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

Meeting Materials

June 21-22, 2022

Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD)
23rd Public Meeting

June 21-22, 2022
Public Meeting Read-Ahead Materials

Table of Contents

Materials Provided at the Meeting

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

PUBLIC MEETING AGENDA

June 21 - 22, 2022
Ritz Carlton, Pentagon City, Virginia

Tuesday, June 21, 2022

8:30 a.m. - 9:15 a.m.	**Administrative Session** **Military Justice (101) Overview** *COL Jeff Bovarnick, DAC-IPAD Executive Director*
9:15 a.m. – 9:25 a.m.	**Break**
9:25 a.m. – 9:30 a.m.	**Welcome and Introduction to Public Meeting** *Mr. Dwight Sullivan, Designated Federal Official opens meeting* *Remarks of the Chair, the Honorable Karla N. Smith*
9:30 a.m. – 10:20 a.m.	**Terms of Reference, Subcommittees, and Committee Task Review and Update** *COL Jeff Bovarnick, DAC-IPAD Executive Director*
10:20 a.m. – 10:30 a.m.	**Break**
10:30 a.m. – 11:00 a.m.	**Appellate Decisions in Military Sexual Assault Cases** *Ms. Audrey Critchley, DAC-IPAD Staff Attorney* *Ms. Kate Tagert, DAC-IPAD Staff Attorney*
11:00 a.m. – 11:30 a.m.	**Data Update** *Mr. Chuck Mason, DAC-IPAD Staff Attorney*
11:30 a.m. – 12:00 p.m.	**FY20 National Defense Authorization Act Joint Explanatory Statement Update** *DAC-IPAD Professional Staff*
12:00 p.m. – 1:15 p.m.	**Lunch**
1:15 p.m. – 1:30 p.m.	**Offices of Special Trial Counsel Overview** *COL Jeff Bovarnick, DAC-IPAD Executive Director*

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

PUBLIC MEETING AGENDA

Tuesday, June 21, 2022 (continued)

1:30 p.m. – 3:00 p.m.	**Civilian Prosecutors Panel: Best Practices for Establishing an Independent Prosecutorial Office** *Ms. Sherry Boston, District Attorney, Office of the DeKalb County District Attorney, Decatur, Georgia* *Ms. Parisa Dehghani-Tafti, Commonwealth's Attorney for Arlington County and the City of Falls Church, Virginia* *Ms. Fara Gold, Senior Counsel on Sexual Misconduct to the Assistant Attorney General, Civil Rights Division, U.S. Department of Justice* *Ms. Sharon Marcus-Kurn, Chief, Sex Offense and Domestic Violence Section, United States Attorney's Office for the District of Columbia* *Mr. Eric Rosenbaum, Chief, Special Victims Bureau, Major Crimes Division, Queens County District Attorney's Office*
3:00 p.m. – 3:15 p.m.	**Break**
3:15 p.m. – 4:00 p.m.	**Committee Members' Assessment of Best Practices for Establishing an Independent Prosecutorial Office** *Ms. Martha Bashford* *Mr. A.J. Kramer* *Ms. Jennifer Long* *Ms. Meghan Tokash*
4:00 p.m. – 4:45 p.m.	**SVC/VLC Report Overview and Discussion** *Mr. Peter Yob, DAC-IPAD Staff Attorney*
4:45 p.m.	**Meeting Adjourned**

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

PUBLIC MEETING AGENDA

Wednesday, June 22, 2022

9:00 a.m. – 9:45 a.m.	**Presentation on the R.C.M. Amendment Process to Implement FY22 NDAA Military Justice Reforms** *Col Elizabeth Hernandez, U.S. Air Force, Chair, Joint Service Committee*
9:45 a.m. – 10:00 a.m.	**Break**
10:00 a.m. – 11:30 a.m.	**Offices of Special Trial Counsel Panel** *Honorable Carrie F. Ricci, General Counsel, Department of the Army* *Lieutenant General Stuart W. Risch, The Judge Advocate General, U.S. Army* *Honorable John P. Coffey, General Counsel, Department of the Navy* *Rear Admiral Christopher C. French, Deputy Judge Advocate General, U.S. Navy* *Major General David J. Bligh, Staff Judge Advocate to the Commandant, U.S. Marine Corps* *Honorable Peter J. Beshar, General Counsel, Department of the Air Force* *Lieutenant General Charles L. Plummer, The Judge Advocate General, U.S. Air Force* *Major General Rebecca Vernon, The Deputy Judge Advocate General, U.S. Air Force*
11:30 a.m. – 12:30 p.m.	**Lunch**
12:30 p.m. – 2:30 p.m.	**Strategic Planning Discussion**
2:30 p.m. – 3:00 p.m.	**Public Comment, Recap, and Preview of Next Meeting**
3:00 p.m.	**Meeting Adjourned**

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

June 21 - 22, 2022
DAC-IPAD Public Meeting
Presenter Biographies

Tuesday, June 21, 2022:

1:30 p.m. – 3:00 p.m. – Civilian Prosecutors Panel: Best Practices for Establishing an Independent Prosecutorial Office

Ms. Sherry Boston, District Attorney, Office of the DeKalb County District Attorney, Decatur, Georgia, stands among the elite in the world of prosecution as one of the rare one-percent of African-American females currently serving as District Attorney nationwide.

Ms. Boston assumed the role of District Attorney for the Stone Mountain Judicial Circuit in January 2017. In her capacity, DA Boston oversees the prosecution of felony offenses filed in the Superior Court of DeKalb County and supervises a staff of more than 200 individuals, including attorneys, investigators, paralegals, victim-witness advocates, and administrative professionals assigned to various divisions.

Since taking the helm as District Attorney, Ms. Boston has assembled a diverse and highly experienced leadership team to assist with restructuring and redefining prosecution processes to include the development of new units and the consolidation of others. The Office has also increased its capacity to serve victims with an expanded victim services unit. Observers have taken notice of DA Boston's efforts. She was recently lauded by Atlanta Magazine as one of metro Atlanta's *500 Most Influential People*, earning the coveted front cover of the publication. Through her work with the *Institute for Innovation in Prosecution* and the *Fair and Just Prosecution* initiative, DA Boston has also become an integral part of the national dialogue on criminal justice reform and innovative prosecution strategies specific to juvenile justice, reentry, and accountability initiatives. DA Boston is one of four top prosecutors recently named to the GRACE Commission, a statewide task force created by Georgia's First Lady to combat human trafficking.

Prior to her role as District Attorney, Ms. Boston served as DeKalb County Solicitor-General, the elected prosecutor overseeing misdemeanor crimes. During her tenure as Solicitor-General, Ms. Boston was instrumental in the development of DeKalb's revamped Traffic Division and also implemented a wide variety of innovative programming and strategies aimed at community outreach and crime prevention. In addition to her elected positions, DA Boston has received numerous legal appointments and wide recognition for her innovative prevention/intervention initiatives and impassioned commitment to domestic violence awareness. In 2018, she received the *Champion for Change Award* from the Women's Resource Center to End Domestic Violence for her leadership in the DV arena, including the development of two signature community awareness campaigns.

Among her varied involvement in community and legal organizations, District Attorney Boston is an active member of the State Bar of Georgia where she serves on the Disciplinary Board, which has the power to investigate and discipline members of the State Bar for violations of Standards of Conduct. District Attorney Boston also serves on the Board of Governors, the State Bar's policy-making arm. District Attorney Boston is a graduate of Villanova University in Philadelphia, Pennsylvania and Emory University School of Law.

Ms. Parisa Dehghani-Tafti, Commonwealth's Attorney for Arlington County and the City of Falls Church, Virginia, is the Commonwealth's Attorney for Arlington County and the City of Falls Church. Ms. Dehghani-Tafti was first elected to a four-year term in November 2019. She has a twenty-year record of criminal justice reform as an innocence protection attorney, a public defender, and a law professor. As an innocence protection attorney, Ms. Dehghani-Tafti served as the Legal Director for the Mid-Atlantic Innocence Project, where she helped exonerate innocent individuals who were wrongfully incarcerated. She litigated at all levels of state and federal courts, including the United States Supreme Court and the Supreme Court of Virginia.

As a public defender with the District of Columbia's Public Defender Service, Ms. Dehghani-Tafti litigated cases of constitutional magnitude and won the first DNA exoneration in DC. As a law professor at Georgetown University Law Center and at George Washington University School of Law, she has helped train the next generation of criminal law attorneys, teaching courses on wrongful convictions. Ms. Dehghani-Tafti earned a B.A. in Philosophy and Comparative Literature from the University of California, Berkeley and a J.D. from the New York University School of Law.

Ms. Fara Gold, Senior Counsel on Sexual Misconduct to the Assistant Attorney General for the Civil Rights Division, U.S. Department of Justice, has served as a federal prosecutor in the Civil Rights Division for nearly 13 years. She currently serves on detail to the Assistant Attorney General as Senior Counsel on Sexual Misconduct, where she is working to strengthen the Justice Department's response to civil rights violations that involve sexual assault and misconduct. Ms. Gold has developed national expertise in investigating and prosecuting sexual misconduct committed by law enforcement and other government actors. She has prosecuted more of these cases than anyone in the country, including a case that recently earned her and her colleagues the 2021 FBI Director's Award for Excellence.

Ms. Gold's efforts have led to a significant increase in the Civil Rights Division's sexual assault prosecutions and an increased awareness of federal civil rights jurisdiction over sexual misconduct. She has published several articles about federal jurisdiction over sexual misconduct committed by government actors; she has also developed national trainings for federal and local prosecutors and agents and military personnel about how to effectively investigate allegations of sexual misconduct; she provided technical assistance on the newly-enacted federal sexual abuse and criminal civil rights statutes that were part of the reauthorization of the Violence Against Women Act; and she assisted with the revised gender bias in policing guidance.

Ms. Gold was also awarded the Attorney General's Award for Exceptional Service in 2014 and the Attorney General's Award for Outstanding Contributions by a New Employee in 2012. Prior to joining DOJ, she served as an Assistant State Attorney for the Broward County State Attorney's Office in Fort Lauderdale, Florida, where she specialized in prosecuting sex crimes and child abuse. This summer, she will be teaching a class at Georgetown University Law Center, titled, "Prosecuting Sex Crimes and Vindicating Victims' Rights."

Ms. Sharon Marcus-Kurn, Chief, Sex Offense and Domestic Violence Section,
is an Assistant United States Attorney and the Chief of the Sex Offense and Domestic Violence Section of the D.C. United States Attorney's Office. In that role she supervises a section of 35+ prosecutors, plus advocates and support staff, who investigate and prosecute all of the sexual assault and domestic violence cases brought in D.C. Superior Court (the local court in D.C.) including adult perpetrators (and some juveniles) charged with forced rape, incest, armed violent assaults, child cruelty, voyeurism, stalking, distribution of sexually explicit images, and other offenses. She also co-supervises sex trafficking, child exploitation, interstate kidnapping, and other federal cases brought in D.C. District Court.

Ms. Marcus-Kurn created and ran the first D.C. Human Trafficking Task Force, a city-wide governmental and non-governmental partnership of 20 local and federal law enforcement agencies and 35 non-governmental agencies, spearheaded the first clergy abuse hotline in D.C., and created an Intimate Partner Violence Prevention Initiative for the U.S. Attorney's Office. She also personally handled scores of local and federal sexual assault cases, involving adult and child victims.

Before coming to the D.C. United States Attorney's Office, Ms. Marcus-Kurn was a Special Assistant United States Attorney in the Phoenix United States Attorney's Office, prosecuting violent crimes on the Indian Reservations in Arizona, and a Trial Attorney at the Department of Justice's Office of Consumer Litigation.

Mr. Eric Rosenbaum, Chief, **Special Victims Bureau, Major Crimes Division**,
has been a prosecutor in Queens County, New York City since 1994 and was promoted to Chief of the Special Victims Bureau in January 2020. Prior to becoming Bureau Chief, he served as Deputy Chief in SVB (2014-2019), Senior Trial Assistant (2001-2014), and Chief of DNA Prosecutions for the QDA (2004-2020). Mr. Rosenbaum is a senior legislative advisor to the District Attorneys Association of New York State for which he co-chairs the Committee on Special Victims and Domestic Violence. During his tenure at the QDA, he has also served, through the U.S. Department of State and UNICEF, as a legal advisor to the Jordanian Family Protectorate and judiciary regarding law enforcement and judicial responses to gender-based violence and child abuse, and to the government of Malawi regarding efforts to establish one-stop child advocacy centers throughout the country.

Outside of New York City, Mr. Rosenbaum lectures nationally on advanced trial advocacy, special victims prosecutions, and forensic best practices. He also helped to develop trauma-informed survivor-centric training courses for prosecutors throughout New York State.

Mr. Rosenbaum graduated from Fordham University School of Law and Williams College. Prior to joining the QDA, Eric was an associate at the Proskauer Rose law firm in Manhattan where he specialized in litigation involving securities fraud, lender-liability, bankruptcy, and patent and trademark infringement.

Wednesday, June 22, 2022:

9:00 a.m. – 9:45 a.m. – Presentation on the R.C.M. Amendment Process to Implement FY22 NDAA Military Justice Reforms

Colonel Elizabeth M. Hernandez, Chair, Joint Service Committee on Military Justice and Chief, Military Justice Law & Policy Division, U.S. Air Force.

The Joint Service Committee on Military Justice (JSC) is an inter-agency, joint body of judge advocates and advisors, dedicated to ensuring the Manual for Courts-Martial (MCM) and Uniform Code of Military Justice (UCMJ) constitute a comprehensive body of criminal law and procedure. The Military Justice Law and Policy Division provides counsel on military justice matters to senior leaders, as well as guidance on military justice policy and processes to legal offices at every level of command. The Division also represents the Air Force on the Joint Service Committee on Military Justice: an inter-agency, joint body dedicated to ensuring the Manual for Courts-Martial and Uniform Code of Military Justice constitute a comprehensive body of criminal law and procedure.

Colonel Hernandez received her commission through the Direct Appointment Program with the U.S. Army in 2005. She served as a Soldiers' Counsel for the Physical Evaluation Board, Administrative Law attorney, and Brigade Trial Counsel before completing an interservice transfer to the Air Force in 2008.

In the Air Force, Colonel Hernandez served as Chief of Military Justice, Area Defense Counsel, and Senior Defense Counsel. Next, she served as a Defense Fellow in the Office of Congressman Walter B. Jones (NC-03) and was then Legislative Counsel to the Air Force Legislative Liaison. Colonel Hernandez next served as the Staff Judge Advocate for the 319 ABW in Grand Forks, North Dakota. Most recently, she served as the Deputy Chief Circuit Military Judge for the Central Circuit.

Wednesday, June 22, 2022 (continued):

10:00 a.m. – 11:30 a.m. – Secretaries of the Military Departments or their Designees' Discussion of the Offices of Special Trial Counsel

Honorable Carrie F. Ricci, General Counsel, Department of the Army,
was confirmed by the United States Senate on December 14, 2021 and was sworn in as the 23rd General Counsel of the United States Army on January 3, 2022. As General Counsel, she is the chief lawyer of the Army ultimately responsible for determining the Army's position on any legal question. She serves as legal counsel to the Secretary of the Army, Under Secretary, the five Assistant Secretaries, and members of the Army Secretariat.

For nine years prior to her appointment, Ms. Ricci served as a Senior Executive with the United States Department of Agriculture, first as an Assistant General Counsel, then as the Associate General Counsel, Marketing, Regulatory, and Food Safety Programs, where she led a team that provided legal services to two Under Secretaries and three agencies. Her preceding assignment was as Assistant General Counsel, Office of General Counsel, Department of Defense Education Activity.

In 2010, Ms. Ricci retired from the U.S. Army after 20 years of active military service. At the time of her retirement, Ms. Ricci served as Assistant General Counsel, Office of the General Counsel, U.S. Army, where she advised the Secretary of the Army and other senior Army leaders on legal and policy issues concerning all areas of military personnel management. Other key military assignments include: Deputy Staff Judge Advocate, U.S. Army Intelligence and Security Command; Chief, International Law, U.S. Central Command (USCENTCOM); Administrative Law Attorney, Office of the Judge Advocate General; Trial Counsel and Operational Law Attorney, 4th Infantry Division; and Platoon Leader in Operations DESERT SHIELD and DESERT STORM.

In 2020, Ms. Ricci served on the Fort Hood Independent Review Committee, a five-member panel of Highly Qualified Experts appointed by the Secretary of the Army to conduct a review of the Fort Hood command climate and assess its impact on its soldiers and units, particularly as it related to preventing sexual assault and sexual harassment.

Ms. Ricci is a 1988 ROTC graduate of Georgetown University and later attended law school through the Army's Funded Legal Education Program, graduating from the University of Maryland School of Law in 1996. She earned a Master of Laws degree (LL.M.) from The Judge Advocate General's Legal Center and School, and a second LL.M from George Washington University School of Law. She is a graduate of the U.S. Army Command and General Staff College and holds a certificate in Diversity, Equity, and Inclusion in the Workplace from the University of South Florida.

Ms. Ricci is a Fellow of the American Bar Foundation and volunteers as a Girl Scout Troop Leader in Fairfax, Virginia, where she resides with her family.

Lieutenant General Stuart W. Risch, The Judge Advocate General, U.S. Army, a native of Orange/West Orange, NJ, was initially commissioned a Second Lieutenant in the Field Artillery in 1984. He served as a Platoon Leader, Executive Officer, and Company Commander in the 78th Infantry Division, U.S. Army Reserve, while attending law school. He entered active duty and the Judge Advocate General's Corps in1988.

Prior to assuming duty as The Judge Advocate General on July 10, 2021, Lieutenant General Risch recently served as the Deputy Judge Advocate General, from August 2, 2017, until July 9, 2021. His previous assignments as a General Officer include service as the Commander, United States Army Legal Services Agency and Chief Judge, United States Army Court of Criminal Appeals, Fort Belvoir, Virginia; the Assistant Judge Advocate General for Military Law and Operations, Headquarters, Department of the Army, Pentagon, Washington, D.C.; and as the Commanding General/Commandant of The Judge Advocate General's Legal Center and School, Charlottesville, Virginia.

Prior to that, he served as the Staff Judge Advocate, III Armored Corps and Fort Hood, Fort Hood, Texas (duty with U.S. Forces-Iraq during OPERATIONS IRAQI FREEDOM and NEW DAWN); Staff Judge Advocate, U.S. Army Fires Center of Excellence, Fort Sill, Oklahoma; Legislative Counsel in the Army's Office of the Chief Legislative Liaison, Pentagon; Staff Judge Advocate, 1st Infantry Division, Wuerzburg, Germany (with duty in Iraq during OPERATION IRAQI FREEDOM II); Director, Center for Law and Military Operations, The Judge Advocate General's Legal Center & School, Charlottesville, Virginia; Deputy Staff Judge Advocate, 4th Infantry Division, Fort Hood, Texas; Litigation Attorney, U.S. Army Litigation Division, Arlington, Virginia; Instructor and Law Review Editor at The Judge Advocate General's School, Charlottesville, Virginia; and as the Chief, Military Justice, Senior Trial Counsel and Brigade Legal Advisor, 2d (Blackjack) Brigade, 1st Cavalry Division, Fort Hood, Texas (with service in Saudi Arabia, Kuwait, and Iraq during OPERATIONS DESERT SHIELD/STORM). He also practiced civil litigation in the private sector with the law firm of Dwyer, Connell, and Lisbona, in Montclair, NJ, prior to entering active duty.

Lieutenant General Risch received his Bachelor of Arts degree in Government and Law and History from Lafayette College, Easton, Pennsylvania, in 1984; a Juris Doctor degree from Seton Hall University School of Law, Newark, New Jersey, in 1987; a Master's degree in Law from The Judge Advocate General's Legal Center and School, U.S. Army, Charlottesville, Virginia, in 1996, and a Master's degree in Strategic Studies from the U.S. Army War College, Carlisle, Pennsylvania, in 2007.

Lieutenant General Risch's military education includes the Judge Advocate Officer Basic and Advanced Courses, the Combined Arms and Services Staff School, the Command and General Staff Officer's Course, and the Army War College. He is a member of the Bar of the State of New Jersey, and is admitted to practice law before the U.S. Supreme Court and numerous federal and military courts. His military awards include the Legion of Merit with three Oak Leaf Clusters and the Bronze Star Medal with Oak Leaf Cluster. Lieutenant General Risch is married and he and his wife have three children and seven grandchildren.

Honorable John P. Coffey, General Counsel, Department of the Navy,
was sworn into office on February 16, 2022, as the 24th General Counsel of the Department of the Navy after his confirmation by the U.S. Senate on February 9, 2022. As General Counsel, Mr. Coffey is the Department of the Navy's (DON) Chief Legal Officer and head of the Office of the General Counsel (OGC). He leads more than 1,100 attorneys and professional support staff in 140 offices worldwide. DON OGC provides legal advice to the Secretary of the Navy, the Under Secretary of the Navy, the Assistant Secretaries of the Navy and their staffs, and the multiple components of the Department, to include the Navy and the Marine Corps.

He is a native of New York. Mr. Coffey is the oldest of seven children born to Irish immigrants. He is an honors graduate of the United States Naval Academy and Georgetown University Law Center. After graduating from Annapolis, Mr. Coffey completed Naval Flight Officer training and served eight years on active duty, including assignments as a P-3C Orion mission commander hunting Soviet submarines during the Cold War, a junior officer intern to the Strategy Division in the Organization of the Joint Chiefs of Staff, and the special military assistant (personal aide) to Vice President George H.W. Bush. Mr. Coffey attended Georgetown Law's evening program while assigned to the Pentagon and White House. After graduating from Georgetown, Mr. Coffey transitioned to the Navy Reserve and returned to New York, where he practiced law for over thirty-five years, including several years as an Assistant United States Attorney in the Southern District of New York and most recently as Chair of Complex Litigation at Kramer Levin Naftalis & Frankel LLP.

After returning home to New York, Mr. Coffey continued to serve in the Navy Reserve for eighteen years. Among other things, he flew anti-submarine missions in the North Atlantic and Mediterranean, counter-narcotics missions in the Caribbean, and armed missions in support of the blockade of the former Yugoslavia. Mr. Coffey was selected to serve as commanding officer both of a reserve P-3C squadron

(VP-92) and the reserve component of the Enterprise carrier battle group staff (CCDG-12), and served as a staff officer in the Office of the Secretary of Defense (Reserve Affairs). Mr. Coffey retired at the rank of captain in 2004.

Rear Admiral Christopher C. French, Deputy Judge Advocate General, U.S. Navy, is a native of Albany and Brooklyn, New York. He graduated from the University of New Hampshire in 1990. French was commissioned through the Judge Advocate General's Corps Student Program in 1992, graduating in 1993 from the Villanova University School of Law. He later earned a Master of Laws from Georgetown University Law Center in 2004.

At sea, Rear Admiral French served as the fleet judge advocate to Commander, U.S. Seventh Fleet; staff judge advocate to Commander, Carrier Strike Group FIVE; and legal officer, aboard USS Nimitz (CVN 68).

His other assignments include legal counsel, Chairman of the Joint Chiefs of Staff; staff judge advocate, U.S. European Command; deputy legal advisor to the National Security Council; special counsel to the Chief of Naval Operations; commanding officer, U.S. Region Legal Service Office, Europe, Africa, and Southwest Asia; chief of Operational Law, Multi-National Forces, Iraq; deputy legal counsel, Office of the Legal Counsel to the Chairman of the Joint Chiefs of Staff; assistant force judge advocate, Commander, U.S. Naval Forces, Europe; staff judge advocate, Naval Special Warfare Development Group. Rear Admiral French began his legal career first as a trial counsel and later as the senior defense counsel at Naval Legal Service Office, Middle Pacific, Pearl Harbor, Hawaii.

Rear Admiral French's personal decorations include the Defense Superior Service Medal (four awards), Legion of Merit (three awards), Bronze Star, Defense Meritorious Service Medal, Navy and Marine Corps Meritorious Service Medal, (two awards), Joint Service Commendation Medal, and the Navy and Marine Corps Commendation Medal (two awards).

Major General David J. Bligh, Staff Judge Advocate to the Commandant, U.S. Marine Corps, was raised in Athens, Pennsylvania. He is a 1988 graduate of Indiana University of Pennsylvania and a 1997 graduate of the University of Georgia School of Law.

Major General Bligh was commissioned through the Platoon Leaders Course program in 1988. He initially served as a Platoon Commander and Company Commander at 2d Assault Amphibian Battalion, Camp Lejeune, North Carolina. He later served as a Series Commander at Marine Corps Recruit Depot, Parris Island, South Carolina.

Upon completion of the Naval Justice School, Major General Bligh served as a civil law officer, trial counsel, and officer-in-charge of legal assistance at Camp Lejeune. He was then assigned as Director, Joint Law Center, Marine Corps Air Station New River, North Carolina. During this assignment, Major General Bligh deployed for OIF-I with Task Force Tarawa.

Major General Bligh has served as the Staff Judge Advocate for 3d Marine Division and III Marine Expeditionary Force in Okinawa, Japan, and Marine Corps Forces Command in Norfolk, Virginia. Prior to assuming his current duties, Major General Bligh served as the Deputy Staff Judge Advocate to the Commandant of the Marine Corps, and later as the Assistant Judge Advocate General of the Navy (Military Law).

Honorable Peter J. Beshar, General Counsel, Department of the Air Force,
was sworn in as the 25th General Counsel for the Department of the Air Force during a Pentagon ceremony March 18, following his confirmation to the role by the U.S. Senate, March 10.

Prior to his confirmation, Honorable Beshar served as the executive vice president and general counsel of the global professional services firm Marsh McLennan. Among his career highlights, he was appointed by President Barack Obama as a trustee of the Wilson Center for International Scholars in 2015, served as the special assistant to former Secretary of State Cyrus Vance in the peace negotiations in the former Yugoslavia, and spearheaded initiatives to assist veterans with employment opportunities and access to housing, disability and other benefits.

In his newest capacity, Honorable Beshar is the Department of the Air Force's chief ethics official and legal officer, providing oversight, guidance and direction to more than 2,600 Air Force military and civilian lawyers worldwide.

Honorable Beshar joins the Department as it implements requirements in the 2022 National Defense Authorization Act and recommendations from a Department of Defense independent review commission aimed at bolstering the specialized resources available to investigate and prosecute certain offenses such as murder, sexual assault, and domestic violence.

Lieutenant General Charles L. Plummer, The Judge Advocate General, U. S. Air Force,
is The Judge Advocate General, Department of the Air Force, Arlington, Virginia. In this capacity, Lieutenant General Plummer serves as the Legal Adviser to the Secretary of the Air Force, the Chief of Staff of the Air Force, the Chief of Space Operations, and all officers and agencies of the Department of the Air Force. He directs all judge advocates in the performance of their duties and is responsible for the professional oversight of more than 2,200 judge advocates, 350 civilian attorneys, 1,400 enlisted paralegals and 500 civilians in the Total Force Judge Advocate General's Corps worldwide; overseeing military justice, operational and international law, and civil law functions at all levels of Air Force and Space Force commands.

Prior to his appointment as The Judge Advocate General, Lieutenant General Plummer served as the Deputy Judge Advocate General, Headquarters U.S. Air Force, Arlington, Virginia.

Lieutenant General Plummer was admitted to practice law in the State of New York in 1994. From August 1994 to September 1995, he practiced as a civilian attorney with firms in Buffalo and Syracuse, New York. He entered the Air Force by direct appointment in September 1995.

Lieutenant General Plummer has served in a variety of legal positions at the base, the field operating agency, the air staff and the joint staff levels. In addition to his traditional assignments, he served a rotation as the Staff Judge Advocate to the 3rd Air Expeditionary Group, Kwang Ju Air Base, South Korea, and as the Staff Judge Advocate to a Joint Special Operations Task Force in Jordan.

Major General Rebecca R. Vernon, Deputy Judge Advocate General, U.S. Air Force, serves as the Deputy Judge Advocate General, Department of the Air Force, Arlington, Virginia. The general assists The Judge Advocate General in advising the Secretary of the Air Force, the Chief of Staff of the Air Force, the Chief of Space Operations and all officers and agencies of the Department of the Air Force. Additionally, she assists The Judge Advocate General in the professional oversight of more than 2,200 judge advocates, 350 civilian attorneys, 1,400 enlisted paralegals and 500 civilians in the Total Force Judge Advocate General's Corps worldwide, overseeing military justice, operational and international law, and civil law functions at all levels of Air Force and Space Force commands.

Prior to her appointment as the Deputy Judge Advocate General, Major General Vernon was the Director of Military Justice and Discipline, Judge Advocate General's Corps, Department of the Air Force, Andrews Air Force Base, Maryland. In that capacity, she supervised the administration of military justice throughout the Air Force and the Space Force, including 450 personnel at 79 locations worldwide engaged in military justice policy, legislative, trial, appellate, disability, clemency and parole operations.

Major General Vernon was admitted to practice law in the State of Massachusetts in 1995. She entered the Air Force through the Direct Appointment Program in 1996.

Major General Vernon has served in a variety of legal positions at the wing, major command, and air staff levels, including as defense counsel, JAG School instructor, program counsel, wing staff judge advocate, and MAJCOM staff judge advocate.

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

TERMS OF REFERENCE

These terms of reference establish the objectives for the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD).

I. Objectives and Scope:

Pursuant to section 546 of the Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015 (FY15 NDAA) (Pub. L. No. 113-291), as amended by section 537 of the National Defense Authorization Act for Fiscal Year 2016 (Pub. L. No. 114-92), the DAC-IPAD shall provide independent advice and recommendations on the investigation, prosecution, and defense of allegations of rape, forcible sodomy, sexual assault, and other sexual misconduct involving members of the Armed Forces, based on its ongoing review of cases.

II. Methodology:

A. *Regulatory Compliance*.

All DAC-IPAD assessments will be conducted in compliance with the Federal Advisory Committee Act (FACA) (5 U.S.C., App) and the General Services Administration, Federal Advisory Committee Management Final Rule (41 C.F.R. Part 102-3).

B. *Tasking Authority*.

All work performed by the DAC-IPAD, as designated by the Secretary of Defense and defined in statute, is based upon these Terms of Reference or written tasks assigned to the DAC-IPAD by the Secretary of Defense, the Deputy Secretary of Defense, or the DoD General Counsel (DoD GC) unless otherwise provided for by statute or Presidential directive. These Terms of Reference and all written tasks must be provided to the DoD Advisory Committee Management Officer and are subject to public review.

C. *Access to Records*.

The DAC-IPAD is authorized to access and review, consistent with law, documents and records from the Department of Defense and Military Departments and any other Federal department or agency which the Committee deems necessary. The DAC-IPAD is authorized to meet with and interview DoD and other personnel the Committee determines necessary to complete its tasks. Committee members may be required to execute a non-disclosure agreement, consistent with FACA.

D. *Collection of Information through Meetings, Visits, and Observations*.

The Committee may hold meetings and gather information through interviews, presentations, oral or written testimony, roundtable/panel discussions, document reviews, military installation or other site visits, court-martial observations, or other means, as necessary.

E. *Input from Government Agencies, Experts, and Other Entities*.

As appropriate, the Committee may seek input from other Federal agencies, non-Federal entities, and other sources with pertinent knowledge or experience.

F. *Input from Members the Public*.

The Committee will consider all submissions by organizations or members of the public that are relevant to its mission and received either in writing or orally during public meetings in compliance with FACA.

III. Statutory Deliverables:

A. *Annual Report*.

Pursuant to section 546(d) of the FY15 NDAA, the DAC-IPAD, not later than March 30 of each year, will submit to the Secretary of Defense through the DoD GC, and to the Committees on Armed Services of the Senate and the House of Representatives, a report describing the results of the activities of the DAC-IPAD during the preceding year.

B. *Biennial Collateral Misconduct Report.*

Pursuant to section 547 of the John S. McCain National Defense Authorization Act for Fiscal Year 2019 (Pub. L. No. 115-232), as amended by section 536 of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021 (FY 21 NDAA) (Pub. L. No. 116-283), not later than September 30, 2019, and once every two years thereafter, the Secretary of Defense, acting through the DAC-IPAD, shall submit to the congressional defense committees a report that includes, with respect to the period of two years preceding the date of the submittal of the report, the following:

(1) The number of instances in which a covered individual was suspected of misconduct or crimes considered collateral to the investigation of a sexual offense committed against the individual.

(2) The number of instances in which adverse action was taken against a covered individual who was suspected of collateral misconduct or crimes as described in paragraph (1).

(3) The percentage of investigations of sexual offenses that involved suspicion of or adverse action against a covered individual as described in paragraphs (1) and (2).

The term "covered individual" means an individual who is identified in the case files of a military criminal investigative organization as a victim of a sexual offense that occurred while that individual was serving on active duty as a member of the Armed Forces. The term "suspected of," when used with respect to a covered individual suspected of collateral misconduct or crimes as described in subsection (a), means that an investigation by a military criminal investigative organization reveals

facts and circumstances that would lead a reasonable person to believe that the individual committed an offense under chapter 47 of title 10, United States Code (the Uniform Code of Military Justice).

C. *DAC-IPAD Studies.*

Pursuant to section 546(c)(2) of the FY15 NDAA, the DAC-IPAD shall study issues identified in its ongoing reviews of cases involving allegations of rape, forcible sodomy, sexual assault, and other sexual misconduct involving members of the Armed Forces.

IV. Deliverables Requested by Joint Explanatory Statement:

The Joint Explanatory Statement accompanying the National Defense Authorization Act for Fiscal Year 2020 (Pub. L. No. 116-92) requested two assessments by the DAC-IPAD:

(1) *Assessment of Alternative Justice Programs.*

Review, as appropriate, 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 where 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.

(2) *Victim Impact Statement Assessment.*

On a one-time basis, or more frequently, as appropriate, and adjunct to its review of court-martial cases completed in any particular year, assess whether military judges are according appropriate deference to victims of crimes who exercise their right to be heard under Rule for Courts-Martial (RCM) 1001(c) at sentencing hearings, and appropriately permitting other witnesses to testify about the impact of the crime under RCM 1001. The assessment should 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.

- That Members of Congress have received complaints that some military judges have interpreted 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.

The DAC-IPAD will provide the DoD GC with a recommended date for completion of those two assessments.

V. Deliverable Requested by DoD GC:

Pursuant to the DAC-IPAD Charter filed on February 16, 2022, the DAC-IPAD will address matters of special interest to DoD, as directed by the Secretary of Defense, the Deputy Secretary of Defense, or the DoD GC, as the DAC-IPAD's sponsor, including:

Appellate Case Review.

In a January 28, 2022, memorandum to the DAC-IPAD Staff Director, the DoD GC requested that the DAC-IPAD conduct a comprehensive study of appellate decisions in military sexual assault cases, focusing on recurring appellate issues that arise in such cases, and provide a report of the results of that study. The DAC-IPAD's report should include an analysis of the most commonly recurring issues and any recommendations for reforms and should:

- Consider the efficacy of the military appellate system's handling of those cases.

- Identify any recommended training and education improvements for military justice practitioners suggested by the study.

The DAC-IPAD should determine the optimal study design to analyze the issues set out above. In developing a study design, the DAC-IPAD should note two recent changes to the law that affect the Courts of Criminal Appeals' reviews of findings and sentences:

- Section 542(b) of the FY 21 NDAA modified the factual sufficiency standard of review that the Courts of Criminal Appeals apply when reviewing findings of guilty entered on or after January 1, 2021.

- In conjunction with the enactment of sentencing reform to move largely to parameter-based sentencing in special and non-capital general court-martial cases, section 539E of the National Defense Authorization Act for Fiscal Year 2022 (Pub. L. No. 117-81) modified the Courts of Criminal Appeals' sentence appropriateness review standard to be applied in cases where all offenses resulting in a finding of guilty occur after December 27, 2023.

The DAC-IPAD will provide the DoD GC with a recommended date for completion of that review.

VI. Support:

The DoD, through the Office of the DoD GC, provides support for the Committee's functions and ensures compliance with the requirements of the FACA, the Government in the Sunshine Act (5 U.S.C. § 552b), governing Federal statutes and regulations, and DoD policy and procedures.

Caroline Krass
General Counsel

Date: MAY 23 2022

Military Justice Overview

This document provides a broad overview of commonly used military justice acronyms and abbreviations, the Manual for Courts-Martial, and the steps in the court-martial process.

1. Military Justice Acronyms and Abbreviations

ACCA	Army Court of Criminal Appeals
AFCCA	Air Force Court of Criminal Appeals
AFOSI	Air Force Office of Special Investigations
BCD	bad-conduct discharge
CAAF	Court of Appeals for the Armed Forces
CID	Army Criminal Investigation Command
CGCCA	Coast Guard Court of Criminal Appeals
CGIS	Coast Guard Investigative Service
CONUS	continental United States
DAC-IPAD	Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces
DD	dishonorable discharge
DFO	Designated Federal Officer
DoD	Department of Defense
DoD GC	Department of Defense General Counsel
DSAID	Defense Sexual Assault Incident Database
FACA	Federal Advisory Committee Act of 1972
FAP	Family Advocacy Program
FY	fiscal year
JPP	Judicial Proceedings Since Fiscal Year 2012 Amendments Panel
JSC	Joint Service Committee on Military Justice
GCM	general court-martial
GCMCA	general court-martial convening authority
IRC	Independent Review Commission on Sexual Assault in the Military
LOA	letter of admonishment
LOC	letter of counseling
LOR	letter of reprimand
MCIO	Military Criminal Investigative Organization
MCM	Manual for Courts-Martial
MPO	military protective order

M.R.E.	Military Rule of Evidence
NCIS	Naval Criminal Investigative Service
NDAA	National Defense Authorization Act
NJP	non-judicial punishment (Article 15, UCMJ)
NMCCA	Navy-Marine Corps Court of Criminal Appeals
OCONUS	outside of the continental United States
OSTC	Office of the Special Trial Counsel
PHO	Article 32 preliminary hearing officer
PTA	pretrial agreement
R.C.M.	Rule for Courts-Martial
RFI	request for information
ROI	report of investigation
RSP	Response Systems to Adult Sexual Assault Crimes Panel
SAPR	Sexual Assault Prevention and Response
SAPRO	Sexual Assault Prevention and Response Office
SARC	sexual assault response coordinator
SHARP	Sexual Harassment and Assault Response Office (Army SAPRO)
SJA	staff judge advocate
SPCM	special court-martial
SPCMCA	special court-martial convening authority
SCM	summary court-martial
SVC	special victims' counsel (Army)
TJAG	[The] Judge Advocate General
UCMJ	Uniform Code of Military Justice
USA	United States Army
USAF	United States Air Force
USCG	United States Coast Guard
USMC	United States Marine Corps
USN	United States Navy
VA	victim advocate
VC	victims' counsel (Air Force)
VWAP	Victim and Witness Assistance Program/Personnel
VLC	victims' legal counsel (Navy and Marine Corps)

2. Manual for Courts-Martial (MCM)

Established by Presidential Executive Order, the MCM is a guide for conducting courts-martial. The MCM (2019 ed.) is on-line at the JSC website: https://jsc.defense.gov/Military-Law/Current-Publications-and-Updates/.
For the most current version of the UCMJ, select the updated UCMJ PDF link on the right.

The MCM contains the following parts:

Part I: Preamble

Part II: Rules for Courts-Martial

Part III: Military Rules of Evidence (based on the Federal Rules of Evidence).

Part IV: Punitive Articles of the UCMJ. Contains the text of the article, elements of the offense, explanation, maximum punishment, and sample specifications.
The entire UCMJ—punitive and non-punitive articles—is at Appendix 2 of MCM.

"Covered" offenses: UCMJ punitive articles for which the Office of Special Trial Counsel has referral authority [also includes Article 80 (attempt), Article 81 (conspiracy) and Article 82 (solicitation) to commit these offenses]:

- Art. 117a Wrongful broadcast or distribution of intimate visual images
- Art. 118 Murder
- Art. 119 Manslaughter
- Art. 120 Rape and sexual assault
- Art. 120b Rape and sexual assault of a child
- Art. 120c Other sexual misconduct: indecent viewing, visual recording, or broadcasting; forcible pandering; indecent exposure
- Art. 125 Kidnapping
- Art. 128b Domestic violence
- Art. 130 Stalking
- Art. 132 Retaliation
- Art. 134 Child pornography

Part V Non-judicial Punishment Procedure. Authority derives from Article 15, UCMJ.

Appendices Some commonly used appendices include:

- App. 2 UCMJ
- App. 2.1 Non-Binding Disposition Guidance (issued by Secretary of Defense)
- App. 12 Maximum Punishment Chart
- App. 12A Presidentially-Prescribed Lesser Included Offenses
- App. 15 Analysis for Rules for Courts-Martial
- App. 16 Analysis of the Military Rules of Evidence
- App. 17 Analysis of Punitive Articles of the UCMJ

3. Military Criminal Justice System

Excerpt from Congressional Research Service Report (Oct 2021) (footnotes omitted)

Jurisdiction under military law is based on the U.S. Constitution and relevant aspects of international law. Military law jurisdiction is exercised through four distinct military justice forums: (1) courts-martial, (2) courts of inquiry, (3) military commissions, and (4) non-judicial punishment proceedings. Military law comprises federal law, constitutional authority, and inherent command authority. It is meant to promote justice, efficiency, and discipline in the armed services.

Throughout the 1940s, Congress received evidence of military justice maladministration. The primary concerns were the system's lack of due process and independence. Congress responded to these concerns by enacting the UCMJ in 1950, a military law code that applies to each armed service and replaced the prior military justice system.

The punitive articles in the UCMJ are military law offenses (Articles 77-134). Many of the punitive articles are criminal conduct offenses that have a referent offense in modern penal codes or historical common law (e.g., rape, murder, robbery). Other punitive articles are military misconduct offenses that have a referent offense in medieval chivalric codes or Roman military practices (e.g., mutiny, desertion, cowardice).

Judge Advocates

Each armed service has a senior legal officer known as the Judge Advocate General (JAG). These senior officials are the principal legal officers responsible for military justice matters in their respective service. The attorneys whom they appoint to serve as judge advocates are the military officers primarily responsible for implementing the military justice system. The roles and functions of judge advocates who are military justice practitioners resemble those of attorneys in a civilian criminal justice system (see **Table 2**).

Table 2. Active Duty Military Justice Practitioners (Judge Advocates, by Armed Force – Dec. 2020)

Duty Position	Army	Navy	Marine Corps	Air Force	Coast Guard	Total
Defense Counsel	132	53	69	104	8	366
Trial Counsel (prosecutor)	128	45	72	—	19	342
Military Justice Chief (supervisory prosecutor)	58	8	41	76	1	184
Military Judge	25	12	12	20	3	72
Appellate Judge	6	5	3	10	3	27
Total	349	123	197	288	34	991

Although legislative reforms establishing the UCMJ relied on civilian criminal law and procedure as a model, the reforms also preserved many historical attributes of military justice, such as a commander's discipline and disposition authority. Preserving certain attributes meant that while the UCMJ replicated a civilian criminal justice system overall, the reforms did not allow military lawyers to make decisions regarding the criminal prosecution of servicemembers. Prosecutorial discretion remained a function of command, and judge advocates continued to serve as advisors to commanders regarding their prosecutorial authority.

Investigation

DOD policy states that only entities with statutory law enforcement or criminal investigatory authority may conduct criminal investigations. Each military department has a military criminal investigative organization (MCIO). MCIOs must identify a DOD nexus before initiating a criminal investigation. This nexus is a reasonable likelihood that an alleged or suspected offense is related to DOD personnel, activities, or installations. If a serious offense, including a sexual offense, is alleged, an MCIO must investigate the allegation.

MCIO investigations take precedence over commander inquiries and other parallel investigations. However, if not preempted by an MCIO, all commanders have authority to conduct inquiries into military justice matters. The form of such inquiries can range from an administrative investigation to a court of inquiry. Commanders must conduct preliminary inquiries into allegations that a servicemember committed an offense. Commanders are required to report alleged or suspected sexual offenses to an MCIO.

Prosecution

Upon completion of an inquiry or investigation, a commander makes an initial determination regarding the allegations. Initial determination for certain sexual offenses is restricted to the first officer in the chain of command who is in pay grade O-6 and a special court-martial convening authority. Initial determination options available to a commander are:

- take no action;
- initiate administrative discipline;
- impose non-judicial punishment;
- initiate disposition of charges; or
- forward for disposition of charges.

If the initial determination is to prefer charges or forward for disposition, a superior commissioned officer may subsequently determine to dismiss the charges or to refer any or all of the charges to a court-martial, as authorized. A court-martial must be convened when charges are referred, because unlike civilian criminal courts, which typically are standing courts, a court-martial is a temporary activity established by a convening authority to conduct a trial for specific charges.

There are three levels of courts-martial, each with a corresponding level of convening authority: **general, special, and summary**. Special and general courts-martial try criminal conduct offenses analogous to misdemeanors and felonies, respectively, but they may also try minor misconduct offenses. A summary court-martial adjudicates minor military misconduct offenses. A general court-martial referral cannot be made before the convening authority obtains legal advice from a staff judge advocate.

Court-Martial Procedure: Preferring, Referring, and Convening

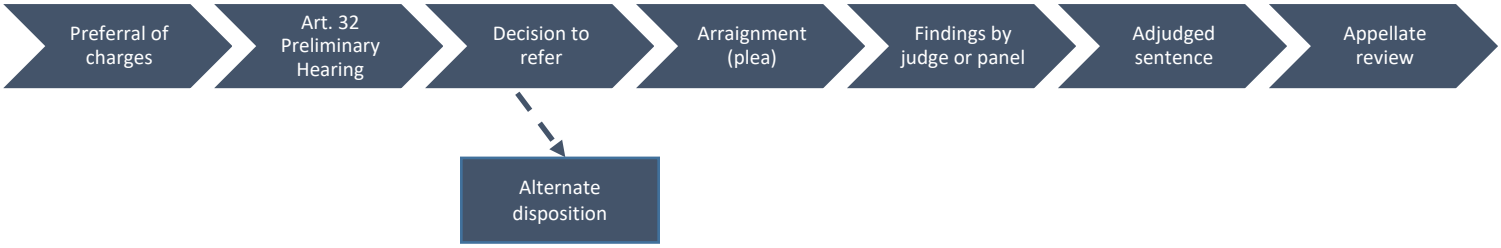
Among the various military justice procedures, certain sequential steps must occur before a military offense can be prosecuted in a trial by court-martial. A proper authority

☐ must first *prefer* charges (press charges and provide notice to the accused); and
☐ may then *refer* the charges to a court-martial (present charges and serve them upon the accused); and
☐ may then *convene* a court-martial (conduct a trial to adjudicate the charges against the accused).

Incarceration

Servicemembers who receive a sentence of confinement may be confined in any facility under the control of an armed force or the United States, or a place the United States may use. Such confinement typically occurs in a military confinement facility (MCF), unless a military offender is subsequently transferred to a federal civilian facility. (Statistics excerpt: total MCF population at start of 2021 was 1,180 military offenders (759 military sex offenders and 421 other military offenders; 64% and 36%, respectively). Military offenders transferred to a Federal Bureau of Prisons (BOP) facility as *military inmates* are not included in the data. The total BOP transferred military offender population in May 2021 was 247 military inmates (116 military sex offenders and 131 other military offenders; 47% and 53%, respectively).

4. Court-Martial Process



- Preferral of charges: The signing and swearing of charges against an accused servicemember. The individual preferring charges signs a charge sheet swearing that the charges are true "to the best of the knowledge and belief of the signer."

- Article 32 Preliminary Hearing: For cases anticipated to go to a general court-martial—for felony-level offenses—the charges are reviewed at a preliminary hearing, at which the preliminary hearing officer (PHO) determines whether there is probable cause to believe that the accused committed the charged offenses. The PHO's probable cause determination is advisory—a charge may be referred to court-martial even if the PHO finds there is no probable cause for that offense.

- Referral of charges: After the convening authority obtains the written advice of their staff judge advocate, they may: (1) order the charges be tried by court-martial; (2) dismiss the charges; or (3) dispose of the charges through alternate disposition.

- Arraignment: The accused is formally brought to trial and called upon to enter a plea.

- Findings at a court-martial: The accused may elect to have their case decided by a military judge or by a panel of members (jury). Except for death penalty cases, the verdict does not have to be unanimous.

- Sentencing: Unlike civilian trials, military courts-martial typically move right from the findings portion of the case into the sentencing portion, with no break in between. Recent legislation passed as part of the FY22 NDAA requires military judge sentencing in all but capital offense cases.

- Appellate review: A servicemember who received a sentence including death, two years or more of confinement, or a punitive discharge or dismissal is entitled to have their case automatically reviewed by their Service court of criminal appeals (CCA), unless waived. If the servicemember does not qualify for automatic appeal but has received a sentence of at least six months' confinement, the member may submit an appeal on a specified issue to their CCA.

For more details on the court-martial process, see attached excerpt from Chapter 2 of the DAC-IPAD's March 2018 Annual Report.

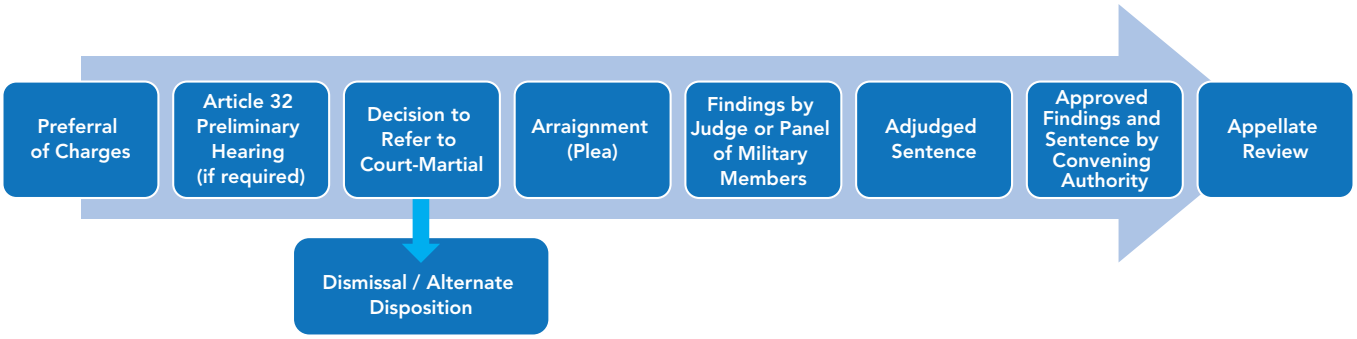
IV. THE COURT-MARTIAL PROCESS

To evaluate trends in the military's judicial response to sexual assault crimes, one must have a basic understanding of the military justice system and its similarities to and differences from civilian court systems. The military justice system is designed to "promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States."[101] All Service members (including National Guard in federal service and Reserve Component members on inactive duty training) are subject to the UCMJ, which sets forth both substantive military criminal law and procedures for handling criminal offenses.

Historically, the military commander has been at the center of the military justice system. In order to achieve good order and discipline, commanders have a variety of tools of military justice at their disposal, and they respond to misconduct with the advice and counsel of judge advocates. A military convening authority may determine that a court-martial is not the appropriate disposition in a case and has other ways to address the misconduct, such as nonjudicial punishment, administrative discharge, or other adverse administrative action.[102]

Determinations regarding the appropriate disposition for an offense under the UCMJ may change in response to a given case's circumstances and evidence. A case that is initially considered appropriate for low-level disciplinary action may later be elevated to court-martial; conversely, a criminal charge preferred with a view toward court-martial may instead be resolved by alternate means.

Once an investigation of a sexual assault report is brought to a commander for review, he or she determines whether and how the case will be resolved through judicial proceedings in accordance with the UCMJ. The following chart illustrates the process by which any criminal offense (not just a sexual offense) is resolved by court-martial.



By DoD policy, all unrestricted reports of adult sexual assault offenses must be taken to a special court-martial convening authority (SPCMCA) for the initial decision on disposition.[103] Should the commander decide, after consulting with a judge advocate, that a court-martial is warranted, the commander initiates the court-martial process with the preferral, or swearing, of charges. Once charges are preferred, the initial disposition authority

101 Manual for Courts-Martial, United States (2016 ed.) [hereinafter MCM], Preamble ¶ 3.

102 *Id.*, Rule for Courts-Martial [hereinafter R.C.M.] 306(c). Section 1705 of the FY14 NDAA (*supra* note 67) limits court-martial jurisdiction over the offenses of rape, sexual assault, forcible sodomy, and attempts to commit these offenses to trial by general court-martial.

103 *See* Memorandum on Withholding Initial Disposition Authority, *supra* note 29. The SPCMCA is a senior commander, typically in the grade of O-6, and generally has at least 20 years of military service.

may refer the charges to a form of court-martial that he or she is authorized under the UCMJ to convene, forward the charges to a higher convening authority, dismiss the charges, or choose an alternate disposition for the case.

Commanders designated as convening authorities may convene courts-martial, provided that they have appropriate authority under the UCMJ to do so.[104] The UCMJ sets forth three types of courts-martial: summary court-martial, special court-martial, and general court-martial.[105]

Summary courts-martial are a unique hybrid between nonjudicial punishment and a criminal trial, and they typically adjudicate minor misconduct or offenses that are less serious than those referred to special or general courts-martial. Only enlisted members may be tried at a summary court-martial. Sentences are limited to no more than one month of confinement and do not allow for separation from service.[106] In addition, a finding of guilt at a summary court-martial does not result in a federal conviction. A member may object to a trial by summary court-martial, in which case the member may be tried by special or general court-martial.[107]

Special and general courts-martial are more like civilian criminal trials in appearance and function. A guilty verdict at a special or general court-martial results in a federal conviction. Defendants may elect to be tried by a military judge alone or by a panel of military members (jury). Unlike in civilian criminal trials, which hold a separate sentencing hearing weeks or months after a guilty verdict, once a Service member is found guilty at a court-martial the court immediately moves into the sentencing proceedings. Another difference in military courts-martial is the wide range of available punishments if a member is found guilty. In addition to or as an alternative to confinement in prison, a Service member may receive a punitive discharge, forfeiture of pay, a fine, a reduction in pay grade, hard labor without confinement, restriction to specified limits, or a reprimand.[108]

A special court-martial is functionally equivalent to a civilian misdemeanor court because confinement is limited to no more than one year, even if the maximum punishment authorized for the crime is greater than one year.[109] In addition, because a dismissal is not an authorized punishment, officers are generally not tried by a special court-martial.[110]

A general court-martial is analogous to a civilian felony court, since the only limitations on punishment are the maximum sentences authorized for the offenses of which the member is convicted.[111] Congress, in the FY14 NDAA, mandated that penetrative sexual assault offenses (rape, sexual assault, forcible sodomy, or attempts to commit these acts) be referred to trial by general court-martial.[112]

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104 MCM, *supra* note 101, R.C.M. 504.

105 10 U.S.C. § 816 (UCMJ, art. 16).

106 10 U.S.C. § 820 (UCMJ, art. 20). The limits of a summary court-martial sentence are confinement for one month, hard labor without confinement for 45 days, restriction to specified limits for two months, and forfeiture of two-thirds of one month's pay.

107 *Id*.

108 MCM, *supra* note 101, R.C.M. 1003(b).

109 10 U.S.C. § 819 (UCMJ, art. 19). The limits of a special court-martial are a bad conduct discharge, confinement for one year, hard labor without confinement for three months, and forfeiture of pay for one year.

110 *Id*.

111 10 U.S.C. § 818 (UCMJ, art. 18).

112 FY14 NDAA, *supra* note 67, § 1705. The NDAA provision applies to offenses committed on or after June 24, 2014. A commander may still dispose

If referral to a general court-martial is contemplated, the commander must first order that a preliminary hearing be conducted, pursuant to Article 32 of the UCMJ. Traditionally, the Article 32 hearing was a "thorough and impartial investigation" of the case in which an investigating officer, who was not necessarily a lawyer, investigated "the truth and form of the charges."[113] In sexual assault cases the victim, if he or she was a military member, was typically required to appear and give testimony and was subject to cross-examination by the defense counsel.[114]

The FY14 NDAA significantly altered the Article 32 process, making it a preliminary hearing rather than a pretrial investigation, and removed the requirement that a victim appear and testify.[115] Under the new process, the Article 32 preliminary hearings are limited to determining whether there is probable cause to believe that an offense has been committed and that the accused committed the offense, determining whether the convening authority has court-martial jurisdiction over the offense and the accused, considering the form of the charges, and recommending the disposition that should be made of the case.[116] At the completion of the Article 32 hearing, the hearing officer, who is a judge advocate, prepares a report of the proceedings and forwards the report, along with his or her disposition recommendation, through command channels to the general court-martial convening authority (GCMCA).

In determining whether to refer charges to a general court-martial, the GCMCA considers the Article 32 report containing the preliminary hearing officer's recommendations and the written pretrial advice of the GCMCA's staff judge advocate.[117]

When a court-martial convening authority refers a case to trial, a military judge arraigns the accused on the charges and presides over the court-martial proceedings.[118] The trial process that follows largely resembles that of civilian criminal courts and uses many of the same rules of procedure and evidence. However, there are meaningful differences between military and civilian criminal proceedings, including the military's procedures for plea agreements and sentencing and the convening authority's role in approving the results of a court-martial.

In civilian courts, a plea agreement is made between the prosecutor and the defendant: the defendant pleads guilty to some or all of the charges in exchange for a lower sentence recommendation or some other concession, such as a reduction in the number or severity of the charges, presented by the prosecutor to the judge.[119] The judge is not bound by this recommendation and can choose to sentence the defendant to a longer term of

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of an offense by alternate means or dismiss charges, but if a court-martial is warranted the only type authorized for these offenses is a general court-martial.

113 10 U.S.C. § 832 (UCMJ, art. 32); MCM, *supra* note 101, R.C.M. 405(a) and (e).

114 MCM, *supra* note 101, R.C.M. 405(g)(2)(A) and (h)(1)(A).

115 FY14 NDAA, *supra* note 67, § 1702(a). Section 531(g) of the FY15 NDAA (*supra* note 4) makes this change effective for all preliminary hearings conducted on or after December 26, 2014.

116 FY14 NDAA, *supra* note 67, § 1702(a).

117 *Id*.; 10 U.S.C. §§ 833, 834 (UCMJ, art. 33 and art. 34).

118 10 U.S.C. § 936 (UCMJ, art. 36) (stating that rules prescribed by the President "shall, so far as he considers practicable, apply the principles of law and rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter."). *See also* MCM, *supra* note 101, R.C.M. 904; Military Rule of Evidence (M.R.E.) 1102.

119 Fed. R. Crim. P. 11(c) and (d).

confinement, though in such circumstances the judge may be required to release the defendant from the plea agreement.[120]

In the military, a plea agreement is between the defendant and the convening authority, and its terms, including any specific limits on confinement, are binding on the convening authority.[121] Unlike civilian court judges, a military judge is not made aware of the sentence limitations agreed to by the defendant and convening authority before deciding on a sentence.[122] The defendant in a military court ultimately receives the benefit of the lower of the two sentences (the one determined at the court-martial and the other contained in the plea agreement).[123]

Another key difference between civilian and military courts is that the conviction and sentence announced in civilian court by the judge or jury are final, pending appeal. In the military, the findings of guilt and the sentence announced by the court-martial panel or judge are not final and must be forwarded to the convening authority for approval. Historically, convening authorities had broad powers under Article 60 of the UCMJ to set aside or modify findings of guilt or provide clemency with regard to the sentence.[124] However, in the FY14 NDAA, Congress significantly restricted the post-conviction authority of convening authorities concerning serious sexual assault offenses, prohibiting them from setting aside or commuting findings of guilt.[125] In addition, the NDAA significantly curtailed the ability of convening authorities to provide relief from the adjudged sentence.[126]

120 *Id*.

121 MCM, *supra* note 101, R.C.M. 705(a) and (b). *See also* R.C.M. 705(d)(4) ("*Withdrawal*. (A) *By accused*. The accused may withdraw from a pretrial agreement at any time; however, the accused may withdraw a plea of guilty or a confessional stipulation entered pursuant to a pretrial agreement only as provided in R.C.M. 910(h) or 811(d), respectively." *See id*., R.C.M. 705(d)(4)(B): "*By convening authority*. The convening authority may withdraw from a pretrial agreement at any time before the accused begins performance of promises contained in the agreement, upon the failure by the accused to fulfill any material promise or condition in the agreement, when inquiry by the military judge discloses a disagreement as to a material term in the agreement, or if findings are set aside because a plea of guilty entered pursuant to the agreement is held improvident on appellate review.").

122 MCM, *supra* note 101, R.C.M. 910(f)(3).

123 MCM, *supra* note 101, R.C.M. 705(b)(2).

124 *See* 10 U.S.C. § 960 (UCMJ, art. 60).

125 FY14 NDAA, *supra* note 67, § 1702(b).

GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
1600 DEFENSE PENTAGON
WASHINGTON, D.C. 20301-1600

MAY 10 2022

GENERAL COUNSEL

MEMORANDUM FOR CHAIR, DEFENSE ADVISORY COMMITTEE ON INVESTIGATION, PROSECUTION, AND DEFENSE OF SEXUAL ASSAULT IN THE ARMED FORCES (DAC-IPAD)

SUBJECT: DAC-IPAD Advice on Policy Development, Workforce Structure, and Implementation of Best Practices for the Military Departments' Offices of Special Trial Counsel

As requested in your letter of April 27, 2022, I task the DAC-IPAD with advising the Secretary of Defense and me on policy development, workforce structure, and implementation of best practices for the Military Departments' Offices of Special Trial Counsel. The Department of Defense would benefit greatly from the advice of the DAC-IPAD, whose members possess extraordinary expertise regarding the organization and operation of offices devoted to complex prosecutions, concerning the Offices of Special Trial Counsel. Advising the Department regarding the Offices of Special Trial Counsel is a core function of the DAC-IPAD. Please provide such advice on an ongoing basis.

Consistent with your request, I have asked the Secretaries of the Military Departments to provide the appropriate civilian officials, supported by uniformed subject matter experts, to appear at the DAC-IPAD's next public meeting.

I reiterate my thanks to you and to all of the DAC-IPAD's members for assisting the Department of Defense in improving our sexual assault response systems.

Caroline Krass
General Counsel

GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
1600 DEFENSE PENTAGON
WASHINGTON, D.C. 20301-1600

MAY 10 2022

GENERAL COUNSEL

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS

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

The DAC-IPAD (or "Committee") is a federal advisory committee tasked with advising the Secretary of Defense on the investigation, prosecution, and defense of allegations of sexual assault offenses involving members of the armed forces. A number of the covered offenses over which the new Office of Special Trial Counsel (OSTC) will exercise authority fall within the DAC-IPAD's charter.

The Chair of the DAC-IPAD has requested my support in inviting you or your designated official to appear before the Committee to provide information about the development of your Department's OSTC. I support the Chair's request as outlined in the attached letter and ask that you designate a civilian official who either was appointed by the President with the advice and consent of the Senate or is acting as or performing the duties of an official who is subject to Presidential appointment with the advice and consent of the Senate to appear in person or virtually before the Committee at its next public meeting to be held on June 21 and 22, 2022, in Arlington, Virginia. Pending coordination of a specific time, the Committee requests a 90-minute panel with representatives from all of the Military Departments appearing together. If any Military Department's official cannot appear as part of that panel, the Committee will accommodate that official in a separate 30-minute session.

The Committee acknowledges that the statutory framework requires that each OSTC be overseen by the Secretary of the applicable Military Department while its mission will be executed by uniformed judge advocates. To support your designated official's appearance, the Committee also requests that the civilian official be accompanied by one or more uniformed subject matter experts. I encourage the Departments to coordinate with each other to identify comparable-level civilian officials and uniformed experts to appear before the Committee to the extent practicable.

Importantly, the Committee acknowledges and will ensure adherence to the limitations on the information that can be provided to the Committee at its public meeting, such as an inability to reveal pre-decisional matters.

Please have your office notify Colonel Jeff Bovanick, DAC-IPAD Staff Director, as to who will appear at the meeting on behalf of your Department and their preferred time. Colonel Bovarnick may be reached at jeff.a.bovarnick.mil@mail.mil. Any questions concerning the appearance of your Department's representatives should be raised with him.

Any other questions about this request should be addressed to Dwight Sullivan of my office, the Committee's Designated Federal Officer, at dwight.h.sullivan.civ@mail.mil.

Thank you for your consideration of this important request.

Caroline Krass
General Counsel

Attachment:
As stated

cc:
General Counsels of the Military Departments
Judge Advocates General of the Military Departments
Staff Judge Advocate to the Commandant of the Marine Corps

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

April 27, 2022

The Honorable Caroline Krass
General Counsel for the Department of Defense
1000 Defense Pentagon
Washington, DC 20301-1000

Dear Ms. Krass:

As the Chair of the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (the "Committee" or "DAC-IPAD"), I respectfully request that you formally task the Committee to advise you and the Secretary of Defense on policy development, workforce structure, and implementation best practices for the Military Department's Offices of Special Trial Counsel (OSTC).

To further this task, I respectfully request that you invite the Secretaries of the Military Departments, or their designated Presidentially-Appointed, Senate-Confirmed (PAS) official (or an official acting as or performing the duties of a PAS official), to the DAC-IPAD's next public meeting on June 21-22, 2022, in Arlington, Virginia, to inform the Committee about the development of their respective Departments' OSTC. I also ask that any official attending the DAC-IPAD's June meeting be accompanied by one or more uniformed subject matter expert. The Committee will accommodate the attendees' appearance, including a virtual option, at a time of their convenience during either day.

For these requests, the Committee acknowledges two critical factors: first, that the statutory design and congressional intent for the OSTC is that they are civilian-led and military-executed and the combination of a PAS official and uniformed expert or experts can best respond to the Committee's requests for information. Second, the Committee acknowledges that at this early stage in the development of each Departments' OSTC, many policy, structural and implementation decisions are pre-decisional and protected by Executive Privilege. The Committee will honor and respect those limitations.

Many aspects of the OSTC fall within the Committee's charter and the Committee has the criminal litigation experience to provide valuable counsel to you and the Secretary as these new offices develop within the Department. I respectfully request that you task the Committee as appropriate and assist with inviting those civilian and military leaders and experts to appear before the Committee in June.

Sincerely,

Karla N. Smith, Chair

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

April 27, 2022

The Honorable Caroline Krass
General Counsel for the Department of Defense
1000 Defense Pentagon
Washington, DC 20301-1000

Dear Ms. Krass:

Thank you for addressing the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (the "Committee" or "DAC-IPAD") at our Initial Meeting on April 21, 2022. The Committee took note of your introductory remarks with respect to the Department's priorities and where you and the Secretary of Defense would like us to focus our efforts. During the public meeting, members raised other tasks for consideration. In addition to our statutory requirements, I acknowledge and submit the following requests for your consideration.

I acknowledge your April 21, 2022 Memorandum requesting the Committee to review the Report on Tour Lengths and Rating Chain Structure for Services' Special Victims' Counsel/Victims' Legal Counsel (SVC/VLC) Programs. The Committee will review the report and complete its assessment as requested.

I acknowledge your Memorandum, dated January 28, 2022, requesting the Committee to study appellate decisions in military sexual assault cases. The Committee will conduct this study.

During the April 21 meeting, Committee members raised additional tasks on the following topics:

(a) Office of Special Trial Counsel (OSTC). In separate correspondence dated today, I forwarded you a request to task the Committee with advising you and the Secretary on certain aspects of the military Departments' OSTC, and a request to invite certain officials to appear before the Committee in June.

(b) Articles 32 and 34, UCMJ. Based on the Secretary's approved Revised IRC Recommendations 1.7a and 1.7b, I request that the Committee's extensive prior work on Articles 32 and 34; and the staff's January 24, 2022 Study of Articles 32 and 34 and April 11, 2022 Supplemental Report; all be forwarded to the Military Justice Review Panel for its further review and assessment.

(c) Independent Review Commission Recommendations. The Committee requests that you specifically task it to study any remaining IRC recommendations the Department deems appropriate, such as administrative boards and boards of inquiry and restorative engagements for survivors.

The Committee welcomes this opportunity to invest its collective experience and expertise in these topics and develop recommendations to improve the military's response to sexual misconduct in its ranks.

Sincerely,

Karla N. Smith, Chair

GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
1600 DEFENSE PENTAGON
WASHINGTON, D.C. 20301-1600

GENERAL COUNSEL

APR 21

MEMORANDUM FOR CHAIR, DEFENSE ADVISORY COMMITTEE ON
INVESTIGATION, PROSECUTION, AND DEFENSE OF
SEXUAL ASSAULT IN THE ARMED FORCES (DAC-IPAD)

SUBJECT: Request to Review Report on Tour Lengths and Rating Chain Structure for Services' Special Victims' Counsel/Victims' Legal Counsel (SVC/VLC) Programs

In response to my request of October 5, 2022, the Defense Legal Services Agency staff attorneys who support the DAC-IPAD prepared the attached report on tour lengths of special victims' counsel and the supervisory rating chain of Army special victims' counsel. That request was the result of a letter that Senator Gillibrand and Representative Speier sent to the Secretary of Defense expressing concern that frequent transfers of special victims' counsel interfere with the continuity of representation of their clients and that the Army's unique performance evaluation structure for special victims' counsel impinges on those counsel's independence. That letter is reproduced at Appendix C of the attached report.

I request that the DAC-IPAD review the staff report and provide me with an assessment of the report's ten recommendations, as well as any additional recommendations from the DAC-IPAD. Please provide me with the result of your examination within 120 days of the date of this memorandum.

If you have any questions concerning this request, please contact Dwight Sullivan of my office, who is the DAC-IPAD's Designated Federal Officer. You can reach him at dwight.h.sullivan.civ@mail.mil.

I am grateful to you and to all of the DAC-IPAD members for sharing your expertise with the Department. The DAC-IPAD's analysis has been instrumental in the Department's ongoing efforts to address the scourge of sexual assault in the military.

Caroline Krass
General Counsel

Enclosure:
As stated

GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

28 JAN 2022

GENERAL COUNSEL

MEMORANDUM FOR STAFF DIRECTOR, DEFENSE ADVISORY COMMITTEE ON INVESTIGATION, PROSECUTION, AND DEFENSE OF SEXUAL ASSAULT IN THE ARMED FORCES (DAC-IPAD)

SUBJECT: Request to Study Appellate Decisions in Military Sexual Assault Cases

I request that the DAC-IPAD conduct a comprehensive study of appellate decisions in military sexual assault cases, focusing on recurring appellate issues that arise in such cases, and provide a report of the results of that study. Your report should include an analysis of the most commonly recurring issues and any recommendations for reforms. Please also consider the efficacy of the military appellate system's handling of those cases. Finally, please identify any recommended training and education improvements for military justice practitioners suggested by the study.

The DAC-IPAD's members and the experts on its support staff are best suited to determine the optimal study design to analyze the issues set out above. In developing a study design, please note two recent changes to the law that affect the Courts of Criminal Appeals' reviews of findings and sentences. First, section 542(b) of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, 134 Stat. 3388, 3461 (2021), modified the factual sufficiency standard of review that the Courts of Criminal Appeals apply when reviewing findings of guilty entered on or after January 1, 2021. Second, in conjunction with the enactment of sentencing reform to move largely to parameter-based sentencing in non-capital courts-martial, section 539E(e) of the National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, 135 Stat. 1541 (2021), modified the Court of Criminal Appeals' sentence appropriateness review standard to be applied in cases where all offenses resulting in a finding of guilty occurred on or after December 27, 2023.

If you have any questions concerning this request, please contact Dwight Sullivan of my office, the DAC-IPAD's Designated Federal Officer. You can reach him by email at dwight.h.sullivan.civ@mail.mil.

The Department continues to benefit from the DAC-IPAD's reports, which were instrumental in the work of the Independent Review Commission on Sexual Assault in the Military. I am grateful to you and your staff for your indispensable role supporting the DAC-IPAD.

Caroline Krass
General Counsel

Committee Members:

The attached ***Report on Tour Lengths and Rating Chain Structure for Services' Special Victims' Counsel/Victims' Legal Counsel (SVC/VLC) Programs*** contains the following 10 recommendations (two primary and eight additional) copied from page 2 of the report.

After you review the report, please use Section I if you concur with all recommendations as they were submitted, or use Sections II and III if you non-concur with any particular recommendation and/or wish to provide any additional assessment, alternative, or recommendations.

Section I: Concur with all

Recommendations 1 - 10	I concur with all 10 Recommendations as drafted.
Please type in: Member Name and Date	

Section II: Only if you Non-Concur with one or more Recommendation (then go to Section III)

Please type an X in the appropriate box and go to Section III for any non-concurs	Concur	Non-Concur
Recommendation 1 (Primary): All of the Services should adopt an 18-month minimum assignment length for SVCs/VLCs, with appropriate exceptions for personal or operational reasons.		
Recommendation 2 (Primary): The Army should establish an independent supervisory rating structure for SVCs outside of the OSJA and local command.		
Additional Recommendations:	Concur	Non-Concur
Recommendation 3: The Army should improve its process for vetting SVCs and require that they have more experience, and consider making SVC assignments part of a military justice litigation track.		
Recommendation 4: The Army should eliminate the use of part-time SVCs, except in rare circumstances or in cases of operational necessity.		
Recommendation 5: The Services should promote better coordination between trial counsel and SVCs/VLCs.		
Recommendation 6: The Services should expand the role of SVCs/VLCs beyond court-martial proceedings to include advocacy during administrative proceedings.		
Recommendation 7: SVC/VLC programs must develop better case management systems.		
Recommendation 8: SVC/VLC programs should include civilian paralegal support.		
Recommendation 9: The Services should provide more resources to ensure that SVCs/VLCs have ready access to behavioral health care.		
Recommendation 10: The Services should identify and train SVC/VLC candidates early to ensure that their transitions with the departing SVCs/VLCs are well coordinated.		

Section III: Use only if you non-concurred with any particular recommendation and/or wish to provide any additional assessment, alternative, or recommendations

I non-concur with Recommendation(s) _____ for the following reasons and offer the following alternative recommendation(s):

I offer the following additional recommendation(s):

Department of Defense Legal Services Agency

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

April 2022

CONTENTS

APPENDICES

Executive Summary

Special Victims' Counsel/Victims' Legal Counsel (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 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 over 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.

At the request of the Department of Defense Office of the General Counsel (DoD GC), the Defense Legal Services Agency professional staff studied these issues. The staff conducted a comprehensive review of the Services' SVC/VLC programs, authorities, agency guidance, and reports relevant to these programs. In addition, the staff conducted 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.

This 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.

Based on those findings and the comprehensive review, this report recommends: (1) an 18-month minimum assignment length for SVCs/VLCs, with appropriate exceptions for personal or operational reasons; (2) the establishment of an independent supervisory rating structure for Army SVC outside of the OSJA and local command; and (3) eight additional best practices to enhance SVC/VLC programs across the Services.

Recommendations

Primary Recommendations:

Recommendation 1: All of the Services should adopt an 18-month minimum assignment length for SVCs/VLCs, with appropriate exceptions for personal or operational reasons.

Recommendation 2: The Army should establish an independent supervisory rating structure for SVCs outside of the OSJA and local command.

Additional Recommendations:

Recommendation 3: The Army should improve its process for vetting SVCs and require that they have more experience, and consider making SVC assignments part of a military justice litigation track.

Recommendation 4: The Army should eliminate the use of part-time SVCs, except in rare circumstances or in cases of operational necessity.

Recommendation 5: The Services should promote better coordination between trial counsel and SVCs/VLCs.

Recommendation 6: The Services should expand the role of SVCs/VLCs beyond court-martial proceedings to include advocacy during administrative proceedings.

Recommendation 7: SVC/VLC programs must develop better case management systems.

Recommendation 8: SVC/VLC programs should include civilian paralegal support.

Recommendation 9: The Services should provide more resources to ensure that SVCs/VLCs have ready access to behavioral health care.

Recommendation 10: The Services should identify and train SVC/VLC candidates early to ensure that their transitions with the departing SVCs/VLCs are well coordinated.

I. Introduction and Methodology

A. Introduction

> *My VLC was extremely helpful to my mental health and ability to go forward with a trial. The VLC program really works and gave me faith in the legal system.*[1]

The serious problem of sexual misconduct cases in the Armed Forces has led to numerous reforms. Among the Military Services' responses, Special Victims' Counsel/Victims' Legal Counsel (SVC/VLC) programs are considered particularly successful.[2] Since their creation in 2013, they have been nationally recognized by Congress, the American Bar Association, civilian prosecutors, and victims for restoring confidence in the military response to sexual assault.[3]

Over the past decade, Congress has legislated tremendous changes to the Uniform Code of Military Justice (UCMJ) with emphasis on the prosecution of sexual misconduct in the military.[4] The Services' SVC/VLC programs have evolved with changes to military justice, expanding and adapting to improve protections and advocacy for victims in the military justice process. The programs—and the individual counsel who implement them—have been at the forefront of the effort to improve delivery of legal services to victims of sexual misconduct.

However, institutional resistance to change has affected certain aspects of SVC/VLC programs. Litigation was required to ensure that SVCs/VLCs could advocate on behalf of their clients to enforce a victim's legal rights.[5] SVCs/VLCs believe some senior leaders may hold the view that their careers and promotion potential require them, like defense counsel, to return to the "team" or to the government "side."[6] In addition, there is tension inherent in the adversarial process.

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[1] Statement from military victim of sexual assault interviewed as part of this study.

[2] This report will use the terms Special Victims' Counsel/Victim' Legal Counsel (SVC/VLC) when describing the programs generally or addressing the Military Services' programs collectively. Terminology differs among the Services: Navy and Marine Corps attorneys are known as victims' legal counsel, or VLCs; Army attorneys are known as special victims' counsel, or SVCs; and the Air Force recently renamed its program counsel as victims' counsel, or VCs. This nomenclature, which emphasizes the focus on the victim, includes domestic violence victims, who now fall under the scope of the SVC/VLC programs. Background research for this report included the Coast Guard; however, because the Coast Guard is aligned under the Department of Homeland Security and its program is small, this report does not assess, evaluate, or make recommendations about the Coast Guard's program for DoD's consideration. *See* Appendix O.

[3] In a letter to the Secretary of Defense dated June 14, 2021, Senator Kirsten Gillibrand and Representative Jackie Speier wrote, "Since the program's creation in 2013, the Special Victims' Counsel program has provided much-needed access to support to survivors of military sexual trauma." Letter from Rep. Jackie Speier and Sen. Kirsten Gillibrand to Lloyd J. Austin III, Secretary of Defense (June 14, 2021), *available at* Appendix C. SVC/VLC program managers routinely present the details of the program at bar association events throughout the country.

[4] The annual National Defense Authorization Acts have included numerous changes to the military justice system; the most comprehensive reforms are found in the Military Justice Act of 2016, set forth in Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328 [FY17 NDAA], 130 Stat. 2000 (2016).

[5] *See LRM v. Kastenberg*, 72 M.J. 364 (C.A.A.F. 2013) (upholding a victim's opportunity to be heard through counsel at a motions hearing to admit evidence on Military Rules of Evidence 412 and 513).

[6] Recently, a military judge dismissed a murder case with prejudice for unlawful command influence because a senior officer who oversaw the assignment process for all Marine judge advocates told a group of defense attorneys that they are not "protected" despite having an independent rating chain and there are consequences for spending years as defense counsel. The military judge's Ruling on Defense Motion to Dismiss for Unlawful Command Influence in *United States v. Eric s. Gilmet* is available at Appendix P.

For example, an SVC/VLC's professional obligation to the client may conflict with the command when the prosecution authority's interests differ from the victim's interests. Overburdened, understaffed, or underfunded SVC/VLC offices or inexperienced counsel can also reduce the effectiveness of these programs.

In their 2021 letter to the Secretary of Defense, Senator Kirsten Gillibrand and Representative Jackie Speier wrote: "One of the top complaints we have heard from military sexual trauma survivors is that they had to work with multiple SVC/VLC on their case due to personnel turnover."[7] They added that "in the Navy and the Air Force the average assignment duration for an SVC/VLC is two to three years, while in the Army and the Marine Corps the average assignment duration is twelve to fifteen months."[8]

1. Tasking to Assess Minimum Tour Length for SVCs/VLCs

In October 2021, the Department of Defense Office of the General Counsel (DoD GC) directed the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD) to study the issue of tour lengths of SVC/VLC, 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.[9]

2. Tasking to Consider Changes to the Army SVC Supervisory Rating Chains

In November 2021, in conjunction with the minimum tour length tasking, the DoD GC asked the DAC-IPAD to study the rating chains of Army SVC, 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.[10]

[7] Letter from Rep. Speier and Sen. Gillibrand to Secretary of Defense Austin, *supra* note 3.

[8] *Id.*

[9] *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. At the time, the DAC-IPAD was suspended based on 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 are duly appointed and as of the date of this report, the members approved for appointment by the Secretary are in the final stages of the appointment process.

[10] *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.

B. Methodology

As part of the comprehensive research on SVC/VLC programs, the staff submitted written requests for information (RFIs) to the Services seeking responses to a range of questions regarding SVC/VLC tour lengths and SVC/VLC rating chains in addition to data about each Service's SVC/VLC program.[11] For example, the Services were asked to provide data on the actual tour lengths of all assigned SVCs/VLCs since 2018, the level of military justice experience for each assigned SVC/VLC, and the names and contact information of SVCs/VLCs—both current and former—and of victims available for interviews.[12]

Then, over a two-month period, the staff conducted 60 interviews, including: 15 former SVCs/VLCs; 21 current SVCs/VLCs; 17 victims represented by SVCs/VLCs; 5 SVC/VLC Program Managers; and 2 civilian victim advocates who provide legal representation to military sexual assault victims and work with military SVCs/VLCs.[13] The staff also reviewed extensive literature, statutes, regulations, agency guidance, and reports relevant to SVC/VLC programs.

This report summarizes the responses, interviews, and research and sets forth specific recommendations to improve the delivery of legal services for victims of military sexual misconduct. Section II provides background information on the history and development of the SVC/VLC programs. Section III addresses the question of appropriate tour lengths for SVCs/VLCs and considers the advantages and disadvantages of requiring a minimum assignment policy. Section IV describes the Army's unique approach to the SVC rating structure and considers the advantages and disadvantages of requiring the Army, like all other Services, to conduct SVC performance evaluations independently of the Office of the Staff Judge Advocate. Section V addresses additional issues that arose during this study and makes recommendations that could enhance SVC/VLC programs across the Services.

[11] *See* Appendix H for DAC-IPAD Request for Information for Study of Tour Lengths of Special Victims' Counsel/Victims' Legal Counsel (SVCs/VLCs) and Rating Chains of Army SVCs (Nov. 5, 2021) [RFI 1], and Appendix I for DAC-IPAD Supplemental Request for Study of Tour Lengths of Special Victims' Counsel/Victims' Legal Counsel (SVCs/VLCs) and Rating Chains of Army SVCs (Nov. 5, 2021) [RFI 2] (Dec. 14, 2021). Where appropriate, any spreadsheets or documents in the Services' RFI responses that contained Personally Identifiable Information were omitted from Appendix H and are on file with the DLSA staff.

[12] The Services' responses to the DAC-IPAD RFI 1 are available at Appendix H; responses to the DAC-IPAD RFI 2 are available at Appendix I.

[13] All interviewees were assured confidentiality and no comments are attributed by name.

II. Background of SVC/VLC Programs

While formal military SVC/VLC programs have existed since 2013, the statutory basis for such programs appeared as early as 1984. The DoD Authorization Act of 1985 vested the Service Secretaries with the authority to provide legal assistance for members of the Armed Forces and gave their Judge Advocates General the responsibility for establishing and supervising the legal assistance programs.[14]

In 2012, Congress expanded the scope of legal assistance representation to "[a] member of the armed forces, or a dependent of a member, who is the victim of a sexual assault" eligible for "legal assistance provided by military or civilian legal assistance counsel."[15] In analyzing this new law, the Office of the Secretary of Defense General Counsel provided a legal opinion that the 1984 and 2012 legislation, taken together, authorized judge advocates to provide representational legal assistance to sexual assault victims in the criminal law context.[16]

In January 2013, the Air Force began an SVC pilot program that was well-received by Congress. Air Force victim impact surveys reported very high rates of client satisfaction.[17] During the first six months of the Air Force program's existence, in a case certified by The Judge Advocate General of the Air Force, the Court of Appeals for the Armed Forces held that military trial judges must allow victims' counsel to be heard on matters involving the victims' assertion of their rights; failure to do so constitutes a violation of the victim's due process rights.[18]

In June 2013, the Air Force made its SVC program permanent.[19] In August 2013, the Secretary of Defense directed the Service Secretaries to implement fully operational programs by January 1, 2014, noting that each Department should establish a program best suited for its Service while mandating that every program provide legal advice and representation to victims throughout the military justice process.[20]

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[14] Department of Defense Authorization Act of 1985, Pub. L. No. 98-525, 98 Stat. 2492, § 651 (1984) ("Subject to the availability of legal staff resources, the Secretary concerned may provide legal assistance in connection with their personal civil legal affairs . . .).

[15] 10 U.S.C. § 1565b (authorizing sexual assault victims to receive legal assistance services) [National Defense Authorization Act of Fiscal Year 2012, Pub. L. No. 112-81, 125 Stat. 1298, § 581 (2011)].

[16] *See* Lieutenant Colonel Rhea A. Lagano et al., *The Air Force SVC Program: The First Five Years*, THE REPORTER, Dec. 7, 2017, at 32, *available at* https://www.afjag.af.mil/Portals/77/documents/44_03_web.pdf?ver=2017-07-170459-020 (noting that the opinion, issued on Nov. 9, 2012, held that "representational legal assistance . . . included attending interviews and interfacing with military prosecutors, investigators and defense counsel").

[17] DEP'T OF DEF., SEXUAL ASSAULT PREVENTION AND RESPONSE OFFICE, ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2014, 33 (Apr. 29, 2015) [FY14 SAPRO REPORT], *available at* https://sapr.mil/public/docs/reports/FY14_DoD_SAPRO_Annual_Report_on_Sexual_Assault.pdf (finding that 90% of victims who were represented by SVC were "very satisfied" with the advice and support their SVC provided, 98% would recommend that other victims request an SVC, 91% said their SVC advocated effectively on their behalf, and 94% indicated that their SVC helped them understand the investigation and court-martial process).

[18] *LRM v. Kastenberg*, *supra* note 5.

[19] Lagano et al., *supra* note 16.

[20] Memorandum from the Secretary of Defense on Sexual Assault Prevention and Response (Aug. 14, 2013) [SecDef Memo], *available at* https://www.sapr.mil/public/docs/news/SECDEF_Memo_SAPR_Initiatives_20130814.pdf.

In December 2013, the Fiscal Year 2014 (FY14) National Defense Authorization Act (NDAA) required the Military Departments to provide SVC/VLC representation to eligible victims who requested it.[21] The statutory provision, codified at Title 10 United States Code § 1044e,[22] addresses SVC/VLC assistance, qualifications, training, and availability; however, the establishment of the SVC/VLC program is left to the discretion of each Military Service to structure its program based on its particular needs and resources.

Since SVC/VLC programs began, the statutory parameters defining the role of the SVC/VLC and rights of the victim and the accused have changed. The FY15 NDAA expanded SVC/VLC eligibility to Reserve Component and National Guard sexual misconduct victims and amended UCMJ Article 6b to specify that SVCs/VLCs can represent victims and speak for them at proceedings rather than merely accompanying them.[23] The FY16 NDAA authorized DoD civilian employees who are sexual misconduct victims to qualify for SVC/VLC representation and required investigators to promptly notify victims of their right to SVCs/VLCs.[24] The FY17 NDAA mandated that defense interviews of a victim be conducted in the presence of either government counsel or an SVC/VLC upon the victim's request.[25] The FY20 NDAA required the Services to expand SVC/VLC services to domestic violence victims.[26] The Air Force Victims' Counsel Program recently expanded its services to provide confidential legal advice to eligible victims of interpersonal dating, domestic, and workplace violence.[27]

The Services' SVC/VLC Chiefs or Program Managers meet regularly as a group, formally known as the Interservice SVC/VLC Coordination Committee (ICC), to identify best practices and strive for uniformity when appropriate.[28] As a group, the ICC considers issues that affect all the Services, such as cross-Service representation of clients, proposals for change to the Joint Service Committee, and legislative proposals; however, it does not coordinate on procedures internal to a particular Service.[29]

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[21] National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66 [FY14 NDAA], § 1702, 127 Stat. 966 (2013).

[22] *See* Appendix G.

[23] Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291 [FY 15 NDAA], § 534, 128 Stat. 3292 (2014).

[24] National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92 [FY16 NDAA], § 1081, 129 Stat. 726 (2015).

[25] FY17 NDAA, *supra* note 4, at 5015(c).

[26] National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92 [FY20 NDAA], § 548, 133 Stat. 1198 (2019), cited in Government Accountability Office Report 21-289, *Domestic Abuse: Actions Needed to Enhance DOD's Prevention, Response, and Oversight* 12 (May 2021), *available at* https://www.gao.gov/assets/gao-21-289.pdf. The Army has initiated a Domestic Violence Representation Program to provide legal advice and representation to eligible domestic violence victims through a combination of legal assistance counsel and SVCs, when appropriate. *See* Army TJAG Policy Memorandum 22-09, *Domestic Violence Representation Program* (Mar. 1, 2022).

[27] David DeKunder, *Program Provides Legal Services for Survivors of Interpersonal Violence, Sexual Assault*, JOINT BASE SAN ANTONIO-FORT SAM HOUSTON NEWS (May 4, 2021), *available at* https://www.jbsa.mil/News/News/Article/2594830/program-provides-legal-services-for-survivors-of-interpersonal-violence-sexual/.

[28] The ICC, comprised of designated SVCs/VLCs from each Service, was established in 2016 and meets quarterly with DoD GC and Under Secretary of Defense for Personnel and Readiness representatives to review SVC/VLC programs and make recommendations, including changes to statutes or the Manual for Courts-Martial. *See* Memorandum re: Special Victims' Counsel/Victims' Legal Counsel Programs, Sept. 2, 2016, available at Appendix E.

[29] Interview with Marine Corps VLC Program Manager (Dec. 13, 2021).

III. SVC/VLC Tour Lengths

In their June 14, 2021, letter, Senator Gillibrand and Representative Speier proposed that the Secretary, at the Department level, "establish uniform guidance mandating a minimum 2-year assignment duration for SVC/VLC," citing complaints from victims who were represented by multiple, successive SVCs/VLCs owing to personnel turnover.[30] Such a change would ease the trauma experienced by survivors in retelling their story to new counsel and would maintain continuity in the military justice process.[31]

The ICC, in its response to the June 14, 2021, letter on behalf of the Services, advised against a minimum SVC/VLC assignment length. Instead, the ICC recommended "allowing each Military Service to retain flexibility and independent authority to build and shape its SVC/VLC program, to include assignment of personnel and establishment of supervisory chain of command."[32] The ICC noted that Navy and Air Force SVC/VLC assignments average two to three years, while Army and Marine Corps SVCs/VLCs average 12 to 18 months within a standard three-year tour. However, the Marine Corps aims for 18-month assignments as the "gold standard" whenever possible.[33] According to the ICC, "The Army's legal leadership has balanced the need to train judge advocates to effectively prosecute crime, defend accused, and represent victims throughout the court-martial process. Balancing those interests would not be possible with mandatory two-year tours for any of those positions."[34] While acknowledging that stabilization or longer SVC/VLC assignments might benefit survivors, the ICC stated that a mandatory two-year SVC/VLC assignment minimum "would significantly curtail the Army and Marine Corps in developing judge advocates to serve as trial or defense counsel, and would reduce other opportunities to gain professional experience that can only improve a judge advocate's ability to represent survivors as an SVC/VLC."[35]

In the October 5, 2021, Tour Length Memo, the DoD GC requested that the DAC-IPAD assess whether it is practical to adopt a minimum assignment length and, if so, what that minimum should be.[36] Highlighting the Army's position that it would not be possible to balance the interests of prosecution, defense, and victim representation with a mandatory two-year tour for any of those positions, the DoD GC remarked: "It is not readily apparent why it is possible for the Air Force and Navy to balance those interests while providing two-to-three-year tours for SVC/VLCs but it is not possible for the Army to do so."[37]

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[30] Letter from Rep. Speier and Sen. Gillibrand to Secretary of Defense Austin, *supra* note 3.

[31] *Id.*

[32] Letter from Lieutenant Colonel Yong J. Lee, USMC, Interim Chair, ICC, to Beth George, Acting DoD General Counsel (Aug. 11, 2021), *available at* Appendix D.

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] Tour Length Memo, *supra* note 9.

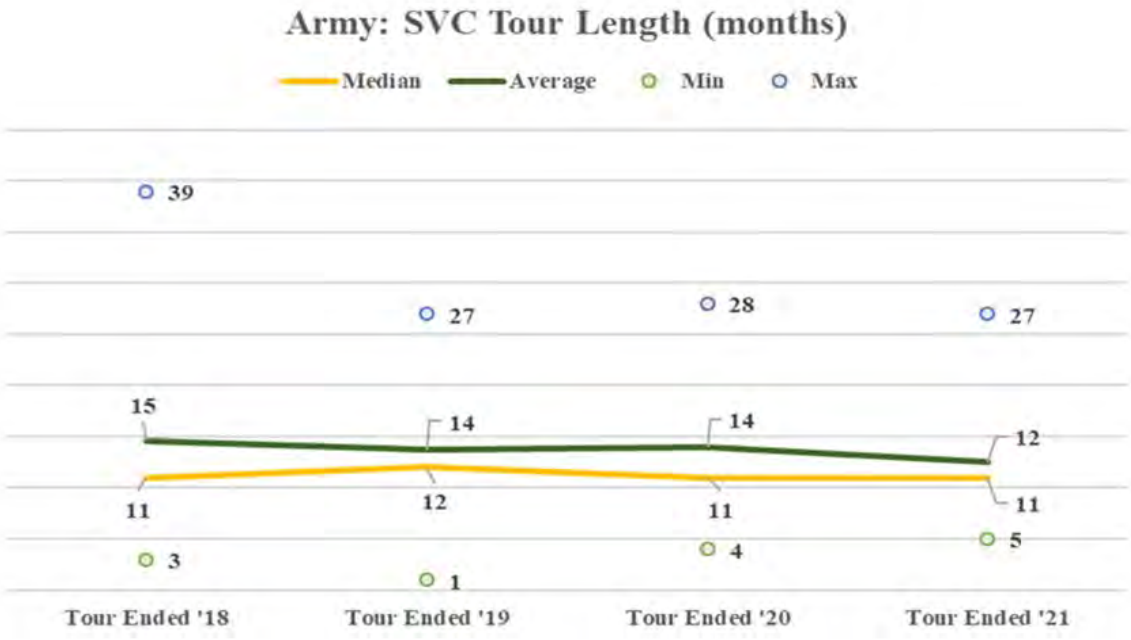
[37] *Id.*

A. Current Practice[38]

1. Army

The Army currently has 51 full-time SVCs and 30 part-time SVCs serving at 42 different locations, with 1 to 6 SVCs at each location. At the end of FY21, there were 1,455 clients represented by 78 SVCs. Army SVCs represent from 1 to 49 clients, with an average of 18 clients each. The Army does not collect data on the number of SVCs who represent each client or the length of client representations; however, a sampling of recently terminated representations in each region yielded an average of two SVC detailed to each client, with each client represented by the SVC program for an average of 10 months.[39]

Most Army SVCs receive permanent change of station (PCS) orders for two to three years in a particular location. Initial three-year orders at one location are typically split into two 18-month assignments.[40] Ninety-five Army SVCs completed their assignments after January 1, 2018, serving as an SVC from 1 to 39 months, including 20 SVCs (21%) serving 18 months or more and 46 SVCs (48%) serving less than 12 months.[41]

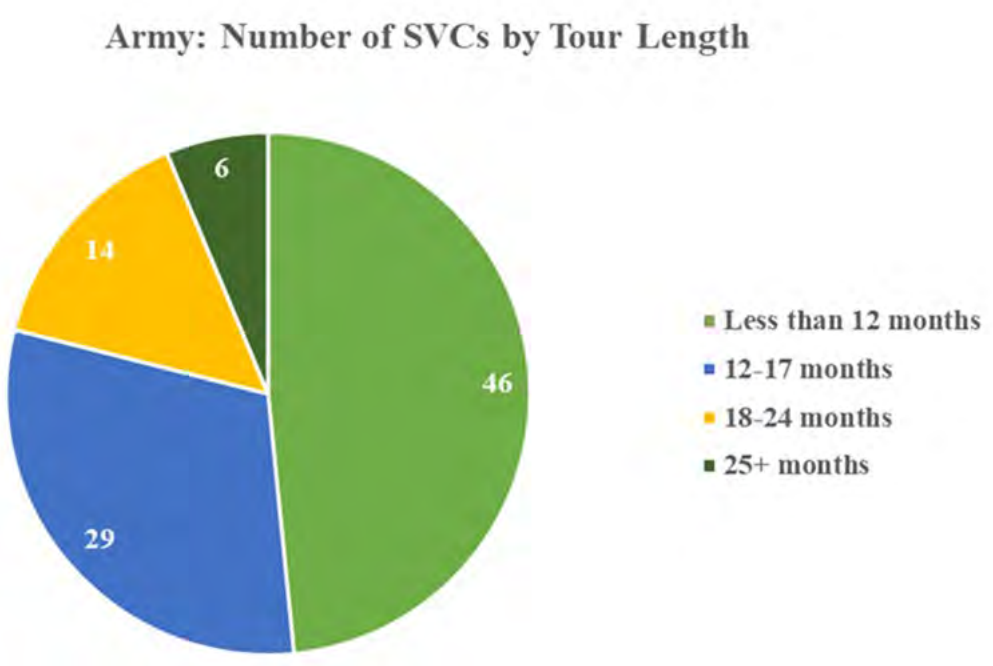


[38] Except as noted, all data are accurate as of the date of the Services' responses to RFI 1 provided in November and December 2021, and to RFI 2, provided in January 2022. The Amy provided a corrected response to RFI 2 in March 2022, which was used for "Army Response to RFI 2."

[39] *See* Appendix H, Army Response to RFI 1, Q. 15.

[40] Interview with Army SVC Program Manager (Dec. 10, 2021).

[41] *See* Appendix I, Army Response to RFI 2. RFI 2 requested that the Services provide, for each SVC/VLC who completed their assignment after January 1, 2018, the month and year that they began their assignment, the month and year they ended the assignment, whether the assignment was full- or part-time, and the number of that assignment within their assignment history. The staff calculated the length of each assignment, excluding the first month and including the last month. For example, an assignment that began in June 2018 and ended in June 2019 was calculated as 12 months long. One SVC was excluded because the reported term of service concluded prior to January 1, 2018.



In December 2021, the Army established a minimum 18-month tour length for SVCs, subject to "compelling reasons" that could decrease this time.[42] Exceptions to the 18-month minimum include the needs of the Army, needs of the client, or personal circumstances of the SVC.[43] For an SVC to depart prior to completing an 18-month assignment, their staff judge advocate (SJA) must notify the SVC Program Manager and provide compelling reasons. Next, the Program Manager makes a recommendation to the Chief, Army JAG Personnel, Plans and Training Office for any proposed exception to the 18-month minimum.[44] The needs of the client and the SVC's health and well-being, especially as they are affected by vicarious trauma or burnout, are the "highest concerns when considering an early move of an SVC."[45]

Upon approval by the Program Manager in consultation with the SVC's SJA, an SVC who moves out of the SVC position may continue to represent a client while in a new position. A rare exception to policy may be granted to allow this when a case is scheduled for court-martial soon after the SVC's planned reassignment.[46] As a practical matter, SVCs serving on two-year orders are likely to remain in that assignment for the duration of the orders.[47]

[42] Judge Advocate Legal Services, PERSONNEL POLICIES ¶5-6(c) (December 2021) [Army JAG Pub 1-1].

[43] *See* Appendix H, Army Response to RFI 1, Q. 2, 4. Personal circumstances of the SVC may include schooling, a PCS reassignment, level of performance, and career development

[44] Army JAG Pub 1-1, *supra* note 42, ¶5-6(c). The Chief of PP&TO acts on the recommendation on behalf of The Judge Advocate General of the Army.

[45] *See* Appendix H, Army Response to RFI 1, Q. 4.

[46] *Id.* at Q. 14.

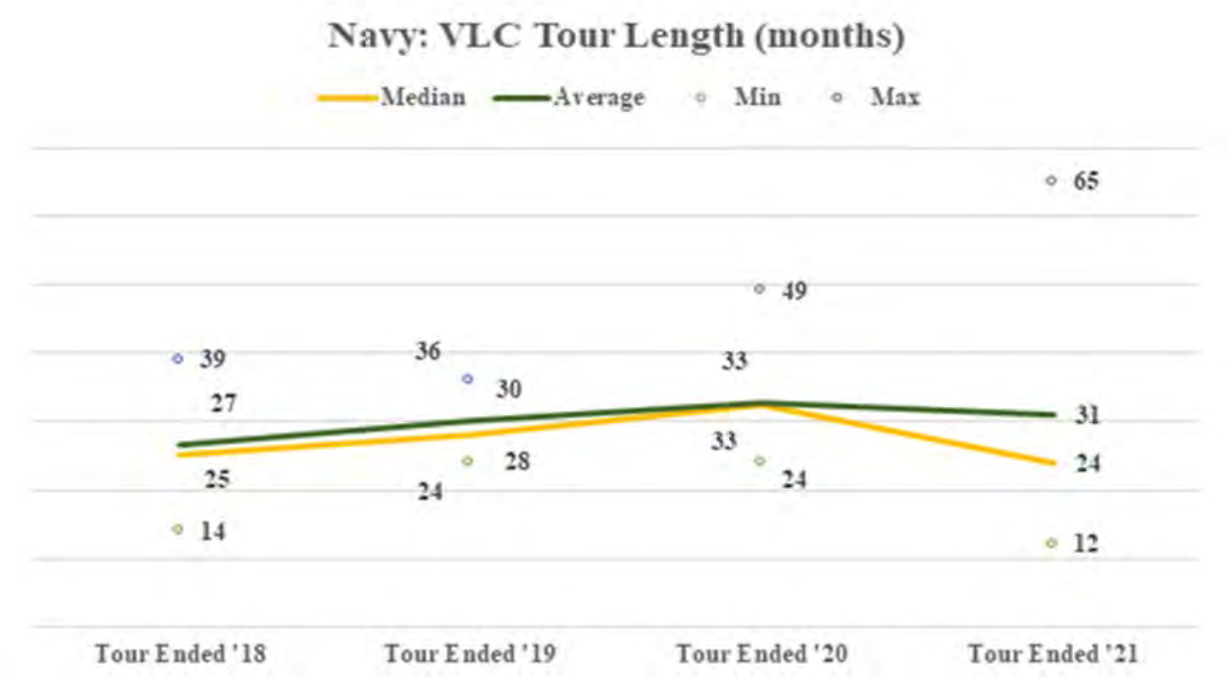
[47] Interview with Army SVC Program Manager (Dec. 10, 2021).

2. Navy

There are 44 full-time Navy VLC billets, spread across 26 installations, each representing an average of 22 clients at any given time.[48] There is no specific directive or policy regarding Navy VLC tour length. Navy VLCs receive two- to three-year orders pursuant to the routine detailing process for all Naval Legal Service Command (NLSC) billets, including trial counsel and defense counsel. Aside from those stationed in Bahrain,[49] all Navy VLCs are issued three-year orders, with reduction to two years for unaccompanied VLCs in specific overseas locations such as Guam, Japan, Italy, and Spain. In addition, VLCs may end their tours after two years if there is a distinct career advantage to doing so.[50]

All exceptions to the standard tour length are made on a case-by-case basis by the NLSC Commander, with input from the Chief of the Navy VLC Program and support from The Judge Advocate General of the Navy. In the eight years of the program, only a few exceptions have been granted to allow VLCs to end their tours early, whether due to the VLC's personal issues or difficulty with the job.[51]

Of the 41 Navy VLCs who completed their assignments after January 1, 2018, 37 VLC (90%) served 24 months or longer. The two shortest tours—12 and 14 months—were served overseas by unaccompanied VLCs in accordance with the tour length requirement for those locations.[52]



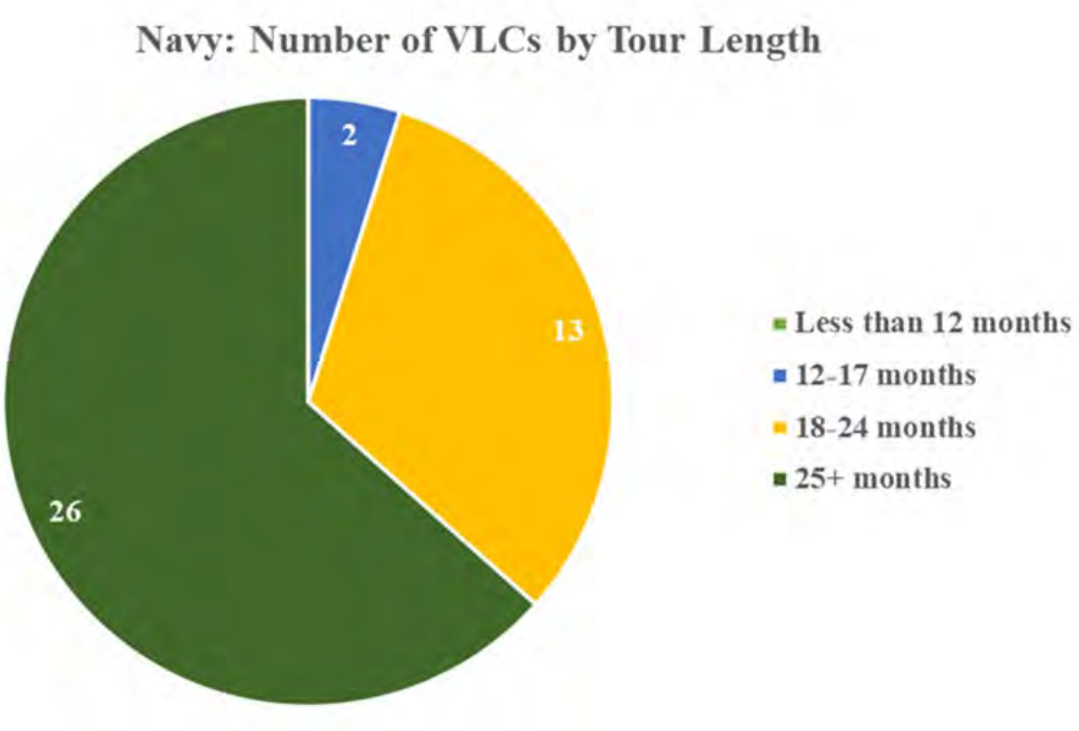
[48] *See* Appendix H, Navy Response to RFI 1, Q. 8, 16.

[49] In Bahrain, the VLC's tour is limited to 18 months unless the VLC is accompanied by dependents, in which case it can be extended to two years.

[50] *See* Appendix H, Navy Response to RFI 1, Q. 2.

[51] Interview with Navy VLC Program Manager (Dec. 22, 2021).

[52] *See* Appendix I, Navy Response to RFI 2.



Most clients work with only one Navy VLC for the duration of a case, although a second VLC may take over if the first transfers to another billet before the case concludes. If the client requests to keep the same counsel, the departing VLC may retain the client, especially if the case is about to go to court-martial. In those cases, the Navy works with the gaining command to delay the VLC's transfer or allow the VLC to continue representation after transferring.[53]

The Navy did not provide information concerning the average length of representation, stating:

> Providing an average length of representation time would be arbitrary and not reflective of the wide variety of case types, disposition options, and client outcome desires. Cases where a victim requires limited advice and ultimately declines to participate in an investigation can take only a few weeks to a few months. Cases where the client is participating in an investigation but the case is not ultimately taken to court-martial can take from a few months to over a year, depending on whether there are alternative dispositions exercised by the command (such as administrative separation or non-judicial punishment). More complex cases where domestic violence and safety concerns exist and/or that are tried by court-martial can take several years to complete and may even involve follow-on appellate practice.[54]

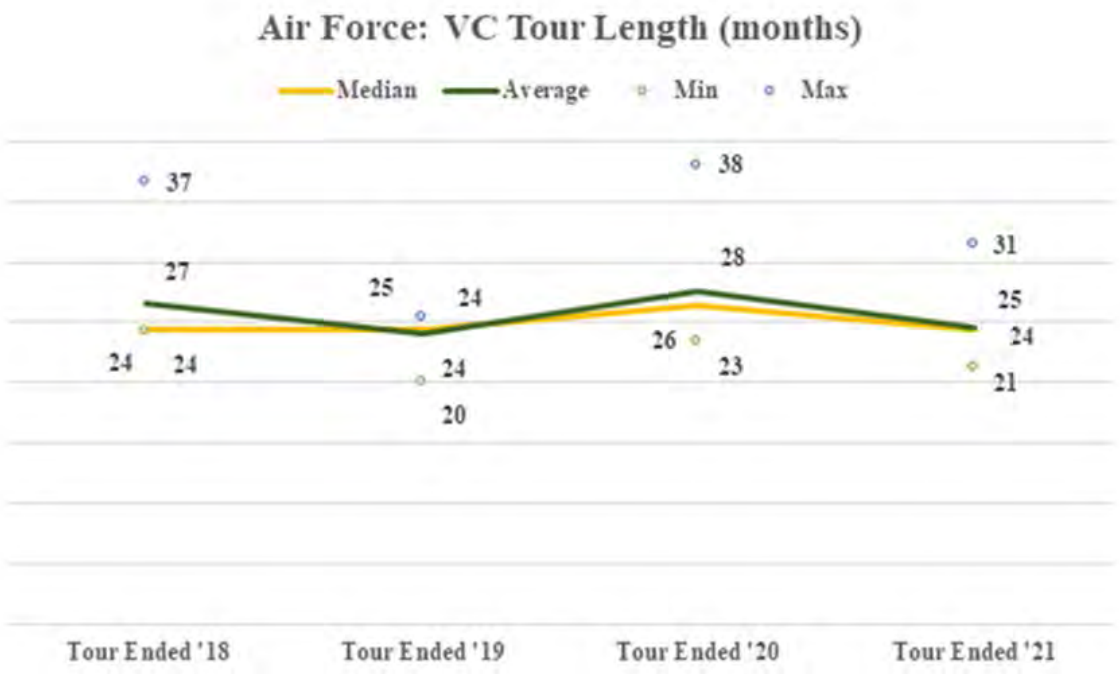
[53] *See* Appendix H, Navy Response to RFI 1, Q. 14.

[54] *Id.* at Q. 15.

3. Air Force

The Air Force has 57 full-time special victims' counsel (VCs), including five Circuit Chiefs (CCVCs) and one civilian VC, spread across 46 locations, with one or two VCs at each location. On average, VCs represent 22 to 25 clients at any given time.[55]

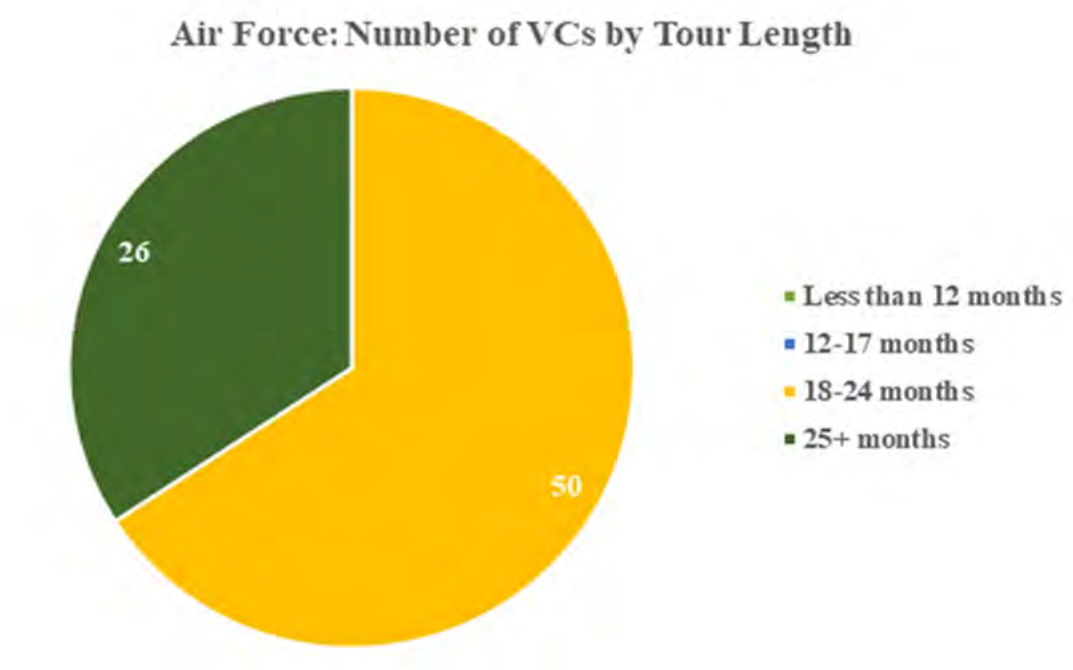
Air Force VCs, like Navy VLCs, are not subject to any directive or policy prescribing a minimum tour length but as a matter of practice are typically assigned for two- to three-year tours.[56] Of the 76 VCs who completed their assignments after January 1, 2018, 66 (87%) served for 24 months or longer. The shortest tour length was 20 months; the longest was 38 months.[57]



[55] *See* Appendix H, Air Force Response to RFI 1, Q. 8, 16.

[56] *Id.* at Q. 1, 2.

[57] *See* Appendix I, Air Force Response to RFI 2.



Several factors influence a VC's assignment length, including the personal and medical needs of the VC and their dependents, mitigation of burnout and vicarious trauma, and a VC's separation or retirement from the Air Force. Professional development needs may also affect tour length, including the movement of experienced VCs into supervisory positions and junior judge advocates into the VC role to gain VC experience and cultivate their skills.[58]

The Judge Advocate General of the Air Force has sole authority to assign judge advocates to their positions and to end a tour whenever the need arises.[59] The absence of a formal directive regarding minimum tour length preserves maximum flexibility to make assignment decisions based on mission needs, the needs of the Air Force, and the needs of individual VCs.[60]

The Air Force does not collect data on the average length of representation, but it makes every effort to ensure that a client has only one VC for the duration of their case. It is rare for a client to have more than two VCs.[61] A VC who is transferring to a new billet may, at the client's request, continue to represent that client, if it is in the client's best interests and there is no conflict.[62]

[58] *See* Appendix H, Air Force Response to RFI 1, Q. 4.

[59] *See* 10 U.S.C. §§ 806, 9037.

[60] *See* Appendix H, Air Force Response to RFI 1, Q. 3.

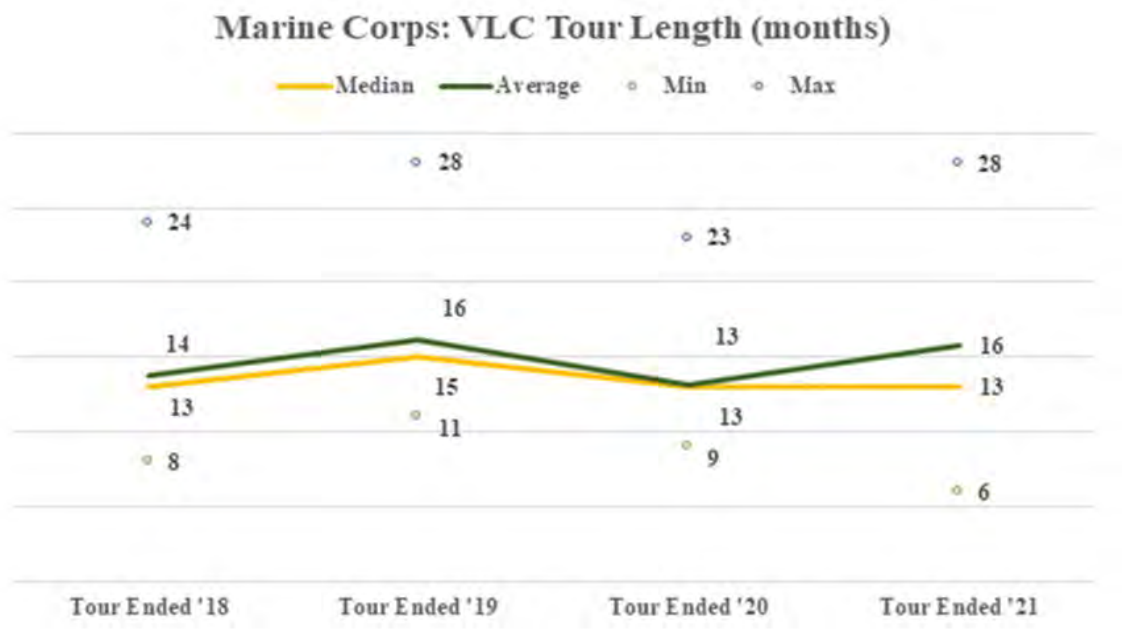
[61] *Id.* at Q. 15, 16.

[62] *Id.* at Q. 14.

4. Marine Corps

The Marine Corps VLC Program consists of a Chief VLC (CVLC), Deputy Officer in Charge (OIC), and 18 line VLCs, including four regional VLCs (RVLCs), who provide direct legal services to victims as their primary duty. One additional auxiliary VLC provides part-time services, and the Deputy OIC provides limited scope VLC services as an additional duty.[63] One to three VLCs serve at 11 different locations, representing an average of 26 clients each. Most victims are represented by only one VLC, but some may have two or more over the duration of a case.[64] VLC representation of a client generally lasts 12 to 18 months, but may be significantly less than 12 months if the client does not want to participate, and significantly more than 18 months in sexual assault cases in which the client does participate.[65]

There is no mandatory minimum tour length for Marine VLCs, but in August 2021, the Marine Corps formally established a goal to assign all VLCs to two-year tours.[66] After January 1, 2018 (but before the two-year goal was instituted), 50 VLC assignments were completed, including three on a part-time basis. These assignments, which ranged from 6 to 28 months, averaged 15 months. Of the 50 assignments, 9 VLCs (18%) served for less than 12 months; 29 VLCs (58%) served from 12 to 18 months; and 12 VLCs (24%) served 18 months or longer.[67]



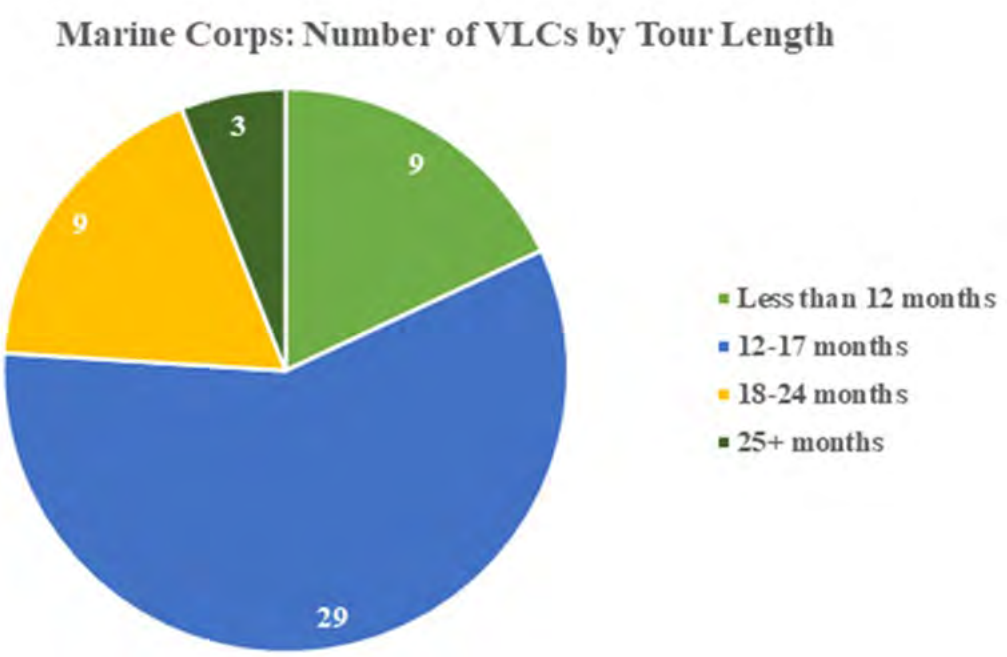
[63] *See* Appendix H, Marine Corps Response to RFI 1, Q. 8. At the time of the Marine Corps' Response to RFI 1, one additional VLC was in the detailing process; two more were expected to be added in 2022.

[64] *Id.* at Q. 16.

[65] *Id.* at Q. 15.

[66] *See* U.S. Marine Corps Order 5800.16, vol. 4, LEGAL SUPPORT AND ADMINISTRATION MANUAL, MILITARY JUSTICE ORGANIZATION, PERSONNEL, AND QUALIFICATIONS ¶010801 (June 19, 2020; rev. Aug. 26, 2021).

[67] *See* Appendix I, Marine Corps Response to RFI 2. As noted in note 40 *supra*, the staff calculated tour lengths for all Services by excluding the month the assignment commenced and including the month it ended. This method of calculation differs from the Marine Corps' method, which included the start month and the end month, so that an assignment from June 2018 to June 2019 was calculated as 13 months.



Tours may be shortened for various reasons, including reassignment in response to the needs of the Marine Corps or to the VLC's request for personal reasons. Other circumstances to shorten an assignment include the time needed to train or qualify to serve as a VLC; the VLC's remaining time on station; the VLC's selection for resident professional military education (PME) or other boards, such as command, that require an early PCS; and the VLC's limited time (less than two years) remaining on active duty.[68]

If the VLC transfers or leaves military service before completion of a case, they must give the client reasonable notice of the pending transfer or separation, assist the client in acquiring a new VLC, and turn over the case to the new VLC to ensure continuity of legal services.[69] The VLC may continue to represent the client after transferring to a new billet if there is a need, and if there is no non-waivable conflict or statutory prohibition on continued representation.[70] If a client transfers to a new duty station before their case is resolved, the VLC may continue representation at the client's request, or the client may request a replacement VLC at the new duty station, subject to approval by the detailing authority.[71]

[68] *See* Appendix H, Marine Corps Response to RFI 1, Q. 2, 4. If a VLC assignment is curtailed, the officer in charge (OIC) of the responsible Legal Services Support Section (LSSS) or Legal Services Support Team (LSST) coordinates with RVLCs and the CVLC to establish a new end-of-tour date and determine the way ahead, including identification of a judge advocate to replace the outgoing VLC.

[69] *Id.* at Q. 13.

[70] *Id.* at Q. 14.

[71] *Id.* at Q. 13.

B. Assessment of Tour Lengths

1. The Impact of Multiple SVCs/VLCs on Victims

Victims represented by SVCs/VLCs stated that changing counsel during a case was inherently stressful, even when they were satisfied with the representation of one or more of their counsel.[72] It is common for two or more SVCs/VLCs to represent one client before the case is resolved. Almost all of the interviewed SVCs/VLCs described inheriting clients from their predecessor or from SVCs/VLCs at other locations, and those who had completed their assignments handed off clients when they departed. Of the 17 victims interviewed, 11 were represented by more than one SVC/VLC during their case. Six victims (all represented by Army SVCs or Marine VLCs) were represented by more than two. Two Army victims had four SVCs, and one had five. While the responses did not constitute a scientific sampling of SVCs/VLCs or their clientele, the message was clear and consistent: victims prefer not to change SVCs/VLCs, and they are better served by longer relationships with fewer SVCs/VLCs.[73]

A common victim complaint was the slow pace of military justice. Army victims voiced frustration over further delays when one SVC was reassigned and a new SVC had to learn about the case.[74] The transition was often hampered by the absence of a "warm handoff"—ideally, an in-person meeting with the victim and both SVCs—to facilitate the transfer of the representation. In the absence of a warm handoff or detailed transition memo, the incoming SVC had to rely on the case file, and in some cases had to get the details from the victim.

Repeating a traumatic event narrative was difficult for clients, who felt re-victimized by the repetition.[75] Transitions were difficult for victims who did not know their SVC/VLC had transferred until they received an introductory email from a new SVC/VLC. Even those who knew in advance were anxious about the transition, discussing the difficulty of rebuilding trust in successive SVCs/VLCs, especially in temporary SVCs/VLCs assigned as placeholders until the new full-time SVC/VLC was available. Victims complained that most short-term SVCs/VLCs were not emotionally engaged with them or knowledgeable about their case, if they communicated at all. There was a strong correlation between victim satisfaction with their SVC/VLC and the extent of their communication, regardless of the case outcome. SVCs/VLCs who checked in monthly, even with no developments to report, were consistently viewed more favorably than those who let months pass between communications.

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[72] *See* examples of victims' comments at Appendix J.1.

[73] The Services track client satisfaction with the SVC/VLC program to varying degrees. The Army provides clients with an optional electronic exit survey prior to termination of the representation, and is developing an online survey. The Army reports that no client who has submitted a survey response has indicated dissatisfaction with their SVC. Appendix H, Army Response to RFI 1, Q.12. The Navy collects customer satisfaction data on several different platforms, including an online anonymous survey, and they reflect a high degree of satisfaction with the SVC/VLC program even when the case does not go the way the client wanted. Only one out of 181 respondents reported dissatisfaction with changing VLC. Interview with Navy VLC Program Manager (Dec. 22, 2021). The Air Force reports 95% client satisfaction from its military justice experience survey that is available to all victims. Interview with Air Force VC Program Manager (Dec. 14, 2021). The Marine Corps is currently vetting a new client satisfaction survey to enable clients to provide input at the beginning and end of representation, and to raise issues at any point along the way. Interview with Marine Corps VLC Program Manager (Dec. 13, 2021).

[74] *See* examples of victims' comments at Appendix J.1.

[75] *Id.*

The transition challenge increased when the new SVC/VLC lacked substantial military justice experience.[76] Without questioning the dedication of junior SVCs/VLCs, victims appreciated the knowledge and skills of experienced counsel. Victims had confidence in SVCs/VLCs who could answer questions and offer advice about the investigation and were familiar with the court-martial process. Victims reported that inexperienced SVCs/VLCs missed opportunities to prepare clients for pretrial interviews with law enforcement; help obtain military protective orders or expedited transfers; and advocate against more experienced trial counsel in pretrial meetings and at courts-martial.

2. The Impact of Longer Tours on SVCs/VLCs

Most of the SVCs/VLCs said that longer tour lengths would enable them to handle more cases from beginning to end without transferring clients to new SVCs/VLCs and creating inefficiencies in a process that victims perceive as slow-moving. SVCs/VLCs echoed their clients' sentiments about the value of experience, emphasizing the importance of prior military justice experience for them to effectively advise clients on the process.[77] Even experienced counsel described a steep learning curve for new SVCs/VLCs; the consensus was that they were most effective after a year in the position. Almost all agreed that 12-month tours are too short, result in too many client handoffs, and end just as the SVC/VLC has reached the effective point in the learning curve and has developed the skills to best represent their clients. However, opinions differed as to how long SVC/VLC assignments should last; the two primary concerns were the emotional toll of the job and its impact on career progression.

a. Burnout, Compassion Fatigue, and Vicarious Trauma

The Services acknowledge that SVCs/VLCs are at high risk of experiencing burnout, compassion fatigue, and vicarious trauma as a result of their work with victims of sexual assault and domestic violence. As defined by the Department of Justice's Office for Victims of Crimes:

> **Burnout** is a state of physical, emotional, and mental exhaustion caused by long-term involvement in emotionally demanding situations. Symptoms may include depression, cynicism, boredom, loss of compassion, and discouragement.
>
> **Compassion fatigue** is a combination of physical, emotional, and spiritual depletion associated with caring for others who are in significant emotional pain and physical distress.
>
> **Vicarious trauma** is an occupational challenge for people working and volunteering in the fields of victim services, law enforcement, emergency medical services, fire services, and other allied professions, due to their continuous exposure to victims of trauma and violence. Exposure to the trauma of others has been shown to change the world-view of these responders and can put people and organizations at risk for a range of negative consequences.[78]

[76] *See* examples of victims' comments at Appendix J.2.

[77] *See* examples of SVC/VLC comments on tour lengths at Appendix J.3.

[78] Office for Victims of Crime, "Glossary of Terms," *The Vicarious Trauma Toolkit: Blueprint for a Vicarious Trauma-Informed Organization*, https://ovc.ojp.gov/program/vtt/glossary-terms (accessed Mar. 24, 2022).

SVCs/VLCs noted the tendency of these issues to emerge at the one-year mark of their assignment, with many stating that they felt the strain at some point during their second year. Serving longer tours, managing heavy caseloads, and having their first duty assignment be as an SVC/VLC exacerbated their stress.[79]

Representation of domestic violence victims was another significant factor contributing to an SVC/VLC's psychological stress. Domestic violence cases tend to be more time-consuming, as victims often require multiple services for issues such as divorce, child custody, expedited transfers, and financial assistance. Domestic violence victims may become emotionally dependent on the SVC/VLC if they are isolated from their families and support systems after years of abuse, and they are less likely than other crime victims to want their cases prosecuted.[80]

The Services all facilitate discussion and provide training on the mental health challenges faced by SVCs/VLCs and on the availability of behavioral health services to treat burnout, compassion fatigue, and vicarious trauma.[81] The Services also offer training on related topics, such as setting boundaries for clients and referring clients to social services so that the SVC/VLC can focus on their responsibilities as attorneys rather than on social work.[82]

The Services recognize the need to identify and support struggling individual SVCs/VLCs who require counseling, time off, or relief from or assistance with their caseload. The Navy VLC Program Chief of Staff speaks with each VLC individually, on a quarterly basis, to assess their well-being, while regional managers provide day-to-day support and mentoring.[83] Marine VLCs receive similar support from their leadership—both RVLCs and the CVLC—who maintain regular communication concerning their difficult cases and their personal well-being. Regional managers were also cited by Army SVCs and Air Force VCs as valuable sources of support.

SVCs/VLCs may seek behavioral health care through the same channels as all Service members. Many SVCs/VLCs said they felt the psychological impact of their work by the time their assignments were over. SVCs/VLCs knew that behavioral health care was available; however, many elected not to pursue it because of the stigma attached to it, or because they did not want risk seeing a client at a clinic or seek care from those with whom they interacted professionally.[84]

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[79] An SVC/VLC who served a two-year tour told the staff, "Anyone who says they didn't [experience burnout] isn't doing their job or is lying to you." That SVC/VLC found support and understanding from leadership to be critical to their making it through the last few difficult months of the assignment. Other SVCs/VLCs shared their coping mechanisms, which included "lots of tears and yelling in the job" and physical exercise to relieve stress. Some found it helpful to talk about their issues with more experienced SVCs/VLCs, including one who relied on a regional SVC/VLC and sexual assault response coordinator (SARC) for support.

[80] One civilian victim advocate opined that SVCs/VLCs are not adequately trained on safety issues that their clients face, and are putting the victims at risk by not fully understanding what is at stake for them.

[81] *See* Appendix H, Service Responses to RFI 1, Q 10, 19.

[82] Interview with Army SVC Program Manager (Dec. 10, 2021); Interview with Marine Corp VLC Program Manager (Dec. 13, 2021).

[83] Interview with Navy VLC Program Manager (Dec. 22, 2021).

[84] Although some noted that leadership is pushing for cultural change, at least one SVC/VLC from each Service except the Navy said they never even considered seeking mental health care because of the stigma attached to it.

Most SVCs/VLCs said they would benefit from dedicated behavioral health support to address the psychological impact of their work, proposing in-house counseling, referrals to off-base resources, or a readily accessible anonymous hotline staffed by professionals. The Navy and Air Force have attempted to secure streamlined access to behavioral health services for their VLCs/VCs; however, this system is not yet in place, largely because the military's behavioral health system is already overburdened.[85]

b. Individual Professional Development

SVC/VLC programs are too new to determine whether and how an SVC/VLC billet impacts a judge advocate's promotion potential. The Army, Air Force, and Marines do not collect statistics regarding promotion rates for SVCs/VLCs, and those three Services stated that the SVCs/VLCs who have served since the program's inception in 2013 are not yet eligible for selection for promotion to O-6.[86] The Navy has tracked VLC promotions and promotion rates since 2013 and reported that two reservists who were activated to serve as VLCs were selected for promotion to O-6 during their VLC tour. Most current and former active duty Navy VLC are not yet eligible to be considered for promotion to O-6.[87]

Despite the absence of data showing that an SVC/VLC tour is detrimental to a judge advocate's career, many SVCs/VLCs cited concerns for their professional development and promotion potential as reasons to limit tour lengths.[88] These concerns were voiced most often by Army and Marine SVCs/VLCs, who said it is not a desirable billet because it is not considered a litigation position, due to the SVC/VLC's limited ability to participate in court-martial proceedings. Army and Marine SVCs/VLCs worried that longer tours lead to professional stagnation and limit their chances to attend schools and rotate through other billets to enhance their own development and improve their promotion potential. This group suggested that shorter tours, of 18 months or less, would attract the best candidates and protect career progression.

The SVC/VLC billet is viewed more favorably in the Air Force and Navy, where it is seen as providing diversity of experience and promotion potential.[89] Navy VLCs observed that judge advocates were wary in the early days of the program that a VLC would be more social worker than attorney; however, effective messaging from Navy leadership overcame their initial hesitancy, showing that it was a robust program for experienced, highly qualified judge advocates. The Navy enhanced the status of the VLC billet by recognizing it as a qualifying billet for judge advocates on the Navy's Military Justice Career Track.[90] Still, Navy and Air Force VLCs/VCs recognize a need to move on to other billets after two to three years to gain experience in different areas.

[85] Interview with Navy VLC Program Manager (Dec. 22, 2021); interview with Air Force VC Program Manager (Dec. 14, 2021).

[86] Appendix H, Service Responses to RFI 1, Q. 18.

[87] *See* Appendix H, Navy Response to RFI 1, Q. 18.

[88] See examples of SVC/VLC comments at Appendix J.3.

[89] *Id*.

[90] One Navy VLC who sat on selection boards confirmed that judge advocates on the Military Justice Career Track benefited from time in a VLC billet because it is seen as providing litigation experience.

c. SVC/VLC Perspectives on Tour Lengths

When discussing a possible two-year minimum assignment length, SVC/VLC had varied responses.[91] Some SVC/VLC said two years should be a ceiling, not a floor. Most Army and Marine SVCs/VLCs preferred 18-month assignments to enable SVCs/VLCs to hone their skills, see more cases to completion, stay within the normal assignment cycle, and not suffer an undue emotional toll. Navy and Air Force VLCs/VCs identified two years as the appropriate tour length, with most of the Air Force VCs viewing two years as the upper limit and most Navy VLCs suggesting that two to three years is reasonable.

C. Recommendation

Recommendation 1: All of the Services should adopt an 18-month minimum assignment length for SVCs/VLCs, with appropriate exceptions for personal or operational reasons.

The Secretary of Defense mandated the establishment of SVC/VLC programs by each of the Services to ensure that military sexual assault victims are represented by qualified judge advocates who advise and advocate for them in military justice proceedings.[92] The Services adapted to the requirement by creating SVC/VLC billets that fit within their existing assignment processes, without formally designating minimum tour lengths.

In recent months, the Army and Marine Corps have modified their SVC/VLC tour lengths: the Army has mandated an 18-month minimum, and the Marine Corps has declared a goal of 24-month tours. These longer tours better serve the victims for whom the SVC/VLC programs were created, enabling SVCs/VLCs to serve more victims from beginning to end, decrease victims' stress, minimize delay and inefficiencies in the military justice process, increase client satisfaction, and allow judge advocates the time to develop the skills and expertise necessary to effectively advocate for their clients.

For these reasons, all of the Services should adopt an 18-month minimum assignment length for SVCs/VLCs, with appropriate exceptions for personal or operational reasons. The Services will retain the flexibility to address unanticipated issues through exceptions, which should be narrowly defined to ensure victims receive the most effective legal representation possible.

[91] See examples of SVC/VLC comments at Appendix J.3.

[92] SecDef Memo, *supra* note 20.

IV. Army SVC Rating Chain

On November 2, 2021, the DoD GC requested a study of the Army SVC rating chain, 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.[93]

The term "SVC rating chain" encompasses the supervisory structure and professional officer evaluation reporting system for Army judge advocates who serve as SVCs. Army officer evaluation reports (OERs) completed by raters and senior raters are a critical part of an Army judge advocate's career management.[94]

This section describes the rating structures for SVCs/VLCs at the initiation of the Services' programs, compares the Army's SVC rating chain with those used by the other Services, evaluates and assesses the Army SVC rating chain, and provides recommendations for change.

A. Army SVC Rating Structure and Other Services' Structures

1. Initiation of the Services' SVC/VLC Programs

In January 2013, the Air Force's new SVC Pilot Program operated as a part of base legal office functions. Judge advocates in the rank of captain, supervised and rated within those offices, provided victims' counsel (VC) representation to sexual assault victim clients as an additional duty. Air Force SJAs, rated and supervised by commanders serving as general court-martial convening authorities, maintained supervisory and rating authority over all local VCs.[95]

In June 2013, the Air Force transferred VCs from its base legal office supervisory and rating structure to one independent of the local command.[96] Air Force VCs were assigned to stand-alone VC Offices with a supervisory and rating chain through regional VC Offices to the Air Force Legal Services Agency.[97] There were no local SJAs or commanders in the rating chain.[98]

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[93] *See* Rating Chain Memo, *supra* note 10. This study was requested in conjunction with the Tour Length study.

[94] *See* Department of the Army Pamphlet 600-3, *Officer Professional Development and Career Management*, chap. 3 (Apr. 3, 2019). The Army OER "rating chain" includes an immediate supervisor ("rater") and a higher level supervisor ("senior rater"). In OSJAs, the senior rater is usually the SJA. The Army evaluation process requires raters and senior raters to produce OERs annually, or more frequently if there is a triggering event, for all SVCs they supervise. An Army officer's OERs is significant for determining retention, promotion, and future assignments.

[95] *See* Lagano et al., *supra* note 16, at 32.

[96] *Id*.

[97] JUDICIAL PROCEEDINGS PANEL INITIAL REPORT 56 (Feb. 2015) [JPP INITIAL REPORT], *available at* https://dacipad.whs.mil/images/Public/10-Reading_Room/04_Reports/01_JPP_Reports/01_JPP_InitialReport_Final_20150204.pdf.

[98] *Id*. This rating chain is considered "independent" because the SVC's supervisors or rating officials are not part of the local convening authority or base legal office rating chain. Independent military rating systems are often referred to as "stovepiped" (see *infra* note 105).

Victims and Congress had an overwhelmingly positive response to the Air Force's SVC Pilot Program.[99] In August 2013, the Secretary of Defense directed all Services to fully establish victims' counsel programs by January 1, 2014.[100] The short timeline required the Services to quickly create fully operational SVC/VLC programs without the benefit of any additional resources or personnel.[101] Following the Air Force model, the Navy and Marine Corps initiated their programs with independent supervisory and rating chains for their VLCs through their supervisory regional or area managers.[102]

When the Army created its SVC program in November 2013, it established a full-time SVC Program Manager position at its headquarters level, but did not create an independent supervisory and rating chain structure for its SVCs.[103] The Army relied on judge advocates assigned to legal assistance sections within installation OSJA to provide eligible sexual assault victims immediate access to this new service. The new Army SVCs remained part of the local command under the supervision and rating of local Chiefs of Legal Assistance and SJAs.[104]

Many factors likely influenced the Army's initial decision to imbed SVCs within installation OSJA legal assistance offices: there were no billets for dedicated SVCs; the SVC Program authority derived from an amendment to legal assistance legislation; SVC services eligibility was tied to legal assistance eligibility; and sexual assault victims' issues were best addressed by judge advocates with expertise in legal assistance services. In addition, the Army legal assistance program represented more clients in more areas than the other Services' programs. Finally, this option enabled the Army, with numerous, geographically dispersed installations, to provide immediate face-to-face SVC services to as many victims as possible.

In its review of the Services' SVC/VLC programs, the Judicial Proceedings Panel Initial Report commented on the Army's unique approach to the SVC program structure:

> Unlike the other Services, the Army did not establish a separate stovepiped[105] chain of command for SVCs and does not designate judge advocates to serve solely as SVCs. Instead, SVC services in the Army are provided through legal assistance offices, where judge advocates assist soldiers with personal legal matters and adverse personnel actions, such as letters of reprimand, negative evaluation reports, or other actions taken against the soldier by the command.

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[99] FY14 SAPRO REPORT, *supra* note 17, at 33.

[100] SecDef Memo, *supra* note 20.

[101] A retired Army official who was instrumental in establishing the Army SVC Program described the process as "like building an airplane while in flight" (interview with Mr. John Meixell, former Chief of the Army Legal Assistance Division, Office of The Judge Advocate General, U.S. Army, Dec. 17, 2021).

[102] *See* Lagano et al., *supra* note 16, at 34–35.

[103] The head of the Army SVC Program was initially called the "SVC Program Manager," but the Army later changed this title to "Chief, SVC Program." *See* U.S. Army, SPECIAL VICTIM COUNSEL HANDBOOK ¶1-2a (5th ed. Oct. 2020) [Army SVC HANDBOOK].

[104] *See* JPP INITIAL REPORT, *supra* note 97, at 57.

[105] In a "stovepiped" rating chain, the local SJA and commander have no supervisory or rating responsibilities, similar to the current rating structure for judge advocates assigned to US Army Trial Defense Service positions. *See* Lieutenant Colonel John R. Howell, *TDS: The Establishment of the US Army Trial Defense Service*, 100 MILITARY LAW REVIEW 4, 19 (Spring 1983).

> In the Army, legal assistance attorneys provide service to individual clients on confidential matters and routinely establish attorney-client relationships. In the other military Services, by contrast, legal offices provide legal assistance as an additional duty, but do not work with clients on adverse personnel actions, such as unfavorable evaluations or administrative reprimands, which are instead referred to designated defense counsel.[106]

In late 2013, the FY14 NDAA mandated that the Services provide SVC/VLC representation when requested by eligible victims of military sexual offenses.[107] When the legislation took effect, the Services had already initiated SVC/VLC programs based on the earlier Secretary of Defense direction. The legislation standardized eligibility, scope of services, and reporting requirements across the Services; but it did not specify the rating chain, independent or local, for SVCs/VLCs—that issue was left to the Services' discretion. While Congress has amended the statutory authority for SVCs/VLCs multiple times since 2014, it has not required the Services to implement independent rating chains for SVCs/VLCs.[108] None of the Services has significantly modified its rating and supervisory structure for SVCs/VLCs since 2013.[109]

In 2018, the Army identified two problems within its SVC program: (1) a need to cross-level workloads between SVC locations to relieve pressure on overburdened SVC and (2) a need to detail the closest available SVC to victims with no SVCs at their location. In response, the Army designated five experienced SVCs to act as Program Regional Managers (RMs) with the authority to detail clients to other SVCs within their region.[110] RMs did not have supervisory or rating authority over any SVCs, except—and only if the local SJA approved of that role—those assigned to their same location. RMs continue to be supervised and rated by their local SJAs.[111] The Army SVC Program Manager has no OER rating role or supervisory authority over RMs or SVCs in the field.[112]

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[106] JPP INITIAL REPORT, *supra* note 97, at 57.

[107] FY14 NDAA, *supra* note 21, at §1716(b), codified at 10 U.S.C. § 1044e (*available at* Appendix G).

[108] *See* FY14 NDAA, *supra* note 21, at §1702; FY15 NDAA, *supra* note 23, at §534; FY16 NDAA, *supra* note 24, at §1081; and FY20 NDAA, *supra* note 26, at §548, discussing expanded SVC/VLC representation of children, victims of domestic violence, and DoD civilians, and a victim's right to have an SVC/VLC present during a defense interview.

[109] Services' Responses to RFI 1, Q. 5, at Appendix H.

[110] TJAG and DJAG Special Announcement 40-04, *Announcement of Decisions on Strategic Initiatives* (Apr. 20, 2018). *See* Appendix N for a map depicting the Army SVC RM regions.

[111] Army SVC HANDBOOK, *supra*, note 103, at ¶1-3c.

[112] *Id*. at ¶1-2b.

2. Current Army SVC Rating Structure

In 2017, the Army established 24 authorized billets specifically designated for SVCs, and since that time it has periodically added more.[113] Army SVC billets are within OSJA under the supervision and rating schemes of SJAs with the local SVC usually supervised and rated by the Chief of Legal Assistance and SJAs as their senior raters on their OERs.[114] Senior commanders who are general court-martial convening authorities are the senior raters for their SJA legal advisors and have UCMJ and administrative command authority over all personnel in their command's OSJA, including the SJA and all SVCs. Army OER ratings have a direct and consequential effect on the rated officers' future career opportunities, promotion potential, and retention in the Service.

3. Comparison with Other Services' SVC/VLC Rating Structures

A notable difference among Services' SVC/VLC programs is in their supervisory and professional rating structures. Unlike the Army, the other Services use an independent rating chain for their SVCs/VLCs.[115] Army SVCs are assigned to OSJA, and they report to and are rated by OSJA personnel within the supervisory and rating structure of the local command who are not part of the Army SVC Program.[116] The other Services' supervisors and raters of their SVCs/VLCs are independent of the local legal office and command.[117] A key reason for keeping these programs' rating scheme separate from the local command's SJA is to avoid undue influence from within the local command that could undermine the SVCs/VLCs' independent and zealous representation of their clients.[118]

The other Services' SVCs/VLCs are grouped into regions. Each region has a supervisory SVC/VLC who either serves as the first line rater for the SVCs/VLCs in their region or provides rating input to the higher-level independent rater in the program. In the other Services, the designated Program Manager is a senior rating official for all SVCs/VLCs.[119] In the Army, the Chief, Army SVC Program, has no supervisory or rating role for any SVCs or RMs.[120]

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[113] According to the Chief, Army SVC Program, by the end of FY22 the Army will have 91 billets designated for SVCs; 24 of these are characterized as MTOE (Modification Table of Organizational Equipment) authorizations and the rest as TDA (Table of Distribution and Allowances) positions. All are part of installation OSJAs.

[114] Army SVC RMs are also assigned to SVC billets that are part of OSJAs.

[115] *See* Services' Responses to RFI 1, Q. 2, at Appendix H.

[116] *See* Army Response to RFI 1, Q. 5, at Appendix H; Army SVC HANDBOOK, *supra* note 101, at ¶1-2b.

[117] *Id*.

[118] *See* United States Coast Guard, *U.S. Coast Guard Special Victims' Counsel Program*, https://www.uscg.mil/Resources/legal/LMA/SVC/ (accessed Mar. 21, 2022) ("No one in a victim's chain of command or the accused's chain of command will influence an SVC in providing legal support to a victim."). Also, *United States Air Force Victims' Counsel Program flyers* (May 16, 2018), available at: https://www.aflag.af.mil/Portals/77/documents/SVC/CLSV_Handout_2018.pdf?ver=2018-05-16-091142-727, produced to publicize the VC Program to potential clients, includes the following assurance: "[Air Force] SVC are supported by Special Victim Paralegals (SVPs). Together, their primary duty is to represent the victim. The SVC/SVP chain of command is independent from every base chain of command."

[119] *See* Appendix K, for diagrams depicting the Services' SVC/VLC rating structures.

[120] *Id*.

The other Services' SVCs/VLCs never fall under the command authority of anyone at their assigned location. However, they may be supported by the local command, installation, and legal office for logistical or administrative support, or funding; and they may interact with their local legal office for training and social or professional development events.

In February 2015, the Judicial Proceedings Panel (JPP) assessed the Services' SVC/VLC programs when they had been in effect for less than two years. While noting the distinction between the Army's local rating chain and the other Services' independent rating schemes, the JPP deferred making a recommendation until it could acquire more information. The JPP observed that "an SVC's ability to represent a client's interest free from command influence is of utmost importance," and that "SVCs must be allowed to advocate candidly and forthrightly on behalf of their clients to the maximum extent possible, including placing their clients' priorities above those of the Service, without fear of harm to their career, retribution, or retaliation."[121]

Drawing on seven more years of data on SVC/VLC programs since the JPP's assessment, this report analyzes and evaluates the positive and negative consequences of employing a local rating chain for Army SVCs, and provides a recommendation for change.

B. Assessment and Evaluation of the Army SVC Supervisory and Rating Chain

To assess and evaluate the Army approach to supervising and rating SVCs, the staff interviewed 20 Army SVCs and 17 SVCs from the other Services.[122] SVCs were asked about the advantages and disadvantages of having a supervisory chain within the OSJA, and whether they experienced any actual or potential conflicts in zealously representing their clients.[123]

The staff also interviewed 6 sexual assault survivors represented by Army SVCs and 12 survivors represented by SVCs/VLCs from the other Services.[124] Discussion topics included whether they had to change counsel, how that change was handled, how the change affected them, their opinion of their counsel, and whether their counsel was "zealous" or inhibited.[125]

1. Advantages of the Current Army Rating Structure

a. Tradition of Professional Independence

In a memorandum to the DoD GC, The Judge Advocate General of the Army described the advantages of the current rating system, emphasizing the professional independence of SVCs and noting that Army SVCs are typically directly supervised by Chiefs of Legal Assistance Offices within the OSJA, offices that have a tradition of representing clients in personal legal matters "in opposition to their commands."[126]

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[121] *See* JPP INITIAL REPORT, *supra* note 97, at 58.

[122] This Army sample included 12 current and 8 former SVCs.

[123] *See* list of questions used for interviews with Army SVCs at Appendix L.

[124] The Army Chief, SVC Program Office, provided the names and contact information for victims to interview after ensuring that these victims were willing to discuss their representation by Army SVCs.

[125] *See* list of questions used for interviews with victims who were represented by SVCs/VLCs at Appendix M.

[126] Memorandum from Lieutenant General Stuart W. Risch, USA, The Judge Advocate General, to General Counsel of the Department of Defense, *Rating Chain for Army Special Victims' Counsel*, *available at* Appendix F.

The Army also noted that all SVCs are trained on and aware of the requirement to report any improper influence or pressure through their SVC RMs and Program Office. To date, the SVC Program Office has never received any formal report of attempted, perceived, or actual pressure from their OSJAs.[127] None of the Army SVCs interviewed personally experienced any direction from an SJA to defer or take any specific actions in their representation of clients under an explicit threat that not doing so would be held against them on their OER ratings.

b. Support for SVCs and Their Clients

Although the Army JAG Corps continues to evaluate and assess Army SVC practice, senior Army JAG Corps leaders meeting as a "board of directors" recently advised against changing the Army SVC rating system, given the benefits of the current structure, including:

- The holistic approach for survivors achieved when SVCs work in conjunction with legal assistance attorneys under the supervision of Chiefs of Legal Assistance.
- SVCs' access to immediate resources from senior colleagues that are available when the SVCs work within an OSJA.
- Better inclusion in the legal community that benefits the SVCs and can improve the overall acceptance of their role as counsel for specific clients.
- Local supervision for SVCs that enables SJAs to select the most qualified judge advocates to fill this role and to nominate part-time SVCs to relieve the burden on full-time SVCs. Local supervision also enables SJAs to address the possible removal of SVCs from their position for reasons such as poor performance or burnout.[128]

Army SVCs may also draw on the technical knowledge and experience of their SVC RM or the SVC Program Manager's Office for advice and support on issues related to representation.[129] Some SVCs noted their perceived advantage of being rated within their OSJA: when their rater is co-located, they are more visible and are better able to make a positive impression.[130] SVC get to know the SJA through extra duties, training, and office duties. An independent rating chain could lead SVCs to feel isolated, particularly for very junior SVCs, some coming directly from the officer basic course with no military justice experience. Junior SVCs benefit from the mentorship and support of the SJA and broader installation legal community.

[127] *Id*. Although there is no evidence that an SVC has ever submitted a formal complaint, the Army does not solicit anonymous comments or survey SVCs about negative experiences with command influence.

[128] *Id*.

[129] *Id*.

[130] *See* examples of Army SVC comments at Appendix J.4.

2. Disadvantages of the Current Army Rating Structure

a. Inherent Effects on the Independence of SVCs and Their Zealous Advocacy

Despite these stated advantages, the comments of some Army SVCs interviewed suggest that the current Army rating structure has an inherent impact on SVC independence and zealous advocacy, even in the absence of explicit threats.[131] Situations arise in which the victim's interests do not align with those of the command, SJA, or government. In such cases, the SVC must zealously advocate for their client's interests without concern for personal or professional consequences. Some SVCs noted that they are viewed, and view themselves, as part of the SJA team and thus should reflect the SJA's philosophy in their work.[132]

SVCs who describe themselves as independent and zealous advocates fear that their advocacy could "burn bridges" with their performance raters. Some SVCs feel pressure to warn their office leadership about issues that might embarrass them or the commanders.[133] These comments reflect the conflict experienced by SVCs between their duty to independently and zealously represent their clients and the pressure to support their OSJA raters, who are a part of and support the local command.

Several Army SVCs identified circumstances that may exacerbate the pressures they face, including domestic violence cases, the SVC's junior status or lack of experience, and representing clients from a different command. Domestic violence cases tend to be complicated, and the clients are less likely than victims of other crimes to cooperate with the government in pursuing a case.[134] A junior or less experienced SVC, especially when involved in high-profile cases, can feel pressure from more experienced counsel, or even the SJA, when opinions differ on what the victim should or should not do.[135] Finally, SVCs representing victims outside their home station can feel the pressure of requesting and explaining extended temporary duty travel to represent victims that have transferred to other locations, especially overseas.[136]

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[131] One Army SVC noted that, in general, SVCs may feel the need to reflect the philosophy of their senior rater and leadership. For the pros and cons of independent rating, he noted leaving the SVC "truly independent" as a pro, but removal from the rating at the cost of weakening the SVC's ability to build the good relationship between the victim and the government as a con. The SVC was also aware of the concern about subtle pressure on junior SVCs who lacked experience or emotional intelligence. *See* examples of Army SVC comments at Appendix J.6.

[132] *Id*.

[133] One SVC noted that they would caution their clients against taking actions that are "needlessly aggressive." *See* examples of Army SVC comments at Appendix J.8.

[134] For example, as one Army SVC noted, if an SVC has to advocate for charges to be dismissed, doing so can lead to tension between the SVC and the local command.

[135] One SVC said they believed that SJAs are more comfortable pressuring young SVCs.

[136] Army SVCs often must represent clients at other locations when SVC work is cross-leveled between installations, clients move to a new location, or conflicts with local SVC prevent representation. The Army's decision to assign SVC to the local legal assistance office can itself create conflicts that prevent local SVC representation due to client conflict rules that prohibit opposing parties to the legal action from having attorneys in the same legal assistance office. Some Army SVCs, especially those overseas, have many or even most of their clients in areas away from their assigned duty location. Some SVC noted the pressure they felt explaining to their local rating chain why they must be absent so often from their assigned OSJA. *See* examples of Army SVC comments at Appendix J.7.

There were no examples of an SJA explicitly demanding an SVC's compliance under the threat of a poor performance rating; however, the rating relationship makes some Army SVCs reluctant to oppose the SJA based on perceived intimidation or retribution. These perceptions are based on factors such as the SJA's personality, the SVC's experience level, and their cases.

Army SVCs were split on whether their rating chain should be local or independent.[137] Other Services' SVCs/VLCs unanimously expressed support for their independent rating chain outside the local OSJA and command; they noted that the interests of the SVC/VLC and the SJA do not always align, and that when the SVC/VLC had to take a position unwelcome to the government or SJA, the SVC/VLC could reassure the client that they did not report to the command. These SVCs/VLCs expressed concern about the challenges Army SVCs may face maintaining impartiality and independence if they are worried about their professional evaluation rating.[138] Other Services' SVC/VLC also generally described positive interaction with the installation legal offices at their assignment locations and feeling included in the local legal community.[139]

Half of the sexual assault victims interviewed, who were represented by Army SVCs, were dissatisfied with certain aspects of their SVC representation.[140] Several victims speculated that a lack of zealous advocacy could be explained by the supervisory structure, in which the SVCs were supervised and rated within the local chain of command.[141]

b. Limitations on the SJA's Ability to Rate SVCs

In addition to the inherent conflict affecting independence and zealous advocacy, several Army SVCs felt that the local OSJA rating structure was not optimal because the SJA could not fairly evaluate the SVC's performance, pointing out that SJAs cannot know the details of their work in representing clients.[142] Many Army SVCs commented that they could not discuss their cases with the SJA even as their SJA routinely discussed cases and other details with their trial counsel, administrative law attorneys, and operational law specialists. Some SVCs would prefer to have their RM as their rater, since the RM is more involved in the SVC's cases and could provide a more accurate assessment and rating for future progression.[143]

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[137] Seven of the 20 Army SVCs interviewed expressed a preference for independent rating for SVCs, and six expressed support for local rating. Seven others had no preference or no opinion. Those who supported an independent SVC rating chain generally pointed to the benefit of SVC independence. Those in favor of local rating mostly cited the benefit of having a local rating chain whose members would get to know them personally, and some observed that being part of the OSJA enables them to fully engage in office training and activities.

[138] *See* examples of other Services' SVC/VLC comments at Appendix J.10.

[139] *See* examples of other Services' SVC/VLC comments at Appendix J.12.

[140] *See* examples of comments from victims who had been represented by Army SVCs at Appendix J.9.

[141] For example, one Army victim was represented by four consecutive Army SVCs over the course of 17 months. This victim felt that two of the SVCs were inhibited by their deference to the command when one SVC would not advocate for prosecution of the case and another SVC would not advocate for an expedited transfer.

[142] *See* examples of Army SVC comments at Appendix J.11.

[143] Some Army SVCs satisfied with their rater already had their co-located RM as their rater. One noted that SVCs are more akin to Army defense counsel, who are rated independently of their local OSJA because of their need to act without fear of reprisal from their rater, and also to preserve confidentiality in their attorney-client communications.

c. Insufficient Supervisory Authority for Army SVC Regional Managers

This report has identified several areas of recurring problems where the Army SVC Program services to clients could improve, such as poor communication with clients, especially during SVC transitions; too many transitions; clients' perception of a lack of zealous advocacy; and lack of experience among SVCs. In 2018, the Army designated five SVCs as RMs. SVC RMs are in a better position to closely monitor SVCs' work than is the local OSJA supervisory rating chain, with the added benefit of overseeing SVC operations in their region. With increased authority to supervise and oversee the work of all SVCs in their region, RMs could help resolve these recurring issues by monitoring work performance, balancing workloads, managing transitions, and correcting deficiencies.[144] SVCs and their clients would benefit from the greater involvement of RMs serving as supervisors. As the middle link in an independent Army SVC rating chain, RMs would also alleviate any concerns about an SVC's independence and zealous advocacy on behalf of their clients, regardless of the local command's interests.

C. Recommendation

Recommendation 2: The Army should establish an independent supervisory rating structure for SVCs outside of the OSJA and local command.

The Army SVC Program exists to provide legal advice, support, and advocacy for sexual assault victims and other victims of crime. Statutory authority requires all Army SVCs to form attorney-client relationships with the victims they represent.[145] SVCs are therefore bound by all provisions of their state bar and Army ethical standards that address competence, diligence, client confidentiality, conflicts of interest, and other duties to their clients.[146] These include the obligation to provide zealous advocacy for their clients' stated interests and adherence to the idea that loyalty and independent judgment are essential elements in a lawyer's relationship with their client.[147] Army regulations specifically direct SVCs to competently represent their clients throughout the military justice process and to advocate for their clients' stated interests, even when those interests do not align with the government's; they inform each SVC that their primary duty as an Army lawyer is to their client.[148]

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[144] *See* Army SVC HANDBOOK, *supra* note 103, at chap. 1-3c (limiting Army SVC RM authority to the following: supervising and rating SVCs who are co-located with them, with the SVC's permission (while the RM remains in the rating chain of the SJA); detailing local or outside clients to SVCs within their region; providing technical advice and mentorship to SVCs in their region; planning and executing annual training for SVCs in their region; serving as expert facilitators in SVC certification training; collecting statistical data about SVC representation and providing that to the SVC Program Office; addressing professional responsibility complaints made by or against SVCs; forwarding requests for exception of client eligibility to the SVC Program Office; assisting SVCs in filing appellate writs; recommending statutory or regulatory change to the SVC Program Office that would improve the SVC program; assisting SJAs to nominate judge advocates to become SVCs; and moderating disagreements or disputes between SVCs and local command or legal personnel).

[145] 10 U.S.C. § 1044e, *available* at Appendix G.

[146] Army Response to RFI 1, ¶3 at Appendix H; *see also* Army Regulation 27-26, *Rules of Professional Conduct for Lawyers* 15 (June 28, 2018) [AR 27–26] (The comment to Rule 1.3, Diligence, explains that "a lawyer should also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.").

[147] *Id*.

[148] Army SVC HANDBOOK, *supra* note 103, at chap. 1.

Victims of sexual assault or domestic violence may have individual interests that are in conflict with the interests of the commander, the SJA, and the members of the prosecution team, who also work for and receive their OER ratings from the SJA.[149] For example, when a victim is subjected to unfair, arbitrary, abusive, or illegal actions by their command, their SVC must zealously advocate on their behalf against the command's actions.

The Army rating structure creates an inherent conflict, because at times SVCs must advocate zealously for their clients against the position of their professional supervisor and rater, whose evaluation and commentary on their work performance has a direct and consequential impact on their future professional progress.[150] This inherent conflict created by the Army's rating structure can limit an Army SVC's independence and effective advocacy. Even when Army SVCs do not receive overt pressure in the form of intimidation or threats from their professional raters, they still often feel the need to adjust their behavior to adhere to the philosophy and interests of those who rate their performance.

To avoid this conflict, the staff recommends that Army SVCs have an independent rating chain. SVCs should be rated by supervisors within the SVC program who can better understand their responsibilities and more accurately rate them on their job performance. The SVC RMs are better positioned to know if SVCs are not performing to standards for their clients and to hold them accountable. Establishing Army SVC RMs as the immediate raters for all SVC in their regions, with the Army SVC Program Manager serving as the senior rater, will ensure that the SVCs are completely focused on the welfare of their clients.

None of the advantages of the current system cited by the Army—including access to legal assistance services for victims and more support and resources for SVCs—actually require SVCs to be supervised or rated locally within the OSJA. As the other Services' SVCs/VLCs demonstrate, an independent rating chain does not prevent SVCs/VLCs from being a part of the legal community where they are assigned. SVCs/VLCs from other Services commented that they have good working relationships with local legal offices and are integrated into them for social functions, training, and administrative matters. Similarly, Army SVCs with independent supervisory and rating chains who are co-located with the OSJA still could and should be included within that legal community, participate in OSJA physical and professional development training, reach out to OSJA personnel for advice on non-confidential matters, and work closely with the local legal office on all client matters.[151] SJAs should still mentor and support co-located SVCs, even if they do not supervise or rate them.

[149] For example, victims may be pressured to provide evidence; participate in meetings, interviews, or proceedings; or respond to allegations of collateral misconduct.

[150] There are limits to this requirement; SVCs are not required to participate in actions that are illegal or unethical.

[151] One Army SVC commented that serving in the legal assistance office creates unnecessary conflicts with potential clients since a conflict within the legal assistance office was imputed to the SVC as well.

V. Additional Recommendations

While studying, evaluating, and analyzing the Services' SVC/VLC programs and listening to concerns raised by current and former SVCs/VLCs, by victims represented by SVCs/VLCs, by program managers, and by civilian experts who regularly work with SVCs/VLCs, the staff noted other steps that should be taken to support the SVC/VLC programs. These additional recommendations merit further consideration and potential study by the Services or DoD.

Recommendation 3: The Army should improve its process for vetting SVCs and require that they have more experience, and consider making SVC assignments part of a military justice litigation track.

Army SJAs must analyze the background of judge advocates they nominate to be SVCs to ensure they have the appropriate experience, maturity, and judgment to be effective advocates for their clients. Some judge advocates selected to be SVCs are still in the Judge Advocate Officer Basic Course, and others are in their first assignment, often as a legal assistance counsel. There is no requirement for Army SJAs to interview prospective candidates to be SVCs, or for the Program Managers' Office to do so.

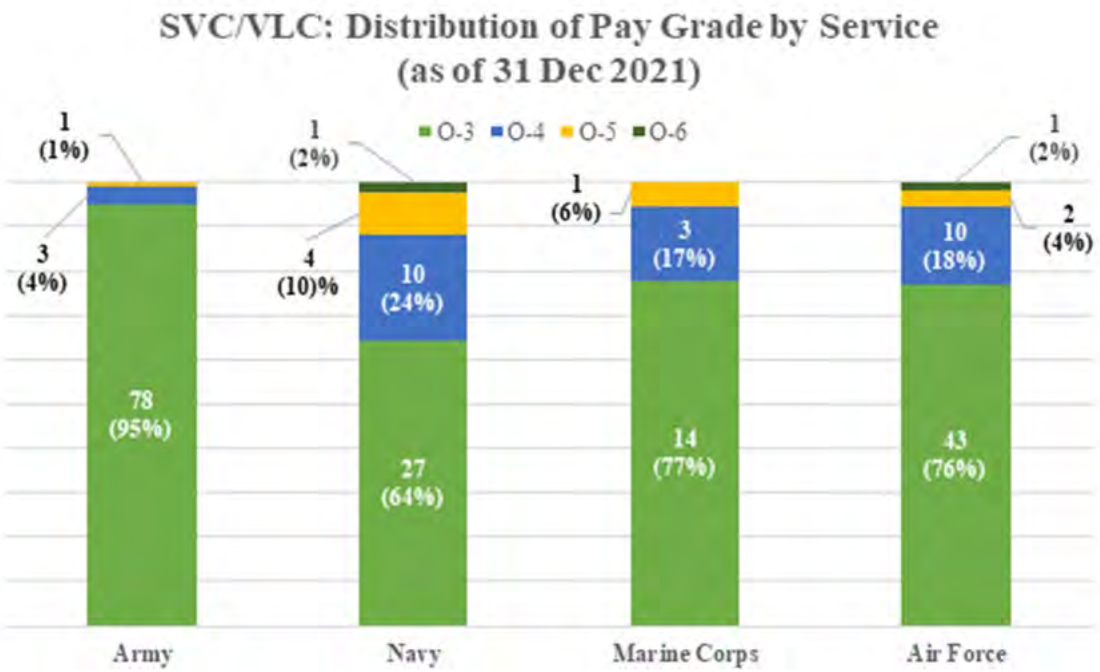
Like judge advocates in legal assistance positions, many Army SVCs have little or no military justice experience prior to their SVC assignment.[152] The SVCs interviewed for this report noted the difficultly for SVCs to be effective or oppose the government or defense when they lack experience. It can be a challenge for SVCs to guide their clients through the military justice process when they do not have any military justice experience.

As part of a move to an independent rating structure for SVCs, the Army should consider having its SVC Program Office interview, vet, and assess SVC applications to select the best candidates. In this process, the Army should emphasize the selection of more experienced judge advocates for SVC positions, perhaps as part of a military justice career track program. Ideally, judge advocates should be required to express an interest in an SVC assignment and apply for it, not be selected or directed to serve. Categorizing the SVC/VLC billet as litigation experience and as part of a military justice litigation track (as the Navy has done) makes it a more desirable billet to attract judge advocates who want the challenge and experience of litigation work, are likely to thrive in the billet, and have the skills to provide high-quality representation in a longer tour.

The other Services employ stricter selection criteria for new SVCs/VLCs. Navy VLCs are never first tour and almost never second tour judge advocates. The general rule is that a Navy VLC must be in their third or fourth tour with at least four to five years of experience that includes some litigation. The Navy VLC Program carefully vets all candidates for experience, demeanor, judgment, and emotional skills. Candidates requesting VLC billets undergo a four-step interview process, and not all are selected. Likewise, the Air Force judge advocates interested in a VC assignment submit an application to the Air Force Professional Development Director for evaluation. Applicants must have a minimum of two prior assignments before consideration. The Marine Corps requires at least six months' experience as a trial counsel before an advocate becomes a VLC, with limited and rare exceptions.

[152] *See* Army SVC comments on SVC experience at Appendix J.11.

The data graphic included below denotes the low number of more senior judge advocates in SVC/VLC positions, particularly in the Army where there are very few SVCs above the rank of CPT (O-3). The Army selects some SVCs to serve in their initial assignment directly from their officer basic course. Many other Army SVCs are initially assigned as legal assistance counsel followed immediately by an assignment as an SVC.



Recommendation 4: The Army should eliminate the use of part-time SVCs, except in rare circumstances or in cases of operational necessity.

The Army states that one advantage of locally supervised and rated SVCs is that the SJA can employ some judge advocates in their office as part-time SVCs. These judge advocates, whose primary duty is unrelated to military justice, provide SVC services on top of their regular work.

While assigning part-time SVCs may offer flexibility to meet fluctuations in client demand, this approach may create additional problems. Part-time SVC may exacerbate the problem of clients who have multiple SVCs represent them and they are more focused on their primary job than on their SVC work. Units moving overseas for short-term deployments must have an SVC; however, that position is often filled by a judge advocate who has another primary duty and typically lacks experience, requiring complicated cases to be sent to the nearest full-time SVC.

Part-time SVCs should be employed rarely and only when operational needs require it. Judge advocates serving as part-time SVC should have the appropriate military justice background, experience, and personality traits required to provide independent and zealous representation in their clients' interests. They should express an interest in the position and be vetted within the Army SVC Program Office. The Army should move away from reliance on part-time SVCs who serve as gap fillers or who may give lower priority to their SVC work. Representation gaps should be handled by SVC Regional Managers who manage the SVC services in their region.

Recommendation 5: The Services should promote better coordination between trial counsel and SVCs/VLCs.

Some SVCs/VLCs believe that the Services' SVC/VLC programs would benefit from policies that promote more communication and better working relationships between SVCs/VLCs and trial counsel. SVCs/VLCs complained about trial counsel who would not share information about actions imposed on the accused or waiting weeks for an update on a case. Army SVCs experienced difficulty getting case files and information from the Army Criminal Investigation Command (CID), the Army's military criminal investigative organization. When the prosecution team is not forthcoming with information, SVCs/VLCs cannot update their clients. This lag in information frustrates victims and unnecessarily hampers their SVC/VLC representation.

First and foremost, victims want the misconduct to end and most never want to see the offender again. For a variety of reasons, many do not want to go through a court-martial at all. All victims want transparency concerning the outcome of their complaint. Closer communication between SVCs/VLCs and trial counsel will enhance resolution of many complaints, especially when the victim does not want to go to court-martial, including the possibility of alternate disposition, when appropriate. An Air Force VC cited several recent cases in which victims who were reluctant to go to trial resolved their complaints through restorative justice measures. A system that encourages better coordination and communication between the SVC/VLC and the prosecution team will enhance the process.

Recommendation 6: The Services should expand the role of SVCs/VLCs beyond court-martial proceedings to include advocacy during administrative proceedings.

SVCs/VLCs expressed a concern over the current policies and regulations that affect victims' rights and representation at administrative hearings. Because many cases are resolved administratively, the SVC/VLC should have more authority to represent clients in administrative processes. For example, SVCs/VLCs believe they should be able to pursue Veterans Affairs benefits for their clients, receive documentation or transcripts from administrative separation boards, and fully advise and represent clients about their involvement in administrative investigations. This expanded scope of representation will benefit victims and provide SVCs/VLCs additional litigation experience to enhance the position's credibility among military justice practitioners.

Recommendation 7: SVC/VLC programs must develop better case management systems.

SVCs/VLCs commented on the challenges created by the absence of a consolidated case management system to help them manage their caseloads. A Navy VLC noted that the five different regions have five different systems in place, none of which is optimal. A Marine VLC noted that Wolverine, an interim case management system developed by the Marine Corps and Navy to track courts-martial information, is useful for conflict checks and assigning counsel, but not managing cases. These VLCs and others have improvised and created their own trackers. A consolidated tracking system would help SVCs/VLCs maintain regular communication with their clients and facilitate the efficient transfer of representation to new counsel when necessary.

Recommendation 8: SVC/VLC programs should include civilian paralegal support.

Recent legislation specifically authorizes the Services to hire civilians to support SVCs/VLCs.[153] Many SVCs/VLCs said an experienced civilian paralegal could be an invaluable help,[154] providing continuity of communications when victims transfer from one SVC/VLC to another; providing case updates; assisting with administrative work and reporting requirements; and serving as a local source of knowledge for victim resources and services.

Recommendation 9: The Services should provide more resources to ensure that SVCs/VLCs have ready access to behavioral health care.

As tour lengths increase, ready access to behavioral health services for SVCs/VLCs is critical. Vicarious trauma is detrimental to the attorney, their clients, and the military justice system. The Services must continue to train SVCs/VLCs to prevent, recognize, and deal with burnout, compassion fatigue, and vicarious trauma, and they must normalize the use of behavioral health resources. More resources are needed to avoid months-long waits for behavioral health appointments, and to ensure the availability of specialized care and support for SVC/VLC.

Judge advocates with prior military justice or criminal justice experience are better prepared for the emotional and psychological aspects of the SVC/VLC's job and tend to be more effective advocates for their clients. Ideally, SVCs/VLCs are closely coordinated with victim assistance services, sexual assault prevention personnel, and legal assistance. Social and emotional support for victims and continuity of care are critical throughout the military justice process, so that SVCs/VLCs can focus on legal support and not social work.

Recommendation 10: The Services should identify and train SVC/VLC candidates early to ensure that their transitions with departing SVCs/VLCs are well coordinated.

Turnover of military personnel, regardless of the billet, is inevitable. To decrease victims' anxiety about changing SVC/VLC, the Services should require coordinated turnover plans between outgoing and incoming SVCs/VLCs and the client, including early notice to the client and communication between both SVCs/VLCs and the client during the transition process.

The Services should identify – and train – SVC/VLC candidates before they begin their SVC/VLC service.[155] This will decrease the use of temporary SVCs/VLCs as placeholders and minimize gaps in representation. When faced with changing SVC/VLC, victims should have the option to: (1) retain the departing SVC/VLC, as long as the representation can be conducted remotely and there is no conflict of interest; (2) keep their SVC/VLC and continue the representation remotely when the victim transfers; or (3) rely on dual representation by SVCs/VLCs at the losing and gaining locations.

[153] National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, 135 Stat. 1541 § 546 (2021).

[154] *See* examples of Army SVC comments at Appendix J.10.

[155] Some Service members reported to the billet, only to leave a month later for the SVC/VLC certification course, effectively shortening their time to represent clients and leaving clients without representation for a month or more.

I. Creation of Special Trial Counsel (FY 2022 NDAA)

SEC. 531. SPECIAL TRIAL COUNSEL

(a) IN GENERAL.—Subchapter V of chapter 47 of title 10, United States Code, is amended by inserting after section 824 (article 24 of the Uniform Code of Military Justice) the following new section:

''§ 824a. Art 24a. Special trial counsel

''(a) DETAIL OF SPECIAL TRIAL COUNSEL.—Each Secretary concerned shall promulgate regulations for the detail of commissioned officers to serve as special trial counsel.

''(b) QUALIFICATIONS.—A special trial counsel shall be a commissioned officer who—

''(1)(A) is a member of the bar of a Federal court or a member of the bar of the highest court of a State; and

''(B) is certified to be qualified, by reason of education, training, experience, and temperament, for duty as a special trial counsel by—

''(i) the Judge Advocate General of the armed force of which the officer is a member; or

''(ii) in the case of the Marine Corps, the Staff Judge Advocate to the Commandant of the Marine Corps; and ''(2) in the case of a lead special trial counsel appointed pursuant to section 1044f(a)(2) of this title, is in a grade no lower than O–7.

''(c) DUTIES AND AUTHORITIES.—

''(1) IN GENERAL.—Special trial counsel shall carry out the duties described in this chapter and any other duties prescribed by the Secretary concerned, by regulation.

''(2) DETERMINATION OF COVERED OFFENSE; RELATED CHARGES.—

''(A) AUTHORITY.—A special trial counsel shall have exclusive authority to determine if a reported offense is a covered offense and shall exercise authority over any such offense in accordance with this chapter. Any determination to prefer or refer charges shall not act to disqualify the special trial counsel as an accuser.

''(B) KNOWN AND RELATED OFFENSES.—If a special trial counsel determines that a reported offense is a covered offense, the special trial counsel may also exercise authority over any offense that the special trial counsel determines to be related to the covered offense and any other offense alleged to have been committed by a person alleged to have committed the covered offense.

''(3) DISMISSAL; REFERRAL; PLEA BARGAINS.—Subject to paragraph (4), with respect to charges and specifications alleging any offense over which a special trial counsel exercises authority, a special trial counsel shall have exclusive authority to, in accordance with this chapter—

''(A) on behalf of the Government, withdraw or dismiss the charges and specifications or make a motion to withdraw or dismiss the charges and specifications;

''(B) refer the charges and specifications for trial by a special or general court-martial;

''(C) enter into a plea agreement; and

''(D) determine if an ordered rehearing is impracticable.

''(4) BINDING DETERMINATION.—The determination of a special trial counsel to refer charges and specifications to a court-martial for trial shall be binding on any applicable convening authority for the referral of such charges and specifications.

''(5) DEFERRAL TO COMMANDER OR CONVENING AUTHORITY.— If a special trial counsel exercises authority over an offense and elects not to prefer charges and specifications for such offense or, with respect to charges and specifications for such offense preferred by a person other than a special trial counsel, elects not to refer such charges and specifications, a commander or convening authority may exercise any of the authorities of such commander or convening authority under this chapter with respect to such offense, except that such commander or convening authority may not refer charges and specifications for a covered offense for trial by special or general court-martial.''.

(b) TABLE OF SECTIONS AMENDMENT.—The table of sections at the beginning of subchapter V of chapter 47 of title 10, United States Code (the Uniform Code of Military Justice), is amended by inserting after the item relating to section 824 (article 24) the following new item:

‘‘824a. Art 24a. Special trial counsel.’’

(c) REPORT REQUIRED.—

(1) IN GENERAL.—Not later than one year after the date of the enactment of this Act, each Secretary concerned shall submit to the Committees on Armed Services of the Senate and the House of Representatives a report setting forth the plan of the Secretary for detailing officers to serve as special trial counsel pursuant to section 824a of title 10, United States Code (article 24a of the Uniform Code of Military Justice) (as added by subsection (a) of this section).

(2) ELEMENTS.—Each report under paragraph (1) shall include the following—

(A) The plan of the Secretary concerned—

(i) for staffing billets for—

(I) special trial counsel who meet the requirements set forth in section 824a of title 10, United States Code (article 24a of the Uniform Code of Military Justice) (as added by subsection (a) of this section); and

(II) defense counsel for cases involving covered offenses; and (ii) for supporting and ensuring the continuing professional development of military justice practitioners.

(B) An estimate of the resources needed to implement such section 824a (article 24a).

(C) An explanation of other staffing required to implement such section 824a (article 24a), including staffing levels required for military judges, military magistrates, military defense attorneys, and paralegals and other support staff.

(D) A description of how the use of special trial counsel will affect the military justice system as a whole.

(E) A description of how the Secretary concerned plans to place appropriate emphasis and value on litigation experience for judge advocates in order to ensure judge advocates are experienced, prepared, and qualified to handle covered offenses, both as special trial counsel and as defense counsel. Such a description shall address promotion considerations and explain how the Secretary concerned plans to instruct promotion boards to value litigation experience.

(F) Any additional resources, authorities, or information that each Secretary concerned deems relevant or important to the implementation of the requirements of this title.

(3) DEFINITIONS.—In this subsection—

(A) The term ‘‘Secretary concerned’’ has the meaning given that term in section 101(a) of title 10, United States Code.

(B) The term ‘‘covered offense’’ has the meaning given that term in section 801(17) of title 10, United States Code (as added by section 533 of this part).

II. Policies of the Special Trial Counsel

SEC. 532. POLICIES WITH RESPECT TO SPECIAL TRIAL COUNSEL.

(a) IN GENERAL.—Chapter 53 of title 10, United States Code, is amended by inserting after section 1044e the following new section:

‘‘§ 1044f. Policies with respect to special trial counsel

‘‘(a) POLICIES REQUIRED.—The Secretary of Defense shall establish policies with respect to the appropriate mechanisms and procedures that the Secretaries of the military departments shall establish relating to the activities of special trial counsel, including expected milestones for such Secretaries to fully implement such mechanisms and procedures. The policies shall—

‘‘(1) provide for the establishment of a dedicated office within each military service from which office the activities of the special trial counsel of the military service concerned shall be supervised and overseen;

‘‘(2) provide for the appointment of one lead special trial counsel, who shall—

‘‘(A) be a judge advocate of that service in a grade no lower than O–7, with significant experience in military justice;

‘‘(B) be responsible for the overall supervision and oversight of the activities of the special trial counsel of that service; and

‘‘(C) report directly to the Secretary concerned, without intervening authority;

‘‘(3) ensure that within each office created pursuant to paragraph (1), the special trial counsel and other personnel assigned or detailed to the office—

''(A) are independent of the military chains of command of both the victims and those accused of covered offenses and any other offenses over which a special trial counsel at any time exercises authority in accordance with section 824a of this title (article 24a); and

''(B) conduct assigned activities free from unlawful or unauthorized influence or coercion;

''(4) provide that special trial counsel shall be well-trained, experienced, highly skilled, and competent in handling cases involving covered offenses; and

''(5) provide that commanders of the victim and the accused in a case involving a covered offense shall have the opportunity to provide input to the special trial counsel regarding case disposition, but that the input is not binding on the special trial counsel.

''(b) UNIFORMITY.—The Secretary of Defense shall ensure that any lack of uniformity in the implementation of policies, mechanisms, and procedures established under subsection (a) does not render unconstitutional any such policy, mechanism, or procedure.

''(c) MILITARY SERVICE DEFINED.—In this section, the term 'military service' means the Army, Navy, Air Force, Marine Corps, and Space Force.''.

(b) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 53 of title 10, United States Code, is amended by inserting after the item relating to section 1044e the following new item:

''1044f. Policies with respect to special trial counsel.''

(c) QUARTERLY BRIEFING.—Beginning not later than 180 days after the date of the enactment of this Act, and at the beginning of each fiscal quarter thereafter until the policies established pursuant to section 1044f(a) of title 10, United States Code (as added by subsection (a)) and the mechanisms and procedures to which they apply are fully implemented and operational, the Secretary of Defense and the Secretaries of the military departments shall jointly provide to the Committee on Armed Services of the Senate and the Committee on Armed Services of the House of Representatives a briefing detailing the actions taken and progress made by the Office of the Secretary of Defense and each of the military departments in meeting the milestones established as required by such section.

III. Definitions

SEC. 533. DEFINITION OF MILITARY MAGISTRATE, COVERED OFFENSE, AND SPECIAL TRIAL COUNSEL.

Section 801 of title 10, United States Code (article 1 of the Uniform Code of Military Justice), is amended—

(1) by inserting after paragraph (10) the following new paragraph:

''(11) The term 'military magistrate' means a commissioned officer certified for duty as a military magistrate in accordance with section 826a of this title (article 26a).''; and

(2) by adding at the end the following new paragraphs: ''(17) The term 'covered offense' means—

''(A) an offense under section 917a (article 117a), section 918 (article 118), section 919 (article 119), section 920 (article 120), section 920b (article 120b), section 920c (article 120c), section 925 (article 125), section 928b (article 128b), section 930 (article 130), section 932 (article 132), or the standalone offense of child pornography punishable under section 934 (article 134) of this title;

''(B) a conspiracy to commit an offense specified in subparagraph (A) as punishable under section 881 of this title (article 81);

''(C) a solicitation to commit an offense specified in subparagraph (A) as punishable under section 882 of this title (article 82); or

''(D) an attempt to commit an offense specified in subparagraph (A), (B), or (C) as punishable under section 880 of this title (article 80).

''(18) The term 'special trial counsel' means a judge advocate detailed as a special trial counsel in accordance with section 824a of this title (article 24a) and includes a judge advocate appointed as a lead special trial counsel pursuant to section 1044f(a)(2) of this title.''.

IV. Convening Courts-Martial

SEC. 534. CLARIFICATION RELATING TO WHO MAY CONVENE COURTS-MARTIAL.

(a) GENERAL COURTS-MARTIAL.—Section 822(b) of title 10, United States Code (article 22(b) of the Uniform Code of Military Justice), is amended—

(1) by striking ''If any'' and inserting ''(1) If any''; and

(2) by adding at the end the following new paragraph:

''(2) A commanding officer shall not be considered an accuser solely due to the role of the commanding officer in convening a general court-martial to which charges and specifications were referred by a special trial counsel in accordance with this chapter.''

(b) SPECIAL COURTS-MARTIAL.—Section 823(b) of title 10, United States Code (article 23(b) of the Uniform Code of Military Justice), is amended—

(1) by striking ''If any'' and inserting ''(1) If any''; and

(2) by adding at the end the following new paragraph:

''(2) A commanding officer shall not be considered an accuser solely due to the role of the commanding officer in convening a special court-martial to which charges and specifications were referred by a special trial counsel in accordance with this chapter.''

V. Detailing

SEC. 535. DETAIL OF TRIAL COUNSEL.

Section 827 of title 10, United States Code (article 27 of the Uniform Code of Military Justice), is amended by adding at the end the following new subsection:

''(e) For each general and special court-martial for which charges and specifications were referred by a special trial counsel—

''(1) a special trial counsel shall be detailed as trial counsel; and

''(2) a special trial counsel may detail other trial counsel as necessary who are judge advocates.''.

VI. Article 32 (Preliminary Hearings)

SEC. 536. PRELIMINARY HEARING.

(a) DETAIL OF HEARING OFFICER; WAIVER.—Subsection (a)(1) of section 832 of title 10, United States Code (article 32 of the Uniform Code of Military Justice), is amended—

(1) in subparagraph (A), by striking ''hearing officer'' and all that follows through the period at the end and inserting ''hearing officer detailed in accordance with subparagraph (C).'';

(2) in subparagraph (B), by striking ''written waiver'' and all that follows through the period at the end and inserting the following: ''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.''; and

(3) by adding at the end the following new subparagraph:

''(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.''.

(b) REPORT OF PRELIMINARY HEARING OFFICER.—Subsection (c) of such section is amended—

(1) in the heading, by inserting ''OR SPECIAL TRIAL COUNSEL'' after ''CONVENING AUTHORITY''; and

(2) in the matter preceding paragraph (1) by striking ''to the convening authority'' and inserting ''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,''

VII. Pre-Trial Advice

SEC. 537. ADVICE TO CONVENING AUTHORITY BEFORE REFERRAL FOR TRIAL.

Section 834 of title 10, United States Code (article 34 of the Uniform Code of Military Justice), is amended—

(1) in subsection (a)(1), by striking ''Before referral'' and inserting ''Subject to subsection (c), before referral''

(2) in subsection (b), by striking ''Before referral'' and inserting ''Subject to subsection (c), before referral'';

(3) by redesignating subsections (c) and (d) as subsections (d) and (e) respectively;

(4) by inserting after subsection (b) the following new subsection:

''(c) COVERED OFFENSES.—A referral to a general or special court-martial for trial of charges and specifications over which a special trial counsel exercises authority may only be made—

''(1) by a special trial counsel, subject to a special trial counsel's written determination accompanying the referral that—

''(A) each specification under a charge alleges an offense under this chapter;

''(B) there is probable cause to believe that the accused committed the offense charged; and

''(C) a court-martial would have jurisdiction over the accused and the offense; or

''(2) in the case of charges and specifications that do not allege a covered offense and as to which a special trial counsel declines to prefer or, in the case of charges and specifications preferred by a person other than a special trial counsel, refer charges, by the convening authority in accordance with this section.''; and

(5) in subsection (e), as so redesignated, by inserting ''or, with respect to charges and specifications over which a special trial counsel exercises authority in accordance with section 824a of this title (article 24a), a special trial counsel,'' after ''convening authority''

VIII. Former Jeopardy

SEC. 538. FORMER JEOPARDY.

Section 844(c) of title 10, United States Code (article 44(c) of the Uniform Code of Military Justice), is amended by inserting ''or the special trial counsel'' after ''the convening authority'' each place it appears.

IX. Plea Agreements

SEC. 539. PLEA AGREEMENTS.

(a) AUTHORITY TO ENTER INTO AGREEMENTS.—Subsection (a) of section 853a of title 10, United States Code (article 53a of the Uniform Code of Military Justice), is amended—

(1) in paragraph (1), by striking ''At any time'' and inserting ''Subject to paragraph (3), at any time''; and

(2) by adding at the end the following new paragraph:

''(3) With respect to charges and specifications over which a special trial counsel exercises authority pursuant to section 824a of this title (article 24a), a plea agreement under this section may only be entered into between a special trial counsel and the accused. Such agreement shall be subject to the same limitations and conditions applicable to other plea agreements under this section (article).''

(b) BINDING EFFECT.—Subsection (d) of such section (article) is amended by inserting after ''parties'' the following: ''(including the convening authority and the special trial counsel in the case of a plea agreement entered into under subsection (a)(3))''.

SEC. 539A. DETERMINATIONS OF IMPRACTICABILITY OF REHEARING.

(a) TRANSMITTAL AND REVIEW OF RECORDS.—Section 865(e)(3)(B) of title 10, United States Code (article 65(e)(3)(B) of the Uniform Code of Military Justice), is amended—

(1) by striking ''IMPRACTICAL.—If the Judge Advocate General'' and inserting the following: ''IMPRACTICABLE.—''

''(i) IN GENERAL.—Subject to clause (ii), if the Judge Advocate General'';

(2) by striking ''impractical'' and inserting ''impracticable''; and

(3) by adding at the end the following new clause:

''(ii) CASES REFERRED BY SPECIAL TRIAL COUNSEL .— If a case was referred to trial by a special trial counsel, a special trial counsel shall determine if a rehearing is impracticable and shall dismiss the charges if the special trial counsel so determines.''.

(b) COURTS OF CRIMINAL APPEALS.—Section 866(f)(1)(C) of title 10, United States Code (article 66(f)(1)(C) of the Uniform Code of Military Justice), is amended—

(1) by striking ''IMPRACTICABLE.—If the Court of Criminal Appeals'' and inserting the following: ''IMPRACTICABLE.—

''(i) IN GENERAL.—Subject to clause (ii), if the Court of Criminal Appeals''; and

(2) by adding at the end the following new clause:

''(ii) CASES REFERRED BY SPECIAL TRIAL COUNSEL.— If a case was referred to trial by a special trial counsel, a special trial counsel shall determine if a rehearing is impracticable and shall dismiss the charges if the special trial counsel so determines.''.

(c) REVIEW BY THE COURT OF APPEALS FOR THE ARMED FORCES.—Section 867(e) of title 10, United States Code (article 67(e) of the Uniform Code of Military Justice), is amended by adding at the end the following new sentence: ''Notwithstanding the preceding sentence, if a case was referred to trial by a special trial counsel, a special trial counsel shall determine if a rehearing is impracticable and shall dismiss the charges if the special trial counsel so determines.''.

(d) REVIEW BY JUDGE ADVOCATE GENERAL.—Section 869(c)(1)(D) of title 10, Untied States Code (article 69(c)(1)(D) of the Uniform Code of Military Justice), is amended—

(1) by striking ''If the Judge Advocate General'' and inserting ''(i) Subject to clause (ii), if the Judge Advocate General'';

(2) by striking ''impractical'' and inserting ''impracticable''; and

(3) by adding at the end the following new clause:

''(ii) If a case was referred to trial by a special trial counsel, a special trial counsel shall determine if a rehearing is impracticable and shall dismiss the charges if the special trial counsel so determines.''.

SEC. 539B. APPLICABILITY TO THE UNITED STATES COAST GUARD.

The Secretary of Defense shall consult and enter into an agreement with the Secretary of Homeland Security to apply the provisions of this part and the amendments made by this part, and the policies, mechanisms, and processes established pursuant to such provisions, to the United States Coast Guard when it is operating as a service in the Department of Homeland Security.

SEC. 539C. EFFECTIVE DATE.

(a) IN GENERAL.—Except as provided in subsection (b), the amendments made by this part shall take effect on the date that is two years after the date of the enactment of this Act and shall apply with respect to offenses that occur after that date.

(b) REGULATIONS.—

(1) REQUIREMENT.—The President shall prescribe regulations to carry out this part not later than two years after the date of the enactment of this Act.

(2) IMPACT OF DELAY OF ISSUANCE.—If the President does not prescribe the regulations necessary to carry out this part before the date that is two years after the date of the enactment of this Act, the amendments made by this part shall take effect on the date on which such regulations are prescribed and shall apply with respect to offenses that occur on or after that date.

DAC-IPAD Staff Summary of Interviews with Federal and State Prosecutors

From May 27, 2020 through July 7, 2020, members of the DAC-IPAD Policy Subcommittee and staff conducted telephonic interviews with federal and state prosecutors from 10 jurisdictions. The primary purpose of these interviews is to serve as comparative information for the DAC-IPAD in evaluating pretrial processes in the military judicial system—such as the Article 32, UCMJ, preliminary hearings. These responses, summarized by the DAC-IPAD Staff, may be helpful to consider as part of an evaluation of the prosecutorial structure and standards for the new Services' Offices of Special Trial Counsel.

Each interview was about one hour long with questions focused on sexual assault investigations, prosecutors' charging decisions and standards, grand jury or preliminary hearing procedures, and victim and witness participation in the pretrial process. Prior to conducting these interviews, the DAC-IPAD staff drafted a series of questions on these topics, which was approved by the Policy Subcommittee. The staff asked each interviewee these questions, with some variations, and participating Subcommittee members asked additional questions.

These summarized responses reflect the experience and opinion of individual prosecutors. Names of prosecutors interviewed and specific locations are not included in these summaries.

Following is the summarized interview information, categorized by topic.

1. Investigators turning over the case to the prosecutor

U.S. Attorney's Office Prosecutors

- All federal investigative agencies are required to bring criminal investigations to the U.S. Attorney's Office if a federal crime is involved; they can't dispose of a case on their own. Sometimes investigators come to the prosecutor asking for a prosecution declination decision because they know there is nothing to the case.
- Investigators will typically bring a case directly to an assistant U.S. Attorney, while in other federal jurisdictions, the investigator may bring the case to a supervisory attorney who will assign it to an assistant U.S. Attorney. In the office's white collar division, the investigator brings the case to the prosecutorial supervisor who then distributes the cases among the attorneys in that section.
- In some instances, the case is largely complete and in other cases the prosecutor may work with the investigator during the course of the investigation. For child exploitation cases, the prosecutor usually gets involved early in the investigative process, but for fraud cases, the investigation is usually further along.

Second U.S. Attorney's Office Prosecutors

- In some locations, federal prosecutors work with various investigative agencies. This is true with offenses that occur on some Native American Reservations and military installations (special maritime and territorial jurisdiction of the Unites States). One prosecutor interviewed never received a sexual assault case from other federal lands in their jurisdiction, other than reservations and a few from military installations.
- Typically, the FBI brings the investigative file for the prosecutor to review and the prosecutor often sends the FBI agent out to conduct additional investigation. A prosecutor interviewed prefers that a sexual assault victim give only one statement to avoid inconsistencies so they rarely will ask an FBI agent to re-interview the victim, unless there is something big missing.

County District Attorney's Office Prosecutors

- Local law enforcement agencies bring sexual offense cases to the DA's office even if they know there is not sufficient evidence. A prosecutor interviewed wasn't sure if they bring all cases to their office and noted there are many cases that investigators are not able to follow up on due to staffing and resources. Each investigator has about 100 to 150 cases assigned to them.
- When an investigator brings a sexual offense case to their office, it will be assigned to an attorney in the sexual assault prosecution unit. Even if the case appears to be "he said she said," the prosecutor will often suggest additional investigative steps.
- Once the law enforcement investigation has been turned over to the DA's office, they have a staff of 70 investigators who can conduct follow-up investigative steps.

Second County District Attorney's Office Prosecutors

- When a law enforcement investigator first presents a case to prosecutors, their first question is whether the subject has been arrested. If yes, they have 48 hours to get a probable cause determination. If no, they might ask for additional investigative work but will also consider exigencies like danger to the community and likelihood the subject will flee.
- In their jurisdiction, investigators are not required to bring all cases to a prosecutor, but in practice the district attorney is the one deciding to decline or charge a case. In their County, the special victim prosecutors know about every sexual assault investigation and they are a resource for the investigator. However, if a trooper is the first one on the scene of a sexual assault and doesn't have proper training, that trooper may not bring the case to a prosecutor.
- The investigation is largely complete when it is brought to the prosecutor, but it's also typical for the prosecutor to have been involved in the investigation in order to get medical records, search warrants, or just consult with the investigator along the way.

Third County District Attorney's Office Prosecutors

- Local rules require the District Attorney's office to approve all sex offense complaints before they are filed. The police are not required to consult with the DA's office before closing a case but they are in the habit of consulting with them. Police often send them cases because they want the prosecutor's stamp of approval to close it out. Close out means decline to forward or prosecute.
- In their Prosecution unit, they usually get involved with a case pre-arrest. The police usually contact the District Attorney's Office early in the investigation, depending on the experience of the police officer. The detective will contact the on-call ADA directly and they will assign an ADA in their office. The attorney will work with the police on the investigation—advising on witnesses or forensic testing.

Fourth County District Attorney's Office Prosecutors

- In their jurisdiction, police officers can decline to bring a case to the prosecutor, so prosecutors do not see all cases. Additionally, in their jurisdiction, the police and the city prosecutor can decide not to send every case to the County prosecutor's office. But different administrations can take a different approach, and some insist on seeing every case.
- A problem they sometimes have is that investigators may do only enough to meet the probable cause standard. In order to gather more evidence, their office sometimes declines prosecution of the case in writing to the investigators and requests additional investigation.

Fifth County District Attorney's Office Prosecutors

- In their County the Special Victim Unit (SVU) serves as a clearinghouse for all sexual assault reports, so the SVU prosecutors have to be notified of every report. They have more than 20 local police departments, and all of them have to notify the county prosecutor's office of the sexual assaults so that prosecutors know what the police are seeing. Practically speaking, the prosecutors cannot run every investigation out there, but at least they know what investigations are pending.
- There are some smaller city jurisdictions that do not have the resources or experiences to really know how to handle sexual assault cases well, but the county prosecutor's office can marshal resources for cases as needed. In spite of this policy, there are some cases in where city police departments are resistant to the county's involvement. City police could file a "captain's report" as a way to get around counting or calling something an official report–but that's a rare occurrence now.

Sixth County District Attorney's Office Prosecutors

- The police in their jurisdiction have the authority to dispose of a sexual assault case without arrest and without a prosecutor's approval. When police decide to close a case without making an arrest, they reach out to the victim and explain, particularly in intoxication cases, that what occurred does not constitute a crime, and then they close the file.

Seventh County District Attorney's Office Prosecutors

- Cases do not have to go to a prosecutor before closure without arrest. Most law enforcement agencies within the county have a special victim's unit (SVU), and if the SVU detectives decide there is no probable cause to issue an arrest warrant, then they can close the case. In many cases, if the detectives have questions about the case or about a lack of evidence, the detectives will consult prosecutors.
- Pre-arrest, the prosecutor evaluates the case to see if further investigation is needed before obtaining an arrest warrant. The county DA's office has its own investigative unit, comprising 43 certified officers with arrest powers, so the prosecutors have the resources to direct their own investigation as needed. The prosecutor being interviewed caveated the discussion by noting that not every county in their state has the same level of resources as the prosecutor's—the county is well-funded and encompasses a small portion of a major metropolitan area. By comparison, other jurisdictions in the state are going to rely more heavily on the local detective or investigator to do all of the investigative work to get ready for trial.

2. Declining prosecution

U.S. Attorney's Office Prosecutors

- When the investigator brings the prosecutor into the case, they take one of the following actions:
  - Request further investigation
  - Decline prosecution and refer to another jurisdiction
  - Decline prosecution and refer for pretrial diversion
  - Decline prosecution with no further action
  - Accept the case for prosecution
- The prosecutor is not required to get supervisory approval to decline prosecution on a case in their jurisdiction, but sometimes they do to get "buy in" on a difficult case. In another prosecutor's section, the attorneys need approval of the supervisor and criminal chief for prosecution declinations.
- The level of formality for declining a prosecution depends on the case. A prosecutor can decline prosecution on a less serious case through an email, but for higher profile cases, the declination decision may go up to the U.S. Attorney and would involve more formal documentation. Based on the experience of a prosecutor interviewed with both entities, it is far less rigorous to decline a case at the U.S. Attorney's Office than to decline a case in the Navy.

County District Attorney's Office Prosecutors

- Only an attorney in their office's specialized sexual assault unit can decline a sexual assault case. Previously, investigators would sometimes take cases to other assistant DAs who did not have training in sexual assault cases, who would decline the cases. A prosecutor interviewed said they spot check cases to make sure cases aren't being declined inappropriately. If they encounter an attorney with outdated or inappropriate opinions on the issue of consent in sexual assault cases, they will usually move that person out of the unit.
- Common reasons for declining a case are insufficient evidence and when the victim declines to cooperate. They memorialize the declination decisions in their electronic case management system. In high profile cases, they may memorialize in writing the decision not to prosecute. They don't usually like to do this because it locks them into a position that may change as new evidence comes to light or additional victims are discovered.

Second County District Attorney's Office Prosecutors

- They don't have a written procedure for declining to charge a case. They make the decision not to charge a case at a higher level than the junior prosecutors. If they decide not to charge a case, the prosecutor will sit down with the victim and explain their reasons, usually with the police officer assigned to the case in the meeting. They do not reduce the declinations to writing.

Third County District Attorney's Office Prosecutors

- Once a case is brought to the prosecutor's office, the bureau chiefs or deputies—as opposed to line attorneys—have the authority to decide not to go forward. For cases that come to the SVU pre-arrest, or cases that involve an arrest by non-SVU police out on patrol, case closure decisions have to be approved by either the bureau chief or the deputy, who memorializes the decision in a detailed memorandum. The level of approval required to decline to prosecute a case depends on the complexity of the issues involved. Regardless of who makes that substantive decision, the bureau chief has to approve of every case-closing memorandum.
- Victims do not receive that memorandum. However, in every case, the victim receives an in-person explanation of the decision not to go forward. In situations where the case is closed because a victim is not responsive, the DA's office sends a letter to the victim informing him or her that they are closing the case.

Fourth County District Attorney's Office Prosecutors

- A prosecutor in the office cannot decline to present a case to the grand jury without speaking with their supervisor, and usually the director of the SVU is involved in the decision. Supervisor approval is required for case closures, and any prosecutor would need approval from the deputy chief of SVU to decline a sexual assault case. Some cases receive higher-level attention, including from the District Attorney —that occurs when a case receives a lot of media attention or it's anticipated that there will be blowback in the community in response to a declination. There is not one strict procedure in place, but in practice there are mechanisms to ensure the declination is appropriate.

3. The decision to initiate prosecution

U.S. Attorney's Office Prosecutors

- All U.S. Attorney offices are required to use the DoJ Justice Manual when initiating prosecution, but each U.S. Attorney's Office also has its own procedures and prosecution manual.
- To charge a case, there must be probable cause—this is a bright line test and the Justice Manual, Section 9-27.200 discusses this. Just because there is probable cause, that doesn't mean the offense should be prosecuted. *[Note: The Department of Justice's Justice Manual, Section 9-27.220: Grounds for Commencing or Declining Prosecution states: 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 (1) the prosecution would serve no substantial federal interest; (2) the person is subject to effective prosecution in another jurisdiction; or (3) there exists an adequate non-criminal alternative to prosecution.]*
- The standard of proof for grand jury indictment is probable cause, but the Justice Manual provides the standard for prosecution, which is if admissible evidence is sufficient to obtain and sustain a conviction, there is a substantial federal interest, and they have considered alternatives. The prosecutor interviewed said they would not go forward with a complaint if they didn't think they could obtain a conviction.
- A prosecutor interviewed said they weigh the complainant's credibility in a probable cause determination, though it is not listed in the Justice Manual principles of prosecution guidelines. The prosecutor stated that in cases that rely on witness testimony, credibility is one of the most important factors. Another prosecutor from that office also stated that victim credibility is very important in cases in which victim testimony is the primary evidence. He stated that victim credibility is a factor they weigh heavily when deciding whether to take a case to the grand jury.

Second U.S. Attorney's Office Prosecutors

- When deciding whether to charge, they do a jurisdictional analysis and ask whether there is a reasonable likelihood of successful prosecution—i.e., if they tried the case 10 times, how many juries would convict? A prosecutor interviewed stated in making this decision, it is important to watch the video recording of the victim's statement and ask whether a reasonable juror would believe this person.
- Another prosecutor interviewed noted that, as a more seasoned prosecutor, they would often take harder cases than they would have as a more junior and less-confident prosecutor. In some cases, they personally interviewed every victim because often in smaller tribal communities the victim knew of someone else who had been victimized. As a more seasoned prosecutor, they take cases that they would have shied away from earlier in their career. Many of the sexual assault cases they tried involved alcohol-facilitated assault, no forensic exams, and were assembled through "gum shoe" investigating. Two prosecutors agreed that most sexual offense cases involved delayed disclosure.

County District Attorney's Office Prosecutors

- A prosecutor interviewed stated their office uses the state District Attorneys Association standard for charging a subject, which is whether the attorney believes there is sufficient evidence to prove the charge beyond a reasonable doubt. The prosecutor emphasized that if they don't use this standard, they run the risk of putting a case out into the public eye that is not viable and may result in loss of public confidence.
- They always look for corroboration and they test all rape kits to see if there is a serial perpetrator. Only their specialized sexual assault prosecutors make the charging decision in sexual assault cases as they understand the nature of consent. Before this practice was put into place, only 30% of the sexual assault cases brought to them resulted in charges; now 75% result in charges.
- They always take victim and witness credibility into account when charging a case. But it is important for specialists to evaluate victim credibility—the trauma of a sexual assault may result in inconsistencies in a victim's statement, but that should not prevent the case from going forward.

Second County District Attorney's Office Prosecutors

- A prosecutor stated they must have probable cause to charge a case, but do not hold themselves to a beyond a reasonable doubt standard at the charging stage. The prosecutor stated they have lost cases at trial because they were not afraid to charge a case when they felt it was right.
- They don't have written guidance to refer to in making charging decisions, but they look at admissible evidence, the credibility of the victim, protecting the community, and the defendant's criminal history. They also look at who are the witnesses, the investigator, and the judge and whether he has any physical evidence. They also consult the National District Attorneys Association guidance.
- The credibility of the victim is the most, or one of the most, important factors in the decision whether to charge the case, especially since most sexual assault cases don't have physical evidence. If a credibility issue means the case probably can't be proven, then they can't charge the case. The prosecutor will usually meet with the victim for an introduction and to discuss the process and at that point, the prosecutor gets a feel for the victim's credibility. A review of just the paper file is not due diligence.

Third County District Attorney's Office Prosecutors

- They look at a beyond a reasonable doubt standard at charging before the complaint is approved. They try to get all of the information they need before filing the complaint. Corroborating evidence is not required to prove a sexual offense case—the victim's testimony can stand alone, but corroboration is helpful and jurors look for that. Juries want more than the victim's testimony but that doesn't mean they won't go to trial with just the victim's testimony. Sometimes victims are unhappy with a decision not to prosecute and then they review the decision neutrally and try to convey the decision to the victim in person or by phone. They always consider the credibility of the victim in making a charging decision even though the law says that credibility is not an issue at the preliminary hearing.

- In determining whether to charge a subject with a sexual offense, their office relies on the experience of the prosecutor. They try to balance the desire to help people and right wrongs with the knowledge that they can't right every wrong. If the ADA doubts whether a crime occurred, they can't ethically proceed with the case. That is usually not the case. Often the problem is corroboration, but if the prosecutor really believes the victim, the case may go forward if the victim is a strong witness—there is no formula, but you learn to read people. If you believe the victim and think you can get a conviction, you should go forward. They look at whether the complaint has the ring of truth to it as in these cases it is often just the victim's word against the subject's. Prompt reports help make the decision. If not a prompt complaint, that doesn't mean they won't charge the case, but it's a factor. At trial, they can call behavioral experts to explain late reports. The #MeToo movement has resulted in there being more understanding of the trauma of sexual assault.

Fourth County District Attorney Prosecutors

- A prosecutor interviewed from this office stated that to charge a subject, you've got to be likely to prevail at trial or likely to get a plea. While they prefer to have enough evidence to prove guilt beyond a reasonable doubt at the charging stage, there are cases that meet a clear and convincing standard that they charge even though they are not sure they can win those cases at trial. The standard should not be probable cause.
- They have developed a sense of how many felony cases they should be taking to trial—about 70%. If the prosecution rate dips to 62%, that's too low, and indicative of a problem with either incomplete investigations or prosecutors not challenging themselves to take harder cases.

Fifth County District Attorney Prosecutors

- A prosecutor interviewed from this office acknowledged that the charging process is one of the more difficult aspects of their practice because it is inherently subjective. While it is tough to articulate a single process for selecting charges, it is still advisable to have some uniformity from one case or attorney to the next. To that end, they have seen efforts along these lines applied in drug cases where, for example, the state attorney general issued guidelines to make charging drug cases more objective. However, in the prosecutor's experience, the drawback of the guidelines is they do not include certain nuances like a DA's understanding of the jurors in his respective jurisdiction.
- In this office, charging decisions are run through the director or supervisor of the special victims' unit and that provides some uniformity. However, there is a lot of deference given to the individual prosecutor who ran the investigation as to what charge is appropriate. A prosecutor may consider many factors, such as whether the victim will make it through the process, how strong the victim is, and whether there was alcohol involved in the incident. Those issues could help determine what degree of offense to charge. In addition, prosecutors should examine additional evidence such as forensics, the SAFE, etc. When the prosecutor interviewed selects charges, they look to the National District Attorneys' Association guidebook on charging factors, which adds some uniformity to the process. They also advise consulting with the investigators to hear how they feel about the case.

Sixth County District Attorney's Office Prosecutors

- A prosecutor interviewed explained that while the legal standard for indictment is a reasonable belief that a crime has been committed, in practice they would not charge someone with a crime without sufficient evidence to prove the case beyond a reasonable doubt. In order to assess the strength of the case, the prosecutor speaks with the victim in person, and this conversation can last 3-5 hours. If the prosecutor is still unclear on some aspects of the case, they could interview the victim a second time or have the bureau chief or deputy chief conduct the interview. Additionally, prosecutors consider other evidence like relevant text messages and other digital communications. If the prosecutors believe the victim, they go forward with the prosecution. The grand jury and preliminary hearing are not where case-vetting takes place. That happens prior to charging. Even if victim advocates are pressing prosecutors to put on their case for the victim's benefit—to give the victim their day before the grand jury—that would not persuade a prosecutor to proceed with the case.
- Over time, cases change, even after charging; sometimes they get better, sometimes they get worse. Out of fairness to the defendant, a prosecutor cannot just charge someone and see if those charges will survive pretrial litigation or survive until verdict. Similarly, as prosecutors, they never wanted to do anything that, in the interviewee's view, was likely to increase victims' reluctance to come forward and report a crime. Therefore, members of their office will never explain publicly that their decision not to charge, or the decision to dismiss a case, was due to the fact that a victim lacked credibility, even if that is in fact the reason why they did not go forward. While this approach may make the DA's office appear a little flat-footed in the media, it serves the interests of victims generally not to portray a complainant in that light.

Seventh County District Attorney's Office Prosecutors

- In practice, the interviewed prosecutor said they are always looking at whether they have proof beyond a reasonable doubt prior to charging someone with a crime. Even before the prosecutor charges someone or presents a case to the grand jury, they are always looking down the road to trial, which means assessing whether they can prove the case beyond a reasonable doubt. There is no formal written guidance that they follow in assessing the evidence and deciding whether to charge. They consider the facts, the corroboration, if any, the timing of the disclosure of the sexual assault and to whom was it made if it wasn't initially made to the police. Additionally, they will consider the statements of outcry witnesses and any DNA evidence. Many sexual assault cases involve acquaintances.

4. Charging mechanisms

U.S. Attorney's Office Prosecutors

- A prosecutor interviewed stated that in their jurisdiction, the individual attorney has the discretion to decide which charging vehicle they will use, whether it will be grand jury indictment or a criminal complaint. The deciding factor is the exigency of the case. If the case needs to be handled expeditiously, they will not wait for a grand jury, but will have the investigator draft an affidavit detailing the evidence and will take it to a magistrate for a criminal complaint. Another prosecutor stated that they will pursue a criminal complaint, rather than a grand jury indictment, if there is an exigency—if there is a danger to the community or if the subject is a flight risk.
- A prosecutor also stated that in their jurisdiction, they don't have preliminary hearings because the defense bar doesn't request them. The prosecutor stated that some federal jurisdictions use preliminary hearings as a proving ground for the case, especially for special victim cases. One prosecutor said he had never done a preliminary hearing. The grand jury is of some value in vetting cases, but in their experience, it hasn't been very impactful. They said the vetting of the case happens internally at the office discussing the case with colleagues and sometimes supervisors. It's much harder to dismiss a case after the grand jury. If a grand jury returns a "no bill," you can try to find additional evidence with which to go back to a grand jury or go to the magistrate to get a criminal complaint. A prosecutor stated they have never had a grand jury return a "no bill."

Second U.S. Attorney's Office Prosecutors

- A prosecutor interviewed explained that in their jurisdiction, they charge the vast majority of their cases by grand jury indictment. However, if the prosecutor feels the victim is in danger or there are other exigencies, they would file a complaint in order to make a quick arrest and get the offender in custody as the grand jury only meets once a month. The prosecutor interviewed stated that they have seen more cases go to a preliminary hearing during the COVID-19 era because fewer grand juries are meeting.
- After filing a complaint, the prosecutor has 14 days to get to a preliminary hearing, but if they can indict the offender in that time, there is no longer a right to a preliminary hearing. In their jurisdiction, the same magistrate who approves the complaint would preside over the preliminary hearing, if held. Even if a preliminary hearing were held, the defendant is still entitled to a grand jury presentment within 30 days, which prosecutors find duplicative. The prosecutor interviewed tells defense counsel that if they force the prosecutor to go to both a preliminary hearing and grand jury, they will not accept a plea offer. Both prosecutors interviewed said preliminary hearings and grand jury proceedings did little to help them assess the strength of their case beyond the assessments made prior to charging the defendant. The volume of cases they handle dictates that prosecutors assess their cases prior to indictment because of the speed with which a case has to move after indictment.
- If they receive a "no bill" from the grand jury, they would have to step back and reassess the case and sometimes a grand juror will ask a question that will help the prosecutor identify an area of weakness in a case. But they want to make sure they have sufficient evidence because getting a "no bill" from a grand jury may cause the grand jury to lose respect for them. One prosecutor noted that in another office where they worked, supervisors assessed their cases and if they didn't think they could get an indictment they would reevaluate their case.

County District Attorney's Office Prosecutors

- While there is a provision in their state law for a grand jury, 99% of sexual assault cases go to a preliminary hearing. There are only a few cases where they might decide to take a case to a grand jury, such as if the subject has a mental illness and there may be significant delay in holding a preliminary hearing. The purpose of the preliminary hearing is limited to showing probable cause so the case can go forward and that the case shouldn't even be charged if they don't believe they have sufficient evidence to prove the charges beyond a reasonable doubt.

Second County District Attorney's Office Prosecutors

- In the jurisdiction of the prosecutor interviewed, they can get a probable cause determination in two ways. The first and most common is a probable cause affidavit from the police officer provided to the magistrate. The second way is to have a probable cause hearing, but they rarely do that. They have a grand jury option in their jurisdiction, but they rarely take a case to a grand jury, but instead files an information. If they went to a grand jury, they would have to put the victim on the stand, which they would rather not do.

Third County District Attorney's Office Prosecutors

- They almost always use preliminary hearings in their state. There is a provision for a grand jury, but it is primarily investigative and can be used to indict only under limited circumstances. They may use the grand jury for investigation if needed to compel production of documents or to force a witness to testify. To use a grand jury to indict they have to show witness intimidation or something similar. If they use a grand jury they can skip the preliminary hearing, but under state law, preliminary hearings are very favorable to the prosecution. They can use hearsay so don't typically require victims to testify at the preliminary hearing. They have the police detective testify.
- There is still value to a preliminary hearing even if the victim doesn't testify and there are no witnesses. Preliminary hearings can lead to plea deals, depending on the case. If they have a strong case, they might want to show their hand and put on more evidence than is required at the preliminary hearing for the purpose of influencing a plea bargain.

Fourth County District Attorney's Office Prosecutors

- Their pretrial process begins one of two ways—by direct charging from the grand jury, or with an arrest by local police, followed by an initial appearance in municipal court. During this initial appearance, the judge informs a defendant of the charges and sets a date for a preliminary hearing. If the defendant is held in custody, the preliminary hearing must occur within ten days of the arrest. If the defendant is released on bond, the preliminary hearing must be held within sixteen days of the arrest.
- In their system, a defendant whose case proceeds to a preliminary hearing will have the opportunity to hear sworn testimony from, and to cross-examine, the arresting police officer and possibly the victim. However, if the prosecutor takes the case to a grand jury before the preliminary hearing date, and the grand jury returns a bill of indictment, then a preliminary hearing will not take place. Since 2001, when the prosecutor became the supervisor of the sex crimes section, the prosecutor interviewed has tried to indict defendants and avoid preliminary hearings in order to spare victims the difficulty of testifying and being cross-examined.
- A typical case will proceed as follows: a prosecutor receives a report of investigation from the police, charges the case a few days later, and indicts the defendant a few days after that. Frequently, defendants waive the preliminary hearing because defense attorneys know that our prosecutors will indict the case before it gets to a preliminary hearing. In the time between that waiver and the indictment, the prosecutor arranges an informal conference with the defense attorney to try to resolve the case. This requires open discovery for the defense, meaning the defense receives everything they would otherwise get at a preliminary hearing—access to witness statements and the detective's impressions and thoughts that are contained in the investigative file. The open-discovery approach has had a positive effect on their practice. One benefit is it has reduced the defendant's desire to hold a preliminary hearing for the purpose of probing witnesses on the stand, since they should already have most of the information that he seeks.

Fifth County District Attorney's Office Prosecutors

- In their state prosecutors have the option of either charging by grand jury indictment or charging by complaint. In both instances the legal standard for charging someone with a crime is probable cause. Prosecutors in their office tend to charge by complaint, and then bring the case to the grand jury for indictment prior to the preliminary hearing deadline. However, cases may be handled differently depending on the strength of the case and the victim's desires.
- If a defendant is not in custody, then they are entitled to a probable cause hearing. The typical complaint process involves submitting a probable cause affidavit to a judge. The average probable cause hearing then does not involve calling witnesses, and the prosecutor tries to present only a paper case. At this hearing the defendant can raise issues and present evidence relevant to the substantive issues of guilt and innocence, but cannot present character witnesses. The judge at the hearing is different from the judge who signed the complaint.
- No-bills from a grand jury are rare. In weaker cases, the defendant may want to testify, and if that happens and a grand jury does not indict, then prosecutor knows they likely would not win at trial. As a procedural matter, the prosecutor could present the case to another grand jury if there is additional evidence that was not presented to the original grand jury. After a second no-bill, the prosecutor cannot go back to the grand jury on the same case without judicial approval.

Sixth County District Attorney's Office Prosecutors

- In their jurisdiction, prosecutors may file a complaint and go to a preliminary hearing in sex crimes cases, but the prosecutor interviewed chooses to use a grand jury instead. The standard of proof at a grand jury is reasonable belief that a crime was committed and the defendant committed it.
- In their jurisdiction, the grand jury has 23 members and 12 must vote to indict. If the grand jury returns a no-bill, judicial approval is needed to re-present the case to another grand jury. The prosecution must show the judge that additional evidence exists and provide good reason why the prosecutor either did not have that evidence at the first presentment or why they chose not to present that evidence to the first grand jury.

Seventh County District Attorney's Office Prosecutors

- Regarding the processing of sexual assault cases in their jurisdiction, the prosecutor interviewed explained that the vast majority of sexual assault cases are brought to the prosecutor's office post-arrest. A defendant will have an initial appearance before a judge within 24 hours of arrest. If the defendant does not get a bond or cannot make bond, then the defendant is entitled to a preliminary hearing unless indicted before the preliminary hearing is scheduled to take place. In practice, most sex crimes cases proceed to a grand jury. If the defendant is released pending trial, then they are not entitled to a preliminary hearing.
- DAs only present cases to the grand jury that they believe, based on the evidence that they have at the time, establish guilt beyond a reasonable doubt. The prosecutor interviewed does not believe the grand jury should be used to test the strength of the case.
- After the grand jury meets, the prosecutor will reach out and introduce themself to the victim, and the first interaction with the victim does not involve a discussion of the facts of the case. The prosecutor interviewed prefers to first build rapport with the victim before asking her to talk about something traumatic.
- It is rare to for the grand jury to return a no-bill across all types of cases, and they have never seen a no-bill in a sex case.

5. Grand jury or preliminary hearing testimony

U.S. Attorney's Office Prosecutors

- Victim and witness credibility is important to grand juries. The prosecutor interviewed often wants victims to testify in front of grand juries in order to lock down their testimony while under oath. The prosecutor can use grand jury testimony to later impeach a victim or witness if they recant or change their testimony. In preliminary hearings, the victim usually will not testify, but the case agent will testify.
- It's a good proving ground to put the victim on the stand for the grand jury. If the grand jury doesn't find the victim credible, they can "no bill" the case. It's important to let the grand jury see the vulnerabilities of the victim and lay all of the evidence out before them. If the grand jury system was unavailable, the prosecutor interviewed would use a preliminary hearing to vet her case.

Second U.S. Attorney's Office Prosecutors

- A prosecutor interviewed avoids putting victims on the stand to testify at preliminary hearings because they do not want the victim to have that difficult experience of testifying under oath, subject to cross-examination and they do not want the victim to give an inconsistent statement. They prefer to have the investigative agent testify as hearsay is allowed in preliminary hearings. They also have the agent testify at grand jury proceedings. The prosecutor would usually have the investigator testify at the grand jury. Some prosecutors put the victim on the stand but they did not take that approach.
- When they prosecuted cases at the state level, they often had preliminary hearings in sexual assault cases in their county and victims had to testify. Being cross-examined by defense counsel was tough for victims. The only benefit was the prosecutor could use the transcript of the hearing as evidence at trial.
- In their state courts, it is common to have sexual assault victims testify at preliminary hearings, which the prosecutor interviewed thinks is appalling.

County District Attorney's Office Prosecutors

- Sexual assault victims usually testify at preliminary hearings, though the police officer can testify if the victim does not want to. The prosecutor interviewed prefers having the victim testify because it gets the victim used to testifying under oath and to being cross-examined. Also, if the victim is later unable to testify at trial, they can admit her preliminary hearing testimony. It is frequently the defense's strategy at a preliminary hearing to impeach the victim and embarrass the victim through vigorous cross-examination.

Second County District Attorney's Office Prosecutors

- A prosecutor interviewed said they could put the victim on the stand at a probable cause hearing, but they don't see a good reason to do that when they can just get an affidavit from the police officer. The rules of evidence are not applicable at a preliminary hearing so why would they allow the defense counsel to have unrestricted cross-examination of the victim? Rather than having the victim testify at the probable cause hearing, they prefer to meet with the victim informally in their office or victim's home in a less intimidating environment. They spend a lot of time preparing victims for trial. They don't use a probable cause hearing as trial prep.
- In their state, the defense can ask for pretrial depositions where victims who are age 16 and older can be compelled to attend and answer questions. The prosecutor interviewed estimated that about 70% of rape cases involve a pretrial deposition. At these depositions, there is no judge, no rules, and the defense counsel may bully the victim. The prosecutor can object to questions, but the objection won't be ruled on by a judge until later. Sometimes defense counsel ask questions that are irrelevant or violate rape shield laws as a means of intimidating the victim. The transcript of this deposition can be used to impeach the victim at trial. The defense is entitled to this deposition even if there is a preliminary hearing so there's no reason to put the victim on the stand for a preliminary hearing.

Third County District Attorney's Office Prosecutors

- A prosecutor interviewed said they don't have the victim testify at the preliminary hearing, usually just the police officer. In their state, they used to be required to call the victim at a preliminary hearing, but the law changed and now they can call the detective. The prosecutor has seen both ways of conducting the preliminary hearing and it's been fine to not have the victim testify. The victim may be in a better place emotionally later at trial.

Fourth County District Attorney's Office Prosecutors

- Most of the time prosecutors will not call the victim to testify at the grand jury as often the courtroom is packed with defendants waiting for their cases to be heard. There were some cases where a prosecutor is not sure the victim will participate in the long run and so they might ask the victim to commit to testifying at the grand jury.

Fifth County District Attorney's Office Prosecutors

- When a case goes before the grand jury, it is common for the prosecutor to have the victim testify. One reason for that is prosecutors often find that statements taken by police are incomplete or otherwise wanting, and in those instances the prosecutor uses the grand jury as the vehicle for finding the additional information or explanations needed. This approach provides a fuller perspective of the incident itself in a non-adversarial setting. The other benefit is the victim gets a sense of what it's like to answer questions in front of a jury, and to answer questions from the grand jury. The prosecutor has the victim lay out the basic facts, and if applicable, discuss on the witness stand the digital forensic evidence associated with the case. Sometimes, if a victim does not want to appear before the grand jury, the prosecutor will admit through the investigator the victim's sworn statement because hearsay is admissible.
- When a sexual assault case is charged by complaint, and the defendant is in custody, the defendant must appear before a judge within 48 hours of arrest, at which point the prosecutor has to present evidence establishing probable cause to justify the defendant's continued detention. Hearsay evidence is admissible at this proceeding. Normally, they would not have the victim participate personally in this proceeding, which is a modified preliminary examination or probable cause hearing. Instead, they seek to admit the victim's statement to police, the digital forensic evidence, and maybe a hospital report if the test results from the SAFE kit are not yet complete (as is often the case this early in the investigation).

Sixth County District Attorney's Office Prosecutors

- A prosecutor interviewed does not have the victim testify in front of the grand jury. Instead, they call the lead investigator or the investigator from the DA's office. They have not yet had a case in which the prosecutor felt it would be beneficial to have the victim testify before the grand jury. The prosecutor interviewed said they are hard-pressed to identify a case where they would put the victim on the stand. Since their state law does not require victim testimony, they would want to avoid any circumstance in which the victim testifies. Consideration of the victim's well-being is the primary reason for that approach.
- A prosecutor interviewed has not observed victims being unprepared at trial as a direct result of not testifying at the grand jury or other pretrial hearing. They have found that victims are resilient—the prosecutor may meet three or more times with a victim prior to trial in order to build rapport and prepare the victim for direct- and cross-examination. Anecdotally, many victims have been through therapy by the time trial arrives and as a result, they are surprisingly resilient.

6. Plea negotiations and conviction rates

U.S. Attorney's Office Prosecutors

- More than 95% of federal cases are resolved through plea bargains. One of the reasons for this is to protect victims from having to testify at trial and they can still achieve a just result through plea bargain. Plea agreements also protect against the uncertainty regarding a jury verdict especially when dealing with cases involving Native Americans (not uncommon in their jurisdiction) as there is the potential for racism to influence a jury verdict. The aim of the plea agreement is to ensure the defendant still has to register as a sex offender.

County District Attorney's Office Prosecutors

- If something came up at a preliminary hearing that they weren't previously aware of or if the victim didn't testify well, they would likely seek a plea bargain with the defendant.
- Most of their cases are plea bargained—only about 5% of cases go to trial. In their state, they have long potential prison terms for sexual offenses, so plea bargains typically involve the defendant pleading to the sexual offense, but for a reduced sentence. Sometimes they allow the defendant to plead to a lesser offense if they feel that is appropriate.
- Of the sexual assault cases that go to trial, they have a 90% conviction rate for the primary offense. Often there is an issue of consent in the case.

Second County District Attorney's Office

- Plea bargains are offered in 99% of cases, but not all of those are accepted. The prosecutor informs the victim and seeks his or her input before offering a plea bargain, but the prosecutor has to make the decision based on the evidence and what he or she thinks is an appropriate punishment, even if the victim disagrees with that assessment. The prosecutor interviewed prefers to have the defendant plead guilty to the lead charge every time, but they are not rigid about it and sometimes offer a plea to a lesser offense if they feel it's appropriate.
- Their contested trial conviction rate for the lead offense is probably lower than 90%, but it's significantly higher than 30%. If a prosecutor gets a conviction not on the lead offense, but on a lesser offense, such as sexual battery, they think the prosecutor didn't do his or her job. They would wonder whether the lesser offense should have been charged because it gave the jury an out and allowed them to convict on a compromise offense.
- A prosecutor interviewed wants all prosecutors to take tough cases to trial, but they don't want inexperienced prosecutors taking them to trial just for the sake of trying them. If they get back not guilty verdicts the victim is not happy and acquittals raise the question of whether the lead offense should have been charged or whether the case should have been screened out.

Third County District Attorney's Office Prosecutors

- The vast majority of their cases result in pleas. Sex crimes tend to go to trial more often than other offenses due to the no corroboration requirement and the type of offender—sex offenders often think no one will believe the victim—but still the majority are pleas. They usually get the victim's input before entering into a plea bargain and they are usually willing to "roll the dice" if the victim wants to go to trial.
- Their conviction rate for sex offenses is lower than for other types of crimes, but they win most of their cases. They have very few straight up acquittals, but more than in other types of cases.

Fourth County District Attorney's Office Prosecutors

- A prosecutor interviewed stated that overall, 98% of their cases are resolved through a plea bargain and around 90% of sexual assault cases are resolved through a plea bargain. Defendants may seek a plea deal in order to obtain a lower sentence, and sometimes the state seeks a plea deal when a victim, at the last minute, becomes nervous about testifying at trial.

Fifth County District Attorney's Office Prosecutors

- A prosecutor interviewed stated that in their state's second-largest county by population—97% of cases resolve by plea bargain. Annually there are approximately 100-110 trials for every conceivable charge, and those are primarily drug cases. In an average year, a dozen sex cases going to a contested trial would be a high number. SVU prosecutors typically try one or two contests a year. If more cases went to trial, the court system could not handle it. This is a plea-bargaining system. It is hard to get a plea to the top charge, and the primary reason for that is the state's sentencing scheme which involves mandatory sentences for first and second-tier offenses. The prosecutor noted that it's not the strongest cases that tend to end up at a contest. The stronger cases tend to result in a plea.

Sixth County District Attorney's Office Prosecutors

- Once a case is indicted, many of their cases are resolved at a contested trial rather than through a plea arrangement. The prosecutor interviewed explained that the relatively high number of trials is due to the fact that their state has some of the highest mandatory minimums in the country for sexual assault offenses. Many defendants resist pleading guilty when they know they will receive lengthy prison sentences. The prosecutor interviewed added that if Brock Turner had been tried and convicted in Georgia, he would have received a mandatory minimum sentence of 25 years' in prison, instead of the 6 months he received in California.
- There are 4 prosecutors and 1 deputy chief in their SVU, and that SVU prosecutors have 40-50 indicted cases, plus additional, un-indicted cases, and all of them involve either sexual assault, domestic violence, or murder if it has a sexual assault or domestic violence component to it.
- They do not define a successful prosecution as one resulting in a conviction. Success can be achieved when, after the closing argument is finished, the victim knows the prosecutor gave the case their all, which lets the victim know he or she was heard.
- The staff asked what case characteristics tend to lead to a conviction or an otherwise successful outcome. A prosecutor interviewed indicated that DNA evidence is helpful, as is having a witness other than the victim explain what the victim did on the night of the incident—this can be especially important where alcohol is involved. Ultimately, cases that result in conviction tend to have a credible victim and corroboration. Prosecutors will have experts discuss at trial counter-intuitive victim behavior in cases that tend to center on the victim's words vs. the defendant's. It is rare that sexual assault cases are straight forward and easy to prove—they tend to take more work to prove up than other types of cases, particularly since many will involve delayed disclosures and lack physical evidence such as DNA.

7. Perspectives on Article 32, UCMJ, hearings and referral standards (from interviewees who have served as judge advocates or have familiarity with the court-martial process)

U.S. Attorney's Office Prosecutors

- A prosecutor interviewed previously served as a judge advocate and special victim prosecutor in the military. The prosecutor stated they did not see the utility of the Article 32 hearing. When the prosecutor takes their cases to a grand jury in federal practice, they must have their case ready to go and have the evidence to show probable cause or the grand jury could return a "no bill" and they could not proceed with the case. There is no similar incentive in military practice as the case can proceed to referral even if an Article 32 preliminary hearing officer determines there is no probable cause for an offense. The Article 32 does not seem useful for case vetting or counsel preparedness. The prosecutor stated they wished the Article 32 preliminary hearing officer could sit with the commander for the preferral decision to help evaluate the case.
- Another prosecutor interviewed served on active duty as a judge advocate and is currently a reserve judge advocate. This prosecutor stated that in the military it's no secret that judge advocates and commanders feel congressional pressure to refer sexual assault cases to court-martial. The prosecutor stated that convening authorities ask for the prosecutor's opinion about a case before referral and sometimes the attorney thinks the convening authority wants the case to go forward, so gives the opinion that the case should be referred even when the case is weak. Prosecutors sometimes infer that convening authorities want cases to go forward to avoid congressional scrutiny even when that is not always the case.
- At DOJ, they rely on the experience of more senior attorneys for guidance on the level of evidence necessary to obtain a guilty verdict at trial. But in the military, young judge advocates are asked to punch above their weight and make decisions they're not prepared to make. The conviction rate for sexual offenses is low in the military not because prosecutors lack ability, but because too many cases with bad facts are going forward and resulting in acquittal.

County District Attorney's Office Prosecutors

- One of the main differences between state and military cases is that the UCMJ and state law differ in how they define criminal conduct involving incapacitation by alcohol, and thus the military cases many times involved fact patterns that the prosecutor did not prosecute in state court. Under state law, where someone alleges lack of consent due to incapacitation by alcohol, evidence of voluntary alcohol consumption makes prosecution difficult, if not impossible. The law essentially criminalizes incidents in which the victim is unconscious, but not incidents in which the victim is drunk of their own volition. In addition, among the military prosecutions, the prosecutor observed more intimate partner cases in which disclosure was delayed by more than a year, than they would typically see in their jurisdiction. In the prosecutor's experience, those cases would not be charged and prosecuted.

Office of Special Trial Counsel
Panel Questions

I. Structural Aspects:

   a. How do you generally foresee the structure of your Services OSTC, as required by the statutory authority?
   b. What increase in military and civilian personal do you believe implementation of the OSTC will required, and will there be an impact on other operations due to this?
   c. What additional funding requirements will you have and will there be an impact on other operations due to this?
   d. What steps can you take to assure the independence of the OSTC and its personnel?
   e. What role will the Service Judge Advocate General/Senior Legal Advisor play in the formation and operation of the OSTC?

II. OSTC Functions: How do you envision the interaction between OSTC personnel and investigators, defense counsel, victims' counsel, and military judges?

III. Charging Standards: Do you anticipate that charging decisions made by lawyers will require consideration of a higher standard than probable cause?

Trexler, Dale L CIV OSD OGC (USA)

From: Manuel Dominguez <dominguezmj@live.com>
Sent: Friday, June 3, 2022 4:18 PM
To: josh.farley@kitsapsun.com; tward@soundpublishing.com; spowell@soundpublishing.com; thayer.rose@stripes.com; wentling.nikki@stripes.com; letters@stripes.com; geoffz@militarytimes.com; Doornbos, Caitlin V NAF (USA); dcorrell@militarytimes.com; tsouth@militarytimes.com; scott.glover@warnermedia.com; audrey.ash@cnn.com; casey.tolan@cnn.com; curt.devine@cnn.com; tips@vice.com; Investigations@npr.org; west.trialopinions@thomson.com; West.briefsandtrialdocsubmissions@thomson.com; journalism@austin.utexas.edu; press@vice.com; west.attysubmissions@thomsonreuters.com; Carson, Julie K CIV OSD OGC (USA); throughline@npr.org; web@thislife.org; WHS Pentagon EM Mailbox DACIPAD; law-review@illinois.edu; eic@texaslrev.com; articles@texaslrev.com; featuredcontent@texaslrev.com; tplohetski@statesman.com; hosbourne@statesman.com; rrusak@star-telegram.com.; scoffman@star-telegram.com; tjohanningmeier@star-telegram.com; amcdaniel@star-telegram.com; katrice.hardy@dallasnews.com; Karisa.king@dallasnews.com; press@ted.com; letters@nytimes.com; nytnews@nytimes.com; MHLcustserv@cdsfulfillment.com; Letters@GQ.com; themail@newyorker.com; tami@usatoday.com; aball@gatehousemedia.com; dcatron@gannett.com; CFernando@gannett.com; raxon@usatoday.com; gbarton@gannett.com; dduret@gatehousemedia.com; kjacoby@gannett.com; brett.murphy@usatoday.com; tnadolny@usatoday.com; mkwiatko@usatoday.com; tips@buzzfeed.com; pr@buzzfeed.com; newspr@buzzfeed.com; publicity@texasmonthly.com; news@texasmonthly.com; browen@texasmonthly.com; jknickell@texasmonthly.com; llarson@texasmonthly.com; heidi.brady@lockelord.com; Doornbos, Caitlin V NAF (USA); newsdesk.thechesapeaketoday@gmail.com; info@saveourheroesproject.org; shopsarahkay@gmail.com; hello@thisiscriminal.com; info@innocenceproject.org; press@innocenceproject.org; Service@americanbar.org; abanews@americanbar.org; carol.stevens@americanbar.org; jacqueline.salmon@americanbar.org; betsy.adeboyejo@americanbar.org; bill.choyke@americanbar.org; info@veteransdefenseproject.org; info@nvlsp.org; cdeutsch@allrise.org; DODHRA Ft Knox DMDC Mailbox dmdcbenesupport; bath.alison@stripes.com; garland.chad@stripes.com; cperry@prosecutorintegrity.org; info@prosecutorintegrity.org; lauren.aratani@theguardian.com; lois.beckett@theguardian.com; gabrielle.canon@theguardian.com; malik.meer@theguardian.com; gloria.oladipo@theguardian.com; edwin.rios@theguardian.com
Subject: [Non-DoD Source] **Military Justice News Story - U.S versus LCDR Manuel J. Dominguez, USN (June 2022)**
Attachments: DOMINGUEZ_202000109_PUB.pdf; SignedResponse_US_District.pdf; 2014 CCSG-5 Tactician.pdf; Ft_Leavenworth_ltr_ico_LCDR_MJD.pdf; Signed response to USDB ico LCDR MJD.pdf; 20220421_DACIPAD_Transcript_Final_pgs. 115 to 127_LCDR MJD.pdf; BASE ACCESS NBK form [UPDATED].pdf

To all I've contacted in this email,

My name is Manuel Dominguez, I am an active-duty Naval Officer with over 19 years of service, and I have been accused of crimes I did not commit. I was previously investigated for over 3 years from 2017 to 2020, and I was subsequently tried and convicted of alleged child sexual assault under the Uniform Code of Military Justice in February

2020. I spent 22 months in prison before my conviction was set aside in October 2021; I was finally released in December 2021 after filing a writ of *Habeus Corpus* with the federal district court of Kanas. Two of the attached documents provide more information.

One of the fundamental issues and flaws with the military justice system is the inherent lack of transparency, I seek to help bridge that gap…at least in my own case. ***I'm scheduled for a retrial the week of 27 June through 01 July 2022 at the Regional Legal Service Office Northwest, Naval Base Kitsap-Bremerton, Washington (the trial hours are likely 8am – 5pm every day that week).*** I write this email as an invitation to various news and media sources to observe a military trial firsthand as opposed to secondhand accounts or curated releases on military cases. I also believe in a specific call for investigative reporting in my case as well as other cases like mine within the military justice system.

*****I specifically invite and request*** the Defense Advisory Committee on the Investigation, Prosecution, and Defense of Sex Assault (**DAC-IPAD**) to send a representative and observe the process firsthand. I've attached comments I provided at the 21 April 2022 DAC-IPAD committee meeting as a refresher on my case and perspective. Your public meeting in April also alluded to observing court martials and well as taking on specific case studies, I offer my own case as a candidate, and I ask you to put words into action.** (My comments to the DAC IPAD committee are on pdf pages 115 to 127 of the transcript.)

Please keep in mind that I cannot comment on specifics of the case (at this time). However, the publicly available, published Navy Marine Corps Court of Criminal Appeals opinion (attached) provides foundational information. I also cannot facilitate any logistics in getting access to the base, courtroom, etc. There is a form (attached) for gaining access to the base…but I do not have a POC for submittal.

It is my sincere hope that many of you take the opportunity to observe and cover the trial…whether in person or in general reporting, commentary, radio, podcast, etc. Because observing military justice is a fundamental public right and tenet in civilian oversight of the military, albeit it is not one usually exercised. ***My case is unique, but unfortunately, my case is also <u>not</u> unique in in the realm of military justice.*** My story needs to be told, not just for my sake but for the sake of other service members and the general public.

Our stories need to be told in ways, means, narratives, and terms that resonate outside legal and miliary jargon. Thank you, I express my deepest gratitude for your time and consideration in this important matter.

Background: ***<u>LCDR Manuel Dominguez</u>***

- I grew up in the Dallas Fort Worth area, my hometown is Bedford, TX
- As noted earlier, I have served 19 years in the Naval service. My job has been as a Surface Warfare Officer with multiple deployments and overseas tours
- I spent ~2 years previously enlisted as a nuclear engineering trained machinist mate
- I was commissioned through ROTC and graduated with a B.A. in government from the University of Texas at Austin, TX (Dec'2005)
- I have a M.A. in security studies from the Naval Post Graduate School in Monterrey, CA (2011)
- I was p reviously married and divorced (2 children); I am currently married for 4.5 years…inclusive of time while wrongly incarcerated
- ***Public/Court records will show I was charged with assault of a family member (ex-wife), the charge was subsequently dismissed***
- My wife and I call Austin, TX our home
- Due to these false allegations and the military's handling of my case ***I have not seen or spoken to my children in over 5 years*** (save for seeing my daughter on the stand in my first trial). I still do not have contact with either of my kids

******Note, ***from a media/intrigue perspective***…I highlight that a complaining witness in my case has ties to the mayor of Arlington, TX (Mr. Jim Ross). He and the witness were in a romantic relationship and now remain friends/acquaintances.

Mr. Ross participated in further perpetrating lies and influence in my case during the original trial in 2020. This is not conjecture and can be corroborated.**

With humble gratitude for your time,
Manuel Dominguez
LCDR, USN
817-875-2613
"Have a Powerful Day…"

United States Navy–Marine Corps Court of Criminal Appeals

Before
GASTON, HOUTZ, and MYERS
Appellate Military Judges

UNITED STATES
Appellee

v.

Manuel J. DOMINGUEZ
Lieutenant Commander (O-4), U.S. Navy
Appellant

No. 202000109

Argued: 29 September 2021—Decided: 22 October 2021

Appeal from the United States Navy-Marine Corps Trial Judiciary

Military Judge:
Ann K. Minami

Sentence adjudged 10 February 2020 by a general court-martial convened at Joint Base Pearl Harbor-Hickam, Hawaii, consisting of officer members. Sentence in the Entry of Judgment: confinement for 16 years and a dismissal.

For Appellant:
Tami L. Mitchell, Esq. (argued)
David P. Sheldon, Esq. (on brief)
Lieutenant Commander Christopher K. Riedel, JAGC, USN (on brief)
Lieutenant Commander Michael W. Wester, JAGC, USN (on brief)

For Appellee:
Lieutenant Catherine M. Crochetiere, JAGC, USN (argued)
Lieutenant John L. Flynn, JAGC, USN (on brief)
Major Kerry E. Friedewald, USMC (on brief)
Lieutenant Jennifer Joseph, JAGC, USN (on brief)

Senior Judge GASTON delivered the opinion of the Court, in which Judges HOUTZ and MYERS joined.

PUBLISHED OPINION OF THE COURT

GASTON, Senior Judge:

A panel of officers convicted Appellant, contrary to his pleas, of two specifications of rape of a child and one specification of sexual abuse of a child, in violation of Article 120b, Uniform Code of Military Justice [UCMJ],[1] for penetrating the vulva of his five-year-old daughter, Ocean,[2] with his mouth and finger and causing her to touch his genitalia for sexual gratification.

He asserts nine assignments of error [AOEs], which we renumber and restate as follows:

I. Did the military judge abuse her discretion in admitting two videotaped forensic interviews of Ocean (Prosecution Exhibits 10 and 11) under the residual hearsay exception, Military Rule of Evidence [Mil. R. Evid.] 807?

II. Did the military judge abuse her discretion in denying the Defense's motion to admit evidence under Mil. R. Evid. 412?

III. Did the military judge abuse her discretion in admitting an excerpted report of a medical examination of Ocean (Prosecution Exhibit 2) and testimony from the examining nurse regarding Ocean's statements, under the hearsay exception for statements made for medical diagnosis or treatment, Mil. R. Evid. 803(4)?

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[1] 10 U.S.C. § 920b.

[2] All names in this opinion, other than those of Appellant, the judges, and counsel, are pseudonyms.

IV. Did the cumulative effect of the errors substantially impair the fairness of Appellant's trial?

V. Did the military judge abuse her discretion in denying a Defense motion for a continuance?

VI. Were Appellant's trial defense counsel ineffective for:

(a) Failing to be prepared to rebut Prosecution Exhibits 10 and 11?

(b) Failing to present expert testimony regarding Ocean's suggestibility and the impact of the influence of her mother and therapist on Ocean's reporting?

(c) Failing to present evidence of Ocean's medical history, cultural norms, and gender bias in Appellant's "intimate care" of her, which would have established a legitimate non-sexual purpose for touching?

(d) Failing to adequately prepare Appellant to testify?

(e) Failing to timely move the court to admit evidence under Mil. R. Evid. 412?

VII. Is the evidence legally and factually sufficient to sustain Appellant's convictions?

VIII. Did the military judge abuse her discretion in failing to merge Specifications 2 and 3 of Charge I for sentencing?

IX. Does a mandatory minimum sentence of dismissal for rape of a child violate:

(a) The Eight Amendment prohibition against cruel and unusual punishment?

(b) The Fifth Amendment right to due process in receiving individualized consideration for sentencing?

(c) The Fifth Amendment right to plead not guilty and require the Government to prove its case?

We find merit in Appellant's first, second, third, and fourth AOEs, set aside the findings and sentence, and do not reach the remaining AOEs.

I. BACKGROUND

In 2015, Appellant and his wife, Ms. Bravo, experienced marital difficulties after six years of marriage. They differed over parenting styles, and Ms. Bravo disapproved of Appellant socializing with other junior officers. In September, a verbal argument led to an intoxicated Appellant assaulting Ms. Bravo in front of their two small children and being arrested by local police in Texas. The couple subsequently talked of divorce but decided to reconcile and attend marriage counseling. In October, they moved to Hawaii, where Appellant and Ms. Bravo shared parental responsibilities over their four-year-old daughter Ocean and her younger brother, including bathing with them, wiping them after they used the toilet, spanking them occasionally, and getting them ready for bed. Appellant told Ms. Bravo that once during a bath, Ocean poked his penis with her finger out of curiosity, and he had Ms. Bravo bathe with her from then on.

In May 2016, Ocean, who was just turning five, told Ms. Bravo she had played a game with a seven-year-old girl in the neighborhood called "kiss each other's privacy."[3] Ms. Bravo responded, "[T]hat sounds kind of yucky, doesn't it?"[4] Ocean told Ms. Bravo the girl had kissed her "private" with a closed mouth and she had kissed the girl's "backside."[5] She said she was scared the girl would be mad at her for telling because the girl had made her promise not to tell anyone.

In August 2016, Appellant and Ms. Bravo, unable to resolve their differences, decided to separate. Their separation agreement granted custody of the children to Ms. Bravo and visitation rights to Appellant. Ms. Bravo then moved with the children to Texas, while Appellant remained in Hawaii and stayed in contact with them via phone and video-teleconference.

In Texas, Ocean began acting rude and angry toward Ms. Bravo, blaming her for breaking up the family and telling her she missed Appellant and was concerned about him going to jail again. Ms. Bravo explained that Appellant knew he had made a horrible mistake when he assaulted her and had to go to

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[3] App. Ex. LI.

[4] *Id.*

[5] *Id.*

jail. Ocean told her she hated the family picture that did not have Appellant in it and threw tantrums during which she said she wanted to be with Appellant.

In September 2016, Ms. Bravo took Ocean to see a child therapist, Ms. Bailey, to address her prolonged tantrums and other behavioral issues. Ocean had begun receiving therapy for similar issues in Hawaii, and Appellant supported her continuing to see a therapist in Texas. Ms. Bravo told Ms. Bailey about the "privacy game" Ocean had played the previous May with her seven-year-old neighbor. At Ms. Bailey's suggestion, Ms. Bravo asked Ocean if anyone had ever touched her inappropriately and went over with her who was allowed to touch her and for what reasons. Consistent with Ms. Bailey's advice, Ms. Bravo asked these questions in a general way that did not suggest or refer to anyone in particular, including Appellant. Ocean "responded with what [Ms. Bravo] expected her to respond"[6] and made no allegations against Appellant.

A. Ocean's Allegations

In early February 2017, after Ocean had trouble sleeping and began having a tantrum, Ms. Bravo spanked her so hard that she applied an ice pack to Ocean's bottom afterwards. As she did so, Ocean told her the spanking reminded her that Appellant was not there. Ms. Bravo then asked Ocean again about whether she had played any "privacy games," but this time, against Ms. Bailey's advice, she asked specifically if there were "any secrets that [she] and [Appellant] had or any games that [they] played that [Ms. Bravo] didn't know."[7] In response to Ms. Bravo's questioning, Ocean alleged that Appellant had sexually abused her, which Ms. Bravo reported to Texas Child Welfare Services. The case was then forwarded to Child Protective Services in Hawaii, where local law enforcement and the Naval Criminal Investigative Service [NCIS] were notified and opened investigations.

1. First Forensic Interview

A week later, in mid-February 2017, Ocean was interviewed by a forensic interviewer, Ms. Charlie. Ocean told Ms. Charlie that when she was five Appellant had her "touch his ding-ding [penis] and play with it for a long

[6] R. at 553.

[7] R. at 555.

time."[8] She said it was "poking out" and Appellant was holding her arm and telling her to keep going because it felt good.[9] She said she felt "slimy stuff" on her finger and "there was a little bit of white stuff."[10] She said she tried to wipe off the slimy, wet stuff but Appellant told her to put her finger on her mouth. She then said Ms. Bravo walked in and "saw [her] doing this to [Appellant's] ding-ding," said "Stop," and told Appellant, "Go somewhere else and don't get by my kids again."[11]

Ocean also told Ms. Charlie that once, when Appellant was wiping her after she went to the toilet, he "dug his finger in" her "butt" to make sure there was "no more poop coming out."[12] She said that on another occasion Appellant opened and wiped her vagina with a wipe while she was sitting on the toilet "to make sure there [were] no more drips coming out . . . so [her] tutu [vulva] [did] not burn," which she said hurt and felt weird.[13]

When asked, "Was there ever a time something different happened with your dad?" Ocean responded, "No." When asked, "Was there ever a time something like the stuff we've been talking about happened to you with someone else?" Ocean responded, "No, only to me."[14]

2. Drawing in Therapist's Office

Ocean's therapist, Ms. Bailey, did not ask Ocean about her allegations; however, during a therapy session in April 2017, Ocean drew a picture of her family members at their old house in Hawaii. She told Ms. Bailey that in the picture, she was in the bathroom waiting for Appellant to come wipe her.[15] At the bottom of the picture Ocean wrote, "he did hrt me! He stuck his fingr in me! It hrt. I told him no trespassing but he did it!"[16]

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[8] Pros. Ex. 10; App. Ex. LIX at 9.

[9] Pros. Ex. 10; App. Ex. LIX at 12.

[10] *Id*.

[11] Pros. Ex. 10; App. Ex. LIX at 14. Ms. Bravo in her trial testimony denied doing or saying this. R. at 951–55.

[12] Pros. Ex. 10; App. Ex. LIX at 18.

[13] Pros. Ex. 10; App. Ex. LIX at 18–19.

[14] Pros. Ex. 10; App. Ex. LIX at 21.

[15] R. at 1056–57.

[16] Pros. Ex. 1 at 1.

3. Statements During Forensic Medical Examination

In August 2017, Ocean, then six years old, was examined at a children's medical center pursuant to its "physical and sexual abuse medical protocol."[17] In taking a history from Ocean, the examining nurse, Ms. Williams, asked "had anybody made [her] feel uncomfortable or touched [her] in a way that made [her] uncomfortable?"[18] Ocean said that while at home Appellant "did this little piggy then did this," pointing to her genitalia, and "it hurt."[19] When asked whether this was on top of her clothes or under her clothes, Ocean said that "it was inside, but sometimes on top, under [her] panties."[20] She said that "[w]hen [she] did poop, he digged really far down there . . . when he was wiping [her]."[21] She also said that "he made me kiss his ding-ding, his private" (penis).[22] She said, "He scraped his private with his finger and made me kiss it" and there was something "slimy" and "[she] had to eat a little bit."[23] When asked "how many times did this happen to you," she said "19 or 20 times."[24] She also said Appellant "was always saying don't tell your mother. He told me I would get a spanking or something."[25]

4. Second Forensic Interview

In June 2018, Ocean, then seven years old, was forensically interviewed a second time by Ms. Charlie. This time, when asked about Appellant, Ocean said he did "this little piggy" and "when he went wee, wee all the way home, he touched it and then he went . . . in this part and it hurt[ ]."[26] When Ms. Charlie asked, "What do you call that part, because I don't want to misunderstand?" Ocean responded, "Abusing."[27] Subsequently, Ocean said she had been having discussions with Ms. Kilo, a therapist working down the

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[17] Pros. Ex. 2 at 1.

[18] R. at 516.

[19] R. at 515–16; Pros. Ex. 2 at 2.

[20] *Id.*

[21] R. at 517; Pros. Ex. 2 at 2.

[22] *Id.*

[23] R. at 517–19; Pros. Ex. 2 at 2.

[24] R. at 519; Pros. Ex. 2 at 2.

[25] R. at 517; Pros. Ex. 2 at 2.

[26] Pros. Ex. 11; App. Ex. LX at 5.

[27] Pros. Ex. 11; App. Ex. LX at 5–6.

hall from Ms. Charlie, "who taught [her] about abuse and what [Appellant] did to [her] and what's wrong and what's right."[28]

Ocean said the "little piggy" incident occurred when she was sitting on her parents' bed in Hawaii and that Appellant "went on [her] side and then he digged and then he went down there," meaning the part she uses "to pee."[29] She said he used four fingers and "poked" inside "her private" and it "hurted really bad."[30]

Ocean said that on another occasion she and Appellant were next to the wall by the towels in the bathroom, and she saw "his private part."[31] She said she saw "green stuff coming out of it" and he told her to put her finger on the green stuff and "forced [her] hand to put it in [her] mouth" and "made [her] suck on it.[32] She said it "tasted like somebody ate throw up or something."[33]

When asked "was there ever a time something different happened with [Appellant]," Ocean said, "Not that I remember like—but I feel like there's one more thing but I can't remember."[34] When Ms. Charlie later asked, "Did [Appellant] ever put his mouth on any part of your body?" Ocean first said, "No," and then said, "Actually I—that was the part that I forgot. Once he put his mouth on this part right here" and she pointed to her vaginal area.[35] She said he pulled her panties to the side and "put his mouth down there" on the part she pees from and "licked it . . . with his tongue," and "it felt gross."[36]

When asked, "Was there ever a time anyone else asked to see any private parts of your body," Ocean responded, "No."[37] When asked, "Was there ever a

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[28] Pros. Ex. 11; App. Ex. LX at 22.

[29] Pros. Ex. 11; App. Ex. LX at 7.

[30] Pros. Ex. 11; App. Ex. LX at 8–9.

[31] Pros. Ex. 11; App. Ex. LX at 12.

[32] Pros. Ex. 11; App. Ex. LX at 12–14.

[33] Pros. Ex. 11; App. Ex. LX at 14.

[34] Pros. Ex. 11; App. Ex. LX at 15.

[35] Pros. Ex. 11; App. Ex. LX at 18.

[36] Pros. Ex. 11; App. Ex. LX at 19.

[37] Pros. Ex. 11; App. Ex. LX at 23.

time someone else ever touched any private parts of your body?" Ocean responded, "No."[38]

5. Trial Testimony

In February 2020, Ocean, then eight years old, testified at Appellant's trial. She said she touched Appellant's "ding-ding" with her finger "[o]nce" after Appellant told her to "stick" her finger on it, held her arm, and said, "Keep doing it, it feels good."[39] She said it was "sticking out"; that when she touched it she felt a little bit of goo that was "kind of, like, clear"; that he told her to put it on her lip; and that it felt "really gross" but she did not taste it.[40] She said that on another occasion in the family home in Hawaii, she was playing "this little piggy" with Appellant, and when he went "wee wee all the way home," instead of tickling her like they normally did, he put his finger in her "tutu," which "hurt really bad."[41] She denied that Appellant ever put his mouth on her "tutu" or ever kissed her anywhere but on her face.[42]

B. Appellant's Statements

In February 2017, after learning of the operational message his command had sent out regarding Ocean's allegations, Appellant texted Ms. Bravo that he was being brought in by NCIS for questioning and denied ever touching the children inappropriately. When interviewed by NCIS, Appellant waived his rights, denied sexually abusing Ocean, and consented to a search of his home and his digital media.

At trial, Appellant testified in his defense and denied the allegations. He described his troubled relationship with Ms. Bravo and his care for the children. He said he touched Ocean's vagina and bottom while wiping her with wipes after she used the toilet and while spanking her and bathing her, not for purposes of sexual gratification. He said that Ocean once poked his penis with her finger during a bath, after which he had Ms. Bravo bathe her.

Additional facts necessary to resolve the AOEs are addressed below.

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[38] *Id.*

[39] R. at 441–44.

[40] *Id.*

[41] R. at 447.

[42] R. at 448.

II. DISCUSSION

A. Admission of Evidence under the Residual Hearsay Rule

After Ocean testified that Appellant had never put his mouth on her "tutu" or kissed her anywhere but on her face, the trial counsel asked her, "When you spoke to [the forensic interviewer, Ms. Charlie] and told her everything that happened to you, do you remember everything that happened to you as you sit here today?"[43] Ocean responded, "I don't remember everything, but I remember most of it."[44]

That evening the Government informed the Defense of its intent to introduce Ocean's videotaped forensic interviews into evidence. The following morning the Defense objected to the evidence on grounds of hearsay and lack of notice. After hearing argument, the military judge informed the parties she intended to allow the videotaped interviews to be admitted under the residual hearsay exception, Mil. R. Evid. 807. The Defense orally moved for a 23-hour continuance to consider how to respond to the evidence. The military judge granted two hours and 45 minutes. The Defense then moved in writing for a five-day continuance to adjust its trial strategy, file a written motion to exclude the forensic interviews under the residual hearsay rule, and prepare with its expert to cross-examine the forensic interviewer. The Defense noted it had made a tactical decision not to cross-examine Ocean, to avoid opening the door to introduction of the videotaped interviews. The military judge denied the continuance request and, without any indication of having reviewed either exhibit prior to ruling, admitted both videotaped interviews (Prosecution Exhibits 10 and 11) in their entirety under Mil. R. Evid. 807.

Appellant asserts the military judge erred in admitting Prosecution Exhibits 10 and 11. We review a ruling to admit or exclude evidence for an abuse of discretion.[45] A military judge has "considerable discretion in admitting evidence as residual hearsay."[46] "The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion. The challenged action must be arbitrary, fanciful, clearly unreasonable, or clearly

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[43] R. at 449.

[44] *Id.*

[45] *United States v. Solomon*, 72 M.J. 176, 179 (C.A.A.F. 2013); *United States v. Czachorowski*, 66 M.J. 432, 434 (C.A.A.F. 2008).

[46] *United States v. Donaldson*, 58 M.J. 477, 488 (C.A.A.F. 2003).

erroneous."[47] "Findings of fact are affirmed unless they are clearly erroneous; conclusions of law are reviewed de novo."[48] It is an abuse of discretion if the military judge (1) "predicates [her] ruling on findings of fact that are not supported by the evidence," (2) "uses incorrect legal principles," (3) "applies correct legal principles to the facts in a way that is clearly unreasonable," or (4) "fails to consider important facts."[49]

1. Notice

As an initial matter, Appellant argues the Government failed to give the required pretrial notice of its intent to offer the videotaped interviews. A statement may be admitted under the residual hearsay exception "only if, before the trial or hearing, the proponent gives an adverse party reasonable notice of *the intent to offer the statement* and its particulars, including the declarant's name and address, so that the party has a fair opportunity to meet it."[50] On its face, this language appears to require notice of both the statement itself and the party's intent to offer it into evidence. However, our superior court in *United States v. Czachorowski*, noting a split among Article III courts on this issue, construed the rule's language to require only "(1) advance notice (2) *of the statements* (3) to allow the adverse party to challenge the statements' admission and substance."[51] In other words, the court held the notice requirement "applies to the statements, not to the means by which the proponent intends to seek admission of those statements."[52]

The military judge admonished the Government for failing to give notice of its intent to offer the videotaped interviews prior to trial so that the matter could have been litigated before seating members; however, she concluded the rule's notice requirement was met under *Czachorowski*.[53] She found the Defense had received the videotaped forensic interviews in discovery almost a year prior to trial, had been provided an expert to assist in evaluating them, and had received notice of the Government's trial witnesses, which included

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[47] *United States v. White*, 69 M.J. 236, 239 (C.A.A.F. 2010).

[48] *Czachorowski*, 66 M.J. at 434.

[49] *United States v. Commisso,* 76 M.J. 315, 321 (C.A.A.F. 2017) (citations omitted).

[50] Mil. R. Evid. 807(b) (emphasis added).

[51] *Czachorowski*, 66 M.J. at 435 (emphasis added).

[52] *Id.*

[53] R. at 632, 645.

the forensic interviewer. Thus, despite the Government's lack of pretrial notice of its intent to offer the videotaped interviews at trial, she concluded the Defense had received "more than a fair opportunity to prepare in advance of trial to confront these statements and to consider the matter that they may be admitted into this court."[54]

We find the military judge's conclusion consistent with the intentionally "flexible" notice requirement adopted in *Czachorowski*.[55] But we note that in *Czachorowski*, the trial defense counsel "admitted that he had known about the statement, and *trial counsel's intent to seek admission of those statements*, since the case's inception."[56] We therefore reject the Government's contention during oral argument that the *Czachorowski* test was satisfied by the mere disclosure of the videotaped interviews to the Defense during pretrial discovery. Here, however, Appellant had not only received the evidence, but had also been granted a forensic psychologist specifically to "prepare and address the testimony and interviews—forensic or otherwise—of the alleged victims in this case."[57] Thus, the Defense was sufficiently in a position "to challenge the statements' admission and substance"[58] when the Government announced its intent to offer them after Ocean's in-court testimony.

2. Analysis of the Military Judge's Admissibility Ruling

The residual hearsay exception is intended to "be used very rarely and only in exceptional circumstances."[59] It allows for the admission of otherwise excludable hearsay statements, even if not specifically covered by another hearsay exception, provided the following conditions are met:

> (1) the statement has equivalent circumstantial guarantees of trustworthiness;
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> (2) it is offered as evidence of a material fact;

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[54] R. at 646.

[55] *Czachorowski*, 66 M.J. at 435.

[56] *Id.* at 434 (emphasis added).

[57] App. Ex. XVI at 7.

[58] *Czachorowski*, 66 M.J. at 435.

[59] *Id.* at 435 n.6 (quoting S. Rep. No. 1277 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 7051, 7066).

> (3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and
>
> (4) admitting it will best serve the purposes of these rules and the interests of justice.[60]

Our superior court has summarized these requirements as "(1) materiality, (2) necessity, and (3) reliability."[61]

Materiality "is a multi-factored test looking at the importance of the issue for which the evidence was offered in relation to the other issues in this case; the extent to which the issue is in dispute; and the nature of the other evidence in the case pertaining to th[at] issue."[62]

The necessity prong "essentially creates a best evidence requirement," albeit one applied more liberally to the statements of child victims relating the details of abusive events.[63] "This prong may be satisfied where a witness cannot remember or refuses to testify about a material fact and there is no other more probative evidence of that fact."[64] While residual hearsay may be "somewhat cumulative, it may be important in evaluating other evidence and arriving at the truth so that the 'more probative' requirement cannot be interpreted with cast iron rigidity."[65]

Reliability is determined through the weighing of "particularized guarantees of trustworthiness . . . drawn from the totality of circumstances that surround the making of the statement and that render the declarant particularly worthy of belief."[66] These include such factors as the age and mental state of the declarant; the spontaneity and repetition of the statement; the circumstances under which the statement was made; whether suggestive questioning was used; the use of terminology unexpected of a child

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[60] Mil. R. Evid. 807(a).

[61] *United States v. Kelley*, 45 M.J. 275, 280 (C.A.A.F. 1996) (citations omitted).

[62] *United States v. Ellerbrock*, 70 M.J. 314, 318 (C.A.A.F. 2011) (citations and internal quotation marks omitted).

[63] *Kelley*, 45 M.J. at 280–81 (citations omitted).

[64] *United States v. Wellington*, 58 M.J. 420, 425 (C.A.A.F. 2003) (citations omitted).

[65] *Kelley*, 45 M.J. at 280 (quoting *United States v. Shaw*, 824 F.2d 601, 610 (8th Cir. 1987)).

[66] *Idaho v. Wright*, 497 U.S. 805, 820 (1990).

of similar age; the lack of motive to fabricate; and whether the statement is corroborated by other evidence.[67]

Here, after the Government announced its intent to offer the videotaped interviews, the Defense objected, and the military judge heard argument on the objection. She then informed the parties that she anticipated the residual hearsay factors would be satisfied and that she would allow the Government to elicit foundational testimony from the forensic interviewer. When the Defense requested that the military judge review the videos during a long recess prior to ruling on their admissibility, the trial counsel responded that "the court's already ruled as to what foundation we need to lay. . . . I don't know that the content of the videos is determinative of that."[68] After the recess, the Defense moved for a continuance and an evidentiary hearing to litigate whether the interviews were admissible under the residual hearsay rule.[69] Among other things, the Defense argued that:

> the court must watch the videos before making that determination. We would even like to be able to take clips of those videos and be able to point those things out. We just haven't had the time in the close to three hours that we've had since we broke last to be able to point out those areas where the Defense would challenge those circumstantial guarantees of trustworthiness that I believe the Government would be trying to point out.[70]

The military judge denied the Defense requests. She made a preliminary ruling based principally on what she had observed during Ocean's in-court testimony,[71] conditioned it on the Government eliciting appropriate foundational testimony from the forensic interviewer, and subsequently admitted both videotaped interviews in their entirety. She did so without actually watching the interviews.

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[67] *Wright*, 497 U.S. at 821–22; *United States v. Donaldson*, 58 M.J. 477, 488 (C.A.A.F. 2003); *United States v. McGrath*, 39 M.J. 158, 166–67 (C.M.A. 1994).

[68] R. at 638.

[69] App. Ex. LII; R. at 638-43.

[70] R. at 641.

[71] The military judge found that during her testimony Ocean appeared articulate, was not crying, and was not overly emotional; that her answers were short; and that she kept strict eye contact with her Article 6(b) representative, who was placed in a position in the gallery to ensure that she could testify fully. R. at 649.

The only findings the military judge made as to the contents of the videos—the actual out-of-court statements sought to be admitted—were essentially educated guesses as opposed to factual findings. She determined the interviews were material because they "included, what the court understands, are the victim's statements concerning the accused's sexual abuse of her as charged by the Government."[72] Regarding their necessity, she found the interviews were "likely to be more probative" than Ocean's in-court testimony because Ocean "testified to fewer offenses and in less detail than what is expected to be shown in [the] forensic interviews."[73] Regarding their reliability, she stated that she "expect[ed] the forensic interviews to show that [Ocean's] statements were made in a safe environment specifically made for children to make them comfortable . . . [and] anticipate[d] that the statements were taken by a professional who is trained to speak to children and to avoid suggestibility or argument."[74]

For several reasons, we conclude that the military judge abused her discretion by ruling in this manner on the admissibility of the statements under the residual hearsay rule. First, the military judge's analysis of the content and context of the statements themselves was ultimately grounded on speculative assumptions about what the videos contained, as opposed to being predicated on actual findings of fact supported by the evidence.

Second, addressing the statements' admissibility in this manner resulted in her application of the various prongs of the residual hearsay rule to the "facts" in a way that is clearly unreasonable. In determining the statements' necessity, for example, the military judge made factual findings about Ocean's demeanor and testimony during trial and heard foundational testimony from the forensic interviewer about her training and interview protocols. But without factual findings based on a review of the interviews themselves, the military judge had no basis upon which to conclude as a matter of law that Ocean's statements during the interviews were actually "more probative on the point for which [they were] offered than any other evidence that the proponent [could] obtain through reasonable efforts."[75] A military judge cannot possibly weigh the probative value of out-of-court

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[72] R. at 648.

[73] R. at 649.

[74] R. at 650.

[75] Mil. R. Evid. 807(a)(3).

statements vis-à-vis in-court testimony (or other evidence) without knowing, and addressing, what those statements actually are.

Third, in ruling in this manner on the admissibility of the statements, the military judge failed to consider important facts—namely, what Ocean actually said during each interview. The contours of what makes a fact "important" enough to constitute an abuse of discretion if not "considered" are not clearly defined.[76] But it is difficult to imagine facts more important to consider in an admissibility analysis under the residual hearsay rule than the content of the statements sought to be introduced. To assess their reliability, for example, the statements must be analyzed for *particularized* guarantees of trustworthiness, based on the totality of the circumstances under which they were made. Here, statements made during two interviews conducted over 14 months apart were addressed collectively for, at best, generalized guarantees of trustworthiness based on the forensic interviewer's testimony about how she conducted the interviews. The military judge's analysis did not take into account such critical, material facts as what Ocean actually stated during each interview, whether she used any terminology unexpected of a child of similar age, whether there appeared to be suggestibility concerns during either interview, or whether her statements during the two interviews were corroborated by other evidence or even by each other.

The failure to give individualized consideration to each interview—let alone the statements within each interview—led the military judge to overlook significant issues that affect the analysis under the residual hearsay rule. While the necessity prong is generally applied more liberally to statements of child victims, it is nevertheless true that "the direct testimony of the hearsay declarant ordinarily would be judged the most probative evidence."[77] Here, the general similarities between what Ocean alleged

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[76] *Compare Commisso*, 76 M.J. at 317–18, 323 (finding abuse of discretion in denial of mistrial motion on grounds of member bias where military judge did not address panel member's statements indicating bias and three panel members' attendance at Sexual Assault Review Board meetings discussing victim's allegations); *and Solomon*, 72 M.J. at 180 (finding abuse of discretion in admission of evidence under Mil. R. Evid. 413 where military judge did not reconcile or mention a police report showing the accused was in custody at time of alleged assaults and gave little or no weight to his prior acquittal of the offenses); *with United States v. Becker*, No. 21-0236, ___ M.J. ___, 2021 CAAF LEXIS 844 (C.A.A.F. Sept. 14, 2021) (finding no abuse of discretion in denial of motion to admit statements under forfeiture by wrongdoing where military judge did not address immediate circumstances and premeditated manner of accused's alleged murder of declarant).

[77] *Czachorowski*, 66 M.J. at 436.

during the first interview and what she testified to at trial highlight the lack of any reasoned basis for the military judge's speculative assumption that the forensic interviews were "likely to be more probative" than Ocean's in-court testimony.

More concerning is the military judge's failure to address *particularized* guarantees of trustworthiness, especially with respect to the second interview. There, Ocean changed her statements about Appellant wiping her in the bathroom after she used the toilet into an allegation that he digitally penetrated her on a bed; she alleged for the first time that he had put his mouth on her vaginal area, while failing to disclose when asked that someone else (her neighbor) had touched her private parts in this manner; she used adult terminology to describe Appellant's alleged conduct as "abusing"; and she referred to discussions she had been having with a therapist working down the hall from the forensic interviewer "who taught [her] about abuse and what [Appellant] did to [her] and what's wrong and what's right."[78] These facts dramatically impact the analysis as to whether Ocean's statements during the second interview are sufficiently reliable to be admitted under Mil. R. Evid. 807, and none would be apparent without reviewing, and addressing, the videotaped interview itself.

Applying the appropriate deference to her ruling, we find that the military judge's failure to address or reconcile the contents of the videotaped interviews or give due weight to the statements Ocean made therein, for which admission was sought, undermined her analysis under the residual hearsay rule such that the decision to admit Prosecution Exhibits 10 and 11 was an abuse of discretion.[79]

3. Prejudice

Having found error, we test for prejudice. Appellant argues the error is constitutional because admission of the exhibits after Ocean's testimony deprived him of his constitutional rights. We disagree, and find Appellant's rights to confrontation and due process were satisfied when Ocean testified and thereafter remained subject to recall for further examination by either party during the trial, including the Defense.[80] For non-constitutional

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[78] Pros. Ex. 11; App. Ex. LX at 22.

[79] *See Solomon*, 72 M.J. at 182.

[80] *See United States v. Deland*, 22 M.J. 70, 72 (C.M.A. 1986) (finding that where the alleged victim "testified at the trial and could be observed by the trier of fact . . . the reception of her extrajudicial statement did not violate appellant's sixth

evidentiary errors, the test for prejudice "is whether the error had a substantial influence on the findings."[81] In conducting this analysis, we weigh "(1) the strength of the Government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question."[82]

With respect to Specification 2 of Charge I, Prosecution Exhibit 11 is the only evidence supporting the allegation that Appellant penetrated Ocean's vulva with his mouth, which Ocean denied during her in-court testimony and did not mention in her other out-of-court statements that were admitted at trial. At oral argument, the Government conceded that if the Court found Prosecution Exhibit 11 was erroneously admitted, the error would be prejudicial with respect to Appellant' conviction of this specification. We agree, and conclude the erroneous admission of this evidence necessitates setting aside the finding of guilty for Specification 2 of Charge I, which we accomplish in our decretal paragraph.

In weighing the above factors with respect to Appellant's other convictions for Specification 3 (penetrating Ocean's vulva with his finger) and Specification 6 (causing her to touch his genitalia) of Charge I, we reach the opposite conclusion. The Government's case with respect to these specifications was not strong, as it rested essentially on Ocean's testimony and out-of-court statements, with additional evidence bearing on Appellant's credibility, intent, and consciousness of guilt.[83] The Defense case was not strong either, consisting principally of Appellant testifying about his difficult relationship

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amendment right of confrontation") (citing *United States v. LeMere*, 22 M.J. 61 (C.M.A. 1986); *California v. Green*, 399 U.S. 149 (1970)). *Cf. United States v. Gardinier*, 67 M.J. 304, 305–07 (C.A.A.F. 2009) (using constitutional standard to test for prejudice where trial judge admitted child victim's out-of-court statements in violation of the appellant's confrontation right after determining she was not available to testify at trial).

[81] *United States v. Kohlbek*, 78 M.J. 326, 334 (C.A.A.F. 2019) (internal quotation marks and citation omitted).

[82] *Id.* (quoting *United States v. Norman*, 74 M.J. 144, 150 (C.A.A.F. 2015)).

[83] The evidence supports that Appellant would hit himself when he felt he had disappointed the family, lied about doing so, and called himself a monster during arguments with Ms. Bravo, who testified he had a sexual proclivity to have her taste his ejaculate after intercourse.

with Ms. Bravo, his care for the children which included bathing and wiping them, and his denial of Ocean's allegations.[84]

While Ocean's statements to Ms. Charlie are material these offenses, the quality of their support to the Government's case is undermined in certain respects. Ocean's statements during the first interview about touching Appellant's penis are relatively consistent with her in-court testimony; however, her claim that Ms. Bravo walked in when this occurred, said "stop," and told Appellant to "go somewhere else and don't get by my kids again" (which Ms. Bravo denied doing or saying) undermines the credibility of the allegation. Moreover, Ocean's statements about digital penetration during this interview place the activity in the context of Appellant wiping her in the bathroom after she used the toilet,[85] which supports Appellant's parental-care defense and undermines her claim during the second interview that Appellant penetrated her with four fingers on her parents' bed. Similarly, Ocean's statements during the second interview about touching Appellant's penis are inconsistent and more exaggerated in comparison with both the first interview and her trial testimony, which also undermines her credibility.

Accordingly, we conclude the erroneous admission of the videotaped interviews alone did not have a substantial influence on the guilty findings for Specifications 3 and 6 of Charge I.

B. Denial of Defense Motion under Mil. R. Evid. 412

During the Government's opening statement, the trial counsel told the members:

> We invite you to listen to how [Ocean] describes these acts, what words she uses, how it happened, how it felt. Because when you hear how she describes it in her own words, it will allow you to understand that *what she is describing are things she actually experienced.*[86]

In response, during his opening statement, Appellant's civilian defense counsel [CDC] began to discuss the game of "kiss each other's privacy" in

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[84] The Defense also called several character witnesses who opined that Appellant was a truthful person, despite not knowing about asserted instances of his dishonesty.

[85] Ocean's drawing and statements to her therapist, Ms. Bailey, also place the allegation in this context.

[86] R. at 402 (emphasis added).

which Ocean had experienced her seven-year-old neighbor putting her mouth on Ocean's "private." The Government objected and asserted lack of notice under Mil. R. Evid. 412. During the Article 39(a) session, CDC argued the Defense should be allowed to rebut the Government's position that "the only place that [Ocean] could learn this from is [Appellant]. The Defense has to be able to show there's another source for this information that's coming out. It is not [Mil. R. Evid.] 412, it is [Mil. R. Evid.] 608."[87]

The military judge found the evidence was covered by Mil. R. Evid. 412, the issue had not been litigated, and the required notice under the rule had not been given. She sustained the Government's objection and instructed the Defense not to mention the issue further.

Subsequently, the Defense moved the court to allow it to elicit the "privacy game" evidence during its cross-examination of Ms. Bravo, who testified about reporting Ocean's allegations to the authorities and then taking her to be forensically interviewed. CDC argued the evidence that the neighbor had placed her lips/mouth on Ocean's private parts was constitutionally required under Mil. R. Evid. 412 because it would rebut the impression left by the Government "that the only way that [Ocean] learned about this information is through experiences exclusively with [Appellant]."[88] Rather, it would show that Ocean's behavior "could have been learned from an outside source. . . . Because, otherwise, [the members would] go back to the deliberation room and say, 'Where else could she have learned this? Where else would a 5-, 6-, 7-, 8-year-old learn this?' "[89]

The military judge denied the motion, concluding that it was untimely and the Defense had "not articulated a theory of relevance that place[d] it into the constitutional realm."[90] She found there was no impression left with the members that the only place Ocean could have learned the behavior was from Appellant, and that the Defense was not arguing it was relevant to Ocean's credibility.

The Government then introduced into evidence, over Defense objection, the videotaped forensic interviews (Prosecution Exhibits 10 and 11) and published them in open court. During the second interview, Ocean made the

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[87] R. at 423.

[88] R. at 596.

[89] R. at 597.

[90] R. at 608.

new allegation that Appellant had put his mouth on the part she pees from and said that "it felt gross."[91] When subsequently asked during the same interview, "Was there ever a time anyone else asked to see any private parts of your body," Ocean responded, "No."[92] When asked, "Was there ever a time someone else [other than Appellant] ever touched any private parts of your body?" Ocean again responded, "No."[93]

In conjunction with introducing this evidence, the Government elicited testimony from the forensic interviewer, Ms. Charlie, that an aspect of conducting forensic interviews is "to explore alternative hypotheses," to find out whether the alleged behavior has "ever happened to [the child] with someone else."[94] Following that, the Government elicited testimony from its expert in forensic interviewing, Dr. Foxtrot, that such alternative hypotheses

> are important, in my view, to explore sources of a child's knowledge. So if a child did provide information that suggested exposure from other sources, that would be information about the sources of a child's knowledge, and it might impact upon how somebody examined, you know, why they know what they know, where is it coming from. So, I mean, that is the basis of, in part, of why we ask those questions. It is, also, to screen for additional forms of maltreatment, but it is also just to understand, why does a five-year-old know something, or where is that coming from.[95]

In light of this additional evidence, CDC moved the military judge to reconsider her previous Mil. R. Evid. 412 ruling. He argued there was good cause under the rule's constitutional exception to question Dr. Foxtrot about the alternative hypothesis that Ocean had gained the experiential knowledge of having someone's mouth placed on her vaginal area not from Appellant, but from her seven-year-old neighbor. He argued that "if in this case there was an external influence or external game where this individual could have

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[91] Pros. Ex. 11; App. Ex. LX at 19.

[92] Pros. Ex. 11; App. Ex. LX at 23.

[93] *Id*.

[94] R. at 1116.

[95] R. at 1189.

learned about the behavior from someone else, that could influence what was done in the interview."[96]

He also argued the evidence was admissible under Mil. R. Evid. 608 because it contradicted Ocean's statements during the interviews that left a false impression that no one else had ever inappropriately touched her—specifically, by placing their mouth on her private parts. He argued that Ms. Charlie's testimony suggested it was important "to eliminate the possibility that this otherwise abnormal behavior, not typically known by a five-year-old, could have been learned only from the accused in this particular case."[97] Because the Defense had been precluded from eliciting the evidence from other witnesses pursuant to the court's earlier Mil. R. Evid. 412 ruling, he argued he should be allowed to explore the issue with Dr. Foxtrot who emphasized the importance of exploring alternative hypotheses "in the context of the forensic interview. They must know why the child knows what they know, and they must know where that information has come from."[98]

The military judge denied the motion for reconsideration. Adopting her prior ruling, she concluded the evidence was not constitutionally required because it was not "relevant to the issues that are before the members," which she found concerned "the issue of suggestibility, not learned behavior."[99] She further found the evidence was "not material or important to the issue for which the evidence is offered in relation to other issues in the case, the other evidence that the Defense has and has been able to present to the members."[100]

Appellant asserts the military judge erred in denying the Defense's motion to admit this evidence under Mil. R. Evid. 412. We review rulings to admit or exclude evidence for an abuse of discretion.[101]

1. Law

"Evidence offered to prove an alleged victim engaged in other sexual behavior" is, with limited exceptions, generally not admissible at a trial

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[96] R. at 1202.

[97] R. at 1203–04.

[98] R. at 1206.

[99] R. at 1207.

[100] *Id.*

[101] *Ellerbrock*, 70 M.J. at 317.

involving a sexual offense.[102] A party intending to offer such evidence under an exception to this rule must "file a written motion at least 5 days prior to entry of pleas specifically describing the evidence and stating the purpose for which it is offered unless the military judge, for good cause shown, requires a different time for filing or permits filing during trial."[103] If after a hearing the military judge determines that the evidence falls within an exception to this rule and the probative value of the evidence outweighs the danger of unfair prejudice to the alleged victim's privacy, the evidence is admissible subject to any parameters specified by the military judge and the Mil. R. Evid. 403 balancing test.[104]

One of the rule's exceptions is for "evidence the exclusion of which would violate the accused's constitutional rights."[105] This exception encompasses an accused's Sixth Amendment right to confront and cross-examine the witnesses against him, which includes the right "to impeach, i.e., discredit the witness."[106] Evidence, provided it passes the Mil. R. Evid. 403 balancing test, is admissible under this exception if it is relevant, material, and favorable (i.e., "vital") to the defense, no matter how embarrassing it may be to the alleged victim.[107] Evidence is relevant if it has any tendency to make a fact of consequence in determining the action more or less probable than it would be without the evidence.[108] Materiality "is a multi-factored test looking at the importance of the issue for which the evidence was offered in relation to the other issues in this case; the extent to which the issue is in dispute; and the nature of the other evidence in the case pertaining to th[at] issue."[109] To pass the Mil. R. Evid. 403 balancing test, the evidence's probative value must not be substantially outweighed by such dangers as "harassment,

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[102] Mil. R. Evid. 412(a)(1). "Sexual behavior" includes "any sexual behavior not encompassed by the alleged offense." Mil. R. Evid. 412(d).

[103] Mil. R. Evid. 412(c)(1)(A).

[104] Mil. R. Evid. 412(c).

[105] Mil. R. Evid. 412(b)(3).

[106] *Ellerbrock*, 70 M.J. at 318 (quoting *Olden v. Kentucky*, 488 U.S. 227, 231 (1988)).

[107] *United States v. Banker*, 60 M.J. 216, 222–23 (2004), *abrogated by United States v. Gaddis*, 70 M.J. 248, 256 (C.A.A.F. 2011).

[108] Mil. R. Evid. 401.

[109] *Ellerbrock*, 70 M.J. at 318 (citations and internal quotation marks omitted).

prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant."[110]

For specific instances of conduct as it relates to a witness' character for truthfulness, Mil. R. Evid. 608(b) provides that "the military judge may, on cross-examination, allow [such instances] to be inquired into if they are probative of the character for truthfulness or untruthfulness" of the witness.[111] Extrinsic evidence "is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness."[112] However, the doctrine of "impeachment by contradiction," does allow "showing the tribunal the contrary of a witness' asserted fact, so as to raise an inference of general defective trustworthiness."[113]

2. Analysis

Just as the Government failed to give pretrial notice of its intent to admit the videotaped interviews, the Defense gave no notice under Mil. R. Evid. 412 of its intent to elicit the evidence of Ocean's "other sexual behavior": her game of "kiss each other's privacy" with her neighbor. So once again, the military judge was forced to rule on a crucial motion mid-trial, without the benefit of a pretrial evidentiary hearing or formal briefing from the parties. However, the rule grants the military judge authority to entertain such motions during trial "for good cause shown."[114] In addition, as we have previously found, the Government can through its own actions at trial open the door to Mil. R. Evid. 412 evidence that might not otherwise be admissible under the rule.[115] Specifically, if the Government creates a factual inference through its presentation of evidence, "the defense must be allowed to rebut that inference. To do otherwise denies the appellant his right to mount a defense, and allows the Government to meet its burden based on an incomplete description of events."[116]

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[110] *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986).

[111] Mil. R. Evid. 608(b).

[112] *Id.*

[113] *United States v. Banker*, 15 M.J. 207, 210 (C.M.A. 1983).

[114] Mil. R. Evid. 412(c)(1)(A).

[115] *See United States v. Villanueva*, No. 201400212, 2015 CCA LEXIS 90 (N-M. Ct. Crim. App. Mar. 19, 2015) (unpublished).

[116] *Id.* at *9-10.

We find that is the case here. Irrespective of whether the evidence of Ocean's "privacy game" with her neighbor was relevant at the time of opening statements, it was certainly relevant by the time the Government elected to introduce and publish Ocean's second videotaped interview (Prosecution Exhibit 11), during which Ocean stated that Appellant had put his mouth on her vaginal area and subsequently denied that anyone else had ever touched or asked to see her "private parts." These statements create precisely the inference that the Defense had expressed concerns about with the Government's opening statement: that given her young age, the members would infer that the only way Ocean could have learned and been able to testify about such behavior was through Appellant's alleged misconduct.

The Government then reinforced the inference it created through Ms. Charlie's and Dr. Foxtrot's testimony about the importance of "exploring alternative hypotheses" during forensic interviews, in order to examine the sources of a child's knowledge and understand why a five-year-old knows what she knows. At the very least, this testimony implied that Ms. Charlie's interviews of Ocean were forensically sound because there were no alternative hypotheses to explore. In fact, the "privacy game" evidence suggests the opposite is true: the forensic interviews are potentially not as sound as they appear because at least one known alternative hypothesis was never explored—that Ocean's knowledge of someone putting their mouth on her vaginal area was drawn from her interaction with her neighbor. In context, that alternative hypothesis is an important one, because it could explain how Ocean acquired the knowledge and sensory experience of such behavior wholly independent of Appellant's alleged conduct.

By this time in the trial, the evidence of the "privacy game" was also relevant to Ocean's credibility. When the Government admitted Prosecution 11, it placed squarely before the members Ocean's denials that anything like what she had been describing (which included both digital penetration and oral copulation) had ever happened with anyone other than Appellant—namely, that anyone had ever touched or asked to see her "private parts."[117] These denials are directly contradicted by Ocean's statements to Ms. Bravo about the game of "kiss each other's privacy," during which her neighbor had kissed her "private" with a closed mouth and she had kissed the girl's

[117] Pros. Ex. 11; App. Ex. LX at 23.

"backside."[118] Because the Government's evidence (Prosecution Exhibit 11) raised this issue, the Defense was entitled to use the other evidence for impeachment by contradiction: "showing the tribunal the contrary of a witness' asserted fact, so as to raise an inference of general defective trustworthiness."[119]

As such, we find clearly erroneous the military judge's finding on the motion for reconsideration that the "privacy game" evidence was not relevant, material, or important to the issues before the members, which she found solely concerned suggestibility as opposed to learned behavior. While suggestibility was indeed an issue explored by the Defense, the issue of learned behavior, which the Government's evidence had placed in issue, had not been explored precisely because the military judge's earlier Mil. R. Evid. 412 ruling had foreclosed the Defense from doing so. We find the circularity of such analysis to be clearly unreasonable.

We also find clearly erroneous and unsupported by the evidence the military judge's determination, adopted from her prior ruling, that the Government's evidence left no impression that the only place Ocean could have learned the alleged behavior was from Appellant. Ocean's statements in Prosecution Exhibit 11 create exactly this impression, which the "privacy game" evidence reveals to be not only misleading but false. This impression was then reinforced through the forensic interviewer's and the Government expert's testimony about exploring alternative hypotheses, when there was a known alternative hypothesis which should have been but, unbeknownst to the court-martial members, was never explored. Thus, not only does the evidence of this particular alternative explanation for Ocean's knowledge color the trustworthiness of the forensic interviews, but her contradictory statements impact the overall credibility of her allegations. The evidence was

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[118] App. Ex. LI. While the Government quibbled during oral argument about what "private" may mean, we find that in distinguishing between "private" and "backside" Ocean provided sufficient context to raise this contradiction.

[119] *Banker*, 15 M.J. at 210. While we understand such substantive impeachment may not have been accomplished through cross-examining the witness on the stand at the time of the motion for reconsideration—Ms. Foxtrot—we conclude that based on the evidence and arguments the military judge had before her at that time, her ruling foreclosed the Defense from pursuing the matter further with either the Government's witnesses or its own. *See* Mil. R. Evid. 103(b) ("Once the military judge rules definitively on the record admitting or excluding evidence, either before or at trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.").

therefore relevant, material, and vital to Appellant's defense, and its probative value in these areas far outweighed any danger of unfair prejudice.

Applying the appropriate deference to the military judge's ruling, we conclude this evidence was of such clear importance to issues central to the trial and to Appellant's defense that excluding it as not constitutionally required was an abuse of discretion.

3. Prejudice

Because we conclude the evidence was constitutionally required, its exclusion is constitutional error. Consequently, "we must test the error to see if it was harmless beyond a reasonable doubt—whether there is a reasonable possibility that the evidence [or error] complained of might have contributed to the conviction."[120] We do so by applying five nonexclusive factors: "the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case."[121]

We conclude the exclusion of this Mil. R. Evid. 412 evidence was not harmless. Ocean's testimony and out-of-court statements were the heart of the Government's case, which was not strong. The "privacy game" evidence was a principal means of impeaching both the reliability of the videotaped interviews and the credibility of the Government's central witness. Without question, the evidence was material to Specification 2 of Charge I, as it contradicted Ocean's statements in a way specific to her allegation in Prosecution Exhibit 11 that Appellant had put his mouth on her vulva (and no one else ever had). As, in fact, this is exactly what the excluded evidence showed the neighborhood girl had done to her—which would explain how Ocean might be both aware of and able to describe such an experience—we conclude there is a reasonable possibility that the erroneous exclusion of the evidence might have contributed to Appellant's conviction of this specification.

We further find the evidence impeaches Ocean's overall credibility in a way that impacts Appellant's other convictions. Similar to prior inconsistent statements through which, "[b]y showing self-contradiction, the witness can

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[120] *Ellerbrock*, 70 M.J. at 320 (citations and internal quotation marks omitted).

[121] *Van Arsdall*, 475 U.S. at 684 (citations omitted).

be discredited as a person capable of error," impeachment by contradiction of a witness' asserted fact raises "an inference of general defective trustworthiness."[122] Appellant's defense was that suggestion from Ms. Bravo or others (like Ms. Kilo) had caused Ocean to turn innocuous or non-criminal conduct—bathing, wiping, even playing with a neighbor's child—into abuse allegations whose trustworthiness was generally defective. The "privacy game" evidence calls into question Ocean's statements that she had never before had anyone touch or ask to see her "private parts," which during the second interview included Appellant not only putting his mouth on her vaginal area but also digitally penetrating her vagina with four fingers on a bed (as opposed to wiping her after she used the toilet as she had previously stated). Had the court-martial members been aware of the apparent falsity of her denials that similar conduct had occurred to her outside the presence of Appellant, we find that "[a] reasonable jury might have received a significantly different impression of [Ocean's] credibility."[123] Thus, under these circumstances, we conclude there is a reasonable possibility that the erroneous exclusion of the evidence might also have contributed to Appellant's convictions of Specifications 3 and 6 of Charge I.

Accordingly, we find the error was not harmless beyond a reasonable doubt with respect to any of Appellant's convictions, which we set aside in our decretal paragraph.

C. Admission of Evidence Under Mil. R. Evid. 803(4)

Appellant asserts the military judge erred in admitting, over his trial defense counsel's hearsay objection, both the testimony of a pediatric nurse practitioner, Ms. Williams, and an excerpt of her report (Prosecution Exhibit 2) regarding Ocean's statements to her, under the hearsay exception for statements made for medical diagnosis or treatment, Mil. R. Evid. 803(4). We review rulings to admit or exclude evidence for an abuse of discretion.[124]

Mil. R. Evid. 803(4) excludes from the rule against hearsay "[a] statement that—(A) is made for—and is reasonably pertinent to—medical diagnosis or treatment; and (B) describes medical history; past or present symptoms or sensations; their inception; or their general cause."[125] Our superior court has

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[122] *Banker*, 15 M.J. at 210.

[123] *Ellerbrock*, 70 M.J. at 321 (citations and internal quotations omitted).

[124] *Solomon*, 72 M.J. at 179.

[125] Mil. R. Evid. 803(4).

construed this language to require two conditions to be satisfied: "first the statements must be made for the purposes of 'medical diagnosis or treatment'; and second, the patient must make the statement 'with some expectation of receiving medical benefit for the medical diagnosis or treatment that is being sought.'"[126] This test is in accordance with the exception's rationale: "the self-interested motivation to speak the truth to a treating physician . . . in order to receive proper care and the necessity of the statement for a diagnosis or treatment."[127]

1. Analysis

The military judge found that Ocean's statements to Ms. Williams "fit under the exception, [Mil. R. Evid.] 803(4), statements made for medical diagnosis or treatment."[128] On the exception's subjective prong, while the military judge did not make a finding as to Ocean's expectation in speaking with Ms. Williams, she did note Ms. Williams' testimony that she "informs the child that she's going to have a checkup to make sure that she's okay and everything is okay with her body."[129] "A child-victim's expectation of receiving medical treatment . . . may be established by the testimony of the treating medical professionals," as long as the record "support[s] the military judge's determination that the child had the requisite understanding and expectation of a medical benefit to satisfy the subjective prong."[130] We find the military judge's implicit finding that Ocean "had some expectation of treatment when she talked to [Ms. Williams]"[131] is supported by Ms. Williams' testimony.

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[126] *United States v. Rodriguez-Rivera*, 63 M.J. 372, 381 (C.A.A.F. 2006) (quoting *United States v. Edens*, 31 M.J. 267, 269 (C.M.A. 1990)).

[127] *United States v. Quigley*, 35 M.J. 345, 347 (C.M.A. 1992). While the court in *Quigley* required that the statement also be made "near the pivotal time of events," *id.* at 347, the court has since analyzed Mil. R. Evid. 803(4) under the two-pronged test described above, which does not include such a temporal requirement. *Rodriguez-Rivera*, 63 M.J. at 381. We therefore disagree with Appellant's contention that the exception requires the statements to be close in time to events at issue and conclude that any lapse of time between the alleged abuse and the examination during which the statements are made is simply a factor to be used in determining whether the current two-pronged test has been satisfied.

[128] R. at 494.

[129] *Id.*

[130] *United States v. Hollis*, 57 M.J. 74, 79–80 (C.A.A.F. 2002).

[131] *Rodriguez-Rivera*, 63 M.J. at 381 (quoting *United States v. Haner*, 49 M.J. 72, 76 (C.A.A.F. 1998)).

The issue here is with the exception's objective prong—the necessity of the statements for purposes of medical diagnosis or treatment—regarding which the military judge made no specific findings. In *United States v. Gardinier*, our superior court found error in the admission of a child's statements to a sexual assault nurse examiner [SANE] during a forensic medical examination.[132] The SANE testified she took a patient history from the child regarding the alleged inappropriate touching "to determine diagnosis and treatment," but the child had already been interviewed by law enforcement, and the sheriff's department was involved in arranging the examination and, per the authorization form, received a copy of the report, which the government then introduced at trial.[133] The court found that the SANE, "who specialized in conducting forensic medical examinations, performed a forensic medical exam on [the child] at the behest of law enforcement with the forensic needs of law enforcement and prosecution in mind."[134]

Like the court in *Gardinier*, we recognize that the "referral of an alleged victim to a medical professional by law enforcement or trial counsel does not always establish that the statements at issue were made in response to a law enforcement or prosecution inquiry or elicited with an eye toward prosecution."[135] Nor does delay alone negate the possibility that an examination could be undertaken for the legitimate purposes of medical diagnosis or treatment.[136] However, our superior court has also noted that "military judges must remain vigilant in ensuring that the hearsay exception for statements made for the purposes of medical diagnosis or treatment is not used as a subterfuge."[137]

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[132] 65 M.J. 60, 64–67 (C.A.A.F. 2007) (analyzing the issue as a violation of the appellant's confrontation right).

[133] *Id.* at 66.

[134] *Id.*

[135] *Id.* (citing *Rodriguez-Rivera*, 63 M.J. at 381).

[136] *See Rodriguez-Rivera*, 63 M.J. at 381 (upholding admission of statements under medical hearsay exception where, after being examined by a physician at an overseas Naval medical clinic, upon the family's subsequent transfer back to the United States the trial counsel arranged for the child to see a child abuse pediatrician, whose purpose in examining her was to provide a second opinion regarding the child's health and determine if she needed any further medical or psychological intervention).

[137] *Id.* at 381 n.2.

Here, six months after arranging for Ocean to be forensically interviewed, law enforcement arranged for Ocean to be examined at a children's medical center pursuant to its "physical and sexual abuse medical protocol."[138] Ms. Williams worked as part of the hospital's "child advocacy resource and evaluation team," which specialized in seeing suspected child abuse victims through referrals from law enforcement, child protective services, and other agencies.[139] The authorization form Ms. Bravo signed listed the name of the Honolulu Police Department detective assigned to the case and authorized the release of the examination report to "the appropriate law enforcement agency and the Office of the District Attorney having jurisdiction."[140] After talking to Ms. Bravo about Ocean's allegations, Ms. Williams asked Ocean "had anybody made [her] feel uncomfortable or touched [her] in a way that made [her] uncomfortable?"[141] The statements she elicited and wrote in the "patient history" section of the report contain no ongoing medical issues or complaints, only Ocean's allegations of inappropriate touching by Appellant well over a year before.[142] Nevertheless, Ms. Williams took photographs during the course of her examination, which the authorization form acknowledged the collection of evidence might include. While Ms. Williams testified that the purpose of her examination was "to treat,"[143] she conceded that she did not expect to find anything she would need to treat, and as predicted, her physical examination of Ocean revealed no injuries or abnormal findings indicative of abuse. Per the authorization form, law enforcement then received a copy of the report, and the Government introduced the portion containing Ocean's statements and elicited Ms. Williams' testimony about them.

Under these circumstances, we find clearly erroneous and unsupported by the evidence the military judge's implicit finding that Ocean's statements to Ms. Williams were reasonably pertinent to medical diagnosis or treatment, as opposed to furthering a forensic medical examination in aid to law enforcement. Thus, applying the appropriate deference to her ruling, we find the

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[138] Pros. Ex. 2 at 1; R. at 483–84, 489–92, 1064-66, 1069; App. Ex. VII at 31.

[139] R. at 499–501.

[140] Pros. Ex. 2 at 1.

[141] R. at 505–06, 515–16; Pros. Ex. 2 at 2.

[142] Pros. Ex. 2 at 2. *See also* section I.A.3, *supra.*

[143] R. at 537.

military judge abused her discretion in finding Ocean's statements to Ms. Williams "fit under the exception, [Mil. R. Evid.] 803(4)."[144]

2. Prejudice

Having found error, we test for prejudice. Contrary to Appellant's assertion, because both Ocean and Ms. Williams testified at trial and could be observed by the trier of fact, we conclude the reception of Ocean's out-of-court statements to Ms. Williams did not violate Appellant's confrontation right.[145] For non-constitutional evidentiary errors, the test for prejudice "is whether the error had a substantial influence on the findings."[146] In conducting this analysis, we weigh "(1) the strength of the Government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question."[147]

As discussed above, neither party's case was strong. The Government's rested almost entirely on Ocean's testimony and out-of-court statements, and the Defense's consisted principally of Appellant's denial of Ocean's allegations. However, the statements made to Ms. Williams, as testified to and memorialized in Prosecution Exhibit 2, are material to Specifications 3 and 6 of Charge I. And while the credibility of the statements is undermined by inconsistencies with Ocean's in-court testimony and other statements—particularly her unique claim to Ms. Williams that Appellant's alleged abusive acts happened "19 or 20 times"—we find the quality of the statements particularly important because they lend the imprimatur of medical testimony to delayed claims for which other forms of corroboration are lacking. Moreover, the trial counsel apparently shared this view, as the Government relied extensively on the statements contained in Prosecution Exhibit 2 during its closing argument.[148]

In weighing these factors, we conclude that the erroneous admission of Prosecution Exhibit 2 and Ms. Williams' testimony about Ocean's statements to her had a substantial influence on the guilty findings for Specifications 3

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[144] R. at 494.

[145] *See Deland*, 22 M.J. at 72 (citations omitted).

[146] *Kohlbek*, 78 M.J. at 334 (internal quotation marks and citation omitted).

[147] *Id.* (quoting *Norman*, 74 M.J. at 150.

[148] *See* App. Ex. LXVI.

and 6 of Charge I.[149] Accordingly, we find prejudice to these findings and set them aside in our decretal paragraph.

D. Cumulative Error

Finally, we address the doctrine of cumulative error, "under which a number of errors, no one perhaps sufficient to merit reversal, in combination necessitate the disapproval of a finding."[150] Here, "[w]e cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error[s]."[151] This was a contested case where Appellant consistently denied the allegations; there were no corroborating eyewitnesses for Ocean's allegations; the report was delayed and made under suggestive circumstances; the allegations made to authority figures changed over time and in significant ways that tend to undermine their credibility; and important information for assessing the credibility of the complaining witness was withheld from the trier of fact. We have found three errors and concluded that each caused sufficient prejudice to require setting aside one or more of Appellant's convictions. Even if we were to assume one or more of these errors did not require such action, we conclude that under the circumstances of this case, the confluence of the errors requires setting aside all of Appellant's convictions.

III. CONCLUSION

The findings and sentence are **SET ASIDE.** The record is returned to the Judge Advocate General of the Navy. A rehearing is authorized.

Judges HOUTZ and MYERS concur.

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[149] We conclude the error did not have a substantial influence on the guilty finding for Specification 2 of Charge I, as the statements Ocean made to Ms. Williams did not contain her later allegation that Appellant had put his mouth on her vaginal area.

[150] *United States v. Banks*, 36 M.J. 150, 170–71 (C.A.A.F. 1992) (quoting *United States v. Walters*, 4 C.M.A. 617, 635, 16 C.M.R. at 191, 209 (1954)); *see also United States v. Flores*, 69 M.J. 366, 373 (C.A.A.F. 2011) ("It is well established that an appellate court can order a rehearing based on the accumulation of errors not reversible individually.").

[151] *Banks*, 36 M.J. at 171 (quoting *United States v. Yerger*, 1 C.M.A. 288, 290, 3 C.M.R. at 22, 24 (1952)) (internal quotation marks omitted).

FOR THE COURT:

RODGER A. DREW, JR.
Clerk of Court

MEMORANDUM FOR THE RECORD

TO: OFFICE OF THE CLERK
UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS
444 S.E. QUINCY, ROOM 490
TOPEKA, KS 66683

FROM: LCDR MANUEL J. DOMINGUEZ, USN

SUBJECT: CASE NO. 21-3278-JWL

DATE: 11 FEB'2022

ATTN: HONORABLE JUDGE JOHN W. LUNGSTRUM

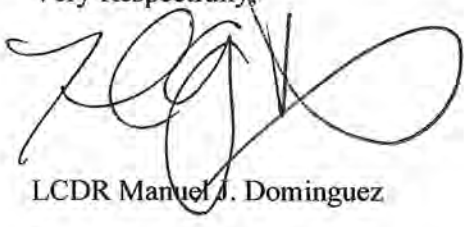
Your Honor, United States District Court, et al,

Regarding case no. 21-3278-JWL, Manuel Dominguez v. Secretary of the Navy, I am writing to inform and confirm to the court that I was released from confinement from the USDB on 14 December 2021. I have been returned to active duty and am awaiting further litigation from the government in my case.

I want to personally thank the District Court of Kansas, specifically the administrative staff and your honor, Judge Lungstrum for the expedient review, response, and order compelling the U.S. Navy to act in my writ. The district court's actions are the direct reason I am free, and I have been united with my wife, family, and friends. The Navy had no intention of freeing me with any kind of expediency or urgency following the NMCCA's appellate decision in October of 2021. The service's follow-on actions and lack of coordination pertaining to my case are testaments to my assertion.

Once again, I extend my deepest gratitude to the court.

Very Respectfully,



LCDR Manuel J. Dominguez

United States Navy

USS Shiloh

3/15/2015

150312-N-LX437-088 SOUTH CHINA SEA (March 12, 2015) *Lt. Manuel Dominguez stands the tactical action officer watch in the combat information center of Ticonderoga class guided-missile cruiser USS Shiloh (CG 67). Dominguez was named the 2014 tactician of the year for Commander, Carrier Strike Group 5. Shiloh is on patrol in the 7th Fleet area of operation supporting security and stability in the Indo-Asia-Pacific region. (U.S. Navy Photo by Lt. Frederick Martin/Released)*

Shiloh Officer Receives Tactician Award

By Lt. Frederick Martin, USS Shiloh Public Affairs

SOUTH CHINA SEA – Lt. Manny Dominguez has been named the 2014 Tactician of the Year for Commander, Carrier Strike Group (CSG) 5 in a message released by Vice Adm. Thomas Rowden and Rear Adm. Peter Gumataotao, March 9.

Dominguez, from Bedford Texas, received the award after being nominated by the ship and undergoing an oral board by the strike group staff.

"Lt. Dominguez is my combat systems officer, and one of the most tactically proficient lieutenants I have had the pleasure of working with," said Capt. Kurush Morris, Shiloh's commanding officer. "He has my highest degree of trust in his judgment and tactical decisions, so much so that he is my tactical action officer [TAO] during Shiloh's most critical operations."

The award recognizes individual tactical excellence in each strike group and destroyer squadron around the world.

Dominguez attributes much of his success to Shiloh's crew, who received the 2014 Unit Tactics award for CSG 5.

"This award represents the great watch teams I've been a part of throughout 2014," said Dominguez. "The subject matter experts, our Sailors, and training entities have made me a better TAO and overall watch stander. My chain of command put me in a position to both learn and succeed; I'm certainly thankful and blessed to represent Shiloh for this award."

Shiloh, forward-deployed to Yokosuka, Japan, is on patrol in the 7th Fleet area of operation supporting security and stability in the Indo-Asia-Pacific region.

DEPARTMENT OF THE ARMY
INSTALLATION MANAGEMENT AGENCY
HEADQUARTERS, UNITED STATES ARMY GARRISON
290 GRANT AVENUE UNIT 1
FORT LEAVENWORTH, KANSAS 66027-1292

Mr DOMINGUEZ, Manuel J.
1301 NORTH WAREHOUSE ROAD
FORT LEAVENWORTH, KANSAS 66027-2304

Dear Mr. Dominguez:

You are scheduled for release from confinement at the United States Disciplinary Barracks on or about 14 December 2021. You were convicted of and sentenced for serious criminal conduct.

Effective upon receipt of this letter, you are ordered not to enter, remain upon, engage in activities upon or be found within the limits of the United States Military Reservation of Fort Leavenworth. If you disobey this order, you will be subject to immediate arrest or detention by law enforcement authorities and subsequent prosecution for violating Title 18, United States Code, and Section 1382. This offense carries a penalty of imprisonment for six months and a $5,000 dollar fine.

Should any compelling reason exist that you believe is sufficient to justify a modification or termination of this order, you should submit a written request to this address: Garrison Commander, Fort Leavenworth, and Office of the Staff Judge Advocate, Attention: Administrative Law, 415 Custer Avenue. Building 244, Fort Leavenworth, Kansas 66027-2313.

This order is permanent and may be revoked or modified only in writing by the Commander, U.S. Army Combined Arms Center and Fort Leavenworth. Any other action purporting to revoke or modify this order is invalid.

Sincerely,

JOHN G. MISENHEIMER JR
COL, AG
Commanding

Cc
Directorate of Emergency Services
United States Disciplinary Barracks

MEMORANDUM FOR THE RECORD

TO: GARRISON COMMANDER, FORTH LEAVENWORTH
AND OFFICE OF THE JUDGE ADVOCATE

ATTN: ADMINSTRATIVE LAW
415 CUSTER AVENUE, BUILDING 244
FORT LEAVENWORTH, KS 66027-2313

FROM: LCDR MANUEL J. DOMINGUEZ, USN

SUBJECT: RELEASE ORDER – 14 DEC'2021 ICO LCDR MANUEL J. DOMINGUEZ

DATE: 01 FEB'2022

CC: DIRECTORATE OF EMERGENCY SERVICES, USDB

Commander et al,

I am writing in regard to the letter I received on 14 December 2021 which released me from confinement from the USDB. My release was secured due to my case being overturned, the findings of my case being voided, and my sentence being aside. My release was executable due to a Habeus Corpus filing upon which the Federal District Court of Kansas mandated the U.S. Navy to act upon the filing.

I understand that the 'release' letter was most likely generated from a template, nevertheless - I wanted to point out an egregious administrative and perspective error you and your staff committed upon giving me this release letter. The letter states "You were convicted of and sentenced for serious criminal conduct." Semantics aside, the language and perspective run counter to my status, I was released because the courts recognized the egregious flaws pertaining to my case. I stand and write before you as an innocent man…**counter to your release letter: I did <u>not</u> commit <u>any</u> serious criminal conduct.** I ask that you reflect and consider correcting this letter in the future for cases like mine.

Semantics or detail aside, the tone, tenor, perspective and execution of the release letter is indicative of your staff and military's overall and indoctrinated thinking when it comes to military justice…that is a presumption of guilt as opposed to innocence. I thank you for your time in this matter.

Very Respectfully,

LCDR Manuel J. Dominguez

United States Navy

for the group. Even though you haven't seen them yet, the terms of reference that we are going to get, and again, that's the document that we get, that you have to follow these, as opposed to the bylaws, that's exactly the process that that would happen.

So, we're actually doing something that we're required to do, even though we don't have the approved terms of reference. But the answer is yes, when I get any draft letter, send it to me, I'll finalize it for the chair's signature, sign it, and boom, I'll process it up through Mr. Sullivan to the general counsel, which is exactly the process that's required.

CHAIR SMITH: Okay, great, thank you. All right, so Colonel, are we ready for the public comments?

COL BOVARNICK: Yes, we've received, as you heard, one request for public comment at this meeting. Navy Lieutenant Commander Manuel Dominguez, and he'll have five minutes to provide his comment, and then members are permitted to

ask questions. So, we'll kind of start the clock here. I see Lieutenant Commander Dominguez is on there. And so over to you.

MR. DOMINGUEZ: Thank you very much. I first thank the staff, and committee for granting me the opportunity to speak on such an important matter for both the Military, and the public. As stated, my name is Lieutenant Commander Manuel Dominguez, and I have served in the United States Navy for 19 years. I am also part of the organizational culture striving towards eradicating sexual assault from our ranks.

Many of the policy changes enacted over the last few years were overdue, and part of a necessary refocus for all of us in the Military. Unfortunately, in the quest to create change, justice has become a zero sum equation. The process has deprived a few service members of fundamental rights in the pursuit of convictions, because convictions drive the data that purports quantitative change for members of Congress.

Given this shortened public forum, I highlight three avenues I request the committee to take action on. First, the Military justice system remains a forum for which non-unanimous verdicts are enough to convict a defendant. This is not in line with basic constitutional rates, state, and federal guidelines, and the Supreme Court ruling in Ramos versus Louisiana.

I ask the committee to draft findings on this matter, and publish them in a report. Second, the committee reports deviate from prior judicial panel proceedings when considering barriers to the fair administration of justice in sex assault cases. What I observe, and caution against is a burgeoning trend of group, and confirmation thinking.

I ask the committee to take on a more comprehensive approach by inviting increased varied perspectives from defense advocacy groups, academic scholars, investigative journalists, defense attorneys, and yes, convicted service members. I specifically ask that the committee

include Military confinement facilities in their site visits, and surveys.

If you want a sobering perspective, speak to the inmates themselves, and not just appointed facility representatives. You can cross reference what they say against records of trial, and appellate decisions. I also strongly recommend that the committee make efforts to attend court-martials. Third, prior reports have cited a lack of data in child sex assault cases.

I ask the committee to continue looking at these cases, inclusive of associated context data. I ask the committee to publish findings in their reports. One observation is that the Military justice system has increasingly adjudicated family law as opposed to, or in addition to criminal law. This facet is especially true when allegations involving child, or minor victims arise in divorce, or custody proceedings.

I'm aware that the committee has made recommendations as far as a guardian ad litem,

this is an important, but singular facet in these types of complex cases. Lastly, I address you candidly, I am also a wrongly accused, and convicted service member, who is free after spending 22 months in prison. Thankfully the appellate court ruled on the most fundamental, and egregious issues in my case, and thus reunited me with my wife, and family.

I have not seen, or spoken to my children in over five years. Furthermore, I persevered through anxiety, and depression due to my wrongful imprisonment, and separation from my children. Yes, this is what the Military justice system looks like when we get it wrong. I can personally attest to what the Military justice system does with cases involving child, or minor victim allegations.

I ask the committee to look at cases such as mine. The U.S. versus Lieutenant Commander Manuel Dominguez United States Navy, and The U.S. versus Colonel Daniel H. Wilson United States Marine Corps are just two examples

of injustice brought on by over correction in our current prosecutorial environment. There are more innocent service members who are wrongly accused, investigated, prosecuted, convicted, and incarcerated in our system.

As a note, I have provided the DAC-IPAD staff with a copy of my appellate decision. I express humble gratitude for your time, for this forum to speak, and for all your challenging work. It is my sincere hope that this meeting prefaces real action, and this concludes my comments.

COL BOVARNICK: Thank you very much Lieutenant Commander Dominguez. Any members have any questions?

MEMBER SCHWENK: This is Jim Schwenk, I'd just like to thank you for your comments. I think the issues you raised are really good issues that we need to consider carefully, and look into. And I appreciate you taking the time to bring them to our attention.

MEMBER MARKEY: This is Jim Markey for

the record commissioner. Thank you sir for your coming forward, and meeting with the committee. Yes, defense is part of DAC-IPAD, we have had discussions about issues that are faced by defense counsel during a lot of these investigations, as well as convictions.

A current project that I am on outside of this is a conviction integrity project. And I think that's something that is -- that you bring forward, I think that's something that the committee has looked at, and should consider to look at when we're looking holistically at this entire process, and including everything within the system, and ensure that everybody's victims are supported, and everybody's rights are also respected.

So, I think conviction integrity is a very, very large part of what we need to ensure that the judicial system is functioning in a very optimal way. So, thank you so much.

CHAIR SMITH: Yes, thank you sir.

MEMBER KRAMER: Can I ask a question?

This is A.J. Kramer. Thanks a lot for your comments, and I just have -- and I hope you understand, we did not consider child sexual offenses, as the former chair said, we put that aside. But what we heard was the remarkably low rate of convictions for sexual assault offenses in all the services.

And I'm just curious if you think there's some kind of effort to change that, or turn the direction of that, or that some of these changes are made because of that?

MR. DOMINGUEZ: My answer to that is twofold. One, when you're trying to translate qualitative change, you need to substantiate that with quantitative change. So, I think in a previous report, it's actually been referenced that there is an unusual propensity to refer cases to court-martial, and in fact there are many cases that are referred to court-martial regardless of Article 32, unfounded evidence.

Finding 21 from the 2020 DAC-IPAD report also indicated that the decision makers

weren't exactly attuned to actual definitions of probable cause, reasonable, unreasonable, founded, unfounded. And so when you have a mix up in definitions, you have what I call the risk versus gain decision paradigm. Convening authorities are always going to let the system make that decision as opposed to taking on that decision process themselves.

Also I think when you indicate low conviction numbers, that is a statistical smoke, and mirror so to speak. Because if you take from a data input, the total number of offenses that someone might face versus the number of punitive outcomes, what you're going to have is a low percentage as far as conviction rates of actual specifications, and charges.

So, if you're going to come up with a service member who faces court-martial in a hypothetical situation of let's say, sexual assault against two victims with maybe multiple charges across both victims, and multiple specifications. What ends up happening a lot of

times is that that person only gets convicted of the most egregious, or the most serious, or the strongest cases that the prosecution can present.

So, from a data perspective, you're looking at an aggregate percentage being low, and that's what gets reported, as opposed to the actual reporting of the overall punitive outcome. And that is that person probably was over sentenced, or over charged, so you have a splitting there of the data that indicates a low percentage of the conviction numbers, but then you still have that person being convicted.

MEMBER TOKASH: This is Megan Tokash, thank you for speaking today. I wonder what your thoughts are about the creation of the new Office of the Special Trial Counsel, and what impact, if any, you think that will have on the referral of future cases like your own? Over.

MR. DOMINGUEZ: First, I would like to see if the special counsel will adopt the same guidelines as in federal systems. Because this all boils down to probable cause. So, when a

convening authority, or a special counsel in this case has anywhere from 48 to 72 hours to determine probable cause, or to have that initial hearing, we have to understand that probable cause is a different standard than beyond a reasonable doubt.

Probable cause is prefaced on merely that the offense could have happened, and the offender was most likely the person. That is often premised on merely a statement. Especially when it comes to sex assault cases, where you don't have a corroborating witness, who in their right mind is going to say that probable cause does not exist?

So, that's the first question I have to ask, is what standard is going to be used to evaluate that? Second of all, one of the reasons convening authorities were removed from the decision cycle is because of the public perception, or the service's perception of undue pressure politically. You have the McCaskills, and the Gillibrands, and the Speiers who will

publicly admonish members in uniform for not taking cases to court.

My question is, is the same mechanism for fitness reports, referrals, moving up from a political, and job perspective going to be applied in the same manner when it comes to that special office? Because the other thing is that special office is probably going to be advised by Military JAGs. So, those Military JAGs working with that special office might undergo the same political pressures, or the service pressures that those convening authorities were subject to prior.

So, I have a hard time answering that question until I've seen what it looks like, what standards are going to be adopted. I personally don't think if a person had gotten a hold of my case, whether now, or back in 2017 when I was first investigated, based on the original definition of probable cause, that anybody would actually take a look at it.

Because when you're looking at merits

of evidence, it takes more than 72 hours. And then you're getting into the actual investigative piece, which a convening authority, or a special counsel is not going to make that decision to dismiss, especially when it's a serious allegation.

COL BOVARNICK: Any other questions for Lieutenant Commander Dominguez? Looks like there are none, so we'll close the public comment session. Thank you Lieutenant Commander Dominguez for appearing before the committee today. So, as we close out the public comment session, and before I turn it over to Ms. Saunders, just one recommendation.

So, the letter that Ms. Tokash was going to send around to all the members, it sounded like there was no objection to that. And so perhaps I'll recommend, and then we can get it official, where Ms. Tokash sends it to me, I can finalize it for Judge Smith's signature, then get it to the general counsel's office. Maybe we just skip a step, because it just didn't appear

DEPARTMENT OF THE NAVY LOCAL POPULATION ID CARD/BASE ACCESS PASS REGISTRATION

PRIVACY ACT STATEMENT:

AUTHORITY: 10 U.S.C. 5013, Secretary of the Navy; 10 U.S.C. 5041, Headquarters, Marine Corps; OPNAVINST 5530.14E, Navy Physical Security; Marine Corps Order 5530.14A, Marine Corps Physical Security Program Manual; and E.O. 9397 (SSN), as amended, SORN NM05512-2 .
PURPOSE(S): To control physical access to Department of Defense (DoD), Department of the Navy (DON) or U.S. Marine Corps Installations/Units controlled information, installations, facilities, or areas over which DoD, DON, or U.S. Marine Corps has security responsibilities by identifying or verifying an individual through the use of biometric databases and associated data processing/information services for designated populations for purposes of protecting U.S./Coalition/allied government/national security areas of responsibility and information; to issue badges, replace lost badges, and retrieve passes upon separation; to maintain visitor statistics; collect information to adjudicate access to facility; and track the entry/exit times of personnel.
ROUTINE USE(S): To designated contractors, Federal agencies, and foreign governments for the purpose of granting Navy officials access to their facility.
DISCLOSURE: Providing registration information is voluntary. Failure to provide requested information may result in denial of access to benefits, privileges, and DoD installations, facilities and buildings.

IDENTITY PROOFING AND APPLICANT INFORMATION

1. LAST NAME:	2. FIRST NAME:	3. MIDDLE NAME:	4. NAME SUFFIX: ☐ Jr. ☐ Sr. ☐ I ☐ II ☐ III ☐ IV

5. HISPANIC OR LATINO *(Check one)*: ☐ YES ☐ NO	6. RACE *(Check one or more)*: ☐ WHITE ☐ AFRICAN AMERICAN OR BLACK ☐ ASIAN ☐ AMERICAN INDIAN OR ALASKIN NATIVE ☐ NATIVE HAWAIIAN OR OTHER PACIFIC ISLANDER

7. GENDER *(Check one)*: ☐ MALE ☐ FEMALE	8. DATE OF BIRTH:	9. CITY OF BIRTH:	10. STATE OF BIRTH:	11. BIRTH COUNTRY:

12. US CITIZEN *(Check)*: ☐ YES ☐ NO	13. DUAL CITIZENSHIP: ☐ YES ☐ NO CITIZENSHIP IF OTHER THAN US *(Country)* :

U.S. Citizen Minimum Documentation Required:
By Birth - Social Security No and/or State ID/Drivers License.
Naturalized - Certification Number, Petition Number, Date, Place and Court, United States passport number, Social Security No and/or State ID/Drivers License.
Derived - Parent's certification number, Social Security No and/or State ID/Drivers License.

Alien Minimum Documentation Required:
Registration Number, Expiration date, Date of entry, Port of entry.

14. IDENTITY SOURCE DOCUMENTS PRESENTED:	15. DOCUMENT NUMBER:	16. ISSUED BY STATE/COURT:	17. ISSUED BY COUNTRY:	18. ISSUED:	19. EXPIRES:
☐ Social Security No.			United States		
☐ State ID/Drivers License			United States		
☐ Passport No.					
☐ Certification Number and Petition Number					
☐ Derived - Parent's Certification Number:			United States		
☐ Alien Registration No.			United States		
		Date of Entry:	Port of Entry:		

OTHER APPROVED IDENTITY SOURCE DOCUMENTS:

☐					
☐					

20. WEIGHT *(Pounds)*:	21. HEIGHT *(Inches)*:	22. HAIR COLOR *(Check one)*:	23. EYE COLOR *(Check one)*:
		☐ Blond ☐ Brown ☐ Black ☐ Gray ☐ Red ☐ White ☐ Silver ☐ Auburn ☐ Bald	☐ Brown ☐ Green ☐ Blue ☐ Hazel ☐ Black ☐ Gray ☐ Violet ☐ Unknown

24. HOME ADDRESS *(Include city, state, zip code)*:	HOME PHONE *(Include Area Code)*:
25. BASE SPONSOR'S NAME:	SPONSOR PHONE *(Include Area Code)*:

EMPLOYMENT ACTIVITY INFORMATON

26. EMPLOYER NAME AND ADDRESS *(Include city/state/zip code)*:	EMPLOYER PHONE *(Include Area Code)*:
27. SUPERVISOR NAME AND ADDRESS *(Include city/state/zip code)*:	SUPERVISOR PHONE *(Include Area Code)*:

FOR OFFICIAL USE ONLY WHEN FILLED - PRIVACY SENSITIVE:
Any misuse or unauthorized disclosure of this information may result in both criminal and civil penalties.

28. Check the applicable box for WORK HOURS box or check the OTHER box and enter the work hours, then check the applicable for WORK DAYS:

WORK HOURS: ☐ 0600-1800 ☐ 0800-1700 ☐ OTHER _____ WORK DAYS: ☐ SN ☐ M ☐ T ☐ W ☐ TH ☐ F ☐ ST

PRIOR FELONY CONVICTIONS

29. Have you ever been convicted of a Felony? ☐ YES ☐ NO _____ *Initial*

REQUIREMENT TO RETURN LOCAL POPULATION ID CARD

30. I understand that I am required to return my Local Population Identification Card to the Base Pass Office when it expires or if my employment is terminated for any reason. _____ *(initial)*

AUTHORIZATION AND RELEASE AND CERTIFICATION

31. I hereby authorize the DOD/DON and other authorized Federal agencies to obtain any information required from the Federal government and/or state agencies, including but not limited to, the Federal Bureau of Investigation (FBI), the Defense Security Service (DSS), the U.S. Department of Homeland Security (DHS).

I have been notified of DON right to perform minimal vetting and fitness determination as a condition of access to DON installation/facilities. I understand that I may request a record identifier; the source of the record and that I may obtain records from the State Law Enforcement Office as may be available to me under the law. I also understand that this information will be treated as privileged and confidential information.

I release any individual, including records custodians, any component of the U.S. Government or the individual State Criminal History Repository supplying information, from all liability for damages that may result on account of compliance, or any attempts to comply with this authorization. This release is binding, now and in the future, on my heirs, assigns, associates, and personal representative(s) of any nature. Copies of this authorization that show my signature are as valid as the original release signed by me.

FALSE STATEMENTS ARE PUNISHABLE BY LAW AND COULD RESULT IN FINES AND/OR IMPRISONMENT UP TO FIVE YEARS.

BEFORE SIGNING THIS FORM, REVIEW IT CAREFULLY TO MAKE SURE YOU HAVE ANSWERED ALL QUESTIONS FULLY AND CORRECTLY.

I DECLARE UNDER PENALTY OF PERJURY THAT THE STATEMENTS MADE BY ME ON THIS FORM ARE TRUE, COMPLETE AND CORRECT

DATE _____ SIGNATURE _____

FINAL DETERMINATION ON YOUR ACCESS: The Base Commanding Officer has final authority for determination on granting physical access to DON controlled installations/facilities under his/her jurisdiction.

BELOW COMPLETED BY BASE REGISTRAR PERSON CONDUCTING IDENTY PROOFING and NCIC CHECK

32. INFORMATION VERIFIED BY:	33. ENTERED IN C/S SYSTEM BY:	34. PASS ISSUE DATE:	35. PASS EXPIRATION DATE:

36. NCIC CHECK PERFORMED BY:	37. RESULTS OF NCIC CHECK: ☐ NO RECORDS ☐ RECORD IDENTIFIER RECORD NUMBER:	38. RESULTS OF LOCAL RECORDS CHECK: ☐ NO RECORDS ☐ RECORD IDENTIFIER RECORD NUMBER:

Office of Under Secretary of Defense Directive-Type Memorandum (DTM) 09-012, "Interim Policy Guidance for DoD Physical Access Control," December 8, 2009. DTM 09-012 requires that DoD installation government representatives query the National Crime Information Center (NCIC) and Terrorist Screening Database to vet the claimed identity and to determine the fitness of non-federal government and non-DoD-issued card holders (i.e. visitors) who are requesting unescorted access to a DoD installation. The minimum criteria to determine the fitness of a visitor is: 1) not on a terrorist watch list; 2) not on an DoD installation debarment list; and 3) not on a FBI National Criminal Information Center (NCIC) felony wants and warrants list. Additionally, SECNAV Memo, Policy for Sex Offender Tracking and Assignment and Access Restrictions within the Department of the Navy, of 7 Oct 08 and OPNAVINST 1752.3 established the Navy's policy on sex offenders, requiring Region Commanders (REGCOMs) and Installation Commanding Officers (COs) to prohibit sex offender access to DoN facilities and Navy owned, leased or PPV housing. This form describes the authority and purpose to collect and share the required information; and identifies the applicant/visitor and sponsor; and authorizes the DoD to perform the minimum vetting and fitness determination criteria. A favorable response on the vetting and fitness determination is required to receive access to DOD-controlled installation/facilities.

Instruction for completing the Local Population Access Registration Form

INSTRUCTIONS: Please complete all information in black ink (printed) or by typing. By voluntarily providing your Personal Information, you agree to the following terms and restrictions:
RESTRICTIONS: Local Population Identification Card/Base Access Pass may only be used by person to whom they are issued and for the specific business/purpose issued. Applicants are reminded that soliciting (i.e., door-to-door sales) is prohibited on the base, and that such activity is grounds for cancellation of the Pass. Additionally, such action may result in debarment from the base and legal action. The Base Commanding Officer has discretion over specifying the period of validity for any Local Population ID Cards/Base Access Passes that are issued under his/her jurisdiction.
Review the Privacy At Statement that is printed at the top of the form

Block 1: Enter the Last Name.
Block 2: Enter the First Name.
Block 3: Enter the Middle Name.
Block 4: If applicable, check the box for Name Suffix.
Block 5: Check the applicable box for Hispanic or Latino.
Block 6: Check the applicable box for Race.
Block 7: Check the applicable box for Gender.
Block 8: Enter Date of Birth.
Block 9: Enter City of Birth.
Block 10: Enter State of Birth.
Block 11: Enter Country of Birth.
Block 12: Check the applicable box for US Citizenship.
Block 13: If not a US Citizen, enter the name of the Country of Citizenship.
Block 14: Two forms of identity source documents from the list of acceptable documents listed below must be presented to the base registrar with this completed form. Check the box for the type of Documents that will be presented for identity proofing. If the document type is not listed, use the two rows under Other Approved Identity Source Documents to enter the type of document(s) that you will present.
Block 15: Enter the Document Number located on the Identity Proofing Source document that was checked in Block 14.
Block 16: Enter the State that issued the Identity Source Document.
Block 17: Enter the Country that issued the Identity Source Document.
Block 18: Enter the Date that the Identity Source Document was issued.
Block 19: Enter the Date that the Identity Source Document will expire.
Block 20: Enter Weight in pounds.
Block 21: Enter Height in inches.
Block 22: Check the applicable box for Hair Color.
Block 23: Check the applicable box for Eye Color.
Block 24: Enter Home Address Including City, State, Zip Code, and Home Telephone Number.
Block 25: Enter Name of Registrant's Base Sponsor and Base Sponsor's Telephone Number.
Block 26: Enter Employer Name and address including City, State, Zip Code, and Employer's Telephone Number.
Block 27: Enter Supervisor's Name including City, State, Zip Code, and Supervisor's Telephone Number.
Block 28: Check the applicable box for Work Hours box or check the OTHER box and enter the work hours, then check applicable boxes for Work Days. Block 28: Check the applicable answer if you have been convicted of Felony and enter initials.
Block 29: Check the applicable box for felony conviction.
Block 30: Enter initials to accept terms for returning Local Population Identification Card.
Block 31: Sign and date the form to attest that the foregoing information is true and complete to best of your knowledge.

LIST OF ACCEPTABLE DOCUMENTS - All documents must not be expired.

Must present one selection from List A or a combination of one selection from List B and one selection from List C.

List A - Documents that Establish Identity and Employment Authorization

1. U.S. Passport or U.S. Passport Card.
2. Permanent Resident Card or Alien Registration Receipt Card (Form I-551).
3. Foreign passport that contains a temporary I-551 stamp or temporary I-551 printed notation on a machine-readable immigrant visa.
4. Employment Authorization Document that contains a photograph (Form I-766).
5. For a nonimmigrant alien authorized to work for a specific employer because of his or her status:
   a. Foreign Passport; and
   b. Form I-94 or Form I-94A that has the following:
      (1) The same name as the passport; and
      (2) An endorsement of the alien's nonimmigrant status as long as that period of endorsement has not yet expired and the proposed employment is not in conflict with and restrictions or limitations identified on form.
6. Passport from the Federal States of Micronesia (FSM) or the Republic of the Marshal Islands (RM) with Form I-94 or Form I-94A indicating nonimmigrant admission under the Compact of Free Association Between the United Stated and FSM or RM.

OR

List B - Documents that Establish Identity

1. Driver's license or ID card issued by a State or outlying possession of the United States provided it contains a photograph or information such as name, date of birth, gender, height, eye color, and address.
2. ID card issued by federal, state or local government agencies or entities, provided it contains a photograph or information such as name, date of birth, gender, height, eye color, and address.
3. School ID card with a photograph
4. Voter's registration card.
5. U.S. Military card or draft record.
6. Military dependent's ID card.
7. U.S. Coast Guard Merchant Mariner Card.
8. Native American tribal document.
9. Driver's license issued by a Canadian government authority.

For persons under age 18 who are unable to present a document listed above:

10. School record or report card.
11. Clinic, doctor, or hospital record.
12 Day-care or nursery school record.

AND

List C - Documents that Establish Employment Authorization

1. A Social Security Account Number card, unless the card includes one of the following restrictions:
   (1) NOT VALID FOR EMPLOYMEMT
   (2) VALID FOR WORK ONY WITH INS AUTHORIZATION.
   (3) VALID FOR WORK ONLY WITH DHS AUTHORIZATION.
2. Certification of Birth Abroad issued by the Department of State (Form FS-545).
3. Certification of Birth issued by the Department of State (Form DS-1360).
4. Original or certified copy of birth certificate issued by a State, county, municipal authority or territory of the United States bearing an official seal.
5. Native American tribal document.
6. U.S. Citizen ID Card (Form I-197).
7. Identification Card for Use of Resident Citizen in the United States (Form I-179).
8. Employment authorization document issued by the Department of Homeland Security.

The remainder of the form will be completed by the Base Registrar Person conducting Identify Proofing process and NCIC check.

AGENCY DISCLOSURE STATEMENT:

The public reporting burden for this collection of information is estimated to average 10 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to the Department of Defense, Washington Headquarters Services, Executive Services Directorate, Information Management Division, 4800 Mark Center Drive, East Tower, Suite 02G09, Alexandria, VA 22350-3100 OMB 0703-0061. Respondents should be aware that notwithstanding any other provision of law, no person shall be subject to any penalty for failing to comply with a collection of information if it does not display a currently valid OMB control number.

PLEASE DO NOT RETURN COMPLETED FORM TO THE ABOVE ADDRESS.
Completed form should be submitted to the Base Registrar.

FOR OFFICIAL USE ONLY WHEN FILLED - PRIVACY SENSITIVE:
Any misuse or unauthorized disclosure of this information may result in both criminal and civil penalties.

Materials Provided at the Meeting

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

MINUTES OF APRIL 21, 2022, PUBLIC MEETING

AUTHORIZATION

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

EVENT

The Committee held its twenty-second public meeting on April 21, 2022, from 2:45 p.m. to 5:15 p.m.

LOCATION

The meeting was held virtually with dial-in access information provided to the public in the Federal Register and on the DAC-IPAD's website.

MATERIALS

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

PARTICIPANTS

Participating Committee Members
The Honorable Karla N. Smith, Chair
Major General Marcia Anderson, U.S. Army, Retired
Ms. Martha S. Bashford
Ms. Margaret A. Garvin
The Honorable Suzanne Goldberg
The Honorable Paul W. Grimm
Mr. A. J. Kramer
Ms. Jennifer G. Long
Mr. James P. Markey
Dr. Jenifer Markowitz
The Honorable Jennifer M. O'Connor
Brigadier General James R. Schwenk, U.S. Marine Corps, Retired
Dr. Cassia C. Spohn
Ms. Meghan A. Tokash
The Honorable Reggie B. Walton

Absent Committee Members
Mr. William E. Cassara

Committee Staff
Colonel Jeff A. Bovarnick, U.S. Army, Executive Director
Ms. Julie Carson, Deputy Director
Mr. Dale Trexler, Chief of Staff

Ms. Audrey Critchley, Attorney-Advisor
Dr. Alice Falk, Technical Editor
Ms. Theresa Gallagher, Attorney-Advisor
Ms. Nalini Gupta, Attorney-Advisor
Ms. Amanda Hagy, Senior Paralegal
Mr. Chuck Mason, Attorney-Advisor
Ms. Marguerite McKinney, Analyst
Ms. Meghan Peters, Attorney-Advisor
Ms. Stacy Powell, Senior Paralegal
Ms. Stayce Rozell, Senior Paralegal
Ms. Terri Saunders, Attorney-Advisor
Ms. Kate Tagert, Attorney-Advisor
Ms. Eleanor Magers Vuono, Attorney-Advisor
Mr. Pete Yob, Attorney-Advisor

Other Participants
Mr. Dwight Sullivan, Designated Federal Officer (DFO)

MEETING MINUTES

Quorum was established and Mr. Dwight Sullivan, Designated Federal Officer, opened the meeting at 2:45 p.m. Mr. Sullivan introduced the Honorable Karla N. Smith, Chair of the DAC-IPAD, who provided opening remarks welcoming those in attendance to the reconstituted committee's first meeting since December 4, 2020. She explained the purpose of the meeting and outlined the agenda. She introduced DAC-IPAD Executive Director Colonel Jeff Bovarnick, who provided a brief overview of the meeting and introduced the first session.

DAC-IPAD Staff Presentation to Committee, Update and Summary of Events Since Last Meeting

Ms. Eleanor Magers Vuono, DAC-IPAD Attorney Advisor, and Mr. Dwight Sullivan, DFO, briefed the Committee on the key events and legislative changes from the previous two years related to sexual misconduct in the Armed Forces.

Ms. Vuono provided the Committee an overview of events surrounding the Fort Hood Independent Review Committee established by the Army, and the 90-day Independent Review Commission (IRC) on Sexual Assault in the Military established by the Secretary of Defense.

She explained that the Fort Hood report included over 90 policy reform recommendations to improve the local command climate and culture. She stated that the Army has begun to make changes and recently announced a comprehensive restructuring of the Criminal Investigative Division with an experienced civilian investigator leading the division. Additionally, investigating officers outside of the subject's unit will handle all sexual harassment complaints.

She explained that the IRC completed an independent, impartial assessment of the military's treatment of sexual harassment and sexual assault. The IRC's report made over 80 recommendations in the areas of accountability, prevention, climate and culture, and victim support and care. She stated that the Secretary of Defense accepted all the recommendations, some with modifications, and issued implementation guidance.

Ms. Vuono explained that the IRC report recommended that the DAC-IPAD conduct several studies. She noted that the studies include a study of the military's Article 32 preliminary hearing; a study of the military's Article 34 advice to convening authority before referral; a study of U.S. allies' responses for victims; and a study of military administrative boards. It was later noted that the Secretary of Defense's approved Revised Recommendations for Articles 32 and 34 tasked the Military Justice Review Panel with conducting those studies.

Next, Mr. Dwight Sullivan provided the Committee a summary of the changes enacted by the National Defense Authorization Act for Fiscal Year 2022. He noted that the statute requires 11 of approximately 104 UCMJ offenses move from the control of the commanders to the control of judge advocates. Within DoD, those judge advocates will be assigned to Offices of Special Trial Counsel (OSTC). He stated that the command-controlled and judge advocate-controlled systems will interact as parallel systems. He explained that each Lead Special Trial Counsel, by statute, will be a general or flag officer and report directly to the Secretary of the applicable military departments with no intervening authority.

Mr. Sullivan provided an overview of the 11 covered offenses over which the OSTCs will have authority:

Art. 117a	Wrongful broadcast or distribution of intimate visual images
Art. 118	Murder
Art. 119	Manslaughter
Art. 120	Rape and sexual assault
Art. 120b	Rape and sexual assault of a child
Art. 120c	Other sexual misconduct
Art. 125	Kidnapping
Art. 128b	Domestic violence
Art. 130	Stalking
Art. 132	Retaliation
Article 134	Child pornography

He also explained that the OSTCs will have discretionary authority over related offenses, as well as known offenses allegedly committed by someone over whom they are exercising authority. He stated that the effective date of the changes will apply to offenses that occur or after December 27, 2023.

Mr. Sullivan explained that when an OSTC defers action on a case, it would go to the commander to exercise certain action as deemed appropriate, though the commander will not have the authority to refer a covered offense for trial by special court-martial or general court-martial.

Mr. Sullivan closed his briefing with an overview of an executive order signed by the President of the United States on January 26, 2022, amending the Manual for Courts-Martial. He explained that the executive order amended Article 134, UCMJ, to include sexual harassment as a covered offense, while promulgating a maximum punishment and other implementing rules for the domestic violence punitive article that Congress enacted for the military in 2018. The executive order also fully implemented the criminalization of wrongful broadcast or distribution of intimate visual images and aggravated assault by suffocation or strangulation.

DAC-IPAD Staff Presentation to Committee. Update on DoD's March 2022 Report on the DAC-IPAD

Ms. Julie Carson, DAC-IPAD Deputy Director, briefed the Committee on the Report of the Department of Defense on the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces, submitted in March 2022 in the absence of a constituted committee. She explained that the Committee's authorizing statute requires the submission of an annual report to the Secretary of Defense and Congress; however, due to the suspension of all the Department's federal advisory committees in January 2021, the Committee was precluded from completing its fifth annual report that was due March 30, 2021. She stated that in the interim, letters from the DoD Acting General Counsel were submitted to the House and Senate Committees on Armed Services in March 2021 and August 2021, explaining the suspension and status of the DAC-IPAD.

Ms. Carson explained that the DoD report submitted in March 2022 described the DAC-IPAD's activities from its March 2020 annual report through January 2021. She explained that prior to the suspension and the COVID-19 pandemic, the DAC-IPAD held 5 public meetings and 16 preparatory sessions via teleconference. She stated that the committee drafted and released standalone reports that made 17 recommendations to Congress and the Secretary of Defense. Ms. Carson closed her briefing by reminding the Committee that the next annual report is due March 30, 2023 and encouraged the members to begin thinking about potential topics to cover.

Committee Deliberations and Planning Discussion

After a brief break, Chair Smith opened the deliberations and planning session and asked the Committee members to provide their thoughts on establishing and serving on subcommittees. DAC-IPAD Committee members supported the establishment of subcommittees stating that they allow the Committee to accomplish a great deal of work. Committee members agreed that a case review and a policy subcommittee should be established.

DAC-IPAD Committee member Ms. Meghan Tokash recommended establishing a special projects subcommittee to examine and advise the General Counsel and Secretary of Defense on the newly created OSTC; review the Article 32 and 34 report covering topics the Committee previously studied; and review the IRC recommendations for the DAC-IPAD. After deliberating on subcommittee options, the Committee voted unanimously to create case review, policy, special projects, and data subcommittees.

Chair Smith asked the Committee to consider the scope of the Committee's current charter, and whether there would be interest in expanding the charter to include minor victims and sexual harassment. After a brief discussion of the Committee's current tasks, Chair Smith asked the Committee members to consider the stakeholders that they would like to hear from in future meetings. She requested that the members submit via email their preferences along with any other priorities and issues they think the Committee should address.

Public Comment

The Committee received comments from Navy Lieutenant Commander Manuel Dominguez who stated his concerns regarding the military justice process and the fundamental rights of service members that at times are deprived in the pursuit of convictions. His comments included areas of interest for the Committee to consider in its work. Those included non-unanimous verdicts, site visits to include incarceration facilities, and child sex assault cases.

Meeting Wrap-Up

DAC-IPAD Attorney Advisor Ms. Terri Saunders provided a list of due-outs to the Committee, and Colonel Jeff Bovarnick provided closing remarks. Chair Smith thanked the members and staff for their commitment to the work of the DAC-IPAD and reported that the next scheduled public meeting for the DAC-IPAD is June 21-22, 2022. With no further comments or issues to address, the meeting concluded.

The DFO closed the public meeting at 5:15 p.m.

CERTIFICATION

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

Honorable Karla N. Smith
Chair

MATERIALS

Materials Provided Prior to and at the Public Meeting

1. Meeting Agenda, DAC-IPAD Public Meeting, April 21, 2022
2. Secretary of Defense Memo, Zero-Based Review, January 30, 2021
3. DAC-IPAD Member Professional Biographies
4. DAC-IPAD Staff Professional Biographies
5. DAC-IPAD Authorizing Statutes
6. DAC-IPAD Charter
7. Fort Hood Independent Review Committee Report (Excerpt)
8. Independent Review Commission (IRC) Report (Excerpt)
9. Secretary of Defense Memo, IRC Guidance and Implementation, September 22, 2021
10. Select Military Justice Provisions of the National Defense Authorization Act for FY21 and FY 22
11. Report of the Department of Defense on the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces, March 2022

Presentations at the Meeting

Appellate Review of Military Sexual Assault Cases

June 21, 2022

Ms. Kate Tagert and Ms. Audrey Critchley
DAC-IPAD Staff Attorneys

Appellate Review of Military Sexual Assault Cases

DoD General Counsel Tasking Memorandum, dated January 28, 2022

Request to Study Appellate Decisions in Military Sexual Assault Cases

Chair Smith Acknowledgement Memorandum, dated April 27, 2022

The task: Conduct a comprehensive study of appellate decisions in military sexual assault cases

- Analyze recurring appellate issues in military sexual assault cases
- Analyze efficacy of military appellate system's handling of these cases
- Recommend training and education improvements for practitioners

Appellate Review of Military Sexual Assault Cases

Committee Decisions

1. Which cases should be studied?

2. What role will Committee members play?

3. Who would the Committee like to hear from?

Appellate Review of Military Sexual Assault Cases

Why FY21?

- Military Justice Act of 2016 (Effective Jan. 1, 2019)
- FY21 NDAA modified factual sufficiency standard of review (for guilty findings entered on or after Jan. 1, 2021)
- FY22 NDAA modified sentence appropriateness standard of review (for offenses that occur on or after Dec. 27, 2023)

Appellate Review of Military Sexual Assault Cases

Step 1: Define *military sexual assault*

- A nonconsensual penetrative or sexual contact offense under any Article:

  - Article 120 (rape, sexual assault)
  - Article 120b (rape, sexual assault, or sexual abuse of child)
  - Article 92 (violation of lawful general order)
  - Article 93 (maltreatment of subordinate)
  - Article 133 (conduct unbecoming an officer)
  - Article 134 (general article)

and Articles 80, 81 & 82 (attempts, conspiracies, solicitation)

Appellate Review of Military Sexual Assault Cases

Step 2: Identify military sexual assault cases

- **789** appellate decisions in FY21
- **235** appellate decisions in military sexual assault cases

Appellate Review of Military Sexual Assault Cases

Step 3: Identify and analyze recurring issues

- Review FY21 appellate decisions in 235 military sexual assault cases
- Solicit input from Government and Defense Appellate Divisions, other stakeholders

Appellate Review of Military Sexual Assault Cases

Step 4: Reports

Report I: Introduce study in DAC-IPAD annual report, identifying recurring issues to be studied.

Report II: Standalone report analyzing recurring issues and efficacy of the military appellate system, with recommendations.

Report III and IV: Standalone reports on modified factual sufficiency and sentence review standards.

Appellate Review of Military Sexual Assault Cases

Deliberation Topics

1. Scope of study
   - include child sexual assault offenses?
   - define military “sexual assault” as 120/120b + select offenses?

2. Methodology
   - identify speakers
   - working group
   - series of reports based on tasking

Appellate Review of Military Sexual Assault Cases

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

June 21, 2022

R. Chuck Mason
Staff Attorney

Professional Staff & Data Team Support

Professional Staff

Leadership Team
Staff Attorneys
Paralegals

Data Team

Mr. Chuck Mason, Team Lead
Ms. Stacy Powell, Staff Paralegal
Ms. Stayce Rozell, Staff Paralegal
Dr. William Wells, Criminologist

Communication

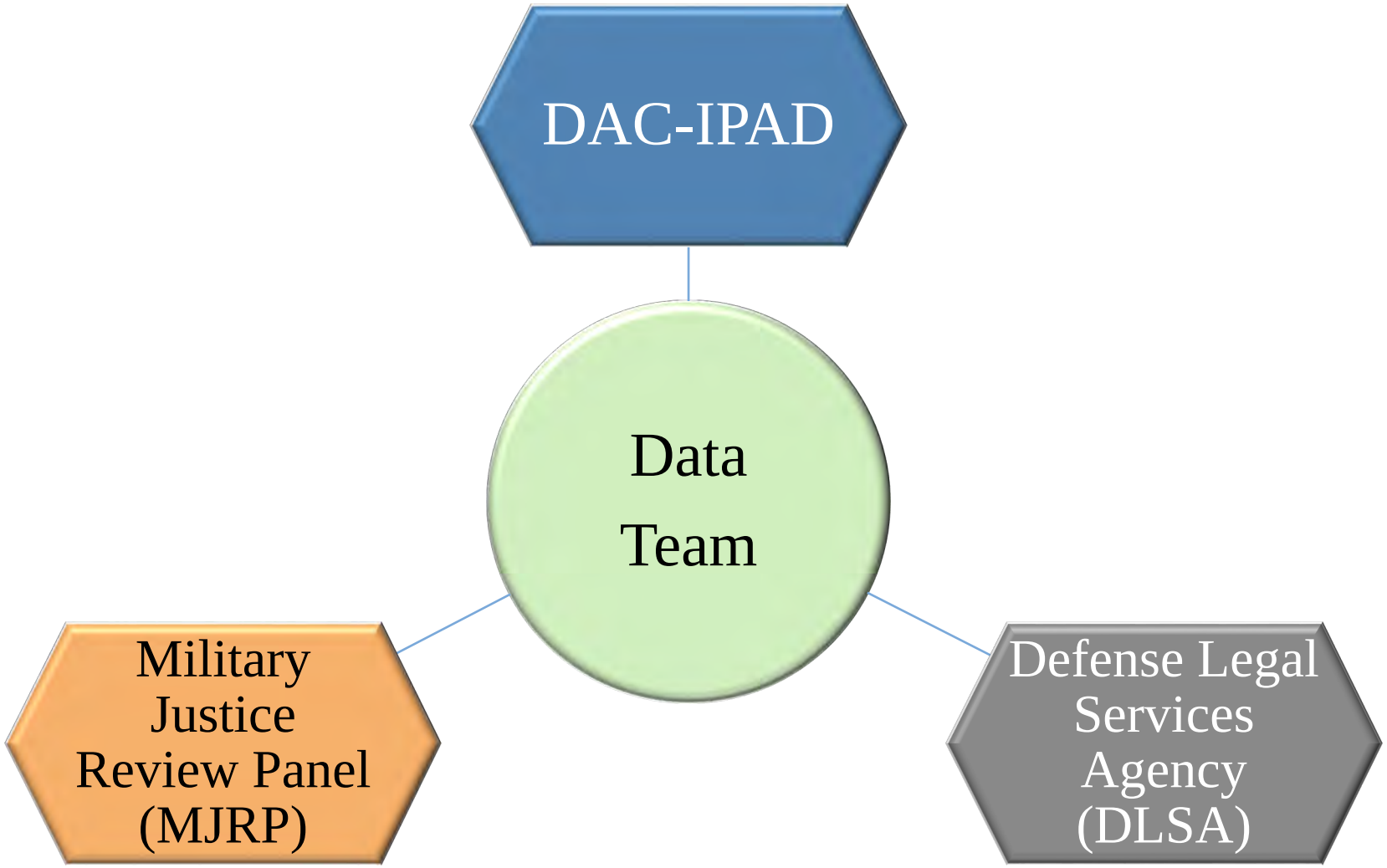
Collaboration

DAC-IPAD

(Subcommittees)

Project Teams

Organizational Relationships



Products

DAC-IPAD

- Annual Report incorporating Case Adjudication Data
- Case Review (Investigations) Report
- Ad-hoc reports and analysis

MJRP

- Initial Review of Recent Amendments to UCMJ
- Sentencing Data Collection and Report

DLSA

- Allies Recompense
- Articles 32 & 34
- SVC/ VLC
- FY22 NDAA, Section 547 Implementation

Data Team Support to the DAC-IPAD

Data Team Commitment

- Vertical integration throughout research process
- Tailored requests for data (RFI) on specific policy questions
- Analysis utilizing Excel and analytics software
- Consistent and continual support

Questions

FY20 National Defense Authorization Act
Joint Explanatory Statement

June 21, 2022

Ms. Terri Saunders and Ms. Meghan Peters
DAC-IPAD Staff Attorneys

FY 2020 National Defense Authorization Act
Joint Explanatory Statement

[December 20, 2019]

Congress requested the DAC-IPAD review:

- Whether military judges are limiting victim impact statements at sentencing proceedings
- Whether alternative justice programs could be used in the military

Victim Impact Statements: Task

"…[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.**"

Victim Impact Statements

- Congress requested the DAC-IPAD, on a one-time basis or more frequently, 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

DAC-IPAD Public Comment on Victim Impact Statements

- Feb 2020: Representative of Survivors United spoke at DAC-IPAD public meeting
- Military judges “severely limit” what a victim may include in their impact statements as well as how those statements are delivered. Specific examples:
  - Redlining of statements before presentation
  - Not being allowed to complete the statement
  - Inability to say anything about preference or desire for sentencing

Victim's Right to be Heard

- **Article 6b**, UCMJ, [enacted in FY14 NDAA] establishes the right of victims to be "reasonably heard at a sentencing hearing relating to the offense."

- **Rule for Courts-Martial [R.C.M.] 1001(c)** implements Art. 6b:

"After presentation by trial counsel, a crime victim of an offense of which the accused has been found guilty has the right to be reasonably heard at the presentencing proceeding relating to that offense."

Important Changes Since FY20 NDAA

- Concerns with victim impact statements in panel member sentencing
- Current sentencing procedures
  - Judge alone sentencing the default; accused can still select panel
  - DLSA sentencing study shows most cases now have judge alone sentencing
- FY22 NDAA: Requires judge alone sentencing in all but capital cases
  - In place for cases involving offenses committed on/after Dec. 27, 2023
- Rewrite of Rules for Courts-Martial underway to implement changes

Path Forward on Victim Impact Statements

How does the Committee want to respond to this request?

- Decline to study based on pending change to judge-alone sentencing
- Defer action to determine effect of judge-alone sentencing
- Undertake study—review FY21 sentencing documents/transcripts to determine whether military judges are appropriately applying the rules

Alternative Justice Programs

- Task
- Related developments
- Path forward for the DAC-IPAD

Task

"The conferees request the DAC-IPAD review, as appropriate, **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, nonjudicial, or administrative action against the perpetrator of the alleged offense."

Examples

Restorative Justice

Restorative Engagement

Mediation

Recompense

Restitution

Reparations

Compensation

Pre-charging Diversion

Prior to Zero-Based Review

- At the November 2020 DAC-IPAD public meeting, staff presented information on existing restorative justice programs run by civilian entities.

- DAC-IPAD members voiced some concerns that restorative justice mediation for sexual assault offenses could be problematic for victims and the accused where the conduct involves interpersonal, sexual violence.

Independent Review Commission (IRC) Recommendations

DAC-IPAD study the methods our allies have used to make amends to survivors, including **restorative engagement** to acknowledge harm and potential victim compensation.

DoD study underway.

Amend the UCMJ to establish sentencing parameters and to make **restitution** mandatory for certain crimes, including sexual assault.

DoD approved sentencing reform.

IRC Report

- DoD should seek to learn from the Canadian Armed Forces and the Australian Defense Force, both of whom are using restorative engagement to provide survivors with an opportunity to be heard by a senior officer and share their experience through a facilitated, trauma-informed dialogue. (*IRC Report, Appx. B at 41*).

- In both the Canadian and Australian models, restorative engagement also includes some form of financial compensation to acknowledge economic losses incurred by survivors as a result of the harm they experienced. (*IRC Report, Appx. B at 41*).

Report of the Judicial Proceedings Panel (JPP)

- In the *JPP Report on Restitution and Compensation for Military Adult Sexual Assault Crimes* (2016), the JPP recommended that DoD address the financial needs of sexual assault victims by establishing a new, uniform DoD compensation program.

The Path Forward on Alternative Justice Programs

- DoD reviews the issue
- DAC-IPAD initiates its own study

Best Practices for Establishing an Independent Prosecution Office

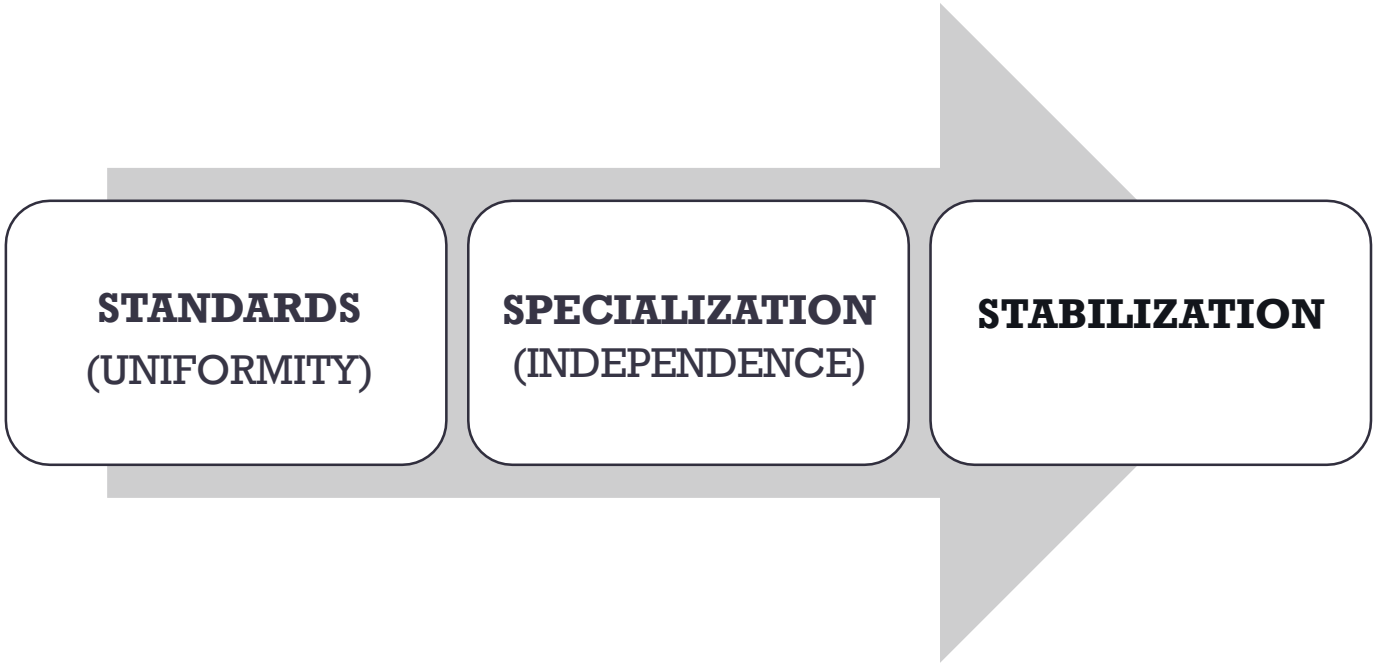
Meghan Tokash, AUSA

Human Trafficking Prosecution Unit

OVERALL POLICY STRATEGY

- Legal Sufficiency Policy?
- System Efficiency Policy?
- Defendant Rehabilitation Policy?
- Trial Sufficiency Policy?

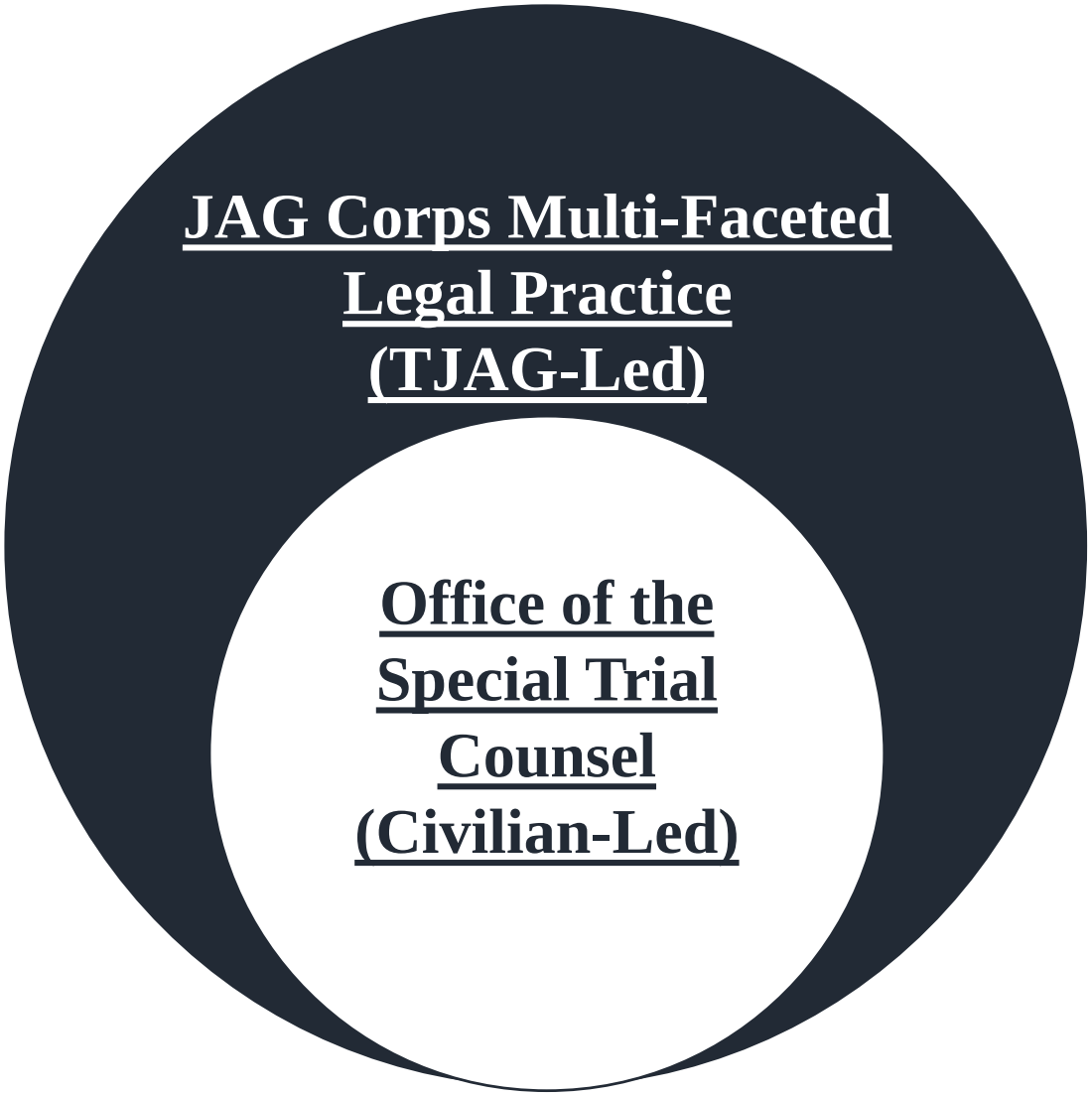
PROSECUTORIAL PRINCIPLES



STANDARDS (UNIFORM)

- **DoD-wide Standards**
  - **Asserting Jurisdiction**
  - **Screening Procedures**
  - **Charging Considerations (Can I prove this case? Should I prove this case?)**
  - **Approval/Justification for Deviation**
- **Service-Specific Standards**
  - **Level of Prosecutorial Discretion**
  - **Assignment of Cases/Case Load**
  - **Discovery Policies (Brady/Giglio, etc.)**
- **Victim Notification Systems**
  - **This should be uniform DoD-Wide**
  - **Adhering to the CVRA and CVCWR**
  - **Exacting standards with sanctions for prosecutor non-compliance**

SPECIALIZATION



SPECIALIZATION

- Addresses the problem of inexperienced counsel
- Cultivates expertise; confidence in victims and American public
- Workforce retention

INDEPENDENCE

- Prosecutorial independence is an industry standard and best practice
- IRC recommended a prosecution office with civilian oversight
- Congress agreed
- “Without intervening authority”

STABILIZATION

- Vertical prosecution is a best practice for specialized units within prosecution offices
- Military has to take a hard look at what career advancement looks like for these special prosecutors and correct course
- As head of the OSTCs, Secretaries of Military Departments should make prosecutor billeting a priority

CONCLUSION

- Establishment of OSTC is historic
- Uniformity is key (UCMJ)
- Must establish office standards, hone prosecutorial specialization, and allow for stabilization

SVC/VLC Report

June 21, 2022

Mr. Pete Yob and Ms. Audrey Critchley
DAC-IPAD Staff Attorneys

Purpose

- Background
- Overview of the SVC/VLC Report
- Summarize Committee Member Feedback on the Report
- Facilitate Discussion of the Committee’s Action on the Report

SVC/VLC Programs Overview

- SVC/VLC Role
- SVC/VLC Programs Began in 2013
- Legislative Authority/Expansion
- Service Differences

Report Overview

- Impetus
- Appointment and Questions Presented
- Unique Circumstances = DLSA Product
- Background
- Methodology
- Issue 1: Tour Length
- Issue 2: Army Rating Structure
- Additional Recommendations

Eight Additional Recommendations

- The Army should improve its process for vetting SVCs and require that they have more experience, and consider making SVC assignments part of a military justice litigation track.
- The Army should eliminate the use of part-time SVCs, except in rare circumstances or in cases of operational necessity.
- The Services should promote better coordination between trial counsel and SVCs/VLCs.
- The Services should expand the role of SVCs/VLCs beyond court-martial proceedings to include advocacy during administrative proceedings.
- SVC/VLC programs must develop better case management systems.
- SVC/VLC programs should include civilian paralegal support.
- The Services should provide more resources to ensure that SVCs/VLCs have ready access to behavioral health care.
- The Services should identify and train SVC/VLC candidates early to ensure that their transitions with the departing SVCs/VLCs are well coordinated.

Committee Members Feedback

- Tour Length
  - 2 years
  - Services' Position on this Issue
- Rating Chain
- Additional Recommendations
  - Military Justice Experience Required/No First Tour SVC/VLC
  - Require Rotating SVC/VLC to Notify Client of Transition and Provide a Contact Number During Transition (Notification Must be Memorialized)
  - Best Practices or Additional Recommendations

Committee Action

- Issue 1 - Tour Lengths
- Issue 2 – Rating and Supervisory Structure
- Additional Recommendations
- Adopt Report (with or without changes)

Joint Service Committee on Military Justice

June 22, 2022

Elizabeth Hernandez, Colonel, USAF
Chief, Military Justice Law and Policy Division

Joint Service Committee on Military Justice

- Joint Service Committee Overview
- Joint Service Committee Composition
  - Voting Group Members
  - Working Group Members
  - Non-Voting Advisors
- Joint Service Committee Duties
- Joint Service Committee Process
- Joint Service Committee Current Activities

Joint Service Committee Overview

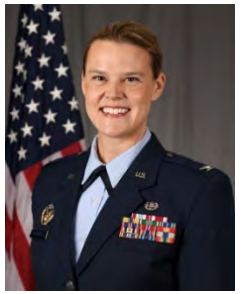
- An interservice committee formed by and reporting to the Department of Defense General Counsel to conduct an annual review of the Manual for Courts-Martial
- Prepares proposed amendments to the Manual for Courts-Martial, and, as appropriate, the Uniform Code of Military Justice
- Carries out other tasks related to the military justice system as assigned by the Department of Defense General Counsel

Joint Service Committee Composition

- Voting Group
  - Air Force (Chair)
  - Army
  - Navy
  - Marine Corps
  - Coast Guard
- Executive Secretary
  - Air Force
- Working Group
- Non-Voting Advisors
  - Court of Appeals for the Armed Forces Designee
  - Joint Chiefs of Staff, Chairman’s Office of Legal Counsel Designee
  - General Counsel Designee

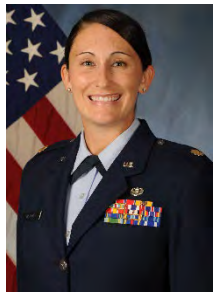
Joint Service Committee Composition

Voting Group Members

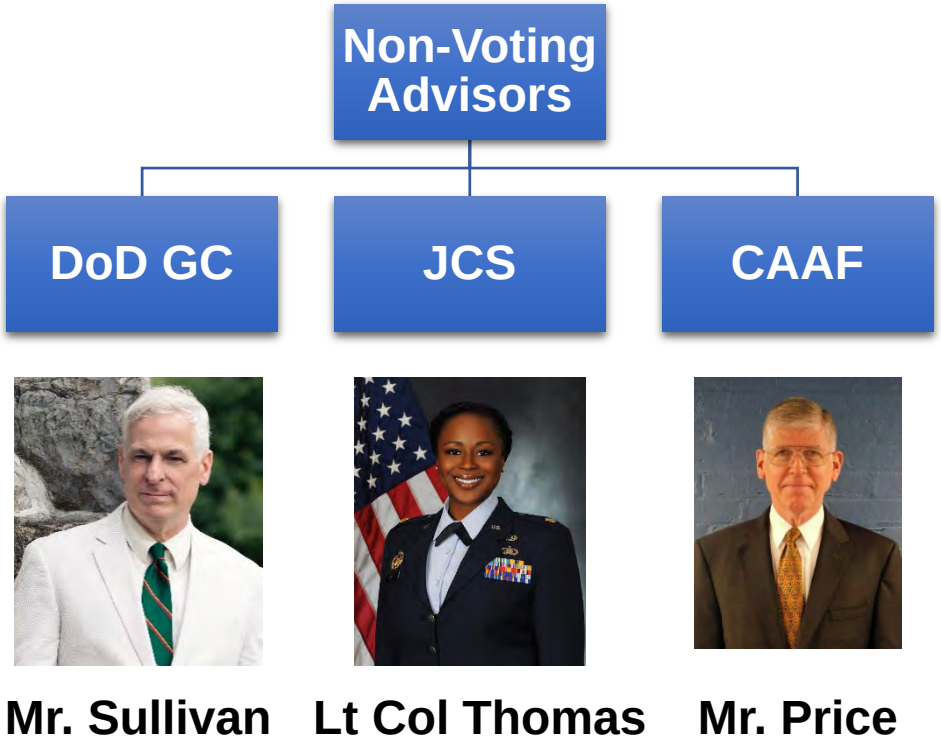
USA	USAF	USCG	USMC	USN
				
LTC Porter	**Col Hernandez** **Chair**	**Mr. Jamison**	**Col Woodard**	**CAPT Rugh**

Joint Service Committee Composition

Working Group Members

USA	USAF	USCG	USMC	USN
					
MAJ Borchers	Lt Col Nettinga	Maj Haslup	LCDR Halsig	Maj Lipton	CDR Leary
	Executive Secretary				

Joint Service Committee Composition



Joint Service Committee Duties

- Ensure the Uniform Code of Military Justice and the Manual for Courts-Martial reflect a comprehensive body of military criminal law and procedure
  - Review the Manual for Courts-Martial annually
  - As appropriate, propose legislation amending the Uniform Code of Military Justice
- Propose amendments to the Manual for Courts-Martial
- Other duties, as assigned by the Department of Defense General Counsel

Joint Service Committee Process

- The Joint Service Committee considers proposed changes to the Manual for Courts-Martial and its supplementary materials
  - The Working Group will draft proposed changes as necessary
  - The Voting Group votes on proposed changes
- Proposed changes are routed to the General Counsel and published in the Federal Register
- Proposed changes are open for public comment for a minimum of 60 days, during which a public hearing is held

Joint Service Committee Current Activities

- Reviewing the entire Manual for Courts-Martial, to include the Rules for Court-Martial and the Military Rules of Evidence
  - Ensuring updates are made consistent with the military justice reforms from the Fiscal Year 2022 National Defense Authorization Act
- Once complete, the proposed amendments will be published in the Federal Register and the Joint Service Committee will hold a public hearing
- Thereafter, the proposed amendments will be transmitted to the Office of Management and Budget for inter-agency review

Questions?

Strategic Planning Discussion

Special Projects	Case Review	Policy
Office of Special Trial Counsel (Requested / GC Assigned)	Appellate Case Review (ToR)	*Proposed:* Victim Impact (JES/ToR)
Proposed:	*Proposed:*	*Proposed:* Alternative Justice (JES/ToR)

Remaining Recommendations (Write-Ins)		
Acquittal rate in Courts-Martial	Standing military magistrates	Standing courts for MJ in 21st century
Analysis on why victims withdraw	Sexual Harassment	Reprisal
Appellate practice, including victim representation	Leader training (NCOs & Officers)	Creating a uniform military justice database (Sec. 547, FY22 NDAA)