

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

## **Meeting Materials**

**February 21 - 22, 2023**

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

**February 21 & 22, 2023  
Public Meeting Read-Ahead Materials**

*Table of Contents*

<b>Tab 1</b>	Agenda: February 21 & 22, 2023	(3 pages)
<b>Tab 2</b>	25 <sup>th</sup> DAC-IPAD Public Meeting: Minutes	(13 pages)
<b>Tab 3</b>	Fiscal Year 2023 NDAA Review	
	a. Presenter Biography	(1 page)
	b. FY23 NDAA: Military Justice and Other Matters	(12 pages)
	c. Panel Questions	(1 page)
<b>Tab 4</b>	Trial Defense Organizations	
	a. Panel Biographies	(5 pages)
	b. Panel Questions	(2 pages)
<b>Tab 5</b>	Public Comment	
	a. Mr. Darin G. Lopez: Letter	(4 pages)
	b. Mr. Erik J. Burris: Letter and supporting documents (391 pages)	
	Located at: <a href="https://dacipad.whs.mil/images/Public/06-Public_Comment/05b-PublicComment_ErikBurris_Docs_Final.pdf">https://dacipad.whs.mil/images/Public/06-Public_Comment/05b-PublicComment_ErikBurris_Docs_Final.pdf</a>	
<b>Tab 6</b>	Military Sentencing Update	
	a. Presenter Biography	(1 page)
	b. Panel Questions	(1 page)
<b>Tab 7</b>	Former Military Judges	
	a. Panel Biographies	(3 pages)
	b. Panel Questions	(2 pages)
<b>Tab 8</b>	DAC-IPAD Subcommittee: Policy	
	a. Service Victims' Counsel Responses to Follow Up Questions	(5 pages)
	b. Report on Victim Impact Statements at Courts-Martial Presentencing Proceedings (DRAFT)	(18 pages)
<b>Tab 9</b>	DAC-IPAD Subcommittee: Case Review	
	a. Excerpt (Sentencing): Review of Recent Amendments to the UCMJ and Sentencing Data Report (December 2021)	(30 pages)
	b. Appellate Review Study (DRAFT)	(28 pages)
<b>Tab 10</b>	DAC-IPAD 5 <sup>th</sup> Annual Report (DRAFT)	(27 pages)
<b>Tab 11</b>	Court-Martial Docket (March – May 2023)	(3 pages)

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

**PUBLIC MEETING AGENDA**

**February 21 - 22, 2023**

**Location: Renaissance Arlington Capital View, 2800 Potomac Ave, Arlington, VA**

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<b>Tuesday, February 21, 2023</b>	<b>Day 1</b>		
<b>8:30 a.m. – 10:00 a.m.</b>	<b>Subcommittee Meeting: Case Review</b> <i>(Closed)</i> <i>Ms. Martha Bashford (Chair)</i> <i>Ms. Meg Garvin</i> <i>Ms. Jennifer Long</i> <i>BGen(R) James Schwenk</i> <i>DFO: Mr. Dwight Sullivan</i>		
<b>10:15 a.m. – 11:45 a.m.</b>	<table><tr><td><b>Subcommittee Meeting: Policy</b> <i>(Closed)</i> <i>BGen(R) James Schwenk (Chair)</i> <i>MG(Ret) Marcia Anderson</i> <i>HON Suzanne Goldberg</i> <i>HON Jennifer O'Connor</i> <i>Judge Karla Smith</i> <i>(Committee Chair)</i> <i>DFO: Mr. David Gruber</i></td><td><b>Subcommittee Meeting: Special Projects</b> <i>(Closed)</i> <i>Ms. Meghan Tokash (Chair)</i> <i>Judge Paul Grimm</i> <i>Mr. A.J. Kramer</i> <i>Dr. Jenifer Markowitz</i> <i>Dr. Cassia Spohn</i> <i>Judge Reggie Walton</i> <i>DFO: Mr. Dwight Sullivan</i></td></tr></table>	<b>Subcommittee Meeting: Policy</b> <i>(Closed)</i> <i>BGen(R) James Schwenk (Chair)</i> <i>MG(Ret) Marcia Anderson</i> <i>HON Suzanne Goldberg</i> <i>HON Jennifer O'Connor</i> <i>Judge Karla Smith</i> <i>(Committee Chair)</i> <i>DFO: Mr. David Gruber</i>	<b>Subcommittee Meeting: Special Projects</b> <i>(Closed)</i> <i>Ms. Meghan Tokash (Chair)</i> <i>Judge Paul Grimm</i> <i>Mr. A.J. Kramer</i> <i>Dr. Jenifer Markowitz</i> <i>Dr. Cassia Spohn</i> <i>Judge Reggie Walton</i> <i>DFO: Mr. Dwight Sullivan</i>
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<b>11:45 a.m. – 12:45 p.m.</b>	<b>Lunch</b>		
<b>12:45 p.m. – 1:00 p.m.</b>	<b>Administrative Session: Annual Ethics Training</b> <i>(Closed)</i> <i>Mr. Dean Raab, OGC</i>		
<b>1:00 p.m. – 1:05 p.m.</b>	<b>Welcome and Introduction to Public Meeting</b>		
<b>1:05 p.m. – 1:50 p.m.</b>	<b>FY23 NDAA Review (JSC Representative)</b> <i>(45 minutes)</i> <i>CAPT Anita Scott, U.S. Coast Guard</i>		
<b>1:50 p.m. – 2:00 p.m.</b>	<b>Break</b>		
<b>2:00 p.m. – 3:30 p.m.</b>	<b>Trial Defense Organizations</b> <i>(90 minutes)</i> <i>COL Sean McGarry, U.S. Army</i> <i>CAPT Mark Holley, U.S. Navy</i> <i>Col Valerie Danyluk, U.S. Marine Corps</i> <i>Col Brett Landry, U.S. Air Force</i> <i>LCDR Jennifer Saviano, U.S. Coast Guard</i>		
<b>3:30 p.m. – 3:45 p.m.</b>	<b>Break</b>		

**Defense Advisory Committee on Investigation, Prosecution, and Defense  
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<b>3:45 p.m. – 4:00 p.m.</b>	<b>Public Comment</b> <i>(15 minutes)</i> <i>Mr. Damion Yates (In-person)</i> <i>Mr. Micah Carroll (In-person/Virtual)</i> <i>Mr. Garlan Burris (Virtual)</i>
<b>4:00 p.m. – 4:05 p.m.</b>	<b>Break</b>
<b>4:05 p.m. – 4:50 p.m.</b>	<b>Special Projects SC Update and Annual Report Input</b> <i>(45 minutes)</i>
<b>4:50 p.m.</b>	<b>Public Meeting Adjourned</b>

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

**PUBLIC MEETING AGENDA**

**Wednesday, February 22, 2023 Day 2**

<b>8:55 a.m. – 9:00 a.m.</b>	<b>Welcome and Overview of Day</b>
<b>9:00 a.m. – 9:45 a.m.</b>	<b>Military Sentencing Update</b> <i>(45 minutes)</i> <i>COL Tyesha Lowery Smith, U.S. Army</i>
<b>9:45 a.m. – 10:00 a.m.</b>	<b>Break</b>
<b>10:00 a.m. – 11:30 a.m.</b>	<b>Former Military Judges</b> <i>(90 minutes)</i> <i>LTC(R) Stefan Wolfe, U.S. Army</i> <i>CAPT(R) Marcus Fulton, U.S. Navy</i> <i>CDR(R) Will Weiland, U.S. Navy</i> <i>LtCol(R) Michael Libretto, U.S. Marine Corps</i> <i>COL(R) W. Shane Cohen, U.S. Air Force</i>
<b>11:30 a.m. – 12:30 p.m.</b>	<b>Lunch</b>
<b>12:30 p.m. – 1:15 p.m.</b>	<b>Policy SC Update and Annual Report Input</b> <i>(45 minutes)</i>
<b>1:15 p.m. – 2:00 p.m.</b>	<b>Case Review SC Update and Annual Report Input</b> <i>(45 minutes)</i>
<b>2:00 p.m. – 2:15 p.m.</b>	<b>Break</b>
<b>2:15 p.m. – 3:15 p.m.</b>	<b>5<sup>th</sup> Annual Report Deliberations</b> <i>(60 minutes)</i> <i>COL Jeff Bovarnick</i>
<b>3:15 p.m. – 3:30 p.m.</b>	<b>Meeting Wrap-Up / Preview of Next Meeting</b>
<b>3:30 p.m.</b>	<b>Public Meeting Adjourned</b>



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

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**MINUTES OF DECEMBER 6-7, 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-fifth public meeting on December 6-7, 2022.

**LOCATION**

The meeting was held at the Ritz-Carlton Hotel, Pentagon City, located at 1250 South Hayes Street, Arlington, Virginia. Location details were provided to the public in the Federal Register and on the DAC-IPAD’s website.

**MATERIALS**

A verbatim transcript of the meeting and preparatory materials provided to the Committee members prior to and during the meeting are incorporated herein by reference and listed individually below. The meeting transcript and materials received by the Committee are available on the website at <https://dacipad.whs.mil>.

## **PARTICIPANTS**

### Participating Committee Members

The Honorable Karla N. Smith, Chair  
Major General Marcia Anderson,  
U.S. Army, Retired \*  
Ms. Martha S. Bashford  
Mr. William E. Cassara\*  
Ms. Margaret A. Garvin  
Ms. Suzanne Goldberg  
The Honorable Paul W. Grimm\*  
Mr. A. J. Kramer

Ms. Jennifer Gentile Long  
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

### 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 Boggess, Senior Paralegal\*  
Ms. Stayce Rozell, Senior Paralegal  
Ms. Terri Saunders, Attorney-Advisor  
Ms. Kate Tagert, Attorney-Advisor  
Ms. Eleanor Magers Vuono, Attorney-Advisor  
Dr. William Wells, Criminologist\*

### Other Participants

Mr. Dwight Sullivan, Designated Federal Officer (DFO)

\*Via video-teleconference

## MEETING MINUTES

### Day One – December 6, 2022

Quorum was established and Mr. Dwight Sullivan, Designated Federal Officer, opened the meeting at 9:00 a.m. Mr. Sullivan introduced the Honorable Karla N. Smith, DAC-IPAD Chair, who provided opening remarks welcoming those in attendance; explained the purpose of the meeting; outlined the agenda; and introduced Colonel Jeff Bovarnick, DAC-IPAD Executive Director, who provided a brief overview of the meeting and introduced the first session.

### Uniform Code of Military Justice Panel Selection Panel

This panel included the following presenters:

Colonel Shannon Sherwin, Staff Judge Advocate (SJA), Air Education & Training Command, U.S. Air Force\*

Captain Andrew House, SJA, U.S. Naval Academy, U.S. Navy

Colonel Christopher G. Tolar, Deputy SJA to the Commandant of the Marine Corps, U.S. Marine Corps

Commander Kismet Wunder, Legal Services Command, U.S. Coast Guard

Christopher Kennebeck, Chief, Criminal Law, OTJAG, U.S. Army

After providing an overview of their Service panel selection process and training, the panel of experts engaged in an in-depth dialogue (through a Q&A format) with Committee members covering such topics as:

1. Is a convening authority excluded from selecting members they are familiar with?

No.

2. Is voir dire used to exclude individuals familiar with the case from hearing the case?

Yes; voir dire is used in the member selection process. The Navy, Army, and Air Force panelists cited Article 25 as the process to exclude any member who is the accuser or whose familiarity with the case threatens their objectivity or perceptions of their objectivity from the panel.

The Marine and Coast Guard panelists added that commands nominate a select number or pool of individuals from each command and those who are best qualified, in accordance to Article 25 criteria, are selected. Sometimes a Commander may select a member not within the pool based on his or her familiarity with that individual as being the best qualified under Article 25.

3. What are the obstacles to having diverse panels?

Convening authorities may go outside the specific installation where a court-martial is held to select other individuals who may be more qualified under Article 25.

4. Can reservists sit as panel members?

An Air Force Instruction specifically addresses detailing reservists as panel members.

The Coast Guard routinely selects some active duty members for reservist accused and reservist panel members for active duty accused.



5. Mr. Cassara noted that based on personal experience, an African American defendant is more likely than not to have an all-White panel of members. Dr. Markowitz agreed with his assessment. Chair Smith requested the Services provide the Committee with statistics of the racial make-up of courts-martial panel members.

6. In response to a question about sentencing parameters, Colonel Kennebeck and Mr. Sullivan noted that for cases in which all findings of guilty are for offenses committed after December 27, 2023, based on the FY 22 NDAA (enacted December 27, 2021) there will be new parameters and criteria for sentencing by judge alone. DoD established the Military Sentencing Parameters and Criteria Board to propose sentencing guidelines. (Note: the Committee requested and will hear from an MSPCB representative of at its next public meeting).

7. Ms. Tokash inquired about uniform questionnaires across the Services.

The Army panelist stated that although the Services routinely share best practices, no purposeful steps are being taken to make panel member questionnaires uniform across the Services.

8. Ms. Goldberg inquired about gender diversity and exclusion of females from panels.

The Coast Guard panelist responded that although officer and enlisted panels may not be as racial or ethnically diverse, they are gender diverse. The Army panelist added that in some cases female panel members are more likely to be taken off the panel due to their past experience with sexual assault or feeling about the particular alleged crime.

#### Survivors United Panel

This panel included the following presenters:

Mr. Ryan Guilds, Special Victims' Counsel, Arnold & Porter LLP

Ms. Adrian Perry, Victim Advocate, Survivors United

Dr. Breck Perry, Victim Advocate, Survivors United

Dr. Breck Perry and Ms. Adrian Perry—founding members of Survivors United—and Mr. Ryan Guilds, an attorney who has represented victims in military and civilian trials, provided information to the Committee regarding victim impact statements (VIS).

The Perrys relayed that during the trial of the officer accused of sexually abusing their young daughters, the military judge caused them great pain by placing limitations on their delivery of their victim impact statements, including allowing only one parent to provide a VIS.

Dr. Perry, who ultimately provided the VIS, stated that the military judge stopped him on several occasions while he was delivering the VIS to tell him he had to remove several parts and he could not face the accused while delivering his statement, but instead had to face the jury.

Ms. Perry stated it is insulting for a victim to have that moment tarnished after everything they endured and the silence they faced for so long during the entire criminal justice process.

Mr. Guilds gave his opinion that the appellate courts have provided a broader interpretation of who may be considered a victim and that parents or others in the Perrys' position would now be allowed to provide VIS. In his representation of victims, he has observed victims limited in their ability to speak directly to the accused during their VIS, not being able to speak to an appropriate sentence, not being permitted to express too much emotion, and not being permitted to describe the impact on them in detail. He noted these limitations are often self-imposed by well-meaning victims' counsel or prosecutors to prevent the victim being interrupted by defense objection.

Mr. Guilds also expressed concern about the practice of military judges "whittling down" victim impact statements in court. He gave an example of an accused pleading guilty to a physical assault rather than a sexual assault as part of a plea agreement, yet the victim cannot discuss the impact of a sexual assault, but only the physical assault, thus undermining "the value and power of the victim impact statement" and reinforcing the survivor's "sense of powerlessness" in a manner not necessary to protect the accused rights.

Finally, Mr. Guilds commented that victims should be allowed to describe the impact of the investigation and pretrial and trial processes in their impact statements, topics that are currently not within the scope of victim impact under R.C.M. 1001(c). He recommended to the Committee that there should be a presumption that unless there is a Constitutional right at stake, a victim should be allowed to say what they want in their VIS.

#### Special Victims' Counsel (SVC)/Victims' Legal Counsel (VLC)/Victims' Counsel (VC) Panel

This panel included the following presenters

Colonel Carol A. Brewer, Chief, SVC Program, U.S. Army  
Captain Daniel Cimmino, Chief, VLC Program, U.S. Navy  
Lieutenant Colonel Iain D. Pedden, Chief, VLC Program, U.S. Marine Corps  
Colonel Tracy Park, Chief, VC Program, U.S. Air Force  
Ms. Elizabeth Marotta, Chief, Office of Member Advocacy, U.S. Coast Guard

After providing brief introductions, the panel of SVC/VLC/VC engaged in an in-depth dialogue (through a Q&A format) with Committee members covering such topics as:

1. Services' SVC/VLC/VC representation of non-military victims.

All Services have similar policies that grant authorization to provide counsel to non-military victims when it is in the best interest of the government or the victims.

2. Training requirements and enforcement mechanisms for enforcing the Crime Victims' Rights Act.

All Services have similar training requirements in their certification courses that teach judge advocates about victims' rights and how to report violations and remedies available to victims.

3. The number of appeals filed for actual or perceived violations of 18 U.S.C. 3771.

The Army has not had a writ filed in some time. The Marine Corps currently has one docketed at the Court of Appeals for the Armed Forces (CAAF). The Air Force currently has five petitions for extraordinary relief before the Air Force Court of Criminal Appeals. The Coast Guard recently had a writ granted for review.

4. Joint Service Committee on Military Justice (JSC) proposals to broaden the scope of R.C.M. 1001(c) to allow victims to speak more fully about the impact of the crime and to recommend specific sentences.

All Services agreed with the JSC's proposal to allow SVCs to be heard on the objections regarding VIS and other changes to allow a broader definition of victim impact and for the victim to be able to propose an appropriate sentence.

5. SVC/VLC/VC 2-year tour lengths.

All Services responded that 2- or 3-year assignments as a Senior SVC/VLC/VC are appropriate and consistent with other judge advocate positions.

#### Office of the Special Trial Counsel Panel (OSTC)

This panel included the following presenters:

The Honorable Carrie F. Ricci, General Counsel of the Department of the Army  
The Honorable John P. "Sean" Coffey, General Counsel of the Department of the Navy  
The Honorable Peter J. Beshar, General Counsel of the Department of the Air Force  
Lieutenant General Stuart W. Risch, The Judge Advocate General of the U.S. Army  
Vice Admiral Darse E. "Del" Crandall, Jr., Judge Advocate General of the U.S. Navy  
Major General David J. Bligh, Staff Judge Advocate to the Commandant of the Marine Corps  
Major General Rebecca R. Vernon, Deputy Judge Advocate General of the U.S. Air Force

After providing opening remarks, the panelists engaged in an in-depth dialogue (through a Q&A format) with Committee members covering such topics as:

1. Unlawful Command Influence.

Mr. Coffey, VADM Crandall, LTG Risch and Maj Gen Vernon all replied that the Military Departments' Secretaries have made it clear through their instructions that convening authorities and SJAs are forbidden from exercising unlawful influence on STCs.

2. Case Disposition.

LTG Risch stated that the Army's OSTC policy outlines the standards and process by which cases are disposed and at what level those decision will be made. VADM Crandall echoed LTG Risch's response and said the Navy has a similar procedure for disposition of cases.

### 3. Race and gender diversity.

The Army has a program that targets Historically Black Colleges and Universities to help the OSTC obtain a balanced and diverse population. Diversity is a huge priority for the Air Force, starting with recruitment and continuing with professional development throughout an individual's career. All four Services' OSTC continue to work together to exchange ideas and challenges on this extremely important issue.

### 4. Equity between trial defense counsel and special trial counsel.

LTG Risch expressed concern about perceived imbalance, so he specifically requested the Secretary and Chief increase growth of the (Army) Trial Defense Service (TDS) personnel and experience, including the potential for TDS to manage its own budget and a manpower analysis for additional needs. Ms. Ricci added that the appropriate administrative support was added to the TDS. MajGen Bligh, VADM Crandall, and Maj Gen Vernon responded similarly that their respective Services continually strive to create a balanced military justice system that is fair and provides due process.

### 5. Evaluation of the impacts of legislative changes on OTSC/LSTC or individual STCs.

All Services are looking at the measures of effectiveness. Many (service members, family, and public) have lost faith in the military system and leaders and much needs to be done to restore trust. All Services are identifying ways to take self-assessments and make changes and adjustments where required.

### 6. How are OSTCs measuring whether trust is restored in the military justice system?

All Service OSTCs routinely work with SVC Program Chiefs on ways to improve victims' responses to surveys about their experience and ways to improve barriers to trust.

### 7. What can the DAC-IPAD do regarding the addition of sexual harassment as a covered offense?

Mr. Coffey did not have a specific recommendation, but urged all concerned to consider any demands for additional resources to investigate and potentially prosecute sexual harassment offenses.

### DAC-IPAD and U.S. Government Accountability Office (GAO) Racial Disparity Reports Brief

Mr. Chuck Mason addressed the Committee Members on the topic of racial and ethnic disparities in the Services and military justice, including findings and recommendations of two reports published by the GAO (GAO-19-344 in May 2019 and GAO-21-105000 in August 2021), and one DAC-IPAD report on Racial and Ethnic Disparities published in December 2020. The discussion focused on the Services' progress to improve accounting and reporting of demographic data. After identifying differences in reporting, the Committee requested that the June 2022 Request for Information be reissued requesting the Services provide the data according to standardized racial and ethnicity categories.

### Public Comment

Mr. Christopher Hines gave public comment virtually.

Mr. Antiwan Henning gave public comment.

Ms. Nicole Pulver gave public comment.

### Meeting Wrap-Up; Subcommittee Update; Preview Next Meeting

Colonel Bovarnick discussed the December 7, 2022 meeting agenda. Chair Smith thanked the members and staff for their commitment to the work of the DAC-IPAD.

The DFO closed the public meeting at 4:47 p.m.

## Day Two – December 7, 2022

### Case Review Subcommittee Update Panel

This panel included the following presenters:

Ms. Kate Tagert, DAC-IPAD Staff Attorney

Ms. Audrey Critchley, DAC-IPAD Staff Attorney

Ms. Tagert and Ms. Critchley provided an update on the Case Review Subcommittee (CRSC), covering the subcommittee's review of cases and updates on certain appellate decisions.

The Court of Appeals for the Armed Forces (CAAF) case, *United States v. Jeter*, which will be decided in 2023, will cover issues involving a military member's right to a fair and impartial panel and the UCMJ, article 25 criteria used by the convening authority when selecting panel members that does not include race as a factor.

The FY22 NDAA contains a provision for a randomization process when selecting panel members.

Ms. Bashford asked why a convening authority would have to depart from the Article 25 criteria to select a diverse panel.

Ms. Spohn referenced the U.S. Supreme Court case, *Castaneda v. Partida*, 430 U.S. 482 (1977) which held that the Texas "key man" system for jury selection in which a person from the community would select the venire for jury selection based on subjective standards demonstrated intentional discrimination.

Ms. Tokash asked what the DAC-IPAD could do to have an immediate impact on the Article 25 criteria in either this or next year's legislation.

Several DAC-IPAD members suggested a study of the new legislation for randomized panel selection. Chair Smith expressed concern about the lack of diversity on panels and would like to review data on panel selection. Ms. Goldberg stated she would like to look at the data where discretionary decisions occur, especially at the points where the pools are narrowed down. Judge Walton said the data was important; however, there is much research showing the benefits of having diverse panels in the civilian sector, and that change is needed now for panels to appropriately reflect racial diversity. Ms. Tokash agreed that change was needed now as opposed to waiting for the data to be analyzed.

### Special Projects Subcommittee Update Panel

Ms. Meghan Peters, DAC-IPAD Staff Attorney, opened this Panel by introducing the Special Projects Subcommittee (SPSC) members: Ms. Meghan Tokash, Chair; Judge Grimm; Mr. Kramer; Dr. Markowitz; Dr. Spohn and Judge Walton, and the staff: Ms. Peters, Ms. Eleanor Magers Vuono and Ms. Stayce Rozell.

The SPSC will study and evaluate the OSTC, with a focus on policy development, workforce structure, and implementation of best practices.

The SPSC will review proposed changes to the Rules for Courts-Martial published for comment in October 2022. Ms. Tokash, Ms. Goldberg and Dr. Markowitz attended the JCS's public meeting, which was brief and no one provided comment. The deadline to make public comment to the JCS is December 19, 2022.

The SPSC will meet after the DAC-IPAD public meeting closes. The SPSC will hear from members of the Inter-Service Working Group on the Special Trial Counsel on the business rules and standards for referral of cases and deferral of cases back to the command for action. A second panel of judge advocate personnel managers will discuss recruiting for STC, attrition, and military justice expertise within the Services.

The SPSC is considering introducing a draft assessment of pretrial procedures in articles 32 and 34 and how they apply in cases prosecuted by the STC.

The SPSC will also discuss its contribution to the Annual Report, including topics such as OSTC development and recommendations; proposed RCM changes; and an SPSC assessment of articles 32 and 34 in cases over which STC exercise authority. The SPSC will consider whether a preliminary hearing officer should be elevated to the stature of a magistrate or a judge compared to the current legal officer who offers an advisory opinion as to probable cause. Article 34 requires the SJA to advise the convening authority on probable cause and the appropriate disposition of the case. The FY22 NDAA amendment to article 34 provides for an STC to make the probable cause determination. The SPSC is concerned that the probable cause threshold for referral is too low.

#### Policy Subcommittee Update Panel

Ms. Terri Saunders, DAC-IPAD Staff Attorney  
Ms. Terry Gallagher, DAC-IPAD Staff Attorney

Ms. Saunders summarized the victim impact statement (VIS) information for the annual report. The Joint Explanatory Statement to the FY20 NDAA posed two questions: (1) are military judges interpreting RCM 1001(c) too narrowly in limiting victim impact statements; and (2) are judges appropriately permitting others to testify about the impact of the crime on them? A Policy Subcommittee (PSC) study answered these two questions.

A review of 241 cases tried in FY21 resulting in a guilty verdict for:

- Article 120: adult sexual offenses
- Article 120b: child sexual offenses
- Article 120c: indecent viewing, recording, indecent exposure
- Article 93: sexual harassment offenses
- Article 93a: military trainer/recruiter sexual conduct with trainee/recruit
- Article 117a: wrongful broadcast/distribution of intimate images
- Article 128: assault (had Art. 120 or 120b offense referred and accused was acquitted or charge was dismissed pursuant to a pretrial agreement)
- Article 80: attempts to commit one of these offenses

The study found the following result:

	Army	Navy	Marine Corps	Air Force	Coast Guard	
<b>Judge Sentenced</b>	91	14	13	31	2	151
<b>VIS Limited</b>	8 (9%)	1 (7%)	1 (8%)	3 (10%)	0 (0%)	13 (9%)
<b>Members Sentenced</b>	5	4	2	9	2	22
<b>VIS Limited</b>	0 (0%)	4 (100%)	0 (0%)	3 (33%)	0 (0%)	7 (32%)

In most of the cases in which the military judge limited the VIS, the judge found that the statement went beyond the scope of the victim impact or the victim recommended a sentence. In the majority of the cases that were not limited, the judge did not ask for any objections.

In the majority of the 13 cases in which the judge limited some aspect of the VIS, the judge applied the rule appropriately.

The members offered comments in the cases they reviewed:

Ms. Goldberg provided the opinion that in one case, the judge's ruling was unduly narrow as to what the victim could say.

BGEN (R) Schwenk provided the opinion that in one case, the military judge's refusal to allow a portion of a victim's daughter's statement about how the crime had affected her mother because it was not the effect of the crime on the daughter was unduly narrow.

Ms. Garvin stated that she was shocked about the process of "redlining" the victim's words and editing the words of the victim.

Judge Walton, Judge Grimm and Chair Smith gave additional comments about their experience with victim impact statements.

Ms. Saunders summarized the JSC's draft Executive Order on changes to RCM 1001:

- (1) includes a provision for victims to be heard on objections to the unsworn statement.
- (2) will remove the provision prohibiting recommendation for specific sentence;
- (3) allows the victim, victim's counsel, or both to make an unsworn statement; and
- (4) will remove a portion of the discussion that reads, "Upon objection by either party or *sua sponte*, a military judge may stop or interrupt a victim's statement that includes matters outside the scope of R.C.M. 1001(c)(3)."



The Committee voted on the following recommendations for the JSC's draft E.O.:

### **Recommendation 1**

The JSC should draft an amendment to R.C.M. 1001(c)(2)(B) to remove the word “directly” from the definition of victim impact. Alternately, the words “or indirectly” should be added to the definition of victim impact.

There were no objections to the recommendation and the recommendation was adopted as amended.

### **Recommendation 2**

The JSC should draft an amendment to R.C.M. 1001(c)(2)(B) to allow crime victims to discuss the impact on family members relating to or arising from the offenses for which the accused has been found guilty.

Mr. Kramer opposed the recommendation. With no other objections, the recommendation was not adopted.

### **Recommendation 3**

The JSC should draft an amendment to R.C.M. 1001(c)(3) by adding a sentence stating that a victim impact statement may include a recommendation of a specific sentence.

There were no objections to the recommendation and the recommendation was adopted.

### **Recommendation 4**

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

There were no objections to the recommendation and the recommendation was adopted.

### **Recommendation 5**

The Joint Service Committee on Military Justice should draft an amendment to R.C.M. 1001(c)(5)(B) to remove the “upon good cause shown” clause in order to be consistent with the Joint Service Committee's proposed change to R.C.M. 1001(c)(5)(A).

There were no objections to the recommendation and the recommendation was adopted.

### **Recommendation 6**

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

Mr. Kramer and Mr. Cassara opposed the recommendation. With no other objections, the recommendation was adopted.

## Meeting Wrap-Up

Colonel Bovarnick covered the timeline for the March 2023 5<sup>th</sup> Annual Report, calendar year 2023 meeting dates; and topics for the February meeting. Chair Smith thanked the members and staff for their commitment to the work of the DAC-IPAD. With no further comments or issues to address, the meeting concluded.

The DFO closed day two of the public meeting at 1:39 p.m.

## **CERTIFICATION**

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



The Honorable Karla N. Smith, Chair

## **MATERIALS**

### Materials Provided Prior to and at the Public Meeting

1. Agenda for December 6 – 7 2022 Meetings
2. UCMJ Panel Selections
  - a. Presenter Biographies; b. Panel Questions; c. Article 25, UCMJ;
  - d. UCMJ Panel Selection Materials: Air Force; Navy; Marine Corps; Coast Guard; Army
3. Survivors United
  - a. Presenter Biographies; b. Panel Questions
4. Special Victims' Counsel/Victims' Legal Counsel
  - a. Presenter Biographies; b. Panel Questions
5. Office of Special Trial Counsel
  - a. Presenter Biographies; b. Panel Questions (Committee); c. Panel Questions (SPSC)
6. Race and Ethnicity Disparities Reports: Presentation & Army Article 146a (excerpt)
7. Subcommittee: Case Review Update: Presentation
8. Subcommittee: Special Projects Update: Presentation
9. Subcommittee: Policy Update
  - a. Presentation; b. Draft E.O. Annex R.C.M. 1001; c. Draft Public Comment to the JSC;
  - d. Victim Impact Statement Deliberation Guide
10. Deliberations
  - a. Timeline and CY 2023 Meeting Dates; b. 5<sup>th</sup> Annual Report Outline; c. Presentation
11. Public Comment
  - a. Mr. Clarence Anderson III
    1. Written Comment (Mr. Anderson) (Redacted)
    2. Petition for a New Trial
    3. Petition for Reconsideration
  - b. LCDR Manuel Dominguez
    1. Written Comment (LCDR Dominguez)
    2. Written Comment (Ms. Tami Mitchell-Attorney)
    3. Written Comment (Ms. Sarah Gonzales)

<p><b>Fiscal Year 2023 NDAA Review</b> <b>Presenter Biography</b></p>
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**Captain Anita Scott, U.S. Coast Guard, Chief of Military Justice**

Captain Anita Scott is the Coast Guard's Chief of Military Justice and Chair of the Joint Service Committee. In this role she oversees policy development and execution for all aspects of the Coast Guard's criminal law program. Her duties include supervising the service's government appellate representation before the Coast Guard Court of Criminal Appeals (CGCCA) and the Court of Appeals for the Armed Forces (CAAF). Captain Scott also serves as the service's representative on Voting Group of the Joint Service Committee for Military Justice.

Captain Scott has previously served in numerous legal and operational assignments over her 25-year Coast Guard career. Notably, she served as a Military Trial Judge from 2013 to 2015 and a Military Appellate Judge on the CGCCA from 2021 until 2022 when her new assignment as the Chief of Military Justice conflicted her from further service on the Court. She spent seven years as a Staff Judge Advocate at various Coast Guard commands and was detailed to the Department of Justice as a Trial Attorney from 2007 to 2009.

# National Defense Authorization Act for Fiscal Year 2023

## Subtitle E – Military Justice and Other Legal Matters

<a href="#">Sec. 541</a>	Matters in connection with special trial counsel.
<a href="#">Sec. 542</a>	Technical corrections relating to special trial counsel.
<a href="#">Sec. 543</a>	Randomization of court-martial panels.
<a href="#">Sec. 544</a>	Jurisdiction of Courts of Criminal Appeals.
<a href="#">Sec. 545</a>	Special trial counsel of the Department of the Air Force.
<a href="#">Sec. 546</a>	Independent investigation of sexual harassment.
<a href="#">Sec. 547</a>	Primary prevention research agenda and workforce.
<a href="#">Sec. 548</a>	Limitation on availability of funds for relocation of Army CID special agent training course.
<a href="#">Sec. 549</a>	Review of titling and indexing practices of the Army and certain other organizations.
<a href="#">Sec. 549A</a>	Briefing and report on resourcing required for implementation of military justice reform.
<a href="#">Sec. 549B</a>	Report on sharing information with counsel for victims of offenses under the UCMJ.
<a href="#">Sec. 549C</a>	Dissemination of civilian legal services information.

<b>SEC. 541. MATTERS IN CONNECTION WITH SPECIAL TRIAL COUNSEL.</b>
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(a) DEFINITION OF COVERED OFFENSE.—

(1) IN GENERAL.—Section 801(17)(A) of title 10, United States Code (article 1(17)(A) of the Uniform Code of Military Justice), as added by section 533 of the National Defense Authorization Act for Fiscal Year 2022 (Public Law 117–81; 135 Stat. 1695), is amended by striking “section 920 (article 120)” and inserting “section 919a (article 119a), section 920 (article 120), section 920a (article 120a)”.

(2) EFFECTIVE DATE.—The amendments made by paragraph (1) shall take effect immediately after the coming into effect of the amendments made by section 533 of the National Defense Authorization Act for Fiscal Year 2022 (Public Law 117–81; 135 Stat. 1695) as provided in section 539C of that Act (10 U.S.C. 801 note) and shall apply with respect to offenses that occur after that date.

(b) INCLUSION OF SEXUAL HARASSMENT AS COVERED OFFENSE.—

(1) IN GENERAL.—Section 801(17)(A) of title 10, United States Code (article 1(17)(A) of the Uniform Code of Military Justice), as added by section 533 of the National Defense Authorization Act for Fiscal Year 2022 (Public Law 117–81; 135 Stat. 1695) and amended by subsection (a) of this section, is further amended—

(A) by striking “or”; and

(B) by striking “of this title” and inserting “, or the standalone offense of sexual harassment punishable under section 934 (article 134) of this title in each instance in which a formal complaint is made and such formal complaint is substantiated in accordance with regulations prescribed by the Secretary concerned”.

(2) EFFECTIVE DATE.—The amendments made by paragraph (1) shall take effect on January 1, 2025, and shall apply with respect to offenses that occur after that date.

(c) RESIDUAL PROSECUTORIAL DUTIES AND OTHER JUDICIAL FUNCTIONS OF CONVENING AUTHORITIES IN COVERED CASES.—The President shall prescribe regulations to ensure that residual prosecutorial duties and other judicial functions of convening authorities, including granting immunity, ordering depositions, and hiring experts, with respect to charges and specifications over which a special trial counsel exercises authority pursuant to section 824a of title 10, United States Code (article 24a of the Uniform Code of Military Justice) (as added by section 531 of the National Defense Authorization Act for Fiscal Year 2022 (Public Law 117–81; 135 Stat. 1692)), are transferred to the military judge, the special trial counsel, or other authority as appropriate in such cases by no later than the effective date established in section 539C of the National Defense Authorization Act for Fiscal Year 2022 (Public Law 117–81; 10 U.S.C. 801 note), in consideration of due process for all parties involved in such a case.

(d) AMENDMENT TO THE RULES FOR COURTS-MARTIAL.—The President shall prescribe in regulation such modifications to Rule 813 of the Rules for Courts-Martial and other Rules as appropriate to ensure that at the beginning of each court-martial convened, the presentation of orders does not in open court specify the name, rank, or position of the convening authority convening such court, unless such convening authority is the Secretary concerned, the Secretary of Defense, or the President.

(e) BRIEFING REQUIRED.—Not later than 180 days after the date of the enactment of this Act, the Secretary of Defense shall provide to the Committees on Armed Services of the Senate and the House of Representatives a briefing on the progress of the Department of Defense in implementing this section, including an identification of—

(1) the duties to be transferred under subsection (c); and

(2) the positions to which those duties will be transferred;

(3) any provisions of law or Rules for Courts Martial that must be amended or modified to fully complete the transfer.

(f) **ADDITIONAL REPORTING RELATING TO IMPLEMENTATION OF SUBTITLE D OF TITLE V OF THE NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2022.**—Not later than February 1, 2025, and annually thereafter for five years, the Secretary of Defense shall submit to the Committees on Armed Services of the Senate and the House of Representatives a report assessing the holistic effect of the reforms contained in subtitle D of title V of the National Defense Authorization Act for Fiscal Year 2022 (Public Law 117–81) on the military justice system. The report shall include the following elements:

- (1) An overall assessment of the effect such reforms have had on the military justice system and the maintenance of good order and discipline in the ranks.
- (2) The percentage of caseload and courts-martial assessed as meeting, or having been assessed as potentially meeting, the definition of “covered offense” under section 801(17) of title 10, United States Code (article 1(17) of the Uniform Code of Military Justice) (as added by section 533 of the National Defense Authorization Act for Fiscal Year 2022 (Public Law 117–81; 135 Stat. 1695)), disaggregated by offense and military service where possible.
- (3) An assessment of prevalence and data concerning disposition of cases by commanders after declination of prosecution by special trial counsel, disaggregated by offense and military service when possible.
- (4) Assessment of the effect, if any, the reforms contained in such subtitle have had on non-judicial punishment concerning covered and non-covered offenses.
- (5) A description of the resources and personnel required to maintain and execute the reforms made by such subtitle during the reporting period relative to fiscal year 2022.
- (6) A description of any other factors or matters considered by the Secretary to be important to a holistic assessment of those reforms on the military justice system.

<b>SEC. 542. TECHNICAL CORRECTIONS RELATING TO SPECIAL TRIAL COUNSEL.</b>
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(a) **TECHNICAL CORRECTIONS.**—Section 824a(c)(3) of title 10, United States Code (article 24a(c)(3) of the Uniform Code of Military Justice), is amended—

- (1) by striking “Subject to paragraph (4)” and inserting “Subject to paragraph (5)”;
- (2) in subparagraph (D), by striking “an ordered rehearing” and inserting “an authorized rehearing”.

(b) **EFFECTIVE DATE.**—The amendments made by subsection (a) shall take effect immediately after the coming into effect of the amendments made by section 531 of the National Defense Authorization Act for Fiscal Year 2022 (Public Law 117–81; 135 Stat. 1692) as provided in section 539C of that Act (10 U.S.C. 801 note).

#### **SEC. 543. RANDOMIZATION OF COURT-MARTIAL PANELS.**

- (a) **IN GENERAL.**—Section 825(e) of title 10, United States Code (article 25(e) of the Uniform Code of Military Justice), is amended by adding at the end the following new paragraph:
- “(4) When convening a court-martial, the convening authority shall detail as members thereof members of the armed forces under such regulations as the President may prescribe for the randomized selection of qualified personnel, to the maximum extent practicable.”.
- (b) **EFFECTIVE DATE.**—The amendment made by subsection (a) 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 courts- martial convened on or after that effective date.
- (c) **REGULATIONS.**—Not later than the effective date specified in subsection (b), the President shall prescribe regulations implementing the requirement under paragraph (4) of section 825(e) of title 10, United States Code (article 25(e) of the Uniform Code of Military Justice), as added by subsection (a) of this section.

#### **SEC. 544. JURISDICTION OF COURTS OF CRIMINAL APPEALS.**

- (a) **WAIVER OF RIGHT TO APPEAL; WITHDRAWAL OF APPEAL.**— Section 861(d) of title 10, United States Code (article 61(d) of the Uniform Code of Military Justice), is amended by striking “A waiver” and inserting “Except as provided by section 869(c)(2) of this title (article 69(c)(2)), a waiver”.
- (b) **JURISDICTION.**—Section 866 of title 10, United States Code (article 66 of the Uniform Code of Military Justice), is amended—
- (1) in subsection (b)(1), by striking “shall have jurisdiction over” and all that follows through the period at the end of subparagraph (D) and inserting the following: “shall have jurisdiction over—
- “(A) a timely appeal from the judgment of a court-martial, entered into the record under section 860c(a) of this title (article 60c(a)), that includes a finding of guilty; and
- “(B) a summary court-martial case in which the accused filed an application for review with the Court under section 869(d)(1) of this title (article 69(d)(1)) and for which the application has been granted by the Court.”; and
- (2) in subsection (c), by striking “is timely if” and all that follows through the period at the end of paragraph (2) and inserting the following: “is timely if—
- “(1) in the case of an appeal under subparagraph (A) of such subsection, it is filed before the later of—
- “(A) the end of the 90-day period beginning on the date the accused is provided notice of appellate rights under section 865(c) of this title (article 65(c)); or
- “(B) the date set by the Court of Criminal Appeals by rule or order; and
- “(2) in the case of an appeal under subparagraph (B) of such subsection, an application for review with the Court is filed not later than the earlier of the dates established under section 869(d)(2)(B) of this title (article 69(d)(2)(B)).”.
- (c) **REVIEW BY JUDGE ADVOCATE GENERAL.**—Section 869 of title 10, United States Code (article 69 of the Uniform Code of Military Justice), is amended—
- (1) by amending subsection (a) to read as follows:
- “(a) **IN GENERAL.**—Upon application by the accused or receipt of the record pursuant to section 864(c)(3) of this title (article 64(c)(3)) and subject to subsections (b), (c), and (d), the Judge Advocate General may—

“(1) with respect to a summary court-martial, modify or set aside, in whole or in part, the findings and sentence; or “(2) with respect to a general or special court-martial, order such court-martial to be reviewed under section 866 of this title (article 66).”; and

(2) in subsection (b)—

(A) by inserting “(1)” before “To qualify”; and

(B) by striking “not later than one year after” and all that follows through the period at the end and inserting the following: “not later than—

“(A) for a summary court-martial, one year after the date of completion of review under section 864 of this title (article 64); or

“(B) for a general or special court-martial, one year after the end of the 90-day period beginning on the date the accused is provided notice of appellate rights under section 865(c) of this title (article 65(c)), unless the accused submitted a waiver or withdrawal of appellate review under section 861 of this title (article 61) before being provided notice of appellate rights, in which case the application must be submitted to the Judge Advocate General not later than one year after the entry of judgment under section 860c of this title (article 60c).

“(2) The Judge Advocate General may, for good cause shown, extend the period for submission of an application, except that— “(A) in the case of an application for review of a summary court martial, the Judge Advocate may not consider an application submitted more than three years after the completion date referred to in paragraph (1)(A); and

“(B) in case of an application for review of a general or special court-martial, the Judge Advocate may not consider an application submitted more than three years after the end of the applicable period under paragraph (1)(B).”; and

(3) in subsection (c)—

(A) in paragraph (1)(A), by striking “section 864 or 865(b) of this title (article 64 or 65(b))” and inserting “section 864 of this title (article 64)”; and

(B) in paragraph (2), by striking “the Judge Advocate General shall order appropriate corrective action under rules prescribed by the President” and inserting “the Judge Advocate General shall send the case to the Court of Criminal Appeals”; and

(4) in subsection (d)—

(A) in paragraph (1), by striking “under subsection (c)—” and all that follows through “(B) in a case submitted” and inserting “under subsection (c)(1) in a case submitted”; and

(B) in paragraph (2), in the matter preceding subparagraph (A), by striking “paragraph (1)(B)” and inserting “paragraph (1)”.

(d) **APPLICABILITY.**—The amendments made by this section shall not apply to—

(1) any matter that was submitted before the date of the enactment of this Act to a Court of Criminal Appeals established under section 866 of title 10, United States Code (article 66 of the Uniform Code of Military Justice); or

(2) any matter that was submitted before the date of the enactment of this Act to a Judge Advocate General under section 869 of such title (article 69 of the Uniform Code of Military Justice).



<b>SEC. 545. SPECIAL TRIAL COUNSEL OF THE DEPARTMENT OF THE AIR FORCE.</b>
--

(a) IN GENERAL.—Section 1044f of title 10, United States Code, is amended—

(1) in subsection (a), in the matter preceding paragraph (1), by striking “The policies shall” and inserting “Subject to subsection (c), the policies shall”;

(2) by redesignating subsection (c) as subsection (d); and

(3) by inserting after subsection (b) the following new sub- section:

“(c) SPECIAL TRIAL COUNSEL OF DEPARTMENT OF THE AIR FORCE.—In establishing policies under subsection (a), the Secretary of Defense shall—

“(1) in lieu of providing for separate offices for the Air Force and Space Force under subsection (a)(1), provide for the establishment of a single dedicated office from which office the activities of the special trial counsel of the Department of the Air Force shall be supervised and overseen; and

“(2) in lieu of providing for separate lead special trial counsels for the Air Force and Space Force under subsection (a)(2), provide for the appointment of one lead special trial counsel who shall be responsible for the overall supervision and oversight of the activities of the special trial counsel of the Department of the Air Force.”.

(b) EFFECTIVE DATE.—The amendments made subsection (a) shall take effect immediately after the coming into effect of the amendments made by section 532 of the National Defense Authorization Act for Fiscal Year 2022 (Public Law 117–81; 135 Stat. 1694) as provided in section 539C of that Act (10 U.S.C. 801 note).

<b>SEC. 546. INDEPENDENT INVESTIGATION OF SEXUAL HARASSMENT.</b>
--

(a) DEFINITIONS.—Subsection (e) of section 1561 of title 10, United States Code, as amended by section 543 of the National Defense Authorization Act for Fiscal Year 2022 (Public Law 117– 81; 135 Stat. 1709), is amended to read as follows:

“(e) DEFINITIONS.—In this section:

“(1) The term ‘independent investigator’ means a civilian employee of the Department of Defense or a member of the Army, Navy, Marine Corps, Air Force, or Space Force who— “(A) is outside the immediate chain of command of the complainant and the subject of the investigation; and “(B) is trained in the investigation of sexual harassment, as determined by—

“(i) the Secretary of Defense, in the case of a civilian employee of the Department of Defense;

“(ii) the Secretary of the Army, in the case of a member of the Army;

“(iii) the Secretary of the Navy, in the case of a member of the Navy or Marine Corps; or

“(iv) the Secretary of the Air Force, in the case of a member of the Air Force or Space Force.

“(2) The term ‘sexual harassment’ means conduct that constitutes the offense of sexual harassment as punishable under section 934 of this title (article 134) pursuant to the regulations prescribed by the Secretary of Defense for purposes of such section (article).”.

(b) EFFECTIVE DATE.—The amendment made by subsection (a) shall take effect immediately after the coming into effect of the amendments made by section 543 of the National Defense Authorization Act for Fiscal Year 2022 (Public Law 117–81; 135 Stat. 1709) as provided in subsection (c) of that section.

<b>SEC. 547. PRIMARY PREVENTION RESEARCH AGENDA AND WORKFORCE.</b>
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- (a) ANNUAL PRIMARY PREVENTION RESEARCH AGENDA.—Section 549A(c) of the National Defense Authorization Act for Fiscal Year 2022 (Public Law 117–81; 135 Stat. 1722) is amended—

(1) by redesignating paragraphs (2), (3), and (4) as paragraphs (5), (6), and (7), respectively;

(2) by inserting after paragraph (1) the following new paragraphs:

“(2) include a focus on whether and to what extent sub- populations of the military community may be targeted for interpersonal violence more than others;

“(3) seek to identify factors that influence the prevention, perpetration, and victimization of interpersonal and self- directed violence;

“(4) seek to improve the collection and dissemination of data on hazing and bullying related to interpersonal and self- directed violence.”; and

(3) by amending paragraph (6), as redesignated by paragraph (1) of this section, to read as follows:

“(6) incorporate collaboration with other Federal departments and agencies, including the Department of Health and Human Services and the Centers for Disease Control and Prevention, State governments, academia, industry, federally funded research and development centers, nonprofit organizations, and other organizations outside of the Department of Defense, including civilian institutions that conduct similar data-driven studies, collection, and analysis; and”.

- (b) PRIMARY PREVENTION WORKFORCE.—Section 549B of the National Defense Authorization Act for Fiscal Year 2022 (Public Law 117–81; 135 Stat. 1722) is amended—

(1) in subsection (c)—

(A) in paragraph (2), by striking “subsection (a)” and inserting “paragraph (1)”; and

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

“(3) COMPTROLLER GENERAL REPORT.—Not later than one year after the date of the enactment of this paragraph, the Comptroller General of the United States shall submit to the congressional defense committees a report that—

“(A) compares the sexual harassment and prevention training of the Department of Defense with similar programs at other departments and agencies of the Federal Government; and

“(B) includes relevant data collected by colleges and universities and other relevant outside entities on hazing and bullying and interpersonal and self-directed violence.”; and

(2) by adding at the end the following new subsection: “(e) INCORPORATION OF RESEARCH AND FINDINGS.—The Secretary of Defense shall ensure that the findings and conclusions from the primary prevention research agenda established under section 549A are regularly incorporated, as appropriate, within the primary prevention workforce established under subsection (a).”.

<b>SEC. 548. LIMITATION ON AVAILABILITY OF FUNDS FOR RELOCATION OF ARMY CID SPECIAL AGENT TRAINING COURSE.</b>
--

- (a) **LIMITATION.**—None of the funds authorized to be appropriated by this Act or otherwise made available for fiscal year 2023 for the Army may be obligated or expended to relocate an Army CID special agent training course until—
- (1)(A) the Secretary of the Army submits to the Committees on Armed Services of the Senate and the House of Representatives—
- (i) the evaluation and plan required by subsection (a) of section 549C of the National Defense Authorization Act for Fiscal Year 2022 (Public Law 117–81; 135 Stat. 1724);
- (ii) the implementation plan required by subsection (b) of such section; and
- (iii) a separate report on any plans of the Secretary to relocate an Army CID special agent training course, including an explanation of the business case for any transfer of training personnel proposed as part of such plan;
- (B) the Secretary provides to the Committee on Armed Services of the House of Representatives a briefing on the contents of each report specified in subparagraph (A); and
- (C) a period of 90 days has elapsed following the briefing under subparagraph (B); and
- (2) the Secretary submits a written certification to the Committees on Armed Services of the Senate and the House of Representatives indicating that the Army has fully complied with subsection (c) of section 549C of the National Defense Authorization Act for Fiscal Year 2022 (Public Law 117–81; 135 Stat. 1724) with regard to locations at which military criminal investigative training is conducted.
- (b) **DEFINITIONS.**—In this section:
- (1) The term “relocate”, when used with respect to an Army CID special agent training course, means the transfer of such course to a location different than the location used for such course as of the date of the enactment of this Act.
- (2) The term “Army CID special agent training course” means a training course provided to members of the Army to prepare such members for service as special agents in the Army Criminal Investigation Division.

<b>SEC. 549. REVIEW OF TITLING AND INDEXING PRACTICES OF THE ARMY AND CERTAIN OTHER ORGANIZATIONS.</b>
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- (a) **REVIEW OF TITLING AND INDEXING DECISIONS.**—Not later than 180 days after the date of the enactment of this Act, the Secretary of the Army shall review the case file of each member or former member of the Army, the Army Reserve, or the Army National Guard who was titled or indexed in connection with the Guard Recruiting Assistance Program, the Army Reserve Recruiting Assistance Program, or any related activity to determine the appropriateness of the titling or indexing decision that was made with respect to such member or former member.
- (b) **FACTORS TO BE CONSIDERED.**—In reviewing a titling or indexing decision under subsection (a), the Secretary of the Army shall consider—
- (1) the likelihood that the member or former member to whom the decision pertains will face future criminal prosecution or other adverse action on the basis of the facts in the record at the time of the review;
- (2) the appropriate evidentiary standard to apply to the review of the decision; and
- (3) such other circumstances or factors as the Secretary determines are in the interest of equity and fairness.

(c) NOTIFICATION AND APPEAL.—

(1) IN GENERAL.—Upon the completion of each review under subsection (a), the Secretary of the Army shall notify the member or former member concerned of such review, the disposition of the relevant instance of titling or indexing, and the mechanisms the member or former member may pursue to seek correction, removal, or expungement of that instance of titling or indexing.

(2) NOTIFICATION OF NEXT OF KIN.—In a case in which a member or former member required to be notified under paragraph (1) is deceased, the Secretary of the Army shall provide the notice required under such paragraph to the primary next of kin of the member or former member.

(d) ACTIONS BY THE SECRETARY OF THE ARMY.—If the Secretary of the Army determines that correction, removal, or expungement of an instance of titling or indexing is appropriate after considering the factors under subsection (b), the Secretary of the Army may request that the name, personally identifying information, and other information relating to the individual to whom the titling or indexing pertains be corrected in, removed from, or expunged from, the following:

(1) A law enforcement or criminal investigative report of the Department of Defense or any component of the Department.

(2) An index item or entry in the Department of Defense Central Index of Investigations (DCII).

(3) Any other record maintained in connection with a report described in paragraph (1), or an index item or entry described in paragraph (2), in any system of records, records database, records center, or repository maintained by or on behalf of the Department, including entries in the Federal Bureau of Investigation's Interstate Identification Index or any successor system.

(e) REPORT OF SECRETARY OF THE ARMY.—Not later than 180 days after the completion of the review required by subsection (a), the Secretary of the Army shall submit to the Committees on Armed Services of the Senate and the House of Representatives a report on the results of the review. The report shall include the following:

(1) The total number of instances of titling and indexing reviewed under such subsection.

(2) The number of cases in which action was taken to correct, remove, or expunge an instance of titling or indexing.

(3) The number of members and former members who remain titled after the conclusion of the review.

(4) The number of members and former members who remain indexed after the conclusion of the review.

(5) A brief description of the reasons the members and former members counted under paragraphs (3) and (4) remain titled or indexed.

(6) Such other matters as the Secretary determines appropriate.

(f) SECRETARY OF DEFENSE REVIEW AND REPORT.—

(1) REVIEW.—The Secretary of Defense shall conduct a review the titling and indexing practices of the criminal investigative organizations of the Armed Forces. Such review shall include—

(A) an assessment of the practices of titling and indexing and the continued relevance of such practices to the operation of such criminal investigative organizations;

(B) an evaluation of the suitability of the evidentiary requirements and related practices for titling and indexing in effect at the time of the review; and

(C) the development of recommendations, as appropriate, to improve the consistency, accuracy, and utility of the titling and indexing processes across such criminal investigative organizations.

(2) **REPORT.**—Not later than one year after the date of the enactment of this Act, the Secretary of Defense shall submit to the Committees on Armed Services of the Senate and the House of Representatives a report on the results of the review conducted under paragraph (1).

(g) **DEFINITIONS.**—In this section:

(1) The term “titling” means the practice of identifying an individual as the subject of a criminal investigation the records of a military criminal investigative organization and storing such information in a database or other records system.

(2) The term “indexing” means the practice of submitting an individual’s name or other personally identifiable information to the Federal Bureau of Investigation’s Interstate Identification Index, or any successor system.

<b>SEC. 549A. BRIEFING AND REPORT ON RESOURCING REQUIRED FOR IMPLEMENTATION OF MILITARY JUSTICE REFORM.</b>
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(a) **BRIEFING AND REPORT REQUIRED.**—

(1) **BRIEFING.**—Not later than March 1, 2023, and no less frequently than once every 180 days thereafter through December 31, 2024, each Secretary concerned shall provide to the appropriate congressional committees a briefing that details the resourcing necessary to implement subtitle D of title V of the National Defense Authorization Act for Fiscal Year 2022 (Public Law 117–81) and the amendments made by that subtitle.

(2) **REPORT.**—Not later than one year after the date of the enactment of this Act, each Secretary concerned shall submit to the appropriate congressional committees a report that details the resourcing necessary to implement subtitle D of title V of the National Defense Authorization Act for Fiscal Year 2022 (Public Law 117–81) and the amendments made by that subtitle.

(3) **FORM OF BRIEFING AND REPORT.**—The Secretaries concerned may provide the briefings and report required under paragraphs (1) and (2) jointly, or separately, as determined appropriate by such Secretaries.

(b) **ELEMENTS.**—The briefing and report required under sub- section (a) shall address the following:

(1) The number of personnel and personnel authorizations (military and civilian) required by the Armed Forces to implement and execute the provisions of subtitle D of title V of the National Defense Authorization Act for Fiscal Year 2022 (Public Law 117–81) and the amendments made by that sub-title.

(2) The basis for the numbers provided pursuant to para- graph (1), including the following:

(A) A description of the organizational structure in which such personnel or groups of personnel are or will be aligned.

(B) The nature of the duties and functions to be per- formed by any such personnel or groups of personnel across the domains of policy-making, execution, assessment, and oversight.

(C) The optimum caseload goal assigned to the following categories of personnel who are or will participate in the military justice process: criminal investigators of different levels and expertise, laboratory personnel, defense counsel, special trial counsel, military defense counsel, military judges, military magistrates, and paralegals.

(D) Any required increase in the number of personnel currently authorized in law to be assigned to the Armed Force concerned.

(3) The nature and scope of any contract required by the Armed Force concerned to implement and execute the provisions of subtitle D of title V of the National Defense Authorization Act for Fiscal Year 2022 (Public Law 117–81) and the amendments made by that subtitle.

(4) The amount and types of additional funding required by the Armed Force concerned to implement the provisions of subtitle D of title V of the National Defense Authorization Act for Fiscal Year 2022 (Public Law 117–81) and the amendments made by that subtitle.

(5) Any additional authorities required to implement the provisions of subtitle D of title V of the National Defense Authorization Act for Fiscal Year 2022 (Public Law 117–81) and the amendments made by that subtitle.

(6) Any additional information the Secretary concerned determines is necessary to ensure the manning, equipping, and resourcing of the Armed Forces to implement and execute the provisions of subtitle D of title V of the National Defense Authorization Act for Fiscal Year 2022 (Public Law 117–81) and the amendments made by that subtitle.

(c) DEFINITIONS.—In this section:

(1) The term “appropriate congressional committees” means—

(A) the Committee on Armed Services, the Committee on Commerce, Science, and Transportation, and the Committee on Appropriations of the Senate; and

(B) the Committee on Armed Services, the Committee on Transportation and Infrastructure, and the Committee on Appropriations of the House of Representatives.

(2) The term “Secretary concerned” has the meaning given that term in section 101(a) of title 10, United States Code.

<b>SEC. 549B. REPORT ON SHARING INFORMATION WITH COUNSEL FOR VICTIMS OF OFFENSES UNDER THE UNIFORM CODE OF MILITARY JUSTICE.</b>
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- (a) **REPORT REQUIRED.**—Not later than one year after the date of the enactment of this Act, the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (referred to in this section as the “Advisory Committee”) shall submit to the Committees on Armed Services of the Senate and the House of Representatives and each Secretary concerned a report on the feasibility and advisability of establishing a uniform policy for the sharing of the information described in subsection (c) with a Special Victims’ Counsel, Victims’ Legal Counsel, or other counsel representing a victim of an offense under chapter 47 of title 10, United States Code (the Uniform Code of Military Justice).
- (b) **ELEMENTS.**—The report under subsection (a) shall include the following:
- (1) An assessment of the feasibility and advisability of establishing the uniform policy described in subsection (a), including an assessment of the potential effects of such a policy on—
    - (A) the privacy of individuals;
    - (B) the criminal investigative process; and
    - (C) the military justice system generally.
  - (2) If the Advisory Committee determines that the establishment of such a policy is feasible and advisable, a description of—
    - (A) the stages of the military justice process at which the information described in subsection (c) should be made available to counsel representing a victim; and
    - (B) any circumstances under which some or all of such information should not be shared.
  - (3) Such recommendations for legislative or administrative action as the Advisory Committee considers appropriate.
- (c) **INFORMATION DESCRIBED.**—The information described in this subsection is the following:
- (1) Any recorded statements of the victim to investigators.
  - (2) The record of any forensic examination of the person or property of the victim, including the record of any sexual assault forensic exam of the victim that is in possession of investigators or the Government.
  - (3) Any medical record of the victim that is in the possession of investigators or the Government.
- (d) **SECRETARY CONCERNED DEFINED.**—In this section, the term “Secretary concerned” has the meaning given that term in section 101(a)(9) of title 10, United States Code.

<b>SEC. 549C. DISSEMINATION OF CIVILIAN LEGAL SERVICES INFORMATION.</b>
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Not later than one year after the date of the enactment of this Act, the Secretary of Defense, acting through the head of the Sexual Assault Prevention and Response Office of the Department of Defense, shall ensure that information on the availability of legal resources from civilian legal service organizations is distributed to military-connected sexual assault victims in an organized and consistent manner.

**I. FY23 NDAA Military Justice Provisions**

Q1: What is the Joint Service Committee's role in implementing statutory changes to the UCMJ?

Q2: Regarding Section 543, Randomization of Court-Martial Panels, who will be responsible for developing the randomization procedures? What will be the process for developing these procedures?

Q3: Section 541 includes sexual harassment as a covered offense under the jurisdiction of the Office of Special Trial Counsel. Can you remind us what the other covered offenses are?

**II. JSC Draft Executive Order: Changes to the Manual for Courts-Martial**

Q4: Understanding that you aren't permitted to comment on the substance of the Joint Service Committee's draft Executive Order concerning changes to the Manual for Courts-Martial, can you tell us the process for getting the executive order approved and the anticipated timeline?



<b>Trial Defense Services Presenter Biographies</b>
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**Colonel Sean McGarry, U.S. Army, Chief, Trial Defense Service**

Colonel Sean McGarry assumed duties as the Chief of the United States Army Trial Defense Service in July 2022. Prior to this current assignment he served as the Dean of the Army Judge Advocate General's Legal Center and School from 2020-2022. Colonel McGarry also served as Staff Judge Advocate for 1st Armored Division and Fort Bliss from 2017-2019. Other previous assignments include service as an Armor Platoon Leader at 1st Armored Division in Baumholder, Germany (1996-1998); V Corps Legal Services Attorney and Trial Counsel (1999-2001), Wiesbaden, Germany; USARPAC Chief of International & Operational Law, Fort Shafter, HI (2001-2003); Chief of Operational Law, Combined Forces Afghanistan (2004); National Training Center Observer/Controller, Fort Irwin, CA (2005-2007); USARAF/SETAF Deputy Staff Judge Advocate, Vicenza, Italy (2008-2009); Security Agreement Secretariat, U.S. Forces – Iraq (2010); Legislative Counsel at the Office of the Chief of Legislative Liaison, MDW (2011-2013); Staff Judge Advocate at 7th Army JMTTC, Grafenwoehr, Germany (2013-2015); Strategic Initiatives Officer at the Office of The Judge Advocate General, MDW (2015-2017).

COL McGarry received his commission as an Armor Officer from Colorado State University in 1992, where he also received a Bachelor of Science Degree in Business Management. He is a 1995 cum laude graduate of St. Thomas University Law School, where he earned a Juris Doctorate. In 1996 he graduated from the Armor Officer Basic Course and in 2005 from the Judge Advocate Officer Basic Course. COL McGarry is admitted to practice before the Supreme Court of the United States, the U.S. Court of Federal Claims, and the Supreme Court of Florida. He has also completed the Judge Advocate General Graduate Course, earning a Master of Laws (LLM) degree. He is also a graduate of Airborne School, Ranger School, the Command and General Staff College, and the U.S. Army War College.

Colonel McGarry's awards and decorations include the Legion of Merit, Bronze Star Medal with 1 OLC, the Defense Distinguished Service Medal, Defense Meritorious Service Medal with OLC, the Meritorious Service Medal with 3 OLC, the Joint Service Commendation Medal, the Army Commendation Medal with 2 OLC, Joint Service Achievement Medal, the NATO Medal, the OIF and OEF Campaign Medals, the Parachutist Badge, and the Ranger Tab.

## **Captain Mark C. Holley, U.S. Navy, Director, Defense Service Office Operations**

Captain Holley is a native of Topeka, Kansas, and graduated from the University of Kansas in 1991 with a Bachelor of Arts Degree in Political Science. From 1992 to 1995 he attended the University of Kansas, School of Law. In February 1995, during his third year of law school, he was commissioned an Ensign in the United States Navy, Judge Advocate General's Corps. Captain Holley is also a graduate of the Naval War College, Fleet Seminar Program with a Master of Arts in National Security and Strategic Studies.

Following his initial training at the Naval Justice School in Newport, Rhode Island he reported to his first duty station in Pearl Harbor, Hawaii. From February 1996 until October 1997, he served as a legal assistance attorney and defense counsel at Naval Legal Service Office Mid-Pacific. He then spent a year assigned to the newly established Trial Service Office Pacific as the special advisor to the Naval Criminal Investigative Service and Special Assistant United States Attorney.

Captain Holley was then transferred to Spain in October 1998 where he served as the Officer in Charge of the Trial Service Office, Europe and Southwest Asia, Detachment Rota, Spain. In June 2001 Captain Holley reported for duty as the Command Judge Advocate for Naval Submarine Base Bangor, Washington and again served part-time as a Special Assistant United States Attorney. In January 2003 he joined the crew of the USS ABRAHAM LINCOLN (CVN 72) as the Command Judge Advocate. During his tour the carrier first deployed to the Arabian Gulf in support of Operations Southern Watch and Iraqi Freedom. Later in his tour the carrier deployed to the Western Pacific and then to the Indian Ocean in support of humanitarian assistance operations following the earthquake and tsunami of 26 December 2004.

In April 2005 Captain Holley reported to the Administrative Law Division of the Office of the Judge Advocate General (OJAG). During his time at OJAG he deployed as an Individual Augmentee to the Regime Crimes Liaison's Office in Baghdad Iraq as an Attorney Advisor to the Iraqi High Tribunal. In June of 2008, Captain Holley began his first tour as the Legal Counsel for Commander, Navy Personnel Command in Millington, Tennessee. In July 2010 Captain Holley transferred to San Diego where he first served for two years as the Executive Officer of Naval Legal Service Office Southwest and later served as the Deputy Force Judge Advocate at Commander Naval Surface Force US Pacific Fleet and later as the Force Judge Advocate for Commander, Naval Air Force, Pacific. From July 2014 to June 2017 Captain Holley again served as the Legal Counsel for Commander, Navy Personnel Command in Millington, Tennessee.

Captain Holley served as the Commanding officer of Region Legal Service Office Midwest from July 2017 to July 2019. Next, he served as the Naval Legal Service Command, Inspector General from August 2019 until October 2021. CAPT Holley is currently Director, Defense Service Office Operations and in this billet is the senior defense counsel in the Navy. Captain Holley is married to Pia Holley of Sjömarken, Sweden and they have two daughters: Emma and Annie.

## **Colonel Valerie C. Danyluk, U.S. Marine Corps, Chief Defense Counsel of the Marine Corps**

Colonel Danyluk was born in Baton Rouge, Louisiana where she graduated from Louisiana State University in August 1993. Commissioned a second lieutenant, she attended law school at Campbell University School of Law receiving her Juris Doctorate degree in May 1996.

First Lieutenant Danyluk reported for training at The Basic School, Quantico, Virginia in 1996, attended the Basic Lawyer's Course at Naval Justice School, then reported in 1997 to MCRD Parris Island, South Carolina. Captain Danyluk served as a civil law officer, defense and trial counsel, and legal assistance OIC. In addition to her duties at the Joint Law Center, Captain Danyluk served as a Series Commander and Company Executive Officer at 4th Recruit Training Battalion. She was awarded an impact Navy Marine Corps Achievement Medal for assisting a drowning recruit. In 1999, Captain Danyluk was transferred to the Trial Service Office, Pensacola Detachment for assignment with the U.S. Navy. Her duties included Senior Trial Counsel and legal advisor to MATSG-21. During this tour, she was awarded an impact Navy-Marine Corps Achievement Medal for Trial Counsel of the Quarter for the Southern Circuit. After attending Expeditionary Warfare School, Captain Danyluk was assigned in 2003 as the Military Justice Officer for Marine Corps Base Quantico, Virginia where she was promoted to Major. Here, she and her staff provided prosecutorial services to 23 special and 7 general court martial convening authorities. In August 2005, she was assigned as the Officer in Charge of Legal Assistance.

Attending the Military Judge's Course in 2006, Major Danyluk was named the Distinguished Honor Graduate, finishing first in her class among military judges from all services. Major Danyluk was assigned to the Eastern Judicial Circuit where she presided over special and general courts martial in Florida, South Carolina, North Carolina and Iraq. She departed the bench in 2008 to attend the U.S. Army Judge Advocate General's Graduate Course in Charlottesville, Virginia where she was the Class Leader for attorneys from all services and five countries. She earned a Master of Laws degree in military law with a specialty in criminal law. In June 2009, she assumed duties as the Staff Judge Advocate for MCAS Beaufort, South Carolina and the Director of the Law Center. In July 2012, Lieutenant Colonel Danyluk was transferred to Camp Lejeune where she assumed duties as the Regional Defense Counsel, Eastern Region and personally represented clients from lance corporal to major general in courts martial and adverse administrative actions. She was awarded the American Bar Association's Outstanding Military Service Career Judge Advocate (Marine Corps) in 2014. Just before returning to the trial bench as the Deputy Chief Trial Judge for the Department of the Navy. She was re-assigned as the Officer in Charge of the Legal Service Support Section, National Capital Region to fill an unexpected vacancy in 2015. Upon promotion to Colonel, she assumed duties as the Director, Appellate Government Division, Department of the Navy, in 2016. Colonel Danyluk led a mixed team of Navy and Marine, active and reserve, Judge Advocates representing the United States at the Navy-Marine Corps Court of Appeals and the Court of Appeals for the Armed Forces. Thereafter, in 2018, she was assigned as the Command Inspector General, Marine Corps

Installations National Capital Region servicing more than a dozen units. In August 2019 she assumed the duties as the Chief Defense Counsel of the Marine Corps. Her personal decorations include the Legion of Merit, the Meritorious Service Medal with silver star in lieu of 5th award, Navy-Marine Corps Commendation Medal with gold star, Navy-Marine Corps Achievement Medal with gold star, Army Achievement Medal, and the Drill Instructor Ribbon.

**Colonel Brett A. Landry, U.S. Air Force, Chief, Trial Defense Division, Military Justice and Discipline Directorate**

Colonel Brett Landry is the Chief, Trial Defense Division (DAF/JAJD), Military Justice and Discipline Directorate, Joint Base Andrews, Maryland. In that job, Colonel Landry leads 108 Judge Advocates and 82 paralegals who are responsible for providing zealous, ethical, and professional legal defense services to Air and Space Force members world-wide. His division consists of all Area Defense Counsel, Defense Paralegals, Circuit Defense Counsel, Defense Paralegal Managers, and Chief Circuit Defense Counsel representing military members in courts-martial, administrative discharge boards, and other criminal and adverse personnel proceedings.

Colonel Landry was born in Belle Chasse, LA. Prior to joining the Air Force, he earned an undergraduate degree in Business Administration from Louisiana State University. He went on to attend law school at LSU, earning his JD in 2004. During law school, Colonel Landry clerked for two years with the United States Attorney's Office, Middle District of Louisiana. He was admitted to the Louisiana Bar in October of 2004 and was commissioned by direct appointment that same month. Col Landry attended Officer Training School in November 2004. He is married to the former Ms. Natasha Wadesky. They have two daughters, Julianne and Alexandra.

**Lieutenant Commander Jennifer Saviano, U.S. Coast Guard, Chief of Defense Services**

Lieutenant Commander Jennifer Saviano currently serves as the Coast Guard's Chief of Defense Services in the Office of Legal Assistance and Defense at Coast Guard Headquarters in Washington, D.C. Her prior legal assignments include Chief of Command Services at the Coast Guard's Legal Service Command in Norfolk, Virginia and as an embedded defense counsel with the Navy's Judge Advocate General Corps at Defense Service Office Southeast, Detachment Mayport, Florida. Prior to entering the Coast Guard Legal Program, Lieutenant Commander Saviano served as the Waterways Management Division Chief at Sector Miami where she led the Sector's Waterways Management Division, managed the USCGC HUDSON and two Aids to Navigation Teams in the maintenance and tracking of over 1,200 federal aids to navigation, and oversaw all waterways management activities from Port Miami and Port Everglades to the Port of Palm Beach. Prior to this position she served as the District Eight Western Rivers Division Assistant Division Chief in New Orleans, Louisiana where she helped manage continuity, budgets, and logistics for three inland Sectors and three Marine Safety Units. Lieutenant Commander Saviano began her Coast Guard career as a Deck Watch Officer aboard the sea going buoy tender USCGC JUNIPER in Newport, Rhode Island.

In 2017, Lieutenant Commander Saviano was awarded her Juris Doctor from the University of Florida Levin College of Law, graduating cum laude with Certificates in Environmental and

Land Use Law, and International and Comparative Law. She holds a Master of Professional Studies in Homeland Security from Tulane University and a Bachelor of Science in Marine and Environmental Sciences from the U.S. Coast Guard Academy. Lieutenant Commander Saviano and her husband, Jamesen, currently reside together in Arlington, Virginia with their two sons and two dogs.

Trial Defense Organizations Panel Questions
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The defense panel is scheduled for 90 minutes to cover the following four general topics, with an initial focus on resources, including personnel, training, and preparation to defend covered offenses.

- I. Defense Personnel, Training, and Resources for Covered Offenses.**
  - II. Victim Impact Statements.**
  - III. Article 25 Criteria and Randomized Selection of Panel Members.**
  - IV. Victim Counsel Access to Investigation and Case Information.**
- 

**I. Defense Personnel, Training, and Resources for Covered Offenses (45 min).**

Following a very brief introduction on their background and position, each presenter should provide introductory comments (no more than 5 minutes) to respond to the 3 parts of Question 1 only:

**Q1: Will the Services' Trial Defense Organizations receive personnel, training, and resource increases comparable to the OSTC?**

- (1) how your structure and resources will change with the establishment of the OSTC;
- (2) does your organization have equal access to experienced personnel, training, and resources;
- (3) what additional resources does your organization need for parity with the OSTC

Additional related topics and questions:

**Q2: Investigators: Does your organization have assigned investigators?**

If so, please describe how many; their level of expertise; where and how they are assigned; and the source of funding.

**Q3: Defense Experts: Is your organization resourced to obtain sufficient civilian experts to assist with case assessment, investigation, preparation, and trial?**

**Q4: Coverage of covered offenses and all other offenses: How does your organization intend to detail counsel to covered offenses and all offenses preferred by the command; how will your organization prioritize coverage?**

**Q5: Consultation: At what stage in the process does your organization detail counsel to consult with a suspect prior to preferral of charges? Is this driven by resource limitations?**

**Q6: What one thing would you change to improve your representation of clients?**

## **II. Victim Impact Statements.**

**Q7: Are military judges according appropriate deference to victims of crimes who exercise their right to be heard under RCM 1001(c)?**

**Q8: Are military judges appropriately permitting other witnesses to testify about the impact of the crime under RCM 1001?**

**Q9: The DAC-IPAD provided five recommendations to the JSC to amend R.C.M. 1001(c). Do you have any comments on these recommendations you would like the DAC-IPAD to consider prior to finalization of the DAC-IPAD report on Victim Impact Statements?**

## **III. Article 25 Criteria and Randomized Selection of Panel Members.**

Section 543 of the FY23 NDAA amended article 25 of the UCMJ to require the convening authority to detail members under such regulations as the President may prescribe for the randomized selection of qualified personnel, to the maximum extent possible (effective in December 2024).

Based on your experience and input from your organization, please provide the general defense perspective on the following topics:

**Q 10: Are the Article 25e(2) criteria (age, education, training, experience, length of service, and judicial temperament) still appropriate for detailing “qualified” members?**

**Q 11: Are panels diverse across racial, gender, and other demographic qualities?  
Do these factors impact a counsel’s advice to clients regarding forum selection?**

**Q12: Should the random selection process include a computer program that generate a diverse panel based on rank, gender, and race/ethnicity**

**Q13: What benefits/challenges will the randomized panel selection process create for the defense?**

## **IV. Victim Counsel Access to Investigation and Case Information.**

Section 539C of FY23 NDAA requires the DAC-IPAD to consider a uniform policy that would give victims’ counsel access to recorded statements of the victim to investigators, medical records of the victim, and records of forensic examinations of the person or property of the victim.

**Q14: Does your organization have any comments you would like the DAC-IPAD to consider on victims’ counsel access to this information?**

To The Honorable Members of the Committee:

## **INTRO**

Thank you very much to the staff and committee for granting me the opportunity to again have a voice on such an important matter for both the Military, Veterans, and the public. I continue to advocate for a service free of sexual assault, as well as fair and impartial processes of justice. As stated, my name is Darin Lopez, and I am a former Navy Intelligence Specialist who honorably served by country for 12 years. I was convicted of a sexual assault in 2014 against my plea of **not guilty** and was sentenced to three years confinement and a bad conduct discharge where consent was the argued point. Today, again I am here in the interest of Justice and respectfully request a status of what I proposed in the September 21, 2022 meeting in the public comments, document submissions, and reading room. My cause was to share with the committee that I was unjustly and wrongfully convicted and after exhausting all options proposed a way forward for wrongfully convicted Veterans to seek relief. I brought up what I called the Falsely Accused Individual Review (FAIR) unit, committee, or subcommittee and that such entity should be granted fact-finding authority and make necessary recommendations to the appellate services and/or board of corrections for adjudication. Although my initial my plight is based upon relief for those believed to be affected by Unlawful Command Influence, I still believe there is a need beyond that single scope and that such review committee should be permanently commissioned in the interest of all service members and military justice.

In an effort to ensure that those like me are not left behind, I am sharing in hopes that someone, or group of individuals finally use all of the known information regarding Unlawful Command Influence, the violations of human rights regarding the mishandling of military courts-martials revealed through case law over this passed decade.



## **KEY POINTS**

### **The Implications**

The implications of unlawful command influence (UCI) in the military justice system that is not adequately addressed can be severe. UCI is a form of bias that can negatively impact the outcomes of military justice proceedings. Because commanders are responsible for justice proceedings and also have the power to exercise discretion in matters such as recommending clemency, there is a potential for bias in favor of the military's own interests. This can lead to an unfair and biased results in court-martial cases.

If UCI is not adequately addressed, it can have a long-term negative impact on military justice. Soldiers may begin to doubt the fairness of the justice system or lose faith in their commanders, who could be seen as impartial decision- makers. This could lead to a breakdown of trust and morale as well as a decrease in the public's confidence in the military's disciplinary system.

### **Taking Action**

As one of the most significant problems I have observed is not the knowledge of problem, or even solution for that matter, yet still when it comes to action there has been little. here further are some thoughtful proposed courses of action that would result in limiting and work toward eradication of Unlawful Command Influence (UCI) as well as retroactively correcting wrongful convictions.

1. Strengthen enforcement of existing policies and regulations prohibiting unlawful command influence.

2. Implement an independent body in the military to review any case involving unlawful command influence and make recommendations for disciplinary action or changes to policies or regulations.
3. Enact stronger whistleblower protection for those who report instances of unlawful command influence.
4. Review cases of wrongful conviction due to unlawful command influence and determine methods for providing restorative justice for those that have been wrongfully convicted.
5. Create a task force to review any changes needed in relation to policies, procedures, and legislation to strengthen protections from unlawful command influence.
6. Increase military personnel's education and training on recognizing, reporting, and challenging unlawful command influence.
7. Establish a commission to assess further recommendations to protect members of the military from unlawful command influence.

Again, in short the armed forces has experienced **the largest account of Unlawful Command Influence (UCI) in US history** and those who are damaged and will be damaged by a lack of action deserve the proper attention as they have sworn oaths and supported and took action for this nation's defense without hesitation and the presumption that if ever accused of anything wrong doing, justice would be fair and impartial.

I would like to end this statement with this following quote by one of my favorite former Presidents. I believe there is some added value in revisiting the wisdom of the past to ensure a better future.

## **The Man in the Arena**

"The Man in the Arena" tells us that those we should praise are that who are fighting David battles, regardless of the outcome.

"It is not the critic who counts; not the man who points out how the strong man stumbles, or where the doer of deeds could have done them better. The credit belongs to the man who is actually in the arena, whose face is marred by dust and sweat and blood; who strives valiantly; who errs, who comes short again and again, because there is no effort without error and shortcoming; but who does actually strive to do the deeds; who knows great enthusiasms, the great devotions; who spends himself in a worthy cause; who at the best knows in the end the triumph of high achievement, and who at the worst, if he fails, at least fails while daring greatly, so that his place shall never be with those cold and timid souls who neither know victory nor defeat"

- President Theodore "Teddy" Roosevelt

I am very appreciative and thankful for the opportunity to submit documentation for consideration as this area specifically has forever altered the course of my life, and I want to ensure I am doing all that I can to continue positive change so that others never have to suffer the damages that I have. Support our troops.

Very Respectfully,

Darin G. Lopez

<p style="text-align: center;"><b>Military Sentencing Update</b> <b>Presenter Biography</b></p>
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**Colonel Tyesha Lowery Smith, U.S. Army, Chief Trial Judge, United States Army Trial Judiciary**

Colonel Tyesha Lowery Smith is a native of Portsmouth, Virginia. In January 1999, Colonel Smith entered active duty, as a direct commissionee, in the United States Army Judge Advocate General Corps. She is a graduate of the Judge Advocate Officer Basic Course, the Judge Advocate Officer Graduate Course, and the U.S. Army Military Judge Course. She holds a B.A. in Prelaw from Pensacola Christian College; a J.D. from Regent School of Law; and an L.L.M. in military law from The Judge Advocate General's Legal Center and School.

Colonel Smith is currently assigned as the 24th Chief Trial Judge of the U.S. Army. She previously served as the Deputy Chief Trial Judge, Fort Belvoir, Virginia; Chief Circuit Judge, 1st Judicial Circuit, Fort Meade, Maryland; military judge, 4th Judicial Circuit, Korea; Staff Judge Advocate for United States Army Garrison Fort Meade; military judge, 1st Judicial Circuit, Fort Belvoir, Virginia; Executive Officer Office of the Staff Judge Advocate, United States Army Forces Command, Fort Bragg, North Carolina; Senior Defense Counsel, Fort Bragg, North Carolina; Evidence Professor, Criminal Law Department, The Judge Advocate General's Legal Center and School, Charlottesville, Virginia; Defense Appellate Attorney and later Branch Chief, Defense Appellate Division, Arlington, Virginia; Brigade Judge Advocate, 2BCT, 2nd Infantry, Ramadi, Iraq; Trial Counsel, Korea; Trial Defense Counsel, Bamberg, Germany; SAUSA, Federal Litigation, Fort Bragg, North Carolina; and Legal Assistance Attorney, Fort Bragg, North Carolina.

Colonel Smith has been awarded the Bronze Star Medal, the Meritorious Service Medal with four Oak Leaf Clusters, the Army Commendation Medal, the Army Achievement Medal, and the Iraq Campaign Medal. She is also entitled to wear the Combat Action Badge.

Colonel Smith is married to Gregory Anton Smith. Greg is a director in the Department of Education in Washington, D.C. They have two daughters, Gabriella (age 11) and Tatiana (age 7).

The Chief Army Trial Judge and Chair of the Military Sentencing Parameters and Criteria Board (MSPCB) is scheduled for 45 minutes to provide a sentencing reform update.

Please note that the report prepared by the MSPCB is pre-decisional and Chief Judge Smith may be limited in her response to some questions regarding the MSPCB's work.

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## **I. Sentencing**

Military justice sentencing practice has undergone significant changes since the Military Justice Act of 2016.

**Q1: Please describe the changes to sentencing that were enacted as part of the Military Justice Act of 2016, and the subsequent changes to sentencing enacted in the FY22 NDAA?**

**Q2: What was the Congressional mandate for the MSPCB?**

**Q3. When will military judges begin applying parameters and criteria to sentences?**

**Q4. What issues did DoD and/or Congress identify that led to these sentencing reforms?**

**Q5: Can you comment on the benefits of judge-alone vs. panel member sentencing?**

## **II. Sentencing Data**

Historically military sentencing practice imposed a single sentence for all offenses. Now, the military judge will impose a separate sentence to confinement for each offense for which there is a conviction. In addition, the military judge will decide whether multiple sentences to confinement run concurrently or consecutively.

**Q5: What data or information has the MSPCB used to develop the parameters and criteria?**

**Q6: Is there a process in place to amend or update the parameters and criteria as data is collected in future years?**

**Q7: [Based on the MSPCB's Charter], will the Board continue to meet and analyze sentencing data in future years?**

**Q8: Will the MSPCB (or other DoD entity) analyze racial, ethnic, gender and other demographic data that may indicate the presence of disparities in sentencing?**

<b>Former Military Judges Presenter Biographies</b>
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**Lieutenant Colonel (Retired) Stefan R. Wolfe, U.S. Army**

Stefan Wolfe retired from the US Army as a Lieutenant Colonel, in September 2019 after 23 years of service. Among other assignments, he served as the Chief of Justice for the Military District of Washington, the Acting-Chief of the Army's Trial Counsel Assistance Program, and as a Military Judge in the Army's Fourth Circuit. After his work as a trial judge Stefan was assigned to the Military Justice Review Group where he assisted in proposing and drafting changes to the Uniform Code of Military Justice, many of which were adopted in the Military Justice Act of 2016. Stefan finished his career as a Senior Judge on the Army Court of Criminal Appeals.

**Captain (Retired) Marcus Fulton, U.S. Navy**

**Commander (Retired) Will Weiland, U.S. Navy**

William H. Weiland was born in the city of Chicago, Illinois. After graduating from Marmion Military Academy in Aurora, Illinois, Weiland attended the University of Illinois at Champaign-Urbana. Weiland was commissioned as an Ensign in the United States Navy upon receiving his Bachelor of Arts degree in history in 1997. He first served in the Navy as a Surface Warfare Officer, deploying onboard USS AUSTIN (LPD-4) and with the staff of Commander, Mine Countermeasures Squadron THREE.

Selected for the Navy's Law Education Program in 2001, Weiland attended Boston College Law School, from which he graduated in 2004. Redesignated as a Judge Advocate, Weiland's first legal assignment was as a prosecutor at Trial Service Office Pacific, Detachment Yokosuka, Japan. Staying in Japan for a follow-on tour, Weiland next served as the Staff Judge Advocate for Commander Task Force 54/74 and Commander, Submarine Group SEVEN.

Returning stateside in 2008, Weiland was assigned as the Officer-in-Charge of Region Legal Service Office Southeast Detachment Pensacola. Fleeted up to the position of Director, Military Justice, Weiland was responsible for the provision of prosecution services across a seven-state area of responsibility covering the southeastern United States.

Upon completion of his tour in Pensacola, Weiland was selected to receive his Masters of Law in Litigation from the Beasley School of Law at Temple University. While completing that program of study, Weiland also served as a full-time Special Assistant United States Attorney in the Eastern District of Pennsylvania, where he prosecuted violent crimes and narcotics cases.

Upon receipt of his LL.M., Weiland was next assigned as Senior Trial Counsel, Region Legal Service Office Mid-Atlantic, where he served from 2011 – 2014. During this timeframe, Weiland partnered with the Naval Criminal Investigative Service to pioneer the first multi-disciplinary sexual assault and child abuse prosecution team.

Following his tour as the lead prosecutor at the world's largest fleet concentration area, Weiland was next assigned as Senior Defense Counsel, Defense Service Office West, with responsibility for the provision of defense services at all Navy installations west of the Mississippi river.

Weiland's final tour in the Navy was in Washington D.C. as Circuit Military Judge, Northern Judicial Circuit, Navy-Marine Corps Trial Judiciary.

Retiring from the Navy in 2018, Weiland currently defends the United States as a civil litigator with the U.S. Department of Justice.

### **Lieutenant Colonel (Retired) Michael D. Libretto, U.S. Marine Corps**

Michael D. Libretto graduated Summa Cum Laude from Norwich University and was commissioned through the NROTC Program in May 2000.

After graduating from The Basic School and Combat Engineer Officer Course he served as a Platoon Commander and Company Executive Officer, Engineer Operations Company, Marine Wing Support Squadron 272. During this operational tour, Mr. Libretto deployed to Jamaica in support of the Humanitarian Operation New Horizons 2002 where he served as a Military Liaison Officer to the U.S. Embassy to Jamaica.

Upon returning to the United States, Mr. Libretto was assigned as the Assistant Operations Officer and deployed to Operation Iraqi Freedom in January 2003. Upon returning from deployment, he assumed command of Engineer Operations Company from June 2003 through May 2004.

In April 2004, Mr. Libretto was selected to serve at Marine Barracks Washington, D.C. During his assignment to the Oldest Post of the Corps he served as a ceremonial officer, Assistant Training Officer, Facilities and Grounds Officer in Charge, and as Headquarters Company Executive Officer.

In 2005, Mr. Libretto was selected for the Funded Law Education Program and reported to the State University of New York at Buffalo Law School to pursue his law degree. In May 2008, Mr. Libretto earned his Juris Doctor (Magna Cum Laude) and, after successfully passing the bar exam, was licensed to practice law by the state of North Carolina.

Mr. Libretto graduated with honors from the Naval Justice School, Newport, Rhode Island in October 2008 and reported to the Legal Services Support Section, Camp Lejeune North Carolina for duty shortly thereafter. Mr. Libretto served as a defense counsel for the duration of his tour. While at Camp Lejeune, Mr. Libretto was selected to attend the U.S. Army's Graduate Lawyer Course at the Judge Advocate General's Legal Center and School where he earned a Master of Law degree in Military Law with a concentration in Military Justice.

Upon graduation from the Graduate Course in May 2012, Mr. Libretto returned to the Legal Services Support Section aboard Camp Lejeune where he was assigned as the Senior Complex Trial Counsel for the Eastern Region. In March 2013, Mr. Libretto assumed duties as the Regional Trial Counsel overseeing all prosecutions within the Eastern Region until September

2013 when he was assigned as the Senior Trial Counsel for Legal Services Support Team – Camp Lejeune. In March 2014, upon notification of his selection to serve as Military Judge, Mr. Libretto was assigned as the Regional Review Officer, Legal Services Support Section East.

After completing the Military Judges Course in May 2014, Mr. Libretto took the bench as a trial judge at Marine Corps Base Camp Lejeune presiding over General and Special Courts-Martial. He remained in that position until December 2016 when he assumed the billet of Military Judge stationed at Marine Corps Recruit Depot Parris Island, SC. Mr. Libretto served in that capacity until July 2020 when he retired from active duty after 20 years of service. Following retirement, Mr. Libretto was hired into his current job as a litigation attorney advisor for the USMC Defense Services Organization where he trains, mentors, and assists uniformed defense counsel representing service members at courts-martial and adverse administrative proceedings.

### **Colonel (Retired) W. Shane Cohen, U.S. Air Force**

Colonel (Retired) W. Shane Cohen is currently the supervisor for the Homicide Unit in the Salt Lake County District Attorney's Office. Prior to his retirement, Colonel Cohen was the Chief Circuit Military Judge, Air Force Trial Judiciary, Eastern Circuit, Joint Base Langley-Eustis, Virginia. In that capacity, he served as a trial judge at general and special courts-martial worldwide. He was also the military judge presiding over the 9-11 military commission case at Guantanamo Bay, Cuba.

Colonel Cohen entered active duty in November 1998 through the direct accession program (DAP). Since entering active duty, he has been privileged to serve as Chief of Legal Assistance, Chief of Adverse Actions, Chief of General Law, Area Defense Counsel, Deputy Chief Circuit Defense Counsel, Regional Environmental Counsel, Deputy Staff Judge Advocate, Military Judge, Staff Judge Advocate and Chief of the Environmental Law and Litigation Division. Colonel Cohen was selected in 2005 for assignment as a Master of Laws (LL.M.) candidate at The George Washington University Law School in Washington, D.C., where he obtained an LL.M. degree in Environmental Law in August 2006. He is admitted to practice law before the Supreme Court of the United States, the Supreme Court of Utah and the United States Court of Appeals for the Armed Forces.



Former Military Judge Panel
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The former military judge panel is scheduled for 90 minutes following a sentencing reform update from the Chair of the Military Sentencing Parameters and Criteria Board (MSPCB). After brief introductions on their experience, the questions will focus on the following topics:

**I. Sentencing**

**II. Voir Dire**

**III. SVC and Victim Impact Statements**

**IV. Article 25**

**V. Prosecution Standards**

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**I. Sentencing**

Civilian judges generally explain their rationale at sentencing for why they have imposed a particular sentence. The judge's explanation serves many purposes, including validation of the victim's experience and the judge's role balancing the sentencing factors. Military judges do not explain the reason for the sentence out of concern that it may create an appellate issue.

**Q1: Can you comment on the practice of military judges not explaining their sentences.**

The Committee has heard concerns about sentencing disparities based on race/ethnicity and among the Military Services.

**Q2: Can you comment on the perception that: (a) there are sentencing disparities based on race/ethnicity, and/or: (b) disparities among the Military Services, especially with respect to sexual misconduct offenses?**

**II. Voir Dire**

The DAC-IPAD is concerned that challenges for cause may disproportionately exclude women from panels, given females' higher rates of reported experience with sexual assault and involvement with sexual assault advocacy.

**Q3: Should there be more comprehensive voir dire to determine if females with these experiences are capable of fair participation and to ensure a panel that is not all-male?**

**Q4: Should military judges have more discretion during voir dire?**

**Q5: Should counsel have more latitude during voir dire?**

**III. SVC and Victim Impact Statements**

**Q6: What is your assessment of SVC/VLC support for the victim's rights in the courtroom?**

**Q7: Are SVC/VLC overly restrained in their ability to advocate for their clients?**

**Q8: Should SVC/VLC be allowed to attend 802 sessions; for ex., when scheduling is discussed?**

**Q9: With judge-alone sentencing, should victims have broader latitude to speak at sentencing?**

**Q10: Should victims be able to recommend a specific sentence in their VIS?**

The FY23 NDAA asks the DAC-IPAD to consider a uniform policy that would give SVC access to certain information pre-trial (for ex, recorded statements of the victim to investigators, forensic examination records of the person or property of the victim, the victim's medical records in possession of the government).

**Q11: Do you have comments on the value of this recommendation?**

#### **IV. Article 25 Criteria and Randomized Selection of Panel Members**

Section 543 of the FY23 NDAA amended article 25, UCMJ, to require the convening authority to detail members under such regulations as the President may prescribe for the randomized selection of qualified personnel, to the maximum extent possible (effective December 2024).

**Q12: In your experience, were panels diverse across racial, gender, and other demographic qualities?**

**Q13: Would you recommend a computer-generated process that produces a diverse panel based on rank, gender, and race/ethnicity and eliminates the convening authority's discretion?**

**Q14: What benefits/challenges would be created with a randomized process that eliminates the convening authority's discretion?**

**Q15: In your experience, does the defense receive panel selection documents, panel member questionnaires, and amended convening orders in time to challenge the panel selection process and/or adequately prepare for voir dire?**

**Q16: Are the Article 25 criteria (age, education, training, experience, length of service, and judicial temperament) still relevant in today's military justice system?**

#### **V. Prosecution Standards**

There are proposals to adopt prosecution standards like the DOJ standard that would require military prosecutors to consider the sufficiency of the evidence to obtain and sustain a conviction before a case is sent to general court-martial.

**Q17: Should the article 34 referral standard require more than a probable cause determination?**

**Q18: In your experience, were sexual assault cases referred to courts-martial without sufficient admissible evidence to convict?**

## Service Victims' Counsel Responses to Follow Up Questions

The Service victims' counsel program managers provided information to the DAC-IPAD regarding victim impact statements at sentencing and other topics at the December 6-7, 2022 public meeting. Because the Committee members were not able to ask all of their questions in the time allotted, members of the Policy Subcommittee requested the DAC-IPAD staff send follow up questions to the victims' counsel program managers. Following are the questions posed to the program managers on January 31, 2023 and a composite of their responses.

**Question 1. To what extent do victims' counsel work with victims to suggest edits to their victim impact statements prior to delivery in order to ensure the statements comply with the requirements in R.C.M. 1001(c) and to prevent, to the largest extent possible, objections from defense counsel and/or interruptions by the military judge?**

**Army Response** (Colonel Carol Brewer, Chief, Army Special Victims' Counsel Program)

a. SVCs regularly discuss the applicable rules governing impact statements with their clients. SVCs advise that victims have the right to give a victim impact statement, either written (submitted to court), oral, written and oral, and/or that SVC can read the statement in court for them (if good cause is shown) when victims don't feel capable or comfortable doing it themselves. Many SVCs provide a written summary of the options to their client following their first discussion of the topic to give them more time to absorb and consider their options.

b. A goal of the conversations about impact statements between SVCs and their clients is to empower the client by ensuring they understand that they are not required to provide any statement at all and that if they do, they can decide how to make their statement. To make sure the client's decision is informed, the SVC discusses the benefits and risks of each method of making a statement.

c. SVCs also explain to clients that their statement can be very impactful and persuasive to the judge/panel and may be the only way the court learns about the effects of the sexual assault/domestic violence on all aspects of their life, including but not limited to: emotional, professional, physical, medical, and financial effects.

d. After the victim-client makes their decision regarding the form and content of their impact statement, SVCs assist them in drafting their impact statements. Many described providing draft statements, worksheet-type questions, and other exercises to help their clients start thinking about all the impacts the crime has had on their lives. Many SVCs keep notes relating to impacts throughout their representation of the client. Some recommend clients start journaling to think about the impacts over the months of investigation and any administrative or judicial process.

e. Once the statement is drafted, SVCs recommend removing or editing content that exceeds the scope permitted by RCM 1001(c). The SVCs make sure their client understands that what remains in the statement is the client's decision; they are recommending edits to avoid conflict and to help ensure the impact statement is presented to the sentencing authority without conflict. However, if the client wants content in, regardless of the SVC's advice regarding admissibility or potential objection, the content will remain in the statement. The SVC explains how objections to any content would be brought to the court and the process for the judge to decide what will be permitted in their presentation.

## **Marine Corps Response** (Lt Col Iain Pedden, OIC, Marine Corps Victims' Legal Counsel Org)

Marine Corps Victims' Legal Counsel (VLC) advise their clients on edits to victim impact statements (VIS) where edits are required to conform those impact statements to the restrictive boundaries of Rule for Court-Martial (RCM) 1001 and applicable case law. Our counsel initially work with victims to capture their thoughts about the impact of misconduct committed by the accused. Early drafts are often much broader than what the rules permit, a practice which allows victims to capture a more complete description of their thoughts prior to conforming the statement to detailed legal requirements. Counsel and client then review and refine those statements, frequently in response to plea agreement negotiations conducted in the absence of VLC input. The product of those plea negotiations further narrows the scope of the draft VIS, ordinarily because a convening authority has agreed to withdraw and dismiss a charge relating to a substantial harm on which the victim sought to be heard.

The VIS drafting and revision process necessarily involves advising clients on revisions necessary to conform the scope of the statement not only to the requirements of the RCM and case law, but also to anticipated objections by defense counsel and/or redactions by the military judge. This dialogue frequently includes advice regarding prohibitions on recommending specific sentences. Military judges and Service appellate courts have interpreted these rules to prohibit victims from making values-based commentary on the misconduct of the convicted Service member, including comments on whether the person deserves to hold the title of Marine, to serve in a specific rank to which Marines attribute especially high standards (i.e. Sergeant Major), or be retained as a commissioned officer endowed with the special trust and confidence of the President. Courts have found such comments to be specific recommendations on sentence because punitive discharge and reduction in rank are authorized punishments. These limitations substantially infringe upon a victim's right to be heard under Article 6b(a)(4)(C), and frustrate the purpose of giving victims voice during sentencing proceedings—particularly in light of the extremely remote possibility of prejudice which would accrue to an accused in sentencing proceedings conducted before a military judge alone.

Drafting and editing efforts notwithstanding, a victim's impact statement is often the subject of extensive discussion on the record by the military judge, trial counsel, defense counsel, and the VLC. This discussion often results in further edits, yielding an overly-legalistic expression of victim commentary far distant from the actual sentiment held by the person whose voice is to be heard. In short, nearly everyone in the room is permitted to speak the words included in the draft submitted to the military judge—everyone, that is, except the victim.

Military sentencing practice stands in sharp contrast to the broader and more constructive approach available to victims in proceedings held in civilian federal and state courts. In those courts, victims are permitted to make broader statements, and judges presumed to know the law do not consider any impermissible portion of such statements when determining an appropriate sentence. In military courts, even where VLC work to diligently assist clients with creating a VIS to prevent objections, Marine Corps VLC anecdotally observe that approximately one half to two thirds of victim impact statements are still redacted to some extent by a military judge. Despite this unnecessarily burdensome and contentious process, Service appellate courts continue to examine victim impact statements in minute detail and have taken significant post-trial action in favor of the accused when victim impact statements do not comply with the complex and counterintuitive web of restrictions found in the Manual for Courts-Martial and emerging case law. Accordingly, Marine Corps VLC also advise clients on the risk of adverse appellate action if a VIS exceeds acceptable limits.

### **Navy Response** (Captain Dan Cimmino, Chief, Navy Victims' Legal Counsel Program)

Navy VLC will generally tell their clients about the restrictions of RCM 1001. They give them an opportunity to write their statement in the manner that the client sees fit, and then they work with them to ensure the statement is in compliance with the rule. That being said, there is some leeway in the description of the impact (financial, psychological, social or medical impact directly relating or arising from) as it is subjective. VLC does not usually censor their clients in their description of the impact, as long as it is restricted to the impacts described in the rule, but judges who do not appreciate emotional descriptions of impact may interrupt a victim restricting them only to non-emotional descriptors of their trauma, as will defense counsel.

### **Air Force Response** (Colonel Tracy Park, Chief, Air Force Victims' Counsel Program)

One of the responsibilities of Victims' Counsel is to advise clients on the military justice process. Delivering an impact statement is a critical opportunity for victims to describe the financial, social, psychological, or medical impacts suffered as a result of a crime committed against them. If a victim is represented by Victims' Counsel, then Victims' Counsel are universally involved in helping victims prepare their impact statements. Generally, Victims' Counsel and Victims' Paralegals inform clients on the rule that governs impact statements and help establish expectations from the outset. Specifically, Victims' Counsel and Victims' Paralegals cover the purpose of the rule, explain the parameters, explain victim impact statement options—unsworn, sworn or both—and answer any questions a victim may have.

Ultimately, Victims' Counsel want the statement to be in the client's voice and contain what the client wants to say. Utilizing their training and court-martial experience, Victims' Counsel assist victims in conveying their sentiments and the tangible and intangible impacts of the crime within the applicable scope of the rule. The extent of Victims' Counsel involvement in any given case depends on each individual victim. Each victim approaches the impact statement differently; some request extensive assistance in starting the first draft, whereas others want to write the first draft on their own. Some factors that affect the level of Victims' Counsel involvement include age of the victim, the level of trauma they have experienced, and stage of healing.

Victims' Counsel and Victims' Paralegals review draft impact statements for clarity, scope, grammar, and flow. Victims' Paralegals often complete an initial review of the statement and can help the victim develop and articulate the effects of the crime based on the paralegal's knowledge of the victim's experience. If there are potentially objectionable portions, the Victims' Counsel will highlight those portions to the client, provide recommendations, and discuss potential risks. However, the final decision about the content of an impact statement belongs to the victim. Finally, Victims' Counsel and the Victims' Paralegal will prepare the victim to deliver the statement in a manner chosen by the victim: verbally, in writing, or both.

### **Coast Guard Response** (Ms. Elizabeth Marotta, Chief, Office of Member Advocacy)

In the U.S. Coast Guard, SVCs work with victims' to suggest edits to their VIS if necessary. SVC utilize a practice guide that explains R.C.M. 1001(c) options and provides best practices for crafting a victim impact statement. The guide contains sample questions for the SVC to use to help the victim capture the full impact of the offense. The guide also provides the victim with a memo explaining the process and providing them with a questionnaire to help draft the statement. Special Victims' Counsel do try to focus the victim on financial, social, psychological, or medical impact on the victim directly relating or arising from the offense which the accused was found guilty. Counsel will then review the statement and if it contains areas that might be outside the scope of R.C.M. 1001 or draw an objection, the SVC will explain the issue to the victim and leave it up to them if they want to edit the statement. Explaining potential issues upfront helps the victim understand why a Judge may later remove part of the statement.

**Question 2. To what extent do victims' counsel coordinate proposed victim impact statements with trial counsel and defense counsel in order to identify and remove potentially objectionable material?**

**Army Response** (Colonel Carol Brewer, Chief, Army Special Victims' Counsel Program)

- a. SVCs coordinate with either trial or defense counsel when their client consents and the nature of the case allows for the collaboration. For example, when a client supports a plea agreement, the SVC may coordinate with the defense to support the sentence result the accused and client both want. Or where the client and the trial counsel are trying to highlight certain aspects of impact to justify the sentence they both believe is just, they may discuss those goals and impacts with the trial counsel.
- b. SVCs reported that when time permits, and the client agrees, they provide a draft impact statement to both sides so they can discuss potential objections to any content prior to trial. SVCs noted that when they could not come to an agreement about admissibility of any content, the pre-coordination gave them time to suggest adjustments and/or prepare their argument for admissibility to the military judge.
- c. SVCs indicated that when clients decided to make their impact statements under oath, they were more likely to coordinate with the Special Victim Prosecutor (SVP) to schedule time for prep-sessions. The SVC would discuss potential areas for cross-examination. However, practicing the question-and-answer format and running a practice cross-examination was normally left to the SVP and their team.

**Marine Corps Response** (L Col Iain Pedden, OIC, Marine Corps Victims' Legal Counsel Org)

Marine Corps VLC coordinate consistently but not always successfully in removing potentially objectionable material from the VIS. Both RCM 1001(c) and the Navy-Marine Corps Trial Judiciary Rules require VLC to provide written copies of victim impact statements to trial and defense counsel before sentencing. While VLC often discuss potential objections with trial and defense counsel prior to sentencing proceedings, the merit of those objections is often in dispute and therefore resolution of those objections is better addressed before the military judge. Where VLC and counsel for the parties disagree on the content of a VIS, bringing that disagreement before the military judge is preferable to extrajudicial resolution because resolving the matter on the record affords VLC the opportunity to enter an appropriate objection, make necessary argument, and preserve the matter for potential writ and appellate purposes. At each of these stages, VLC seek a means by which they can best accomplish the client's objectives for their impact statement.

While VLC may advise a client to remove *objectionable* material, it is far from certain that *objectionable* material is *inadmissible* material. Indeed, the friction between the expansive language of Article 6b and the restrictive language of RCM 1001 leaves our counsel with the difficult and unenviable task of balancing advocacy with professional responsibility. Because defense counsel often raise good-faith objections to VIS matter which is permissible under both RCM 1001 and applicable case law, resolution of any disagreement is best had on the record before the military judge.

**Navy Response** (Captain Dan Cimmino, Chief, Navy Victims' Legal Counsel Program)

VLC does not coordinate in advance with TC or DC to identify and remove potentially objectionable material except when preparing to argue what is potentially objectionable in front of the court. Judges differ as to how much a victim can describe or how they speak about the impact arising from the crime and what it means for them. It is the role of the VLC to advocate why the description in a victim's statement of the harm is directly relating to or arising from the offense.

Currently victims are restricted in various ways to prevent a full accounting of the impact of their trauma. For example, the VLC will ensure clients are aware that if an accused pleads guilty to a Lesser Included Offense, they are limited to expressing the impact of that crime and not the more serious crime that is on the charge sheet. Defense generally will try to minimize what a victim can say in terms of how they were impacted, and the VLC will advocate to provide the victim an opportunity to fully speak about their trauma. VLC does not coordinate in advance to allow TC or DC to tell their client what is the least objectionable way to describe the impact of the crime to them, as this is the victim's only opportunity to truly state the harm done to them in their own words.

**Air Force Response** (Colonel Tracy Park, Chief, Victims' Counsel)

Victims' Counsel do not always coordinate proposed victim impact statements with trial and defense counsel prior to sentencing. Victims' Counsel may do so when it makes sense. For example, when there's a plea agreement in which Accused is not going to plead guilty to all charged offenses, or when there is uncharged misconduct, Victims' Counsel may discuss victim impact statement content with trial counsel and/or defense counsel to identify any objectionable statements in advance. However, Victims' Counsel duties are always first to their client, and in accordance with the client's expressed interests. When Victims' Counsel discuss the impact statement with trial and/or defense counsel in advance, the purpose is to mitigate potentially objectionable content, avoid surprise to their clients, and ensure their clients are able to fully articulate the impact of the crime within the bounds of law and the Rules for Courts-martial.

**Coast Guard Response** (Ms. Elizabeth Marotta, Chief, Office of Member Advocacy)

The victims' statements are typically provided to TC/DC about an hour prior to providing it to the Court. Typically, the statement will not be edited based on TC/DC objection alone and the SVC will wait to see the Judge's determination on any issues. Most victims elect to read the statement, while others published it to the Court for the MJ's consideration without reading it aloud.

# Report on Victim Impact Statements at Courts-Martial Sentencing Proceedings



## Summary of Responses and Recommendations

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

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

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

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

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

### Recommendations:

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

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

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

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

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

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

# **Report on Victim Impact Statements at Courts-Martial Presentencing Proceedings**

## **I. Introduction and Background**

### **A. Introduction.**

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

[T]he conferees recognize the importance of providing survivors of sexual assault an opportunity to provide a full and complete description of the impact of the assault on the survivor during court-martial sentencing hearings related to the offense. The conferees are concerned by reports that some military judges have interpreted Rule for Courts-Martial (RCM) 1001(c) too narrowly, limiting what survivors are permitted to say during sentencing hearings in ways that do not fully inform the court of the impact of the crime on the survivor.

Therefore, the conferees request that, on a one-time basis, or more frequently, as appropriate, and adjunct to its review of court-martial cases completed in any particular year, the DAC-IPAD assess whether military judges are according appropriate deference to victims of crimes who exercise their right to be heard under RCM 1001(c) at sentencing hearings, and appropriately permitting other witnesses to testify about the impact of the crime under RCM 1001.<sup>1</sup>

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

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

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

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

<sup>3</sup> *See Transcript of DAC-IPAD Public Meeting* (Dec. 7, 2022).

<sup>4</sup> FY22 NDAA, Pub. L. No. 117-81, §539E, 135 Stat. 1541 (2021).

## B. Background

Congress enacted Article 6b of the UCMJ in the FY14 NDAA.<sup>5</sup> Article 6b codifies the rights of crime victims and incorporates many of the provisions of the federal Crime Victims' Rights Act.<sup>6</sup> Among other rights, it provides a victim of an offense the right to be reasonably heard at a sentencing hearing relating to the offense.<sup>7</sup> A provision in the FY15 NDAA specifies that when a victim of a sexual offense has the right to be heard, the victim may exercise that right through counsel, including a victims' counsel.<sup>8</sup>

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

## II. Legal Framework of Victim Impact Statements

### A. Rule for Courts-Martial 1001(c)

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

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

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<sup>5</sup> FY14 NDAA § 1701, as amended in the FY15 NDAA § 531(f).

<sup>6</sup> 18 U.S.C. § 3771.

<sup>7</sup> 10 U.S.C. § 806b (2021) (Art. 6b, UCMJ).

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

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

<sup>10</sup> 2019 MCM, R.C.M. 1001(c)(3).

<sup>11</sup> 2019 MCM, R.C.M. 1001(c)(1) discussion.

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

<sup>13</sup> 2019 MCM, R.C.M. 1001(c)(2)(A). This definition comes from Article 6b, UCMJ.

<sup>14</sup> 2019 MCM, R.C.M. 1001(c)(2)(B).

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

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

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

## **B. Uses of and Limitations on Victim Impact Statements**

### *1. Use of Unsworn Statements*

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

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

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

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<sup>15</sup> 2019 MCM, R.C.M. 1001(c)(5)(A).

<sup>16</sup> 2019 MCM, R.C.M. 1001(c)(5)(B).

<sup>17</sup> 2019 MCM, R.C.M. 1001(c)(5) discussion.

<sup>18</sup> [\*United States v. Tyler\*](#), 81 M.J. 108 (C.A.A.F. 2021).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Military Judges' Benchbook*, Dept. of the Army Pamphlet 27-9 at 90 (Feb. 29, 2020).

## 2. Definition of a Crime Victim

While not addressed by R.C.M. 1001(c) or the United States Court of Appeals for the Armed Forces (CAAF), the Military Department Courts of Criminal Appeals have held that a person does not need to be a named victim on the charge sheet or a named victim's designee under Article 6b to be considered a crime victim for purposes of R.C.M. 1001(c).<sup>22</sup> The individual must have suffered the requisite direct physical, emotional, or pecuniary harm and the court must not just look at the type of offense of which the accused was convicted but must further determine "whether that offense is the source of the harm discussed by the victim."<sup>23</sup>

## 3. Scope of Victim Impact Statements

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

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

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<sup>22</sup> *United States v. Miller*, NMCCA No. 201900234 (f rev) (N-M. Ct. Crim. App. 2022) citing *United States v. Hamilton*, 78 M.J. 335 (C.A.A.F. 2019) which found that the mother of a child pornography victim was a crime victim for purposes of R.C.M. 1001A in light of the crimes committed against her daughter and "the resulting financial and psychological hardships suffered by the family." In *United States v. Miller*, NMCCA held that the mother of a soldier who had died as a result of a drug overdose could properly be considered a victim and provide a victim impact statement, though the accused had not been convicted of an offense relating to the soldier's death, but had provided the soldier the needle he used to administer the fatal overdose. See also *United States v. Dunlap*, No. ACM 39567, 2020 CCA LEXIS 148 (A.F. Ct. Crim. App. May 4, 2020) holding that the spouse of the accused who had been convicted of adultery could properly be considered a victim under Article 6b, UCMJ, and provide a victim impact statement.

<sup>23</sup> *In re A.J.W.*, 80 M.J. 737 (N-M. Ct. Crim. App. 2021).

<sup>24</sup> 2019 MCM, R.C.M. 1001(c)(2)(B).

<sup>25</sup> *United States v. Hamilton*, 78 M.J. 335, 340 n. 6 (C.A.A.F. 2019).

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

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

#### 4. Sentence Recommendation

R.C.M. 1001(c)(3) provides that a victim impact statement may not include a recommendation for a specific sentence.<sup>28</sup>

#### 5. Form of the Victim Impact Statement

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

### III. FY 2021 Courts-Martial Case Review

#### A. Introduction and Methodology

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

- Article 120: rape, sexual assault, aggravated sexual contact, abusive sexual contact, or attempts to commit one of these offenses
- Article 120b: rape, sexual assault, or sexual abuse of a child under 16, or attempts to commit one of these offenses [not including cases with attempted conduct without any real child involved—e.g., sting operations undertaken by law enforcement]
- Article 120c: indecent viewing, visual recording, or broadcasting; forcible pandering; indecent exposure; or attempts to commit one of these offenses
- Article 93: sexual harassment offenses<sup>32</sup>

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<sup>27</sup> *In re A.J.W.* at 744.

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

<sup>29</sup> See *United States v. Edwards*, 82 M.J. 239, 241 (C.A.A.F. 2021).

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

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

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

- Article 93a: abuse of training leadership position or recruiter position involving sexual activity with a trainee or recruit
- Article 117a: wrongful broadcast or distribution of intimate visual images
- Article 128: assault, but only in cases with a referred related specification of an Article 120, 120b, or 120c offense and either the accused was found not guilty of the Article 120, 120b, or 120c offense or this Article 120, 120b, or 120c offense was dismissed as part of a pretrial agreement

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

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

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

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

## B. FY 2021 Courts-Martial Data

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

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

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



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

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

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

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

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

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



## C. Reviewer Comments

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

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

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

- In 12 of the 13 cases, the military judge limited the statement because the military judge determined that it was outside the scope of victim impact. An example of this is a case in which the victim discussed her difficulty finding a job after leaving the military and her resulting financial problems in her victim impact statement. The military judge ruled that this information was outside the scope of victim impact.
- In four of the 13 cases, the military judge limited the statement because the military judge determined that it recommended a specific sentence. Some military judges seemed to interpret the restriction on victims from recommending a "specific" sentence as precluding any reference to sentencing. In one case, the victim's impact statement consisted only of one sentence stating he hoped the accused went to jail "for a very long time." The military judge in that case would not allow the victim impact statement as it impermissibly recommended a sentence.
- In most cases, the military judge ruled in accordance with R.C.M. 1001(c), but some military judges applied the standard for victim impact more narrowly than others.

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

## IV. Stakeholder Input Regarding Victim Impact Statements

### A. Survivors United

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

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<sup>33</sup> This meeting was held prior to the reconstitution of the DAC-IPAD. See *supra* note 2.

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

<sup>35</sup> *Id.*

Survivors United members had earlier spoken to legislators about these restrictions, and their accounts were the impetus for the FY20 NDAA JES.<sup>36</sup>

At the December 6, 2022, DAC-IPAD public meeting, Dr. Breck Perry and Ms. Adrian Perry—founding members of Survivors United—together with Mr. Ryan Guilds, an attorney who has represented victims in military and civilian trials, provided information to the Committee regarding victim impact statements.<sup>37</sup> The Perrys recounted that during the trial of the officer accused of sexually abusing their young daughters, the military judge allowed only one parent to provide a victim impact statement, a limitation that caused them a great deal of pain.<sup>38</sup> Dr. Perry, who ultimately provided the statement, asserted that the military judge interrupted him on several occasions while he was delivering the statement to stop him from making certain statements, struck out some passages, told him to revise it; and later prevented him from delivering the remainder of his statement.<sup>39</sup> Dr. Perry also noted that the military judge told him he could not face the accused while delivering his statement, but instead had to face the jury.<sup>40</sup>

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

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

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<sup>36</sup> See *supra* note 1.

<sup>37</sup> See generally *Transcript of DAC-IPAD Public Meeting* (Dec. 6, 2022).

<sup>38</sup> *Id.* at 104, 108 (testimony of Ms. Adrian Perry) (the referenced trial took place September 2017).

<sup>39</sup> *Id.* at 112 (testimony of Dr. Breck Perry).

<sup>40</sup> *Id.* at 111-112.

<sup>41</sup> *Id.* at 107 (testimony of Ms. Adrian Perry).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 130-131 (testimony of Mr. Ryan Guilds).

<sup>44</sup> *Id.* at 100.

<sup>45</sup> *Id.*

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

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

## **B. Victims’ Counsel**

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

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

*[The staff sent follow up questions to the victims’ counsel program managers on Jan 31 regarding the extent to which victims’ counsel edit their clients’ statements prior to delivery. Their responses, when received, will be summarized and added to this section of the report.]*

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<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 121.

<sup>48</sup> *Id.* at 101.

<sup>49</sup> *Id.* at 122.

<sup>50</sup> *Id.* at 140-141

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

<sup>52</sup> *Id.* at 178-179 (testimony of LtCol Pedden).

<sup>53</sup> *Id.*

## C. Military Judges

At the February 14, 2020, DAC-IPAD public meeting, a panel of several former military judges provided information to the Committee regarding their experiences with victim impact statements, as well as other topics.<sup>54</sup> In general, the former judges stated that they limited a victim's impact statement when it contained information they previously ruled inadmissible,<sup>55</sup> as well as when the statement recommended a particular sentence for the accused.<sup>56</sup> One former judge stated that he did not recall ever limiting a victim impact statement and two judges commented that victims' counsel did a good job helping to prepare the statement and modifying it so that it would comply with the rules.<sup>57</sup> Overall, the panel believed victims were allowed broad latitude in what they could say in their impact statements.<sup>58</sup>

**D. Military Defense Counsel** *[The Services' Trial Defense Counsel Chiefs will provide information to the Committee at the Feb 21-22 public meeting. The staff will summarize any information they provide related to victim impact statements and include here.]*

## V. Federal and Select State Law Regarding Victim Impact Statements

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

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

Several DAC-IPAD members relayed their experiences with victim impact statements in their jurisdictions with the consensus that federal and state jurisdictions allow victims much broader latitude in their statements than the military.<sup>59</sup> One member noted that civilian jurisdictions have

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<sup>54</sup> *Transcript of DAC-IPAD Public Meeting* 142-149 (Feb. 14, 2020).

<sup>55</sup> *Id.* at 145, 149.

<sup>56</sup> *Id.* at 147, 148.

<sup>57</sup> *Id.* at 147.

<sup>58</sup> *Id.* at 147-148.

<sup>59</sup> *Transcript of DAC-IPAD Public Meeting* 78 (Dec. 7, 2022) (comment of Hon. Reggie Walton, U.S. District Judge, District of Columbia; DAC-IPAD member) ("I've never seen [these limitations] in a federal court proceeding."); 79-80 (comment of Hon. Paul Grimm, U.S. District Judge, District of Maryland; DAC-IPAD member); 81-82 (comment of Hon. Karla Smith, Circuit Court Judge, Montgomery County, MD; DAC-IPAD member).

largely discontinued the practice of “redlining” or restricting victim impact statements,<sup>60</sup> stating that the victim impact statement is recognized as the victim’s right of allocution similar to the defendant’s right of allocution.<sup>61</sup> Two members observed that many civilian jurisdictions allow the victim to speak to or recommend a sentence for the defendant.<sup>62</sup>

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

On October 19, 2022, the Joint Service Committee on Military Justice (JSC) of the Department of Defense released for public comment its draft executive order with numerous proposed changes to the Manual for Courts-Martial (MCM).<sup>63</sup> This draft included the following proposed changes to R.C.M. 1001(c) regarding victim impact statements:

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

On December 12, 2022, the DAC-IPAD submitted a public comment to the JSC with five recommendations for amending R.C.M. 1001(c). These five recommendations are also included in this report as DAC-IPAD Recommendations 41–45.<sup>64</sup>

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Chair); *Transcript of DAC-IPAD Public Meeting* 119 (Dec. 6, 2022) (comment of Ms. Martha Bashford, former Chief, New York County District Attorney’s Office Sex Crimes Unit; DAC-IPAD member).

<sup>60</sup> *Transcript of DAC-IPAD Public Meeting* 75 (Dec. 7, 2022) (comments of Ms. Meg Garvin, Executive Director, National Crime Victim Law Institute; DAC-IPAD member).

<sup>61</sup> *Id.* at 74-75.

<sup>62</sup> *Id.* at 124-125 (comment of Hon. Reggie Walton); 127 (comments of Ms. Meg Garvin).

<sup>63</sup> Joint Service Committee on Military Justice draft Executive Order and Annex to the draft Executive Order, available at <https://jsc.defense.gov/Military-Law/Current-Publications-and-Updates/>

<sup>64</sup> See DAC-IPAD public comment to the Joint Service Committee on Military Justice at Appendix **xx**.

## VII. Analysis, Response to Congress, and Recommendations

### A. Analysis

Being able to provide a statement to the court at sentencing can be extremely empowering and freeing for a victim, and it's a moment that can open the very first door to hopeful healing for survivors.

—Adrian Perry, co-founder of Survivors United<sup>65</sup>

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

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

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

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

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

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<sup>65</sup> *Transcript of DAC-IPAD Public Meeting 108-109 (Dec. 6, 2022) (testimony of Ms. Adrian Perry).*

## B. Response to Congress

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

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

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

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

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

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

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

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

## C. Recommendations

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

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

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

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

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

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

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

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



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

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

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

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

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

## **VIII. Conclusion**

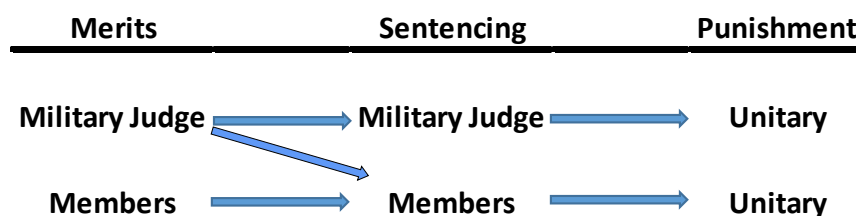
The Committee concludes that R.C.M. 1001(c) should be broadened to allow crime victims to exercise their right of allocution without unnecessary limitation. There is no reason that military practice in this area should confine the victim’s right to be heard more strictly than does the practice in civilian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

## II. Background on Court-Martial Sentencing

### A. Court-Martial Sentencing Prior to the Military Justice Act of 2016

Before the MJA16 took effect in January 2019, an accused at a general or special court-martial would be tried by a panel of members unless the accused requested a trial by military judge alone.<sup>44</sup> In noncapital cases, if an accused elected trial by a military judge alone, the military judge would adjudicate findings, conduct a sentencing hearing for any finding of guilt, and adjudge a sentence. If an accused was tried by a panel of members, then the members would adjudicate findings for any not guilty pleas and would sentence the accused on any findings of guilt.<sup>45</sup> The accused could not request judge-alone sentencing when the court-martial was composed of members for findings. All sentencing in the military was unitary, meaning that one single sentence was adjudged for all offenses of which the accused was found guilty.<sup>46</sup>

**Figure 1. Sentencing in Courts-Martial Before January 1, 2019<sup>47</sup>**



The sentencing proceeding usually occurred immediately after the announcement of a guilty verdict.<sup>48</sup> After the government presented sentencing evidence, the accused could elect to present evidence in extenuation or mitigation. The Military Rules of Evidence applied during the sentencing proceeding, unless those rules were relaxed by the military judge.<sup>49</sup>

The maximum punishment for each enumerated military offense was set by the President of the United States through executive order. The sentencing authority exercised broad discretion when imposing sentences. For most offenses, a sentence could range anywhere from no punishment to the maximum punishment.<sup>50</sup> For a few select offenses—premeditated murder, felony murder, spying, and certain sexual offenses—Congress imposed mandatory minimum punishments.<sup>51</sup>

<sup>44</sup> MANUAL FOR COURTS-MARTIAL, UNITED STATES (2016) [2016 MCM], Rule for Courts-Martial (R.C.M.) 903.

<sup>45</sup> For any guilty pleas, the military judge would enter findings after determining whether to accept the pleas, unless the plea was to a lesser included offense and the government planned to proceed to trial on the greater offense. Sentencing would still be by members for all offenses in which there were guilty findings. *Id.* at R.C.M. 910.

<sup>46</sup> *Id.* at R.C.M. 1002(b). To determine the maximum authorized confinement, the court adds the maximum confinement for each individual offense. *Id.* at R.C.M. 1003(c)(1)(C).

<sup>47</sup> For the arrows going straight across for a military judge and members, Figure 1 represents sentencing options for not guilty pleas. Figure 1 also depicts scenarios where a military judge enters findings of guilty on the merits and members conduct sentencing as requested by an accused. 2016 MCM, *supra* note 44, R.C.M. 910. See *supra* note 45 for guilty plea options.

<sup>48</sup> MJRG REPORT, *supra* note 43, at 469.

<sup>49</sup> 2016 MCM, *supra* note 44, R.C.M. 1001.

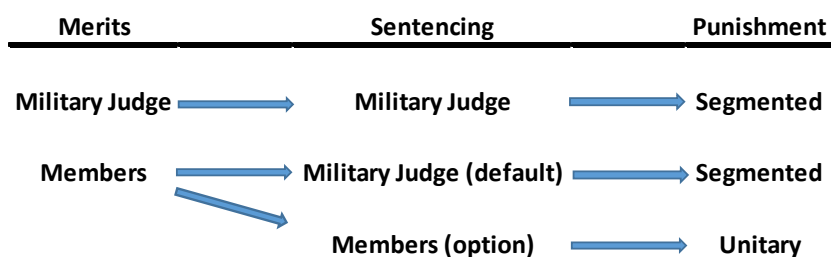
<sup>50</sup> *Id.* at R.C.M. 1002(a).

<sup>51</sup> See, e.g., Article 118, UCMJ; National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1705, 127 Stat. 672 (2013).

## B. Changes to Sentencing in the Military Justice Act of 2016

Congress revised court-martial sentencing in the MJA16.<sup>52</sup> The MJA16 provides that in all noncapital cases in which an accused requests judge-alone findings, the military judge also sentences the accused.<sup>53</sup> In courts-martial composed of members for findings, the accused may elect sentencing by members in lieu of the default—sentencing by a military judge alone.<sup>54</sup> If the military judge sentences the accused, the judge applies segmented sentencing, also known as offense-based sentencing: that is, a separate term of confinement and fine is adjudged for each specification.<sup>55</sup> If a sentence has more than one term of confinement, the judge also determines whether the confinement terms will run concurrently or consecutively.<sup>56</sup> In contrast, in cases in which the accused elects members for sentencing, the members apply unitary sentencing.<sup>57</sup>

**Figure 2. Sentencing in Courts-Martial After January 1, 2019<sup>58</sup>**



In “straddle” cases in which the accused is charged with offenses that occurred before and after January 1, 2019 (MJA16 effective date),<sup>59</sup> pursuant to Rule for Courts-Martial (R.C.M.) 902A, the accused could elect to be sentenced under the old (pre-MJA16) or new sentencing systems.<sup>60</sup>

Military sentencing practice continues to require the President to establish, by executive order, maximum punishments for offenses. Other than for the offenses with mandatory minimums, sentences may still be announced within a range from no punishment up to the maximum authorized, at the discretion of the judge or panel members conducting the sentencing. The MJA16 codified in the UCMJ those limited instances involving sexual assault convictions that have a mandatory minimum sentence in the form of a required punitive discharge.<sup>61</sup>

<sup>52</sup> *Supra* note 1.

<sup>53</sup> After the MJA16 changes, all pleas of guilty by an accused are heard and accepted or rejected by a military judge alone, even when the same case has contested findings adjudicated by members. In such cases, the accused can elect sentencing by the members who determined findings on the contested charges, or sentencing by a military judge alone.

<sup>54</sup> MANUAL FOR COURTS-MARTIAL, UNITED STATES (2019) [2019 MCM], R.C.M. 1002(b).

<sup>55</sup> *Id.* at R.C.M. 1002(d)(2)(A).

<sup>56</sup> *Id.* at R.C.M. 1002(d)(2)(B).

<sup>57</sup> *Id.* at R.C.M. 1002(d)(1). Under the MJA16 changes, all sentences other than death that are imposed by members now require the concurrence of at least three-fourths of the members. *See* Article 52(b), UCMJ.

<sup>58</sup> This figure represents sentencing options for not guilty pleas. *See supra* note 53 for guilty plea options.

<sup>59</sup> *See infra* Part II, Section III for a discussion of the population of cases analyzed in this report, including the straddle cases.

<sup>60</sup> 2019 MCM, *supra* note 54, R.C.M. 902A.

<sup>61</sup> Article 56(b), UCMJ.

### C. Ongoing Interest in Court-Martial Sentencing Reforms

Following the MJA16 changes, as part of the FY20 NDAA, Congress directed the Secretary of Defense to establish nonbinding sentencing guidelines for UCMJ offenses, using the sentencing data collected by the MJRP, to “provide the sentencing authority with a suggested range of punishments, including suggested ranges of confinement, that will generally be appropriate for a violation of each offense.”<sup>62</sup> Congress also directed the Secretary to provide an assessment of the feasibility and advisability of implementing sentencing guidelines in panel sentencing cases.<sup>63</sup>

More recently, in February 2021, the Secretary of Defense established the Independent Review Commission (IRC) on Sexual Assault in the Military, a 90-day commission “charged with conducting an independent, impartial assessment of the military’s current treatment of sexual assault and sexual harassment.”<sup>64</sup> Among its many recommendations, the IRC recommended that Congress amend the UCMJ to require judge-alone sentencing in all noncapital general and special courts-martial and to establish sentencing parameters, noting that such reforms would reduce sentencing disparities.<sup>65</sup> In September 2021, the Secretary of Defense released implementation guidance for the IRC’s recommendations, categorizing the IRC’s sentencing recommendations as Tier 1 recommendations that “build the Department’s basic foundation and infrastructure for a best-in-practice sexual assault prevention and response program.”<sup>66</sup> Both the Senate and House of Representatives introduced versions of the National Defense Authorization Act for Fiscal Year 2022 (FY22 NDAA) to eliminate member sentencing at special and general courts-martial in noncapital cases and establish sentencing parameters and criteria.<sup>67</sup>

The Senate and House versions of the FY22 NDAA, along with the IRC recommendations, mirror earlier sentencing recommendations made by the Military Justice Review Group (MJRG), a 2014 panel of experts that completed a comprehensive review of the military justice system.<sup>68</sup> Most MJRG recommendations to Congress were incorporated in the MJA16; however, several recommendations to modify court-martial sentencing were not adopted, including: (1) the recommendation to require sentencing by a military judge in all noncapital general and special courts-martial, even when members adjudicated the findings; and (2) the recommendation to establish a board to develop sentencing parameters and criteria for each punitive UCMJ article.<sup>69</sup>

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<sup>62</sup> National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, § 537, 133 Stat. 1198 (2019).

<sup>63</sup> The guidelines and assessment must be provided to the Committees on Armed Services of the Senate and House of Representatives within one year of the date of the MJRP’s first report. *Id.*

<sup>64</sup> IRC REPORT, *supra* note 12, at 3.

<sup>65</sup> *Id.* at 46.

<sup>66</sup> Secretary of Defense, *Memorandum on Commencing DoD Actions and Implementation to Address Sexual Assault and Sexual Harassment in the Military* (Sept. 22, 2021).

<sup>67</sup> See National Defense Authorization Act for Fiscal Year 2022, H.R. 4350, 117th Cong., § 539F (2021); National Defense Authorization Act for Fiscal Year 2022, S. 2792, 117th Cong., § 544 (2021).

<sup>68</sup> MJRG REPORT, *supra* note 43, at 13.

<sup>69</sup> The MJRG explained that a sentencing parameter “would provide an upper and lower limit on the sentence that may be imposed, but one that the military judge could depart from when warranted by the facts of a case and to fashion an individualized sentence for the offender.” Deviation from the range would require written analysis and be subject to appellate review. Sentencing criteria would apply to offenses for which it would be impracticable to set a parameter: they “would consist of factors that aggravate or mitigate the severity of an offense and that the military judge must consider, but would not constrain the development of an appropriate sentence.” *Id.* at 512–28.

### III. Methodology

#### A. Analysis of Source Documents

In December 2020, a request for information (RFI) to the Services requested a list of all military justice cases completed in FY20 that involved a preferred charge under the punitive articles of the UCMJ.<sup>70</sup> For the RFI, a “completed case” was a case tried to verdict at general court-martial or special court-martial. Cases “tried to verdict” included convictions, acquittals, plea agreements, and cases in which charges were dismissed.

The staff reviewed the completed case spreadsheets to confirm the cases were responsive to the RFI. For each responsive case, the staff requested the following documents from the Services:<sup>71</sup>

- Department of Defense Form 458, Charge Sheet;
- Statement of Trial Results;
- Entry of Judgment;
- Promulgation Order; and
- Pretrial Agreement.

From the charge sheets, the staff analyzed the dates of the charges and specifications and referral type to determine whether the case fell under:

- a. pre-MJA16 sentencing system: for offenses that occurred before January 1, 2019; or
- b. post-MJA16 sentencing system: for offenses that occurred after January 1, 2019.

The 490 pre-MJA16 cases were not analyzed for this project, given the statutory requirement for this sentencing report.<sup>72</sup> This report analyzed 542 post-MJA16 cases and 270 “straddle” cases.

For the 270 “straddle” cases—those in which offenses occurred both before and after January 1, 2019—the staff examined the source documents to determine whether the accused made an affirmative selection regarding the pre-MJA16 or post-MJA16 sentencing system. If the source documents did not indicate the accused’s selection, the staff used the final result to determine which sentencing system applied.<sup>73</sup> For 28 of the 270 straddle cases, the source documents did not indicate which sentencing scheme applied. These 28 cases were categorized as indeterminate and, like the pre-MJA16 cases, were not analyzed further for purposes of this project.<sup>74</sup>

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<sup>70</sup> Due to the time required to conduct a criminal investigation and adjudicate a case, the staff requested cases completed in FY20, recognizing that cases tried in FY19 were unlikely to be governed by the MJA16’s segmented sentencing system. In addition, Article 146(f)(2), UCMJ, requires the MJRP to gather and analyze sentencing data from FY20. Military Justice Review Panel Request for Information 1 (Dec. 3, 2020) [MJRP RFI 1] is included at Appendix C.

<sup>71</sup> See MJRP RFI 1 at Appendix C.

<sup>72</sup> See *infra* Tables 1 and 2.

<sup>73</sup> In straddle cases, if members found the accused guilty but a judge determined the sentence, the staff concluded that the accused selected the post-MJA16 sentencing system.

<sup>74</sup> Generally, the indeterminate cases were: (1) straddle cases that resulted in an acquittal; (2) straddle cases with a judge-alone conviction for a single offense; or (3) straddle cases that had both member findings and sentencing.

**Table 1. Application of Pre- and Post-MJA16 Sentencing Systems in FY 2020 Cases**

FY20 Cases	Pre-MJA16 / Indeterminate		Post-MJA 16	
	n	%	n	%
Army (N=582)	203	35%	379	65%
Marine Corps (N=229)	90	39%	139	61%
Navy (N=197)	95	48%	102	52%
Air Force (N=284)	125	44%	159	56%
Coast Guard (N=10)	5	50%	5	50%
Total (N=1,302)	518	40%	784	60%

Of the 1,302 total completed cases in FY20, 784 used the post-MJA16 sentencing system. The 784 post-MJA16 cases include 242 straddle cases in which the accused elected the post-MJA16 sentencing system.

Of the 784 post-MJA16 cases, 711 resulted in a conviction.<sup>75</sup> For these 711 cases:

- In 682 cases, the accused was sentenced by a military judge.
- In 29 cases, the accused was sentenced by a member panel.

Offense-based sentencing only applied in the 682 post-MJA16 cases in which the accused was sentenced by a military judge (see Table 2).

**Table 2. Number of FY 2020 Cases Applying Offense-Based Sentencing**

Cases Applying Offense-Based Sentencing	
Army	330
Marine Corps	129
Navy	92
Air Force	126
Coast Guard	5
Total	682

<sup>75</sup> For the 784 cases that applied post-MJA16 sentencing procedures, the staff analyzed the Statement of Trial Results or the Entry of Judgment to determine whether the accused was convicted or the case resulted in a full acquittal. Across the Services, acquittals comprised 72 of the 784 cases in which the post-MJA16 sentencing system applied. Plea agreements comprised 589 of the 711 cases in which a conviction was obtained and the post-MJA16 sentencing system applied. One Air Force case identified under the MJA16 resulted in a dismissal by a judge and was not analyzed further.

## B. Analysis of Offense-Based Sentences

Article 146(f)(2), UCMJ, requires analysis of offense-based sentences to determine: (1) the offenses of which the accused were convicted; and (2) the resulting sentence for each offense in each case.<sup>76</sup> This report defines offenses according to their statutory elements and, to reflect facts that might increase punishment, any aggravating factors prescribed by the President.<sup>77</sup> The maximum punishment chart at Appendix 12 of the MCM lists the maximum authorized discharge, confinement, and forfeiture for every UCMJ offense.<sup>78</sup> Some punitive articles consist of a single offense with one set of elements and one permissible maximum punishment, while other punitive articles have multiple related offenses with different sets of statutory elements or aggravating factors and thus different permissible maximum punishments.<sup>79</sup>

The 682 judge-alone sentencing cases included convictions on 2,430 offenses<sup>80</sup> which were categorized based on Appendix 12 of the MCM.<sup>81</sup> The staff recorded the confinement terms for each case and whether the confinement terms were applied consecutively or concurrently.<sup>82</sup>

**Table 3. Number of Offenses Analyzed for Offense-Based Sentencing**

Number of Offenses Analyzed	
Army	1,127
Marine Corps	457
Navy	292
Air Force	531
Coast Guard	23
Total	2,430

<sup>76</sup> The UCMJ does not define the word “offense.”

<sup>77</sup> Any statutory element or aggravating factor that exposes an accused to a different maximum punishment constitutes an element of a separate legal offense. *Apprendi v. New Jersey*, 530 U.S. 466, 483 n.10 (2000) (“Put simply, facts that expose a defendant to a punishment greater than that otherwise legally prescribed were by definition “elements” of a separate legal offense.”); *see also Alleyne v. United States*, 570 U.S. 99, 103 (2013) (“Any fact that, by law, increases the penalty for a crime is an ‘element’ that must be submitted to the jury and found beyond a reasonable doubt.”); *Mathis v. United States*, 136 S.Ct. 2243, 2258–59 (2016) (“If statutory alternatives carry different punishments, then under *Apprendi* they must be elements.”).

<sup>78</sup> 2019 MCM, *supra* note 54, Appendix 12. Appendix 12, MCM, is a reference tool and not the authority for specific punishments.

<sup>79</sup> For example, Article 120, UCMJ, defines four offenses with four different permissible maximum punishments: the maximum confinement for rape under 120(a) is life; the maximum confinement for sexual assault under 120(b) is 30 years; the maximum confinement for aggravated sexual contact under 120(c) is 20 years; and the maximum confinement for abusive sexual contact under 120(d) is 7 years. *See* 2019 MCM, *supra* note 54, Part IV.

<sup>80</sup> Data were collected from the Statement of Trial Results and Entry of Judgment in the 682 judge-alone sentencing cases.

<sup>81</sup> The staff included offenses added after 2019 and not contained in Appendix 12 of the 2019 MCM.

<sup>82</sup> The MJA16 reorganized the punitive articles by transferring and redesignating 16 UCMJ articles. For cases with a conviction under a punitive article not yet redesignated, the staff converted the pre-MJA16 punitive article into the post-MJA16 article. *See* Appendix E.



#### IV. Results of Analysis of Court-Martial Sentencing

##### A. The Number of Accused Who Request Member Sentencing and the Number Who Request Sentencing by Military Judge Alone

Of the 784 FY20 cases studied in this report that applied post-MJA16 sentencing, 711 resulted in a conviction. For these 711 cases resulting in a conviction, Table 4 analyzes the number of accused who requested member sentencing (29, 4%) and the number who requested military judge-alone sentencing (682, 96%).

**Table 4. Member Sentencing and Judge-Alone Sentencing in FY 2020 Cases**

MJA16 with Convictions	Member Sentencing		Judge-Alone Sentencing	
	n	%	n	%
Army (N=340)	10	3%	330	97%
Marine Corps (N=131)	2	2%	129	98%
Navy (N=96)	4	4%	92	96%
Air Force (N=139)	13	9%	126	91%
Coast Guard (N=5)	0	0%	5	100%
Total (N=711)	29	4%	682	96%

Of the 711 cases that resulted in a conviction, 54 (7.6%) were tried at a court-martial with members. For these 54 cases tried by members that resulted in a conviction, Table 5 analyzes the number of accused who elected to be sentenced by the members (25, 46%) and the number of accused who were sentenced by the military judge (29, 54%).<sup>83</sup>

**Table 5. Member Sentencing and Judge-Alone Sentencing in FY 2020 Contested Cases Tried in Front of Members<sup>84</sup>**

MJA16 Contested Cases Tried in Front of Members Resulting in Conviction	Member Sentencing		Judge-Alone Sentencing	
	n	%	n	%
Army (N=33)	10	30%	23	70%
Marine Corps (N=5)	2	40%	3	60%
Navy (N=5)	4	80%	1	20%
Air Force (N=11)	9	82%	2	18%
Total (N=54)	25	46%	29	54%

<sup>83</sup> There were 43 contested cases tried in front of members that resulted in a full acquittal. In four Air Force cases, a plea agreement was entered and the members conducted sentencing. See Table 4 indicating 29 total cases with member sentencing.

<sup>84</sup> The Coast Guard did not have any contested cases tried in front of members.



**B. The Offenses of Which the Accused Were Convicted, and the Resulting Sentence for Each Offense in Each Case**

As discussed earlier, Article 146(f)(2) requires that sentencing data be collected and analyzed for cases involving offense-based sentencing during FY20. Offense-based sentencing applies only in post-MJA16 cases with judge-alone sentencing. For this study, across the Services in FY20, 682 cases involved offense-based sentencing.

Based on the large population of cases analyzed—682 cases with convictions on a total of 2,430 offenses—the data on offense-based sentencing are provided separately in the appendixes. Appendix D presents the data on the minimum, maximum, and median confinement term received for each offense. Appendix E presents the data on the offenses of which the accused were convicted and the resulting confinement term for each offense in each case.

## PART III

### ASSESSMENT

#### I. Staff Assessment

A significant feature of the MJA16 was the creation of the MJRP,<sup>85</sup> a panel of private citizens with criminal justice expertise tasked with conducting independent periodic reviews and assessments of the military justice system. Congress directed the MJRP to evaluate the Services' implementation of the last five years of UCMJ amendments with a report due in December 2021. With the MJRP not yet established, DLSA staff attorneys completed this report. Although the staff collected the sentencing data requested by Congress, the staff could not provide the same robust review of the MJA16 and subsequent amendments that the MJRP would have provided. Given the heightened interest in the military justice system, the challenges of racial inequities, and continued problems with sexual misconduct in the military, the MJRP must be established to provide a thorough, independent assessment of the military justice system.

Without an MJRP, Part I of this report was limited to a summary of the Services' own self-assessments. The staff did not independently verify the Services' reports or question the various stakeholders in the military justice system. To fully assess the recent amendments, among other questions, the staff would have sought the following additional information:

- Are the Services effectively modernizing their information technology to meet the data collection, public access, and transparency requirements of Article 140a, UCMJ?
- How are SJAs and commanders exercising prosecution authority in accordance with the disposition guidance found in Appendix 2.1 of the MCM? Are commanders' decisions to send cases to trial subject to undue influences, resulting in Service members' erosion of trust?
- Are the Services complying with FY19 NDAA provisions for titling individuals suspected of crimes, given the concern about racial disparities in arresting and titling Service members?
- Are the Services complying with new rules for post-trial processing, such as shifting responsibility for authenticating the record from military judge to court reporter?
- Are the Services effectively utilizing the new authorities for military magistrates and pre-trial investigative tools such as warrants and subpoenas?
- How is the case law developing through the courts to shape the interpretation and implementation of the last five years' amendments to the UCMJ?
- Are Service members and the government utilizing the greater access to appellate courts?
- How are the new criminal offenses being reported and investigated? For example, is the new Article 117a, UCMJ (wrongful broadcast or distribution of intimate visual images) being investigated by the MCIOs or at a lower-level?
- Have the Services' specialization programs for judge advocates been implemented in a meaningful way and are they having an impact on prosecution and conviction rates?

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<sup>85</sup> Article 146, UCMJ.

Similarly, Part II of this report was limited to a presentation of the FY20 sentencing data requested by Congress, without additional analysis to provide further insights into recent and proposed sentencing reforms. It is also advisable to consider more than a single year of data in the development of any proposed sentencing parameters. A comprehensive understanding of military sentencing would be enhanced by addressing the following topics:

- Does the data indicate disparities in sentencing based on the demographic factors of the accused and victim, including race, ethnicity, gender, and rank?
- Are the Services implementing the new plea agreement rules uniformly and preserving the military judge's discretion to impose an appropriate sentence?
- How do sentences in cases involving plea agreements compare with sentences in cases without plea agreements?

## **II. Issues for Assessment in 2024**

The MJRP's first comprehensive review of the UCMJ is due to Congress on December 31, 2024.<sup>86</sup> Once assembled, the MJRP will determine which UCMJ issues to consider for the 2024 report. The Secretary of Defense may also ask the MJRP to consider specific military justice matters.<sup>87</sup> This report summarizes the Services' FY19 and FY20 information; however, the 2024 MJRP report will benefit from five full years of data and analysis to provide a more informed understanding of the impact of five years of UCMJ changes on the military justice system. In addition to the above topics, the MJRP may consider the following issues in its 2024 comprehensive review:

- How have the Services employed the new pre-referral tools for investigative subpoenas, warrants, and orders for electronic communications?
- How is the new disposition guidance in Article 33 and Appendix 2.1 of the Manual for Courts-Martial (MCM) affecting the disposition of criminal charges?
- What do the data show about offense-based sentencing and sentences imposed by military judges?
- Are plea agreements uniformly administered across the Services in such a way that the military judge maintains discretion to impose an appropriate sentence?
- Are the Services effectively using technology to improve post-trial processing timelines?
- Do the Services' case management systems adhere to the Article 140a requirement for uniform data collection, and what do the data indicate about racial and ethnic disparities in the administration of justice?
- How are the Service Courts of Criminal Appeals applying the amended factual sufficiency review under Article 66(d)?<sup>88</sup>

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<sup>86</sup> *Supra* note 6.

<sup>87</sup> Article 146(f)(4), UCMJ.

<sup>88</sup> In the FY21 NDAA, Congress amended Article 66(d) to allow a Service Court of Criminal Appeals to overturn a guilty verdict only upon a specific showing of a factual deficiency, when the finding is clearly against the weight of the evidence, affording greater deference to the fact-finders' verdict. *See* Section 542(b)(1)(B) of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283 (2021).

## Appendix D. Summary of Confinement by Offense in FY20

The following tables contain a summary of the confinement sentences by offense for FY20 cases involving offense-based sentencing. The tables indicate the number of convictions for each offense as well as the minimum, maximum, and median confinement term in months for each offense. Offenses for which a conviction was not obtained are omitted from the tables.

The median illustrates the middle point in the data set: half of the values are below the median and half the values are above. The median is used in these tables rather than the mean (average) because the value of the mean can be distorted by outliers.

For example, there were three instances in the Army in which an accused was convicted for the offense “Missing movement through design” under Article 87, UCMJ. Of these three convictions, the minimum confinement term received by an accused for this offense was 0 months and the maximum confinement term received was 3 months. The median confinement term was 1 month (the three confinement terms received for this offense were 0 months, 1 month, and 3 months).

### ARMY

Art.	Offenses-Convicted	# Convict.	MIN sentence (months)	MAX sentence (months)	Median sentence (months)
<b>78</b>	<b>Accessory after the fact</b>	3	4	12	6
<b>80</b>	<b>Attempts</b>	26	0	108	10
<b>81</b>	<b>Conspiracy</b>	18	0	58	6
<b>82</b>	<b>Soliciting commission of offenses</b>				
	Solicitation of all other offenses (not espionage; desertion; mutiny or sedition; or misbehavior before the enemy)	3	1	1.7	1
<b>85</b>	<b>Desertion</b>				
	Terminated by apprehension	10	2	6.17	6.09
	Terminated otherwise	2	0.17	4	2.09
<b>86</b>	<b>Absence without leave</b>				
	Failing to go to, or going from appointed place of duty	22	0	1	0.03
	Absence from unit, organization, or other place of duty				
	<i>Not more than 3 days</i>	4	0	1	0.3
	<i>More than 3, not more than 30 days</i>	22	0	3	0.49
	<i>More than 30 days</i>	12	0	4.03	0.67
	<i>More than 30 days and terminated by apprehension</i>	9	0.33	3.5	1.5
<b>87</b>	<b>Missing movement; jumping from vessel</b>				
	Missing movement through design	3	0	3	1
<b>87a</b>	<b>Resistance, flight, breach of arrest, and escape</b>				
	Resisting apprehension	8	0	7	0.47
	Flight from apprehension	3	0	2	1.5
	Escape from custody, pretrial confinement, or confinement pursuant to Article 15	2	5	10	7.5

<b>87b</b>	<b>Offenses against correctional custody and restriction</b>				
	Breach of restriction	1	1	1	1
<b>89</b>	<b>Disrespect toward superior commissioned officer; assault of superior commissioned officer</b>				
	Disrespect toward superior commissioned officer				
	<i>In command</i>	3	0.17	1	1
	<i>In rank</i>	1	2.5	2.5	2.5
<b>90</b>	<b>Willfully disobeying superior commissioned officer</b>				
	Other than in time of war	49	0	6	1
<b>91</b>	<b>Insubordinate conduct toward warrant officer, noncommissioned officer, or petty officer</b>				
	Striking or assaulting superior noncommissioned or petty officer	1	1	1	1
	Contempt or disrespect to superior noncommissioned officer or petty officer	10	0.07	4.03	0.37
	Contempt or disrespect to other noncommissioned officer or petty officer	2	0.23	0.5	0.37
<b>92</b>	<b>Failure to obey order or regulation</b>				
	Violation of or failure to obey general order or regulation	54	0	8	0.8
	Violation of or failure to obey other lawful order	18	0	4	1
	Dereliction in the performance of duties				
	<i>Through neglect or culpable inefficiency</i>	3	0	0	0
	<i>Willful</i>	2	0.33	0.5	0.42
<b>93</b>	<b>Cruelty and maltreatment</b>	7	0.83	2.17	1
<b>93a</b>	<b>Prohibited activities with military recruit or trainee by person in position of special trust</b>	2	0.67	1	0.84
<b>105</b>	<b>Forgery</b>	2	1.33	1.5	1.42
<b>107</b>	<b>False official statements; false swearing</b>				
	False official statements	34	0	40	0.33
<b>108</b>	<b>Military property of U.S. — loss, damage, destruction, or wrongful disposition</b>				
	Selling or otherwise disposing				
	<i>Of a value of \$1,000 or less</i>	5	4	8	4
	<i>Of a value of more than \$1,000 or any firearm or explosive</i>	6	8	48	30
	Damaging, destroying, losing, or suffering to be lost, damaged, destroyed, sold, or wrongfully disposed - through neglect, of a value or damage of				
	<i>\$1,000 or less</i>	1	1.5	1.5	1.5
	<i>More than \$1,000</i>	5	0	6	0.5

<b>109</b>	<b>Property other than military property of U.S. — waste, spoilage, or destruction</b>				
	Wasting or spoiling, non-military property — real property valued at \$1,000 or less	1	0.7	0.7	0.7
	Damaging any property other than military property of the U.S.; inflicting damage of \$1,000 or less	2	0	0.67	0.34
	Destroying any property other than military property of the U.S. valued at \$1,000 or less	1	4.03	4.03	4.03
<b>111</b>	<b>Leaving scene of vehicle accident</b>	2	1.5	1.5	1.5
<b>112</b>	<b>Drunkenness and other incapacitation offenses</b>				
	Drunk on duty	1	1	1	1
	Incapacitation for duty from drunkenness or drug use	1	0	0	0
<b>112a</b>	<b>Wrongful use, possession, etc., of controlled substances</b>				
	Wrongful use, possession, manufacture, or introduction of controlled substance				
	<i>Amphetamine, cocaine, heroin, lysergic acid diethylamide, marijuana (except possession of less than 30 grams or use), methamphetamine, opium, phencyclidine, secobarbital, and Schedule I, II, and III controlled substances</i>	82	0	24	3
	<i>Marijuana (possession of less than 30 grams or use), phenobarbital, and Schedule IV and V controlled substances</i>	47	0	15	1
	Wrongful distribution, possession, manufacture, or introduction of controlled substance with intent to distribute, or wrongful importation or exportation of a controlled substance				
	<i>Amphetamine, cocaine, heroin, lysergic acid diethylamide, marijuana, methamphetamine, opium, phencyclidine, secobarbital, and Schedule I, II, and III controlled substances</i>	40	0	22	2.34
	<i>Phenobarbital and Schedule IV and V controlled substances</i>	1	0	0	0
<b>113</b>	<b>Drunken or reckless operation of a vehicle, aircraft, or vessel</b>				
	Resulting in personal injury	1	0.7	0.7	0.7
	No personal injury involved	28	0	5	0.1
<b>114</b>	<b>Endangerment offenses</b>	10	0.33	24	6.84
<b>115</b>	<b>Communicating threats</b>				
	Threats and false threats generally	21	0	18	1.5
<b>116</b>	<b>Riot or breach of peace</b>				
	Breach of peace	3	0.33	2	0.5
<b>117</b>	<b>Provoking speeches or gestures</b>	1	0.17	0.17	0.17
<b>118</b>	<b>Murder</b>				
	Article 118 (2) or (3)	1	LWOP	LWOP	LWOP

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<b>119</b>	<b>Manslaughter</b>				
	Involuntary manslaughter	1	27	27	27
<b>119b</b>	<b>Child endangerment</b>				
	Endangerment by design resulting in harm	1	3	3	3
	Other cases by culpable negligence	1	9	9	9
<b>120</b>	<b>Rape and sexual assault generally</b>				
	Rape	2	96	252	174
	Sexual assault	27	0	72	18
	Abusive sexual contact	24	0	36	6
<b>120b</b>	<b>Rape and sexual assault of a child</b>				
	Sexual assault of a child	14	18	432	252
	Sexual abuse of a child				
	<i>Cases involving sexual contact</i>	20	3	144	100.5
	<i>Other cases</i>	14	2	96	12.5
<b>120c</b>	<b>Other Sexual Misconduct</b>				
	Indecent recording	3	1	18	2
<b>121</b>	<b>Larceny and wrongful appropriation</b>				
	Larceny				
	<i>Property of a value of \$1,000 or less</i>	45	0	9	1
	<i>Military property of a value of more than \$1,000 or of any military motor vehicle, aircraft, vessel, firearm, or explosive</i>	19	0.17	50	2.83
	<i>Property other than military property of a value of more than \$1,000 or any motor vehicle, aircraft, vessel, firearm, or explosive not included in d(1)(b)</i>	13	0	8	1.5
	Wrongful appropriation				
	<i>Of a value of \$1,000 or less</i>	1	7	7	7
	<i>Of any motor vehicle, aircraft, vessel, firearm, explosive, or military property of a value of more than \$1,000</i>	15	0	1.33	1
<b>121a</b>	<b>Fraudulent use of credit cards, debit cards, and other access devices</b>				
	To obtain property of a value of \$1,000 or less	5	0.17	3	3
<b>124</b>	<b>Frauds against the U.S.</b>				
	Article 124 (1) and (2)	1	0.17	0.17	0.17
	Article 124 (3) and (4)				
	<i>When amount is more than \$1,000</i>	1	1.33	1.33	1.33
<b>126</b>	<b>Arson; burning property with intent to defraud</b>				
	Simple arson, where property value is \$1,000 or less	2	0.1	1.5	0.8
<b>127</b>	<b>Extortion</b>	1	6	6	6

EXCERPT: Review of Recent Amendments to the Uniform Code of Military Justice and Sentencing Data Report

<b>128</b>	<b>Assault</b>				
	Simple assault				
	<i>Generally</i>	2	0.67	0.73	0.7
	<i>When committed with an unloaded firearm</i>	1	2.83	2.83	2.83
	Battery				
	<i>Assault consummated by battery</i>	65	0	6	1
	<i>Assault upon a commissioned officer of the armed forces of the U.S. or of a friendly foreign power, not in execution of office</i>	3	0.5	1.33	0.63
	<i>Assault upon noncommissioned or petty officer, not in execution of office</i>	2	0.5	0.63	0.57
	<i>Assault upon a sentinel or lookout in the execution of duty, or upon any person who, in the execution of office, is performing security police, military police, shore patrol, master at arms, or other military or civilian law enforcement duties</i>	12	0.47	36	1.5
	<i>Assault consummated by a battery upon a child under 16 years, spouse, intimate partner, or an immediate family member</i>	49	0	9	1.5
	Aggravated assault				
	<i>Aggravated assault with a dangerous weapon</i>				
	<i>When committed with a loaded firearm</i>	7	1.67	40	18
	<i>Other cases</i>	3	4.03	12	8
	<i>Aggravated assault in which substantial bodily harm is inflicted</i>				
	<i>When the injury is inflicted with a loaded firearm</i>	1	40	40	40
	<i>When the injury is inflicted upon a child under the age of 16 years, spouse, intimate partner, or an immediate family member</i>	6	1	18	8.5
	<i>Other cases</i>	5	1	6.03	2
	<i>Aggravated assault in which grievous bodily harm is inflicted</i>				
	<i>When the injury is inflicted upon a child under the age of 16 years, spouse, intimate partner, or an immediate family member</i>	2	14	25	19.5
	<i>Other cases</i>	2	0	1.5	0.75
	<i>Aggravated assault by strangulation/suffocation</i>				
	<i>Aggravated assault by strangulation</i>	8	0	12	4.5
<b>128b</b>	<b>Domestic violence</b>	14	0	6	4
<b>129</b>	<b>Burglary; unlawful entry</b>				
	Burglary (with intent to commit an offense punishable under Article 118-120, 120b-121, 122, 125-128a, or 130)	16	0	36	1.2
	Unlawful entry	4	0	54	3.5
<b>131b</b>	<b>Obstructing justice</b>	27	0	8	1.5
<b>133</b>	<b>Conduct unbecoming an officer and a gentleman</b>	8	2	6	3.5



EXCERPT: Review of Recent Amendments to the Uniform Code of Military Justice and Sentencing Data Report

<b>134</b>	<b>General Article</b>				
	Animal abuse				
	<i>Abuse, neglect, or abandonment of an animal</i>	1	6.33	6.33	6.33
	Child pornography				
	<i>Possessing, receiving, or viewing</i>	21	5	40	18
	<i>Distributing child pornography</i>	7	8	120	60
	<i>Producing child pornography</i>	6	10	288	72
	Debt, dishonorably failing to pay	5	0.17	0.17	0.17
	Disorderly conduct, drunkenness				
	<i>Disorderly conduct</i>				
	Under such circumstances as to bring discredit upon the military Service	2	1	1.5	1.25
	<i>Drunk and disorderly</i>				
	Under such circumstances as to bring discredit upon the military Service	11	0	2	0.33
	Extramarital sexual conduct	4	0	1.5	1
	Firearm, discharging—through negligence	2	0	0.33	0.17
	Fraternization	2	0	0.33	0.17
	Homicide, negligent	1	30	30	30
	Indecent conduct	5	1.5	9	1.5
	Indecent language				
	<i>Communicated to any child under the age of 16 yrs.</i>	1	2	2	2
	<i>Other cases</i>	7	0.7	2	1.5
	Pandering and prostitution				
	<i>Prostitution and patronizing a prostitute</i>	3	0	4.03	0
	U.S. Code offense, non-capital	6	0	10	5.5

**MARINE CORPS**

<b>Art.</b>	<b>Offenses-Convicted</b>	<b># Convict.</b>	<b>MIN sentence (months)</b>	<b>MAX sentence (months)</b>	<b>Median sentence (months)</b>
<b>80</b>	<b>Attempts</b>	23	1	48	14
<b>81</b>	<b>Conspiracy</b>	8	2	18	4
<b>82</b>	<b>Soliciting commission of offenses</b>				
	Solicitation of all other offenses (not espionage; desertion; mutiny or sedition; or misbehavior before the enemy)	2	22	96	59
<b>86</b>	<b>Absence without leave</b>				
	Failing to go to, or going from appointed place of duty	13	0	1	0
	Absence from unit, organization, or other place of duty				
	<i>Not more than 3 days</i>	1	0	0	0
	<i>More than 3, not more than 30 days</i>	5	2	6	4
	<i>More than 30 days</i>	1	3.8	3.8	3.8
<b>87a</b>	<b>Resistance, flight, breach of arrest, and escape</b>				
	Resisting apprehension	1	4	4	4
	Flight from apprehension	1	5	5	5
<b>87b</b>	<b>Offenses against correctional custody and restriction</b>				
	Breach of restriction	2	0	1	0.5
<b>89</b>	<b>Disrespect toward superior commissioned officer; assault of superior commissioned officer</b>				
	Disrespect toward superior commissioned officer, in command	1	0.03	0.03	0.03
<b>90</b>	<b>Willfully disobeying superior commissioned officer</b>				
	Other than in time of war	7	0	6	4
<b>91</b>	<b>Insubordinate conduct toward warrant office, noncommissioned officer, or petty officer</b>				
	Contempt or disrespect to superior noncommissioned officer or petty officer	2	0.17	4.93	2.55
<b>92</b>	<b>Failure to obey order or regulation</b>				
	Violation of or failure to obey general order or regulation	33	0	18	4
	Violation of or failure to obey other lawful order	11	0	10	2.87
	Dereliction in performance of duties:				
	<i>Through neglect or culpable inefficiency resulting in death or grievous bodily harm</i>	1	3	3	3
	<i>Willful</i>	4	0	3	1.5
	<i>Willful dereliction of duty resulting in death or grievous bodily harm</i>	1	6	6	6
<b>95a</b>	<b>Disrespect toward sentinel or lookout</b>	4	0	0	0
<b>104a</b>	<b>Fraudulent enlistment, appointment, or separation</b>				
	Fraudulent enlistment or appointment	2	1	24	12.5

<b>105a</b>	<b>False or unauthorized pass offenses</b>				
	Possessing or using with intent to defraud or deceive, or making, altering, counterfeiting, tampering with, or selling	1	12	12	12
<b>107</b>	<b>False official statements; false swearing</b>				
	False official statements	16	0	18	2.5
<b>108</b>	<b>Military property of U.S. — loss, damage, destruction, or wrongful disposition</b>				
	Damaging, destroying, losing, or suffering to be lost, damaged, destroyed, sold, or wrongfully disposed				
	<i>Through neglect, of a value or damage of more than \$1,000</i>	1	0	0	0
	<i>Willfully, of a value or damage of \$1,000 or less</i>	2	6	6	6
<b>109</b>	<b>Property other than military property of U.S. — waste, spoilage, or destruction</b>				
	Wasting or spoiling, non-military property — real property of a value of \$1,000 or less	2	9	9	9
	Damaging any property other than military property of the U.S. of value of \$1,000 or less	2	0.03	0.03	0.03
<b>112a</b>	<b>Wrongful use, possession, etc. of controlled substances</b>				
	Wrongful use, possession, manufacture, or introduction of controlled substance				
	<i>Amphetamine, cocaine, heroin, lysergic acid diethylamide, marijuana (except possession of less than 30 grams or use), methamphetamine, opium, phencyclidine, secobarbital, and Schedule I, II, and III controlled substances</i>	60	0	30	3
	<i>Marijuana (possession of less than 30 grams or use), phenobarbital, and Schedule IV and V controlled substances</i>	19	0	14	3.33
	Wrongful distribution, possession, manufacture, or introduction of controlled substance with intent to distribute, or wrongful importation or exportation of a controlled substance				
	<i>Amphetamine, cocaine, heroin, lysergic acid diethylamide, marijuana, methamphetamine, opium, phencyclidine, secobarbital, and Schedule I, II, and III controlled substances</i>	45	0.83	30	11
<b>113</b>	<b>Drunken or reckless operation of a vehicle, aircraft, or vessel</b>				
	Resulting in personal injury	2	0	6	3
	No personal injury involved	4	1	6	3.1
<b>114</b>	<b>Endangerment offenses</b>	3	4	12	5
<b>115</b>	<b>Communicating threats</b>				
	Threats and false threats generally	5	2	9	6
<b>116</b>	<b>Riot or breach of peace</b>				
	Breach of the peace	1	1	1	1

<b>117</b>	<b>Provoking speeches or gestures</b>	1	2.87	2.87	2.87
<b>117a</b>	<b>Wrongful broadcast or distribution of intimate visual images</b>	1	6	6	6
<b>119</b>	<b>Manslaughter</b>				
	Involuntary manslaughter	2	54	69	61.5
<b>119b</b>	<b>Child endangerment</b>				
	Other cases by culpable negligence	1	6	6	6
<b>120</b>	<b>Rape and sexual assault generally</b>				
	Rape	1	72	72	72
	Sexual Assault	5	15	28	18
	Abusive Sexual Contact	2	6	6	6
<b>120b</b>	<b>Rape and sexual assault of a child</b>				
	Rape of a Child	1	180	180	180
	Sexual Assault of a Child	7	24	96	96
	Sexual Abuse of a Child				
	<i>Cases Involving Sexual Contact</i>	7	96	96	96
	<i>Other Cases</i>	1	24	24	24
<b>120c</b>	<b>Other sexual misconduct</b>				
	Indecent recording	4	12	12	12
<b>121</b>	<b>Larceny and wrongful appropriation</b>				
	Larceny				
	<i>Property of a value of \$1,000 or less</i>	4	0	6	6
	<i>Military property of a value of more than \$1,000 or of any military motor vehicle, aircraft, vessel, firearm, or explosive</i>	6	0.47	3.33	2
	<i>Property other than military property of a value of more than \$1,000 or any motor vehicle, aircraft, vessel, firearm, or explosive not included in d(1)(b)</i>	1	18	18	18
<b>121a</b>	<b>Fraudulent use of credit cards, debit cards, and other access devices</b>				
	To obtain property during any 1 year period the aggregate value of which is greater than \$1,000	3	0	5.33	2.1
<b>123</b>	<b>Offenses concerning government computers</b>				
	Unauthorized access of a Government computer and obtaining classified or other protected information	1	3.33	3.33	3.33
<b>124</b>	<b>Frauds against the U.S.</b>				
	Article 124 (3) and (4)				
	<i>When amount is more than \$1,000</i>	2	3.33	3.33	3.33
<b>127</b>	<b>Extortion</b>	1	6	6	6

EXCERPT: Review of Recent Amendments to the Uniform Code of Military Justice and Sentencing Data Report

<b>128</b>	<b>Assault</b>				
	Simple assault				
	<i>Generally</i>	1	3	3	3
	Battery				
	<i>Assault consummated by battery</i>	28	0	6	3.17
	<i>Assault upon noncommissioned or petty officer, not in execution of office</i>	1	0	0	0
	<i>Assault upon a sentinel or lookout in the execution of duty, or upon any person who, in the execution of office, is performing security police, military police, shore patrol, master at arms, or other military or civilian law enforcement duties</i>	4	2.87	5	3
	<i>Assault consummated by a battery upon a child under 16 years, spouse, intimate partner, or an immediate family member</i>	9	6	12	6
	Aggravated assault				
	<i>Aggravated assault with a dangerous weapon</i>				
	When committed upon a child under the age of 16 years, spouse, intimate partner, or an immediate family member	1	30	30	30
	<i>Aggravated assault in which substantial bodily harm is inflicted</i>				
	Other cases (not when the injury is inflicted with a loaded firearm or when the injury is inflicted upon a child under the age of 16 years, spouse, intimate partner, or an immediate family member)	3	18	36	18
	<i>Aggravated assault in which grievous bodily harm is inflicted</i>				
	When the injury is inflicted with a loaded firearm	1	6	6	6
	When the injury is inflicted upon a child under the age of 16 years, spouse, intimate partner, or an immediate family member	2	10	24	17
	Other cases	1	5	5	5
	<i>Aggravated assault by strangulation/suffocation</i>				
	Aggravated assault by strangulation	4	6	24	9
<b>128b</b>	<b>Domestic violence</b>	<b>2</b>	<b>5</b>	<b>13</b>	<b>9</b>
<b>129</b>	<b>Burglary; unlawful entry</b>				
	Burglary (with intent to commit any offense other than under Article 118-120, 120b-121, 122, 125-128a, or 130 of the UCMJ)	1	2	2	2
	Unlawful entry	4	1	3	3
<b>131b</b>	<b>Obstructing justice</b>	<b>10</b>	<b>1.5</b>	<b>14</b>	<b>5</b>

EXCERPT: Review of Recent Amendments to the Uniform Code of Military Justice and Sentencing Data Report

<b>134</b>	<b>General Article</b>				
	Child pornography				
	<i>Possessing, receiving, or viewing</i>	7	13	36	24
	<i>Distributing child pornography</i>	1	43	43	43
	<i>Producing child pornography</i>	2	46	48	47
	Disorderly conduct, drunkenness				
	<i>Disorderly conduct</i>				
	Under such circumstances as to bring discredit upon the military Service	1	1	1	1
	<i>Drunk and disorderly</i>				
	Under such circumstances as to bring discredit upon the military Service	3	1	4	3
	Extramarital sexual conduct	7	0	12	10
	Firearm, discharging—through negligence	3	1	3	3
	Homicide, negligent	2	12	12	12
	Indecent conduct	1	4	4	4
	Pandering and prostitution				
	<i>Prostitution and patronizing a prostitute</i>	1	1	1	1
	U.S. Code offense, non-capital	20	0	18	7

## NAVY

Art.	Offenses-Convicted	# Convict.	MIN sentence (months)	MAX sentence (months)	Median sentence (months)
<b>80</b>	<b>Attempts</b>	11	0	36	6
<b>81</b>	<b>Conspiracy</b>	9	1	24	8
<b>82</b>	<b>Soliciting commission of offenses</b>				
	Solicitation of all other offenses (not espionage; desertion; mutiny or sedition; or misbehavior before the enemy)	6	0	36	0.92
<b>83</b>	<b>Malingering</b>				
	Feigning illness, physical disablement, mental lapse, or mental derangement (Other than in time of war)	1	1.17	1.17	1.17
<b>85</b>	<b>Desertion</b>				
	Terminated by apprehension	1	3.13	3.13	3.13
<b>86</b>	<b>Absence without leave</b>				
	Failing to go to, or going from appointed place of duty	2	0	0.67	0.34
	Absence from unit, organization, or other place of duty				
	<i>Not more than 3 days</i>	2	0	1	0.5
	<i>More than 3, not more than 30 days</i>	7	0.23	6	1
	<i>More than 30 days</i>	2	1.17	2.1	1.64
	<i>More than 30 days and terminated by apprehension</i>	2	1.4	2.7	2.05
<b>87</b>	<b>Missing movement; jumping from vessel</b>				
	Missing movement				
	<i>Through design</i>	3	1.8	3	1.8
	<i>Through neglect</i>	5	0.1	2.7	0.23
<b>87b</b>	<b>Offenses against correctional custody and restriction</b>				
	Breach of restriction	2	0.53	1	0.77
<b>90</b>	<b>Willfully disobeying superior commissioned officer</b>				
	Other than in time of war	2	0	1.17	0.59
<b>91</b>	<b>Insubordinate conduct toward warrant office, noncommissioned officer, or petty officer</b>				
	Willfully disobeying the lawful order of a noncommissioned officer or petty officer	1	1	1	1
<b>92</b>	<b>Failure to obey order or regulation</b>				
	Violation of or failure to obey general order or regulation	14	0	3.07	1.5
	Violation of or failure to obey other lawful order	3	1.17	6	2
	Dereliction in the performance of duties				
	<i>Willful</i>	1	1	1	1

<b>95</b>	<b>Offenses by Sentinel or lookout</b>				
	Drunk or sleeping on post, or leaving post before being relieved				
	<i>In all other places, not in time of war or while receiving special pay under 37 USC 310</i>	1	0.5	0.5	0.5
<b>107</b>	<b>False official statements; false swearing</b>				
	False official statements	7	0.33	6	1.7
<b>108</b>	<b>Military property of U.S. — loss, damage, destruction, or wrongful disposition</b>				
	Damaging, destroying, losing, or suffering to be lost, damaged, destroyed, sold, or wrongfully disposed - willfully, of a value or damage \$1,000 or less	1	1	1	1
<b>109</b>	<b>Property other than military property of U.S. — waste, spoilage, or destruction</b>				
	Damaging any property other than military property of the U.S. of a value \$1,000 or less	1	3	3	3
<b>109a</b>	<b>Mail matter: Wrongful taking, opening, etc.</b>	6	1	1	1
<b>112a</b>	<b>Wrongful use, possession, etc., of controlled substances</b>				
	Wrongful use, possession, manufacture, or introduction of controlled substance				
	<i>Amphetamine, cocaine, heroin, lysergic acid diethylamide, marijuana (except possession of less than 30 grams or use), methamphetamine, opium, phencyclidine, secobarbital, and Schedule I, II, and III controlled substances</i>	61	0	18	3.33
	<i>Marijuana (possession of less than 30 grams or use), phenobarbital, and Schedule IV and V controlled substances</i>	23	0	4	1
	Wrongful distribution, possession, manufacture, or introduction of controlled substance with intent to distribute, or wrongful importation or exportation of a controlled substance				
	<i>Amphetamine, cocaine, heroin, lysergic acid diethylamide, marijuana, methamphetamine, opium, phencyclidine, secobarbital, and Schedule I, II, and III controlled substances</i>	33	1.73	36	7
<b>113</b>	<b>Drunken or reckless operation of a vehicle, aircraft, or vessel</b>				
	No personal injury involved	4	0	4	1.09
<b>114</b>	<b>Endangerment offenses</b>	1	3.7	3.7	3.7
<b>115</b>	<b>Communicating threats</b>				
	Threats and false threats generally	1	2	2	2
<b>117a</b>	<b>Wrongful broadcast or distribution of intimate visual images</b>	3	1.33	4.67	1.33
<b>120</b>	<b>Rape and sexual assault generally</b>				
	Abusive sexual contact	1	12	12	12



EXCERPT: Review of Recent Amendments to the Uniform Code of Military Justice and Sentencing Data Report

<b>120c</b>	<b>Other sexual misconduct</b>				
	Indecent viewing	1	9	9	9
	Indecent recording	2	12	12	12
<b>121</b>	<b>Larceny and wrongful appropriation</b>				
	Larceny				
	<i>Property of a value of \$1,000 or less</i>	10	0	12	12
	<i>Military property of a value of more than \$1,000 or of any military motor vehicle, aircraft, vessel, firearm, or explosive</i>	2	2	6	4
	Wrongful appropriation				
	<i>Of a value of more than \$1,000</i>	1	0	0	0
<b>121a</b>	<b>Fraudulent use of credit cards, debit cards, and other access devices</b>				
	To obtain property of a value of \$1,000 or less	2	12	12	12
	To obtain property during any 1 year period the aggregate value of which is greater than \$1,000	2	9	10	9.5
<b>128</b>	<b>Assault</b>				
	Simple assault				
	<i>Generally</i>	2	1	3	2
	Battery				
	<i>Assault consummated by a battery</i>	12	0	6	3
	<i>Assault upon commissioned officer of the armed forces of the U.S. or of a friendly foreign power, not in execution of office</i>	1	0	0	0
	<i>Assault consummated by a battery upon a child under 16 years, spouse, intimate partner, or an immediate family member</i>	7	0.37	10	10
	Aggravated assault				
	<i>Aggravated assault with a dangerous weapon</i>				
	When committed with a loaded firearm	1	1	1	1
	Other cases	2	3	12	7.5
	<i>Aggravated assault in which substantial bodily harm is inflicted</i>				
	Other cases (not when the injury is inflicted with a loaded firearm or when the injury is inflicted upon a child under the age of 16 years, spouse, intimate partner, or an immediate family member)	1	24	24	24
	<i>Aggravated assault by strangulation/suffocation</i>				
	Aggravated assault by strangulation	1	7	7	7
<b>129</b>	<b>Burglary; unlawful entry</b>				
	Unlawful entry	4	0	6	4
<b>131b</b>	<b>Obstructing justice</b>	3	0.33	9	2
<b>133</b>	<b>Conduct unbecoming an officer and a gentleman</b>	2	0	2	1

EXCERPT: Review of Recent Amendments to the Uniform Code of Military Justice and Sentencing Data Report

<b>134</b>	<b>General Article</b>				
	Child pornography				
	<i>Possessing, receiving, or viewing</i>	7	19	60	20
	<i>Distributing child pornography</i>	1	20	20	20
	Disorderly conduct, drunkenness				
	<i>Drunk and disorderly</i>				
	Under such circumstances as to bring discredit upon the military Service	4	0	3	2.5
	Firearm, discharging—through negligence	2	2.5	3	2.75
	Indecent language				
	<i>Other cases</i>	2	2.5	6	4.25
	Pandering and prostitution				
	<i>Prostitution and patronizing a prostitute</i>	1	0	0	0
	U.S. Code offense, non-capital	2	1.5	1.5	1.5

**AIR FORCE**

<b>Art.</b>	<b>Offenses-Convicted</b>	<b># Convict.</b>	<b>MIN sentence (months)</b>	<b>MAX sentence (months)</b>	<b>Median sentence (months)</b>
<b>80</b>	<b>Attempt</b>	15	0.5	120	12
<b>81</b>	<b>Conspiracy</b>	2	0.5	12	6.25
<b>82</b>	<b>Soliciting commission of offenses</b>				
	Solicitation of all other offenses (not espionage; desertion; mutiny or sedition; or misbehavior before the enemy)	5	0	96	1
<b>86</b>	<b>Absence without leave</b>				
	Failing to go to, or going from appointed place of duty	7	0	1	0.17
	Absence from unit, organization, or other place of duty				
	<i>Not more than 3 days</i>	4	0.07	1	0.62
	<i>More than 3, not more than 30 days</i>	3	3	4.5	3
	<i>More than 30 days and terminated by apprehension</i>	1	1.47	1.47	1.47
<b>87a</b>	<b>Resistance, flight, breach of arrest, and escape</b>				
	Resisting apprehension	1	4	4	4
	Flight from apprehension	1	0	0	0
<b>87b</b>	<b>Offenses against correctional custody and restriction</b>				
	Breach of restriction	2	0.67	1	0.84
<b>89</b>	<b>Disrespect toward superior commissioned officer; assault of superior commissioned officer</b>				
	Disrespect toward superior commissioned officer				
	<i>In command</i>	2	0.67	0.83	0.75
	<i>In rank</i>	2	0.5	2	1.25
<b>90</b>	<b>Willfully disobeying superior commissioned officer</b>				
	Other than in time of war	6	1	6	1.5
<b>92</b>	<b>Failure to obey order or regulation</b>				
	Violation of or failure to obey general order or regulation	5	0.63	6	1
	Violation of or failure to obey other lawful order	14	0	5	1
	Dereliction in the performance of duties				
	<i>Through neglect or culpable inefficiency</i>	4	0.5	1.5	0.75
	<i>Willful</i>	14	0	5	1
<b>93a</b>	<b>Prohibited activities with military recruit or trainee by person in position of special trust</b>	1	3	3	3
<b>104a</b>	<b>Fraudulent enlistment, appointment, or separation</b>				
	Fraudulent enlistment or appointment	1	3	3	3
<b>107</b>	<b>False official statements; false swearing</b>				
	False official statements	15	0	4	1
	False swearing	1	0	0	0

<b>109</b>	<b>Property other than military property of U.S. — waste, spoilage, or destruction</b>				
	Damaging any property other than military property of the U.S. of \$1,000 or less	5	0.33	1.5	1
<b>111</b>	<b>Leaving scene of vehicle accident</b>	3	0	1.23	1
<b>112a</b>	<b>Wrongful use, possession, etc., of controlled substances</b>				
	Wrongful use, possession, manufacture, or introduction of a controlled substance				
	<i>Amphetamine, cocaine, heroin, lysergic acid diethylamide, marijuana (except possession of less than 30 grams or use), methamphetamine, opium, phencyclidine, secobarbital, and Schedule I, II, and III controlled substances</i>	128	0	12	2
	<i>Marijuana (possession of less than 30 grams or use), phenobarbital, and Schedule IV and V controlled substances</i>	46	0	7	1
	Wrongful distribution, possession, manufacture, or introduction of controlled substance with intent to distribute, or wrongful importation or exportation of a controlled substance				
	<i>Amphetamine, cocaine, heroin, lysergic acid diethylamide, marijuana, methamphetamine, opium, phencyclidine, secobarbital, and Schedule I, II, and III controlled substances</i>	29	0.17	12	3
<b>113</b>	<b>Drunken or reckless operation of a vehicle, aircraft, or vessel</b>				
	Resulting in personal injury	1	0.5	0.5	0.5
	No personal injury involved	8	0	5	0.67
<b>114</b>	<b>Endangerment offenses</b>	3	0	9	1
<b>115</b>	<b>Communicating threats</b>				
	Threats and false threats generally	15	1	36	3
<b>116</b>	<b>Riot or breach of peace</b>				
	Breach of peace	1	2	2	2
<b>117a</b>	<b>Wrongful broadcast or distribution of intimate visual images</b>	2	2	3	2.5
<b>119b</b>	<b>Child endangerment</b>				
	Endangerment by culpable negligence resulting in harm	1	6	6	6
<b>120b</b>	<b>Rape and sexual assault of a child</b>				
	Sexual Abuse of a Child				
	<i>Cases Involving Sexual Contact</i>	2	48	72	60
	<i>Other Cases</i>	3	24	48	48
<b>120c</b>	<b>Other sexual misconduct</b>				
	Indecent recording	10	2	50	18
	Broadcasting or distributing of an indecent recording	1	2	2	2

<b>121</b>	<b>Larceny and wrongful appropriation</b>				
	Larceny				
	<i>Property of a value of \$1,000 or less</i>	6	0.13	4	0.42
	<i>Military property of a value of more than \$1,000 or of any military motor vehicle, aircraft, vessel, firearm, or explosive</i>	1	2.5	2.5	2.5
	<i>Property other than military property of a value of more than \$1,000 or any motor vehicle, aircraft, vessel, firearm, or explosive not included in d(1)(b)</i>	2	46	46	46
<b>123a</b>	<b>Making, drawing, or uttering check, draft, or order without sufficient funds</b>				
	For the procurement of any article or thing of value, with intent to defraud, in the face amount of				
	<i>\$1,000 or less</i>	21	6	6	6
	<i>More than \$1,000</i>	22	6	46	18
<b>125</b>	<b>Kidnapping</b>	1	24	24	24
<b>128</b>	<b>Assault</b>				
	Simple assault				
	<i>When committed with an unloaded firearm</i>	1	6	6	6
	Battery				
	<i>Assault consummated by a battery</i>	29	0	6	2
	<i>Assault upon a sentinel or lookout in the execution of duty, or upon any person who, in the execution of office, is performing security police, military police, shore patrol, master at arms, or other military or civilian law enforcement duties</i>	4	0.33	3	1.75
	<i>Assault consummated by a battery upon a child under 16 years, spouse, intimate partner, or immediate family member</i>	13	1	24	3
	Aggravated assault				
	<i>Aggravated assault with a dangerous weapon</i>				
	<i>When committed with a loaded firearm</i>	1	4.33	4.33	4.33
	<i>When committed upon a child under the age of 16 years, spouse, intimate partner, or an immediate family member</i>	1	36	36	36
	<i>Aggravated assault in which grievous bodily harm is inflicted</i>				
	<i>Other cases (not when the injury is inflicted with a loaded firearm or when the injury is inflicted upon a child under the age of 16 years, spouse, intimate partner, or an immediate family member)</i>	2	22	22	22
	<i>Aggravated assault by strangulation/suffocation</i>				
	<i>Aggravated assault by strangulation</i>	1	11	11	11
<b>128b</b>	<b>Domestic violence</b>	14	0.33	6	2.67
<b>129</b>	<b>Burglary; unlawful entry</b>				
	Unlawful entry	3	3	4	4

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<b>131b</b>	<b>Obstructing justice</b>	9	0	12	6
<b>133</b>	<b>Conduct unbecoming an officer and a gentleman</b>	5	0	0.33	0.33
<b>134</b>	<b>General article</b>				
	Child pornography				
	<i>Possessing, receiving, or viewing</i>	5	3	72	13
	<i>Distributing child pornography</i>	1	36	36	36
	Disorderly conduct, drunkenness				
	<i>Drunk and disorderly</i>				
	Under such circumstances as to bring discredit upon the military Service	3	0.33	1	0.7
	Other cases (not when aboard ship or under such circumstances as to bring discredit upon the military Service)	2	2	3	2.5
	Extramarital sexual conduct	6	2	8	2.5
	Fraternization	3	1	2	2
	Indecent conduct	2	5	6	5.5
	Pandering and prostitution				
	<i>Prostitution and patronizing a prostitute</i>	3	4	4	4
	U.S. Code offense, non-capital	2	0.23	36	18.12
	Novel (Other)	4	0.7	4	2.25

## COAST GUARD

Art.	Offenses-Convicted	# Convict.	MIN sentence (months)	MAX sentence (months)	Median sentence (months)
<b>86</b>	<b>Absence without leave</b>				
	Failing to go to, or going from the appointed place of duty	1	0.17	0.17	0.17
<b>90</b>	<b>Willfully disobeying superior commissioned officer</b>				
	Other than in time of war	2	4	4	4
<b>92</b>	<b>Failure to obey order or regulation</b>				
	Violation of or failure to obey general order or regulation	1	0	0	0
	Dereliction in the performance of duties				
	<i>Willful</i>	2	3	3	3
<b>107</b>	<b>False official statements; False swearing</b>				
	False official statements	5	0.33	3	2
<b>112a</b>	<b>Wrongful use, possession, etc., of controlled substances</b>				
	Wrongful use, possession, manufacture, or introduction of controlled substance				
	<i>Amphetamine, cocaine, heroin, lysergic acid diethylamide, marijuana (except possession of less than 30 grams or use), methamphetamine, opium, phencyclidine, secobarbital, and Schedule I, II, and III controlled substances</i>	1	0	0	0
	<i>Marijuana (possession of less than 30 grams or use), phenobarbital, and Schedule IV and V controlled substances</i>	1	4	4	4
	Wrongful distribution, possession, manufacture, or introduction of controlled substance with intent to distribute, or wrongful importation or exportation of a controlled substance				
	<i>Amphetamine, cocaine, heroin, lysergic acid diethylamide, marijuana, methamphetamine, opium, phencyclidine, secobarbital, and Schedule I, II, and III controlled substances</i>	1	4	4	4
<b>120c</b>	<b>Other sexual misconduct</b>				
	Indecent recording	2	2	3	2.5
<b>128</b>	<b>Assault</b>				
	Battery				
	<i>Assault consummated by a battery</i>	1	4	4	4
<b>131b</b>	<b>Obstructing justice</b>	1	4	4	4
<b>134</b>	<b>General article</b>				
	Extramarital sexual conduct	1	3	3	3
	Firearm, discharging—through negligence	1	0.5	0.5	0.5
	Homicide, negligent	1	8	8	8
	U.S. Code offense, non-capital	2	3	3	3

# Appellate Review Study



## **I. Appellate Review Study**

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

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

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

## **II. Methodology**

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

To identify the relevant FY21 appellate decisions, the staff reviewed all decisions posted on the websites of the Courts of Criminal Appeals for each military service (CCAs) and the Court of Appeals for the Armed Forces (CAAF) published between October 1, 2020, and September 30, 2021, including rulings on writs and substantive motions. The staff identified 775 appellate decisions published during this time and the associated Entry of Judgment from trial to determine whether the case involved a conviction on a qualifying MSA offense. Qualified cases, including both contested trials and guilty pleas, were selected for further review.

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

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

<sup>3</sup> The CRSC members are Ms. Martha Bashford (Chair), Ms. Meg Garvin, Ms. Jennifer Gentile Long, and BGen (ret.) James Schwenk.

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

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

The staff reviewed all 212 appellate opinions from the CCAs and CAAF,<sup>7</sup> with some cases associated with more than one appellate opinion. For example, a case may have involved a writ petition, thus generating more than one appellate decision, or a case may have returned to the appellate court for a second review after a partial reversal. Some cases had two opinions: one published by the CCA and then a subsequent CAAF opinion. Accordingly, although the study involved 212 cases, the staff reviewed all 262 appellate opinions issued in those 212 cases.<sup>8</sup>

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

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

**Table 2. Appellate Opinions in FY21 MSA Cases**

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

<sup>5</sup> See *Transcript of DAC-IPAD Public Meeting 31* (June 21, 2022; *Transcript of DAC-IPAD Public Meeting 153* (June 22, 2022)).

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

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

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

### III. Descriptive Data from FY2021 Appellate Review

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

#### A. Descriptive Data for the 212 MSA Cases

**Table 3. MSA Cases with and without Guilty Pleas**

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

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

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

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

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

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

**Table 5. MSA Cases with Adult or Child Victims**

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

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

**Table 6. Guilty Pleas in MSA Adult Victim Cases**

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

**Table 7. Guilty Pleas in MSA Child Victim Cases**

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

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

## **B. Descriptive data from the 262 Appellate Court Opinions**

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

<sup>9</sup> 10 U.S.C. § 920b (Article 120b(h)(4), UCMJ) (2019)

<sup>10</sup> See generally 10 U.S.C. § 920b (Article 120b, UCMJ) (2019)

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

**Table 8. Form of CCA Decisions**

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

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

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

**Table 9. Statutory Authority for CCA Review**

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

The majority of the 262 decisions were reviewed at the CCAs pursuant to Article 66(b), UCMJ. Article 66(b) provides an automatic review by the CCA if the accused receives a punitive discharge, a confinement sentence of two years or more (including when the accused pled guilty),

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

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

<sup>14</sup> *Id.*

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

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

- Whether the military judge abused their discretion in denying the government's motion to admit the accused's testimony from his prior court-martial.<sup>18</sup>
- Whether the military judge erred in declaring a mistrial owing to cumulative error, including a determination by the military judge that a panel member was selected despite implied bias.<sup>19</sup>
- Whether the military judge erred in suppressing DNA evidence that resulted from a search and seizure.<sup>20</sup>
- Whether the military judge erred in granting the appellant's motion to dismiss for a violation of the right to a speedy trial.<sup>21</sup>

In all but one interlocutory appeal, the government prevailed at the CCA and at CAAF.<sup>22</sup>

**Table 10. Dispositions at CCAs and CAAF**

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

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

<sup>16</sup> Article 66(b)(1), UCMJ (2021).

<sup>17</sup>Article 56(d)(1), UCMJ (2021).

<sup>18</sup> *United States v. Pyron*, No. 201900296R, 2022 WL 2764366, at \*5 (N-M. Ct. Crim. App. Jul. 15, 2022) (holding that previous trial testimony should have been admitted and that the military judge's conclusions of law were erroneous).

<sup>19</sup> *United States v. Badders*, Army MISC 20200735, 2021 WL 4498674, at \*16 (A. Ct. Crim. App. Sept. 30, 2021) (holding that military judge abused discretion in post-trial finding of implied bias and in declaring mistrial based on cumulative error).

<sup>20</sup> *United States v. Garcia*, 80 M.J. 379, 389 (C.A.A.F. 2020) (holding that military judge abused discretion in suppressing evidence from search).

<sup>21</sup> *United States v. Harrington*, 81 M.J. 184, 191 (C.A.A.F 2021) (dismissing charge and specification with prejudice where service member's Sixth Amendment right to speedy trial was violated).

<sup>22</sup> *Id.*

The court affirmed the findings and sentence in 175 (67%) of the 262 appellate decisions reviewed. In 20 cases (8%), the appellate court set aside the findings and the sentence.<sup>23</sup> In 31 cases (12%), the findings were set aside in part, and the sentence was set aside or reassessed. In 10 cases (4%), the appellate court adjusted the sentence but not the findings.<sup>24</sup> The final category of dispositions, “other,” includes 26 cases (10%) with decisions that did not alter the findings or sentence but affected the case in some other way, including dismissals owing to a lack of jurisdiction, new trial orders, remands, and cases in which the Record of Trial was returned to the military judge or convening authority for correction.

#### **IV. Assessment of FY21 Appellate Issues**

For this study, the DoD GC specifically requested that the DAC-IPAD “focus on recurring appellate issues.”<sup>25</sup> For the 262 appellate decisions reviewed, the following five specific issues recurred with the highest frequency: (1) factual sufficiency; (2) post-trial processing and delay; (3) evidentiary issues; (4) prosecutorial misconduct or ineffective assistance of counsel; and (5) panel member selection.<sup>26</sup> The following section describes these errors, including a review of significant cases and data on the frequency with which error was found and relief was granted.

##### **A. Factual Sufficiency**

In FY21, one of the top recurring appellate issues at the CCAs was factual sufficiency.<sup>27</sup> Factual sufficiency review will be impacted by a recent legislative change affecting the appellate courts.

##### *The “Old” Article 66 Factual Sufficiency Standard of Review*

Before the FY21 NDAA amendments to Article 66, UCMJ, CCAs were required to review every case for the factual sufficiency of every conviction.<sup>28</sup> CCAs had plenary statutory authority to conduct a de novo review of the court-martial record, pursuant to Article 66, which provided that the CCAs

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<sup>23</sup> The findings set aside were not limited to sexual assault offenses but included all offenses in the MSA cases.

<sup>24</sup> In the majority of these cases, the sentence was adjusted to remedy post-trial processing delay.

<sup>25</sup> The memorandum did not define the term “recurring issues.” There may be “recurring” appellate issues that are briefed by the parties but not reported here, if the courts chose not to discuss those specific issues, decided the appeal by summary affirmance, or denied a petition for discretionary review. Finally, there were no appellate decisions on writ petitions filed by victims’ counsel in the FY21 cases, and none of the opinions indicated that they considered arguments made by victims’ counsel on appeal.

<sup>26</sup> The professional staff identified every issue discussed by the CCA and CAAF in their opinions, regardless whether relief was granted. After reviewing all 262 appellate decisions, the staff identified 33 appellate issues. The five issues most often discussed were factual and legal insufficiency (58); post-trial processing errors, including post-trial delay (70); ineffective assistance of counsel (33); and problems with various Military Rules of Evidence (50). Other frequently recurring appellate issues included instructional error, sentence inappropriateness, panel member selection, and prosecutorial misconduct. Among the CAAF decisions, the recurring issues differed slightly. While ineffective assistance of counsel, prosecutorial misconduct, and problems with Military Rules of Evidence also were addressed at CAAF, other recurring issues included whether issues not raised at trial were waived (6); guilty pleas and pretrial agreements (6); and jurisdiction (5).

<sup>27</sup> *Supra* note X.

<sup>28</sup> Report of the Military Justice Review Group, Part I: UCMJ Recommendations, Military Justice Review Group 610 (Dec. 22, 2015) [MJRG Report].

may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as the Court finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, the Court may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.<sup>29</sup>

For decades, the CCAs' broad power of factual sufficiency review was reaffirmed through case law at CAAF and its predecessor, the Court of Military Appeals.<sup>30</sup> Under this "old" Article 66 standard of review, the CCA determined, after weighing all of the evidence in the record of trial and making allowances for not having personally heard or seen the witnesses, that it was convinced of the accused's guilt beyond a reasonable doubt.<sup>31</sup>

#### *The "New" Article 66 Factual Sufficiency Standard of Review*

In the FY21 NDAA, Congress amended Article 66 to modify the scope of the CCA's power to review the factual sufficiency of a court-martial.<sup>32</sup> For findings of guilt entered on or after January 1, 2021, the language of Article 66 now provides, in relevant part, that the CCA may consider

whether the finding is correct in fact upon request of the accused if the accused makes a specific showing of a deficiency of proof. After an accused has made such a showing, the Court may weigh the evidence and determine controverted questions of fact subject to—

(I) appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence; and

(II) appropriate deference to findings of fact entered into the record by the military judge.

If, as a result of the review . . . , the Court is clearly convinced that the finding of guilty was against the weight of the evidence, the Court may dismiss, set aside, or modify the finding, or affirm a lesser finding.<sup>33</sup>

The Military Justice Review Group (MRJG) proposed these changes to Article 66 in its December 2015 Report<sup>34</sup> recommending that instead of requiring the CCA to review every conviction for factual sufficiency, the burden should be on the accused to raise the issue of factual sufficiency and to make a specific showing of deficiencies in proof.<sup>35</sup> Upon such a showing, the CCA would be authorized to set aside a finding if the court was clearly convinced

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<sup>29</sup> Excerpt from 10 U.S.C. § 866(d)(1) as in effect for findings of guilt entered before January 1, 2021.

<sup>30</sup> Walter B. Huffman, Richard D. Rosen, Military Law: Criminal Justice & Administrative Process § 11:14, 1675 (2018-19 ed.).

<sup>31</sup> CPT Christian L. Reismeier, Commentary: Awesome, Plenary, and De Novo: Appellate Review of Courts-Martial 27 Fed. Sent. R. 143 (Feb 2015).

<sup>32</sup> Pub. L. 116-283, div. A, title V, § 542(b) Jan. 1, 2021 amended subsec. (d)(1) generally.

<sup>33</sup> 10 U.S.C. § 866(d)(1).

<sup>34</sup> *Supra* note X, [MJRG Report] at 605-620.

<sup>35</sup> *Id.* at 610.



that the finding was against the weight of the evidence. Under the MJRG proposal, the CCA would weigh the evidence and determine controverted questions of fact, but it would be required to give deference to the fact that the trial court saw and heard the witnesses and other evidence.<sup>36</sup>

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

#### *Assessment of FY21 Appellate Opinions Discussing Factual Sufficiency*

This study identified 58 cases in which the CCA discussed the factual sufficiency of a finding of guilty in its written opinion. In these 58 cases, the CCA applied the old Article 66 standard as the findings of guilt were entered before the new standard took effect on January 1, 2021. Thus, the CCA had plenary authority to affirm only such findings of guilty as it found correct in law and fact and as it determined, on the basis of the entire record, should be approved.<sup>37</sup> Under the old Article 66 standard, the CCAs were required to review every case for the factual sufficiency of every conviction; however, not every CCA written opinion discussed a factual sufficiency review.

**Table 11. Factual Sufficiency Review at CCAs, FY21**

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

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

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

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

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

<sup>36</sup> *Id.*

<sup>37</sup> *Supra* note X.

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

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

Of the 58 cases in which the CCA discussed factual sufficiency, the CCA reversed one or more findings of guilty in 15 opinions. In 13 of those 15 opinions, the CCA affirmed at least one other conviction—and often multiple other findings of guilty—or affirmed a lesser-included offense, resulting in the CCA’s reassessment of the sentence or a decision to remand the case for a rehearing on the sentence for the remaining convictions.

For example, in one Army case, the CCA reversed the conviction for production of child pornography as factually insufficient but affirmed multiple other findings of guilty for aggravated sexual assault of a child, indecent liberties with child, indecent acts with a child, and sodomy of a child.<sup>38</sup> The Army CCA set aside the conviction for production of child pornography because the appellate judges were not convinced beyond a reasonable doubt that the appellant actually took the alleged photo at issue. At trial, the government failed to introduce evidence of a photo, and no witness testified that they ever saw a photo; the victim testified only that she “saw a flash.” In that case, the CCA affirmed the remaining convictions and reassessed the sentence to affirm a dishonorable discharge and confinement for 43 years.

In the two cases in which the CCA set aside and dismissed with prejudice all findings of guilty, the convictions were all sexual offenses. In those two cases, the court provided a detailed explanation of why the government’s evidence failed to convince it beyond a reasonable doubt that the appellant was guilty.<sup>39</sup> As the Navy-Marine Corps CCA explained in one opinion: “There is simply too much reasonable doubt associated with the evidence in this case. We are not charged with deciding ‘who to believe,’ but simply whether the Government proved its case beyond a reasonable doubt. It did not.”<sup>40</sup>

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<sup>38</sup> *United States v. Adams*, ARMY 20130693, 2020 WL 4001871 (A. Ct. Crim. App. Jul. 13, 2020), *rev’d in part on other grounds*, 81 M.J. 475 (C.A.A.F. 2021).

<sup>39</sup> *United States v. Gilpin*, No. 201900033, 2019 WL 7480783 (N-M. Ct. Crim. App. Dec. 30, 2019); *United States v. Lewis*, No. 201900049, 2020 WL 3047524 (N-M. Ct. Crim. App. June 8, 2020).

<sup>40</sup> *Gilpin*, 2019 WL 7480783, at \*15.

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

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

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

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

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

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

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

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

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

## B. Post-trial Processing and Delay

Post-trial processing errors were among the most frequently recurring issues discussed by the appellate courts. Many of the discussions grappled with recent legislative changes aimed at streamlining the process for memorializing the results of the trial and transferring the record of trial to the appellate courts.<sup>41</sup> These changes, introduced by the Military Justice Act of 2016 (MJA16), took effect on January 1, 2019, and apply to cases in which all offenses were committed on or after that date.<sup>42</sup>

Under the old procedural rules, the convening authority's action was the final step before a record of trial was forwarded to the CCA and the case was docketed. In *United States v. Moreno*, CAAF established a presumption of facially unreasonable delay where: the convening authority did not take action within 120 days of sentencing (*Moreno I*); the case was not docketed with the CCA within 30 days of the convening authority's action (*Moreno II*); or the CCA did not render a decision within 18 months of docketing (*Moreno III*).<sup>43</sup> In the years since *Moreno* was decided, the Services have reported a significant decrease in post-trial processing delays.<sup>44</sup>

The MJA16 changed the role of the convening authority in post-trial processing, eliminating the requirement that the convening authority take action on the sentence prior to entry of judgment. In fact, such action is now prohibited, except in limited circumstances.<sup>45</sup> Under the new procedural rules, the convening authority's action is not required in cases where all offenses were committed on or after January 1, 2019. Although CAAF has not yet addressed the issue,<sup>46</sup> the CCAs have adopted a new timeline in response to the changes, concluding that a presumptively unreasonable delay occurs where more than 150 days elapse between sentencing and docketing.<sup>47</sup>

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<sup>41</sup> REPORT OF THE MILITARY JUSTICE REVIEW GROUP, 558 (2015), available at <https://jsc.defense.gov/Portals/99/MJRG%20Part%201.pdf>.

<sup>42</sup> Military Justice Act of 2016, Pub. L. No. 114-328, §§ 5001-5542 (23 Dec. 2016), implemented in the 2019 Rules for Courts-Martial [R.C.M.] by Executive Order 13,825, 83 Fed. Reg. 9889 (8 Mar. 2018) [EO 13825].

<sup>43</sup> 63 M.J. 129, 142 (C.A.A.F. 2006).

<sup>44</sup> See Reports to Congress from the Services for FY18, FY19, FY20, and FY21, available at Joint Service Committee on Military Justice website: <https://jsc.defense.gov/Annual-Reports/>. See also *United States v. Rivera*, 81 M.J. 741, 744 (N-M. Ct. Crim. App. 2021) (noting that “[s]ince [*Moreno*], this Court has virtually eliminated *Moreno III* violations and the Navy and Marine Corps have done likewise with *Moreno I and II* violations”); *Transcript of DAC-IPAD Public Meeting* 206-08 (Sept. 21, 2022) (explaining that backlog of cases was cleared after CAAF issued *Moreno* decision).

<sup>45</sup> 10 U.S.C. § 860a (2018).

<sup>46</sup> See *United States v. Anderson*, 82 M.J. 82, 86 n.2 (C.A.A.F. 2022) (acknowledging that “the amendments to the 2017 National Defense Authorization Act and R.C.M. 1109-1112 of the 2019 Rules for Courts-Martial call into question the continued validity of the *Moreno* timelines,” but concluding resolution of the issue was not necessary to resolve appeal where charges were referred prior to effective dates of amendments).

<sup>47</sup> *United States v. Rivera*, 81 M.J. 741, 745-46 (N-M. Ct. Crim. App. 2021); *United States v. Brown*, 81 M.J. 507, 510 (A. Ct. Crim. App. 2021); *United States v. Livak*, 80 M.J. 631, 633 (A.F. Ct. Crim. App. 2020); *United States v. Tucker*, 82 M.J. 553, 570 (C.G. Ct. Crim. App. 2022).

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

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

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

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

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

The CCAs granted relief for post-trial delay in nine cases, remedying the delay in most cases with modest reductions to the sentence to confinement ranging from ten days to seven months.<sup>48</sup> In only one case did the CCA grant more substantial relief, setting aside the findings and sentence to remedy both post-trial delay amounting to a due process violation and the military judge's failure to conduct sufficient inquiry into alleged unlawful command influence.<sup>49</sup>

Most of the opinions discussing other post-trial processing issues addressed errors in the convening authority's action on the sentence in cases where all offenses were committed before January 1, 2019, but charges were referred after that date. The CCAs reached different conclusions as to whether, in those circumstances, a convening authority was required to explicitly state whether the sentence was approved, and in case of error in the action, whether the CCA had jurisdiction and was required to analyze for prejudice before remanding for corrective action.<sup>50</sup>

<sup>48</sup> All but two of the post-trial delay cases were subject to the *Moreno* standards.

<sup>49</sup> *United States v. Leal*, 81 M.J. 613, 624 (C.G. Ct. Crim. App. 2021).

<sup>50</sup> Compare *United States v. Brown*, No. ACM 39854, 2021 WL 3701691, at \*3 (A.F. Ct. Crim. App. Aug. 19, 2021) (holding that Service Court must remand for corrective action where convening authority's failure to take action on sentence fails to satisfy requirement of applicable Article 60, UCMJ), with *United States v. Hale*, ARMY 20190614, 2021 WL 2005916, at \*1 n.2 (A. Ct. Crim. App. May 19, 2021) (concluding that convening authority's error in failing to take action was neither jurisdictional nor prejudicial to substantial right of the accused).

In *United States v. Brubaker-Escobar*,<sup>51</sup> CAAF resolved these issues when it held that a convening authority errs by failing to take action to approve, disapprove, commute or suspend a sentence in whole or in part if the accused is found guilty of at least one offense committed before January 1, 2019. CAAF concluded the error is procedural rather than jurisdictional, at least where charges were referred after January 1, 2019, and the accused is not entitled to relief absent material prejudice to a substantial right of the accused.<sup>52</sup> Post-trial processing errors are unique in that the error is often plain, and the only issue the appellate court must decide is the appropriate remedy. In 24 cases, the CCAs granted relief for post-trial processing errors other than delay, including errors in the convening authority's action. In 16 of these cases, the relief granted did not affect the findings or sentence: the CCAs corrected scrivener's errors in post-trial documents, ordered the government to produce missing portions of the transcript of trial; or ordered a new post-trial processing or remanded the case to resolve an ambiguity in the convening authority's action. In most of the remaining cases, the CCAs disapproved a portion of the sentence due to ambiguity or errors in the convening authority's action on those portions of the sentence. The CCA set aside the findings and sentence in just one case, due to the absence of a substantially verbatim transcript of trial.

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

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

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

#### *Prosecutorial Misconduct*

Prosecutors, military or civilian, occupy a special role in military justice as the government's representative in the courtroom, and their actions can affect the fairness of the criminal justice process at any stage, whether during the investigative, charging, or adjudicative phases of a case.<sup>53</sup> Courts exercise some oversight over the prosecution function by remedying errors caused by prosecutorial misconduct—defined broadly as action or inaction by a prosecutor in violation of some legal norm or standard, such as a constitutional provision, a statute, a Manual rule, or an applicable professional ethics canon.<sup>54</sup>

<sup>51</sup> 81 M.J. 471, 474 (C.A.A.F. 2021).

<sup>52</sup> *Id.* at 475.

<sup>53</sup> *United States v. Hillman*, 621 F.3d 929, 1465 (10th Cir. 2011); *United States v. Carter*, 236 F.3d 777, 792-3v (6th Cir. 2001).

<sup>54</sup> *United States v. Meek*, 44 M.J. 1, 5 (C.A.A.F. 1996).

A prosecutor's arguments at trial amount to prosecutorial misconduct when the comments "overstep the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense."<sup>55</sup> In general, counsel may argue facts in evidence and reasonable inferences drawn from the evidence. However, when a prosecutor deliberately misstates the evidence in comments to the factfinder, attacks other parties to the case, or appeals overtly to the passions or prejudices of the factfinder, courts may identify and remedy the error. Reversal of the findings, or setting aside the sentence, may occur when the error negatively influences the appellant's rights under Article 59, UCMJ.<sup>56</sup> In the context of an improper argument, courts will reverse a finding only when "the trial counsel's comments taken as a whole, were so damaging that the court cannot be confident that the appellant was convicted or sentenced on the basis of the evidence alone."<sup>57</sup>

### *Overview of decisions reviewed*

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

### *Decisions finding error*

In *U.S. v. Norwood*, CAAF found counsel improperly vouched for the victim's veracity during argument, but when balanced against the weight of the evidence and the military judge's instructions, appellant was not prejudiced.<sup>58</sup> CAAF found that trial counsel's sentencing argument was inappropriate and prejudicial because it invited the panel members to adjudge a sentence based on how they might be judged in society for the sentence they assess in a sexual offense case, rather than on the evidence presented.<sup>59</sup> In setting aside the sentence and ordering a new sentence hearing, the Court explained, "an inflammatory hypothetical scenario with no basis in evidence amounts to improper argument that we have repeatedly, and quite recently, condemned," and likely contributed to a higher sentence than appellant might otherwise have received.<sup>60</sup>

### *Ineffective Assistance of Counsel*

The Sixth Amendment to the United States Constitution guarantees an accused the right to effective assistance of counsel.<sup>61</sup> This right applies to Service Members facing courts-martial.<sup>62</sup> Attorneys representing criminal defendants incur responsibilities to thoroughly investigate the facts and law; uphold a duty of loyalty to the client; and provide competent advice to a defendant

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<sup>55</sup> *United States v. Fletcher*, 62 M.J. 175, 178 (C.A.A.F. 2005).

<sup>56</sup> *Id.* at 179; 10 U.S.C. § 859.

<sup>57</sup> *United States v. Andrews*, 77 M.J. 393, 401-02 (C.A.A.F. 2018); *United States v. Halpin*, 71 M.J. 477, 480 (C.A.A.F. 2013).

<sup>58</sup> *United States v. Norwood*, 81 M.J. 12, 20-21 (C.A.A.F. 2021)

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> U.S. CONST. AMEND. VI; *Strickland v. Washington*, 466 U.S. 668, 688 (1984).

<sup>62</sup> *United States v. Gooch*, 69 M.J. 353, 361 (C.A.A.F. 2011); *United States v. Gilley*, 56 M.J. 113, 124 (C.A.A.F. 2001)

in furtherance of the exercise of their rights. Effective advocacy is essential to the reliability of and public confidence in the criminal justice process. On appeal, military courts evaluate defense counsel's performance using the standard articulated by the U.S. Supreme Court in *Strickland v. Washington*.<sup>63</sup> In general, counsel are presumed competent.<sup>64</sup> However, if an appellant can demonstrate both that counsel's performance was deficient in a specific way, and that deficiency renders unreliable the trial outcome, the conviction and/or sentence may be set aside.

#### *Overview of decisions reviewed*

Ineffective assistance of counsel was one of the most frequently raised issues in the decisions reviewed for this study,<sup>65</sup> including a wide variety of conduct by counsel in preparing and litigating a case. The appellate courts scrutinized the substantive conduct of counsel for the potential deficiency—e.g., whether there was in fact a basis to file a particular motion, and the likelihood that such a motion would have been successful—and then separately analyze whether, had the error occurred, it would have affected the outcome of the trial. In none of these recently issued decisions was relief granted for deficient performance by defense counsel. Examples of the types of issues discussed include:

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

No single issue was raised repeatedly so as to highlight a potentially systemic issue regarding the competence or training of military and civilian defense counsel. Given the importance of the right to counsel, and the broad spectrum of issues that may arise in the course of representing a criminal defendant at trial, it is expected that allegations of ineffective assistance will recur with some frequency. Military justice practitioners must monitor these discussions in appellate cases for recurring trends and take note of instances in which a deficiency is found.

#### *Decision finding error*

In *United States v. Westcott*,<sup>66</sup> the Air Force Court of Criminal Appeals found civilian and military defense counsel's performance deficient for failing to ensure the findings instructions defined "consent" as it related to a sexual contact offense of which appellant was convicted. Counsel had reviewed the proposed instructions before the military judge read them to the panel, listened as the military judge instructed the panel, and at no point objected to the missing instruction. The Court concluded that counsel's failure to object was an oversight, as opposed to

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<sup>63</sup> *Strickland*, 466 U.S. at 694.

<sup>64</sup> *United States v. Cronin*, 466 U.S. 648, 658 (1984).

<sup>65</sup> See *infra*. \_\_\_\_

<sup>66</sup> No. ACM 39936, 2022 WL 807944 (A.F. Ct. Crim. App. Mar. 17, 2022).



a strategic or tactical choice, for which there was no reasonable explanation;<sup>67</sup> however, the Court found appellant was not due any relief because the defense counsel error did not contribute to appellant's conviction. Moreover, the instructions provided did permit the panel to consider related issues, such as mistake of fact as to consent, in line with the defense's theory of the case.

#### **D. Evidentiary Issues**

Rules of Evidence, in any court, are a collection of rules that govern admissibility of evidence at trial; their purpose includes the fair administration of justice as well as "ascertaining the truth and securing a just determination."<sup>68</sup> The Military Rules of Evidence (MREs) are almost identical to the Federal Rules of Evidence. In any trial, what evidence can or should be shared with the factfinder will be contested. Evidentiary issues were one of the recurring issues frequently discussed by the CCAs. In this study, there were 50 CCA opinions with discussion of MREs, most often pertaining to hearsay, search and seizure, confessions and admissions, and MREs 513 and 412. The appellate court opinions discussing MRE 513 and MRE 412 appear below.

##### *Military Rule of Evidence 513: psychotherapist-patient privilege*

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

The military's psychotherapist–patient privilege was codified into the Military Rules of Evidence more than 20 years ago.<sup>69</sup> MRE 513 protects a patient from having to disclose and prevents others from disclosing a "confidential communication made between the patient and the psychotherapist or an assistant to the psychotherapist . . . [when] such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition."<sup>70</sup> Although there is no equivalent privilege delineated in the Federal Rules of Evidence, the Supreme Court has recognized a psychotherapist–patient privilege in federal common law, noting its importance because therapy "depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories and fears."<sup>71</sup>

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<sup>67</sup> *Id.* at \*19 ("Trial defense counsel had the obligation to carefully review the draft instructions and propose their own instructions based upon the facts of Appellant's case and the state of the law.").

<sup>68</sup> Fed. R. Evid. 102, Purpose.

<sup>69</sup> See Exec. Order No. 13, 140, 64 Fed. Reg. 55, 115 (Oct. 12, 1999); Mil. R. Evid. 513(a).

<sup>70</sup> Mil. R. Evid. 513(a).

<sup>71</sup> *Jaffee v. Redmond*, 518 U.S. 1, 2 (1996).

Beyond the rule itself, MRE 513 contains several parts: definitions, a description of who may claim the privilege, and seven enumerated exceptions to the rule,<sup>72</sup> as well as a lengthy description of the procedure to determine admissibility of patient records or communications.<sup>73</sup> Despite the rule's complexity, in 2006, CAAF began a long stretch during which it issued no decisions interpreting MRE 513. That changed in 2021, when CAAF took up three cases pertaining to MRE 513, each addressing a different issue: the scope of the rule itself; the in-camera review process; and enumerated exceptions to the privilege.

In July 2022, CAAF decided *U.S. v. Mellette*, addressing whether the scope of communications between a patient and psychotherapist under MRE 513 extends to diagnoses and treatments.<sup>74</sup> Before *Mellette*, the CCAs were split on how broadly to interpret privileged "communications" between a psychotherapist and patient.<sup>75</sup>

At trial, the military judge denied a defense motion for in camera review and disclosure of the victim's mental health records, finding that the records were privileged and that diagnoses and treatment were not "segregable" from any privileged communications.<sup>76</sup> The Navy-Marine Court of Criminal Appeals (NMCAA) affirmed, concluding that privileged communications between a patient and psychotherapist for the purposes of facilitating diagnosis and treatment include the actual "diagnosis and treatment plan."<sup>77</sup>

CAAF disagreed with the lower court's broad interpretation of communications. Relying on the Supreme Court's statutory interpretation of evidentiary privileges, it concluded they are to be "narrowly construed."<sup>78</sup> CAAF looked to the text of MRE 513(a) and framed the ultimate question as follows: whether the word "communications" should be "interpreted broadly to include all evidence that in some way reflects, or is derived from, confidential communications."<sup>79</sup> In a 3-2 decision, CAAF found that the privilege was limited to "communications" between the patient and psychotherapist. In making this decision, the Court stated that the judges' opinion was based not on their "views on the proper scope" but only on their interpretation of the text itself, reasoning if the President intended for the rule to govern information outside of the "communications" he would have so specified.

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<sup>72</sup> Mil. R. Evid. 513(d)(1)-(7). Exceptions include: when the patient is dead, the communication is evidence of child abuse or neglect, when a law imposes a duty to report, when the psychotherapist believes that the patient is a danger to a person, if the communication clearly contemplated a future crime, disclosure is necessary to ensure the safety and security of military personnel, when an accused offers statements or other evidence concerning his mental condition in defense.

<sup>73</sup> Mil. R. Evid. 513(e)

<sup>74</sup> *United States v. Mellette*, 82 M.J. 374 (C.A.A.F. 2021).

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

<sup>76</sup> *United States v. Mellette*, 81 M.J. 681, 691 (N-M. Ct. Crim App. 2021).

<sup>77</sup> *Id.*

<sup>78</sup> *United States v. Mellette*, 82 M.J. 374, 379 (C.A.A.F. 2021).

<sup>79</sup> *Id.* at 378.

### *Duty to Report Exception under MRE 513*

In *United States v. Beauge*, CAAF explored the contours of the enumerated “duty to report” exception to the psychotherapist-patient privilege.<sup>80</sup> Under MRE 513, a psychotherapist must disclose to the authorities “when federal law, state law, or service regulation imposes a duty to report information contained in a communication.”<sup>81</sup> Generally, these mandated disclosures involve the potential for self-harm or certain types of abuse—for example, a child’s report of sexual abuse. In *Beauge*, CAAF granted review on the issue of whether the lower court created an “unreasonably broad scope of the psychotherapist-patient privilege” by denying the defense access to the child victim’s mental health records after her therapist reported the child’s sexual abuse to state authorities.<sup>82</sup> The defense was provided the audio recording and investigative summary of the report in discovery, but was denied the remaining records of the communications between the therapist and the victim. The appellant argued, on the basis of the plain language of the rule, that the privilege was pierced to all communications once a mandated report was made.

As in *Mellette*, CAAF looked to principles of statutory construction.<sup>83</sup> Here, the Court clarified that the privilege applies not only to communications between a therapist and patient but also to “legally required reports to state authorities.”<sup>84</sup> CAAF went on to find that the underlying communications should not be viewed as a “unitary whole” with the mandated state reporting requirements, because to do so would violate MRE 513(e)(4), which states that disclosure should be narrowly tailored.<sup>85</sup>

### *In-camera Review and the Constitutional Exception*

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

- a specific, credible factual basis demonstrates a reasonable likelihood that the records would contain information admissible under an exception to the privilege;
- the requested information meets an enumerated exception;
- the information is not merely cumulative; and
- the party made reasonable efforts to obtain the same or substantially similar information from non-privileged sources.<sup>86</sup>

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<sup>80</sup> *United States v. Beauge*, 81 M.J. 157 (C.A.A.F. 2021).

<sup>81</sup> Mil. R. Evid. 513(d)(3), UCMJ.

<sup>82</sup> *United States v. Beauge*, 81 M.J. 301 (C.A.A.F. 2021) (order granting review).

<sup>83</sup> *Beauge*, 81 M.J. at 162.

<sup>84</sup> *Id.* at 163.

<sup>85</sup> *Id.* at 165.

<sup>86</sup> Mil. R. Evid. 513(e)(3)(A)-(D), UCMJ.

The second factor for in-camera review is that the requested information must meet an enumerated exception to pierce the MRE 513 privilege. The CCAs have split on whether to recognize a constitutional exception that was enumerated as MRE 513(d)(8) until 2015, when it was removed from the enumerated exceptions.<sup>87</sup>

In a published decision in *United States v. Tinsley*, the Army Court of Criminal Appeal (ACCA) rejected the appellant's argument that in camera review of a victim's mental health records was constitutionally required, concluding "that the military courts do not have the authority to either read back the constitutional exception in Military Rule of Evidence 513, or otherwise conclude that the exception still survives notwithstanding its explicit deletion."<sup>88</sup> In *Mellette*, discussed above, the NMCAA reached the opposite conclusion, finding that in camera review of the victim's mental health records was constitutionally required, based on an accused's "weighty interests of due process and confrontation," because the victim's inability to remember key dates went to credibility.<sup>89</sup> CAAF denied a petition for review of *Tinsley* and decided *Mellette* on other grounds, leaving unresolved the question of whether a constitutional exception can be considered as part of the authorization process for in-camera review.<sup>90</sup>

The disagreement between the CCAs over whether to recognize a constitutional exception to the psychotherapist-patient privilege in determining whether to conduct in-camera review will likely result in further litigation, especially as it relates to the discovery of documents related to MRE 513. Specifically, the issue of whether military courts, for purposes of an in-camera inspection, can read into the Rule a constitutional exception will most likely center on rights to discovery in conjunction with the Sixth Amendment right to confront witnesses.<sup>91</sup>

### *Military Rule of Evidence 412*

MRE 412, commonly referred to as the rape shield rule, prohibits the introduction of any evidence offered to prove that an alleged sexual assault victim engaged in other sexual behavior or evidence offered to prove an alleged victim's sexual predisposition.<sup>92</sup> This rule is "intended to shield victims of sexual assaults from the often embarrassing and degrading cross-examination and evidence presentations common to sexual offense prosecutions."<sup>93</sup> The rule itself, like MRE 513, contains a definition section, three exceptions, and a relevancy test for admissibility, as well

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<sup>87</sup> See National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291 (2014). This legislation removed the "constitutionally required" exception under Mil. R. Evid 513(d)(8).

<sup>88</sup> *United States v. Tinsley*, 81 M.J. 836 (A. Ct. Crim. App. 2021), *petition denied*, 82 M.J. 372 (C.A.A.F. 2022).

<sup>89</sup> *Mellette*, 81 M.J. at 694. The NMCCA did not find that the error materially prejudiced Appellant's substantial rights.

<sup>90</sup> See also *United States v. McClure*, 82 M.J. 194 (C.A.A.F. 2022) (granting review of issue "Whether the Military Judge abused his discretion when he denied defense's motion for access to JS's mental health records under M.R.E. 510 and 513 and refused to review the mental health records in camera to assess whether a constitutional basis justified the release of the records to the defense"), *aff'd by summ. disp.*, \_\_\_ M.J. \_\_\_ (affirming in light of *Mellette*, assuming error but finding no prejudice).

<sup>91</sup> See *Beaube*, 82 M.J. at 167 (noting that "the debate on the confrontation issue is limited by the Supreme Court's decision in *Pennsylvania v. Ritchie*, in which a plurality of the Court opined that the Sixth Amendment right 'to question adverse witnesses...does not include the power to require the pretrial disclosure of any and all information that might be useful in contradicting unfavorable testimony'").

<sup>92</sup> Mil. R. Evid. 412(a), UCMJ.

<sup>93</sup> *United States v. Carpenter*, 77 M.J. 285 (C.A.A.F. 2018).

as procedures for conducting hearings on the issue. This study reviewed eight appellate opinions discussing the application of MRE 412, including four AFCCA decisions, two ACCA decisions, and two NMCCA decisions.

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

Both cases setting aside findings related to the military judge's ruling excluding evidence. In the first case, the appellant filed a motion to introduce evidence of the victim's behavior before the sexual assault under two MRE 412 exceptions: behavior of the victim to prove consent and the appellant's constitutional right to confrontation. The Air Force CCA found the military judge's reasoning flawed and concluded he abused his discretion by excluding evidence that the victim and appellant were playing a "sexually provocative game" of Jenga in the lead-up to the sexual assault.<sup>94</sup> Specifically, the court found that the evidence went directly to the defense's theory of consensual sex while the appellant was blacked out and that the behavior between the appellant and the victim during the sexually suggestive drinking game had "some tendency to lead the court members to find she may have also consented to the engage in sexual intercourse."<sup>95</sup> Further, the court found that the evidence was relevant to a mistake of fact defense.

In the second decision that set aside findings, the issue on appeal also invoked the appellant's constitutional right to confrontation. At a motions hearing, the defense sought to introduce evidence of the victim's diagnosis of chlamydia, and a doctor testified that this particular STD could have caused intercourse to be painful. The defense moved to have the evidence introduced to rebut the victim's testimony that the intercourse was painful. In his ruling, the judge made a factual finding that the victim's pain did not derive from a chlamydia infection but was instead caused by her intercourse with the appellant. The Army CCA found that the appellant was denied his constitutional right to confront the victim. The court also found that the military judge's finding of fact that the chlamydia could not have caused pain, despite testimony from a medical doctor, invaded the "province of the panel."<sup>96</sup>

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

- The military judge erred by admitting evidence of the victim's virginity as evidence of sexual predisposition, but the prejudicial effect was minimal in light of the totality of the evidence adduced at trial;<sup>97</sup>

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<sup>94</sup> *United States v. Harrington*, No. ACM 39223, 2018 WL 4621100, at \*4 (A.F. Ct. Crim. App. Sept. 25, 2018).

<sup>95</sup> *Id.* at \*5.

<sup>96</sup> *United States v. Cuevas-Ibarra*, ARMY 20200146, 2021 WL 2035139, at \*5 (A. Ct. Crim. App. May 21, 2021).

<sup>97</sup> *United States v. Olson*, ARMY 20190267, 2021 WL 1235923, at \*6 (A. Ct. Crim. App. Apr. 1, 2021). The Army court noted that other Services have reached the opposite conclusion, holding that a victim's virginity is not evidence of sexual predisposition under M.R.E. 412 and is therefore admissible. *Id.* (citing *United States v. Price*, 2014 WL 2038422 (A.F. Ct. Crim. App. Apr. 22, 2014) and *United States v. White*, 62 M.J. 639 (N-M. Ct. Crim. App. 2006)).

- Assuming without deciding that the military judge erred by precluding the defense from cross examining the victim about alleged consensual sexual behavior with the accused immediately prior to the charged offense, the error was harmless beyond a reasonable doubt, where the evidence supporting conviction was not overwhelming but the victim’s testimony on cross examination would not have changed the members’ perception of her credibility;<sup>98</sup>
- The military judge abused his discretion by precluding the defense from cross examining the victim about a sexually explicit video recording to prove consent, where he failed to consider admissibility of the evidence to impeach the victim’s character for truthfulness, but the error was harmless beyond a reasonable doubt where her testimony was not the only evidence and cross examination regarding the recordings would not have meaningfully undermined her credibility.<sup>99</sup>

## **E. FY21 Appellate Opinions Addressing Court-Martial Panels**

In December 2022, the DAC-IPAD heard testimony from senior judge advocates who described how a court-martial panel is convened.<sup>100</sup> In January 2023, the CRSC also heard from civilian defense attorneys who described their experiences with court-martial panel selection processes.<sup>101</sup> Despite some differences between the Services and between different convening authorities within each Service, they all described a process by which the pool of prospective panelists is gradually narrowed to a venire from which the members are selected for specific courts-martial.

Typically, subordinate commanders under the convening authority’s jurisdiction nominate a certain number of officers and enlisted personnel who are “best qualified” according to the criteria of Article 25, UCMJ,<sup>102</sup> and provide the SJA with a member questionnaire and/or Enlisted or Officer Record Brief<sup>103</sup> (ERB/ORB) from each nominee. After collecting nominations from the subordinate commands, the SJA screens the nominees for eligibility and availability and compiles a package for the convening authority to consider, consisting of the member questionnaires and/or ERB/ORBs as well as a roster of every eligible Service member under that command. The convening authority is not limited to nominated personnel or even to the command roster, but may borrow personnel from other commands. After the convening authority selects the members, the SJA drafts a Court-Martial Convening Order (CMCO). The CMCO creates the court-martial and details members to the court-martial panel. All of the Services typically use standing panels that are available to any court-martial convened within a

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<sup>98</sup> *United States v. Horne*, ACM 39717, 2021 WL 2181169, at \*37 (A.F. Ct. Crim. App. May 27, 2021), *aff’d on other grounds*, 82 M.J. 283 (C.A.A.F. 2022).

<sup>99</sup> *United States v. Martinez*, ACM 39903 (f rev), 2022 WL 1831083, at \*44 (A.F. Ct. Crim. App. May 31, 2022).

<sup>100</sup> *Transcript of DAC-IPAD Public Meeting 9-94* (Dec. 6, 2022).

<sup>101</sup> *Transcript of CRSC Meeting 31-126* (Jan. 23, 2023).

<sup>102</sup> Article 25(e)(2), UCMJ, provides that the convening authority “shall detail as members thereof such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experiences, length of service, and judicial temperament.” *See also* RCM 503(a)(1)(A) (providing that the convening authority shall detail qualified persons as members for courts-martial); RCM 502(a)(1) (requiring that the “members detailed to a court-martial shall be those persons who in the opinion of the convening authority are best qualified for the duty by reason of their age, education, training, experience, length of service, and judicial temperament”).

<sup>103</sup> These documents provide a one-page summary of a person’s military career as well as demographic information.

specified time period, but the convening authority may also detail panelists to a specific court-martial.

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

Once the panel members are sworn and the court-martial is assembled, the military judge and counsel may whittle down the panel even more through the voir dire process. Military judges uphold the accused’s right to an impartial panel by applying R.C.M. 912(f)(1)(M), which requires that a member be excused for actual bias when they have “formed or expressed a definite opinion as to the guilt or innocence of the accused as to any offense charged,” and R.C.M. 912(f)(1)(N), which requires that a member be excused for implied bias when they “[s]hould not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality.” While issues of actual and implied bias often arise during pretrial voir dire, “A party may challenge a member for cause ‘during trial when it becomes apparent that a ground for challenge may exist.’”<sup>104</sup>

*Assessment of FY21 Appellate Opinions Discussing Court-Martial Panel Issues*

This study identified 14 appellate opinions addressing the selection of court-martial panel members.<sup>105</sup> In two of the opinions, the CCA reviewed the convening authority’s selection of the court-martial panel. In 11 of the opinions, the CCA reviewed the military judge’s rulings on challenges for cause during the voir dire process and other panel issues that arose during trial. In one case, the CCA reviewed challenges to both the convening authority’s panel selection process and the voir dire process.

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

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

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

<sup>104</sup> *United States v. McFadden*, 74 M.J. 87, 90 (C.A.A.F. 2015) (quoting R.C.M. 912(f)(2)(B)).

<sup>105</sup> All but three of the decisions involved contested cases; in the three in which the accused pled guilty, he was sentenced by a panel.

### *Reversals in Member Selection Cases*

The appellate courts reversed the military judge's ruling in four cases involving member selection at trial. One of the reversals was an Article 62 appeal by the government in response to a mistrial the military judge granted after imputing bias to a member as a result of the member's conduct during an evening recess (conduct unrelated to the court-martial). The appellate court set aside the ruling, concluding that the military judge abused her discretion in imputing implied bias to the member.<sup>106</sup>

In the three other cases in which a CCA granted relief because of error in member selection, the findings and sentence were set aside owing to the military judge's abuse of discretion in denying a defense challenge for cause. In all three cases, the appellate courts noted that voir dire was inadequate to rehabilitate the challenged panel member, and the military judge did not put their reasoning on the record or consider the liberal grant mandate. Two of the reversals were based on implied bias revealed during pretrial voir dire. In one case, the panel member could not be certain he would not think of his own two daughters, who were close in age to the victims.<sup>107</sup> In the other, the member failed to disclose in group voir dire that her daughter was a victim of sexual assault.<sup>108</sup> The third reversal arose from a mid-trial challenge for cause, resulting from a panel member's questions referring to "sexual predators."<sup>109</sup>

### *Affirmances in Member Selection Cases*

The appellate courts denied relief in eight member selection cases, including one in which appellate review was precluded by the appellant's exercise of his peremptory strike against the challenged member,<sup>110</sup> and one that addressed limits on the questions the accused was allowed to ask during voir dire.<sup>111</sup> In one case, the court affirmed the military judge's ruling excusing a member, over defense objection, for medical reasons.<sup>112</sup> In the remaining cases, which included two guilty pleas with member sentencing, the court affirmed the denial of a challenge for cause, finding no implied bias under the following circumstances:

- a member who made improper comments about favoring the prosecutor was excused for cause, but the military judge declined to *sua sponte* excuse another member who overheard the comment or to grant a mistrial on the grounds the entire panel was tainted by the comment;<sup>113</sup>

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<sup>106</sup> *United States v. Badders*, ARMY Misc. 20200735, 2021 WL 4498674, at \*16 (A. Ct. Crim. App. Sept. 30, 2021), *aff'd*, 82 M.J. 299 (C.A.A.F. 2022).

<sup>107</sup> *United States v. Pyron*, 81 M.J. 637, 640 (N-M. Ct. Crim. App. 2021).

<sup>108</sup> *United States v. Leathorn*, ARMY 20190037, 2020 WL 7343018, at \*4 (A. Ct. Crim. App. Dec. 11, 2020).

<sup>109</sup> *United States v. Hollenbeck*, ARMY 20170237, 2019 WL 2949367, at \*2 (A. Ct. Crim. App. June 27, 2019).

<sup>110</sup> *United States v. VanValkenburgh*, ACM 39571, 2020 WL 2516482, at \*3 (A.F. Ct. Crim. App. May 13, 2020), *aff'd*, 80 M.J. 395 (C.A.A.F. 2020).

<sup>111</sup> *United States v. Long*, ARMY 20190257, 2021 WL 6062948, at \*2 (A. Ct. Crim. App. Dec. 17, 2021).

<sup>112</sup> *United States v. Lizana*, ACM 39280, 2018 WL 3630154, at \*5 (A.F. Ct. Crim. App. July 13, 2018).

<sup>113</sup> *United States v. Guyton*, ARMY 20180103, 2020 WL 7384950, at \*3-4 (A. Ct. Crim. App. Dec. 16, 2020), *aff'd in part on other grounds*, 82 M.J. 146 (C.A.A.F. 2022).



- a member reacted to the reading of the charges with disappointment that criminal activity was occurring in the military community;<sup>114</sup>
- a member had served as a sexual assault response coordinator and unit victim advocate;<sup>115</sup>
- a member's wife was a victim of child sexual assault;<sup>116</sup> and
- a member said he was on board with the command's policy of zero tolerance for sexual misconduct.<sup>117</sup>

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

In *United States v. Crawford*, the Court of Military Appeals—the predecessor to CAAF—held that the deliberate inclusion of a black Service member as a panel member when the accused was black did not violate equal protection.<sup>118</sup> Since then, courts have cited *Crawford* for the proposition that a convening authority may depart from the factors present in Article 25, UCMJ, when seeking in good faith to make the panel more representative of the accused's race or gender.<sup>119</sup> However, “[t]he government is prohibited from assigning members to, or excluding members from, a court-martial panel in order to ‘achieve a particular result[.]’”<sup>120</sup>

This study identified three cases in which the accused challenged the convening authority's composition of their court-martial panel, alleging systematic and purposeful exclusion of women, African Americans, and medical personnel. In those cases, the CCAs did not grant relief on any of the claims. However, CAAF granted review in *United States v. Jeter*, a case involving a black Navy officer convicted by an all-white panel of sexual assault and other offenses, to consider one issue: Did the convening authority violate the appellant's equal protection rights when, over defense objection, he convened an all-white panel using a racially nonneutral member selection process and provided no explanation for the monochromatic result beyond a naked affirmation of good faith?<sup>121</sup>

In *Jeter*, the appellant argued that the total absence of minorities from his panel, combined with a racially nonneutral selection process—in this case, a questionnaire that asked prospective panel members to identify their race—established a prima facie violation of his equal protection rights, as well as a prima facie case of purposeful discrimination under *Batson v. Kentucky*.<sup>122</sup> He

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<sup>114</sup> *United States v. Barnaby*, ACM 39866, 2021 WL 4887771, at \*4 (A.F. Ct. Crim. App. Oct. 19, 2021).

<sup>115</sup> *United States v. Whiteeyes*, ARMY 20190221, 2020 WL 7384949, at \*7 (A. Ct. Crim. App. Dec. 15, 2020), *aff'd on other grounds*, 82 M.J. 168 (C.A.A.F. 2022).

<sup>116</sup> *United States v. Allen*, ARMY 20200039, 2021 WL 3038540, at \*4 (A. Ct. Crim. App. July 19, 2021).

<sup>117</sup> *United States v. Newt*, ACM 39629, 2020 WL 7391563, at \*5 (A.F. Ct. Crim. App. Dec. 11, 2020).

<sup>118</sup> 35 C.M.R. 3, 13, 15 C.M.A. 31, 41 (1964).

<sup>119</sup> E.g., *United States v. Smith*, 27 M.J. 242, 250 (C.M.A. 1988) (recognizing that “a convening authority may take gender into account in selecting court members, if he is seeking in good faith to assure that the court-martial panel is representative of the military population,” but rejecting the intentional selection of women panel members to achieve a particular result in that case, involving the female victim of a sex offense by a male defendant).

<sup>120</sup> *United States v. Riesbeck*, 77 M.J. 154, 165 (C.A.A.F. 2018) (internal quotation marks and citation omitted).

<sup>121</sup> *United States v. Jeter*, 82 M.J. 355 (C.A.A.F. 2022).

<sup>122</sup> 476 U.S. 79 (1986).

argued that in both instances, the convening authority's naked affirmations of good faith were insufficient to rebut the prima facie case. He also argued that the evidence established a pattern of racial discrimination in which, in the span of one year, the same convening authority detailed all-white panels in the courts-martial of three other minority Service members.

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

## **F. Additional Issues Regarding Appellate Practice in the Military**

As part of the appellate review project, the DAC-IPAD received public testimony from the Government and Defense Appellate Divisions from each Military Department. Army, Navy and Air Force representatives reported that factual sufficiency and instructional errors are recurring issues.<sup>123</sup> Navy and Air Force representatives also reported seeing appellate courts consider whether errors at trial were waived, often linked to defense counsel's failure to raise instructional error or other issues giving rise to claims of ineffective assistance of counsel.<sup>124</sup> Other recurring issues included prosecutorial misconduct,<sup>125</sup> MREs 412 and 513, search and seizure, member selection, issues with expert witnesses or consultants, and sentence severity.<sup>126</sup> Representatives of the Government Appellate Divisions described recurring issues in post-trial processing of cases, including delays and errors in the convening authority's action on the sentence, as well as litigation over the contents of the appellate record.<sup>127</sup>

These appellate practitioners described some of the practical challenges they face. The dominant theme that emerged from their testimony was the absence of a shared database of searchable court records, including trial transcripts and pleadings as well as appellate briefs and other filings. Updating knowledge management systems to make these records readily available and searchable would improve efficiency and enhance coordination within and between the Services, especially with respect to recurring issues.<sup>128</sup> Other challenges they described included: personnel shortages during the PCS cycle, which forced appellate counsel to seek extensions of time; inexperienced appellate defense counsel; inability of clients—especially those in confinement—to access records of trial; inability of defense counsel to access digital evidence in the record; the lack of clear guidance as to what matters may be added to the appellate record and considered by the appellate courts in acting on findings or sentence; and the rapid rate of legislative changes outpacing guidance as to how to implement those changes.<sup>129</sup>

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<sup>123</sup> *Transcript of DAC-IPAD Meeting* 208, 265-67 (Sept. 21, 2022).

<sup>124</sup> *Id.* at 266-67, 271-74.

<sup>125</sup> *See Transcript of DAC-IPAD Meeting* 265 (Sept. 21, 2022)

<sup>126</sup> *Id.* at 266, 278-79.

<sup>127</sup> *Id.* at 206-10.

<sup>128</sup> *Id.* at 189-92, 197-201, 306-07.

<sup>129</sup> *See generally id.* at 190-313.

At the January 26, 2023 CRSC meeting, civilian defense counsel discussed the challenges of litigating issues that arise in the court-martial panel selection process.<sup>130</sup> They described a lack of transparency in the process, where the SJA's advice to the convening authority is often a bare-bones recitation of the Article 25 criteria, and other communications between the SJA and convening authority concerning panel selection are not reduced to writing, rendering any irregularities undiscoverable.<sup>131</sup> They recommended that defense counsel be permitted to attend those discussions; justification for the selection should be memorialized in writing and appended to the record; defense counsel and prospective panelists should be notified 30 days in advance of the start of trial; and member questionnaires should be standardized.<sup>132</sup> Civilian defense counsel suggested that these changes would ensure visibility into the process and permit the parties to raise issues in advance of trial, avoiding situations like that faced in *Jeter*, where the SJA and convening authority provided affidavits to the appellate court three years after the panel was selected, when they could no longer recall pertinent details.

The Chief of Appellate and Outreach for the Air Force Victims' Counsel Program also spoke to the CRSC in January, and described the most significant recurring issues for appellate victims' counsel as access to victims' medical records and victims' right to notice of production of their records in the government's possession.<sup>133</sup> With respect to these and other issues, she noted that victim interlocutory appeals had seen a significant increase in recent months, even though there is no rule effectuating victim rights under Article 6(b), UCMJ. Specific issues that have not been clearly settled by the appellate courts but would lend themselves to resolution by rule or statute include victim standing to enforce Article 6(b) rights, definition of the record on an interlocutory victim writ, and whether filing of a writ stays the ruling or order at issue.

## **V. The Way Ahead**

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

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<sup>130</sup> See generally *Transcript of CRSC Meeting* 32-126 (Jan. 26, 2023).

<sup>131</sup> *Id.* at 40.

<sup>132</sup> *Id.* at 52-63, 71-80.

<sup>133</sup> See generally *id.* at 127-76.

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

FIFTH ANNUAL REPORT

MARCH 2023

## **CONTENTS**

### **EXECUTIVE SUMMARY**

### **SUMMARY OF FINDINGS, OBSERVATIONS, AND RECOMMENDATIONS**

### **INTRODUCTION**

- I. Committee Establishment and Mission
- II. Zero-Based Review
- III. Reconstitution of the Committee and Appointment of Members
- IV. Establishment of Subcommittees
- V. Fifth Annual Report – March 2023
- VI. Summary of Committee’s Activities: April 2020 – January 2021

### **CHAPTER 1. UPDATE AND OBSERVATIONS RELATED TO THE OFFICE OF SPECIAL TRIAL COUNSEL (OSTC)**

- I. Introduction
- II. The Way Ahead
- III. Overview of Information Collected to Date Regarding the OSTC

### **CHAPTER 2. ANALYSIS OF APPELLATE DECISIONS IN FISCAL YEAR 2021 SEXUAL ASSAULT CASES**

- I. Introduction
- II. Background
- III. Discussion and the Way Ahead

### **CHAPTER 3. FY20 NDAA JOINT EXPLANATORY STATEMENT: VICTIM IMPACT STATEMENTS AT PRESENTENCING PROCEEDINGS AND ALTERNATIVE JUSTICE PROGRAMS**

- I. Introduction
- II. Victim Impact Statements at Presentencing Proceedings
- III. Alternative Justice Programs

### **CHAPTER 4. REPORT ON TOUR LENGTHS AND RATING CHAIN STRUCTURE FOR SERVICES’ SPECIAL VICTIMS’ COUNSEL / VICTIMS’ LEGAL COUNSEL (SVC/VLC) PROGRAMS**

- I. Introduction
- II. Executive Summary
- III. Findings and Recommendations

## **CHAPTER 5. MEMBER OBSERVATIONS OF COURTS-MARTIAL AND ADVANCED LITIGATION TRAINING**

- I. Courts-Martial Observation
- II. Advanced Litigation Courses
- III. Conclusion

## **APPENDIXES**

- A. Authorizing Statutes
- B. Committee Charter and Terms of Reference
- C. Committee Members
- D. Subcommittee Terms of Reference
- E. Committee Recommendations to Date
- F. Committee Requests for Information
- G. Committee and Subcommittee Meetings and Presenters
- H. Military Justice Related Provisions in FY23 NDAA
- I. Committee Professional Staff
- J. Acronyms and Abbreviations
- K. Sources Consulted

## **Executive Summary**

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

1. To advise the Secretary of Defense on the investigation, prosecution, and defense of allegations of rape, forcible sodomy, sexual assault, and other sexual misconduct involving members of the Armed Forces;
2. To review, on an ongoing basis, cases involving allegations of sexual misconduct for purposes of providing advice to the Secretary of Defense; and
3. To submit an annual report to the Secretary of Defense and to the Committees on Armed Services of the Senate and the House of Representatives describing the results of its activities during the preceding year no later than March 30 of each year.

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

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

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

**Summary of Findings, Observations, and Recommendations in the Fifth Annual Report**

[to be inserted after approval of the Appellate and Victim Impact Statement stand-alone reports]



## **Introduction**

### **I. Committee Establishment and Mission**

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

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

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

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

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

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

<sup>2</sup> FY15 NDAA, *supra* note 1, at § 546(c)(1).

<sup>3</sup> *Id.* at § 546(c)(2).

<sup>4</sup> *Id.* at § 546(d).

<sup>5</sup> *Id.* at § 546(b).

<sup>6</sup> Committee member Dean Keith M. Harrison, Associate Dean and Professor of Law, Savannah Law School, passed away unexpectedly in 2018.

## **II. Zero-Based Review**

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

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

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

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

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<sup>7</sup> Memorandum from Secretary of Defense to Senior Pentagon Leadership Regarding Department of Defense Advisory Committees – Zero-Based Review (Jan. 30, 2021). The Secretary directed this review to align DoD advisory committee efforts with the Department’s most pressing strategic priorities. *See* Appendix \_\_\_\_.

<sup>8</sup> Letters from Acting General Counsel of the Department of Defense to the Honorable Adam Smith, Chairman of the Committee on Armed Services of the House of Representatives (Mar. 26, 2021) and to the Honorable Jack Reed, Chairman of the Committee on Armed Services of the Senate (Mar. 26, 2021). *See* Appendix \_\_\_\_.

<sup>9</sup> Memorandum from Secretary of Defense to General Counsel of the Department of Defense Regarding Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (Jul. 6, 2021). *See* Appendix \_\_\_\_.

<sup>10</sup> Letters from Acting General Counsel of the Department of Defense to the Honorable Adam Smith, Chairman of the Committee on Armed Services of the House of Representatives (Mar 31, 2022) and to the Honorable Jack Reed, Chairman of the Committee on Armed Services of the Senate (Mar 31, 2022); U.S. Dept of Def., Report of the Department of Defense on the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (March 2022). *See* Appendix \_\_\_\_.

### **III. Reconstitution of the Committee and Appointment of Members**

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

The Committee members areas of expertise include: civilian sexual assault forensics; civilian and military sexual assault prosecution; civilian and military sexual assault defense; Federal and state court system; military command; criminology; and academic disciplines and legal policy.

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

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

### **IV. Establishment of Subcommittees**

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

- (1) the Case Review Subcommittee;
- (2) the Policy Subcommittee; and
- (3) the Special Projects Subcommittee.<sup>12</sup>

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

#### **A. Case Review Subcommittee (CRSC)**

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

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

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<sup>11</sup> The citation here would be the approved DA&M Action Memo – I'm not sure if appropriate to make this public.

<sup>12</sup> Memorandum from DoD GC to the Chair of the DAC-IPAD, DAC-IPAD Subcommittee Establishment, Sep 24, 2022. See Appendix \_\_\_\_

<sup>13</sup> CRSC, PSC, and SPSC Terms of Reference

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

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

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

## **B. Policy Subcommittee (PSC)**

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

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

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

BGen (R) James Schwenk is the PSC Chair and the other PSC members include: MG (U.S. Army Retired) Marcia Anderson, Ms. Jennifer O'Connor, Ms. Suzanne Goldberg, and DAC-IPAD Chair Judge Karla Smith.

## **C. Special Projects Subcommittee (SPSC)**

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<sup>14</sup> DoD GC Memo for Appellate Case Review

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

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

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

## **V. Fifth Annual Report – March 2023**

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

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

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

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

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

### A. Guardian ad Litem Report (June 2020)

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

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

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<sup>16</sup> See Appendix E for a complete listing of DAC-IPAD meetings, preparatory sessions, and presenters since April 2020.

<sup>17</sup> DEFENSE ADVISORY COMMITTEE ON INVESTIGATION, PROSECUTION, AND DEFENSE OF SEXUAL ASSAULT IN THE ARMED FORCES REPORT ON THE ADVISABILITY AND FEASIBILITY OF ESTABLISHING A GUARDIAN AD LITEM APPOINTMENT PROCESS FOR CHILD VICTIMS OF AN ALLEGED SEX-RELATED OFFENSE IN THE MILITARY [DAC-IPAD GAL REPORT] (June 2020), available at [https://dacipad.whs.mil/images/Public/08-Reports/06\\_DACIPAD\\_GAL\\_Report\\_20200617\\_Final\\_Web.pdf](https://dacipad.whs.mil/images/Public/08-Reports/06_DACIPAD_GAL_Report_20200617_Final_Web.pdf).

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

<sup>19</sup> DAC-IPAD GAL REPORT, *supra* note 31, at 6–13.

<sup>20</sup> *Id.* at 4.



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

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

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

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

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

In the Committee's view, the decision to refer charges to trial by general court-martial in the absence of sufficient admissible evidence to obtain and sustain a conviction has significant negative implications for the accused, the victim, and the military justice process. Accordingly, the Committee recommended that Congress amend Article 34, UCMJ, to require that the staff judge advocate advise the convening authority in writing that there is sufficient admissible evidence to obtain and sustain a conviction on the charged offenses before a convening authority may refer a charge and specification to trial by general court-martial.<sup>24</sup>

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<sup>21</sup> DEFENSE ADVISORY COMMITTEE ON INVESTIGATION, PROSECUTION, AND DEFENSE OF SEXUAL ASSAULT IN THE ARMED FORCES REPORT ON INVESTIGATIVE CASE FILE REVIEWS FOR MILITARY ADULT PENETRATIVE SEXUAL OFFENSE CASES CLOSED IN FISCAL YEAR 2017 (Oct. 2020), *available at* [https://dacipad.whs.mil/images/Public/08-Reports/08\\_DACIPAD\\_CaseReview\\_Report\\_20201019\\_Final\\_Web.pdf](https://dacipad.whs.mil/images/Public/08-Reports/08_DACIPAD_CaseReview_Report_20201019_Final_Web.pdf).

<sup>22</sup> *Id.* at 26–27.

<sup>23</sup> *Id.* at 2–4.

<sup>24</sup> *Id.* at 16.

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

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

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

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

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<sup>25</sup> DEFENSE ADVISORY COMMITTEE ON INVESTIGATION, PROSECUTION, AND DEFENSE OF SEXUAL ASSAULT IN THE ARMED FORCES REPORT ON RACIAL AND ETHNIC DATA RELATING TO DISPARITIES IN THE INVESTIGATION, PROSECUTION, AND CONVICTION OF SEXUAL OFFENSES IN THE MILITARY (Dec. 2020), *available at* [https://dacipad.whs.mil/images/Public/08-Reports/09\\_DACIPAD\\_RaceEthnicity\\_Report\\_20201215\\_Web\\_Final.pdf](https://dacipad.whs.mil/images/Public/08-Reports/09_DACIPAD_RaceEthnicity_Report_20201215_Web_Final.pdf).

<sup>26</sup> *Id.* at 18.

<sup>27</sup> *Id.* at 1.

<sup>28</sup> *Id.* at 8.

<sup>29</sup> *Id.* at 5–6.



## **Chapter 1. Update and Observations Related to the Office of Special Trial Counsel**

### **I. Introduction**

The National Defense Authorization Act for Fiscal Year 2022 (FY22 NDAA),<sup>30</sup> brought momentous change to the practice of military justice. After years of public debate over the military's handling of sexual assault and sexual misconduct, Congress transferred significant prosecutorial functions in sexual offense cases<sup>31</sup> from military commanders to independent judge advocates and removed the supervision of these military lawyers from their traditional military chains of command and placed them under the supervision of the civilian Secretaries of the Military Departments.<sup>32</sup> These changes create a bifurcated military justice system: If a Service member commits an offense under the jurisdiction of the new "Special Trial Counsel," the military prosecutor will decide—independent of the accused's chain of command—whether to send charges to a court-martial. However, if a Service member commits an offense that is not within the special trial counsel's jurisdiction, then the traditional, command-driven system for charging and referring cases to court-martial will be followed.<sup>33</sup>

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

The Special Projects Subcommittee (SPSC) is leading this effort and will provide findings and recommendations for consideration by the full Committee. As one of its first tasks, the SPSC identified topics foundational to the structure and independence of these new offices. In November 2022, the SPSC reviewed and provided public comment on proposed Rules for Courts-Martial implementing the authorities of the Special Trial Counsel. Finally, the SPSC met with members of an inter-Service working group coordinating the organization and business rules for their respective OSTC. The discussion addressed the law and policies applicable to the

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

<sup>31</sup> The new prosecution office will be responsible for deciding the disposition of "covered offenses," including 10 United States Code section 917a (article 117a), section 918 (article 118), section 919 (article 119), section 919a (article 119a), section 920 (article 120), section 920a (article 120a), 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). [add 3 more from FY32 NDAA here]. Special trial counsel exercise authority in cases in which all covered offenses occurred on or after December 27, 2023.

<sup>32</sup> FY22 NDAA, *supra* note   , §§ 531–32.

<sup>33</sup> Military Criminal Justice: Practice and Procedure, § 8–1 (2022).

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

<sup>35</sup> See *Transcript, Public Meeting of the DAC-IPAD*, 84 (April 21, 2022), available at [https://dacipad.whs.mil/images/Public/05-Transcripts/20220421\\_DACIPAD\\_Transcript\\_Final.pdf](https://dacipad.whs.mil/images/Public/05-Transcripts/20220421_DACIPAD_Transcript_Final.pdf).

special trial counsel's exclusive authority to dispose of charges involving covered offenses, and their ability preserve independence and objectivity in the exercise of prosecutorial discretion.

## **II. The Way Ahead**

In 2023, the SPSC will report on the processes by which special trial counsel prefer and refer charges. The SPSC will assess the current disposition guidance and legal standards for referring cases to court-martial and recommend uniform policies for the exercise of prosecutorial discretion. The SPSC will incorporate the previous DAC-IPAD's extensive review of penetrative sexual offense court-martial documents and observations from its investigative case file review.<sup>36</sup> The SPSC intends to complete report its analysis and findings to the Committee in mid-2023.

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

## **III. Overview of Information Collected to Date Regarding the OSTC**

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

- A. Testimony from senior officials from the Military Departments on the establishment of their OSTC at the DAC-IPAD's 23rd Public Meeting on June 22, 2022.<sup>37</sup>
- B. Testimony from senior officials from the Military Departments on the status of their OSTC at the DAC-IPAD's 25th Public Meeting on December 7, 2022.<sup>38</sup>
- C. The DAC-IPAD requested and received numerous documents from the Military Departments regarding the policies for establishment of the OSTC and the competency and qualification standards for personnel serving in the OSTC.

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<sup>36</sup> [insert reference to DACIPAD reports here]

<sup>37</sup> Transcript available at:

<sup>38</sup> Transcript available at:

## **Chapter 2. Analysis of Appellate Decisions in Fiscal Year 2021 Sexual Assault Cases**

### **I. Introduction**

After the Case Review Subcommittee (CRSC) was formed,<sup>39</sup> the DAC-IPAD assigned the Appellate Review Study to the CRSC.<sup>40</sup> Over the course of several public meetings in 2022, the full Committee developed the parameters for the Appellate Review Study.<sup>41</sup> After reviewing appellate cases, analyzing the court decisions, and hearing public testimony, the CRSC drafted a stand-alone report for the full Committee's consideration and approval to be issued concurrently with this report.

In addition to the Appellate Review Report, the CRSC developed a strategic plan for its future projects, including a study to analyze the race and gender of military panel members, victims, and the accused at courts-martial for sexual assault offenses.

### **II. Background**

As part of the CRSC Appellate Review Study, the full Committee was briefed on court decisions challenging the convening authority's composition of an accused's court-martial panel,<sup>42</sup> including the pending decision in *United States v. Jeter*.<sup>43</sup> The DAC-IPAD expressed a strong interest in studying the court-martial member selection process, including how race and gender factor into panel member selection.<sup>44</sup>

At the September 2022 public meeting, the DAC-IPAD heard testimony from a subject-matter expert on the military panel selection process, including the statutory authority set forth in article 25(e)(2), UCMJ, that provides: the convening authority "shall detail as members thereof such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experiences, length of service, and judicial temperament."<sup>45</sup> The expert stated that military panel selection criteria does not explicitly take into account race or gender

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<sup>39</sup> The CRSC is chaired by Ms. Martha S. Bashford. The other members of the subcommittee are Ms. Jennifer Gentile Long, retired Marine Corps Brigadier General James R. Schwenk, and Ms. Meg Garvin.

<sup>40</sup> See Memorandum from Caroline Krass, DoD General Counsel, to Staff Director, DAC-IPAD, Request to Study Appellate Decisions in Military Sexual Assault Cases (Jan. 28, 2022) [Appellate Review Memo], available at Appendix \_\_\_\_.

<sup>41</sup> The DAC-IPAD discussed and deliberated on the Appellate Project in June, September, and December 2022.

<sup>42</sup> Supra, X. These cases are addressed in depth in the Appellate Project Report.

<sup>43</sup> *United States v. Jeter*, 82 M.J. 355 (C.A.A.F. 2022)(considering whether a convening authority violated the appellant's equal protection rights, when, over defense objection, he convened an all-white panel using a racially nonneutral members selection process and provided no explanation for the monochromatic result beyond a naked affirmation of good faith?).

<sup>44</sup> See generally *Transcript of DAC-IPAD Meeting* (Sept. 21, 2022)

<sup>45</sup> See also RCM 503(a)(1)(A) (providing that the convening authority shall detail qualified persons as members for courts-martial); RCM 502(a)(1) (requiring that the "members detailed to a court-martial shall be those persons who in the opinion of the convening authority are best qualified for the duty by reason of their age, education, training, experience, length of service, and judicial temperament").

and there is a human element in the convening authority's selection of eligible panel members.<sup>46</sup> The testimony suggested it would be difficult to show that a convening authority's selection of a panel was improper because of discrimination based on race or gender.<sup>47</sup>

At a later subcommittee meeting, the CRSC heard similar testimony on the human element in panel selection from a civilian defense attorney who stated that the convening authority, "...selects these individuals based on familiarity and trust rather than a specific reference to judicial temperament, which there is no way that a commander general could know based on job position."<sup>48</sup> During public comment sessions the DAC-IPAD's September and December 2022 meetings, the Committee heard from minority Service members convicted of sexual misconduct by all-white panels, or who chose trial by military judge alone because they were uncomfortable with the all-white panel detailed to their court-martial.<sup>49</sup>

After the September 2022 testimony and testimony from staff judge advocates (SJAs) on the criteria used to select panel members, the Committee members raised questions about military panel demographics.<sup>50</sup> The full Committee focused on military panel composition,<sup>51</sup> and how to change the composition procedurally and factually.<sup>52</sup> The Committee expressed concern about the public perception that women and minorities are underrepresented on court-martial panels, and that this perception undermines the credibility of the military justice system.<sup>53</sup> Committee members also asked whether women are disproportionately excluded from panels because of their experiences as victims of sexual assault or their additional duties as victim advocates.<sup>54</sup>

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<sup>46</sup> See *Transcript of DAC-IPAD Meeting 44* (Sept. 21, 2022). Major Steven Dray, professor of sentencing, post-trial, and appeals at The Judge Advocate Legal Center and School in Charlottesville, Virginia.

<sup>47</sup> *Id.* at 69 (In response to an inquiry of how an accused could show that minorities were being purposefully excluded MAJ Steven Dray stated..."you'd have to be privy to probably some kind of, some of the conversations between the SJA and the command if you could get that, if anybody would admit it or subordinate commanders, very difficult.").

<sup>48</sup> See *Transcript of CRSC Meeting 39* (Jan. 26, 2023). Margaret Kurz, *Owens and Kurz LLC*.

<sup>49</sup> *Id.* at 346-383. See also *Transcript of the DAC-IPAD 76-77* (Sept. 12, 2022)(Testimony of Bill Cassara, "The very first court-martial I ever tried in 1990, it was an African American accused, and there was not a single African American on the panel. The last case I tried in 2018, '16, the first one was an Army case, this last one was an Air Force case. I had an African American accused, and there was not a single African American on the panel. I would venture to say without a scientific analysis or any data, that in my empirical experience the overwhelming majority of my cases fell into that category.)

<sup>50</sup> See *Transcript of DAC-IPAD 27* (Dec. 7, 2022) (Testimony of Honorable Walton on the racial make-up of military panels, "I think the change needs to occur a lot sooner [than gathering data] because I think we're experiencing it now and I think it's detrimental to morale to have people feeling that they're being railroaded through a system that doesn't accurately or appropriately reflect their racial makeup.").

<sup>51</sup> *Transcript of the DAC-IPAD Public Meeting 58* (Sept. 21, 2022) (Testimony of Jennifer O'Connor, "Could you just talk a little bit more about is there—is everybody, you know, put on a list and it's randomly selected based on who's available? I am curious about how the panels are composed.")

<sup>52</sup> *Id.* at 67 (Testimony of Judge Karla Smith. "If it's a scenario of an all white jury or panel, can an accused challenge that panel? And when the general is looking at the list, there any consideration to having women, having minorities, et cetera?").

<sup>53</sup> *Transcript of DAC-IPAD Public Meeting 63-64, 76-78, 94* (Dec. 6, 2022).

<sup>54</sup> *Id.* at 94 (Testimony of Ms. Goldberg, "And so, to the extent it's a common practice that it is assumed that someone who has been trained as a victims counsel cannot deliberate fairly as a panel member, that sort of amplifies

In December, CRSC Chair Martha Bashford made a motion, approved by the DAC-IPAD, that the CRSC study courts-martial panel selection information and collect data on how panels are constituted from the pool of eligible personnel, for the DAC-IPAD to recommend appropriate changes to the military system.<sup>55</sup>

At a January 2023 CRSC meeting, two civilian defense counsel shared their perspectives on military panel selection practices,<sup>56</sup> raising concerns with the lack of transparency within the nomination process, despite both noting that panel members took their duties seriously.<sup>57</sup> One counsel compared the process to a tip of the iceberg: “By the time you get to the venire and you are in the courtroom, it is that top part of the iceberg, but there is a whole selection process that occurred ... invisibly.” The counsel explained that any irregularities in the selection could never be discovered because the conversations between the convening authority and the SJA regarding the selections are not reduced to writing.<sup>58</sup> The counsel noted that if they were privy to how the venire was selected, they could raise any issues to the military judge before trial and preserve the issue for appeal, increasing overall efficiency.<sup>59</sup> The counsel noted there are often delays in receiving questionnaires or even knowing who the panel members are until the day of trial, resulting in delays.<sup>60</sup>

### III. Discussion and the Way Ahead

In 2023, the CRSC will study the issues of race and gender in panel selection. Based on testimony, the Committee believes there is a public perception that military panels are not diverse and that the convening authority’s ability to hand-pick the panel introduces a perception of conscious or unconscious bias. Further, the Committee recognizes that the nomination process is not transparent and if deviances exist in application of the article 25 criteria, such deviances would be near impossible to successfully challenge.

Research has shown that diverse juries have advantages when it comes to group decision making.<sup>61</sup> To address these concerns, the CRSC will collect demographic characteristics of panel

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or exacerbates the other issue, which is that more women will be excluded from panels because more women will report having experienced sexual assault.”

<sup>55</sup> *Id.* at 30.

<sup>56</sup> Brian Pristera, *Daniel and Conway Associates* and Margaret Kurz, *Owens and Kurz LLC*.

<sup>57</sup> See Transcript of CRSC Meeting 51-53 (Jan. 26, 2023)

<sup>58</sup> *Id.* at 40.

<sup>59</sup> *Id.* at 96. (Testimony of Mr. Pristera, “And so, I circle that back around to my discovery ask, which I actually think is the most important change that we could make here. Regardless of what the *Jeter* court says for the decision on venire selection, and even regardless of a randomization, the imposition of a randomizer, this [the nomination process] has to be crystal clear and presented to the defense in a timely manner for the defense to be able to raise any issues it has or waive them before trial, and that would, in my opinion, increase the fairness to the accused and increase the efficiency of the process with panel selection issues...).

<sup>60</sup> *Id.* at 97.

<sup>61</sup> Samuel R. Sommers, “On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations,” *J Pers Soc Psychol.* 597-612 (Apr. 2006) (“Racial composition also had clear effects on deliberation content, supporting the prediction that diversity would lead to broader information exchange.”).

members in courts-martial as well as the demographics of both the victims and accused. The study will include any case in which a sexual offense under Article 120 or 120b, UCMJ, was referred to a general court-martial and a panel was seated in Fiscal Years 2021 and 2022.<sup>62</sup>

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

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

If feasible, the CRSC intends to collect demographic data on the victims and accused in these courts-martial to determine whether there are correlations between a panel's composition and the demographic characteristics of the victims and accused.

The CRSC is not aware of any other study, government or otherwise, which has compiled data on the race and gender of military panels. The lack of data on jury pools is also scarce for civilian juries.<sup>63</sup> The initial phase of this study will focus on discovering the demographic make-up of courts-martial. This data will inform the Committee on whether perceptions that military panels are homogenous are accurate. The data results will also help inform policy recommendations on the nomination process.

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<sup>62</sup> Depending on the number of cases found for FY21 and FY22, the CRSC may also review cases under Article 120c, UCMJ.

<sup>63</sup> Mary R. Rose, Raul S. Casarez, and Carmen M. Gutierrez, "Jury Pool Underrepresentation in the Modern Era: Evidence from Federal Courts," *Journal of Empirical Legal Studies*, Vol. 15, Issue 2, 378-401 (Jun. 2018) ("Remarkably, in the current legal and social science literature, we lack quality answers to even the most basic social science questions about jury pools: How often do disparities exist and how large are they? Are disparities larger for some groups than for others? How often are disparities likely to be deemed 'not fair and reasonable' under any one of the available legal tests of underrepresentation?").



## **Chapter 3. FY20 NDAA Joint Explanatory Statement: Victim Impact Statements at Presentencing Proceedings and Alternative Justice Programs**

### **I. Introduction**

In the Joint Explanatory Statement (JES) accompanying section 535 of the FY20 NDAA, Congress requested that the DAC-IPAD study the issues of victim impact statements at presentencing proceedings and alternative justice programs.<sup>64</sup>

The DAC-IPAD received some initial information on these issues in November 2020;<sup>65</sup> however, as noted earlier in this report, the DAC-IPAD was suspended in January 2021. After its reconstitution, the DAC-IPAD assigned the victim impact statement and alternative justice projects to the Policy Subcommittee (PSC) at its June 2022 public meeting.<sup>66</sup> The PSC reported its findings and recommendations regarding victim impact statements to the DAC-IPAD at its December 2022 public meeting and the DAC-IPAD adopted five proposed recommendations.<sup>67</sup>

### **II. Victim Impact Statements at Presentencing Proceedings**

The DAC-IPAD issued its *Report on Victim Impact Statements at Courts-Martial Presentencing Proceedings* (VIS Report) in March 2023.<sup>68</sup> The VIS Report responded to the following questions posed by Congress in the FY20 JES:

- Are military judges interpreting R.C.M. 1001(c) too narrowly and limiting what victims may say during sentencing such that the courts are not fully informed of the impact of the crime on the victims?
- Are military judges appropriately permitting other witnesses to testify about the impact of the crime?<sup>69</sup>

To respond to these questions, the Committee reviewed records of trial from courts-martial cases tried in FY21 involving victim impact statements; spoke to Service victims' counsel program managers, an attorney who represents victims in military and civilian court proceedings, former military judges, and members of Survivors United—a victim advocacy group that initially brought these issues to the attention of Congress; and reviewed federal and state laws and rules regarding victim impact statements.<sup>70</sup>

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<sup>64</sup> The JES accompanies Sec. 535. Extension of Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces of the FY20 NDAA (Pub. L. No. 116-92).

<sup>65</sup> *Transcript of DAC-IPAD Public Meeting* 163 (Nov. 6, 2020) (all DAC-IPAD public meeting transcripts are available at <https://dacipad.whs.mil/>).

<sup>66</sup> *Transcript of DAC-IPAD Public Meeting* 157 (June 22, 2022).

<sup>67</sup> *See Transcript of DAC-IPAD Public Meeting* (Dec. 7, 2022).

<sup>68</sup> The full report can be found at <https://dacipad.whs.mil/reports>

<sup>69</sup> *See supra* note xx.

<sup>70</sup> *See Transcript of DAC-IPAD Public Meeting* 8 (Feb. 14, 2020); *Transcript of DAC-IPAD Public Meeting* 94, 126 (Dec. 6, 2022).

The Committee noted that in the three years since Congress requested that the DAC-IPAD review this issue, the procedures for implementing victim impact statements have matured, the appellate courts further defined and clarified the rules governing these statements, and Congress enacted an important change to courts-martial sentencing that requires military judges to serve as the sentencing authority in all special and general courts-martial, except in capital cases.<sup>71</sup>

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

In its report on victim impact statements, the Committee made five recommendations to amend R.C.M. 1001(c) to provide victims wider latitude in their impact statements. In December 2022, the Committee provided these recommendations in a public comment to the Joint Service Committee on Military Justice requesting they seek to amend R.C.M. 1001(c).<sup>72</sup> The Committee recommended amending the definition of victim impact to provide a broader standard; allowing the victim to make a specific sentence recommendation in noncapital cases; allowing submission of an unsworn victim impact statement by audiotape, videotape, or other electronic means; allowing the victims' counsel to deliver the victim impact statement without having to show good cause; and removing the requirement that the victim provide a proffer of their impact statement prior to delivery.

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

### **III. Alternative Justice Programs**

In the FY20 NDAA JES, Congress requested the DAC-IPAD review “whether other justice programs (e.g., restorative justice programs, mediation) could be employed or modified to assist the victim of an alleged sexual assault or the alleged offender, particularly in cases in which the evidence in the victim's case has been determined not to be sufficient to take judicial, non-judicial, or administrative action against the perpetrator of the alleged offense.”<sup>73</sup>

On February 26, 2021 – when the DAC-IPAD was suspended as part of the zero-based review – the Secretary of Defense established the Independent Review Commission (IRC) on Sexual Assault in the Military and directed the IRC to conduct a 90-day independent assessment of the

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<sup>71</sup> This provision takes effect for cases in which the charged offenses are committed on or after Dec. 27, 2023. FY22 NDAA, Pub. L. No. 117-81, §539E, 135 Stat. 1541 (2021).

<sup>72</sup> See DAC-IPAD public comment to the Joint Service Committee on Military Justice at Appendix [xx](#).

<sup>73</sup> See *supra* note [xx](#).



military's treatment of sexual assault and sexual harassment.<sup>74</sup> The IRC made numerous recommendations for improvements to the systems used to treat and respond to reports of sexual assault, among them that the DoD "study the methods our Allies have used to make amends to survivors, including restorative engagement to acknowledge harm and potential victim compensation."<sup>75</sup> As rationale for this recommendation, the IRC provided:

The U.S. Five Eyes Partners<sup>76</sup> have found ways to acknowledge the harm that survivors of sexual assault have endured during Service, including financial redress. 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.

The purpose of restorative engagement is to create a safe space to allow survivors' lived experiences of sexual misconduct to be heard, responded to, and acknowledged by DoD and leaders from their branch of Service; contribute to culture change within the military workplace by increasing awareness and understanding of the experiences of survivors and the context within which harm has occurred; and begin the process of restoring the relationship between survivors and the U.S. military. Restorative engagement can promote greater institutional accountability by facilitating a concrete process by which DoD and the Services could recognize the betrayal felt by some of its own.<sup>77</sup>

In a September 2021, the Secretary of Defense approved a roadmap for implementing the IRC's recommendations, including IRC Recommendation 4.3 e on restorative engagement programs.<sup>78</sup> DoD is currently studying the feasibility of implementing restorative justice and restorative engagement programs. The DAC-IPAD will continue to monitor DoD's work on this issue.

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<sup>74</sup> This review began March 24, 2021 and concluded with the release of the IRC's report in July 2021. See INDEPENDENT REVIEW COMMISSION ON SEXUAL ASSAULT IN THE MILITARY STUDY, *Hard Truths and the Duty to Change: Recommendations from the Independent Review Commission on Sexual Assault in the Military* (July 2021) [IRC Report], available at <https://media.defense.gov/2021/Jul/02/2002755437/-1/-1/0/IRC-FULL-REPORT-FINAL-1923-7-1-21.PDF/IRC-FULL-REPORT-FINAL-1923-7-1-21.PDF>.

<sup>75</sup> IRC Report, *supra* note xx, IRC Recommendation 4.3 e.

<sup>76</sup> *Id.* at FN 116 (Fives Eyes is a strategic military and intelligence partnership between Australia, Canada, New Zealand, the United Kingdom, and the U.S.)

<sup>77</sup> IRC report, *supra* note xx at 40-42.

<sup>78</sup> U.S. Dep't of Def., Memorandum from the Secretary of Defense on Commencing DoD Actions and Implementation to Address Sexual Assault and Sexual Harassment in the Military (Sept. 22, 2021).

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

### I. Introduction

In October 2021, the DoD GC requested that the DAC-IPAD study and report on the issue of tour lengths of 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.<sup>79</sup>

In November 2021, in conjunction with the minimum tour length tasking, the DoD GC asked the DAC-IPAD to study and report on the rating chains of Army 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.<sup>80</sup>

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

In April 2022, the DoD GC asked the DAC-IPAD to review the staff study and draft report on SVC/VLC tour lengths and Army SVC supervisory rating chains.<sup>81</sup>

### II. Executive Summary

The DAC-IPAD submitted its *Report on Tour Lengths and Rating Chain Structure for Services' Special Victims' Counsel / Victims' Legal Counsel (SVC/VLC) Programs* in August 2022.<sup>82</sup>

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

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<sup>79</sup> See Memorandum from Caroline Krass, DoD General Counsel, to Staff Director, DAC-IPAD, *Request to Study the Tour Lengths of Special Victims' Counsel/Victims' Legal Counsel* (Oct. 5, 2021) [Tour Length Memo], available at Appendix A. See *infra* notes \_\_\_\_ and accompanying text for status of DAC-IPAD during this time period.

<sup>80</sup> 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.

<sup>81</sup> See Memorandum from Caroline Krass, DoD General Counsel, to Chair, DAC-IPAD, *Request to Review Report on Tour Lengths and Rating Chain Structure for Services' Special Victims' Counsel/Victims' Legal Counsel (SVC/VLC) Programs* (Apr. 21, 2022) [Request for Review Memo], available at Appendix C.

<sup>82</sup> The full report can be found at <https://dacipad.whs.mil/reports>

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.

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

### **III. Findings and Recommendations**

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

Based on those findings and the comprehensive review, the DAC-IPAD recommends:

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

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

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

### **I. Courts-Martial Observations**

At the June 2022 public meeting, the DAC-IPAD approved a program for its members to attend and observe courts-martial involving charges of sexual offenses<sup>83</sup> with a three-fold purpose of: (1) educating members on current courts-martial practice, (2) highlighting practice areas affected by recent or pending changes, and (3) identifying issues that may warrant further review.

Two former DAC-IPAD members and four current DAC-IPAD members attended a total of six courts-martial in their official DAC-IPAD capacity.<sup>84</sup> Members record their observations on topics including motion and objection practice, voir dire, expert and witness testimony, evidence, sentencing proceedings, and the performance of the trial counsel, defense counsel, SVC/VLC, and military judge.<sup>85</sup> Members share their observations during DAC-IPAD public meetings for discussion by the full Committee.

### **II. Advanced Litigation Courses**

Following the June 2022 public meeting and testimony on the establishment of the Offices of Special Trial Counsel (OSTCs), the Air Force and the Army invited Committee members to attend advanced litigation training courses.<sup>86</sup> DAC-IPAD members attended an Air Force litigation course in August 2022 and an Army litigation course in September 2022.<sup>87</sup>

The Air Force advanced sexual assault litigation course was a joint training event attended by prosecutors, defense counsel, and victims' counsel. This training was developed for experienced litigators, and the trial counsel attending the course had been selected to be part of the OSTC. The training covered voir dire, preparation and presentation of expert and witness testimony, and argument in sexual assault and special victim cases. The instructors consisted of Air Force Judge Advocate General's school staff and experienced counsel from the field.<sup>88</sup>

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<sup>83</sup> *Transcript of DAC-IPAD Public Meeting* 202-204 (June 22, 2022); *see also* Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces Fourth Annual Report, 76 (March 2020), *available at* [https://dacipad.whs.mil/images/Public/08-Reports/06\\_DACIPAD\\_Report\\_20200331\\_Final\\_Web.pdf](https://dacipad.whs.mil/images/Public/08-Reports/06_DACIPAD_Report_20200331_Final_Web.pdf).

<sup>84</sup> Former members, Ms. Kathleen Cannon attended a Marine Corps court-martial in January 2020 and Mr. James Markey attended a Marine Corps court-martial in November 2019 and an Army court-martial in January 2020. Dr. Cassia Spohn attended a Marine Corps court-martial in November 2019. Ms. Martha Bashford, Mr. A.J. Kramer, and MG (R) Marcia Anderson attended courts-martial from June 2022 through January 2023. In addition, several DAC-IPAD members have significant exposure to recent courts-martial practice in their personal capacity.

<sup>85</sup> Members record their observations on a form without attribution to any individual by name.

<sup>86</sup> *Transcript of DAC-IPAD Public Meeting* 7 (Sept. 21, 2022).

<sup>87</sup> *Id.* at 71, 74. The Air Force training was attended by Ms. Martha Bashford, Ms. Suzanne Goldberg, and Dr. Cassia Spohn. Ms. Bashford attended the Army training program.

<sup>88</sup> *Id.* at 71–73.

The Army sexual assault trial advocacy course was limited to prosecutors, with approximately half projected to be assigned to the OSTC.<sup>89</sup> The training consisted of lectures and small group practical exercises covering motion practice, corroborating evidence, voir dire, opening statements, closing and rebuttal arguments, expert testimony, and direct and cross-examinations. The lectures were presented by military and civilian experts, with the civilian forensic psychologist and forensic biologist remaining to participate in the practical exercises and to provide feedback to the students. The practical exercise evaluators consisted of both experienced field grade litigators and civilian highly qualified sexual assault experts, the latter from the Trial Counsel Assistance Program.<sup>90</sup>

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

### **III. Conclusion**

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

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<sup>89</sup> *Id.* at 74–75. This course is being redesigned into a three-week Special Trial Counsel certification course with the first training scheduled for June 2023.

<sup>90</sup> *Id.* at 75–76.

## **Appendixes**

- A. Authorizing Statutes
- B. Committee Charter and Terms of Reference
- C. Committee Members
- D. Subcommittee Terms of Reference
- E. Committee Recommendations to Date
- F. Committee Requests for Information (Sets 11-15)
- G. Committee Public Meetings, Preparatory Sessions, and Presenters
- H. Military Justice–Related Provisions Excerpted from the National Defense Authorization Act for Fiscal Year 2023
- I. Committee Professional Staff
- J. Acronyms and Abbreviations
- K. Sources Consulted

## Docketed Courts-Martial

**March 2023**

	Date	Location	Service	Charges	Name	Rank
1.	3/2-10	Washington Navy Yard	USN	92, 120b, 120c, 134	Smith	MIDN
2.	3/6-10	Norfolk, VA	USN	120b	Mielke	E-6
3.	3/6-10	Fort Campbell, KY	Army	120, 120b, 120c, 117a	Herron	E-4
4.	3/6-10	Fort Knox, KY	Army	120	Deless	E-8
5.	3/6-10	JBLM, WA	Army	120, 120c, 92x2	Gray	E-6
6.	3/6-11	JB M-D-L, NJ	Air Force	120	Alvarez	E-3
7.	3/6-11	Cannon AFB, NM	Air Force	120	Bazan	E-4
8.	3/6-11	USAF Academy, CO	Air Force	120	McHugh	AFC2
9.	3/6-11	Whiteman AFB	Air Force	120x3	Wimberly	E-3
10.	3/7-10	Fort Sam Houston, TX	Army	120bx9, 134	Aragon	E-6
11.	3/7-10	JBLM, WA	Army	120x2, 134	Moore	E-4
12.	3/7-10	Fort Hood, TX	Army	120x3	Norris	E-4
13.	3/7-10	Fort Bliss, TX	Army	120, 82x2, 93x2, 81x2	Meyer	E-7
14.	3/12-17	Parris Island, LA	USMC	107, 120	Lott	E-3
15.	3/13-15	Fort Campbell, KY	Army	120x6	Vargas	E-3
16.	3/13-16	Fort Hood, TX	Army	120	Alumbaugh	E-1
17.	3/13-16	Fort Leavenworth, KS	Army	120bx3	Arroyo	E-6
18.	3/13-17	Fort Knox, KY	Army	120x2, 121, 134	Gustave	E-8
19.	3/13-17	JBLM, WA	Army	120x3	Daniel	E-4
20.	3/13-18	Minot AFB, ND	Air Force	120x2, 128, 128b, 134	Sickles	E-4
21.	3/13-18	Beale AFB, CA	Air Force	120bx2	Sherman	E-4
22.	3/20-23	JBLM, WA	Army	120bx10, 134	Mitchell	E-4
23.	3/20-23	Fort Hood, TX	Army	120, 93	Jackson	E-5
24.	3/20-24	JBLM, WA	Army	120x5	Gale	E-6
25.	3/20-24	Camp Lejeune, NC	USMC	92, 120b, 134	Wattle	E-7
26.	3/20-24	Bremerton, WA	USN	120	Ching	E-5
27.	3/20-24	Camp Pendleton, CA	USMC	120, 128, 134	True	E-1
28.	3/20-24	Camp Pendleton, CA	USMC	92, 120, 129, 134	Dizona	E-5
29.	3/20-24	Holloman AFB, NM	Air Force	120	Beyer	E-4
30.	3/20-25	Vandenberg SFB, CA	Air Force	120bx3	Griffin	E-7
31.	3/20-25	Nellis AFB, NV	Air Force	92, 115, 120, 128	Sawyer	E-3
32.	3/20-25	Grand Forks AFB, ND	Air Force	107, 120	Borth	E-3
33.	3/20-30	San Diego, CA	USN	112a, 115, 120b, 128	Whiteman	E-2
34.	3/20-31	Fort Polk, LA	Army	120x2, 120b, 128bx11	Hudgins	E-5
35.	3/21-23	Fort Drum, NY	Army	120x2	Lanham	E-5
36.	3/21-24	Fort Sill, OK	Army	120, 120c, 128	Lopez-Roman	E-4
37.	3/21-24	Fort Stewart, GA	Army	120x4, 128	Williams	E-4
38.	3/27-30	Fort Stewart, GA	Army	120, 107	Grant	E-5
39.	3/27-30	Fort Bragg, NC	Army	120x4, 128, 129x3	Nguyen	E-2
40.	3/27-31	Fort Bragg, NC	Army	120bx9, 120x2, 128b	Sanchez	E-5
41.	3/27-4/1	JB M-D-L, NJ	Air Force	120bx2	Ashley	E-3
42.	3/28-30	Fort Bliss, TX	Army	120x2, 129	Gutierrez	O-1
43.	3/28-31	Fort Hood, TX	Army	120x4, 120bx11	Garcia	E-6
44.	3/28-31	Fort Hood, TX	Army	120x2, 128bx3	Jaramillo	E-3
45.	3/29-31	Fort Campbell, KY	Army	93, 120x2, 128	Lloyd	E-4

## Docketed Courts-Martial

**April 2023**

	Date	Location	Service	Charges	Name	Rank
1.	4/3-6	Fort Drum, NY	Army	120x2, 128b	Wicks	O-2
2.	4/3-6	Fort Hood, TX	Army	120x3	Bodden	E-2
3.	4/3-7	Fort Riley, KS	Army	120bx2	Griffin	E-8
4.	4/3-7	Fort Bragg, NC	Army	120bx4, 134	Durbin	E-4
5.	4/3-14	San Diego, CA	USN	80, 120, 120b, 134	Espejo	E-6
6.	4/4-7	Fort Knox, KY	Army	120x2, 120c, 128x2	Rodriguez	E-9
7.	4/4-7	Fort Polk, LA	Army	120x2	Miles	E-2
8.	4/4-7	Fort Stewart, GA	Army	120bx2; 129	Graves	E-2
9.	4/4-7	Fort Bragg, NC	Army	120x3, 134	Boggs	E-4
10.	4/10-15	Keesler AFB, MS	Air Force	120, 128, 131b, 134	Hymel	O-3
11.	4/10-15	Barksdale AFB, LA	Air Force	120x2, 120c, 134	Manriquez	E-4
12.	4/11-14	Fort Riley, KS	Army	129, 120x3	Torres	E-4
13.	4/11-14	Fort Stewart, GA	Army	120bx7, 128bx5, 131b	Veal	E-4
14.	4/11-14	Fort Carson, CO	Army	120bx7, 128b	Gonzalez	E-4
15.	4/11-14	Fort Campbell, KY	Army	120x4	Walden	E-4
16.	4/11-14	Fort Knox, KY	Army	120x3	Perry	E-7
17.	4/11-14	Fort Hood, TX	Army	120bx5	Norris	E-5
18.	4/17-20	Fort Stewart, GA	Army	120bx13	Andrada	E-7
19.	4/17-21	Camp Pendleton, CA	USMC	120	Ramirez	E-4
20.	4/17-22	Tinker AFB, OK	Air Force	92, 112ax5, 120	Marcoux	E-4
21.	4/17-22	Travis AFB, CA	Air Force	87b, 120x2, 128x2	Philogene	E-1
22.	4/17-22	Laughlin AFB, TX	Air Force	120, 128, 128b	Ramsey	E-7
23.	4/17-22	JB Andrews, MD	Air Force	120x2	Brodanex	E-1
24.	4/17-22	Sheppard AFB, TX	Air Force	120x3	Vicknair	E-3
25.	4/17-24	Jacksonville, FL	USN	120b	Flores	E-6
26.	4/18-21	Fort Bliss, TX	Army	120b	Prickette	E-9
27.	4/24-27	Fort Sam Houston, TX	Army	120bx2	Mitchell	E-6
28.	4/24-28	Fort Campbell, KY	Army	112ax2, 120, 92x3	Cortez	E-4
29.	4/24-28	Norfolk, VA	USN	92, 120, 128	Akande	E-7
30.	4/24-29	Keesler AFB, MS	Air Force	120, 121, 128b	Mabida	E-5
31.	4/24-29	Wright-Patterson AFB, OH	Air Force	120, 128b	Waites	E-4
32.	4/25-27	Fort Leonard Wood, MO	Army	112a, 120x2	Jones	E-4
33.	4/25-28	Fort Hood, TX	Army	120x3	Lorenz	E-5
34.	4/25-28	Fort McNair, DC	Army	120bx2, 134, 89	Ball	E-4
35.	4/28-5/5	Jacksonville, FL	USN	120b, 134	Spenelli	E-7



## Docketed Courts-Martial

**May 2023**

	Date	Location	Service	Charges	Name	Rank
1.	5/1-5	Fort Campbell, KY	Army	120x16, 120bx4, 128	Tebyani	E-3
2.	5/1-5	Fort Polk, LA	Army	81x2, 120x2	Petrie	
3.	5/1-5	Norfolk, VA	USN	120	Armstrong	E-3
4.	5/1-6	Tyndall AFB, FL	Air Force	120	Tolson	E-2
5.	5/2-8	JBLM, WA	Army	120x6, 128, 117a	Zavaleta	E-2
6.	5/8-11	Fort Bragg, NC	Army	120cx3, 128, 131b	Rivera-Lopez	E-6
7.	5/8-11	Fort Stewart, GA	Army	120bx2, 120x2	Morlock	E-3
8.	5/8-11	JBLM, WA	Army	120x3	McGraw	E-3
9.	5/8-12	Fort Campbell, KY	Army	120x4, 129x2	Denham	E-5
10.	5/8-13	Peterson Garrison, CO	Air Force	120, 120c, 134	White	E-4
11.	5/9-12	Fort Sam Houston, TX	Army	120, 128	Anderson	E-4
12.	5/9-12	Fort Hood, TX	Army	120x2, 120c, 134x3	Merino	E-5
13.	5/15-18	Fort Leavenworth, KS	Army	120	Hernandez	E-3
14.	5/15-19	JBLM, WA	Army	120x2, 128bx4	Appleton	E-3
15.	5/15-19	Fort Campbell, KY	Army	104, 120x3, 128	Benedict	E-3
16.	5/15-20	Minot AFB, ND	Air Force	120x2	Petgrave	E-5
17.	5/16-19	Fort Sill, OK	Army	120x2, 133, 134	Kirkines	O-3
18.	5/22-25	Fort Bragg, NC	Army	90x2, 120x2	Leese	E-3
19.	5/22-25	Fort Polk, LA	Army	120x2	Simms	E-4
20.	5/22-25	Fort Lee, VA	Army	120b	South	E-7
21.	5/22-26	JBLM, WA	Army	120bx4	Vigil	E-3
22.	5/22-26	Nellis AFB, NE	Air Force	120x2	Reagan	E-2
23.	5/29-6/3	Grand Forks AFB, ND	Air Force	120	Spraberry	E-2
24.	5/30-6/2	Fort Sill, OK	Army	120, 121, 128bx3	Varlaro	E-7
25.	5/30-6/6	JBLM, WA	Army	120bx7	McDowell	E-4

Presentations provided at the  
26th DAC-IPAD Public Meeting

**FY23 NDAA**

**Military Justice Provisions**

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**Briefing by:**

**CAPT Anita Scott  
U.S. Coast Guard  
Chair, Joint Service Committee**



# Sec. 541

## Matters in Connection with Special Trial Counsel

- Sexual Harassment as a covered offense effective Jan. 1, 2025
- Divestment of residual prosecutorial duties & judicial functions of convening authorities
- De-identification of convening authority during court martial
- Assorted new reporting requirements



# Sec. 542

## Technical Corrections Relating to Special Trial Counsel

- Minor wordsmithing of statutory language and updating of codified numbers



# Sec. 543

## Randomization of Court-Martial Panels

- Gave President additional authority in Article 25, UCMJ to prescribe regulations to enable the randomized selection of qualified members to court-martial panel duty.
- “Maximum extent practicable.”
- President has until Dec. 23, 2024 to prescribe such regulations.



# Sec. 544

## Jurisdiction of Courts of Criminal Appeals

- Adjustment to right to appeal
- Adjustment of timeline to appeal from court martial
- Authority of the Judge Advocate General over post-court martial matters



# Sec. 545

## Special Trial Counsel of the Department of the Air Force

- Provides for a singular special trial counsel office and singular lead special trial counsel to oversee matters arising from both the Air Force and the Space Force





# Sec. 546

## Independent Investigation of Sexual Harassment

- Establishes definition of “independent investigator” to mean a specially trained employee of the DoD or a specific branch responsible for investigating charges of sexual harassment



# Sec. 547

## Primary Prevention Research Agenda and Workforce

- Directs existing research efforts to now include foci on the effect of violence on different sub-populations of the military, potential factors influencing both violence and self-directed violence amidst members, and differences sexual harassment training in the military compared to other federal bodies



# Sec. 548

## Limitation on Availability of Funds for Relocation of Army CID Special Agent Training Course

- Provisioning of numerous reporting requirements prior to the release of allocated funds for the relocation of the Army's CID special agent training course



# Sec. 549

## Review of Titling and Indexing Practices of the Army and Certain Other Organizations

- Requires the Secretary of the Army to review certain personnel files from the Army, Army Reserve, and Army National Guard for members who were either titled or indexed
- Where warranted in the opinion of the Secretary, specified corrective action may be taken in the case of individual members
- Imposes a reporting duty on both the Secretary of the Army and SecDef



# Sec. 549A

## Briefing and Report on Resources Required for Implementation of Military Justice Reform

- Imposes requirement on respective Secretaries to submit reports on the resources necessary to implement FY22 NDAA Title V (Military Personnel Policy), Subtitle D (Military Justice Reform) in a specific format



# Sec. 549B

## Report on Sharing Information with Counsel for Victims of Offenses under the UCMJ

- Requires the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces to produce a report opining on feasibility of sharing privacy-related information with counsel representing victims



Questions?





# ***Air Force Trial Defense Division Personnel - Current a/o 15 February 2023***

- **Military Justice Directorate's (AF/JAJ) Largest Division**
  - **105 Officers**
    - 7 Division/Circuit Leadership Positions
    - 18 Senior/Circuit Defense Counsel
    - 80 Area Defense Counsel
  - **78 Enlisted**
    - 4 Defense Paralegal Managers
    - 74 Defense Paralegals
  - **9 Civilians**
    - 1 GS-15 Defense Counsel Assistance Program
    - 8 GS-13 Defense Investigators

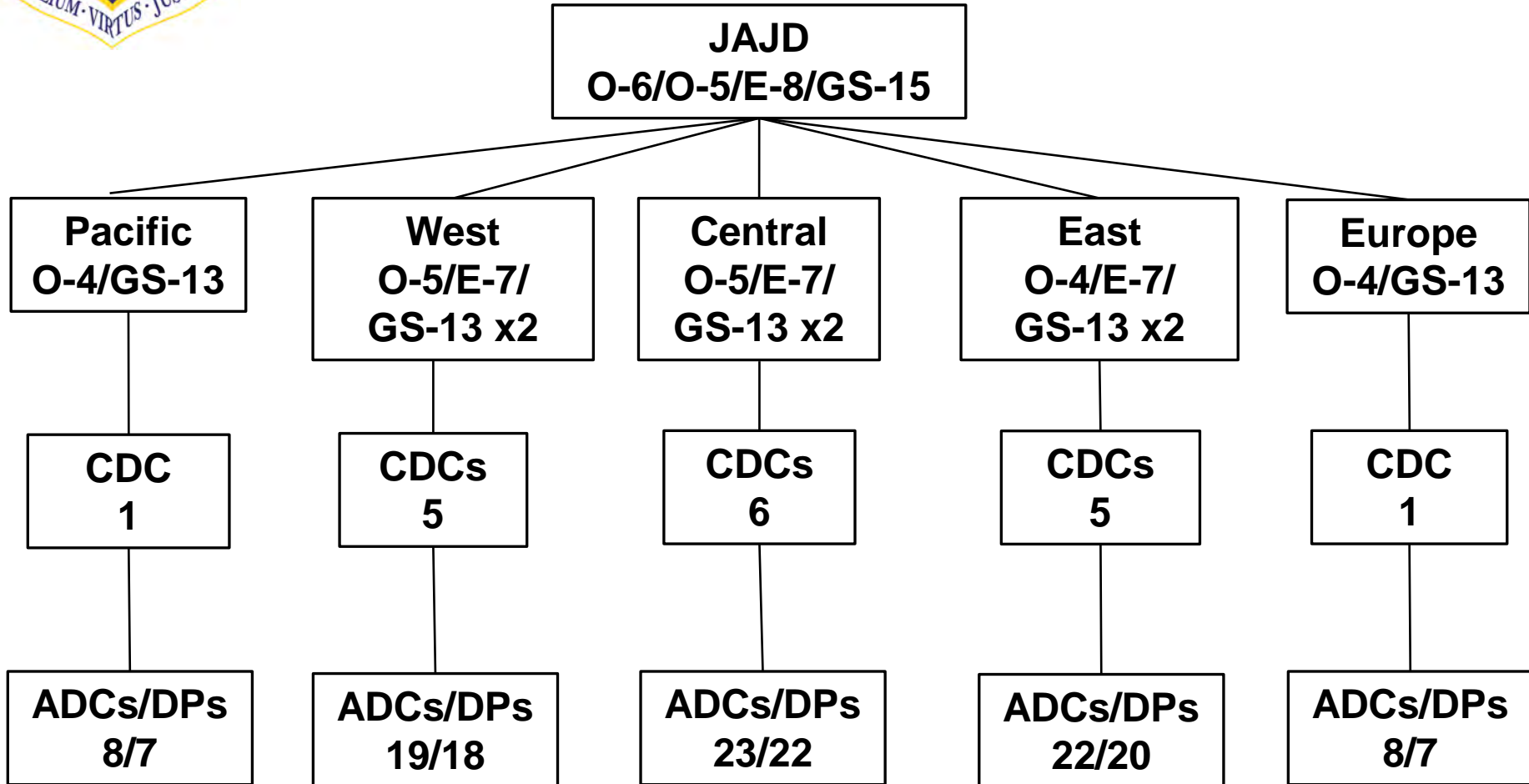






# ***Air Force Trial Defense Division***

## ***Current Organizational Chart (a/o 15 Feb 23)\****



\* Effective Summer '23, the Air Force Trial Defense Division will transition from our current geographically based organization to a six-district construct mirroring the organizational structure of the new Air Force Office of Special Trial Counsel



# Eastern Circuit

## Langley

- JBLE
- Scott
- WPAFB

## Andrews

- JBA
- JBAB
- JBMDL
- Dover

## Charleston

- JBC
- Pope
- SJAFOB

## Eglin

- Eglin
- Tyndall
- Hurlburt

## Robins

- Robins
- MacDill
- Shaw

## Keesler

- Keesler
- Maxwell
- Moody





# Central Circuit

## Randolph

- Randolph
- Lackland
- Ft. Sam Houston

## Barksdale

- Barksdale
- McConnell
- Little Rock

## Offutt

- Offutt
- Ellsworth
- Grand Forks
- Minot

## Sheppard

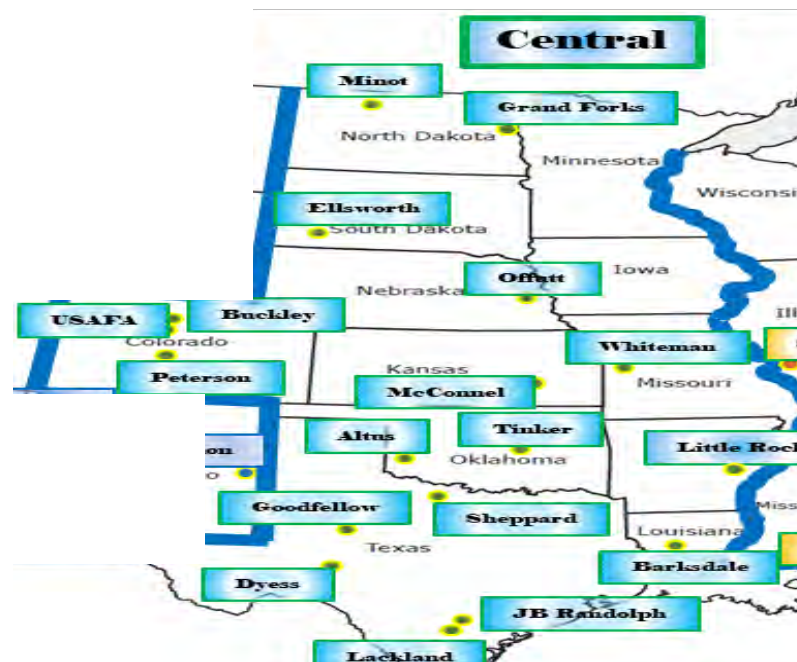
- Sheppard
- Dyess
- Goodfellow

## Tinker

- Tinker
- Altus
- Whiteman

## Peterson

- Peterson
- USAFA
- Buckley





# Western Circuit

## Davis-Monthan

- DMAFB
- Travis
- Luke
- Hill

## Cannon

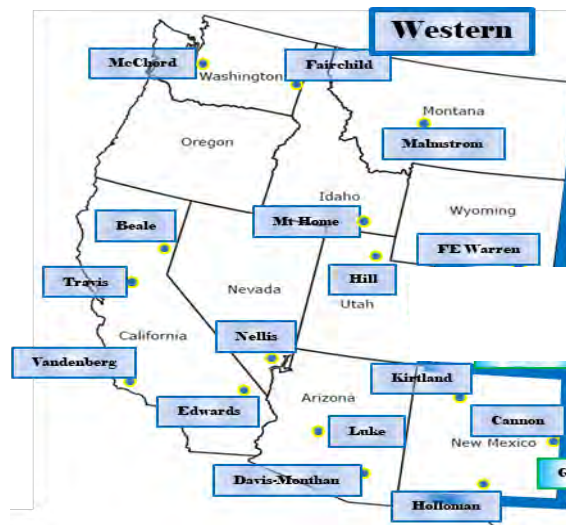
- Cannon
- Holloman
- FE Warren
- Kirtland
- Mt. Home

## Nellis

- Nellis
- Edwards
- Vandenberg
- Beale

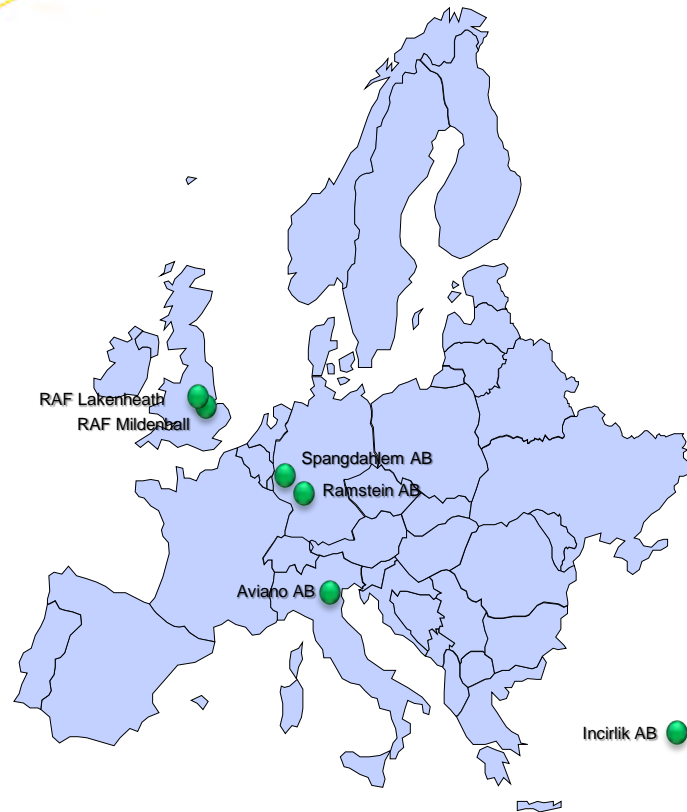
## McChord

- JBLM
- JBER
- Eielson
- Fairchild
- Malmstrom

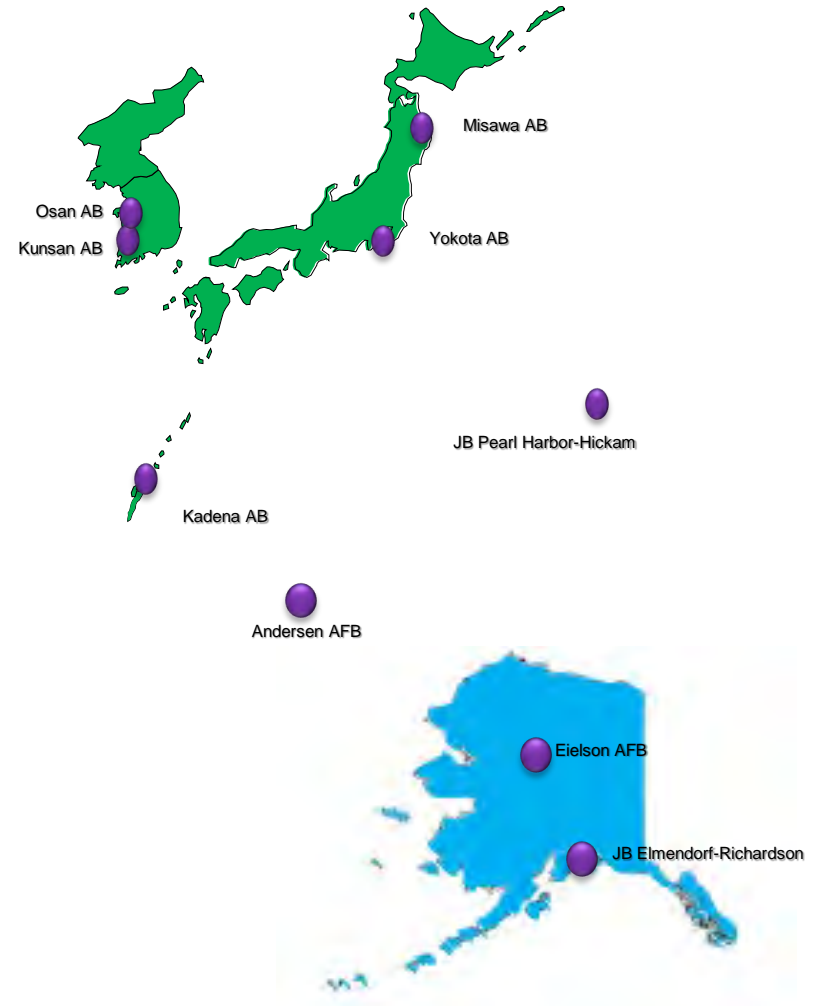




# European and Pacific Circuits



Al Udeid  
AB



**LEGEND:** ● European Circuit ● Pacific Circuit

# **Special Projects Subcommittee Update**

February 21, 2023

Ms. Eleanor Magers Vuono and Ms. Meghan Peters  
DAC-IPAD Staff Attorneys

Ms. Stayce Rozell  
Senior Paralegal



# Topics

- Pretrial processes for cases prosecuted by special trial counsel
- March 2023: Provide draft report and recommendations to Committee members for review
- FY 23 NDAA task to the DAC-IPAD: review of victim access to information



# Concerns Regarding Military Pretrial Procedures and Prosecution Standards

The DAC-IPAD's previous findings:

- Cases lacking sufficient evidence are referred to trial
- The practice of referring weak cases to trial contributes to a high acquittal rate
- Pretrial procedures permit the referral of weak cases:
  - Article 32 (preliminary hearings)
  - Article 33 (disposition guidance)
  - Appendix 2.1, Manual for Courts-Martial (Non-binding disposition guidance)
  - Article 34 (advice before referral for trial)





# Concerns Regarding Military Pretrial Procedures and Prosecution Standards

- The Special Projects Subcommittee is reviewing
  - The Article 32 preliminary hearing's advisory probable cause determination
    - Should Article 32 be changed to preclude referral upon a finding of no probable cause, with an opportunity for reconsideration?
  - Article 33 disposition guidance
    - Says referral authorities “should,” (not “shall”) consider non-binding disposition guidance.
    - Takes into account principles of federal prosecution, with consideration for military requirements.
    - The Secretary of Defense issued guidance in Appendix 2.1, MCM: 14 equally-weighted factors; sufficiency of the evidence is not a threshold or primary concern
- Article 34: The standard for referral is probable cause



# Concerns Regarding Military Pretrial Procedures and Prosecution Standards

- Are the procedures and guidance in Art. 32-34 appropriate for cases prosecuted by Special Trial Counsel?
  - STC has exclusive authority to dispose of charges involving covered offenses
  - The Article 32 probable cause determination is advisory
  - The STC does not have to consider the disposition guidance factors before referring charges to a general court-martial
    - The STC does not have to believe there that there will likely be sufficient admissible evidence to obtain and sustain a conviction
  - Art. 34 says STCs make the probable cause determination prior to referral



# Concerns Regarding Military Pretrial Procedures and Prosecution Standards

- There is no check on the exercise of prosecutorial discretion by STCs:
  - STCs operate independent of the chain of command and staff judge advocate
  - Art. 32 preliminary hearings are advisory
  - STC makes the Art. 34 probable cause determination
- Amendments to Art. 32 and 33 could address this concern
  - Provide an independent check on the prosecution
  - Ground pretrial decision-making in well-established legal and ethical guidelines
- Need to promote uniformity in pretrial processes and decisions



# **FY23 NDAA task to the DAC-IPAD: Report on victim access to information**

Section 549B - DAC-IPAD shall submit:

*“...[A] report on the feasibility and advisability of establishing a uniform policy for the sharing of the information described in subsection (c) with a Special Victims’ Counsel, Victims’ Legal Counsel, or other counsel representing a victim of an offense under . . . the Uniform Code of Military Justice.”*



# **FY23 NDAA task to the DAC-IPAD: Report on victim access to information**

## Elements:

- Consider
  - The privacy of individuals;
  - The criminal investigative process; and
  - The military justice system generally.
- Describe
  - Timing of disclosures
  - Circumstances when information should not be shared
  - Recommendations for legislative or administrative action



# **FY23 NDAA task to the DAC-IPAD: Report on victim access to information**

## Information

- Recorded statements of the victim to investigators
- Record of forensic examination of the person or property of the victim
- Medical record of the victim that is in the possession of investigators or the Government



# Special Projects Subcommittee Request

- DAC-IPAD assign this task to the Special Projects Subcommittee to develop the information for the DAC-IPAD's consideration
- Deadline for DAC-IPAD to submit its report to Congress: Dec. 23, 2023



# **Case Review Subcommittee**

## **Update and Report**

February 22, 2023

Ms. Kate Tagert and Ms. Eleanor Vuono  
DAC-IPAD Staff Attorneys

Ms. Stacy Boggess  
Senior Paralegal

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# Agenda

- Panel Composition Study
- Annual Report



## **Statutory Requirement**

### **Section 546(d) of NDAA for FY 2015**

#### **DAC–IPAD Taskings:**

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



# Initial Purpose

- Obtain an understanding of the demographic characteristics of panel members in sexual assault courts-martial
- Obtain the demographic characteristics of victims and the accused, and compare against the make up of military panels
- How are data relevant to understanding panel selection outcomes
- Compare data across different service branches and installations



# Methodology

- Issue RFI for FY21 and FY22 courts-martial meeting the following criteria:
  - Article 120, 120b, 120c
  - A seated panel



# Methodology

- Record information from source documents on panel members
- Record information on conviction and acquittal data
- Dr. William Wells will analyze data after receiving needed information on race, ethnicity, and gender provided by military personnel organizations



# Annual & Appellate Report

- Annual Report: Tab 10, Chapter 2
- Appellate Report: Tab 9



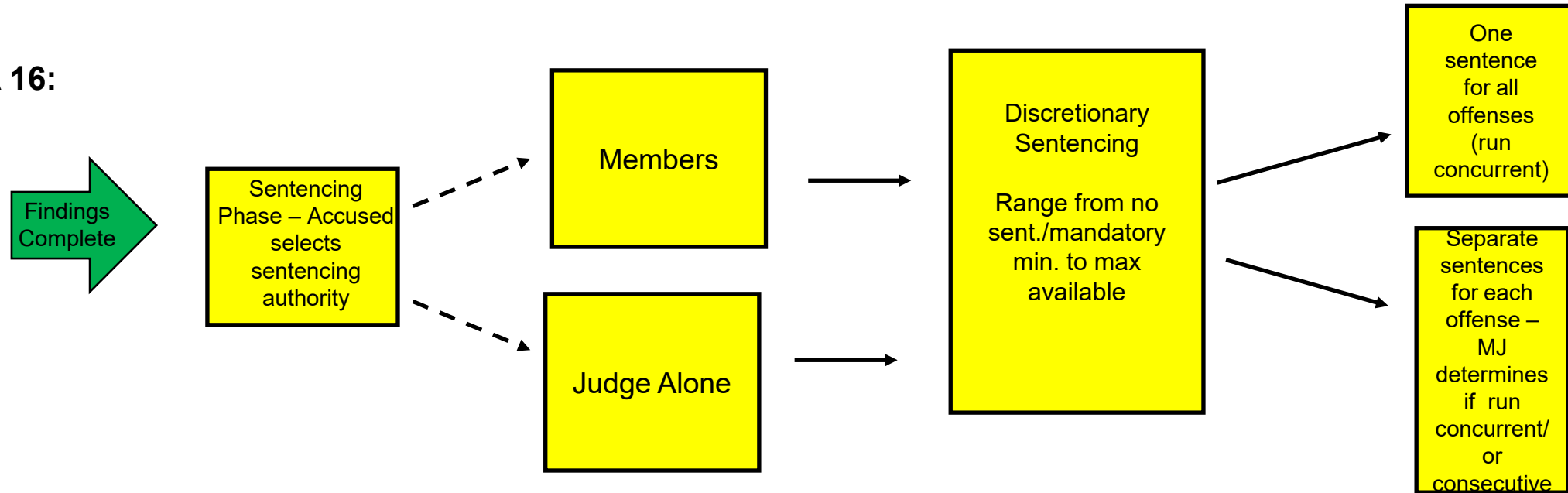
# Sentencing Reform

COL Tyesha Smith

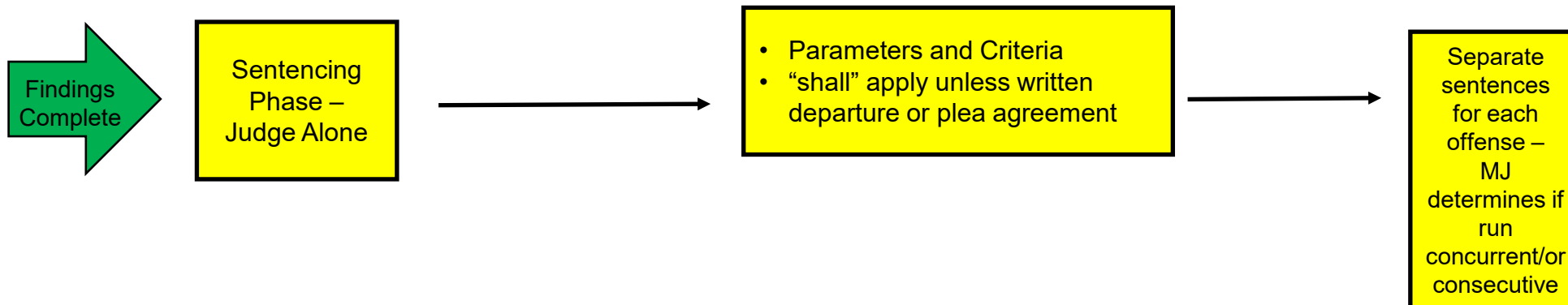


# Comparison

## MJA 16:



## FY22 NDAA:





# Policy Subcommittee Update

February 22, 2023

Ms. Terry Gallagher and Ms. Terri Saunders  
DAC-IPAD Staff Attorneys

Ms. Marguerite McKinney  
Management and Program Analyst



# Topics

- Victim Impact Statement Report
- Alternative Justice Update
- Article 25 Panel Selection



# Victim Impact Statement Report

- Response to Congress for victim impact statement questions:
  - Are military judges interpreting R.C.M. 1001(c) too narrowly and limiting what victims may say during sentencing such that the courts are not fully informed of the impact of the crime on the victims?
  - Are military judges appropriately permitting other witnesses to testify about the impact of the crime?
- Committee approved 5 recommendations at Dec 2022 meeting



# Victim Impact Statement Report

- Final report will include summary of:
  - Victims' Counsel responses to supplemental questions (Tab 8a)
  - Trial Defense Services input



# Victim Impact Statement Report

**Q1:** Are military judges interpreting R.C.M. 1001(c) too narrowly and limiting what victims may say during sentencing such that the courts are not fully informed of the impact of the crime on the victims?

## **DAC-IPAD Response:**

- In vast majority of cases, judges do not limit a victim's impact statement
- When they do, it is generally in accordance with R.C.M. 1001(c)
- Standard is unclear and judges apply it differently
- R.C.M. 1001(c) itself is too narrow



# Victim Impact Statement Report

**Q2:** Are military judges appropriately permitting other witnesses to testify about the impact of the crime?

## **DAC-IPAD response:**

- Military judges permit others besides named victims to provide VIS
- Appellate courts have adopted a more expansive view



# Alternative Justice

- FY20 NDAA Joint Explanatory Statement:

*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, non-judicial, or administrative action against the perpetrator of the alleged offense.*



# Independent Review Commission (IRC)

- **Recommendation 4.3 e: Study the Methods Our Allies Have Used to Make Amends to Survivors, Including Restorative Engagement to Acknowledge Harm and Potential Victim Compensation**
- The IRC recommended that the DAC-IPAD study methods for restorative engagement with survivors. These strategies can help survivors heal from the trauma of sexual assault and the institutional betrayal they may have experienced when their cases were poorly handled.
- Secretary of Defense approved this recommendation with modification that DoD study this issue





# Alternative Justice

- DoD
  - Studying restorative engagement
  - Estimated completion of Fiscal Year 2027



# Article 25, UCMJ

- **Basis for Panel Member Selection Study**

- DAC-IPAD interest in how panels are selected; public testimony raising concerns
- Randomization of court-martial member selection, effective Dec 2024
- Judge alone sentencing, effective December 2023

- **Scope**

- Review and assess Article 25 member selection criteria and processes
- Review and assess best practices for reform, including random selection

- **Coordinated Effort**

- PSC – focus on modernizing selection criteria and processes
- CRSC – focus on the demographics of current panels

