussed the factual sufficiency of a finding of guilty in its written opinion. In these 58 cases, the CCA applied the old Article 66 standard as the findings of guilt were entered before the new standard took effect on January 1, 2021. Thus, the CCA had plenary authority to affirm only such findings of guilty as it found correct in law and fact and as it determined, on the basis of the entire record, should be approved.[38] Under the old Article 66 standard, the CCAs were required to review every case for the factual sufficiency of every conviction; however, not every CCA written opinion discussed a factual sufficiency review.

---

[34] 10 U.S.C. § 866(d)(1).

[35] *Supra* note X, [MJRG Report] at 605-620.

[36] *Id.* at 610.

[37] *Id.*

[38] *Supra* note X.

Table 11. Factual Sufficiency Review, FY21

Military Service	Identified as MSA Cases	Factual Sufficiency Discussed on Appeal*
Army	99	9
Navy	31	16
Marine Corps	25	2
Air Force	55	30
Coast Guard	2	1
Total	212	58

*Cases in which the CCA discussed factual sufficiency in its written opinion.

Table 12. MSA Factual Sufficiency Cases with All Findings of Guilty Affirmed

Military Service	Factual Sufficiency Discussed on Appeal	Finding of Guilty Affirmed	%
Army	9	5	56%
Navy	16	12	75%
Marine Corps	2	1	50%
Air Force	30	24	80%
Coast Guard	1	1	100%
Total	58	43	74%

Of the 58 cases in which the CCA discussed factual sufficiency, the CCA affirmed all findings of guilty in the vast majority of cases (43 of the 58 cases - 74%).

Table 13. MSA Factual Sufficiency Cases with at Least One Finding of Guilty Reversed

Military Service	Factual Sufficiency Discussed on Appeal	Finding of Guilty Reversed	%
Army	9	4	44%
Navy	16	4	25%
Marine Corps	2	1	50%
Air Force	30	6	20%
Coast Guard	1	0	0%
Total	58	15	26%

Of the 58 cases in which the CCA discussed factual sufficiency, the CCA reversed one or more findings of guilty in 15 opinions. In 13 of those 15 opinions, the CCA affirmed at least one other

conviction—and often multiple other findings of guilty—or affirmed a lesser-included offense, resulting in the CCA's reassessment of the sentence or a decision to remand the case for a rehearing on the sentence for the remaining convictions.

For example, in one Army case, the CCA reversed the conviction for production of child pornography as factually insufficient but affirmed multiple other findings of guilty for aggravated sexual assault of a child, indecent liberties with child, indecent acts with a child, and sodomy of a child.[39] The Army CCA set aside the conviction for production of child pornography because the appellate judges were not convinced beyond a reasonable doubt that the appellant actually took the alleged photo at issue. At trial, the government failed to introduce evidence of a photo, and no witness testified that they ever saw a photo; the victim testified only that she "saw a flash." In that case, the CCA affirmed the remaining convictions and reassessed the sentence to affirm a dishonorable discharge and confinement for 43 years.

In the two cases in which the CCA set aside and dismissed with prejudice all findings of guilty, the convictions were all sexual offenses. In those two cases, the court provided a detailed explanation of why the government's evidence failed to convince it beyond a reasonable doubt that the appellant was guilty.[40] As the Navy-Marine Corps CCA explained in one opinion: "There is simply too much reasonable doubt associated with the evidence in this case. We are not charged with deciding 'who to believe,' but simply whether the Government proved its case beyond a reasonable doubt. It did not."[41]

Table 14. Factual Sufficiency Cases with Finding of Guilty Reversed, MSA vs. Non-MSA

Military Service	MSA Reversed	%	Non-MSA Reversed	%
Army (N=4)	2	50%	2	50%
Navy (N=4)	3	75%	1	25%
Marine Corps (N=1)	1	100%	0	0%
Air Force (N=6)	3	50%	3	50%
Coast Guard (N=0)	0	0%	0	0%
Total (N=15)	9	60%	6	40%

Although all 58 cases involved a conviction for a military sexual assault, the CCA sometimes affirmed the MSA conviction(s) but reversed a non-MSA conviction (such as drug use) as factually insufficient. Of the 15 opinions in which the CCA reversed one or more findings of guilty, 9 involved reversal of a MSA conviction and 6 involved reversal of a non-MSA conviction.

[39] *United States v. Adams*, ARMY 20130693, 2020 WL 4001871 (A. Ct. Crim. App. Jul. 13, 2020), *rev'd in part on other grounds*, 81 M.J. 475 (C.A.A.F. 2021).

[40] *United States v. Gilpin*, No. 201900033, 2019 WL 7480783 (N-M. Ct. Crim. App. Dec. 30, 2019); *United States v. Lewis*, No. 201900049, 2020 WL 3047524 (N-M. Ct. Crim. App. June 8, 2020).

[41] *Gilpin*, 2019 WL 7480783, at *15.

Table 15. MSA Factual Sufficiency Cases, Adult vs. Child Victims

Military Service	Adult Victim	%	Child Victim	%	Both	%
Army (N=9)	6	67%	3	33%	0	0%
Navy (N=16)	10	63%	4	25%	2	13%
Marine Corps (N=2)	2	100%	0	0%	0	0%
Air Force (N=30)	22	73%	6	20%	2	7%
Coast Guard (N=1)	1	100%	0	0%	0	0%
Total (N=58)	41	71%	13	22%	4	7%

Of the 58 cases in which the CCA discussed factual sufficiency, 41 cases involved an adult victim of military sexual assault, 13 cases involved a child victim of military sexual assault, and 4 cases involved both adult and child victims.

Table 16. MSA Factual Sufficiency Cases with Finding of Guilty Reversed, Adult vs. Child Victims

Military Service	Adult Victim	%	Child Victim	%	Both	%
Army (N=4)	2	50%	2	50%	0	0%
Navy (N=4)	4	100%	0	0%	0	0%
Marine Corps (N=1)	1	100%	0	0%	0	0%
Air Force (N=6)	5	83%	1	17%	0	0%
Coast Guard (N=0)	0	• 0%	0	0%	0	0%
Total (N=15)	12	80%	3	20%	0	0%

Of the 15 opinions in which the CCA reversed one or more findings of guilty, 12 cases involved an adult victim, and 3 cases involved a child victim.

B. Post-trial Processing and Delay

Post-trial processing errors were among the most frequently recurring issues discussed by the appellate courts. Many of the discussions grappled with recent legislative changes aimed at streamlining the process for memorializing the results of the trial and transferring the record of trial to the appellate courts.[42] These changes, introduced by the Military Justice Act of 2016

[42] REPORT OF THE MILITARY JUSTICE REVIEW GROUP, 558 (2015), available at https://jsc.defense.gov/Portals/99/MJRG%20Part%201.pdf.

(MJA16), took effect on January 1, 2019, and apply to cases in which all offenses were committed on or after that date.[43]

Under the old procedural rules, the convening authority's action was the final step before a record of trial was forwarded to the CCA and the case was docketed. In *United States v. Moreno*, CAAF established a presumption of facially unreasonable delay where: the convening authority did not take action within 120 days of sentencing (*Moreno I*); the case was not docketed with the CCA within 30 days of the convening authority's action (*Moreno II*); or the CCA did not render a decision within 18 months of docketing (*Moreno III*).[44] In the years since *Moreno* was decided, the Services have reported a significant decrease in post-trial processing delays.[45]

The MJA16 changed the role of the convening authority in post-trial processing, eliminating the requirement that the convening authority take action on the sentence prior to entry of judgment. In fact, such action is now prohibited, except in limited circumstances.[46] Under the new procedural rules, the convening authority's action is not required in cases where all offenses were committed on or after January 1, 2019. Although CAAF has not yet addressed the issue,[47] the CCAs have adopted a new timeline in response to the changes, concluding that a presumptively unreasonable delay occurs where more than 150 days elapse between sentencing and docketing.[48]

Table 17. Number of CCA Opinions Discussing Post-Trial Processing Issues

[43] Military Justice Act of 2016, Pub. L. No. 114-328, §§ 5001-5542 (23 Dec. 2016), implemented in the 2019 Rules for Courts-Martial [R.C.M.] by Executive Order 13,825, 83 Fed. Reg. 9889 (8 Mar. 2018) [EO 13825].

[44] 63 M.J. 129, 142 (C.A.A.F. 2006).

[45] *See* Reports to Congress from the Services for FY18, FY19, FY20, and FY21, available at Joint Service Committee on Military Justice website: https://jsc.defense.gov/Annual-Reports/. *See also United States v. Rivera*, 81 M.J. 741, 744 (N-M. Ct. Crim. App. 2021) (noting that "[s]ince [*Moreno*], this Court has virtually eliminated *Moreno III* violations and the Navy and Marine Corps have done likewise with *Moreno I and II* violations"); *Transcript of DAC-IPAD Public Meeting* 206-08 (Sept. 21, 2022) (explaining that backlog of cases was cleared after CAAF issued *Moreno* decision).

[46] 10 U.S.C. § 860a (2018).

[47] *See United States v. Anderson*, 82 M.J. 82, 86 n.2 (C.A.A.F. 2022) (acknowledging that "the amendments to the 2017 National Defense Authorization Act and R.C.M. 1109-1112 of the 2019 Rules for Courts-Martial call into question the continued validity of the *Moreno* timelines," but concluding resolution of the issue was not necessary to resolve appeal where charges were referred prior to effective dates of amendments).

[48] *United States v. Rivera*, 81 M.J. 741, 745-46 (N-M. Ct. Crim. App. 2021); *United States v. Brown*, 81 M.J. 507, 510 (A. Ct. Crim. App. 2021); *United States v. Livak*, 80 M.J. 631, 633 (A.F. Ct. Crim. App. 2020); *United States v. Tucker*, 82 M.J. 553, 570 (C.G. Ct. Crim. App. 2022).

Military Service	CCA Opinions	%	Post-Trial Delay	Other Post-Trial Processing Errors	Both
Army (N=112)	22	20%	8	13	1
Navy (N=41)	5	12%	1	4	0
Marine Corps (N=29)	4	14%	0	4	0
Air Force (N=76)	37	49%	16	11	10
Coast Guard (N=4)	2	50%	1	0	1
Total (N=262)	70	27%	26	32	12

This study identified 70 opinions discussing post-trial processing issues, including 26 opinions discussing post-trial delay; 32 opinions discussing other post-trial processing errors; and 12 opinions discussing both post-trial delay and other post-trial processing issues. Most of these decisions were issued by the Air Force Court of Criminal Appeals, which in many cases considered these issues *sua sponte*.

Table 18. Number of CCA Opinions Discussing and Granting Relief for Post-Trial Delay

Military Service	Post-Trial Delay	Relief Granted	%
Army	9	5	56%
Navy	1	0	0%
Marine Corps	0	0	0%
Air Force	26	3	12%
Coast Guard	2	1	50%
Total	38	9	24%

The CCAs granted relief for post-trial delay in nine cases, remedying the delay in most cases with modest reductions to the sentence to confinement ranging from ten days to seven months.[49] In only one case did the CCA grant more substantial relief, setting aside the findings and sentence to remedy both post-trial delay amounting to a due process violation and the military judge's failure to conduct sufficient inquiry into alleged unlawful command influence.[50]

Most of the opinions discussing other post-trial processing issues addressed errors in the convening authority's action on the sentence in cases where all offenses were committed before January 1, 2019, but charges were referred after that date. The CCAs reached different conclusions as to whether, in those circumstances, a convening authority was required to explicitly state whether the sentence was approved, and in case of error in the action, whether the CCA had jurisdiction and was required to analyze for prejudice before remanding for corrective action.[51]

[49] All but two of the post-trial delay cases were subject to the *Moreno* standards.

[50] *United States v. Leal*, 81 M.J. 613, 624 (C.G. Ct. Crim. App. 2021).

[51] *Compare United States v. Brown*, No. ACM 39854, 2021 WL 3701691, at *3 (A.F. Ct. Crim. App. Aug. 19, 2021) (holding that Service Court must remand for corrective action where convening authority's failure to take action on sentence fails to satisfy requirement of applicable Article 60, UCMJ), *with United States v. Hale*, ARMY 20190614, 2021 WL 2005916, at *1 n.2 (A. Ct. Crim. App. May 19, 2021) (concluding that

In *United States v. Brubaker-Escobar*,[52] CAAF resolved these issues when it held that a convening authority errs by failing to take action to approve, disapprove, commute or suspend a sentence in whole or in part if the accused is found guilty of at least one offense committed before January 1, 2019. CAAF concluded the error is procedural rather than jurisdictional, at least where charges were referred after January 1, 2019, and the accused is not entitled to relief absent material prejudice to a substantial right of the accused.[53]
Post-trial processing errors are unique in that the error is often plain, and the only issue the appellate court must decide is the appropriate remedy. In 24 cases, the CCAs granted relief for post-trial processing errors other than delay, including errors in the convening authority's action. In 16 of these cases, the relief granted did not affect the findings or sentence: the CCAs corrected scrivener's errors in post-trial documents, ordered the government to produce missing portions of the transcript of trial; or ordered a new post-trial processing or remanded the case to resolve an ambiguity in the convening authority's action. In most of the remaining cases, the CCAs disapproved a portion of the sentence due to ambiguity or errors in the convening authority's action on those portions of the sentence. The CCA set aside the findings and sentence in just one case, due to the absence of a substantially verbatim transcript of trial.

Table 19. Number of CCA Opinions Discussing and Granting Relief for Other Post-Trial Processing Errors

Military Service	Other Post-Trial Processing Errors	Relief Granted	%
Army	14	6	43%
Navy	4	3	75%
Marine Corps	4	2	50%
Air Force	21	12	57%
Coast Guard	1	1	100%
Total	44	24	55%

C. Conduct of Counsel: Prosecutorial Misconduct and Ineffective Assistance of Counsel

Prosecutorial Misconduct

Prosecutors, military or civilian, occupy a special role as the government's representative in the courtroom, and their actions can affect the fairness of the criminal justice process at any stage, whether during the investigative, charging, or adjudicative phases of a case.[54] Courts exercise

convening authority's error in failing to take action was neither jurisdictional nor prejudicial to substantial right of the accused).

[52] 81 M.J. 471, 474 (C.A.A.F. 2021).

[53] *Id.* at 475.

[54] *United States v. Hillman*, 621 F.3d 929, 1465 (10th Cir. 2011); *United States v. Carter*, 236 F.3d 777, 792-3v (6th Cir. 2001).

some oversight over the prosecution function by remedying errors caused by prosecutorial misconduct—defined broadly as action or inaction by a prosecutor in violation of some legal norm or standard, such as a constitutional provision, a statute, a Manual rule, or an applicable professional ethics canon.[55]

A prosecutor's arguments at trial amount to prosecutorial misconduct when the comments "overstep the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense."[56] In general, counsel may argue facts in evidence and reasonable inferences drawn from the evidence. However, when a prosecutor deliberately misstates the evidence in comments to the factfinder, attacks other parties to the case, or appeals overtly to the passions or prejudices of the factfinder, courts may identify and remedy the error. Reversal of the findings, or setting aside the sentence, may occur when the error negatively influences the appellant's rights under Article 59, UCMJ.[57] In the context of an improper argument, courts will reverse a finding only when "the trial counsel's comments taken as a whole, were so damaging that the court cannot be confident that the appellant was convicted or sentenced on the basis of the evidence alone."[58]

Overview of decisions reviewed

In most FY21 decisions reviewed, the prosecutorial misconduct claimed by appellant involved allegations of improper argument. In all but one instance, the CCA either did not find error, or found the errors, considered in conjunction with curative measures taken by the military judge, were not so significant as to warrant reversal.

Decisions finding error

In *U.S. v. Norwood*, CAAF found counsel improperly vouched for the victim's veracity during argument, but when balanced against the weight of the evidence and the military judge's instructions, appellant was not prejudiced.[59] CAAF found that trial counsel's sentencing argument was inappropriate and prejudicial because it invited the panel members to adjudge a sentence based on how they might be judged in society for the sentence they assess in a sexual offense case, rather than on the evidence presented.[60] In setting aside the sentence and ordering a new sentence hearing, the Court explained, "an inflammatory hypothetical scenario with no basis in evidence amounts to improper argument that we have repeatedly, and quite recently,

[55] *United States v. Meek*, 44 M.J. 1, 5 (C.A.A.F. 1996).

[56] *United States v. Fletcher*, 62 M.J. 175, 178 (C.A.A.F. 2005).

[57] *Id.* at 179; 10 U.S.C. § 859.

[58] *United States v. Andrews*, 77 M.J. 393, 401-02 (C.A.A.F. 2018); *United States v. Halpin*, 71 M.J. 477, 480 (C.A.A.F. 2013).

[59] *United States v. Norwood*, 81 M.J. 12, 20-21 (C.A.A.F. 2021)

[60] *Id*.

condemned," and likely contributed to a higher sentence than appellant might otherwise have received.[61]

Ineffective Assistance of Counsel

The Sixth Amendment to the United States Constitution guarantees an accused the right to effective assistance of counsel.[62] This right applies to Service Members facing courts-martial.[63] Attorneys representing criminal defendants incur responsibilities to thoroughly investigate the facts and law; uphold a duty of loyalty to the client; and provide competent advice to a defendant in furtherance of the exercise of their rights. Effective advocacy is essential to the reliability of and public confidence in the criminal justice process. On appeal, military courts evaluate defense counsel's performance using the standard articulated by the U.S. Supreme Court in in *Strickland v. Washington*.[64] In general, counsel are presumed competent.[65] However, if an appellant can demonstrate both that counsel's performance was deficient in a specific way, and that deficiency renders unreliable the trial outcome, the conviction and/or sentence may be set aside.

Overview of decisions reviewed

Ineffective assistance of counsel was one of the most frequently raised issues in the decisions reviewed for this study,[66] including a wide variety of conduct by counsel in preparing and litigating a case. The appellate courts scrutinized the substantive conduct of counsel for the potential deficiency—e.g.., whether there was in fact a basis to file a particular motion, and the likelihood that such a motion would have been successful—and then separately analyze whether, had the error occurred, it would have affected the outcome of the trial. In none of these recently issued decisions was relief granted for deficient performance by defense counsel. Examples of the types of issues discussed include:

- Failure to object to evidence;
- Failure to request a specific jury instruction;
- Failure to challenge a panel member for bias;
- Failure to seek certain evidence, interview witnesses, or file specific motions;
- Inadequate preparation of a presentencing case;
- Improper advice as to the meaning and effect of a guilty plea or the terms of a pretrial agreement; and
- Improper advice regarding the accused's right to testify.

No single issue was raised repeatedly so as to highlight a potentially systemic issue regarding the competence or training of military and civilian defense counsel. Given the importance of the

[61] *Id*.

[62] U.S. CONST. AMEND. VI; *Strickland v. Washington*, 466 U.S. 668, 688 (1984).

[63] *United States v. Gooch*, 69 M.J. 353, 361 (C.A.A.F. 2011); *United States v. Gilley*, 56 M.J. 113, 124 (C.A.A.F. 2001)

[64] *Strickland*, 466 U.S. at 694.

[65] *United States v. Cronic*, 466 U.S. 648, 658 (1984).

[66] *See infra*. ___

right to counsel, and the broad spectrum of issues that may arise in the course of representing a criminal defendant at trial, it is expected that allegations of ineffective assistance will recur with some frequency. Military justice practitioners must monitor these discussions in appellate cases for recurring trends and take note of instances in which a deficiency is found.

Decision finding error

In *United States v. Westcott*,[67] the Air Force Court of Criminal Appeals found civilian and military defense counsel's performance deficient for failing to ensure the findings instructions defined "consent" as it related to a sexual contact offense of which appellant was convicted. Counsel had reviewed the proposed instructions before the military judge read them to the panel, listened as the military judge instructed the panel, and at no point objected to the missing instruction. The Court concluded that counsel's failure to object was an oversight, as opposed to a strategic or tactical choice, for which there was no reasonable explanation;[68] however, the Court found appellant was not due any relief because the defense counsel error did not contribute to appellant's conviction. Moreover, the instructions provided did permit the panel to consider related issues, such as mistake of fact as to consent, in line with the defense's theory of the case.

D. Evidentiary Issues

Rules of Evidence, in any court, are a collection of rules that govern admissibility of evidence at trial; their purpose includes the fair administration of justice as well as "ascertaining the truth and securing a just determination."[69] The Military Rules of Evidence (MREs) are almost identical to the Federal Rules of Evidence. In any trial, what evidence can or should be shared with the factfinder will be contested. Evidentiary issues were one of the recurring issues frequently discussed by the CCAs. In this study, there were 50 CCA opinions with discussion of MREs, most often pertaining to hearsay, search and seizure, confessions and admissions, and MREs 513 and 412. The appellate court opinions discussing MRE 513 and MRE 412 appear below.

Military Rule of Evidence 513: psychotherapist-patient privilege

In total, eight decisions involving MRE 513 were reviewed in this study—3 decisions issued by CAAF, and an additional 5 decisions from the CCAs. This section provides an overview of MRE 513 and the decisions in which this rule of privilege was discussed.

The military's psychotherapist–patient privilege was codified into the Military Rules of Evidence more than 20 years ago.[70] MRE 513 protects a patient from having to disclose and prevents others from disclosing a "confidential communication made between the patient and the psychotherapist or an assistant to the psychotherapist . . . [when] such communication was made

[67] No. ACM 39936, 2022 WL 807944 (A.F. Ct. Crim. App. Mar. 17, 2022).

[68] *Id*. at *19 ("Trial defense counsel had the obligation to carefully review the draft instructions and propose their own instructions based upon the facts of Appellant's case and the state of the law.").

[69] Fed. R. Evid. 102, Purpose.

[70] *See* Exec. Order No. 13, 140, 64 Fed. Reg. 55, 115 (Oct. 12, 1999); Mil. R. Evid. 513(a).

for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition."[71] Although there is no equivalent privilege delineated in the Federal Rules of Evidence, the Supreme Court has recognized a psychotherapist–patient privilege in federal common law, noting its importance because therapy "depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories and fears."[72]

Beyond the rule itself, MRE 513 contains several parts: definitions, a description of who may claim the privilege, and seven enumerated exceptions to the rule,[73] as well as a lengthy description of the procedure to determine admissibility of patient records or communications.[74] Despite the rule's complexity, in 2006, CAAF began a long stretch during which it issued no decisions interpretation MRE 513. That changed in 2021, when CAAF took up three cases pertaining to MRE 513, each addressing a different issue: the scope of the rule itself; the in camera review process; and enumerated exceptions to the privilege.

In July 2022, CAAF decided *U.S. v. Mellette,* addressing whether the scope of communications between a patient and psychotherapist under MRE 513 extends to diagnoses and treatments.[75] Before *Mellette*, the CCAs were split on how broadly to interpret privileged "communications" between a psychotherapist and patient.[76]

At trial, the military judge denied a defense motion for in camera review and disclosure of the victim's mental health records, finding that the records were privileged and that diagnoses and treatment were not "segregable" from any privileged communications.[77] The Navy-Marine Court of Criminal Appeals (NMCAA) affirmed, concluding that privileged communications between a patient and psychotherapist for the purposes of facilitating diagnosis and treatment include the actual "diagnosis and treatment plan."[78]

CAAF disagreed with the lower court's broad interpretation of communications. Relying on the Supreme Court's statutory interpretation of evidentiary privileges, it concluded they are to be

---

[71] Mil. R. Evid. 513(a).

[72] *Jaffee v. Redmond,* 518 U.S. 1, 2 (1996).

[73] Mil. R. Evid. 513(d)(1)-(7). Exceptions include: when the patient is dead, the communication is evidence of child abuse or neglect, when a law imposes a duty to report, when the psychotherapist believes that the patient is a danger to a person, if the communication clearly contemplated a future crime, disclosure is necessary to ensure the safety and security of military personnel, when an accused offers statements or other evidence concerning his mental condition in defense.

[74] Mil. R. Evid. 513(e)

[75] *United States v. Mellette,* 82 M.J. 374 (C.A.A.F. 2021).

[76] *United States v. Rodriguez*, No ARMY 20180138, 2019 WL 4858233, (A. Ct. Crim. App. Oct. 1, 2019) (holding that neither the diagnosed disorder nor the medications prescribed to treat the disorder are "confidential communications" under the privilege; *H.V. v. Kitchen*, 75 MJ 717, 719-721 (USCG Ct. Crim App. 2016) (holding both the diagnosis as well any prescribed medications are covered by the privilege).

[77] *United States v. Mellette*, 81 M.J. 681, 691 (N-M. Ct. Crim App. 2021).

[78] *Id.*

"narrowly construed."[79] CAAF looked to the text of MRE 513(a) and framed the ultimate question as follows: whether the word "communications" should be "interpreted broadly to include all evidence that in some way reflects, or is derived from, confidential communications."[80] In a 3-2 decision, CAAF found that the privilege was limited to "communications" between the patient and psychotherapist. In making this decision, the Court stated that the judges' opinion was based not on their "views on the proper scope" but only on their interpretation of the text itself, reasoning if the President intended for the rule to govern information outside of the "communications" he would have so specified.

Duty to Report Exception under MRE 513

In *United States v. Beauge*, CAAF explored the contours of the enumerated "duty to report" exception to the psychotherapist-patient privilege.[81] Under MRE 513, a psychotherapist must disclose to the authorities "when federal law, state law, or service regulation imposes a duty to report information contained in a communication."[82] Generally, these mandated disclosures involve the potential for self-harm or certain types of abuse—for example, a child's report of sexual abuse. In *Beauge*, CAAF granted review on the issue of whether the lower court created an "unreasonably broad scope of the psychotherapist-patient privilege" by denying the defense access to the child victim's mental health records after her therapist reported the child's sexual abuse to state authorities.[83] The defense was provided the audio recording and investigative summary of the report in discovery, but was denied the remaining records of the communications between the therapist and the victim. The appellant argued, on the basis of the plain language of the rule, that the privilege was pierced to all communications once a mandated report was made.

As in *Mellette*, CAAF looked to principles of statutory construction.[84] Here, the Court clarified that the privilege applies not only to communications between a therapist and patient but also to "legally required reports to state authorities."[85] CAAF went on to find that the underlying communications should not be viewed as a "unitary whole" with the mandated state reporting requirements, because to do so would violate MRE 513(e)(4), which states that disclosure should be narrowly tailored.[86]

In-camera Review and the Constitutional Exception

[79] *United States v. Mellette,* 82 M.J. 374, 379 (C.A.A.F. 2021).

[80] *Id*. at 378.

[81] *United States v. Beauge*, 81 M.J. 157 (C.A.A.F. 2021).

[82] Mil. R. Evid. 513(d)(3), UCMJ.

[83] *United States v. Beauge,* 81 M.J. 301 (C.A.A.F. 2021) (order granting review).

[84] *Beauge*, 81 M.J. at 162.

[85] *Id.* at 163.

[86] *Id.* at 165.

Before ordering the production or disclosure of records under MRE 513, a military judge may conduct an in camera review to determine the admissibility of protected records or communications if the moving party establishes four factors:

- a specific, credible factual basis demonstrates a reasonable likelihood that the records would contain information admissible under an exception to the privilege;
- the requested information meets an enumerated exception;
- the information is not merely cumulative; and
- the party made reasonable efforts to obtain the same or substantially similar information from non-privileged sources.[87]

The second factor for in-camera review is that the requested information must meet an enumerated exception to pierce the MRE 513 privilege. The CCAs have split on whether to recognize a constitutional exception that was enumerated as MRE 513(d)(8) until 2015, when it was removed from the enumerated exceptions. [88]

In a published decision in *United States v. Tinsley*, the Army Court of Criminal Appeal (ACCA) rejected the appellant's argument that in camera review of a victim's mental health records was constitutionally required, concluding "that the military courts do not have the authority to either read back the constitutional exception in Military Rule of Evidence 513, or otherwise conclude that the exception still survives notwithstanding its explicit deletion."[89] In *Mellette*, discussed above, the NMCAA reached the opposite conclusion, finding that in camera review of the victim's mental health records was constitutionally required, based on an accused's "weighty interests of due process and confrontation," because the victim's inability to remember key dates went to credibility.[90] CAAF denied a petition for review of *Tinsley* and decided *Mellette* on other grounds, leaving unresolved the question of whether a constitutional exception can be considered as part of the authorization process for in-camera review.[91]

The disagreement between the CCAs over whether to recognize a constitutional exception to the psychotherapist-patient privilege in determining whether to conduct in-camera review will likely result in further litigation, especially as it relates to the discovery of documents related to MRE 513. Specifically, the issue of whether military courts, for purposes of an in-camera inspection,

---

[87] Mil. R. Evid. 513(e)(3)(A)-(D), UCMJ.

[88] *See* National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291 (2014). This legislation removed the "constitutionally required" exception under Mil. R. Evid 513(d)(8).

[89] *United States v. Tinsley*, 81 M.J. 836 (A. Ct. Crim. App. 2021), *petition denied*, 82 M.J. 372 (C.A.A.F. 2022).

[90] *Mellette*, 81 M.J. at 694. The NMCCA did not find that the error materially prejudiced Appellant's substantial rights.

[91] *See also United States v. McClure*, 82 M.J. 194 (C.A.A.F. 2022) (granting review of issue "Whether the Military Judge abused his discretion when he denied defense's motion for access to JS's mental health records under M.R.E. 510 and 513 and refused to review the mental health records in camera to assess whether a constitutional basis justified the release of the records to the defense"), *aff'd by summ. disp.*, __ M.J. __ (affirming in light of *Mellette*, assuming error but finding no prejudice).

can read into the Rule a constitutional exception will most likely center on rights to discovery in conjunction with the Sixth Amendment right to confront witnesses.[92]

Military Rule of Evidence 412

MRE 412, commonly referred to as the rape shield rule, prohibits the introduction of any evidence offered to prove that an alleged sexual assault victim engaged in other sexual behavior or evidence offered to prove an alleged victim's sexual predisposition.[93] This rule is "intended to shield victims of sexual assaults from the often embarrassing and degrading cross-examination and evidence presentations common to sexual offense prosecutions."[94] The rule itself, like MRE 513, contains a definition section, three exceptions, and a relevancy test for admissibility, as well as procedures for conducting hearings on the issue. This study reviewed eight appellate opinions discussing the application of MRE 412, including four AFCCA decisions, two ACCA decisions, and two NMCCA decisions.

In the majority of decisions reviewed for this study, the CCA found or assumed error involving the admission or exclusion of MRE 412 evidence. Two cases resulted in findings being set aside on the sexual assault charge; in three cases the court determined that the error or assumed error was harmless.

Both cases setting aside findings related to the military judge's ruling excluding evidence. In the first case, the appellant filed a motion to introduce evidence of the victim's behavior before the sexual assault under two MRE 412 exceptions: behavior of the victim to prove consent and the appellant's constitutional right to confrontation. The Air Force CCA found the military judge's reasoning flawed and concluded he abused his discretion by excluding evidence that the victim and appellant were playing a "sexually provocative game" of Jenga in the lead-up to the sexual assault.[95] Specifically, the court found that the evidence went directly to the defense's theory of consensual sex while the appellant was blacked out and that the behavior between the appellant and the victim during the sexually suggestive drinking game had "some tendency to lead the court members to find she may have also consented to the engage in sexual intercourse."[96] Further, the court found that the evidence was relevant to a mistake of fact defense.

In the second decision that set aside findings, the issue on appeal also invoked the appellant's constitutional right to confrontation. At a motions hearing, the defense sought to introduce evidence of the victim's diagnosis of chlamydia, and a doctor testified that this particular STD could have caused intercourse to be painful. The defense moved to have the evidence introduced

---

[92] *See Beauge*, 82 M.J. at 167 (noting that "the debate on the confrontation issue is limited by the Supreme Court's decision in *Pennsylvania v. Ritchie*, in which a plurality of the Court opined that the Sixth Amendment right 'to question adverse witnesses…does not include the power to require the pretrial disclosure of any and all information that might be useful in contradicting unfavorable testimony'").

[93] Mil. R. Evid. 412(a), UCMJ.

[94] *United States v. Carpenter*, 77 M.J. 285 (C.A.A.F 2018).

[95] *United States v. Harrington*, No. ACM 39223, 2018 WL 4621100, at *4 (A.F. Ct. Crim. App. Sept. 25, 2018).

[96] *Id.* at *5.

to rebut the victim's testimony that the intercourse was painful. In his ruling, the judge made a factual finding that the victim's pain did not derive from a chlamydia infection but was instead caused by her intercourse with the appellant. The Army CCA found that the appellant was denied his constitutional right to confront the victim. The court also found that the military judge's finding of fact that the chlamydia could not have caused pain, despite testimony from a medical doctor, invaded the "province of the panel."[97]

In the additional three cases that found or assumed error, the CCA concluded:

- The military judge erred by admitting evidence of the victim's virginity as evidence of sexual predisposition, but the prejudicial effect was minimal in light of the totality of the evidence adduced at trial;[98]
- Assuming without deciding that the military judge erred by precluding the defense from cross examining the victim about alleged consensual sexual behavior with the accused immediately prior to the charged offense, the error was harmless beyond a reasonable doubt, where the evidence supporting conviction was not overwhelming but the victim's testimony on cross examination would not have changed the members' perception of her credibility;[99]
- The military judge abused his discretion by precluding the defense from cross examining the victim about a sexually explicit video recording to prove consent, where he failed to consider admissibility of the evidence to impeach the victim's character for truthfulness, but the error was harmless beyond a reasonable doubt where her testimony was not the only evidence and cross examination regarding the recordings would not have meaningfully undermined her credibility.[100]

E. FY21 Appellate Opinions Addressing Court-Martial Panels

In December 2022, the DAC-IPAD heard testimony from senior judge advocates who described how a court-martial panel is convened.[101] In January 2023, the CRSC also heard from civilian defense attorneys who described their experiences with court-martial panel selection processes.[102] Despite some differences between the Services and between different convening authorities within each Service, they all described a process by which the pool of prospective

---

[97] *United States v. Cuevas-Ibarra*, ARMY 20200146, 2021 WL 2035139, at *5 (A. Ct. Crim. App. May 21, 2021).

[98] *United States v. Olson*, ARMY 20190267, 2021 WL 1235923, at *6 (A. Ct. Crim. App. Apr. 1, 2021). The Army court noted that other Services have reached the opposite conclusion, holding that a victim's virginity is not evidence of sexual predisposition under M.R.E. 412 and is therefore admissible. *Id.* (citing *United States v. Price*, 2014 WL 2038422 (A.F. Ct. Crim. App. Apr. 22, 2014) and *United States v. White*, 62 M.J. 639 (N-M. Ct. Crim. App. 2006)).

[99] *United States v. Horne,* ACM 39717, 2021 WL 2181169, at *37 (A.F. Ct. Crim. App. May 27, 2021), *aff'd on other grounds*, 82 M.J. 283 (C.A.A.F. 2022).

[100] *United States v. Martinez,* ACM 39903 (f rev), 2022 WL 1831083, at *44 (A.F. Ct. Crim. App. May 31, 2022).

[101] *Transcript of DAC-IPAD Public Meeting* 9-94 (Dec. 6, 2022).

[102] *Transcript of CRSC Meeting* 31-126 (Jan. 23, 2023).

panelists is gradually narrowed to a venire from which the members are selected for specific courts-martial.

Typically, subordinate commanders under the convening authority's jurisdiction nominate a certain number of officers and enlisted personnel who are "best qualified" according to the criteria of Article 25, UCMJ,[103] and provide the SJA with a member questionnaire and/or Enlisted or Officer Record Brief[104] (ERB/ORB) from each nominee. After collecting nominations from the subordinate commands, the SJA screens the nominees for eligibility and availability and compiles a package for the convening authority to consider, consisting of the member questionnaires and/or ERB/ORBs as well as a roster of every eligible Service member under that command. The convening authority is not limited to nominated personnel or even to the command roster, but may borrow personnel from other commands. After the convening authority selects the members, the SJA drafts a Court-Martial Convening Order (CMCO). The CMCO creates the court-martial and details members to the court-martial panel. All of the Services typically use standing panels that are available to any court-martial convened within a specified time period, but the convening authority may also detail panelists to a specific court-martial.

[add: graphic showing narrowing of pool through nomination and selection by CA]

Once the panel members are sworn and the court-martial is assembled, the military judge and counsel may whittle down the panel even more through the voir dire process. Military judges uphold the accused's right to an impartial panel by applying R.C.M. 912(f)(1)(M), which requires that a member be excused for actual bias when they have "formed or expressed a definite opinion as to the guilt or innocence of the accused as to any offense charged," and R.C.M. 912(f)(1)(N), which requires that a member be excused for implied bias when they "[s]hould not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality." While issues of actual and implied bias often arise during pretrial voir dire, "A party may challenge a member for cause 'during trial when it becomes apparent that a ground for challenge may exist.'"[105]

Assessment of FY21 Appellate Opinions Discussing Court-Martial Panel Issues

This study identified 14 appellate opinions addressing the selection of court-martial panel members.[106] In two of the opinions, the CCA reviewed the convening authority's selection of the

[103] Article 25(e)(2), UCMJ, provides that the convening authority "shall detail as members thereof such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experiences, length of service, and judicial temperament." *See also* RCM 503(a)(1)(A) (providing that the convening authority shall detail qualified persons as members for courts-martial); RCM 502(a)(1) (requiring that the "members detailed to a court-martial shall be those persons who in the opinion of the convening authority are best qualified for the duty by reason of their age, education, training, experience, length of service, and judicial temperament").

[104] These documents provide a one-page summary of a person's military career as well as demographic information.

[105] *United States v. McFadden*, 74 M.J. 87, 90 (C.A.A.F. 2015) (quoting R.C.M. 912(f)(2)(B)).

[106] All but three of the decisions involved contested cases; in the three in which the accused pled guilty, he was sentenced by a panel.

court-martial panel. In 11 of the opinions, the CCA reviewed the military judge's rulings on challenges for cause during the voir dire process and other panel issues that arose during trial. In one case, the CCA reviewed challenges to both the convening authority's panel selection process and the voir dire process.

Table 20. Appellate Review of Court-Martial Panel Selection Issues

Military Service	Identified as MSA Cases	Court-Martial Panel Discussed on Appeal*	Panel Composition Discussed on Appeal	Member Selection Dicussed on Appeal	Panel and Member Discussed on Appeal	CCA Relief Granted	%
Army	99	7	0	7	0	3	43%
Navy	31	3	2	1	0	1	33%
Marine Corps	25	0	0	0	0	0	0%
Air Force	55	4	0	3	1	0	0%
Coast Guard	2	0	0	0	0	0	0%
Total	212	14	2	11	1	4	29%

*Cases in which the CCA discussed panel composition and/or member selection in its written opinion

Reversals in Member Selection Cases

The appellate courts reversed the military judge's ruling in four cases involving member selection at trial. One of the reversals was an Article 62 appeal by the government in response to a mistrial the military judge granted after imputing bias to a member as a result of the member's conduct during an evening recess (conduct unrelated to the court-martial). The appellate court set aside the ruling, concluding that the military judge abused her discretion in imputing implied bias to the member.[107]

In the three other cases in which a CCA granted relief because of error in member selection, the findings and sentence were set aside owing to the military judge's abuse of discretion in denying a defense challenge for cause. In all three cases, the appellate courts noted that voir dire was inadequate to rehabilitate the challenged panel member, and the military judge did not put their reasoning on the record or consider the liberal grant mandate.[108] Two of the reversals were based on implied bias revealed during pretrial voir dire. In one case, the panel member could not be certain he would not think of his own two daughters, who were close in age to the victims.[109] In the other, the member failed to disclose in group voir dire that her daughter was a victim of

[107] *United States v. Badders*, ARMY Misc. 20200735, 2021 WL 4498674, at *16 (A. Ct. Crim. App. Sept. 30, 2021), *aff'd*, 82 M.J. 299 (C.A.A.F. 2022).

[108] *United States v. Peters*, 74 M.J. 31 (C.A.A.F. 2015)(the military judge is mandated to err on the side of granting a challenge of a court member; this is what is meant by the liberal grant mandate).

[109] *United States v. Pyron*, 81 M.J. 637, 640 (N-M. Ct. Crim. App. 2021).

sexual assault.[110] The third reversal arose from a mid-trial challenge for cause, resulting from a panel member's questions referring to "sexual predators."[111]

Affirmances in Member Selection Cases

The appellate courts denied relief in eight member selection cases, including one in which appellate review was precluded by the appellant's exercise of his peremptory strike against the challenged member,[112] and one that addressed limits on the questions the accused was allowed to ask during voir dire.[113] In one case, the court affirmed the military judge's ruling excusing a member, over defense objection, for medical reasons.[114] In the remaining cases, which included two guilty pleas with member sentencing, the court affirmed the denial of a challenge for cause, finding no implied bias under the following circumstances:

- a member who made improper comments about favoring the prosecutor was excused for cause, but the military judge declined to *sua sponte* excuse another member who overheard the comment or to grant a mistrial on the grounds the entire panel was tainted by the comment;[115]
- a member reacted to the reading of the charges with disappointment that criminal activity was occurring in the military community;[116]
- a member had served as a sexual assault response coordinator and unit victim advocate;[117]
- a member's wife was a victim of child sexual assault;[118] and
- a member said he was on board with the command's policy of zero tolerance for sexual misconduct.[119]

Appellate Review of Race, Ethnicity, and Gender in Panel Composition

[110] *United States v. Leathorn*, ARMY 20190037, 2020 WL 7343018, at *4 (A. Ct. Crim. App. Dec. 11, 2020).

[111] *United States v. Hollenbeck*, ARMY 20170237, 2019 WL 2949367, at *2 (A. Ct. Crim. App. June 27, 2019).

[112] *United States v. VanValkenburgh*, ACM 39571, 2020 WL 2516482, at *3 (A.F. Ct. Crim. App. May 13, 2020), *aff'd*, 80 M.J. 395 (C.A.A.F. 2020).

[113] *United States v. Long*, ARMY 20190257, 2021 WL 6062948, at *2 (A. Ct. Crim. App. Dec. 17, 2021).

[114] *United States v. Lizana*, ACM 39280, 2018 WL 3630154, at *5 (A.F. Ct. Crim. App. July 13, 2018).

[115] *United States v. Guyton*, ARMY 20180103, 2020 WL 7384950, at *3-4 (A. Ct. Crim, App. Dec. 16, 2020), *aff'd in part on other grounds*, 82 M.J. 146 (C.A.A.F. 2022).

[116] *United States v. Barnaby*, ACM 39866, 2021 WL 4887771, at *4 (A.F. Ct. Crim. App. Oct. 19, 2021).

[117] *United States v. Whiteeyes*, ARMY 20190221, 2020 WL 7384949, at *7 (A. Ct. Crim. App. Dec. 15, 2020), *aff'd on other grounds*, 82 M.J. 168 (C.A.A.F. 2022).

[118] *United States v. Allen*, ARMY 20200039, 2021 WL 3038540, at *4 (A. Ct. Crim. App. July 19, 2021).

[119] *United States v. Newt*, ACM 39629, 2020 WL 7391563, at *5 (A.F. Ct. Crim. App. Dec. 11, 2020).

In *United States v. Crawford*, the Court of Military Appeals—the predecessor to CAAF—held that the deliberate inclusion of a black Service member as a panel member when the accused was black did not violate equal protection.[120] Since then, courts have cited *Crawford* for the proposition that a convening authority may depart from the factors present in Article 25, UCMJ, when seeking in good faith to make the panel more representative of the accused's race or gender.[121] However, "[t]he government is prohibited from assigning members to, or excluding members from, a court-martial panel in order to 'achieve a particular result[.]'"[122]

This study identified three cases in which the accused challenged the convening authority's composition of their court-martial panel, alleging systematic and purposeful exclusion of women, African Americans, and medical personnel. In those cases, the CCAs did not grant relief on any of the claims. However, CAAF granted review in *United States v. Jeter*, a case involving a black Navy officer convicted by an all-white panel of sexual assault and other offenses, to consider one issue: Did the convening authority violate the appellant's equal protection rights when, over defense objection, he convened an all-white panel using a racially nonneutral member selection process and provided no explanation for the monochromatic result beyond a naked affirmation of good faith?[123]

In *Jeter*, the appellant argued that the total absence of minorities from his panel, combined with a racially nonneutral selection process—in this case, a questionnaire that asked prospective panel members to identify their race—established a prima facie violation of his equal protection rights, as well as a prima facie case of purposeful discrimination under *Batson v. Kentucky*.[124] He argued that in both instances, the convening authority's naked affirmations of good faith were insufficient to rebut the prima facie case. He also argued that the evidence established a pattern of racial discrimination in which, in the span of one year, the same convening authority detailed all-white panels in the courts-martial of three other minority Service members.

After oral argument, the Court ordered supplemental briefing on whether *Crawford* should be overturned. A decision in the case is pending.

F. Additional Issues Regarding Appellate Practice in the Military

As part of the appellate review project, the DAC-IPAD received public testimony from the Government and Defense Appellate Divisions from each Military Department. Army, Navy and Air Force representatives reported that factual sufficiency and instructional errors are recurring

---

[120] 35 C.M.R. 3, 13, 15 C.M.A. 31, 41 (1964).

[121] *E.g.*, *United States v. Smith*, 27 M.J. 242, 250 (C.M.A. 1988) (recognizing that "a convening authority may take gender into account in selecting court members, if he is seeking in good faith to assure that the court-martial panel is representative of the military population," but rejecting the intentional selection of women panel members to achieve a particular result in that case, involving the female victim of a sex offense by a male defendant).

[122] *United States v. Riesbeck*, 77 M.J. 154, 165 (C.A.A.F. 2018) (internal quotation marks and citation omitted).

[123] *United States v. Jeter*, 82 M.J. 355 (C.A.A.F. 2022).

[124] 476 U.S. 79 (1986).

issues.[125] Navy and Air Force representatives also reported seeing appellate courts consider whether errors at trial were waived, often linked to defense counsel's failure to raise instructional error or other issues giving rise to claims of ineffective assistance of counsel.[126] Other recurring issues included prosecutorial misconduct,[127] MREs 412 and 513, search and seizure, member selection, issues with expert witnesses or consultants, and sentence severity.[128] Representatives of the Government Appellate Divisions described recurring issues in post-trial processing of cases, including delays and errors in the convening authority's action on the sentence, as well as litigation over the contents of the appellate record.[129]

These appellate practitioners described some of the practical challenges they face. The dominant theme that emerged from their testimony was the absence of a shared database of searchable court records, including trial transcripts and pleadings as well as appellate briefs and other filings. Updating knowledge management systems to make these records readily available and searchable would improve efficiency and enhance coordination within and between the Services, especially with respect to recurring issues.[130] Other challenges they described included: personnel shortages during the PCS cycle, which forced appellate counsel to seek extensions of time; inexperienced appellate defense counsel; inability of clients–especially those in confinement–to access records of trial; inability of defense counsel to access digital evidence in the record; the lack of clear guidance as to what matters may be added to the appellate record and considered by the appellate courts in acting on findings or sentence; and the rapid rate of legislative changes outpacing guidance as to how to implement those changes.[131]

At the January 26, 2023 CRSC meeting, civilian defense counsel discussed the challenges of litigating issues that arise in the court-martial panel selection process.[132] They described a lack of transparency in the process, where the SJA's advice to the convening authority is often a bare-bones recitation of the Article 25 criteria, and other communications between the SJA and convening authority concerning panel selection are not reduced to writing, rendering any irregularities undiscoverable.[133] They recommended that defense counsel be permitted to attend those discussions; justification for the selection should be memorialized in writing and appended to the record; defense counsel and prospective panelists should be notified 30 days in advance of the start of trial; and member questionnaires should be standardized.[134] Civilian defense counsel suggested that these changes would ensure visibility into the process and permit the parties to

---

[125] *Transcript of DAC-IPAD Meeting* 208, 265-67 (Sept. 21, 2022).

[126] *Id.* at 266-67, 271-74.

[127] *See Transcript of DAC-IPAD Meeting* 265 (Sept. 21, 2022)

[128] *Id.* at 266, 278-79.

[129] *Id.* at 206-10.

[130] *Id.* at 189-92, 197-201, 306-07.

[131] *See generally id.* at 190-313.

[132] *See generally Transcript of CRSC Meeting* 32-126 (Jan. 26, 2023).

[133] *Id.* at 40.

[134] *Id.* at 52-63, 71-80.

raise issues in advance of trial, avoiding situations like that faced in *Jeter*, where the SJA and convening authority provided affidavits to the appellate court three years after the panel was selected, when they could no longer recall pertinent details.

The Chief of Appellate and Outreach for the Air Force Victims' Counsel Program also spoke to the CRSC in January, and described the most significant recurring issues for appellate victims' counsel as access to victims' medical records and victims' right to notice of production of their records in the government's possession.[135] With respect to these and other issues, she noted that victim interlocutory appeals had seen a significant increase in recent months, even though there is no rule effectuating victim rights under Article 6(b), UCMJ. Specific issues that have not been clearly settled by the appellate courts but would lend themselves to resolution by rule or statute include victim standing to enforce Article 6(b) rights, definition of the record on an interlocutory victim writ, and whether filing of a writ stays the ruling or order at issue.

V. The Way Ahead

In the upcoming year, the Appellate Review Study will expand to include FY22 appellate decisions in military sexual assault cases, focusing on the two areas identified by DoD OGC: factual sufficiency and sentence appropriateness review. The FY21 and FY22 opinions will be analyzed with a view toward comparing the effect of legislative changes to the appellate standards of review of these issues. A comprehensive report will be issued in a subsequent year, once cases subject to the new standards reach the appellate courts.

[135] *See generally id.* at 127-76.

THE MILITARY JUSTICE REVIEW PANEL
ARTICLE 146, UNIFORM CODE OF MILITARY JUSTICE

March 6, 2023

The Honorable Karla Smith
Chair, Defense Advisory Committee
on Investigation, Prosecution, and Defense
of Sexual Assault in the Armed Forces

Dear Judge Smith:

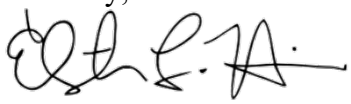
I am writing on behalf of the Military Justice Review Panel (MJRP), created pursuant to § 5521 of the National Defense Authorization Act for Fiscal Year 2017, as amended by § 531(k) of the National Defense Authorization Act for Fiscal Year 2018, to conduct independent comprehensive and periodic reviews of the Uniform Code of Military Justice (UCMJ).

At the request of the General Counsel of the Department of Defense, the MJRP is now reviewing the military justice pretrial process, including articles 32, 33, and 34 of the UCMJ, as they apply to all offenses under the code. Because of the overlap between the DAC-IPAD and MJRP's work, I would greatly value input from the DAC-IPAD as we both address pretrial processes and other military justice issues.

With the understanding that your full Committee is pending an update from a Special Projects Subcommittee at a March 14 public meeting, the MJRP respectfully requests that the DAC-IPAD consider forwarding the results of your work in this area to the MJRP for its review and consideration. We appreciate the DAC-IPAD's extensive research and study as well as your Committee's deep experience and expertise.

Thank you for considering this request. Although the scope of our work differs, I know we share common goals of protecting the rights of service members, enhancing the quality of military justice, and improving the effectiveness of our armed forces.

Sincerely,



Dr. Elizabeth L. Hillman
Chair

cc:
General Counsel of the Department of Defense

Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD)
March 14, 2023
27th Public Meeting Read-Ahead Materials

Special Projects Subcommittee

Table of Contents

SPSC Recommendations Regarding Pretrial Procedures and Prosecution Standards Presented to the DAC-IPAD on March 14, 2023, for Deliberations and Vote

I. *Create a binding no-probable cause determination by the Article 32 preliminary hearing officer with a limited opportunity for reconsideration.*

SPSC Recommendation 1a: Amend Article 32 to provide that a preliminary hearing officer's determination of no-probable cause is an absolute bar to referral of the affected specification(s) to court-martial, subject to reconsideration as described in Recommendation 1b.

SPSC Recommendation 1b: Amend Article 32 and Rule for Courts-Martial 405 to permit reconsideration of a preliminary hearing officer's no-probable cause determination upon the presentation of newly discovered evidence, or evidence that, in the exercise of due diligence, could not reasonably have been obtained before the original hearing, subject to the following:

1. Trial counsel, within 10 days of receiving the preliminary hearing officer's report, petitions the preliminary hearing officer to reopen the Article 32 preliminary hearing stating the nature of the newly discovered evidence and the reason it was not previously presented.
2. The preliminary hearing officer shall reconsider their previous no-probable cause determination one time upon re-opening the Article 32 preliminary hearing to receive the evidence as described above. After reconsideration, the preliminary hearing officer's determination as to whether probable cause exists is final.

Findings and Rationale:

1. The Purposes of Article 32: Congress transformed Article 32, UCMJ, into a preliminary hearing with two primary purposes: (1) to determine whether there is probable cause to believe that the accused committed the offense(s) charged; and (2) to recommend the disposition that should be made of the case.

2. The Problem with Article 32: The advisory nature of Article 32 undermines the purposes of Article 32 and creates systemic problems with the pretrial processing of criminal misconduct.

- The advisory nature of the Article 32 probable cause determination does not incentivize counsel for the Government to establish probable cause, thus failing to fulfill a primary purpose of Article 32.
  - ➢ In 17% of the penetrative sexual offense cases completed in FY16 through FY21 with an Article 32 preliminary hearing, the preliminary hearing officer determined one or more distinct penetrative sexual offense charges lacked probable cause.
- Statistics show that the advisory nature of Article 32 permits prosecutors to treat the proceeding in a perfunctory manner.

- Less than 20% of all preliminary hearings held in FY21 involved live testimony from *any* witness, indicating that the Government rarely uses live testimony from MCIO investigators to establish probable cause.

- In current practice, trial counsel may, without consequence, submit as their only exhibit an entire report of investigation (ROI) from the MCIO, or elect to provide investigative summaries in lieu of evidence.

- When an Article 32 proceeding is advisory, as opposed to binding, the Government is free to pursue cases virtually unchecked. This is of particular concern in cases prosecuted by the new special trial counsel because pretrial decision-making will be consolidated in one office. Although a staff judge advocate's independent, binding, no-probable cause determination under Article 34 serves as a check on the convening authority's ability to refer cases to trial,[1] a special trial counsel will possess exclusive authority to refer cases to trial,[2] without any independent check on prosecutorial discretion.

- The advisory nature of Article 32 contributes to the systematic referral of weak cases that do not meet the standard of proof required at trial.

  - For adult-victim penetrative sexual offense cases tried in FY16–18, more than 30% ended in a full acquittal.[3]

  - Of the 235 adult-victim penetrative sexual offense charges tried to verdict in FY17, 144 (61.3%) of the cases resulted in an acquittal on the penetrative sexual offense; and 91 (38.7%) of the cases resulted in a conviction on the penetrative sexual offense [DAC-IPAD Finding 90].[4]

  - In several recent cases in which adult-victim sexual offenses were tried at general courts-martial after the Article 32 preliminary hearing officer found no probable cause, the appellate courts overturned the convictions for lack of factual sufficiency and urged prosecutors to heed ethical guidelines.[5] One judge observed:

---

[1] Article 34, UCMJ (2021).

[2] For cases involving (14) covered offenses, and any UCMJ offense if related and known, occurring on or after Dec. 28, 2023.

[3] DAC-IPAD COURT-MARTIAL ADJUDICATION DATA REPORT 25 (2019), *available at* https://dacipad.whs.mil/images/Public/08-Reports/05_DACIPAD_Data_Report_20191125_Final_Web.pdf (indicating that out of all cases involving a penetrative sexual offense that were referred to court-martial in FY16–FY18, more than 30% resulted in an acquittal on all charges and specifications.).

[4] DAC-IPAD REPORT ON INVESTIGATIVE CASE FILE REVIEWS, *supra* note __, at 58 (indicating the outcome of the charged penetrative sexual offense).

[5] *See United States v. Hanabarger*, No. 201900031, 2020 CCA LEXIS 252 (N-M. Ct. Crim. App. July 30, 2020); *United States v. Lewis*, No. 201900049, 2020 CCA LEXIS 199 (N-M. Ct. Crim. App. June 8, 2020) (Stephens, Senior Judge, concurring) (Unpub. Op.). *Cf. United States v. Hyppolite*, No. ACM 39358, 2018 CCA LEXIS 517 (A.F. Ct. Crim. App. Oct. 25, 2018) (Huygen, Judge, dissenting) (Unpub. Op.) (Expressing disagreement with the majority's finding that the evidence supporting a specification, which the preliminary hearing officer found unsupported by probable cause, was factually sufficient.), *aff'd*, 79 M.J. 161 (C.A.A.F. 2019).

> "This Preliminary Hearing, at least with respect to these specifications, provided no meaningful protection for Appellant and no check on the Government's ability to expose him to felony-level punishment. . . . Specifications lacking probable cause should not find a home on referred charge sheets for general courts-martial."[6]

3. The Value of Reforming Article 32: A binding no-probable cause determination would produce systemic benefits to the pretrial processing of criminal misconduct.

- Servicemembers would be protected against prosecution on baseless charges.

- An Article 32 preliminary hearing that weeds out unsupported charges will lead to a more effective and efficient military justice system.

- The penalty of dismissal would incentivize counsel to present evidence in a manner that clearly establishes probable cause at the preliminary hearing. A more robust presentation of evidence will enhance the Article 32 preliminary hearing officer's report and disposition recommendation.

- The military would better align with federal civilian practice, where the failure of the Government to meet the minimal requirement of probable cause is an absolute bar to initiating a federal prosecution, and in some circumstances may preclude reference to other prosecuting authorities or recourse to non-criminal measures.

- The victim's statutory right to refuse to testify at the Article 32 is not diminished by the requirement for a binding probable cause determination. A prosecutor must have the victim's agreement to testify or may present the testimony of other witnesses, such as investigators, to establish probable cause—a practice not often used in Article 32 preliminary hearings. Article 32 and Rule for Courts-Martial 405 also permit alternatives to live testimony such as recorded statements to law enforcement.

- The victim's right to confer with counsel for the Government, the convening authority, or the special trial counsel regarding their preference as to disposition is not diminished by the requirement for a binding probable cause determination. The victim's non-binding preference as to disposition is one of several considerations in the disposition guidance in Appendix 2.1 of the Manual for Courts-Martial.

- Article 32 preliminary hearing officers—mostly field grade judge advocates—consistently provide in-depth analyses of how the case file evidence aligns with the elements of each offense.[7] These Article 32 reports indicate that persons with sufficient

[6] *United States v. Lewis*, No. 201900049, 2020 CCA LEXIS 199, 42 (N-M. Ct. Crim. App. June 8, 2020) (Stephens, Senior Judge, concurring) (Unpub. Op.).

[7] *Transcript of DAC-IPAD Policy Subcommittee Meeting* 11–14 (Dec. 3, 2020).

legal expertise are serving as preliminary hearing officers and are qualified to render a binding no-probable cause determination.

  - In the vast majority of FY21 cases in which a preliminary hearing officer found no-probable cause for one or more charged offenses, the charge was either dismissed or the accused was found not guilty, indicating that preliminary hearing officers' assessments are reasonably predictive of the appropriate disposition of the charge(s).

- A binding no-probable cause determination will ensure that appointment of qualified preliminary hearing officers continues to be a priority.

- The Services have voiced concerns about an anticipated increase in the number of Article 32 hearings. Unlike the old Article 32 rules that resembled a contested trial, the more limited scope of the current Article 32 preliminary hearing mitigates against the concern of an undue burden for prosecutors caused by a binding no-probable cause determination.

  - In FY14, when Article 32 required a thorough investigation of the charges, the defense rarely waived the Article 32 investigation in penetrative sexual offense cases (19 waivers in 445 cases (4%)).

  - In FY16 through FY21, the percentage of Article 32 preliminary hearings waived in penetrative sexual offense cases ranged from 21% to 26%.

  - The percentage of Article 32 preliminary hearings waived in FY21 penetrative sexual offense cases (23%) is somewhat lower than in FY21 cases involving all offenses (31%).

- If a no-probable cause determination is binding, there should be an opportunity for reconsideration upon presentation of newly discovered evidence or evidence that, in the exercise of due diligence, could not reasonably have been obtained before the hearing. Military pretrial procedures should provide opportunity for trial counsel, upon receipt of the preliminary hearing officer's report, to petition the preliminary hearing officer to reopen the Article 32 preliminary hearing clearly stating the nature of the newly discovered evidence and the reason it was not previously presented. The prosecution also retains the ability to re-prefer charges following dismissal.

II. *Create Uniform Disposition Guidance for Special Trial Counsel and Convening Authorities*

SPSC Recommendation 2: Revise Appendix 2.1, Manual for Courts-Martial, as follows:

(1) Remove "Non-Binding" from the title of Appendix 2.1 to align with the title of Article 33, UCMJ, "Disposition Guidance"; and

(2) Revise the referral guidance in section 2.3 of Appendix 2.1 to provide that special trial counsel should only refer charges to a general court-martial, and judge advocates should only recommend that a convening authority refer charges to a general court-martial, if they believe that the Servicemember's conduct constitutes an offense under the UCMJ, and that the admissible evidence will probably be sufficient to obtain and sustain a conviction. See proposed revisions to Appendix 2.1, Manual for Courts-Martial, enclosed with this report.

(3) Update Appendix 2.1 to reflect the new authorities of the special trial counsel.

SPSC Recommendation 3: Require training of all special trial counsel and judge advocates advising convening authorities on the disposition guidance in Appendix 2.1 of the Manual for Courts-Martial. The training shall emphasize the principle that referral is only appropriate if they believe that the servicemember's conduct constitutes an offense under the UCMJ, and that the admissible evidence will probably be sufficient to obtain and sustain a conviction.

Findings and Rationale:

- The DAC-IPAD concluded that weak pretrial procedures contributed directly to frequent acquittals in sexual offense cases based on a Case Review Subcommittee study of all investigations involving allegations of penetrative sexual offenses closed in FY17.[8]
    - While the DAC-IPAD found convening authorities' decisions to refer sexual assault cases to court-martial were reasonable in almost all cases, that finding was grounded in Article 34's minimal legal standard of probable cause for referral. In some cases, the DAC-IPAD reviewers did not believe probable cause was established.
    - These FY17 cases were prosecuted prior to the enactment of Article 33 and Appendix 2.1, and prior to the creation of the Office of the Special Trial Counsel.

[8] *See* DAC-IPAD REPORT ON INVESTIGATIVE CASE FILE REVIEWS, *supra* note 20. (DAC-IPAD Finding 98: There is a systemic problem with the referral of penetrative sexual offense charges to trial by general court-martial when there is not sufficient admissible evidence to obtain and sustain a conviction on the charged offense. In 31.1% of cases reviewed that were tried to verdict on a penetrative sexual offense charge, the evidence in the materials reviewed did not meet that threshold.).

  - From 2015 until 2018, the Services' conviction rates for penetrative sexual offenses ranged from 28.2% to 36.8%.[9]

- While the Army, Marine Corps, and Navy acknowledge the importance of assessing the sufficiency of the evidence, they also expressed that the victim's preference is a highly influential factor in referral decisions. Air Force representatives explained that if a victim expresses a desire for a court-martial and probable cause is met, the convening authority will most likely refer the case to trial, regardless of the sufficiency of the evidence.

- Pursuant to Article 36, UCMJ, pretrial, trial, and post-trial procedures for courts-martial are prescribed by the President and shall apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts and be uniform, insofar as practicable.

- Pursuant to Article 33, UCMJ, the Secretary of Defense must issue guidance regarding factors that judge advocates and convening authorities should take into account, with appropriate consideration of military requirements, when exercising their duties as to disposition of charges. The statute further requires that this guidance must take into account the principles contained in official guidance of the Attorney General to attorneys for the Government with respect to disposition of Federal criminal cases in accordance with the principle of fair and evenhanded administration of Federal criminal law.

- Well-established legal ethics rules and guidelines, including Department of Justice prosecution standards, require civilian prosecutors throughout the United States to believe that the admissible evidence will probably be sufficient to obtain and sustain a conviction before taking a case to trial.

- Guidance promulgated pursuant to Article 33 and Appendix 2.1 would be substantially improved by including uniform prosecution standards aligned with the U.S. Justice Manual's "Principles of Federal Prosecution," and by providing more nuanced commentary on the prudent exercise of prosecutorial discretion in the military.

- Referral decisions should be grounded in a technical analysis of the admissibility of evidence and quantum of proof needed to convict in a criminal trial, while giving special trial counsel and judge advocates advising a convening authority a wide berth for exercising prosecutorial discretion. This evidentiary analysis reflects overarching ethical considerations, concerns about the fundamental fairness of the system, and the recognition of how significantly the initiation of criminal charges affects a Servicemember.

[9] *See* DAC-IPAD Court-martial Adjudication Data Report (2019).

Prepared by the DAC-IPAD Special Projects Subcommittee on March 9, 2023
Not reviewed or approved by the DAC-IPAD

Proposed revisions to Appendix 2.1 of the Manual for Courts-Martial

[Red and strike-through text indicate proposed changes]

APPENDIX 2.1

~~NON-BINDING~~ DISPOSITION GUIDANCE

This Appendix provides non-binding disposition guidance issued by the Secretary of Defense, in consultation with the Secretary of Homeland Security, pursuant to Article 33 (Disposition Guidance) of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 833.

SECTION 1: IN GENERAL

1.1. Policy.

a. This Appendix provides ~~non-binding~~ guidance regarding factors that convening authorities, commanders, staff judge advocates, special trial counsel, and judge advocates should consider when exercising their duties with respect to the disposition of charges and specifications under the UCMJ, and to further promote the purpose of military law.[1]

b. This Appendix supplements the Manual for Courts-Martial. The guidance in this Appendix does not require a particular disposition decision or other action in any given case. Accordingly, the disposition factors set forth in this Appendix are cast in general terms, with a view to providing guidance rather than mandating results. The intent is to promote regularity without regimentation; encourage consistency without sacrificing necessary flexibility; and provide the flexibility to apply these factors in the manner that facilitates the fair and effective response to local conditions in the interest of justice and good order and discipline.

c. The disposition guidance contained in this Appendix aligns with the purposes of Articles 33 and 36, UCMJ, in that it includes principles of law generally recognized in official guidance of the Attorney General with respect to disposition of federal criminal cases, and in the trial of criminal cases in the United States district courts. Given that Article 36 also requires all rules and regulations to be uniform insofar as practicable, this Appendix guides all military justice practitioners who exercise prosecutorial authority or advise commanders who make disposition decisions.

1.2. Purpose. This ~~non-binding~~ disposition guidance is intended to:

a. Set forth factors for consideration by those assigned responsibility under the UCMJ for disposing of alleged violations of the UCMJ on how best to exercise their authority in a reasoned and structured manner, consistent with the principle of fair and evenhanded administration of the law;

b. Ensure the fair and effective exercise of prosecutorial discretion and responsibility by convening authorities, commanders, staff judge advocates, special trial counsel, and judge advocates and promote confidence on the part of the public and individual accused servicemembers that disposition decisions will be made rationally and objectively on the merits of each case;

c. Serve as a training tool for convening authorities, commanders, staff judge advocates, special trial counsel, and judge advocates in the proper discharge of their duties;

d. Contribute to the effective utilization of the Government's law enforcement and prosecutorial resources; and

[1] "The purpose of military law is to promote justice, to assist in maintaining good order and discipline on the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.

e. Enhance the relationship between military commanders, judge advocates, and law enforcement agencies, including military criminal investigative organizations (MCIOs), with respect to investigations and charging decisions.

1.3. Scope. This Appendix is designed to promote the reasoned exercise of discretion with respect to the following disposition decisions:

a. Initiating and declining action (to include deferral) under the UCMJ;

b. Disposition of covered offenses by special trial counsel;

c. Selecting appropriate charges and specifications;

d. Selecting the appropriate type of court-martial or alternative mode of disposition, if any; and

e. Considering the appropriateness of a plea agreement.

1.4. Non-Litigability. This Appendix ~~non-binding guidance~~ was developed solely as a matter of internal Departmental policy in accordance with Article 33. This Appendix is not intended to, does not, and may not be relied upon to create a substantive or procedural right, benefit, or defense ~~substantive or procedural,~~ enforceable at law or in equity by any person and may not be relied upon by a party to litigation under the UCMJ.

SECTION 2: CONSIDERATIONS IN ALL CASES

2.1. Interests of Justice and Good Order and Discipline. The military justice system is a powerful tool that promotes justice and assists in maintaining good order and discipline while protecting the civil rights of Service members. ~~It is a commander's duty to use it appropriately.~~ In determining whether the interests of justice and good order and discipline are served by trial by court-martial or some other disposition ~~in a case~~, the special trial counsel, or commander or convening authority in consultation with a judge advocate, as appropriate, should consider the following:

a. The mission-related responsibilities of the command;

b. Whether the offense occurred during wartime, combat, or contingency operations;

c. The effect of the offense on the morale, health, safety, welfare, and good order and discipline of the command;

d. The nature, seriousness, and circumstances of the offense and the accused's culpability in connection with the offense;

e. In cases involving an individual who is a victim under Article 6b, the views of the victim as to disposition;

f. The extent of the harm caused to any victim of the offense;

g. The availability and willingness of the victim and other witnesses to testify;

h. Whether admissible evidence will probably ~~likely~~ be sufficient to obtain and sustain a conviction in a trial by court-martial;

i. Input, if any, from law enforcement agencies involved in or having an interest in the specific case;

j. The truth-seeking function of trial by court-martial;

k. The accused's willingness to cooperate in the investigation or prosecution of others;

l. The accused's criminal history or history of misconduct, whether military or civilian, if any;

m. The probable sentence or other consequences to the accused of a conviction; and

n. The impact and appropriateness of alternative disposition options—including nonjudicial punishment or administrative action—with respect to the accused's potential for continued service and the responsibilities of the command with respect to justice and good order and discipline.

2.2. Initial Disposition and Consultation with a Judge Advocate. If a member of a command is accused or suspected of committing an offense punishable under the UCMJ, the commander should seek advice from a judge advocate regarding all possible dispositions of the allegation. The judge advocate's advice should include a discussion of the advantages and disadvantages of each of the available dispositions. The cognizant commander should consider all available options. If a commander receives a report of a covered offense, they shall promptly forward the report to a Special Trial Counsel (STC).

2.3. Referral. Probable cause must exist for each charge and specification referred to a court-martial. Special trial counsel should only refer, and judge advocates should only recommend that a convening authority refer charges to a general court-martial if they believe that the servicemember's conduct constitutes an offense under the UCMJ, and that the admissible evidence will probably be sufficient to obtain and sustain a conviction.

In all cases, the special trial counsel or judge advocate advising a convening authority, should consider the other factors in paragraph 2.1 of this Appendix before deciding whether to refer or recommend referral to a court-martial, and, in their discretion, make a reasoned determination, given the profound consequences for the accused, crime victims, and their families.

Evidence sufficient to obtain and sustain a conviction is required under Rule 29(a) of the Federal Rules of Criminal Procedure, to avoid judgment of acquittal. Because Article 36 encourages the application of uniform principles of law generally applicable in United States district court, as both a matter of fundamental fairness and in the interest of the efficient administration of justice, no charge should be referred to a general court-martial unless the special trial counsel, or judge advocate advising the convening authority, believes that the admissible evidence will probably be sufficient to obtain and sustain a guilty verdict by an unbiased trier of fact.

When deciding whether to refer or recommend referral, the special trial counsel or judge advocate need not have in hand, at that time, all the evidence upon which they intend to rely at

trial, if they have a reasonable and good faith belief that such evidence will be available and admissible at the time of trial. For example, it would be proper to refer a case to court-martial even though a key witness may be out of the country, so long as there is a good faith basis to believe that the witness's presence at trial could reasonably be expected.

Where the law and the facts create a sound, prosecutable case, the likelihood of an acquittal due to unpopularity of some aspect of the prosecution or because of the overwhelming popularity of the accused or their cause is not a factor prohibiting referral. For example, in a case involving a highly decorated officer, it might be clear that the evidence of guilt—viewed objectively by an unbiased factfinder—will probably be sufficient to obtain and sustain a conviction yet the special trial counsel or judge advocate might reasonably doubt, based on the circumstances, that the court-martial panel would convict. In such a case, despite their negative assessment of the likelihood of a guilty verdict (based on factors extraneous to an objective view of the law and the facts), the special trial counsel or judge advocate may properly conclude that it is appropriate to refer the case and allow the military justice process to operate in accordance with the principles set forth here.

This guidance promotes the reasoned exercise of prosecutorial discretion and contributes to the fair, evenhanded administration of the UCMJ. Following this guidance will safeguard responsibility by special trial counsel in referral decisions and by judge advocates who advise convening authorities regarding referral decisions and ultimately promote confidence on the part of the public, the military community, and accused servicemembers that important prosecutorial decisions will be made rationally and objectively on the merits of each case.

~~2.4 Determining the Charges and Specifications to Refer. Ordinarily, the convening authority should refer charges and specifications for all known offenses to a single court-martial. However, the convening authority should avoid referring multiple charges when they would:~~

~~a. Unnecessarily complicate the prosecution of the most serious, readily provable offense or offenses;~~

~~b. Unnecessarily exaggerate the nature and extent of the accused's criminal conduct or add unnecessary confusion to the issues at court-martial;~~

~~c. Unnecessarily expose the accused to a harsher potential sentence or range of punishments than the circumstances of the case justify; or~~

~~d. Be disposed of more appropriately through an alternative disposition.~~

2.4. Determining the Appropriate Type of Court-Martial. In determining the appropriate type of court-martial, a convening authority should consider the advice of a judge advocate. Additionally, a convening authority or special trial counsel should consider:

a. ~~The advice of a judge advocate~~The interests of justice and good order and discipline and factors set forth in paragraph 2.1 of this Appendix;

b. The authorized maximum and minimum punishments for the offenses charged;

c. Any unique circumstances in the case requiring immediate disposition of the charges;

d. Whether the type of court-martial would unnecessarily expose the accused to a harsher potential sentence or range of punishments than the circumstances of the case justify; and

e. Whether the potential of the accused for rehabilitation and continued service would be better addressed in a specific type of court-martial.

2.5. Alternatives to Referral. If a determination is made that a case should not be referred to court-martial because there exists an adequate alternative to trial, a judge advocate should advise the convening authority on, and the convening authority should consider, in addition to the considerations in paragraph 2.1 the following factors:

a. The effect of alternative disposition on the interests of justice and good order and discipline;

b. The options available under the alternative means of disposition;

c. The views of the victim, if any, concerning the alternative disposition of the case; and

d. The likelihood of an effective outcome.

2.6. Inappropriate Considerations. The disposition determination must not be influenced by:

a. The accused's race, ethnicity, religion, gender, sexual orientation, national origin, or lawful political association, activities, or beliefs;

b. The personal feelings of anyone authorized to recommend, advise, or make a decision as to disposition of offenses concerning the accused, the accused's associates, or any victim or witness of the offense;

c. The time and resources already expended in the investigation of the case;

d. The possible effect of the disposition determination on the commander's, or convening authority's, or judge advocate's, or special trial counsel's military career or other professional or personal circumstances; or

e. Political pressure to take or not to take specific actions in the case.

SECTION 3: SPECIAL CONSIDERATIONS

3.1. Prosecution in Another Jurisdiction. When the accused is subject to effective prosecution in another jurisdiction, the special trial counsel, or the convening authority with the advice of a judge advocate, should consider the following additional factors when determining disposition:

a. The strength of the other jurisdiction's interest in prosecution;

b. The other jurisdiction's ability and willingness to prosecute the case effectively;

c. The probable sentence or other consequences if the accused were to be convicted in the other jurisdiction;

d. The views of the victim, if any, as to the desirability of prosecution in the other jurisdiction;

e. Applicable policies derived from agreements with the Department of Justice and foreign governments regarding the exercise of military jurisdiction; and

f. The likelihood that the nature of the proceedings in the other jurisdiction will satisfy the interests of justice and good order and discipline in the case, including any burdens on the command with respect to the need for witnesses to be absent from their military duties, and the potential for swift or delayed disposition in the other jurisdiction.

3.2. Plea Agreements. In accordance with Article 53a, the special trial counsel, or convening authority with the advice of a judge advocate, may enter into an agreement with an accused concerning disposition of the charges and specifications and the sentence that may be imposed. The special trial counsel, or the convening authority with the advice of a judge advocate, should consider the following additional factors in determining whether it would be appropriate to enter into a plea agreement in a particular case:

a. The accused's willingness to cooperate in the investigation or prosecution of others;

b. The nature and seriousness of the offense or offenses charged;

c. The accused's remorse or contrition and his or her willingness to assume responsibility for his or her conduct;

d. Restitution, if any;

e. The accused's criminal history or history of misconduct, whether military or civilian;

f. The desirability of prompt and certain disposition of the case and of related cases;

g. The likelihood of obtaining a conviction at court-martial;

h. The probable effect on victims and witnesses;

i. The probable sentence or other consequences if the accused is convicted;

j. The public and military interest in having the case tried rather than disposed of by a plea agreement;

k. The time and expense associated with trial and appeal;

l. The views of the victim with regard to prosecution, the terms of the anticipated agreement, and alternative disposition; and

m. The potential of the accused for rehabilitation and continued service.

3.3. Agreements Concerning Disposition of Charges and Specifications. With respect to plea agreements regarding the disposition of charges and specifications, the plea agreement should require the accused to plead guilty to charges and specifications that:

a. Appropriately reflect the nature and extent of the criminal conduct;

b. Are supported by an adequate factual basis;

c. Would support the imposition of an appropriate sentence under all the circumstances of the case;

d. Do not adversely affect the investigation or prosecution of others suspected of misconduct; and

e. Appropriately serve the interests of justice and good order and discipline.

3.4 Agreements Concerning Sentence Limitations. A plea agreement should ensure that any sentence limitation takes into consideration the sentencing guidance set forth in Article 56(c).

****

Analysis:

This appendix implements Article 33, as amended by Section 5204 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), and section 12 of Executive Order 13825 of March 1, 2018. The disposition factors contained in this appendix are adapted primarily from three sources: the Principles of Federal Prosecution issued by the Department of Justice; the American Bar Association, Criminal Justice Standards for the Prosecution Function; and the National District Attorneys Association, National Prosecution Standards.

Practitioners are encouraged to familiarize themselves with the disposition factors contained in this appendix as well as these related civilian prosecution function standards. The disposition factors have been adapted with a view toward the unique nature of military justice and the need for commanders, convening authorities, special trial counsel, and judge advocates to exercise wide discretion to meet their responsibilities to maintain good order and discipline.

Article 32. Investigation (Before Dec. 26, 2014)	**Article 32. Preliminary hearing (On or after Dec. 26, 2014)**	**Article 32. Preliminary hearing required before referral to general court-martial (On or after Jan. 1, 2019)** [FY22 NDAA amendments for Special Trial Counsel in red; strikethrough language in effect until Dec. 28, 2023]
(a) No charge or specification may be referred to a general court-martial for trial until a thorough and impartial investigation of all the matters set forth therein has been made. This investigation shall include inquiry as **to the truth of the matter set forth in the charges**, consideration of the **form of the charges**, and a **recommendation as to the disposition** which should be made of the case in the interest of justice and discipline.	(a) Preliminary Hearing Required – (1) No charge or specification may be referred to a general court-martial for trial until completion of a preliminary hearing unless such hearing is waived by the accused. (2) **The purpose of the preliminary hearing shall be limited to the following**: (A) Determining whether there is **probable cause** to believe an offense has been committed and the accused committed the offense. (B) Determining whether the convening authority has court-martial **jurisdiction** over the offense and the accused. (C) Considering the **form of the charges**. (D) **Recommending the disposition** that should be made of the case.	(a) IN GENERAL – (1)(A) Except as provided in subparagraph (B), a preliminary hearing shall be held before referral of charges and specifications for trial by general court-martial. The preliminary hearing shall be conducted by an impartial hearing officer ~~detailed by the convening authority in accordance with (b).~~ detailed in accordance with subparagraph (C). (B) Under regulations prescribed by the President, a preliminary hearing need not be held if the accused submits a ~~written waiver to the convening authority and the convening authority determines that a hearing is not required.~~ written waiver to— (i) except as provided in clause (ii), the convening authority and the convening authority determines that a hearing is not required; and (ii) with respect to charges and specifications over which the special trial counsel is exercising authority in accordance with section 824a of this title (article 24a), the special trial counsel and the special trial counsel determines that a hearing is not required. (C)(i) Except as provided in clause (ii), the convening authority shall detail a hearing officer. (ii) If a special trial counsel is exercising authority over the charges and specifications subject to a preliminary hearing under this section (article), the special trial counsel shall request a hearing officer and a hearing officer shall be provided by the convening authority, in accordance with regulations prescribed by the President.

		(2) The purpose of the preliminary hearing shall be limited to determining the following: (A) **Whether or not the specification alleges an offense** under this chapter. (B) **Whether or not there is probable cause** to believe that the accused committed the offense charged. (C) Whether or not the convening authority has court-martial **jurisdiction** over the accused and over the offense. (D) A **recommendation as to the disposition** that should be made of the case.
This version of the statute does not specify who may conduct the investigation.	(b) Hearing Officer. (1) A preliminary hearing under (a) **shall be conducted by an impartial judge advocate** certified under section 827(b) of this title (article 27(b)) **whenever practicable** or, in exceptional circumstances in which the interests of justice warrant, by an impartial hearing officer who is not a judge advocate. If the hearing officer is not a judge advocate, a judge advocate certified under section 827(b) of this title (article 27(b)) shall be available to provide legal advice to the hearing officer. (2) Whenever practicable, when the judge advocate or other hearing officer is detailed to conduct the preliminary hearing, the officer shall be equal to or senior in grade to military counsel detailed to represent the accused or the Government at the preliminary hearing.	(b) HEARING OFFICER. (1) A preliminary hearing under this section shall be conducted by an impartial hearing officer, who- (A) whenever practicable, shall be a judge advocate who is certified under section 827(b)(2) of this title (article 27(b)(2)); or (B) When it is not practicable to appoint a judge advocate because of exceptional circumstances, is not a judge advocate so certified. (2) In the case of a hearing officer under paragraph (1)(B), a judge advocate who is certified under section 827(b)(2) of this title (article 27(b)(2)) shall be available to provide legal advice to the hearing officer. (3) Whenever practicable, the hearing officer shall be equal in grade or senior in grade to military counsel who are detailed to represent the accused or the Government at the preliminary hearing.

(b)…. If the charges are forwarded after the investigation, they shall be accompanied by a statement of the substance of the testimony taken on both sides and a copy thereof shall be given to the accused.	(c) Report of Results. **After conducting a preliminary hearing under subsection (a), the judge advocate or other officer conducting the preliminary hearing shall prepare a report that addresses the matters specified in subsections (a)(2) [*purposes of the hearing*] and (f) [*uncharged misconduct*].**	(c) REPORT TO CONVENING AUTHORITY OR SPECIAL TRIAL COUNSEL. After a preliminary hearing under this section, the hearing officer shall submit to the convening authority or, in the case of a preliminary hearing in which the hearing officer is provided at the request of a special trial counsel to the special trial counsel, a written report (accompanied by a recording of the preliminary hearing under subsection (e)) that includes the following: **(1) For each specification, a statement of the reasoning and conclusions of the hearing officer with respect to determinations under subsection (a)(2), including a summary of relevant witness testimony and documentary evidence presented at the hearing and any observations of the hearing officer concerning the testimony of witnesses and the availability and admissibility of evidence at trial.** (2) Recommendations for any necessary modifications to the form of the charges or specifications. (3) An analysis of any additional information submitted after the hearing by the parties or by a victim of an offense, that, under such rules as the President may prescribe, is relevant to disposition under sections 830 and 834 of this title (articles 30 and 34). (4) A statement of action taken on evidence adduced with respect to uncharged offenses, as described in subsection (f).

(b) The accused shall be advised of the charges against him and of his right to be represented at that investigation by counsel. The accused has the right to be represented at that investigation as provided in section 838 of this title (article 38) and in regulations prescribed under that section. At that investigation full opportunity shall be given to the accused to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf, either in defense or mitigation, and the investigation officer shall examine available witnesses requested by the accused. If the charges are forwarded after the investigation, they shall be accompanied by a statement of the substance of the testimony taken on both sides and a copy thereof shall be given to the accused (c) If an investigation of the subject matter of an offense has been conducted before the accused is charged with the offense, and if the accused was present at the investigation and afforded the opportunities for representation, cross-examination, and presentation prescribed in subsection (b), no further investigation of that charge is necessary under this article unless it is demanded by the accused after he is informed of the charge. A demand for further investigation entitles the accused to recall witnesses for further cross-examination and to offer any new evidence in his own behalf.	(d) Rights of the Accused and Victim (1) The accused shall be advised of the charges against the accused and of the accused's right to be represented by counsel at the preliminary hearing under section (a). The accused has the right to be represented at the preliminary hearing as provided in section 838 of this title (article 38) and in regulations prescribed under that section. (2) The accused may cross-examine witnesses who testify at the preliminary hearing and present additional evidence in defense and mitigation, relevant to the limited purposes of the hearing, as provided for in paragraph (4) and subsection (a)(2). (3) **A victim may not be required to testify at the preliminary hearing.** A victim who declines to testify shall be deemed to be not available for purposes of the preliminary hearing. (4) The presentation of evidence and examination (including cross-examination) of witnesses at a preliminary hearing shall be limited to the matters relevant to the limited purposes of the hearing, as provided in subsection (a)(2)."	(d) RIGHTS OF ACCUSED AND VICTIM. (1) *No change*. (2) The accused may cross-examine witnesses who testify at the preliminary hearing and present additional evidence ~~in defense and mitigation, relevant to the limited purposes of the hearing, as provided for in paragraph (4) and subsection (a)(2)~~. **that is relevant to the issues for determination under subsection (a)(2). [the purposes of the hearing]** (3) A victim may not be required to testify at the preliminary hearing. A victim who declines to testify shall be deemed to be not available for purposes of the preliminary hearing. **A declination under this paragraph shall not serve as the sole basis for ordering a deposition under section 849 of this title (article 49).**

(d) If evidence adduced in an investigation under this article indicates that the accused committed an uncharged offense, the investigating officer may investigate the subject matter of that offense without the accused having first been charged with the offense if the accused— (1) is present at the investigation; (2) is informed of the nature of each uncharged offense investigated; and (3) is afforded the opportunities for representation, cross-examination, and presentation prescribed in subsection (b).	(f) Effect of Evidence of Uncharged Offense. If evidence adduced in a preliminary hearing under subsection (a) indicates that the accused committed an uncharged offense, the hearing officer may consider the subject matter of that offense without the accused having first been charged with the offense if the accused-- (1) is present at the preliminary hearing; (2) is informed of the nature of each uncharged offense considered; and (3) is afforded the opportunities for representation, cross-examination, and presentation consistent with subsection (d).	(f) EFFECT OF EVIDENCE OF UNCHARGED OFFENSE. *No change.*
This version of the statute does not specify that a recording of the investigation shall be made.	(e) Recording of Preliminary Hearing. A preliminary hearing under subsection (a) shall be recorded by a suitable recording device. The victim may request the recording and shall have access to the recording as prescribed by the Manual for Courts-Martial.	(e) RECORDING OF PRELIMINARY HEARING. A preliminary hearing under subsection (a) shall be recorded by a suitable recording device. The victim may request the recording and shall have access to the recording as the President may prescribe.

(e) The requirements of this article are binding on all persons administering this chapter but failure to follow them does not constitute jurisdictional error.	(g) Effect of Violation. The requirements of this section are binding on all persons administering this chapter, but failure to follow the requirements does not constitute jurisdictional error.	(g) EFFECT OF VIOLATION. The requirements of this section are binding on all persons administering this chapter, but failure to follow the requirements does not constitute jurisdictional error. **A defect in a report under subsection (c) is not a basis for relief if the report is in substantial compliance with that subsection.**
	(h) Victim Defined. In this section, the term "victim" means a person who— (1) is alleged to have suffered a direct physical, emotional, or pecuniary harm as a result of the matters set forth in a charge or specification being considered, and (2) is named in one of the specifications.	(h) VICTIM DEFINED. *No change*.

Article 33 (New Provision) – Disposition Guidance
10 U.S.C. § 833

1. Summary of Proposal

This proposal would enact a new Article 33 requiring the establishment of non-binding guidance regarding factors that commanders, convening authorities, staff judge advocates, and judge advocates should take into account when exercising their duties with respect to disposition of charges and specifications in the interest of justice and discipline under Articles 30 and 34. This Disposition Guidance would draw upon the Principles of Federal Prosecution ("DOJ Guidelines") in the United States Attorneys' Manual, with appropriate modifications to reflect the unique purposes of military law. Part II of this Report will contain a complete draft of the proposed disposition guidance, for inclusion in the Manual for Courts-Martial as an appendix.

2. Summary of the Current Statute

Under current law, convening authorities may not refer a charge to court-martial for trial in the absence of a determination that the charge is supported by probable cause. In general courts-martial, this probable cause determination is made by the staff judge advocate pursuant to Article 34, and is informed by the Article 32 hearing officer's report. In special and summary courts-martial, the probable cause screening can be performed by any judge advocate, or by the convening authority.[1] Article 30 directs commanders and convening authorities to dispose of charges and specifications "in the interest of justice and discipline."

3. Historical Background

Before 1920, convening authorities exercised virtually unfettered discretion to dispose of charges and specifications against an accused, including by referring the charges to court-martial for trial.[2] Article 70 of the 1920 Articles of War contained the first requirement for pre-referral staff judge advocate advice. This was a procedural requirement only and the convening authority was not required to follow the advice, even if the staff judge advocate determined there was insufficient evidence to prosecute the accused.[3] When the UCMJ was enacted in 1950, Congress provided, in Article 34, that convening authorities themselves must determine that a charge is supported by probable cause before referring the charge to

[1] *See* R.C.M. 601(d)(1).

[2] *See, e.g.*, MCM 1905, at 19 (requiring only that the commanding officer investigate the charges and "state in his indorsement whether or not, in his opinion, the charges can be sustained").

[3] AW 70, ¶3 of 1920 ("Before directing the trial of any charge by general court-martial the appointing authority will refer it to his staff judge advocate for consideration and advice.").

general court-martial; and, in Article 30, Congress specified that commanders and convening authorities must dispose of charges and specifications "in the interest of justice and discipline."[4] In 1983, Congress amended Article 34 to transfer the probable cause screening function in general courts-martial from the convening authority to the staff judge advocate.[5] In 1984, the President set forth the first Manual provision, R.C.M. 306, to expressly provide a "policy" for the disposition of offenses by military commanders and convening authorities.[6]

4. Contemporary Practice

R.C.M. 601(d)(1) provides that a convening authority generally may refer charges to any court-martial as long as "the convening authority finds or is advised by a judge advocate" that there is probable cause for the specification and that the specification alleges an offense. In general court-martial cases, this function is always performed by the staff judge advocate pursuant to Article 34. The rule further provides that the convening authority may rely on information from any source when making the referral decision, including hearsay and other evidence that may not be admissible at trial.[7]

---

[4] Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108. During the Congressional hearings on the proposed UCMJ in 1949, Colonel Melvin Maas suggested that the standard for referral of charges to general court-martial should be raised to "beyond a reasonable doubt," to align the standard with applicable civilian charging standards in felony trials. *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 712 (1949). The Committee demurred that the applicable civilian charging standard would be a "prima facie determination," and did not adopt the proposal.

[5] Military Justice Act of 1983, Pub. L. No. 98-209, § 4(a)(2), 97 Stat. 1393.

[6] R.C.M. 306(b) ("Allegations of offenses should be disposed of in a timely manner at the lowest appropriate level of disposition . . . ."). The Discussion to R.C.M. 306(b) notes that "[t]he disposition decision is one of the most important and difficult decisions facing a commander. Many factors must be taken into consideration and balanced . . . . The goal should be a disposition that is warranted, appropriate, and fair." The Discussion provides a non-exclusive list of "disposition factors" for commanders and convening authorities to consider, including: the nature of and circumstances surrounding the offense and the extent of the harm caused by the offense, including the offense's effect on morale, health, safety, welfare, and discipline; when applicable, the views of the victim as to disposition; existence of jurisdiction over the accused and the offense; availability and admissibility of evidence; the willingness of the victim or others to testify; cooperation of the accused in the apprehension or prosecution of another accused; possible improper motives or biases of the person(s) making the allegation(s); availability and likelihood of prosecution of the same or similar and related charges against the accused by another jurisdiction; and appropriateness of the authorized punishment to the particular accused or offense. Exec. Order No. 13,669, 79 Fed. Reg. 34,999, 35,013-14 (June 18, 2014).

[7] *See, e.g.*, United States v. Howe, 37 M.J. 1062, 1064 (N.M.C.M.R. 1993) ("The convening authority is not required to screen the evidence to ensure its admissibility. In fact, the decision to prosecute may be premised on evidence which is incompetent, inadmissible, or even tainted by illegality."). The requirement for probable cause is consistent with the first sentence—but not the second—of the ABA Standards concerning the exercise of prosecutorial discretion in the charging decision: "A prosecutor should not institute, or cause to be instituted, or permit the continued pendency of criminal charges when the prosecutor knows that the charges are not supported by probable cause. A prosecutor should not institute, cause to be instituted, or permit the continued pendency of criminal charges in the absence of sufficient admissible evidence to support a conviction." ABA STANDARDS FOR THE PROSECUTION FUNCTION § 3-3.9(a).

5. Relationship to Federal Civilian Practice

Military charging practice and federal civilian charging practice differ significantly with respect to the decisional principles used to determine when charges should be referred to court-martial or federal criminal court for trial. In federal civilian practice, probable cause is the ethical floor for charging; above that floor, attorneys are guided by robust decision rules and charging standards that help to structure and guide the exercise of prosecutorial discretion. The Principles of Federal Prosecution ("DOJ Guidelines") contained in the United States Attorneys' Manual provide the following decision rule with respect to the charging decision:

> The attorney for the government should commence or recommend Federal prosecution if he/she believes that the person's conduct constitutes a Federal offense and that the admissible evidence will probably be sufficient to obtain and sustain a conviction, unless, in his/her judgment, prosecution should be declined because:
>
> (1) No substantial Federal interest would be served by prosecution;
>
> (2) The person is subject to effective prosecution in another jurisdiction; or
>
> (3) There exists an adequate non-criminal alternative to prosecution."[8]

In addition to this rule for the charging decision, the DOJ Guidelines provide structured guidance regarding plea agreements, non-criminal alternative dispositions, and wide range of other matters impacting or implicating prosecutorial discretion.[9] In military practice, the broad admonition in Article 30 to dispose of charges and specifications "in the interest of justice and discipline" and the R.C.M. 306 factors are not similarly structured.[10]

---

[8] U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-27.220 (Grounds for Commencing or Declining Prosecution) [hereinafter USAM]. Most state jurisdictions employ similar charging standards, with some form of the "sufficient admissible evidence" criterion. *See, e.g.* Denver District Attorney Policies, The Charging Decision ("If a determination is made that the facts do not support a reasonable belief that the charge can be proven beyond a reasonable doubt, there is a legal and ethical duty to decline to file charges."); WASH. REV. CODE ANN. § 9.94A.411 ("Crimes against persons will be filed if sufficient admissible evidence exists, which, when considered with the most plausible, reasonably foreseeable defense that could be raised under the evidence, would justify conviction by a reasonable and objective fact finder.").

[9] *See, e.g.*, USAM, *supra* note 8, at § 9-27.250 (Non-criminal Alternatives to Prosecution) ("In determining whether prosecution should be declined because there exists an adequate, non-criminal alternative to prosecution, the attorney for the government should consider all relevant factors, including: (1) The sanctions available under the alternative means of disposition; (2) The likelihood that an effective sanction will be imposed; and (3) The effect of non-criminal disposition on Federal law enforcement interests.").

[10] *Compare* R.C.M. 306(b) (Discussion) (instructing commanders and convening authorities to consider and balance the disposition factors "to the extent practicable . . . .") *with* USAM, *supra* note 8, at § 9-27.001 ("These principles of Federal prosecution have been designed to assist in structuring the decision-making process of attorneys for the government. For the most part, they have been cast in general terms with a view to providing guidance rather than to mandating results. The intent is to assure regularity without regimentation, to prevent unwarranted disparity without sacrificing necessary flexibility."). *See generally* Rachel E.

6. Recommendation and Justification

Recommendation 33.2: Create a new statutory provision requiring the establishment of non-binding guidance—taking into account the Principles of Federal Prosecution in the U.S. Attorney's Manual with appropriate consideration of military requirements—regarding factors that commanders, convening authorities, staff judge advocates, and judge advocates should take into account when exercising their duties with respect to disposition of charges and specifications in the interest of justice and discipline.

- This proposal would help to "fill the gap" that currently exists in military practice between the probable cause standard for referral of charges to court-martial and the "beyond a reasonable doubt" standard for conviction. In civilian practice, this gap has been filled with structured decisional principles and charging standards to help guide prosecutors in the prudent and effective exercise of prosecutorial discretion. In military practice, the disposition decision-making guidance under Article 30 and R.C.M. 306(b) is relatively unstructured.

- The proposed disposition guidance would provide structured decisional principles to help guide commanders and convening authorities—as well as the staff judge advocates, judge advocates, and legal officers who advise them in all military justice matters—in the effective exercise of disposition discretion "in the interest of justice and discipline" in individual cases.

- Part II of this Report will contain a complete draft of the proposed disposition guidance, for inclusion in the Manual for Courts-Martial as an appendix.

7. Relationship to Objectives and Related Provisions

- This proposal supports the GC Terms of Reference and MJRG Operational Guidance by incorporating, to the extent practicable, the standards and procedures of the civilian sector with respect to the exercise of prosecutorial discretion.

8. Legislative Proposal

SEC. 604. DISPOSITION GUIDANCE.

Section 833 of title 10, United States Code (article 33 of the Uniform Code of Military Justice), is amended to read as follows:

"**§833. Art. 33. Disposition guidance**

VanLandingham, *Acoustic Separation in Military Justice: Filling the Decision Rule Vacuum with Ethical Standards*, 11 OHIO ST. J. CRIM. L. 389 (2014).

"The President shall direct the Secretary of Defense to issue, in consultation with the Secretary of Homeland Security, non-binding guidance regarding factors that commanders, convening authorities, staff judge advocates, and judge advocates should take into account when exercising their duties with respect to disposition of charges and specifications in the interest of justice and discipline under sections 830 and 834 of this title (articles 30 and 34). Such guidance shall take into account, with appropriate consideration of military requirements, the principles contained in official guidance of the Attorney General to attorneys for the Government with respect to disposition of Federal criminal cases in accordance with the principle of fair and evenhanded administration of Federal criminal law.".

9. Sectional Analysis

Section 604 contains a complete revision of Article 33. The current statute concerning forwarding of charges in general courts-martial when the accused is in confinement would be incorporated into the closely related provisions in Article 10. Article 33, as amended, would require the establishment and maintenance of non-binding guidance regarding factors that commanders, convening authorities, staff judge advocates, and judge advocates should take into account when exercising their duties with respect to disposition of charges and specifications in the interest of justice and discipline under Articles 30 and 34. This disposition guidance would draw upon the Principles of Federal Prosecution in the United States Attorneys' Manual, with appropriate modifications to reflect the unique purposes and requirements of military law. In doing so, the proposed guidance would enhance the disposition decision-making process and better align military charging practice with the standards and principles applicable in most civilian jurisdictions. The proposed disposition guidance would be issued by the Department of Defense, and would be included in the Manual for Courts-Martial as an appendix.