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

Meeting Materials

June 13-14, 2023

Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD)
30th Public Meeting

June 13 & 14, 2023
Public Meeting Read-Ahead Materials

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

PUBLIC MEETING AGENDA

June 13 - 14, 2023

Location: Renaissance Arlington Capital View (2800 S. Potomac Ave, Arlington, VA)

Tuesday, June 13, 2023	**Day 1**
12:55 p.m. – 1:00 p.m.	**Welcome and Introduction to Public Meeting**
1:00 p.m. – 2:00 p.m.	**Military Criminal Investigative Organizations** *(60 minutes)* *Ms. T.L. Williams, U.S. Army Criminal Investigative Division* *Special Agent Ashlee Wega, U.S. Air Force Office of Special Investigations* *Special Agent Erin Hansen, U.S. Navy Criminal Investigative Service* *Special Agent Kathleen 'Katie' Flynn, U.S. Coast Guard Criminal Investigative Service*
2:00 p.m. – 3:00 p.m.	**Prosecutors (work with special victims' counsel)** *(60 minutes)* *Lieutenant Colonel Heather Tregle, U.S. Army, JAG Corps* *Colonel Naomi Dennis, U.S. Air Force, JAG Corps* *Captain Angela Tang, U.S. Navy, JAG Corps* *Colonel Glen Hines, Jr., U.S. Marine Corps, JAG Corps* *Captain Anita Scott, U.S. Coast Guard, JAG Corps*
3:00 p.m. – 3:15 p.m.	**Break**
3:15 p.m. – 4:15 p.m.	**Prosecutors (Military and Civilian Experience)** *(60 minutes)* *Brigadier General Bobby Christine, U.S. Army, Retired* *Lieutenant Colonel Joshua Bearden, U.S. Army, JAG Corps* *Ms. Magdalena Acevedo* *Ms. Kathleen Muldoon, U.S. Marine Corps*
4:15 p.m. – 5:15 p.m.	**Senior Enlisted Leaders** *(60 minutes)* *Command Sergeant Major Michael J. Bostic, U.S. Army, Regimental Command Sergeant Major* *Chief Master Sergeant Laura Puza, U.S. Air Force, Senior Enlisted Advisor* *Master Chief Tiffany George, U.S. Navy, Command Senior Enlisted Leader* *Master Gunnery Sergeant Christopher Pere, U.S. Marine Corps, Legal Services Chief*

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

PUBLIC MEETING AGENDA

5:15 p.m. – 5:30 p.m.	**Public Comment** *(15 minutes)*
5:30 p.m.	**Public Meeting Adjourned**

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

PUBLIC MEETING AGENDA

Wednesday, June 14, 2023	**Day 2**
8:25 a.m. – 8:30 a.m.	**Welcome and Overview of Day 2**
8:30 a.m. – 9:30 a.m.	**Special Victims' Counsel Organizations** *(60 minutes)* *Colonel Carol Brewer, U.S. Army, JAG Corps* *Colonel Tracy Park, U.S. Air Force, JAG Corps* *Captain Daniel Cimmino, U.S. Navy, JAG Corps* *Colonel Iain Pedden, U.S. Marine Corps, JAG Corps* *Ms. Elizabeth Marotta, U.S. Coast Guard*
9:30 a.m. – 10:15 a.m.	**Civilian Advocacy Organizations (Victim Services)** *(45 minutes)* *Ms. Jennifer Elmore, Protect Our Defenders* *Mr. Ryan Guilds, Survivors United*
10:15 a.m. – 10:30 a.m.	**Break**
10:30 a.m. – 11:30 a.m.	**Civilian Advocacy Organizations (Diversity)** *(60 minutes)* *Ms. Elisa Cardnell, Service Women's Action Network (SWAN)* *Ms. Lorry Fenner, Service Women's Action Network (SWAN)* *Ms. Rafaela Schwan, League of United Latin American Citizens (LULAC)*
11:30 a.m. – 12:00 p.m.	**OSTC Course Observation Feedback** *(30 minutes)*
12:00 p.m. – 1:00 p.m.	**Lunch**
1:00 p.m. – 2:15 p.m.	**DoD Office of Diversity, Equity, and Inclusion** *(75 minutes)* *Dr. Lisa Arfaa*
2:15 p.m. – 2:20 p.m.	**Break**
2:20 p.m. – 2:35 p.m.	**Collateral Misconduct Report Update** *(15 minutes)*
2:35 p.m. – 2:50 p.m.	**Special Projects SC Update** *(15 minutes)*
2:50 p.m. – 3:05 p.m.	**Case Review SC Update** *(15 minutes)*
3:05 p.m. – 3:20 p.m.	**Policy SC Update** *(15 minutes)*
3:20 p.m. – 4:00 p.m.	**Committee Deliberations** *(40 minutes)* *- Victim access to information* *- Panel selection criteria*

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

PUBLIC MEETING AGENDA

4:00 p.m. – 4:15 p.m.	**Public Comment** *(15 minutes)*
4:15 p.m. – 4:30 p.m.	**Meeting Wrap-Up / Preview of Next Meeting**
4:30 p.m.	**Public Meeting Adjourned**

SEC. 549B. REPORT ON SHARING INFORMATION WITH COUNSEL FOR VICTIMS OF OFFENSES UNDER THE UNIFORM CODE OF MILITARY JUSTICE.

(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'' as the meaning given that term in section 101(a)(9) of title 10, United States Code.

POLICIES ON VICTIM AND VICTIM COUNSEL ACCESS TO MATERIALS

Service	Policy on Victim and SVC/VLC Access to Materials
U.S. Army	4. Implementation. The prosecution will offer to provide the victim and Special Victims' Counsel (SVC), if applicable, with the information listed below without request by the victim. If a crime victim is represented by a SVC, the prosecution will correspond with both the SVC and the crime victim. a. Upon preferral of charges: (1) A copy of all statements and documentary evidence produced or provided by the victim; (2) An excerpt of the charge sheet setting forth the preferred specifications pertaining to that victim; and (3) The date, time, and location of any pretrial confinement review pursuant to Rule for Courts-Martial 305, and the preliminary hearing pursuant to Article 32, UCMJ. b. Upon receipt by the government: (1) A summarized transcript of the victim's testimony at the preliminary hearing; (2) An excerpt of the charge sheet setting forth the referred specifications pertaining to that victim; (3) Any docket requests, as well as docketing or scheduling orders, including deadlines for filing motions and the date, time, and location for any session of trial; and (4) Any request to interview the victim received from defense counsel. c. Upon filing by the government, a copy of any motion or responsive pleadings that may limit a victim's ability to participate in the court-martial, affect the victim's possessory rights in any property, concern the victim's privileged communications or private medical information, or involve the victim's right to be heard. *Source*: Department of the Army Policy Memorandum 22-07, Subject: Disclosure of Information to Crime Victims (1 Mar 2022).

POLICIES ON VICTIM AND VICTIM COUNSEL ACCESS TO MATERIALS

Service	Policy on Victim and SVC/VLC Access to Materials
U.S. Navy	6. Implementation. a. In addition to the rights of notice, consultation, and disclosure contained in references (a), (b), and (i), government counsel practicing within NLSC shall provide to victims, or VLC when applicable, the following materials upon request, or as otherwise designated below, when in the physical possession of the government counsel. Enclosure (1) may be used to assist victims in identifying which materials they wish to receive. Government counsel has a continuing duty to disclose the requested information. The TC should review enclosure (1) each time it receives new materials/documents. The TC may need to consult with other agencies before releasing materials. (1) Upon request, a copy of any victim statement, including a copy of any recordings and transcriptions made by the victim; (2) Upon request, a copy of any evidence produced by or adopted by the victim; (3) Upon request, a copy of any evidence of the victim's collateral conduct that could be punished under the UCMJ and was discovered as a result of the reporting of a crime or the ensuing investigation, if, in the judgment of the government, such disclosure would not impede or compromise an ongoing investigation; (4) Upon request, a copy of any images or videos of the victim collected in the course of the investigation including photographs taken during a Sexual Assault Forensic Examinations, and images or videos that are the subject of a charge for violation of Articles 117a and 120c, UCMJ, with the exception of contraband constituting child pornography; (5) Upon issuance, a copy of any official request, subpoena, search authorization, or search warrant issued by military authorities to any third-party custodian for documents or records in which the victim maintains a privacy interest; (6) Upon preferral, a copy of the charge sheet setting forth the preferred charge(s) and specification(s) to that victim, redacted as necessary in accordance with applicable laws and regulations; (7) Upon referral, a copy of the charge sheet setting forth the referred charge(s) and specification(s) pertaining to that victim, redacted as necessary in accordance with applicable laws and regulations;

Service	Policy on Victim and SVC/VLC Access to Materials
	(8) Upon issuance, a copy of any appointing order directing a preliminary hearing under Article 32, UCMJ, and any requests for a continuance of such preliminary hearing; (9) Upon adjournment or dismissal of charges that are not intended to be re-preferred a copy of or access to the recording of any Article 32, UCMJ, preliminary hearing, with the exception of materials sealed pursuant to Rules for Courts-Martial (R.C.M.) 1113(a) and in accordance with the requirements and limitations of R.C.M. 405(j)(5); (10) Upon issuance, a copy of any docketing request, scheduling order, or motion for continuance disclosed in a sufficiently timely manner to permit consultation with the victim or VLC prior to finalization of any court dates; (11) Upon request, a copy of any court-martial filing, not under seal, that implicates the victim's rights privileges, or protections. Such filings include those that seek to limit a victim's ability to participate in the court-martial, affect the victim's possessory rights in any property, concern the victim's privileged communications or personal medical information, involve the victim's past sexual behavior or sexual predisposition, as well as requests to obtain information from a third party custodian via documents or records in which the victim may maintain a privacy interest, or seek to have the victim produced for testimonial evidence in support of a motion; and (12) Upon request, copy of any approved plea agreement, including the stipulation of fact. b. VLC may also request records or information related to a client's case for "official use" purposes. Neither the Freedom of Information Act (FOI) nor the Privacy Act prohibits a legal or investigative office from disclosing requested records or information at their discretion to a VLC for "official use" in the performance of their duties. It is within the release authority's discretion to release the documents or to require restrictions on the manner in which the records are used. For example, the release authority may place limits on the manner in which a VLC shares records or information contained in records with their client; may limit the authority of VLC to copy or retain any records or information; and may set requirements for destroying or returning any records after the official purpose permitting their use has concluded. As established in paragraph C4.2.1 of reference (c), the records release authority is authorized to disclose the records or information upon request if the following factors are met:

Service	Policy on Victim and SVC/VLC Access to Materials
	(1) The VLC has a need for the records or information in the performance of his or her assigned duties; (2) The intended use of the records or information generally relates to the purpose for which the records or information are maintained; and (3) Only those records or information requested as are minimally required to accomplish the intended use should be disclosed. c. In addition to the matters disclosed pursuant to subsections (a) and (b) above, government counsel practicing within NLSC may disclose additional responsive investigative or adjudicative materials, or records produced during the military justice process and, if necessary, may set restrictions on disclosure, dissemination, or destruction of those records. Government counsel will insure that any other requests by a victim or VLC, including requests for copies of results of investigations or other investigative materials, for copies of case disposition reports, or for travel support or itineraries, are processed expeditiously and with respect for the applicable Rules for Courts-Martial, the Military Rules of Evidence, the FOIA, the Privacy Act, and reference (a). Prior to release, government counsel should determine the appropriate release authority and request release in accordance with the release authority's policies and procedures. For example, Naval Criminal Investigative Service (NCIS) is the release authority for NCIS Reports of Investigation and the Sexual Assault Prevention and Response office is the release authority for the Sexual Assault Disposition Report (SADR). TC will assist victims or VLC with the processing of their requests for copies of results of investigations or other investigative materials, for copies of case disposition reports, or for travel support or itineraries. *Source*: Department of the Navy Notice 5810.1, Subject: Disclosure of Information to Crime Victims, 5 Apr 22

POLICIES ON VICTIM AND VICTIM COUNSEL ACCESS TO MATERIALS

Service	Policy on Victim and SVC/VLC Access to Materials
U.S. Marine Corps	<u>Documents Provided to Victims' Legal Counsel (VLC)</u> Trial counsel shall provide the following material to the detailed VLC unless otherwise directed by a court: *A. Upon Notification of Representation* 1. A copy of all statements and documentary evidence, in possession of the trial counsel, produced or provided by the victim. 2. The date, time, and location of any pretrial confinement review pursuant to R.C.M. 305. 3. Point of contact information for all assigned trial counsel on the case including applicable supervisors. *B. Upon Referral of Charges* 1. A copy of the charge sheet, redacted for PII, setting forth the preferred specifications pertaining to that victim. 2. The date, time, and location of any preliminary hearing pursuant to Article 32, UCMJ, and any request for continuance. *C. Upon Receipt or Filing by the Government* 1. A transcript or summarized transcript of the victim's testimony at the preliminary hearing. 2. A copy of the charge sheet, redacted for PII, setting forth the referred specifications pertaining to that victim. 3. Any docket requests, as well as docketing or scheduling orders, including deadlines for filing motions and the date, time, and location for any session of trial. 4. A copy of any filing, pre or post-referral, including attachments, that may limit a victim's ability to participate in the court-martial, affect the victim's possessory rights in any property, concern the victim's privileged communications or private medical information, or involve the victim's right to be heard. 5. Any request to interview the victim received from defense counsel.

Service	Policy on Victim and SVC/VLC Access to Materials
	6. Notice of plea agreement negotiations, and an opportunity to express to the convening authority the views of the victim regarding all proposed terms of the agreement. 7. A copy of any approved pretrial agreement. 8. Upon request, counsel for the government shall provide the victim access to, or a copy of, the recording of the Article 32, Preliminary Hearing. Such access or copy shall be provided to the victim not later than a reasonable time following dismissal of the charges, unless charges are dismissed for the purpose of re-referral, or court-martial adjournment. Nothing in this Volume shall be construed to create an obligation to retain records beyond the period specified by SECNAV M-5210.1 or other applicable authority. 9. Upon confirmation of command disposition, a copy of any disposition report or summary from the command, as applicable. *Source*: Legal Support and Administration Manual, Volume 4: Marine Corps Victims' Legal Counsel Organization. (26 AUG 2021)

POLICIES ON VICTIM AND VICTIM COUNSEL ACCESS TO MATERIALS

Service	Policy on Victim and SVC/VLC Access to Materials
U.S. Air Force	*Section 8B—Provision of Information to Victims' Counsel* 8.4. Release of Records to VCs. Requests from DAF VCs and VCs from other services for records pertaining to a court-martial proceeding involving their clients are properly addressed as "official use" requests under the Privacy Act and FOIA. See 5 U.S.C. § 552a(b)(1); DoD 5400.11-R, *Department of Defense Privacy Program*, paragraph C4.2.1. Victims may also hire civilian attorneys to serve as VC. In such cases, a civilian VC may request information pursuant to the "routine use" provision of the SORN "Military Justice and Civilian Criminal Case Records," DoD 0006, consistent with law and policy as to victims' rights and access to information. 8.5. SJA Release of Information. 8.5.1. An SJA's decision to release information is limited in scope to information generated and maintained by the servicing legal office in accordance with law and policy. See also F051 AFJA I, Military Justice and Magistrate Court Records. 8.5.2. An SJA's decision to release information pursuant to an official request or routine use request is discretionary, unless the SJA is otherwise required by law or policy to provide that information to the victim or victim's counsel. See MCM; DAFI 51-207. 8.5.3. Pursuant to an official or routine use request, SJAs have discretion to release records that are minimally required to accomplish the VC's intended use as articulated in the request. See DoD 5400.11-R, paragraph C4.2.1. Such records may include but are not limited to the following items: 8.5.3.1. Copies of the VC's client's statements and documents provided by the client. 8.5.3.2. Copies of or access to statements by the accused or another witness implicating an Article 6b, UCMJ right or privilege of VC's client. For example, evidence that could potentially be covered under M.R.E. 412 or a privilege. 8.5.3.3. Copies of or access to any evidence or information that could suggest a safety concern to the VC's client. Any victim or witness should immediately be informed of any information that suggests a safety concern for that victim or witness. 8.5.3.4. Copies of any evidence directly relating to or derived from the VC's client. For example, photos, medical records, or communications by the VC's client. 8.5.3.5. Copies of or access to evidence or information that could indicate retaliation against or ostracism towards the VC's client. 8.5.3.6. Copies of or access to evidence directly relating to an alleged offense against the VC's client.

Service	Policy on Victim and SVC/VLC Access to Materials
	8.5.4. Releasing Privacy Act Material to VC. Government counsel should redact Privacy Act information regarding individuals other than the attorney's client. An example is SSNs of other victims, which have no relevance to the case. When Privacy Act material is not redacted in official use material, VCs should take appropriate steps to guard against improper release of this information. SJAs should consider obtaining agreement from civilian counsel that they will return the Report of Investigation at the conclusion of the case or post-trial consistent with the admonitions of Gray v. Mahoney, 39 M.J. 299 (C.M.A. 1994), or in the alternative merely providing access to the report. Further, SJAs must obtain a signed statement from the civilian victims' counsel stating counsel agrees not to release any protected information to others not involved with representing the victim. A template is available on the VMJD. 8.5.5. Releasing Privacy Act Material to Victims. When a victim is making the request on their own and is otherwise unrepresented, Government may provide access to requested material as a routine use under the Privacy Act system of records notice for "Military Justice and Civilian Criminal Case Records," DoD 0006. If the government chooses to provide copies, third-party personal information must first be redacted. Note: Victims should not be given access to or copies of sealed exhibits. *Source*: Air Force Instruction 51-201, Administration of Military Justice (22 Apr 2022).
U.S. Coast Guard	**B.1. Background:** To safeguard the rights of crime victims and provide notice as required, victims must receive timely and accurate information regarding significant military justice matters. Therefore, the government counsel must provide the victim with the information listed in this Section. A request by the victim is not required. If the victim is represented by a SVC or other counsel, all notices required throughout this Chapter will be provided to the victim through counsel. **B.2. Initial Information to be provided to crime victims:** Immediately after identification of a crime victim or witness, the SARC or, law enforcement officer will explain and provide information to each crime victim and witness including: The CGIS Pamphlet, "Initial Information for Victims and Witnesses of Crime" or computer-generated equivalent will be used as a handout to convey basic information. Specific points of contact will be recorded in the appropriate place. Proper completion of this pamphlet serves as evidence that the SARC or designee, law enforcement officer, or criminal investigative officer notified the victim of his or her rights. The date the form is given to the victim or witness will be recorded on the document along with signed acknowledgement from the victim or witness. This serves as evidence the victim was timely notified of his or her rights under Article 6b, UCMJ.

Service	Policy on Victim and SVC/VLC Access to Materials
	B.3. General information to be provided during investigation of a crime: SARCs or law enforcement investigators will inform crime victims and witnesses, of the status of the investigation of the crime, to the extent providing such information does not interfere with the investigation. **B.4. Investigation stage:** During the investigation stage, and prior to the preferral of charges, a crime victim is entitled to: a. A copy of all statements and documentary evidence adopted, produced, or provided by the victim that are in possession of the Trial Counsel or a Staff Judge Advocate. However, subpoenas for personal or confidential information about a victim, issued prior to preferral do not require notice before issuing. See RCM 703(g)(3)(C)(ii). b. A copy of all official requests, search authorization, or search warrants issued by military authorities to any third-party custodian for documents or records in which the victim maintains a privacy interest. This includes, but is not limited to, requests for the crime victim's medical or behavioral health records from a military treatment facility or subpoenas issued to a telecommunications carrier for a victim's telephone records. The copy should be provided prior to execution when possible. c. The date, time, and location of any pretrial confinement review hearing pursuant to RCM 305(i). **B.5. At preferral of charges:** Upon preferral of charges a crime victim is entitled to: a. A copy of all statements and documentary evidence adopted, produced, or provided by the victim and of any recordings of interviews of the victim that are in the possession of trial counsel or the Staff Judge Advocate, or other local servicing attorney, unless previously provided; b. A copy of all official requests, subpoenas, search authorization, or search warrants issued by military authorities to any third-party custodian for documents or records in which the crime victim maintains a privacy interest, unless previously provided. Copies should be provided prior to execution when possible; c. An excerpt of the charge sheet setting forth the preferred specifications pertaining to that victim; d. The date, time, and location of any pretrial confinement review pursuant to RCM 305, unless previously provided; e. The time, date, and location of the preliminary hearing pursuant to Article 32, UCMJ, and any information necessary to facilitate attendance by the SVC; f. A copy of any military protective order issued to protect the crime victim or the victim's family; and g. Any request to interview the crime victim. **B.6. Sexual Assault Victim:** If the victim of an alleged violation of Article 120, 130 (Article 120a if alleged to have been committed prior to January 1, 2019), 120b, 120c,

Service	Policy on Victim and SVC/VLC Access to Materials
	125 (if alleged to have been committed prior to January 1, 2019), and 80 (attempts of these offenses) of the Uniform Code of Military Justice, expresses a preference for prosecution in a civilian court, the commander, or if the charges are preferred, the convening authority, shall ensure the civilian authority with jurisdiction over the offense is notified of that preference. See Subsection 11.C.1. The victim must be notified by trial counsel if the civilian authority with jurisdiction makes a decision to prosecute or not prosecute. See RCM 306(e). Counsel for the Government or trial counsel must ensure that the date notification of the ability to express a preference for civilian versus military prosecution is noted in the MJCMS. If the victim expresses a preference to civilian prosecution Counsel for the Government or trial counsel must ensure that the date the civilian authority is notified is entered in MJCMS as well as the date of a response from the civilian authority, if any, and the date the victim is notified of the civilian authority's response. A Service member making an unrestricted report of sexual assault must be notified of the following events, and each notification shall be documented and maintained in the Military Justice Case Management System: a. Conclusion of an investigation; b. The initial disposition decision; c. Pretrial confinement hearings; d. Preferral of charges; e. Article 32 hearings; f. Referral of charges; g. All court proceedings, including, arraignment, motions hearings, and trial dates; h. Withdrawal of charges; i. Dismissal of charges; j. Post-trial hearings; k. Vacation hearings; l. Clemency submissions; m. Appellate filings; n. Appellate hearings; and o. Appellate decisions. The above notifications, except those in which notification is mandated by Article 6b of the Uniform Code of Military Justice, may be limited to avoid endangering the safety of the individual making the report or another witness, jeopardizing an ongoing investigation, disclosing classified or privileged information, or unduly delaying the disposition of an offense. However, if notification does not occur for one or more of the aforementioned reasons, that decision must be documented, including the name of the responsible official making the decision, the specific rationale for the decision, and the support for the decision, all of which must be maintained in the MJCMS.

POLICIES ON VICTIM AND VICTIM COUNSEL ACCESS TO MATERIALS

Service	Policy on Victim and SVC/VLC Access to Materials
Additional DoD Policies Affecting Victim Access to Information	DoDI 6495.02 (Sexual Assault Prevention and Response (SAPR) Program Procedures, 6 Sept 2022) states: • Upon completion of the SAFE, the sexual assault victim shall be provided with a hard copy of the completed DD Form 2911 [DoD Sexual Assault Forensic Examination (SAFE) Report]. Advise the victim to keep the copy of the DD Form 2911 in his or her personal permanent records as this form may be used by the victim in other matters before other agencies (e.g., Department of Veterans Affairs) or for any other lawful purpose. • If the victim needs another copy of [DD Form 2011], he or she can request it at this point and the SARC shall assist the victim in accessing the requested copies within 7 business days. The SARC will document this request in the DD Form 2910.

Military Criminal Investigative Organizations
Presenter Biographies

Ms. T.L. Williams, United States Army Criminal Investigation Division

SA Williams was born and raised in New Virginia, Iowa. She attended Saint Leo College and The George Washington University while serving in the military. She severed as a light wheeled vehicle mechanic in Germany and Fort Campbell, KY. She was a Military Police Soldier at Fort McPherson, GA before becoming a Criminal Investigator. She was subsequently accepted as a Warrant Officer in the U.S. Army Criminal Investigation Command. Significant duty assignments include protective services as a personnel security officer for the Chairman of the Joint Chiefs and Secretary of Defense; commander of the 20th Military Police Detachment in Korea; battalion operations officer (at Fort Campbell and Iraq), as a special agent with Hurricane Andrew Relief and body recovery at the Pentagon during 9/11. She culminated her military career in 2008 - 2013 as the Regimental Chief Warrant Officer and the Command Chief Warrant Officer at the rank of Chief Warrant Officer 5. During her military career she personally investigated and supervised countless numbers of sexual assaults, homicides, and other felonies.

SA Williams began her civilian special agent career as the Chief, Policy Branch with CID from December 2013 until February 2022. She wrote, reviewed, and supervised policies and procedures for criminal investigations. In February 2022, she became the Division Chief for the Sexual and Family Violence Division which coaches, teaches, mentors, special agent in conducting adult and child sexual assault, child abuse, and domestic violence investigations through investigative reviews and training. She has also been on working groups at the Department of Defense and Department of the Army levels concerning sexual assaults, child abuse and sexual assaults, and retaliation and reprisals associated with sexual assaults.

SA Williams' education includes a full range of criminal investigative related courses, both military and civilian, all warrant officer professional development courses through the Warrant Officer Senior Staff Course, a Master's Degree in Forensic Sciences, and a graduate of the FBI National Academy. She has continued her professional development as a civilian by completing the Supervisor Development Course, Organizational Development Course, Foundation Course, Manager Development Course, and Action Office Course.

SA Williams' major awards and decorations include the Legion of Merit with one oak leaf cluster; Bronze Star Medal; Defense Meritorious Service Medal; Meritorious Service Medal with three oak leaf clusters; Joint Service Commendation Medal; Army Commendation Medal with one oak leaf cluster; Army Achievement Medal with four oak leaf clusters; Driver/Mechanic Badge; Parachutist Badge and the Office of the Secretary of Defense Badge. Also, received the Order of the Marechaussee (Silver) and inducted into the Military Police Hall of Fame (2020).

Special Agent Erin Hansen, United States Navy Criminal Investigative Service, U.S Navy

Special Agent Ashlee Wega, United States Air Force Office of Special Investigations

SA Ashlee Wega has been a Special Agent with the Air Force Office of Special Investigations (AFOSI) for over 20 years. She is currently the Director, AFOSI, HQ, Strategic Plans and Requirements/Law Enforcement Directorate, Quantico, VA, where she oversees policy, training, resources and assessments in support of the AFOSI's worldwide law enforcement mission to investigate major crimes affecting Air Force and Space Force personnel and resources. Prior to that, SA Wega served as the Deputy Director, AFOSI HQ, Strategic Plans and Requirements/Violent Crimes Quantico, VA, where she oversaw policy, training, resources and assessments in support of the AFOSI's worldwide violent crimes mission to include sexual assault and domestic violence. From May 2019 - August 2021, SA Wega served as the Deputy Associate Director, AFOSI Center, Law Enforcement Division, where she oversaw all criminal investigations/operations agency wide. SA Wega also previously served at AFOSI's Office of Special Investigations Academy where she created and instructed the agency's first advanced Sex Crimes training course. Finally, SA Wega has served multiple tours as a field agent and also as a Forensic Science Consultant where she investigated and consulted on sex crimes and other violent offenses.

Special Agent Kathleen 'Katie' Flynn, United States Coast Guard Investigative Service, U.S Coast Guard

Military Criminal Investigative Offices (MCIOs) Discussion Topics – Victim Access to Information

Study on the advisability of a uniform policy for sharing information with SVC/VLC

Background: In Section 549B of the National Defense Authorization Act for Fiscal Year 2023, Congress directed the DAC-IPAD to submit a report on the feasibility and advisability of establishing a uniform policy for sharing the following information with a Special Victims' Counsel, Victims' Legal Counsel, or other counsel representing a victim:

(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 and any photographs taken by the examiner during the medical-forensic exam.

(3) Any medical record of the victim that is in the possession of investigators or the Government.

Q1: What is the current practice by which you release the information listed in (1)-(3) to the victim's counsel?

Q2: Is there a stage of the investigation at which this information should not be released to the victim's counsel?

Q3: How do you engage with the prosecutor/trial counsel when deciding how to release this information to victim's counsel?
Do you experience delays in this process?

The DOJ's National Protocol states that, photos "taken by examiners should primarily be considered as part of the patient's medical forensic record...".

Q4a: What are your protocols for handling photographs taken as part of the medical-forensic exam?

Q4b: Is it common practice to consider the photographs as separate, investigative items?
Are these photographs given any additional privacy protections?

Q5: If DoD established a uniform policy for sharing this information, what would be the benefits to your investigation?

Q6: If DoD established a uniform policy for sharing this information, please describe the ideal policy you would recommend considering the need to protect the integrity of your investigations.

Q7: Do you have any other suggestions to address this issue?

Prosecutors (Work with Special Victims' Counsel)
Presenter Biographies

Lieutenant Colonel Heather Tregle, United States Army

Colonel Naomi Dennis, United States Air Force

Colonel Naomi Porterfield Dennis is currently dual-hatted as the Deputy Lead Special Trial Counsel and Chief of Government Trial and Appellate Operations, Military Justice and Discipline Directorate, Joint Base Andrews, Maryland. In this capacity, she leads the Air Force's Special and District Trial Counsel and Appellate Government Counsel in prosecuting courts-martial worldwide and representing the United States before the Air Force Court of Criminal Appeals, the Court of Appeals for the Armed Forces, and the United States Supreme Court.

Col Dennis received her commission through the ROTC program at Howard University where she was named Distinguished Graduate of her field training class. Col Dennis then attended The University of Texas School of Law through the educational delay program. After graduating in May 2003, she was appointed to The National Order of Barristers and practiced in the area of medical malpractice litigation. Col Dennis received her appointment to the United States Air Force Judge Advocate General's Corps in December 2003 and was the recipient of the 2004-B JASOC American Trial Lawyers Association Trial Advocacy award. In 2015, she was competitively selected to serve as a White House Fellow.

Col Dennis and her husband Thomas have five children, Tiffany, Malcolm, Jayla, Thomas & Miles.

Captain Angela Tang, United States Navy

Captain Angela Tang attended The George Washington University on a Naval Reserve Officers Training Corps scholarship and earned a Bachelor's of Arts in International affairs in December 2000. Following Surface Warfare Officers Training School, she served an eighteen-month tour onboard USS Mahan, DDG-72, Norfolk, Virginia. Onboard MAHAN, she qualified as a Surface Warfare Officer. She then completed the Nuclear Propulsion Training pipeline and returned to Norfolk to complete a two-year tour onboard USS DWIGHT D. EISENHOWER, CVN-69. During her tour on IKE, she qualified as Propulsion Plant Watch Officer and passed her Nuclear Engineer Officer exam. While onboard IKE, she was selected for the Law Education Program. She began her legal studies at William and Mary Law School, earning her Juris Doctor degree in 2009. After graduating from Naval Justice School in October 2009, she reported to Regional Legal Service Office Mid-Atlantic, where she served as trial counsel, department head, and assistant department head. In June 2011, she was selected to the Military Justice Litigation Career track. She reported to Defense Service Office North in June 2012 as Senior Defense Counsel and was selected as a Specialist II in December 2013. After earning a Master's in trial advocacy from Temple University in 2015-2016, she served as Special Assistant U.S. Attorney in the U.S. Attorney's Office for the District of Maryland in Baltimore. In June 2016, she reported as Senior Trial Counsel, Regional Legal Service Office Mid-Atlantic. She has also served on the Navy-Marine Corps Court of Criminal Appeals, the Court of Military Commissions Review, military judge, and Northern Judicial Circuit military judge.

Colonel Glen Hines, Jr., United States Marine Corps

Captain Anita Scott, United States Coast Guard

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.

Prosecutor Discussion Topics – Victim Access to Information

Study on the advisability of a uniform policy for sharing information with SVC/VLC

Background: In Section 549B of the National Defense Authorization Act for Fiscal Year 2023, Congress directed the DAC-IPAD to submit a report on the feasibility and advisability of establishing a uniform policy for sharing the following information with a Special Victims' Counsel, Victims' Legal Counsel, or other counsel representing a victim:

(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 and any photographs taken by the examiner during the medical-forensic exam.

(3) Any medical record of the victim that is in the possession of investigators or the Government.

Q1: What is the current practice by which you provide victims and/or victim's counsel the information listed in (1) – (3) above?

Q2: At what stage of the process should this information be provided to victims and/or victim's counsel?

Q3: How do you protect the privacy interests of victims, witnesses, and others affected by the disclosure of this information?

Q4: If DoD established a uniform policy for sharing this information, what would be the benefits?

Q5: If DoD established a uniform policy for sharing this information, please describe the ideal policy you would recommend.

Q6: In your practice, what other information, if any, should be covered by a uniform policy for the sharing of information with counsel representing a victim?

§825. Art. 25. Who may serve on courts-martial

(a) Any commissioned officer on active duty is eligible to serve on all courts-martial for the trial of any person who may lawfully be brought before such courts for trial.

(b) Any warrant officer on active duty is eligible to serve on general and special courts-martial for the trial of any person, other than a commissioned officer, who may lawfully be brought before such courts for trial.

(c)(1) Any enlisted member on active duty is eligible to serve on a general or special court-martial for the trial of any other enlisted member.

(2) Before a court-martial with a military judge and members is assembled for trial, an enlisted member who is an accused may personally request, orally on the record or in writing, that—

(A) the membership of the court-martial be comprised entirely of officers; or

(B) enlisted members comprise at least one-third of the membership of the court-martial, regardless of whether enlisted members have been detailed to the court-martial.

(3) Except as provided in paragraph (4), after such a request, the accused may not be tried by a general or special court-martial if the membership of the court-martial is inconsistent with the request.

(4) If, because of physical conditions or military exigencies, a sufficient number of eligible officers or enlisted members, as the case may be, are not available to carry out paragraph (2), the trial may nevertheless be held. In that event, the convening authority shall make a detailed written statement of the reasons for nonavailability. The statement shall be appended to the record.

(d)(1) Except as provided in paragraph (2) for capital offenses, the accused in a court-martial with a military judge and members may, after the findings are announced and before any matter is presented in the sentencing phase, request, orally on the record or in writing, sentencing by members.

(2) In a capital case, the accused shall be sentenced by the members for all offenses for which the court-martial may sentence the accused to death in accordance with section 853(c) of this title (article 53(c)).

(3) In a capital case, if the accused is convicted of a non-capital offense, the accused shall be sentenced for such non-capital offense in accordance with section 853(b) of this title (article 53(b)), regardless of whether the accused is convicted of an offense for which the court-martial may sentence the accused to death.

(e)(1) When it can be avoided, no member of an armed force may be tried by a court-martial any member of which is junior to him in rank or grade.

(2) When convening a court-martial, 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, experience, length of service, and judicial temperament. No member of an armed force is eligible to serve as a member of a general or special court-martial when he is the accuser or a witness for the prosecution or has acted as preliminary hearing officer or as counsel in the same case.

(3) The convening authority shall detail not less than the number of members necessary to impanel the court-martial under section 829 of this title (article 29).

(f) Before a court-martial is assembled for the trial of a case, the convening authority may excuse a member of the court from participating in the case. Under such regulations as the Secretary concerned may prescribe, the convening authority may delegate his authority under this subsection to his staff judge advocate or legal officer or to any other principal assistant.

§825a. Art. 25a. Number of court-martial members in capital cases

(a) IN GENERAL.—In a case in which the accused may be sentenced to death, the number of members shall be 12.

(b) CASE NO LONGER CAPITAL.—Subject to section 829 of this title (article 29)—

(1) if a case is referred for trial as a capital case and, before the members are impaneled, the accused may no longer be sentenced to death, the number of members shall be eight; and

(2) if a case is referred for trial as a capital case and, after the members are impaneled, the accused may no longer be sentenced to death, the number of members shall remain 12.

§826. Art. 26. Military judge of a general or special court-martial

(a) A military judge shall be detailed to each general and special court-martial. The Secretary concerned shall prescribe regulations providing for the manner in which military judges are detailed for such courts-martial and for the persons who are authorized to detail military judges for such courts-martial. The military judge shall preside over each open session of the court-martial to which he has been detailed.

(b) A military judge shall be a commissioned officer of the armed forces who is a member of the bar of a Federal court or a member of the bar of the highest court of a State and who is certified to be qualified, by reason of education, training, experience, and judicial temperament, for duty as a military judge by the Judge Advocate General of the armed force of which such military judge is a member.

(c)(1) In accordance with regulations prescribed under subsection (a), a military judge of a general or special court-martial shall be designated for detail by the Judge Advocate General of the armed force of which the military judge is a member.

(2) Neither the convening authority nor any member of the staff of the convening authority shall prepare or review any report concerning the effectiveness, fitness, or efficiency of the military judge so detailed, which relates to the military judge's performance of duty as a military judge.

(3) A commissioned officer who is certified to be qualified for duty as a military judge of a general court-martial—

(A) may perform such duties only when the officer is assigned and directly responsible to the Judge Advocate General of the armed force of which the military judge is a member; and

(B) may perform duties of a judicial or nonjudicial nature other than those relating to the officer's primary duty as a military judge of a general court-martial when such duties are assigned to the officer by or with the approval of that Judge Advocate General.

(4) In accordance with regulations prescribed by the President, assignments of military judges under this section (article) shall be for appropriate minimum periods, subject to such exceptions as may be authorized in the regulations.

(d) No person is eligible to act as military judge in a case if he is the accuser or a witness for the prosecution or has acted as preliminary hearing officer or a counsel in the same case.

(e) The military judge of a court-martial may not consult with the members of the court except in the presence of the accused, trial

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

Request for Information

RFI Set 2.9, Narrative Questions

Topics: Article 25, UCMJ, Criteria and Panel Member Selection Processes

Date of Request: April 24, 2023

I. Purpose

At the February 21-22, 2023 DAC-IPAD public meeting, the DAC-IPAD assigned the Policy Subcommittee to review Article 25, UCMJ, panel member selection criteria and panel member selection processes.

The information provided will inform the following research questions:

1. Whether each Article 25 criterion provides a qualification necessary to perform court-martial panel member duties as specified in R.C.M. 502.

2. Whether there is a military purpose for requiring different qualifications than required for federal and state jurors. If so, what is the military purpose and how do the criteria assist in meeting the military purpose?

3. Whether other qualifications are militarily necessary to perform panel member duties. For example, race/ethnicity/gender/pending disciplinary action.

4. What are the best methods for random selection of qualified court-martial members?

II. Authority

1. The DAC-IPAD is a federal advisory committee established by the Secretary of Defense pursuant to section 546 of the National Defense Authorization Act for Fiscal Year 2015, as amended.

2. The DAC-IPAD's mission 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.

3. The DAC-IPAD requests the assistance of the Military Services to provide the requested information by the suspense date indicated below.

III. Summary of Requested Response Dates

Suspense	Question(s)	Proponent
24 May 23	Sect IV: Narrative Questions	Services – The identified groups provide narrative responses to the questions in Section IV of this RFI

IV. Narrative Questions

Background: Article 25 provides that a convening authority is required to detail members to a court-martial that are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament. These criteria are not further defined and they have not changed since 1950, when military judges did not preside over courts-martial and panel members determined an appropriate sentence. Except in death penalty cases, in December 2023, panel members will no longer serve as the sentencing authority, and beginning in December 2024, randomized selection processes will be used, to the maximum extent possible, in the selection of panel members.

The qualifications to serve as potential juror in the federal and state systems include: (a) U.S. citizenship, (b) be at least18 years old, (c) be a resident for 12 months, (d) have English proficiency, (e) have no disqualifying mental or physical condition, (f) have never been convicted of a felony (unless civil rights have been legally restored), and (g) must not be pending felony charges punishable by imprisonment for more than one year.

Questions. Responses to the following questions are requested from each of the Services' criminal law/military justice organization chiefs, trial defense organization chiefs, Office of Special Trial Counsel leads, and victims' counsel program managers.

1. Please evaluate each of the Article 25 criteria below.

a. Age (best qualified by reason of age):

1) Federal criminal juries require jurors to be 18 or older. Should there be a different minimum age for military panel members? If so, what is the military justification for the difference? Do you have a suggested minimum age or a suggested age range?

2) Under the current rules, panel members must be senior in rank and grade to the accused. Do you believe there is a military reason to support this requirement? If so, what is the military justification?

b. Length of Service (best qualified by reason of length of service):

Federal criminal jurors must reside primarily in the judicial district for one year before they are qualified to serve as a juror. States generally have a residency requirement and they range from simply being a resident to being a resident for more than 12 months. Should there be a minimum length of service requirement to be qualified to serve as a panel member? If so, what should that minimum length of service be? What is the military justification for a minimum length of service?

c. Education (best qualified by reason of education):

Federal and state criminal jurors must be proficient in English. There are no other education requirements to be qualified to serve as a juror. Should there be an education requirement to be qualified to serve as a panel member? If so, what should the education requirement be and what is the military justification supporting the requirement?

d. Experience: (best qualified by reason of experience)

Federal and state criminal jury systems do not have an experience requirement. Should there be an experience requirement to be qualified to serve as a panel member? If so, what experience should be required? What is the military justification for this requirement?

e. Training: (best qualified by reason of training)

Federal and state jury systems do not have a training requirement. Should there be a specific training requirement to be qualified to serve as a panel member? If so, what should the training requirement be? What is the military justification for this training requirement?

f. Judicial Temperament: (best qualified by reason of judicial temperament)

Federal and state jury systems do not have a judicial temperament requirement. Should there be a judicial temperament requirement to be qualified to serve as a panel member? If so, please define what you mean by judicial temperament. What is the military justification for this requirement?

2. Are there other criteria that should be required to serve as a panel member?

a. Some examples from federal and state jury systems are: No qualifying mental or physical condition, never been convicted of a felony, and must not be pending felony charges punishable by more than a year in prison. Should any of these be requirements to serve as a panel member?

b. Should there be criteria addressing the qualification of Service members under investigation for a violation of the UCMJ, or other criminal code, or who have received or are pending disciplinary or administrative action for committing an offense under the UCMJ?

c. Please identify any other criteria that you believe should be required for a Service member to be qualified to serve as a panel member?

3. Should there be a requirement for panels to be diverse by race and/or gender?

Please explain your answer and whether there is a military justification for making this a requirement.

4. Should there be an option for an all enlisted panel? Why or why not?

5. Should the military move to a randomized panel member selection process, similar to how federal and state jurisdictions select potential jury members?

Federal and state jurisdictions typically use computer systems to randomly select members from state voter registration rolls to serve on juries. After the venire is chosen in this way, the voir dire process further narrows the number of members sitting on a jury.

Should the military use Alpha rosters, or other similar means, to randomly select the initial pool of panel members? Why or why not?

6. Please share with us any other suggestions you have to improve the panel selection process or considerations that we should be cognizant of in making recommendations to change the selection criteria or randomize the selection process.

7. We heard from several Service members who spoke to the Policy Subcommittee that their Service's administrative discharge policies allowed the respondent to request minority inclusion among the discharge board members. Please provide any applicable Service regulations or policies regarding administrative discharge boards that provide this option.

Summary of Service Responses to RFI 2.9 from Service Criminal Law Departments, Offices of the Special Trial Counsel, Service Trial Defense Organizations Chiefs, and Victims' Counsel Program Managers

I. Article 25 criteria.

Service Criminal Law Departments and Offices of the Special Trial Counsel (OSTC)

The criminal law departments and OSTC prosecutors support retaining the current language of Article 25 that allows for exercise of broad discretion by the convening authority to select court-martial members the convening authority deems best qualified for the duty based on the existing Article 25 criteria. The Air Force OSTC does, however, support aligning the minimum age with the federal minimum age of 18.

Additionally, the Service criminal law departments and OSTC prosecutors support the requirement that panel members be senior in rank and grade to the accused, noting the hierarchical organization of the military is critical to good order and discipline. The Air Force OSTC stated that even if junior panel members were not within the chain of command of an accused, "there is a significant danger rank disparity will create a coercive environment. For example, if an E-7 is facing an allegation of sexual assault, there is a significant risk an E-4 might feel pressure to come to a particular outcome he/she believes other NCOs in the relevant military community desire."[1]

Regarding whether additional criteria should be added, the prosecutors agreed Service members that are flagged for investigation, pending disciplinary actions, or will soon be leaving the Service should not be eligible to serve as court-martial panel members, though they rely on the existing Article 25 criteria to exclude these members from consideration.

Service Trial Defense Organization Chiefs

The military trial defense services support amending the Article 25 criteria to eliminate the experience, training, and judicial temperament criteria. They support adopting the federal state minimum age of 18 years or older, the requirement for English proficiency, and a minimum length of service requirement. Across the Services, the proposed length of service varies—one year, 18 months, and two years—but the justifications are the same. A minimum length of service is necessary to ensure initial training is complete and to provide a level of familiarity with military culture that will support an appropriate understanding of military specific offenses.

Additionally, the military trial defense services support the requirement that panel members must be senior in rank and grade to the accused. Justifications for this requirement include, (1) the necessary link between obedience to lawful orders of superiors and good order and discipline; (2) protecting junior members from fearing reprisal and the possibility the accused may hold a position of authority over the junior member in the future; and (3) protecting the accused from being judged more harshly by junior panel members based on conscious or unconscious bias against their rank or from the junior member feeling pressured to come to a certain result.

[1] The Service Office of Special Trial Counsel (OSTC) Responses are located within the June 13, 2023 DAC-IPAD meeting materials, *Article 25 RFI Set 2.9_Combined Service Responses20230601.pdf*, available at https://dacipad.whs mil/meetings/materials.

Regarding whether additional criteria should be added, the trial defense chiefs agreed Service members that have a felony conviction, or have been indicted or referred to court-martial for a felony offense, should not be eligible to serve as court-martial panel members. They also agreed that Service members under investigation, pending disciplinary or administrative action, or who have received disciplinary or administrative action, should be eligible to serve as court-martial panel members. Additionally, the Army recommended adding a requirement that court-martial members be U.S. citizens.

Victims' Counsel Program Managers

The Army, Navy, and Coast Guard victims' counsel program managers deferred to their respective criminal law department responses to these questions. The Air Force Victims' counsel program manager supports a minimum age of 18 years to be qualified to serve as a panel member, but opposes requirements for minimum length of service, education, experience, or training. The Marine Corps Victims' counsel program manager opposes minimum age and length of service requirements, but supports the Article 25 criteria for selection of the best qualified by reason of education, experience, training, and judicial temperament.

The victims' counsel program managers support retention of the requirement that panel members must be senior in rank and grade to the accused.

Neither program manager believe other criteria should be required. Instead they support using voir dire to address mental and physical conditions and disciplinary status, unless disqualification is already permitted under the existing provisions of Article 25.

II. Diversity.

Service Criminal Law Departments and Offices of the Special Trial Counsel (OSTC)

The Service criminal law departments and OSTC prosecutors are opposed to changing the existing panel selection system for the purpose of increasing diversity, noting that diversity is appropriately provided for through Article 25 criteria and case law. However, the Army criminal law department noted they support the Joint Services Committee working with Congress to identify possible amendments to Article 25 that would "promote diversity of gender, race, and ethnicity on panels."[2] Several responses recommend waiting until the case of *U.S. v. Jeter*, pending decision by the Court of Appeals for the Armed Forces (CAAF) on the issue of race as an inclusive factor for member selection, is decided prior to recommending further changes in this area.[3]

[2] The Service OTJAG/Criminal Law Responses are located within the June 13, 2023 DAC-IPAD meeting materials, *Article 25 RFI Set 2.9_Combined Service Responses20230601.pdf*, available at https://dacipad.whs mil/meetings/materials.

[3] *United States v. Jeter*, 82 M.J. 355 (C.A.A.F. 2022). On October 24, 2022, after hearing oral arguments, CAAF specified two issues concerning whether race is an improper consideration in detailing court members. A decision in the case is pending.

Service Trial Defense Organization Chiefs

The Service trial defense organizations do not support a requirement to provide racial and/or gender diversity on panels. However, most do support a provision that would allow an accused to request a panel with additional racial or gender diversity. The Navy trial defense chief proposes diversification by grade instead.

Victims' Counsel Program Managers

The Victims' counsel program managers oppose adding specific race or gender requirements for selection of court-martial panel members.

III. Enlisted Panels.

Service Criminal Law Departments and Offices of the Special Trial Counsel (OSTC)

The Service criminal law departments and OSTC prosecutors oppose a recommendation to create a right for enlisted Service members to elect to be tried by a panel composed of all enlisted members. Many pointed out that the existing rules do not limit the number of enlisted members who may serve on a court-martial panel, nor do they prohibit the convening authority from detailing an all-enlisted panel. The Air Force Criminal Law Department and OSTC stated, "requiring officers on the court-martial panel ensures broad experience and fairness, and reflects the overall military structure. Removing officers from an enlisted member's court-martial is not reflective of how the military trains, evaluates, and operates and would be detrimental to good order and discipline."[4]

Service Trial Defense Organization Chiefs

Most Service trial defense organizations support the addition of an option for enlisted Service members to request trial by a panel composed of all enlisted members. The Air Force defense organization chief opposes the exclusion of officers who add a different perspective to deliberations, recommending instead an increase to the minimum percentage of enlisted members to increase diversity and the number of enlisted peers serving as the fact finder.

Victims' Counsel Program Managers

The Marine Corps victims' counsel program manager supports a statutory right for enlisted Service members to request trial by a panel composed of all enlisted members. The Air Force victims' counsel program manager does not oppose an all enlisted panel.

[4] See *supra* note 1 at 16.

IV. Randomization.

Service Criminal Law Departments and Offices of the Special Trial Counsel (OSTC)

The Air Force, Navy, Marine Corps and Coast Guard recommend any study on randomization be deferred until after the current efforts to develop and issue regulations in compliance with Section 543, FY23 NDAA are completed and implemented. The Air Force prosecutors noted that some Air Force installation legal offices are already using Alpha rosters for the initial selection of members and continue to study randomization options.

The Service criminal law departments and OSTC prosecutors expressed concerns about randomizing court-martial member selection, including decreased efficiency, loss of the Article 25 factors, and the ability of commanders to retain control over determinations of availability.

Service Trial Defense Organization Chiefs

Service trial defense organizations all support randomizing the panel selection process. Recommendations for randomizing the process include eliminating the Article 25 criteria, removing the command from the selection process, fully randomizing the process, using geographic locations rather than units or command to draw the pool of potential members, and use of Alpha rosters.

Victims' Counsel Program Managers

The Marine Corps and Air Force victims' counsel program managers support using Alpha rosters or other similar means to randomly select the initial pool of panel members, prior to the selection of court-martial members by the convening authority pursuant to Article 25.

V. Suggested Improvements to Panel Selection Process and Relevant Considerations.

Service Criminal Law Departments and Offices of the Special Trial Counsel (OSTC)

The Army OTJAG and OSTC would like the Committee to review and assess the following topics: (1) demographics of federal juries; (2) opinions from federal or state prosecutors on juror selection and use of peremptory challenges based on non-race attributes such as age or education, specifically in sexual assault prosecutions; (3) opinions from Service Special Victim Litigation Experts on experience and comparison between civilian and military juries; (4) jury instructions on unconscious bias that have survived judicial scrutiny; and (5) experiences from any jurisdiction that has studied juror demographics and identified specific practices that have increased diversity of gender, race, and socioeconomic status.

Additionally, the Service criminal law departments and OSTC prosecutors recommend allowing pending changes to the panel selection process to be implemented and evaluated, prior to proposing any additional changes.

Service Trial Defense Organization Chiefs

The Service defense organizations' recommended improvements to the panel selection process include changes to peremptory challenges and codification of the liberal grant mandate.

Victims' Counsel Program Managers

The Service victims' counsel program mangers recommended improvements to the panel selection process, including reform of voir dire practices in sexual assault cases and broadening member pools to cross commands.

VI. Service Policies Providing Option to Request Minority Representation on Discharge Boards

Army regulations permit a discharge board respondent to request a voting board member of their same "race, color, religion, gender, or national origin (or combination thereof)" and a voting member will be provided, if available.[5]

The Navy and Marine Corps do not provide a formal right to request minority representation, although a respondent may request minority representation and the convening authority has the discretion to approve the request. Instead, women and minorities are afforded equal opportunity to serve on boards and board members may be challenged.

The Air Force does not have a regulation or policy that provides a respondent the right to request minority representation.

[5] Army Regulation 635-200, Active Duty Enlisted Administrative Separations, ¶ 2–6(3)-(5) (October 1, 2021).

Request for Information Set 2.9, Narrative Questions
Service OTJAG/Criminal Law Responses

Background: Article 25 provides that a convening authority is required to detail members to a court-martial that are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament. These criteria are not further defined and they have not changed since 1950, when military judges did not preside over courts-martial and panel members determined an appropriate sentence. Except in death penalty cases, in December 2023, panel members will no longer serve as the sentencing authority, and beginning in December 2024, randomized selection processes will be used, to the maximum extent possible, in the selection of panel members.

The qualifications to serve as potential juror in the federal and state systems include: (a) U.S. citizenship, (b) be at least18 years old, (c) be a resident for 12 months, (d) have English proficiency, (e) have no disqualifying mental or physical condition, (f) have never been convicted of a felony (unless civil rights have been legally restored), and (g) must not be pending felony charges punishable by imprisonment for more than one year.

Questions. Responses to the following questions are requested from each of the Services' criminal law/military justice organization chiefs, trial defense organization chiefs, Office of Special Trial Counsel leads, and victims' counsel program managers.

Army Office of the Judge Advocate General (OTJAG) Initial Notes:

Thank you for the opportunity to respond. The U.S. Army Office of The Judge Advocate General has two initial notes relevant to our responses to your questions.

US v. Jeter: Recommendations to amend Article 25, UCMJ, or the policy and process for selecting panel members, may be premature in advance of an opinion in *United States v. Jeter*, currently pending before the Court of Appeals for the Armed Forces. A decision in *United States v. Jeter* may provide additional valuable guidance for any amendments to the panel selection criteria and process.

Federal Criminal Juror Selection Process: All of the questions below appear to use the federal criminal jury process as a starting point for analysis of the Article 25, UCMJ, requirements. Any comparison between the federal criminal justice system and military justice system, particularly with regard to juror selection, should acknowledge the substantive differences between the two systems.

Authorized by separate Articles of the Constitution, the federal criminal justice system and military justice system serve different purposes. According to www.uscourts.gov, the federal criminal courts were created under Article III of the Constitution to administer justice fairly and impartially. The military justice system, authorized under Article I of the Constitution, derives jurisdiction from International Law, the law of war, and the inherent authority of military commanders. The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.

The two systems draw potential jurors from distinct populations. The DoD total military force in 2020 was 40.6% ages 17-25; 20.3% ages 26-30; 15.2% ages 31-35; 11.9% ages 36-40; and 12% ages 41 years or older.[1] In contrast, the U.S. population in the 2022 census is substantially older, with only 13% of the population aged 15-24; 39% ages 25-54, 12% ages 55-64; and 16.8% ages 65 and over.[2] The use of voter registration or driver's license lists and the average 12% nationwide rate of jury summons that are returned undelivered, typically in urban areas, further skews the federal criminal available juror pool toward an older, socio-economically stable population. Purely random juror selection in both systems would produce substantially different-looking jury pools.

Finally, the use of juries/panels in the two systems varies widely. A 2019 Pew research Study concluded that only 2% of federal criminal defendants go to trial, while 90% pleaded guilty, and 8% had charges dismissed.[3] Specific data for 2022 adult sexual assault cases from the Department of Justice indicates that 22 cases total for all U.S. District Courts during the preceding 12-month period went to a contested jury trial, in which six defendants were acquitted by the jury and 16 defendants were convicted by the jury (see attached).

In contrast, the Army has a much larger percentage of cases in which the accused pleads not guilty and elects a panel. The Army alone tries more than three times the number of contested panel adult sexual assault cases than all the U.S. District Courts combined. In FY22, the Army, which typically represents about half of the total Department of Defense courts-martial, tried 483 cases to completion, with 375 (88%) electing a judge alone guilty plea or bench trial and 108 (22%) contested panel trials. For cases involving a sexual assault with an adult victim, the Army completed 80 judge alone guilty pleas and 71 contested panel trials, more than three times the number of cases from the U.S. District Courts combined (see attached).

Given these differences, the federal juror selection process may not be the best model for analyzing Article 25, UCMJ.

Navy Criminal Law Division Initial Notes: As a baseline in these responses I would highlight that Congress and the President crafted few prohibitions on court-martial service to ensure maximum discretion to the convening authority in the selection process while maintaining the fundamental fairness of the military justice system. I agree with this inclusive system of determining eligibility for courts-martial service. Systemic exclusion based on specific minimums (e.g. must have 4 years of service) in otherwise qualified potential members does not support the fair administration of justice.

Air Force Office of the Judge Advocate General Initial Notes: AF/JA would highlight the importance of ensuring that your committee review feedback from all parties who are engaged in the system; to include prosecutors, representatives of the Office of Special Trial Counsel, defense counsel, and victim's counsel, as well as expert military policy advisors from each Service. They all have equities based on their client base and an understanding of additional effects of continuing to evolve military justice in the midst of what are already historic changes that have yet to fully take place or be assessed.

[1] 2020 Demographics, Profile of the Military Community, Department of Defense, Office of the Deputy Assistant Secretary of Defense for Military Community and Family Policy.
[2] https://www.census.gov/data/tables/time-series/demo/popest/2020s-national-detail.html
[3] https://www.pewresearch.org/short-reads/2019/06/11/only-2-of-federal-criminal-defendants-go-to-trial-and-most-who-do-are-found-guilty/

Coast Guard Office of Military Justice Initial Notes: We would like to express our appreciation for the Committee's interest in Article 25, UCMJ. As a preliminary matter, we note that the military justice system is designed to safeguard the due process of the accused while effectively addressing the unique demands of discipline and efficiency within the military. The Coast Guard's insights on potential amendments of Article 25 are therefore offered with a sincere appreciation of the complexities inherent in the issue.[4] We fully recognize the authority of Congress to establish rules for the governance of the armed forces, and, as such, we approach this matter with utmost respect for their legislative judgment including for the provisions of Article 25 they saw fit to pass and retain over the years.

1. Please evaluate each of the Article 25 criteria below.

a. Age (best qualified by reason of age):

1) Federal criminal juries require jurors to be 18 or older. Should there be a different minimum age for military panel members? If so, what is the military justification for the difference? Do you have a suggested minimum age or a suggested age range?

Army OTJAG: There should not be a minimum age or age range for potential military panel members. Article 25, UCMJ allows convening authorities to consider age, holistically along with the other criteria, when selecting members who are best qualified, as opposed to minimally qualified, to support the purposes of military law—to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States. While the youngest servicemembers may not be best qualified to support the purposes of military law, there should not be an arbitrary rule to exclude them.

Navy Criminal Law Division: Given that there are a small number of military members under the age of 18, the military too has a de facto minimum age of 18 to serve as a panel member. Current criteria for selection as a panel member do not establish an alternative age limit and I would not recommend establishing one. Any military member should continue to remain eligible for possible service as a panel member.

Marine Corps Military Justice Branch: While convening authorities consider age among other criteria when identifying those best qualified to serve as court-martial members, there is no age minimum or age range. This maximizes the pool of potential court-martial members and the exercise of discretion by the convening authority. Since military members are over the age of 18 (with limited exception), it is not necessary or advisable to establish an age minimum or range for service as a court-martial member, particularly in light of the holistic assessment of other criteria.

[4] For a general discussion of Article 25 and case law, see Chapter 9, Section III of The Judge Advocate General's Legal Center and School, Criminal Desk Book, Practicing Military Justice, https://tile.loc.gov/storage-services/service/ll/llmlp/Crim-Law-Deskbook_January-2019/Crim-Law-Deskbook_January-2019.pdf. For additional such discussion including proposed amendments, see David A. Schulter, Military Criminal Justice § 8-3(C) (9th ed. 2015). For the Congressional discussion of Article 25 during the 1949 amendments to the UCMJ, see UCMJ: Hearings on H.R. 2498 Before Subcomm. Of House Comm. On Armed Forces, 81st Cong. 1st Sess. 1114 (1949), https://tile.loc.gov/storage-services/service/ll/llmlp/hearings_01/hearings_01.pdf.

Air Force Military Justice Law and Policy: There should not be a different minimum age for military panel members.

Coast Guard Office of Military Justice: The inclusion of a minimum age requirement does not appear necessary. The existing enlistment, appointment, and induction criteria means that the vast majority of members in the military are eighteen years of age or older.[5] An additional minimum age restriction would be redundant since Article 25, UCMJ directs the convening authority to generally consider "age" under the "best qualified" criteria. A general consideration of the age of panel members could become important in reflecting the military's diversity, especially dealing with cases with younger servicemembers. In appropriate cases, it could ensure servicemembers are not solely judged by older individuals and that panels appropriately consider the dynamics and relations specific to different generations in the military community.

2) Under the current rules, panel members must be senior in rank and grade to the accused. Do you believe there is a military reason to support this requirement? If so, what is the military justification?

Army OTJAG: The military is a hierarchical organization in which rank is the fundamental source of command authority and good order and discipline. Good order and discipline, including obedience to the lawful orders of a superior, are at the core of readiness. The importance of rank cannot be ignored in the military justice system.

The long-standing statutory requirement, originating in the 1951 Manual for Courts-Martial, for, when it can be avoided, having no member of the panel be junior to the accused in rank or grade was intended to protect both the accused and the panel members. Accused Soldiers should not perceive or fear that panel members junior in rank, over whom the accused could exercise authority or issue lawful orders, are deliberating without prejudice or impermissible motives. Just as importantly, the use of panel members junior in rank to the accused could have a chilling effect on those panel members to vote their conscience.

Navy Criminal Law Division: Of note, panel members may be junior in rank to the accused and serve as a panel member when it cannot be avoided. That said, the military is an inherently hierarchical organization of authority and responsibility designed to enhance its functioning – individuals are led, supervised, and at times disciplined by those senior in grade to them. No other disciplinary tool is, or even can be, imposed by a junior member on a more senior member. As such, it would be inconsistent with the organizational structure, and the nature of good order and discipline within the military to normally allow those junior in rank or grade to the accused to sit in judgment and in some cases decide on an appropriate punishment.

Marine Corps Military Justice Branch: Yes. The requirement of Article 25(e)(1)—"When it can be avoided, no member of an armed force may be tried by a court-martial any member of which is junior to him in rank or grade"—is "an ancient provision of military law." *United States v. Crawford*, 35 C.M.R.3, 19(C.M.A. 1964) (Kilday, J., concurring). Citing various authorities, the Court of Appeals for the Armed Forces (C.A.A.F.) has recognized, "Historically, the seniority requirement was established to remove any temptation on the part of the members to convict the accused and thus perhaps create an opportunity for personal promotion." *United States v. Schneider*, 38 M.J. 387, 394(C.A.A.F. 1993)(citations and internal quotation marks

[5] *See* 10 U.S.C. § 505.

omitted). Regardless of whether this particular justification retains validity, the seniority requirement remains an essential aspect of courts-martial given the hierarchical organization of the military. Servicemembers are generally subject to the supervision, direction, and evaluation of more senior servicemembers. Subordinates sitting in judgement of superiors is antithetical, imperiling the independence, objectivity, and the appearance thereof required of courts-martial members.

Air Force Military Justice Law and Policy: The requirement that court-martial panel members be senior in rank and grade serves to further the good order and discipline of the service; this requirement ensures those who make decisions in a case are at least as experienced (in a broad military sense) as the accused.

Coast Guard Office of Military Justice: The purposes of the military justice system include promoting discipline and efficiency in the armed forces, in times of peace, war, and national emergency. A hierarchical structure, represented by rank, plays an integral role in maintaining this discipline and efficiency. Congress, with due consideration, has incorporated the requirement that panel members of a court-martial be higher in rank than the accused in Article 25 "when it can be avoided."[6] Despite amending other parts, Congress has preserved this provision, apparently highlighting its ongoing importance and relevance in achieving the system's objectives. Moreover, it is noteworthy that at least one court has acknowledged the validity of a commander's observation that the consideration of rank in panel members may correspond to good judgment and experience necessary to handle serious and complex cases.[7]

b. Length of Service (best qualified by reason of length of service):

Federal criminal jurors must reside primarily in the judicial district for one year before they are qualified to serve as a juror. States generally have a residency requirement and they range from simply being a resident to being a resident for more than 12 months. Should there be a minimum length of service requirement to be qualified to serve as a panel member? If so, what should that minimum length of service be? What is the military justification for a minimum length of service?

Army OTJAG: There should not be a minimum length of service or range for potential military panel members. Article 25, UCMJ allows convening authorities to consider length of service, holistically along with the other criteria, when selecting members who are best qualified, as opposed to minimally qualified, to support the purposes of military law—to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States. While the newest servicemembers may not be best qualified to support the purposes of military law, there should not be an arbitrary rule to exclude them.

[6] See Article 25(e)(1), UCMJ.
[7] *See United States v. Melson*, No. ACM 36523, 2007 WL 2791708, at *1 (A.F. Ct. Crim. App. Sept. 14, 2007), *certified question answered and remanded*, 66 M.J. 346 (C.A.A.F. 2008) (where five of the ten members were colonels, the convening authority testimony indicated "that he wanted to pick members whom he knew had the best judgment and experience . . . . [and] this was the most serious case he had ever handled.").

Navy Criminal Law Division: No, I do not favor establishing a specific minimum length of service criteria – again, to do so would result in the systematic exclusion of some percentage of the force at the less experienced and more junior levels. Given the demographics of the military in general, longer serving individuals tend to be higher in grade, male, and less demographically diverse, than the service as a whole. To exclude individuals systematically based upon their length of service increases the likelihood of resulting panels that do not reflect a good faith effort to be open to all segments of the military community. I do not support such a proposition.

Marine Corps Military Justice Branch: No, there should not be a minimum length of service requirement. Any such requirement would be arbitrary and unnecessarily limit the pool of potential court-martial members and the discretion of convening authorities. "Indeed, the authors of the Uniform Code expressly eliminated in Code, supra, Article 25, the proviso contained in its predecessor legislation, which prohibited members with less than two years' service from being appointed to hear general and special court-martial cases. See Public Law 759, 80th Congress, 62 Stat 604, 628." *United States v. Crawford*, 35 C.M.R. 3, 26 (C.M.A. 1964) (Ferguson, J., dissenting).

Air Force Military Justice Law and Policy: There should not be a minimum length of service required to serve on a court-martial panel. The nexus between length of service and experience is satisfied by the requirement that members of a court-martial panel be senior in rank and grade to the accused.

Coast Guard Office of Military Justice: It is again worth emphasizing that the military justice system is supposed to promote efficiency and effectiveness in the military, whether in times of war, peace, or national emergency. In times of war or emergency, the terms and length of service can vary significantly, particularly considering the activation of the draft, the calling of volunteers, the activation of reserves, and the integration of national guardsmen. As a result, enforcing a minimum "length of service" requirement could prove impractical when considering the unpredictable nature of preserving national security and the military's corresponding role. Additionally, during times of normal operations, there appears to be little benefit in mandating a minimum length of service.

c. Education (best qualified by reason of education):

Federal and state criminal jurors must be proficient in English. There are no other education requirements to be qualified to serve as a juror. Should there be an education requirement to be qualified to serve as a panel member? If so, what should the education requirement be and what is the military justification supporting the requirement?

Army OTJAG: There are minimum educational requirements for military service, including a high school degree or equivalent for enlisted personnel and a college degree for commissioned officers. However, there should not be additional minimum educational requirements for potential military panel members. Article 25, UCMJ allows convening authorities to consider education, holistically along with the other criteria, when selecting members who are best qualified, as opposed to minimally qualified, to support the purposes of military law—to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States. While the least educated servicemembers may not be best qualified to support the purposes of military law, there should not be an arbitrary rule to exclude them.

Navy Criminal Law Division: Minimum standards established for entry into military service is a sufficient baseline and an additional minimum education level is not necessary for military panels.

Marine Corps Military Justice Branch: Education is among the criteria convening authorities must consider when identifying those best qualified for duty as courts-martial members, though there are no, nor should there be, any specific educational requirements. Prior to joining the military, officer and enlisted servicemembers must meet baseline educational requirements. Additionally, servicemembers have a wide variety of military and civilian educational backgrounds. Convening authorities should retain discretion in considering the education of potential court-martial members—without arbitrary minimums—holistically with other criteria.

Air Force Military Justice Law and Policy: There should not be an additional education requirement to be qualified to serve as a court-martial panel member. At a minimum, service members are required to have at least a high school diploma (or have passed the General Education Development (GED) test) in order to serve in the DAF. Further, under Article 25(e)(2), UCMJ, when convening a court-martial, the convening authority is required to detail members who are best qualified by reason of education, among other factors. There is no justification for providing an additional education requirement beyond this statutory mandate.

Coast Guard Office of Military Justice: Convening authorities are indeed mandated to consider the education of potential panel members, as a general requirement. It is important to note that the military recognizes a broad spectrum of educational avenues, as reflected in its diverse professional military education programs for both officers and enlisted personnel. This expansive view not only fosters critical thinking skills but also cultivates an appreciation of unique demands faced by the armed forces, especially those involving military-specific offenses or errors in operational settings. Therefore, altering this standard does not appear to be necessary, particularly as a specific requirement might exclude individuals with diverse or non-traditional educational backgrounds, limiting perspectives within the panel.

d. Experience: (best qualified by reason of experience)

Federal and state criminal jury systems do not have an experience requirement. Should there be an experience requirement to be qualified to serve as a panel member? If so, what experience should be required? What is the military justification for this requirement?

Army OTJAG: There should not be a minimum experience requirement for potential military panel members. Article 25, UCMJ allows convening authorities to consider experience, which provides a better understanding of the mission and readiness, holistically along with the other criteria, when selecting members who are best qualified, as opposed to minimally qualified. This supports the purposes of military law—to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States. While the least experienced servicemembers may not be best qualified to support the purposes of military law, there should not be an arbitrary rule to exclude them.

Navy Criminal Law Division: Creating a minimum level of experience for service on a panel could again result in the systematic exclusion of less experienced and lower ranking service members. For the reasons detailed above with respect to length of service I do not support the establishment of such a criterion.

Marine Corps Military Justice Branch: Experience is among the criteria convening authorities must consider when identifying those best qualified for duty as courts-martial members, though there are no, nor should there be, any specific experience requirements. However, the U.S. Court of Military Appeals (C.A.A.F.'s predecessor) has clarified that "*military* experience was what [the drafters of Article 25] contemplated." *United States v. Smith*, 27 M.J. 242, 249(C.M.A. 1988) (emphasis added). This is sufficiently specific. Convening authorities should retain discretion in considering the experience of potential court-martial members—without arbitrary minimums—holistically with other criteria.

Air Force Military Justice Law and Policy: There should not be an additional experience requirement to be qualified to serve as a court-martial panel member. Under Article 25(e)(2), UCMJ, when convening a court-martial, the convening authority is required to detail members who are best qualified by reason of experience, among other factors. Further, Article 25(e)(1) requires court-martial panel members be senior in rank and grade to the accused, thereby ensuring those who make decisions in a case are at least as experienced (in a broad military sense) as the accused. There is no justification for providing an additional experience requirement beyond these statutory mandates.

Coast Guard Office of Military Justice: There does not seem to be good reason to change the requirement for convening authorities to consider the experience of potential court-martial members. To begin, this requirement is not inconsistent with the practice in federal criminal instructions which call upon jurors to consider their "reason, experience, and common sense" when evaluating evidence.[8] Furthermore, the requirement highlights the important role that experience plays in promoting efficiency and discipline in the Armed Forces. Panel members' experience may enable them to effectively judge cases against a backdrop of the realities of the military and its specific needs. For instance, while sexual harassment may not be a crime in civilian life, such conduct may be punishable by courts-martial due to its detrimental effect on good order and discipline. The nuances of such wrongful behavior itself and the impact upon a unit might not be readily grasped by individuals lacking experience at military units or in operations comparable to the case's factual background. Moreover, the members' experience may become crucial in cases involving warfighting or military operations. For example, one court found it appropriate for a commander to select panel members with "significant sea-going experience" in a case concerning the grounding and loss of a ship.[9]

e. Training: (best qualified by reason of training)

Federal and state jury systems do not have a training requirement. Should there be a specific training requirement to be qualified to serve as a panel member? If so, what should the training requirement be? What is the military justification for this training requirement?

[8] *See* United States Court for the Ninth Circuit, Manual of Model Criminal Jury Instructions, page 6 – 7, https://www.ce9.uscourts.gov/jury-instructions/model-criminal (last accessed May 23, 2023).
[9] *United States v. Lynch*, 35 M.J. 579, 587 (C.G.C.M.R. 1992), *decision set aside on other grounds*, 39 M.J. 223 (C.M.A. 1994)

Army OTJAG: There should not be a minimum training requirement for potential military panel members. Article 25, UCMJ allows convening authorities to consider training, which provides a better understanding of the mission and readiness, holistically along with the other criteria, when selecting members who are best qualified, as opposed to minimally qualified. This supports the purposes of military law—to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States. While the servicemembers with the least training may not be best qualified to support the purposes of military law, there should not be an arbitrary rule to exclude them.

Navy Criminal Law Division: I do not favor establishing a specific minimum level of training to serve as a court-martial panel member. I believe commanders and convening authorities are best positioned to select and detail court-martial members who have sufficient training and are prepared to sit in judgment of their fellow service members in a manner that is consistent with the fair administration of justice.

Marine Corps Military Justice Branch: Training is among the criteria convening authorities must consider when identifying those best qualified for duty as courts martial members, though there are no, nor should there be, any specific training requirements. Servicemembers receive a significant amount of training on various topics throughout their careers , and each service member has different training accomplishments. Convening authorities should retain discretion in considering the training of potential court martial members without arbitrary minimums holistically with other criteria.

Air Force Military Justice Law and Policy: There should not be an additional training requirement to be qualified to serve as a court-martial panel member. Under Article 25(e)(2), UCMJ, when convening a court-martial, the convening authority is required to detail members who are best qualified by reason of training, among other factors. There is no justification for providing an additional training requirement beyond this statutory mandate.

Coast Guard Office of Military Justice: There appears to be insufficient justification to change the requirement for convening authorities to consider the training of panel members in general. Comparable to the reasons for considering education and experience, the requirement for a convening authority to consider members' training aligns with the military justice system's aim of promoting efficiency and discipline in the armed forces, especially in cases involving operational, deployed, or warfighting scenarios. Training of all different sorts (e.g., leadership, technical, etc.) is an obvious and integral part of equipping individuals for the challenges they and their peers may encounter. Imposing a specific training requirement would likely disregard the range of functions performed by military units and missions. The requirement to consider the training of panel members remains a sensible practice that accounts for the multifaceted nature of the military and supports the effective administration of justice.

Also, removing training as a consideration could inadvertently exclude panel members who have developed critical thinking skills through extensive professional training, even if they lack more traditional education paths. This could limit the benefit of inclusive perspectives, particularly among enlisted personnel.

f. Judicial Temperament: (best qualified by reason of judicial temperament)

Federal and state jury systems do not have a judicial temperament requirement. Should there be a judicial temperament requirement to be qualified to serve as a panel member? If so, please define what you mean by judicial temperament. What is the military justification for this requirement?

Army OTJAG: Judicial temperament is an appropriate factor for convening authorities to consider when determining who is best qualified, as opposed to minimally qualified, to support the purposes of military law—to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.

While there is no uniform definition of judicial temperament, caselaw and policy have discussed the term. United States v. Smith provides, "While neither experience nor judicial temperament are explicitly defined by the statute, regulation, or case law, this court finds that both criteria contain elements of judgment and respect for good order and discipline…"[10]

DA PAM 27-9 (Feb 2020) provides additional guidance on judicial temperament. "However, the mantle of responsibility which goes with the judge does not mean the judge must be aloof to human relations. The judge's individual character, warmth, and human qualities should not be adversely affected by judicial status but should be developed fully as necessary ingredients of a proper judicial temperament. A military judge must have a deep sense of justice and an abiding faith in the law. The judge must possess honesty and courage; wisdom and learning; courtesy and patience; thoroughness and decisiveness; understanding and social consciousness; and independence and impartiality."

Navy Criminal Law Division: Although the UCMJ and Manual for Courts-Martial do not define the term "judicial temperament", the American Bar Association, has previously defined the term as "compassion, decisiveness, open-mindedness, sensitivity, courtesy, patience, freedom from bias and commitment to equal justice." I am aware of no uniquely military justification for such qualities in a court member, but I do think all jurors, military or civilian should possess such qualities.

Marine Corps Military Justice Branch: Judicial temperament is among the criteria convening authorities must consider when identifying those best qualified for duty as courts-martial members. The term is undefined in the UCMJ and the Rules for Courts-Martial, permitting convening authorities to exercise broad discretion in identifying those servicemembers best qualified for duty as court-martial members based in part on consideration of a less tangible and quantifiable criterion than others in Article 25. The following attempts to condense a common understanding of judicial temperament:

[D]istilling extant treatments of judicial temperament reveals that certain characteristics repeatedly surface in the construct's taxonomies. One such quality is compassion, an emotional response to perceiving and caring about another's distress. Another commonly cited trait is patience, judged by the ability to be even-tempered and exercise restraint in trying situations. Dignity also is mentioned with moderate frequency. . . . Collegiality, another oft-named quality, similarly is described as both a generous and respectful attitude towards one's judicial fellows

[10] No. 20180156, 2019 CCA Lexis 464, *7-8 (Army Ct. Crim. App. 2019).

and the concrete actions by which that attitude is manifested. Finally, three other qualities that appear to be both highly valued and commonly regarded as temperamental are being open-minded, even-handed, and committed to equality.

Terry A. Maroney, *(What We Talk About When We Talk About) Judicial Temperament*, 61 B.C. L. REV. 2085, 2099-2100(2020).Whatever collection of specific traits and characteristics a convening authority believes that good judicial temperament entails, it requires the consideration of a servicemembers' character to identify those that are to be entrusted with the important responsibility of serving as court-martial members, which is a valuable part of our system.

Air Force Military Justice Law and Policy: There is an existing judicial temperament requirement to be qualified to serve as a court-martial panel member. Under Article 25(e)(2), UCMJ, when convening a court-martial, the convening authority is required to detail members who are best qualified by reason of judicial temperament, among other factors. This requirement is necessary to ensure the best qualified individuals are selected to serve as panel members; specifically, those with the appropriate disposition to serve as the finder of fact.

Coast Guard Office of Military Justice: While the concept of judicial temperament is primarily associated with judges, it can be applied to individuals who are not serving in a judicial role. In a broader sense, the term refers to the qualities and characteristics that contribute to effective decision-making and fairness with respect to the rule of law.

This concept promotes fairness, integrity, and the rights of the accused. Panel members evincing this characteristic would be expected to approach their duties with impartiality, open-mindedness, and a commitment to military regulations and rule of law. Congress has seen it fit to retain consideration of this attribute in Article 25. Congress' judgment perhaps reflects that military society is separate and apart from civilian society and that military law makes a wide variety of things punishable by courts-martial that would not be a crime in civilian life. By incorporating positive attributes like impartiality and a commitment to rule of law, panels are better suited to make just decisions that align with the military's specific rules and regulations.

2. Are there other criteria that should be required to serve as a panel member?

a. Some examples from federal and state jury systems are: No qualifying mental or physical condition, never been convicted of a felony, and must not be pending felony charges punishable by more than a year in prison. Should any of these be requirements to serve as a panel member?

Army OTJAG: It would be a very rare instance to have a servicemember with a prior felony conviction, but that would be an appropriate disqualification. Medical or physical conditions should not be disqualifying, but they could make servicemembers unavailable for service as panel members. Under the current process, potential panel members are removed from selection pools, convening orders, or panels if the panel member has pending disciplinary actions, is assigned to the same unit as the accused, or has an ETS or retirement date within the near future.

Navy Criminal Law Division: I would not seek to add to Article 25's list of criteria. Several of the factors listed above are incompatible with military service and the others would normally be identified through the voir dire process.

Marine Corps Military Justice Branch: No additional requirements to serve as a court-martial member are necessary. These are matters that are identified during voir dire, and the military judge shall excuse a member for cause whenever it appears that the member "[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." R.C.M. 912(f)(1)(N).

Air Force Military Justice Law and Policy: These additional requirements are not needed for service as a panel member. The criteria provided for in Article 25, UCMJ, would frequently rule out the selection of members with these concerns. To the extent they do not, Rule for Court-Martial (RCM) 912 provides the framework for the examination of panel members during which potentially disqualifying information regarding the additional requirements would be discovered. This process allows for identification of potential issues contemplated by the additional requirements, without creating an absolute bar prohibiting an individual from serving as a panel member.

Coast Guard Office of Military Justice: Disqualifying mental and physical conditions would undermine a member's status as "best qualified" under Article 25. Moreover, these conditions would likely render the member physically unable to serve, making them ineligible for panel membership. Similarly, a felony conviction or misconduct resulting in felony charges would normally disqualify a servicemember from serving in the military, let alone meet the "best qualified" criteria outlined in Article 25. Therefore, the inclusion of these specific considerations appears unnecessary and would complicate the framework for selecting panel members.

b. Should there be criteria addressing the qualification of Service members under investigation for a violation of the UCMJ, or other criminal code, or who have received or are pending disciplinary or administrative action for committing an offense under the UCMJ?

Army OTJAG: Under the current process, potential panel members are removed from selection pools, convening orders, or panels if the panel member is flagged for an investigation or pending disciplinary actions. Past completed disciplinary actions are not included in the scrub for members of the selection pool. If a Soldier is selected by the convening authority, the questionnaire provided to all the parties typically includes past disciplinary actions taken against the panel member. Parties may use this information as a basis for a challenge for cause. This practice has been approved by military courts, explaining in United States v. Smith that "[w]hile neither experience nor judicial temperament are explicitly defined by the statute, regulation, or case law, this court finds that both criteria contain elements of judgment and respect for good order and discipline, such that they could be negatively impacted by a completed adverse action."[11]

Navy Criminal Law Division: I do not believe such a requirement is necessary given the discovery, use of member questionnaires, voir dire, and challenge procedures used in military courts-martial. Members are questioned under oath and several of the standard questions within the Military Judge's Benchbook that would be asked of any panel would seem to elicit this information. Likewise, member questionnaires utilized to assess prospective members include this information. Robust voir dire and, if necessary, challenge by counsel for both sides is also a proper means to address this.

[11] *Id.*

Marine Corps Military Justice Branch: No, for the reason articulated above. Further, at least one Court of Criminal Appeals has held that a convening authority may consider these matters when assessing a member's experience, judicial temperament, and availability. *See United States v. Smith*, No. 20180156, 2019 CCA LEXIS 464, at *7–11(A. Ct. Crim. App. November 20, 2019).

Air Force Military Justice Law and Policy: Criteria addressing these factors is not needed. The criteria provided for in Article 25, UCMJ, would frequently rule out the selection of members with these concerns. To the extent they do not, RCM 912 provides the framework for the examination of panel members during which information regarding these criteria would be discovered and evaluated. This process allows for identification of potential issues contemplated by the criteria, without creating an absolute bar for an individual to serve as a panel member.

Coast Guard Office of Military Justice: Consideration that a member has been disciplined under the UCMJ or civilian criminal codes or being under investigation for such offenses would impact a member's judicial temperament evaluation, particularly in cases involving serious UCMJ offenses or civilian criminal codes. However, imposing a requirement to consider pending or disciplinary actions under the UCMJ would be overly broad and could unjustly exclude members who have received corrective action for past infractions. For instance, it is not uncommon for servicemembers to have negative documentation for an inappropriate but consensual relationship in their distant past, which was in violation of technical military rules, despite demonstrating exemplary performance since then.

Maintaining a flexible approach under the current Article 25 criteria allows for fair consideration of an individual's character, ensuring that the selection of panel members remains just and reflective of the needs of the military justice system.

c. Please identify any other criteria that you believe should be required for a Service member to be qualified to serve as a panel member?

Army OTJAG: The current criteria adequately address the basis for disqualification and no other criteria should be required for servicemembers to qualify as panel members. Under the current process, potential panel members are removed from selection pools, convening orders, or panels if the panel member has pending disciplinary actions, is assigned to the same unit as the accused, if the panel member was the accuser or a witness in the case, acted as preliminary hearing officer of as counsel, or has an ETS or retirement date that will make the Soldier unavailable during the expected time of panel member service.

Navy Criminal Law Division: I do not believe any other requirements beyond those that are currently present in Article 25 are necessary.

Marine Corps Military Justice Branch: None.

Air Force Military Justice Law and Policy: The current member selection criteria, coupled with the requirements of RCM 912, sufficiently address the requirements for qualification for service as a panel member.

Coast Guard Office of Military Justice: The Coast Guard believes that Article 25 adequately serves the purpose of courts-martial. It does not see good cause to recommend the implementation of additional criteria. Further, changing the criteria could introduce unanticipated disruptions and unknown hazards into the system.

3. Should there be a requirement for panels to be diverse by race and/or gender?

Please explain your answer and whether there is a military justification for making this a requirement.

Army OTJAG: We are unaware of any federal or state law or federal or state rule that mandates diversity representation on any jury. However, it might be appropriate for the Joint Service Committee to work deliberately with Congress to identify possible amendments to the UCMJ or Rules for Court-Martial, including adding language to Article 25, UCMJ that would promote diversity of gender, race, and ethnicity on panels. Any proposed amendments should maintain a requirement for "best qualified" members and exercise caution not to raise Constitutional or other issues in a case of first impression.

Navy Criminal Law Division: Ideally, panels should be racially and gender diverse but I do not favor the establishment of a quota system to achieve such an outcome. However, a convening authority is not precluded by Article 25 from appointing court-martial members in a way that will best assure that the court-martial panel constitutes a representative cross-section of the military community. This subject is currently under review by the Court of Appeals for the Armed Forces. Given the military's broad discovery requirements, including with respect to matters related to referral and the convening of courts-martial, coupled with a robust voir dire and procedure for challenges of panel members, I believe there are adequate safeguards in place to ensure panels are selected to achieve the fair administration of justice.

Marine Corps Military Justice Branch: There should not be statutory race and gender quota requirements for courts-martial members. Any such requirements would be arbitrary, inconsistent with federal and state practice, and difficult to uniformly comply with across the Services. However, "a convening authority is not precluded by Article 25 from appointing court-martial members in a way that will best assure that the court-martial panel constitutes a representative cross-section of the military community." *United States v. Smith*, 27 M.J. 242, 249 (C.M.A. 1988) (interpreting *United States v. Crawford*, 35 C.M.R. 3 (C.M.A. 1964)). Further, "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." *United States v. Riesbeck*, 77 M.J.

154, 163(C.A.A.F. 2018). This matter is presently under review at C.A.A.F. *United States v. Jeter*, 83 M.J. 77(C.A.A.F. 2022).

Air Force Military Justice Law and Policy: No additional requirement is needed. Convening Authorities are required to consider the factors enumerated in Article 25, UCMJ.

Coast Guard Office of Military Justice: The military's highest court has previously ruled that convening authorities may take race and gender into account so long as the motivation behind such inclusion is compatible with the requirements outline in Article 25.[12] However, it is important to note that issue is currently before the Court of Appeals of the Armed Forces.[13] Given the ongoing deliberation, it is not possible to fully address the delicate issue of racial or gender inclusion without a definitive ruling by the Court.

4. Should there be an option for an all enlisted panel? Why or why not?

Army OTJAG: Currently, neither Article 25, UCMJ nor the Rules for Court-Martial prohibit the selection of an all-enlisted panel; they only require enlisted members comprise at least one-third of the panel upon request by the accused.

Navy Criminal Law Division: No. While a court-martial is of course a legal proceeding, within the military, it must also be understood as a disciplinary proceeding as well. The purpose of military law is to "promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States." Those are matters of consequence to all military members but especially officers charged with leading and developing subordinates, including enlisted members, and with defending the national security of the United States. I would not favor the option of removal of officers from a disciplinary proceeding with that as its purpose. Of note, in some cases all enlisted panels do result after the conclusion of voir dire and challenges but this should not be an election available to an enlisted accused prior to assembly.

Marine Corps Military Justice Branch: Unless an enlisted accused elects to be tried by all officer members, a convening authority may within his or her discretion detail all enlisted members to a court-martial of an enlisted accused; however, there should be no requirement to do so. As evidenced by replete examples within the UCMJ and Rules for Courts-Martial, Congress and the President recognize the crucial role of officers in the military justice system and vest them with authorities not held by enlisted members; an accused should not be permitted to cut them out of courts-martial by election.

Air Force Military Justice Law and Policy: No, requiring officers on the court-martial panel ensures broad experience and fairness, and reflects the overall military structure. Removing officers from an enlisted member's court-martial is not reflective of how the military trains, evaluates, and operates and would be detrimental to good order and discipline.

Coast Guard Office of Military Justice: As noted in paragraph 1, a hierarchical structure, represented by rank, is fundamental to the military. Congress has deemed it necessary to retain the requirement for officers to serve on panels. A rational basis for this requirement is that the military justice system needs to promote efficiency and discipline including in foreign and domestic crises. The Coast Guard sees no compelling reason to revisit Congress' legislative judgment on this matter.

[12] *U.S. v. Crawford*, 35 C.M.R. 3 (C.M.A. 1964) (race); *U.S. v. Smith*, 27 M.J. 242 (C.M.A. 1993) (gender).
[13] See Interlocutory Order, U.S. v. Willie C. Jeter, No. 22-0065/NA, CCA 201700248 (May 3, 2022), https://www.armfor.uscourts.gov/grants_disp.htm.

5. Should the military move to a randomized panel member selection process, similar to how federal and state jurisdictions select potential jury members?

Federal and state jurisdictions typically use computer systems to randomly select members from state voter registration rolls to serve on juries. After the venire is chosen in this way, the voir dire process further narrows the number of members sitting on a jury.

Should the military use Alpha rosters, or other similar means, to randomly select the initial pool of panel members? Why or why not?

Army OTJAG: Historically, the "best qualified" requirement was intended as additional protection for the accused and a check on the convening authority's unfettered discretion. As multiple subject matter experts have testified and committee member observations at court-martial have publicly noted, the "best qualified" standard of Article 25, UCMJ and current processes produce excellent panels of military members who take their duties and responsibilities with the utmost seriousness and contribute to the fact-finding portion of the court-martial with thoughtful questions. Maintaining this practice promotes diversity within the panel member selection process and is the best course of action.

Selection of panel members through the use of Alpha rosters, defined in the Army as all personnel with a Unit Identification Code (UIC) that falls within the General Court-Martial Convening Authority's command, would eliminate the "best qualified" requirement, would be logistically challenging, and would likely not achieve greater diversity of gender, race, or ethnicity.

Selection of panel members though the use of Alpha rosters would potentially lengthen the court-martial process by decreasing efficiency, particularly where current Army practice includes the use of standing convening orders. The current process uses two steps. First, subordinate commanders provide nominations for specific time periods ensuring that the nominated personnel are best qualified, will be generally available during the time period, and are not flagged for disciplinary actions. The OSJA then scrubs nominated personnel to confirm they are not pending disciplinary actions. Second, the installation G1 provides the OSJA with a consolidated Alpha roster with all personnel assigned to a UIC that fall within that General Court-Martial Convening Authority. The G1 typically requires an average of two weeks to generate the roster and scrub to ensure personnel are currently assigned and present on the installation. If the convening authority selects personnel from the consolidated Alpha roster, the OSJA must confirm those personnel are not flagged or are not expected to be unavailable due to deployments, field exercises or schools.

A process requiring randomization from the consolidated Alpha roster for all UIC assigned the General Court-Martial Convening would subsequently involve confirmation of assignment, availability, and flags. This would be more cumbersome, particularly at a large installation where the consolidated alpha roster could have over 30,000 assigned personnel. Repeating this process for each court-martial would increase workload and decrease efficiency.

Finally, a purely randomized panel selection process utilizing Alpha rosters would not require consideration of which personnel are "best qualified." This would likely increase the number of junior personnel selected, but would not necessarily promote diversity in gender, race, or ethnicity.

Navy Criminal Law Division: Randomized member selection was approved as part of the FY23 NDAA. The President has not yet issued any implementing guidance. I would suggest holding off on additional changes until we have a full understanding of what these already approved changes will entail and how well they work. Further change in front of, or on top of, the FY23 NDAA could ultimately prove to be at odds with the President's forthcoming guidance. Instead, I would recommend an implementation of the FY23 NDAA changes, study of those changes, and then further calculated and targeted changes as warranted based on need.

Marine Corps Military Justice Branch: Section 543 of the FY23 NDAA amended Article 25(e)to add a 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." The President has not yet prescribed such regulations. We should await the President to do so, and then assess the impact of the changes before considering additional changes.

Notably, Congress did not amend Article 25(e)(2), which requires the convening authority to detail those that are best qualified for duty as court-martial members.

Air Force Military Justice Law and Policy: The DAF supports the efforts of the Joint Service Committee on Military Justice (JSC) as it works to increase randomization of the panel member selection process. The JSC efforts are taken in accordance with Section 543 of the Fiscal Year 2023 National Defense Authorization Act (FY23 NDAA) and the Secretary of Defense's mandate for compliance with Recommendation 1.7d of the Independent Review Commission on Sexual Assault in the Military's Report. Anticipated amendments to the applicable RCMs will include new requirements for a randomized panel member selection process. As to the initial selection of members, some DAF installation legal offices have already instituted processes using Alpha rosters. The DAF is reviewing these existing options to determine the most effective means for implementing the forthcoming randomized panel member selection process.

Coast Guard Office of Military Justice: Implementing a randomized selection of panel members would present significant challenges in practice. One of the considerations acknowledged by Congress when granting the convening authorities the power to select members was the necessity of commanders to have control over the availability of personnel for operational purposes.[14] In the case of the Coast Guard, implementing a random selection of panel members similar to the federal system would significantly impede the operational effectiveness of Coast Guard cutters, aviation units, search and rescue teams, and deployable law enforcement units. The presence of even a single individual can be crucial to the mission capability of a small unit, especially when considering individuals with specialized or technical skills, such as an aerial use of force gunner or an electronic technician. Taking these members at random to serve on panels would severely degrade, if not debilitate, the operational readiness and capabilities of these units.

[14] See Curry v. Sec'y of Army, 595 F.2d 873, 877 (D.C. Cir. 1979) ("Provisions of the UCMJ authorizing the convening authority to select the members of the court-martial also respond to unique military needs. In order for the command to function effectively, the officer in charge must be assured that he has capable personnel available to perform various tasks. The duties his troops will be called upon to carry out may be difficult, if not impossible, to predict in advance. . . . If, on the other hand, court-martial members were required to be chosen from a broad panel of military personnel, a large number of men would be immobilized and effectively removed from the direct control of the commanding officer pending completion of the selection process. Strategic success and human safety could be jeopardized by so impeding the commanding officer's ability to deploy troops.") (citations omitted).

It is important to note that the Court of the Appeals for the Armed Forces has endorsed the practice of subordinates assembling a pool of potential members by random selection using personnel files, for subsequent selection by a convening authority consistent with Article 25 criteria.[15] This practice is comparable to the Committee's proposal. The military services could probably adapt Alpha Rosters accordingly, in a manner akin to the proposal.

6. Please share with us any other suggestions you have to improve the panel selection process or considerations that we should be cognizant of in making recommendations to change the selection criteria or randomize the selection process.

Army OTJAG: OTJAG would greatly appreciate the expertise and connections of the committee with regard to obtaining subject matter expertise on the following topics: the demographics of federal juries; opinions from federal or state prosecutors on juror selection and use of peremptory challenges based on non-race attributes such as age or education specifically in sexual assault prosecutions; opinions from Service Special Victim Litigation Experts on experience and comparison between civilian and military juries; jury instructions on unconscious bias that have survived judicial scrutiny; and, experiences from any jurisdiction that has studied juror demographics and identified specific practices that have increased diversity of gender, race, and socioeconomic status.

Navy Criminal Law Division: As was the Military Justice Act of 2016 that preceded it, the Military Justice Reform Act is a generational change to the military justice system. It represents a fundamental change in the way that the prosecution of misconduct is handled. We are working hard to prepare for those changes but there are many "unknown unknowns" that will only reveal over time and potentially through litigation as we implement these changes. These reforms were further modified in the FY23 NDAA and randomization of court-martial members was added to the changes. With that in mind, I would recommend that all parties let those changes be implemented and obtain enough information on how they are working and only then, with data in hand, seek additional change to address known problems.

Marine Corps Military Justice Branch: Evaluating the method and criteria for detailing courts-martial members as compared to jurors in civilian jurisdictions is one matter. Evaluating how the qualifications of courts-martial members compare to those of civilian jurors is a different, more informative matter for assessing needed change, considering that "[a]military panel of court members has often been called a 'blue ribbon' panel due to the quality of its members." *United States v. Youngblood*, 47 M.J. 338, 346(C.A.A.F. 1997)(Crawford, J., dissenting) (citations omitted).

Further, the Committee should remain mindful that Congress "cast the eligibility of . . . officers to serve [as members of courts-martial] in broad and inclusive terms in Article 25(a), UCMJ. . . ."*United States v. Bartlett*, 66 M.J. 426, 428–29(C.A.A.F. 2008). The same is true of enlisted members in Article 25(c)(1), with the only limitation being that enlisted members may only serve on courts-martial of other enlisted members. Further, "Congress and the President crafted few prohibitions on court-martial service to ensure maximum discretion to the convening

[15] See United States v. Dowty, 60 M.J. 163, 170 (C.A.A.F. 2004) ("Other cases are illustrative of what subordinates can do in generating a pool of potential court-martial members to be submitted to the CA."); see also United States v. Kemp, 46 C.M.R. 152 (1973) (approving initial compling of pool of potential nominees by random selection from master personnel file); U.S. v. Crawford, 35 C.M.R. 3, 7 (1964) (approving selection of members following a random selection of a prospective member list).

authority in the selection process, while maintaining the basic fairness of the military justice system. *Id.*at 429.

Air Force Military Justice Law and Policy: The DAF anticipates forthcoming changes to the panel selection process through the pending Executive Order. These changes should be implemented and evaluated prior to proposing additional changes.

Coast Guard Office of Military Justice: It should be noted that Congress has amended Article 25 by specifically enabling the President to prescribe regulations which would require a convening authority to detail members, at random, to a court-martial panel provided said members meet the best qualified standard.[16] Also, proposed amendments to R.C.M. 911 and 912 aim to further facilitate the process of randomization.[17] The DAC-IPAD should support the implementation of these rules in the military and allow for necessary refinements as they are put into practice. A study resulting from the effects and outcomes resulting from the implementation of these new rules would provide valuable insight and inform any future considerations for potential modifications.

7. We heard from several Service members who spoke to the Policy Subcommittee that their Service's administrative discharge policies allowed the respondent to request minority inclusion among the discharge board members. Please provide any applicable Service regulations or policies regarding administrative discharge boards that provide this option.

Army OTJAG:

AR 635-200, Active Duty Enlisted Administrative Separations, para. 2–6(3)-(5). Composition of the board, provides:

(3) If the respondent requests a voting member(s) of his or her same race, color, religion, gender, or national origin (or combination thereof), a voting member of the board will be made available.

(4) In the event an individual of the requested race, color, religion, gender, or national origin group (or combination thereof) is determined to be unavailable, the convening authority will annotate the measures taken to have the person(s) made available. The annotation will be entered in the board proceedings.

(5) In the event of nonavailability, the reason will be stated in the record of proceedings. However, the mere appointment, failure to appoint, or failure to record a reasoning to appoint a member of such a group to the board does not provide a basis for challenging the proceedings.

AR 600-8-24, Officer Transfers and Discharges, para. 4-7d provides:

d. When the respondent is a minority, female, or special branch (see 10 USC 7064), the board will (upon the officer's written request) include a minority, female, or special branch as voting member (if reasonably available, as this provision is not an entitlement). If an officer is in more than one category and requests officers from all or two categories, the board membership may be

[16] See Section 543, James M. Inhofe NDAA for FY 2023, Pub. L. No. 117-263, 136 Stat. 2395, 2580 (2022) (adding a new Article 25(e)(4) ("When convening a court-martial, the convening authority shall detail as member thereof members of the armed forces under such regulations as the President may prescribe for the randomized selection of personnel, to the maximum extent practicable.").
[17] See Draft Annex to Proposed Executive Order, pp. 138 – 144. https://jsc.defense.gov/Portals/99/Annex%20to%20the%20draft%20EO.pdf.

met by one or more officers (if reasonably available, as this provision is not an entitlement). The request for these members, if desired, will be submitted 7 days from the date that the respondent receives the notification or else the right to request is waived.

Navy Criminal Law Division: There is no such formal right within the Navy. The respondent or counsel may make such a request that may ultimately be granted, but there is no right to do so. Instead, the Navy's Military Personnel Manual Section 1910.502, states "convening authorities are charged to ensure women and minorities are given equal opportunity to serve on administrative boards. Mere appointment or failure to appoint a member of such a group to the board, however, is not a basis to challenge the proceeding."

Marine Corps Military Justice Branch: There are no provisions in MCO 1900.16 CH 2, Separation and Retirement Manual, or SECNAVINST 1920.6D, Administrative Separation of Officers, that specifically permit a respondent may request minority inclusion among board members. However, nothing prohibits a respondent from making such a request. MCO 1900.16 CH 2 paragraph 6315(1)(c) states, "The convening authority shall ensure that the opportunity to serve on administrative boards is given to women and minorities. The mere appointment or failure to appoint a member of such a group to the board, however, does not provide a basis for challenging the proceeding." Additionally, both MCO 1900.16 CH 2 and SECNAVINST 1920.6D allow for challenges to individual board members.

Air Force Military Justice Law and Policy: The DAF does not have regulations or policies that provide this option.

Coast Guard Office of Military Justice: The Coast Guard's policy responsive to this question is Article 1.C.2 of the Enlisted Personnel Administrative Boards Manual, PSCINST 1910.1 (June 2014), available online.[18]

[18] Available at https://www.dcms.uscg.mil/Portals/10/CG-1/psc/psd/docs/EPAB%20(Final%20Revised%20August%202017).pdf?ver=2018-03-30-101707-787.

Table D-4.
U.S. District Courts–Criminal Defendants Disposed of, by Type of Disposition and Offense,
During the 12-Month Period Ending December 31, 2021

Offense	Total Defendants	Not Convicted				Convicted and Sentenced			
				Acquitted by				Convicted by	
		Total	Dismissed	Bench Trial	Jury Trial	Total	Plea of Guilty	Bench Trial	Jury Trial
Total	**67,686**	**5,617**	**5,379**	**54**	**184**	**62,069**	**61,066**	**123**	**880**
Violent Offenses, Total	**2,475**	**380**	**346**	**5**	**29**	**2,095**	**1,989**	**8**	**98**
Homicide	149	46	40	1	5	103	97	-	6
Robbery	**426**	**32**	**27**	**1**	**4**	**394**	**385**	**-**	**9**
Bank	365	24	19	1	4	341	332	-	9
Other Robbery Offenses	61	8	8	-	-	53	53	-	-
Assault	939	231	211	2	18	708	688	5	15
Kidnapping	118	17	15	-	2	101	85	-	16
Racketeering	552	22	22	-	-	530	488	1	41
Carjacking	125	17	16	1	-	108	107	-	1
Terrorism	34	3	3	-	-	31	25	2	4
Other Violent Offenses	132	12	12	-	-	120	114	-	6
Property Offenses, Total	**7,416**	**942**	**907**	**12**	**23**	**6,474**	**6,323**	**15**	**136**
Burglary	**38**	**4**	**4**	**-**	**-**	**34**	**34**	**-**	**-**
Larceny and Theft	**1,127**	**281**	**278**	**-**	**3**	**846**	**834**	**5**	**7**
Bank	25	1	1	-	-	24	24	-	-
Postal Service	190	10	10	-	-	180	180	-	-
Interstate Shipments	11	1	1	-	-	10	9	-	1
Theft of U.S. Property	782	234	231	-	3	548	541	1	6
Theft Within Maritime Jurisdiction	45	22	22	-	-	23	21	2	-
Transportation of Stolen Property	61	10	10	-	-	51	51	-	-
Other Larceny and Theft Offenses	13	3	3	-	-	10	8	2	-
Embezzlement	**240**	**31**	**29**	**-**	**2**	**209**	**205**	**1**	**3**
Bank	16	-	-	-	-	16	16	-	-
Postal Service	120	15	15	-	-	105	105	-	-
Financial Institutions	10	-	-	-	-	10	9	1	-
Other Embezzlement Offenses	94	16	14	-	2	78	75	-	3
Fraud	**5,734**	**567**	**541**	**10**	**16**	**5,167**	**5,035**	**7**	**125**
Tax	377	15	15	-	-	362	351	-	11
Financial Institutions	315	16	16	-	-	299	291	-	8
Securities and Exchange	69	11	8	3	-	58	53	-	5
Mail	163	20	19	-	1	143	142	-	1
Wire, Radio, or Television	526	27	26	-	1	499	488	-	11

Bankruptcy	28	1	1	-	-	27	25	1	1
Social Security	136	23	22	1	-	113	110	1	2
False Personation	19	4	4	-	-	15	13	-	2
Citizenship and Naturalization	81	22	22	-	-	59	59	-	-
Passport	193	12	11	1	-	181	180	-	1
Identification Documents and Information	502	41	41	-	-	461	453	2	6
False Claims of Government Services	62	11	10	-	1	51	48	-	3
False Statements	587	51	45	2	4	536	530	-	6
Conspiracy to Defraud the United States	1,116	72	70	-	2	1,044	1,032	2	10
Unauthorized Access Devices	221	32	32	-	-	189	185	-	4
Computer	48	6	6	-	-	42	41	-	1
Health Care	208	35	31	2	2	173	158	1	14
Attempt and Conspiracy to Defraud	1,050	161	155	1	5	889	851	-	38
Other Fraud Offenses	33	7	7	-	-	26	25	-	1
Forgery and Counterfeiting	**144**	**16**	**16**	**-**	**-**	**128**	**126**	**1**	**1**
Auto Theft	**16**	**-**	**-**	**-**	**-**	**16**	**16**	**-**	**-**
Other Property Offenses	**117**	**43**	**39**	**2**	**2**	**74**	**73**	**1**	**-**
Drug Offenses, Total	**20,608**	**1,909**	**1,863**	**4**	**42**	**18,699**	**18,413**	**22**	**264**
Marijuana	**1,287**	**306**	**304**	**1**	**1**	**981**	**965**	**3**	**13**
Sell, Distribute, or Dispense	790	79	78	-	1	711	698	3	10
Import/Export	103	8	8	-	-	95	94	-	1
Manufacture	32	2	2	-	-	30	28	-	2
Possession	362	217	216	1	-	145	145	-	-
All Other Drugs	**19,268**	**1,593**	**1,550**	**2**	**41**	**17,675**	**17,409**	**18**	**248**
Sell, Distribute, or Dispense	16,234	1,121	1,083	2	36	15,113	14,863	17	233
Import/Export	2,568	351	346	-	5	2,217	2,210	-	7
Manufacture	135	9	9	-	-	126	121	-	5
Possession	331	112	112	-	-	219	215	1	3
Other Drug Offenses	**53**	**10**	**9**	**1**	**-**	**43**	**39**	**1**	**3**
Firearms and Explosives Offenses, Total	**10,763**	**741**	**687**	**9**	**45**	**10,022**	**9,801**	**34**	**187**
Firearms	**10,638**	**728**	**676**	**7**	**45**	**9,910**	**9,693**	**34**	**183**
Possession by Prohibited Persons	6,987	474	438	2	34	6,513	6,386	26	101
Furtherance of Violent/Drug-Trafficking Crimes	1,744	132	125	3	4	1,612	1,558	4	50
Other Firearms Offenses	1,907	122	113	2	7	1,785	1,749	4	32
Explosives	**125**	**13**	**11**	**2**	**-**	**112**	**108**	**-**	**4**
Sex Offenses, Total	**3,016**	**212**	**193**	**3**	**16**	**2,804**	**2,701**	**11**	**92**
Sexual Abuse of Adults	94	26	21	-	5	68	62	-	6
Sexual Abuse of Minors	739	66	62	1	3	673	625	3	45
Sexually Explicit Material	1,480	60	56	-	4	1,420	1,396	4	20
Transportation for Illegal Sexual Activity	344	17	14	-	3	327	303	4	20
Sex Offender Registry	350	41	38	2	1	309	308	-	1
Other Sex Offenses	9	2	2	-	-	7	7	-	-

Justice System Offenses, Total	**910**	**138**	**135**	-	**3**	**772**	**751**	**2**	**19**
Aiding, Abetting, or Accessory	261	7	7	-	-	254	254	-	-
Obstruction of Justice	145	27	24	-	3	118	101	-	17
Escape from Custody	358	47	47	-	-	311	309	1	1
Failure to Appear	107	51	51	-	-	56	56	-	-
Perjury	18	3	3	-	-	15	14	1	-
Contempt	21	3	3	-	-	18	17	-	1
Immigration Offenses, Total	**17,975**	**440**	**428**	**4**	**8**	**17,535**	**17,489**	**10**	**36**
Alien Smuggling	4,114	119	115	-	4	3,995	3,974	2	19
Improper Entry by Alien	384	29	28	-	1	355	354	1	-
Improper Reentry by Alien	12,934	237	233	3	1	12,697	12,675	7	15
Fraud and Misuse of Visa/Permits	458	11	9	1	1	447	446	-	1
Other Immigration Offenses	85	44	43	-	1	41	40	-	1
General Offenses, Total	**1,884**	**335**	**323**	**5**	**7**	**1,549**	**1,515**	**2**	**32**
Bribery	71	4	3	-	1	67	64	-	3
Money Laundering	636	73	72	-	1	563	552	1	10
RICO (Racketeer Influenced and Corrupt Organizations Act)	198	3	2	-	1	195	185	-	10
Racketeering	66	4	3	-	1	62	62	-	-
Extortion and Threats	151	28	24	1	3	123	120	-	3
Gambling and Lottery	36	1	1	-	-	35	35	-	-
Failure to Pay Child Support	5	2	2	-	-	3	3	-	-
Other General Offenses	721	220	216	4	-	501	494	1	6
Regulatory Offenses, Total	**1,254**	**149**	**130**	**8**	**11**	**1,105**	**1,080**	**9**	**16**
Civil Rights	97	17	10	-	7	80	71	1	8
Copyright	10	2	2	-	-	8	8	-	-
Food and Drug	57	2	2	-	-	55	53	-	2
Hazardous Waste Treatment, Disposal, and Storage	16	2	1	-	1	14	14	-	-
Telegraph, Telephone, and Radiograph	4	1	1	-	-	3	3	-	-
National Defense	47	11	11	-	-	36	35	-	1
Antitrust	12	1	1	-	-	11	11	-	-
Labor	27	2	2	-	-	25	24	-	1
Game and Conservation	101	14	14	-	-	87	85	2	-
National Parks/Recreation	28	1	1	-	-	27	27	-	-
Customs	246	18	16	-	2	228	225	2	1
Postal Service	92	3	3	-	-	89	89	-	-
Reporting of Monetary Transactions	137	10	10	-	-	127	126	1	-
Migratory Bird	38	8	2	6	-	30	29	1	-
Maritime and Shipping	65	2	1	-	1	63	62	1	-

Aircraft Regulations	50	12	11	1	-	38	37	-	1
Other Regulatory Offenses	227	43	42	1	-	184	181	1	2
Traffic Offenses, Total	**1,385**	**371**	**367**	**4**	-	**1,014**	**1,004**	**10**	-
Drunk Driving	541	93	92	1	-	448	442	6	-
Other Traffic Offenses	844	278	275	3	-	566	562	4	-

NOTE: This table includes defendants in all cases filed as felonies or Class A misdemeanors, but includes only those defendants in cases filed as petty offenses that were assigned to district judges rather than magistrate judges.

Table D-4.
U.S. District Courts–Criminal Defendants Disposed of, by Type of Disposition and Offense,
During the 12-Month Period Ending December 31, 2022

Offense	Total Defendants	Not Convicted				Convicted and Sentenced			
		Total	Dismissed	Acquitted by		Total	Plea of Guilty	Convicted by	
				Bench Trial	Jury Trial			Bench Trial	Jury Trial
Total	**71,896**	**6,434**	**6,140**	**68**	**226**	**65,462**	**64,067**	**132**	**1,263**
Violent Offenses, Total	**2,808**	**378**	**337**	**9**	**32**	**2,430**	**2,272**	**8**	**150**
Homicide	205	49	45	-	4	156	138	-	18
Robbery	**418**	**15**	**14**	**1**	**-**	**403**	**393**	**1**	**9**
Bank	369	14	13	1	-	355	346	1	8
Other Robbery Offenses	49	1	1	-	-	48	47	-	1
Assault	1,000	220	204	6	10	780	750	2	28
Kidnapping	152	31	22	1	8	121	96	1	24
Racketeering	657	24	21	-	3	633	578	4	51
Carjacking	175	20	15	-	5	155	148	-	7
Terrorism	56	5	5	-	-	51	46	-	5
Other Violent Offenses	145	14	11	1	2	131	123	-	8
Property Offenses, Total	**8,058**	**939**	**896**	**9**	**34**	**7,119**	**6,875**	**14**	**230**
Burglary	**42**	**2**	**2**	**-**	**-**	**40**	**39**	**-**	**1**
Larceny and Theft	**1,000**	**209**	**208**	**-**	**1**	**791**	**781**	**2**	**8**
Bank	46	1	1	-	-	45	44	-	1
Postal Service	164	10	10	-	-	154	153	-	1
Interstate Shipments	13	1	1	-	-	12	12	-	-
Theft of U.S. Property	668	173	172	-	1	495	487	2	6
Theft Within Maritime Jurisdiction	42	18	18	-	-	24	24	-	-
Transportation of Stolen Property	55	5	5	-	-	50	50	-	-
Other Larceny and Theft Offenses	12	1	1	-	-	11	11	-	-
Embezzlement	**248**	**39**	**38**	**-**	**1**	**209**	**205**	**-**	**4**
Bank	32	4	4	-	-	28	28	-	-
Postal Service	111	22	22	-	-	89	89	-	-
Financial Institutions	8	1	1	-	-	7	7	-	-
Other Embezzlement Offenses	97	12	11	-	1	85	81	-	4
Fraud	**6,487**	**629**	**589**	**8**	**32**	**5,858**	**5,637**	**9**	**212**
Tax	402	24	23	-	1	378	359	-	19
Financial Institutions	323	20	19	1	-	303	296	-	7
Securities and Exchange	67	7	7	-	-	60	57	-	3
Mail	159	13	13	-	-	146	138	-	8
Wire, Radio, or Television	720	52	44	-	8	668	641	2	25
Bankruptcy	27	5	4	-	1	22	20	-	2

Social Security	148	59	59	-	-	89	86	-	3
False Personation	15	3	1	1	1	12	11	-	1
Citizenship and Naturalization	75	19	19	-	-	56	50	2	4
Passport	166	8	8	-	-	158	156	1	1
Identification Documents and Information	544	35	35	-	-	509	499	3	7
False Claims of Government Services	38	6	6	-	-	32	28	-	4
False Statements	537	55	54	-	1	482	475	-	7
Conspiracy to Defraud the United States	1,411	95	94	-	1	1,316	1,284	-	32
Unauthorized Access Devices	211	15	15	-	-	196	192	-	4
Computer	49	16	14	-	2	33	31	-	2
Health Care	258	58	48	3	7	200	188	-	12
Attempt and Conspiracy to Defraud	1,299	136	124	2	10	1,163	1,091	1	71
Other Fraud Offenses	38	3	2	1	-	35	35	-	-
Forgery and Counterfeiting	**151**	**32**	**31**	**1**	**-**	**119**	**118**	**-**	**1**
Auto Theft	**21**	**3**	**3**	**-**	**-**	**18**	**17**	**-**	**1**
Other Property Offenses	**109**	**25**	**25**	**-**	**-**	**84**	**78**	**3**	**3**
Drug Offenses, Total	**22,204**	**2,366**	**2,308**	**12**	**46**	**19,838**	**19,485**	**21**	**332**
Marijuana	**1,208**	**466**	**466**	**-**	**-**	**742**	**730**	**2**	**10**
Sell, Distribute, or Dispense	684	86	86	-	-	598	588	2	8
Import/Export	54	25	25	-	-	29	27	-	2
Manufacture	33	7	7	-	-	26	26	-	-
Possession	437	348	348	-	-	89	89	-	-
All Other Drugs	**20,918**	**1,880**	**1,823**	**12**	**45**	**19,038**	**18,702**	**19**	**317**
Sell, Distribute, or Dispense	18,216	1,310	1,265	8	37	16,906	16,591	18	297
Import/Export	2,178	397	387	3	7	1,781	1,764	1	16
Manufacture	178	31	29	1	1	147	143	-	4
Possession	346	142	142	-	-	204	204	-	-
Other Drug Offenses	**78**	**20**	**19**	**-**	**1**	**58**	**53**	**-**	**5**
Firearms and Explosives Offenses, Total	**11,036**	**760**	**701**	**12**	**47**	**10,276**	**10,035**	**24**	**217**
Firearms	**10,905**	**744**	**686**	**12**	**46**	**10,161**	**9,923**	**24**	**214**
Possession by Prohibited Persons	7,154	489	452	9	28	6,665	6,530	13	122
Furtherance of Violent/Drug-Trafficking Crimes	1,707	134	125	1	8	1,573	1,520	5	48
Other Firearms Offenses	2,044	121	109	2	10	1,923	1,873	6	44
Explosives	**131**	**16**	**15**	**-**	**1**	**115**	**112**	**-**	**3**
Sex Offenses, Total	**3,301**	**173**	**160**	**1**	**12**	**3,128**	**2,963**	**13**	**152**
Sexual Abuse of Adults	106	27	21	-	6	79	61	2	16
Sexual Abuse of Minors	927	53	49	-	4	874	808	2	64
Sexually Explicit Material	1,544	49	47	-	2	1,495	1,458	3	34
Transportation for Illegal Sexual Activity	409	24	24	-	-	385	348	3	34
Sex Offender Registry	310	19	18	1	-	291	284	3	4
Other Sex Offenses	5	1	1	-	-	4	4	-	-
Justice System Offenses, Total	**1,037**	**157**	**139**	**5**	**13**	**880**	**825**	**7**	**48**
Aiding, Abetting, or Accessory	298	10	9	-	1	288	288	-	-

Obstruction of Justice	212	34	19	4	11	178	133	3	42
Escape from Custody	357	29	27	1	1	328	327	-	1
Failure to Appear	106	64	64	-	-	42	41	-	1
Perjury	23	2	2	-	-	21	18	-	3
Contempt	41	18	18	-	-	23	18	4	1
Immigration Offenses, Total	**18,220**	**437**	**414**	**7**	**16**	**17,783**	**17,730**	**20**	**33**
Alien Smuggling	4,229	143	131	2	10	4,086	4,055	8	23
Improper Entry by Alien	383	8	8	-	-	375	373	1	1
Improper Reentry by Alien	13,084	269	258	5	6	12,815	12,797	10	8
Fraud and Misuse of Visa/Permits	467	11	11	-	-	456	455	1	-
Other Immigration Offenses	57	6	6	-	-	51	50	-	1
General Offenses, Total	**1,899**	**362**	**352**	**3**	**7**	**1,537**	**1,472**	**7**	**58**
Bribery	88	8	6	-	2	80	76	-	4
Money Laundering	754	140	136	2	2	614	583	2	29
RICO (Racketeer Influenced and Corrupt Organizations Act)	300	1	1	-	-	299	287	-	12
Racketeering	61	4	4	-	-	57	57	-	-
Extortion and Threats	147	17	15	1	1	130	119	1	10
Gambling and Lottery	17	1	1	-	-	16	16	-	-
Failure to Pay Child Support	1	1	1	-	-	-	-	-	-
Other General Offenses	531	190	188	-	2	341	334	4	3
Regulatory Offenses, Total	**1,344**	**171**	**145**	**7**	**19**	**1,173**	**1,123**	**8**	**42**
Civil Rights	180	24	17	2	5	156	127	1	28
Copyright	2	-	-	-	-	2	2	-	-
Food and Drug	43	2	2	-	-	41	40	-	1
Hazardous Waste Treatment, Disposal, and Storage	29	3	-	3	-	26	26	-	-
Telegraph, Telephone, and Radiograph	8	-	-	-	-	8	8	-	-
National Defense	51	12	12	-	-	39	36	-	3
Antitrust	27	15	8	-	7	12	10	-	2
Labor	25	-	-	-	-	25	25	-	-
Game and Conservation	72	11	11	-	-	61	61	-	-
National Parks/Recreation	29	2	2	-	-	27	26	-	1
Customs	307	14	13	-	1	293	289	2	2
Postal Service	76	14	13	-	1	62	62	-	-
Reporting of Monetary Transactions	127	14	12	-	2	113	112	1	-
Migratory Bird	13	-	-	-	-	13	12	1	-
Maritime and Shipping	61	-	-	-	-	61	58	1	2
Aircraft Regulations	63	15	12	1	2	48	47	-	1
Other Regulatory Offenses	231	45	43	1	1	186	182	2	2
Traffic Offenses, Total	**1,989**	**691**	**688**	**3**	**-**	**1,298**	**1,287**	**10**	**1**

Drunk Driving	721	162	160	2	-	559	552	6	1
Other Traffic Offenses	1,268	529	528	1	-	739	735	4	-

NOTE: This table includes defendants in all cases filed as felonies or Class A misdemeanors, but includes only those defendants in cases filed as petty offenses that were assigned to district judges rather than magistrate judges.

Request for Information Set 2.9, Narrative Questions
Service Office of Special Trial Counsel (OSTC) Responses

Background: Article 25 provides that a convening authority is required to detail members to a court-martial that are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament. These criteria are not further defined and they have not changed since 1950, when military judges did not preside over courts-martial and panel members determined an appropriate sentence. Except in death penalty cases, in December 2023, panel members will no longer serve as the sentencing authority, and beginning in December 2024, randomized selection processes will be used, to the maximum extent possible, in the selection of panel members.

The qualifications to serve as potential juror in the federal and state systems include: (a) U.S. citizenship, (b) be at least18 years old, (c) be a resident for 12 months, (d) have English proficiency, (e) have no disqualifying mental or physical condition, (f) have never been convicted of a felony (unless civil rights have been legally restored), and (g) must not be pending felony charges punishable by imprisonment for more than one year.

Questions. Responses to the following questions are requested from each of the Services' criminal law/military justice organization chiefs, trial defense organization chiefs, Office of Special Trial Counsel leads, and victims' counsel program managers.

1. Please evaluate each of the Article 25 criteria below.

a. Age (best qualified by reason of age):

1) Federal criminal juries require jurors to be 18 or older. Should there be a different minimum age for military panel members? If so, what is the military justification for the difference? Do you have a suggested minimum age or a suggested age range?

Army OSTC: No, there should not be exclusion based on a minimum age for potential military panel members. Pursuant to Article 25, UCMJ, convening authorities may consider age as one criterion among other equally weighted criteria (i.e., education, training, experience, length of service, and judicial temperament) to select the best qualified service members to serve as potential court-martial panel members.

Navy OSTC: We concur with the response of the Navy's Criminal Law Division.

Marine Corps OSTC: OSTC recommends no changes to the age criteria. The legislative history, caselaw, and justifications regarding the various Article 25, UCMJ, selection criteria are well-developed.

Air Force OSTC: There should not be a different minimum age requirement for military panel members.

Coast Guard Office of the Chief Prosecutor: The Office of the Chief Prosecutor defers to the Office of Military Justice on all responses.

2) Under the current rules, panel members must be senior in rank and grade to the accused. Do you believe there is a military reason to support this requirement? If so, what is the military justification?

Army OSTC: The military reason to support this requirement is found in the preamble to the Manual for Courts-Martial: "The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States." In order to maintain good order and discipline and to achieve an effective, lethal, and obedient force, superior ranked uniform personnel exercise command authority over junior personnel. Additionally, a junior Soldier may feel inhibited or reluctant to vote to convict a more senior Servicemember, such as an NCO or officer. Likewise, some junior Soldiers may be more inclined to convict someone of superior rank. Having panel members who are senior in rank or grade removes those possible biases.

Navy OSTC: We concur with the response of the Navy's Criminal Law Division.

Marine Corps OSTC: OSTC recommends no changes to the criteria requiring panel members to be senior in rank to the accused. The legislative history, caselaw, and justifications regarding the various Article 25, UCMJ, selection criteria are well-developed.

Air Force OSTC: The UCMJ should retain the requirement that panel members be senior in rank and grade to the Accused. This is due to the hierarchical structure of the military. It is antithetical to the military rank structure to call upon junior service members to judge the actions of a service member who outranks them. Moreover, even if junior members are not within the chain of command or supervision of an accused, there is a significant danger rank disparity will create a coercive environment. For example, if an E-7 is facing an allegation of sexual assault, there is a significant risk an E-4 might feel pressure to come to a particular outcome he/she believes other NCOs in the relevant military community desire.

b. Length of Service (best qualified by reason of length of service):

Federal criminal jurors must reside primarily in the judicial district for one year before they are qualified to serve as a juror. States generally have a residency requirement and they range from simply being a resident to being a resident for more than 12 months. Should there be a minimum length of service requirement to be qualified to serve as a panel member? If so, what should that minimum length of service be? What is the military justification for a minimum length of service?

Army OSTC: No, a minimum length of service requirement should not exclude members from being eligible to serve as court-martial panel members. Pursuant to Article 25, UCMJ, convening authorities may consider length of service as one criterion among other equally weighted criteria to select the most qualified service members to be part of the pool of individuals who may potentially be selected to serve as a court-martial panel member.

Navy OSTC: We concur with the comment of the Navy's Criminal Law Division that we should maximize the potential pool and do not need to add a minimum length of service requirement. The experience and seniority requirements discussed above already operate as de facto filter for a potential member's time in service.

Marine Corps OSTC: OSTC recommends no changes to the length of service criteria. The legislative history, caselaw, and justifications regarding the various Article 25, UCMJ, selection criteria are well-developed.

Air Force OSTC: There does not need to be a minimum length of service requirement. By the time a member is eligible to serve on a panel they will have gone through the basic training/Reserve Officer Training Corps (ROTC)/Officer Training School (OTS) and technical training which has given them sufficient time to acclimate to the military. Additionally, there is no compelling reason that they need more time in the military in order to follow the Military Judge's instructions and the law as given to them. Requiring members to be senior to the accused in rank and grade will ensure panel members have the requisite experience to sit as a panel member in a particular case.

c. Education (best qualified by reason of education):

Federal and state criminal jurors must be proficient in English. There are no other education requirements to be qualified to serve as a juror. Should there be an education requirement to be qualified to serve as a panel member? If so, what should the education requirement be and what is the military justification supporting the requirement?

Army OSTC: No, a minimum education requirement should not exclude members from being eligible to serve as court-martial panel members. Pursuant to Article 25, UCMJ, convening authorities may consider education as one criterion among other equally weighted criteria to select the most qualified service members to be part of the pool of individuals who may potentially be selected to serve as a court-martial panel member. However, education should remain one of several selection factors due to the value that education brings to a body charged with making informed, critical decisions.

Navy OSTC: We concur with the response of the Navy's Criminal Law Division.

Marine Corps OSTC: OSTC recommends no changes to the education criteria. The legislative history, caselaw, and justifications regarding the various Article 25, UCMJ, selection criteria are well-developed.

Air Force OSTC: There should not be an additional education requirement to be qualified to serve as a court-martial panel member. At a minimum, service members are required to have at least a high school diploma (or have passed the General Education Development (GED) test) in order to serve in the DAF. Further, under Article 25(e)(2), UCMJ, when convening a court-martial, the convening authority is required to detail members who are best qualified by reason of education, among other factors. There is no justification for providing an additional education requirement beyond this statutory mandate.

d. Experience: (best qualified by reason of experience)

Federal and state criminal jury systems do not have an experience requirement. Should there be an experience requirement to be qualified to serve as a panel member? If so, what experience should be required? What is the military justification for this requirement?

Army OSTC: No, a minimum experience requirement should not exclude members from being eligible to serve as court-martial panel members. Pursuant to Article 25, UCMJ, convening authorities may consider experience as one criterion among other equally weighted criteria to select the most qualified service members to be part of the pool of individuals who may potentially be selected to serve as a court-martial panel member. Like education, experience should remain a factor in selecting panel members. Experience gives panels members additional perspectives that inexperienced members may not have. Additionally, military-related UCMJ offenses such as fraternization sometimes include an element (explicit or implicit) regarding the "custom of the service." All Article 134 offenses have as an element either "to the prejudice of good order and discipline" or "of a nature to bring discredit to the armed forces." These types of elements are often best judged by someone who actually has lived experience within the armed forces, is familiar with customs of the service, and has seen both strong and degraded good order and discipline.

Navy OSTC: We concur with the response of the Navy's Criminal Law Division.

Marine Corps OSTC: OSTC recommends no changes to the experience criteria. The legislative history, caselaw, and justifications regarding the various Article 25, UCMJ, selection criteria are well-developed.

Air Force OSTC: There should not be an additional experience requirement to be qualified to serve as a court-martial panel member. Under Article 25(e)(2), UCMJ, when convening a court-martial, the convening authority is required to detail members who are best qualified by reason of experience, among other factors. Further, Article 25(e)(1) requires court-martial panel members be senior in rank and grade to the accused, thereby ensuring those who make decisions in a case are at least as experienced (in a broad military sense) as the accused. There is no justification for providing an additional experience requirement beyond these statutory mandates.

e. Training: (best qualified by reason of training)

Federal and state jury systems do not have a training requirement. Should there be a specific training requirement to be qualified to serve as a panel member? If so, what should the training requirement be? What is the military justification for this training requirement?

Army OSTC: No, a minimum or specific training requirement should not exclude members from being eligible to serve as court-martial panel members. Pursuant to Article 25, UCMJ, convening authorities may consider training as one criterion among other equally weighted criteria to select the most qualified service members to be part of the pool of individuals who may potentially be selected to serve as a court-martial panel member.

Navy OSTC: We concur with the response of the Navy's Criminal Law Division.

Marine Corps OSTC: OSTC recommends no changes to the training criteria. The legislative history, caselaw, and justifications regarding the various Article 25, UCMJ, selection criteria are well-developed.

Air Force OSTC: There should not be an additional training requirement to be qualified to serve as a court-martial panel member. Under Article 25(e)(2), UCMJ, when convening a court-martial, the convening authority is required to detail members who are best qualified by reason of training, among other factors. There is no justification for providing an additional training requirement beyond this statutory mandate.

f. Judicial Temperament: (best qualified by reason of judicial temperament)

Federal and state jury systems do not have a judicial temperament requirement. Should there be a judicial temperament requirement to be qualified to serve as a panel member? If so, please define what you mean by judicial temperament. What is the military justification for this requirement?

Army OSTC: Yes, judicial temperament is an appropriate factor to consider in determining who is best qualified to sit as a potential panel member and promote the purpose of military law. While, Article 25, UCMJ does not offer a definition of judicial temperament, the American Bar Association (ABA) provides that it includes "compassion, decisiveness, open-mindedness, courtesy, patience, freedom from bias and commitment to equal justice under the law." These are exactly the qualities the military seeks to see on panels.

Navy OSTC: We concur with the comments of the Navy's Criminal Law Division that we should continue to see members with the qualities outlined in their comments to promote fairness and confidence in our system.

Marine Corps OSTC: OSTC recommends no changes to the judicial temperament criteria. The legislative history, caselaw, and justifications regarding the various Article 25, UCMJ, selection criteria are well-developed.

Air Force OSTC: There is an existing judicial temperament requirement to be qualified to serve as a court-martial panel member. Under Article 25(e)(2), UCMJ, when convening a court-martial, the convening authority is required to detail members who are best qualified by reason of judicial temperament, among other factors. This requirement is necessary to ensure the best qualified individuals are selected to serve as panel members; specifically, those with the appropriate disposition to serve as the finder of fact.

2. Are there other criteria that should be required to serve as a panel member?

a. Some examples from federal and state jury systems are: No qualifying mental or physical condition, never been convicted of a felony, and must not be pending felony charges punishable by more than a year in prison. Should any of these be requirements to serve as a panel member?

Army OSTC: Felony convictions or pending disciplinary actions would be appropriate bases to render a member ineligible to serve on a court-martial panel. Physical and/or mental conditions, depending on their nature and their impact on a service member's ability to be fair and impartial, may also be appropriate disqualifying criteria.

Navy OSTC: We concur with the response of the Navy's Criminal Law Division.

Marine Corps OSTC: OSTC recommends no other criteria that should be required to serve as a panel member. The issues raised above regarding mental or physical conditions, convictions, pending felony charges, and members under investigation, or pending disciplinary or administrative action should be addressed by the Convening Authority when applying the Article 25 criteria and by the military judge when applying the well-developed legal standards for actual and implied bias challenges during the member selection and voir dire process.

Air Force OSTC: Members should not be eligible to serve as a panel member if they have a prior court-martial conviction, if they are currently under investigation, if they are undergoing administrative discharge processing, currently undergoing nonjudicial punishment, or if they have an active UIF. A conviction, active investigation, active UIF, or active administrative discharge processing present a danger for significant bias against the system prosecuting the Accused.

b. Should there be criteria addressing the qualification of Service members under investigation for a violation of the UCMJ, or other criminal code, or who have received or are pending disciplinary or administrative action for committing an offense under the UCMJ?

Army OSTC: No. Current processes allow for the removal potential members who are being investigated or are facing disciplinary actions.

Navy OSTC: We concur with the comments of the Navy's Criminal Law Division that the voir dire process is the best way to identify and assess these issues.

Marine Corps OSTC: OSTC recommends no other criteria that should be required to serve as a panel member. The issues raised above regarding mental or physical conditions, convictions, pending felony charges, and members under investigation, or pending disciplinary or administrative action should be addressed by the Convening Authority when applying the Article 25 criteria and by the military judge when applying the well-developed legal standards for actual and implied bias challenges during the member selection and voir dire process.

Air Force OSTC: Members should not be eligible to serve as a panel member if they have a prior court-martial conviction, if they are currently under investigation, if they are undergoing administrative discharge processing, currently undergoing nonjudicial punishment, or if they have an active UIF. A conviction, active investigation, active UIF, or active administrative discharge processing present a danger for significant bias against the system prosecuting the Accused.

c. Please identify any other criteria that you believe should be required for a Service member to be qualified to serve as a panel member?

Army OSTC: The current Article 25, UCMJ provides commanders with sufficient criteria to consider when determining a service member's ability to serve on a panel.

Navy OSTC: We concur with the response of the Navy's Criminal Law Division.

Marine Corps OSTC: OSTC recommends no other criteria that should be required to serve as a panel member. The issues raised above regarding mental or physical conditions, convictions, pending felony charges, and members under investigation, or pending disciplinary or administrative action should be addressed by the Convening Authority when applying the Article 25 criteria and by the military judge when applying the well-developed legal standards for actual and implied bias challenges during the member selection and voir dire process.

Air Force OSTC: The current member selection criteria, coupled with the requirements of RCM 912, sufficiently address the requirements for qualification for service as a panel member.

3. Should there be a requirement for panels to be diverse by race and/or gender?

Please explain your answer and whether there is a military justification for making this a requirement.

Army OSTC: Constitutionally, the Sixth Amendment guarantee of the right to a trial by an impartial jury requires that a petit jury be selected from a pool of people that represents a fair cross-section of the community; the requirement refers to the venire from which the jury is chosen rather the jury itself. Article 25, UCMJ, does not exclude consideration of race and gender and permits convening authorities to use a race conscious process to select a venire/pool of people which represent a fair cross-section of the community for the purpose of inclusion (United States v. Crawford, 15 C.M.A. 31, 35 C.M.R. 3, 15 USCMA 31 (1964)). However, given that the case of United States v. Jeter, (USCA Dkt. No. 22-0065/NA) is currently pending before the Court of Appeals for the Armed Forces (CAAF) and directly implicates Crawford and its progeny of cases, the OSTC will await CAAF's decision in Jeter before making recommendations with respect to panel criteria and processes. Respectfully, the OSTC recommends that the DACIPAD does the same.

Navy OSTC: We concur with the response of the Navy's Criminal Law Division.

Marine Corps OSTC: OSTC recommends no changes that would require a particular diversity criteria. Instead, the Convening Authority should properly apply the Article 25 criteria when selecting members, and the military judge should properly apply the well-developed caselaw regarding "panel stacking," and Batson and its military progeny.

Air Force OSTC: No additional requirement is needed. The law already prohibits the exclusion of panel members on the basis of race or gender. Convening authorities, in applying Article 25 criteria, are allowed to factor in the race and gender diversity of the panel in making their

selections. If we move to random panel selection, building a diverse panel pool will ensure no one is being excluded, either intentionally or unintentionally.

4. Should there be an option for an all enlisted panel? Why or why not?

Army OSTC: Article 25 does not prohibit the selection of an all-enlisted panel.

Navy OSTC: We concur with the comment of the Navy's Criminal Law Division that allowing for an all enlisted panel limits the potential pool, precluding some of our most experienced personnel from participating in the process.

Marine Corps OSTC: Because of the unique nature of military service, OSTC recommends no changes that would create an option for an all-enlisted panel.

Air Force OSTC: No. The current system works fine and there is no rational basis for granting an accused the right to exclude officer members from potential service on a court-martial panel. Removing officers from an enlisted member's court-martial is not reflective of how the military trains, evaluates, and operates, and would be detrimental to good order and discipline.

5. Should the military move to a randomized panel member selection process, similar to how federal and state jurisdictions select potential jury members?

Federal and state jurisdictions typically use computer systems to randomly select members from state voter registration rolls to serve on juries. After the venire is chosen in this way, the voir dire process further narrows the number of members sitting on a jury.

Should the military use Alpha rosters, or other similar means, to randomly select the initial pool of panel members? Why or why not?

Army OSTC: No. Article 25, UCMJ criteria result in members who are best qualified to be in panel-member pools. Random selection of individuals via alpha rosters would lead to inefficiency in that members who are deploying, changing stations, imminently retiring/separating, or pending disciplinary actions would be potentially selected for venires and would have to go through voir dire at court-martial vice earlier in the convening authority's initial convening process. Additionally, random selection ignores the very important criteria that Article 25 lays out. As discussed previously, factors such as superior grade, education, experience, and judicial temperament are desirable traits that improve the overall quality of a decision-making panel.

Navy OSTC: We concur with comments of the Navy's Criminal Law Division that we should implement the most recent changes and assess their effectiveness before attempting any additional changes.

Marine Corps OSTC: OSTC recommends no changes that would alter the current system by applying a new random selection method. Utilizing such a system would inevitably result in less

diverse venire, would be less efficient, and likely significantly impact the convening authority's operational mission.

Air Force OSTC: The DAF supports the efforts of the JSC as it works to increase randomization of the panel member selection process. The JSC efforts are taken in accordance with Section 543 of the Fiscal Year 2023 National Defense Authorization Act and the Secretary of Defense's mandate for compliance with Recommendation 1.7d of the Independent Review Commission on Sexual Assault in the Military's Report. Anticipated amendments to the applicable RCMs will include new requirements for a randomized panel member selection process. As to the initial selection of members, some DAF installation legal offices have already instituted processes using Alpha rosters. The DAF is reviewing these existing options to determine the most effective means for implementing the forthcoming randomized panel member selection process.

6. Please share with us any other suggestions you have to improve the panel selection process or considerations that we should be cognizant of in making recommendations to change the selection criteria or randomize the selection process.

Army OSTC: OSTC joins the Army Office of the Judge Advocate General in requesting the expertise and connections of the committee with regard to obtaining subject matter expertise on the following topics: the demographics of federal juries; opinions from federal or state prosecutors on juror selection and use of peremptory challenges based on non-race attributes such as age or education specifically in sexual assault prosecutions; opinions from Service Special Victim Litigation Experts on experience and comparison between civilian and military juries; jury instructions on unconscious bias that have survived judicial scrutiny; and, experiences from any jurisdiction that has studied juror demographics and identified specific practices that have increased diversity of gender, race, and socioeconomic status.

Navy OSTC: We concur with the response of the Navy's Criminal Law Division.

Marine Corps OSTC: OSTC does not believe Article 25, UCMJ, requires modification to ensure the detailing or selection of unbiased, qualified panel members. At its core, the issue is not Article 25, UCMJ, but adherence to its requirements by Convening Authorities. Article 25, UCMJ, requires that Convening Authorities detail members who are not just minimally qualified by reason of age, education, training, experience, length of service, and judicial temperament, but who are best qualified for such duty in accordance with Article 25's criteria.

DAC-IPAD should remain cognizant of the purposes of our military justice system as stated in the Preamble to the Manual for Courts-Martial … "to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby strengthen the national security of the United States." Article 25, UCMJ, the processes and procedures established to implement and ensure adherence to its mandate provides the flexibility needed to accomplish these purposes – provided the Convening Authority details the best qualified.

Air Force OSTC: The DAF anticipates forthcoming changes to the panel selection process through the pending Executive Order. These changes should be implemented and evaluated prior to proposing additional changes.

7. We heard from several Service members who spoke to the Policy Subcommittee that their Service's administrative discharge policies allowed the respondent to request minority inclusion among the discharge board members. Please provide any applicable Service regulations or policies regarding administrative discharge boards that provide this option.

Army OSTC:

AR 635-200, Active Duty Enlisted Administrative Separations, para. 2–6(3)-(5). Composition of the board, provides:
(3) If the respondent requests a voting member(s) of his or her same race, color, religion, gender, or national origin (or combination thereof), a voting member of the board will be made available.

(4) In the event an individual of the requested race, color, religion, gender, or national origin group (or combination thereof) is determined to be unavailable, the convening authority will annotate the measures taken to have the person(s) made available. The annotation will be entered in the board proceedings.

(5) In the event of nonavailability, the reason will be stated in the record of proceedings. However, the mere appointment, failure to appoint, or failure to record a reasoning to appoint a member of such a group to the board does not provide a basis for challenging the proceedings.

AR 600-8-24, Officer Transfers and Discharges, para. 4-7d provides:
d. When the respondent is a minority, female, or special branch (see 10 USC 7064), the board will (upon the officer's written request) include a minority, female, or special branch as voting member (if reasonably available, as this provision is not an entitlement). If an officer is in more than one category and requests officers from all or two categories, the board membership may be met by one or more officers (if reasonably available, as this provision is not an entitlement). The request for these members, if desired, will be submitted 7 days from the date that the respondent receives the notification or else the right to request is waived.

Navy OSTC: No response.

Marine Corps OSTC: As the OSTC will only have the authority to refer charges to special or general courts-martial, we defer to our Military Justice Branch (JMJ) at Judge Advocate Division to provide these regulations or policies.

Air Force OSTC: No substantive comments.

Request for Information Set 2.9, Narrative Questions
Service Trial Defense Organization Responses

Background: Article 25 provides that a convening authority is required to detail members to a court-martial that are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament. These criteria are not further defined and they have not changed since 1950, when military judges did not preside over courts-martial and panel members determined an appropriate sentence. Except in death penalty cases, in December 2023, panel members will no longer serve as the sentencing authority, and beginning in December 2024, randomized selection processes will be used, to the maximum extent possible, in the selection of panel members.

The qualifications to serve as potential juror in the federal and state systems include: (a) U.S. citizenship, (b) be at least18 years old, (c) be a resident for 12 months, (d) have English proficiency, (e) have no disqualifying mental or physical condition, (f) have never been convicted of a felony (unless civil rights have been legally restored), and (g) must not be pending felony charges punishable by imprisonment for more than one year.

Questions. Responses to the following questions are requested from each of the Services' criminal law/military justice organization chiefs, trial defense organization chiefs, Office of Special Trial Counsel leads, and victims' counsel program managers.

1. Please evaluate each of the Article 25 criteria below.

a. Age (best qualified by reason of age):

1) Federal criminal juries require jurors to be 18 or older. Should there be a different minimum age for military panel members? If so, what is the military justification for the difference? Do you have a suggested minimum age or a suggested age range?

Army Trial Defense Service: There should be a minimum age of 18 years for military panel members, which is the same as for Federal criminal juries. A younger age is not appropriate, because deliberating on findings in a criminal case is very important and requires the same experience and wisdom required for Federal civilian jurors. Also, an older minimum age is not necessary. As will be mentioned below, one year of active duty service is an appropriate length of service requirement. If a Soldier has been in the Army for one year, that means they have successfully accomplished the initial training required for service. They are qualified to handle the responsibility required of a court member. The minimum age of 18 is sufficient for a Soldier to serve in combat, which requires as much or more judgement than serving as a court member. One of the guiding principles of the Military Justice Review Group still deserves consideration. "Where they differ with existing military justice practice, consider the extent to which the principles of law and the rules of procedure and evidence used in the trial of criminal cases in the United States district courts should be incorporated into military justice practice." Report of the Military Justice Review Group; Part I: UCMJ Recommendations (December 22, 2015), page 14.

Navy Trial Defense: There should be a minimum age of 18 for military panel members.

Marine Corps Defense Services Organization: No different age requirement is necessary. If you can serve in the military and potentially kill and die for your country, then you should be able to sit on the jury.

Air Force Trial Defense Division: No. Due to age requirements to join the Air Force, it is unlikely that someone younger than 18 would be selected to sit on a panel. However, a requirement that panel members be 18 years of age or older would be appropriate.

Coast Guard Office of Legal Assistance and Defense Services: The Coast Guard has an MOU with the Navy, wherein the Navy provides Trial Defense Services to the Coast Guard and the Coast Guard sends the Navy 7/8 Coast Guard members. We defer to the Navy Defenders and their responses to these questions (which they shared with us).

2) Under the current rules, panel members must be senior in rank and grade to the accused. Do you believe there is a military reason to support this requirement? If so, what is the military justification?

Army Trial Defense Service: There is still a military justification for the seniority requirement. One of the antiquated purposes for this requirement, which was to avoid an incentive for junior court members to improve their promotion chances by opening up positions in a higher grade, is no longer valid in the reality of today's Army. However, there are still valid reasons for this requirement. First, good order and discipline requires a level of respect for rank that will conflict with the duties of a court member. There is a difference between respecting the person and respecting the rank, but being asked to judge the actions of a superior will likely cause a cognitive disconnect with court members. Also, the military justice system should not act to chisel away from the respect for authority that we instill in Soldiers. An additional concern is that military leaders know that doing what is right for the nation may require making decisions that are unpopular with subordinates. The Uniform Code of Military Justice (UCMJ) protects individuals with the status of being a superior, because it recognized this concern. Removing the seniority in rank and grade requirement may create problems or at least raise concerns that interfere with good order and discipline.

Navy Trial Defense: Selecting panels senior to an accused prevents the appearance that a junior member will fear reprisal from the senior member. It also reduces the possibility that the accused has previously taken some action as part of their duties that negatively affected the member or the possibility that the accused may in the future be in a position of authority over a member.

Marine Corps Defense Services Organization: Yes. Military service comes with unique requirements and decisions, and those requirements and decisions flow based almost exclusively on rank (and billet). That sets up senior clients for being judged more harshly by junior jurors. Nevertheless, we should avoid the current bias to significantly more senior members (to which the current criteria inures). Senior by DATE OF RANK (DOR) only as the criteria most closely closes the gap. It more closely aligns with a jury of peers while recognizing that having members who have walked in the accused shoes (by rank) helps members identify with an accused. Additionally, avoiding a bias towards vastly seniors members ensures an accused identify with

members while still protecting from any potential biases against senior accused by a jury of junior members who may hold unconscious biases or are merely subject to the orders of such a senior accused merely by grade. It protects against any fear (conscious or otherwise) of reprisal from an accused against a junior court member, and significantly reduces the chance that the juror either previously worked under the direction of the accused or will be subordinate to the accused in a future assignment.

The system should also attempt to spread the grades across the spectrum senior to the accused, and not based on the rank demographics of the location. For example the National Capital Region is very heavy on officers and senior enlisted; MATSG 21 is almost exclusively company grade officers; while Camp Lejeune is heavily tilted to the non-commissioned officer ranks. The system should endeavor to include all ranks senior to the accused.

Enlisted Marines should retain the ability to request a minimum portion of the panel be enlisted.

Air Force Trial Defense Division: Yes. Good order and discipline in the United States military is dependent upon obedience to lawful orders issued by those superior in rank. In addition to the more obvious concerns that a junior member might feel pressured to render a certain result if called to sit on a panel with a more senior accused, the idea that junior members might routinely be called upon to sit in judgment of a senior member at court-martial would be antithetical to the function of the military in every other mission context. The current iteration of Article 25 recognizes this by allowing junior members to sit in judgment of senior members only when it cannot be avoided, and by prohibiting enlisted members from serving on the court-martial panel of a commissioned officer.

b. Length of Service (best qualified by reason of length of service):

Federal criminal jurors must reside primarily in the judicial district for one year before they are qualified to serve as a juror. States generally have a residency requirement and they range from simply being a resident to being a resident for more than 12 months. Should there be a minimum length of service requirement to be qualified to serve as a panel member? If so, what should that minimum length of service be? What is the military justification for a minimum length of service?

Army Trial Defense Service: The length of active duty service is somewhat similar to the residency issue mentioned below. To incorporate the principles used in United States district courts, an appropriate length of service is at least one year of active duty service. The servicemember's BASD can be used to screen for this qualification. The one year will ensure that initial training has been completed and the Soldier is adequately familiar with the military culture. Some UCMJ offenses require this familiarity, such as offenses charged under Clause 1 of Article 134.

Navy Trial Defense: Appellate courts have declared that service members in the two lowest enlisted grades are presumed to lack the experience and maturity level contemplated by Congress in establishing the criteria in Article 25(d)(2).[1] Beyond that, the military reason for excluding service members with less than two years experience is the reality of military onboard training.

[1] See, U.S. v. Lewis, 46 M.J.338, 342 (1997); US v. Yager, 7 M.J. 171 (C.M.A. 1979).

For the first two years, most service members are deeply embedded in their onboarding training schedules. Interrupting those evolutions would cause considerable challenges to readiness. By making those with less than two years of military service ineligible, the process of random panel selection will be streamlined without impact to readiness.

Marine Corps Defense Services Organization: A twelve-month fleet minimum requirement would parallel most civilian jurisdictions, deconflict most indoctrination and MOS training, and ensure the potential juror has a basic understanding of military culture sufficient to understand and participate in jury deliberations, especially on military specific offenses.

Air Force Trial Defense Division: Yes, there should be a minimum length of service requirement to be qualified to serve as a panel member. That minimum length of service should be 18 months of total active federal military service. That mandatory length of service for potential panel members will eliminate those servicemembers who are still in the midst of initial training required of military members and will ensure that all potential panel members have already experienced the unique culture of military service. These considerations are important given that, even though they will soon not be called upon to render a sentence, military panel members are often called upon to make judgments on uniquely military offenses. For example, offenses charged under Article 134, UCMJ could require a panel to decide as to whether charged conduct is "of a nature to bring discredit upon the armed forces," or "to the prejudice of good order and discipline." A servicemember who has completed initial training and has engaged in the operational mission over 18 months will be better equipped in terms of baseline knowledge of military service necessary to make these determinations.

c. Education (best qualified by reason of education):

Federal and state criminal jurors must be proficient in English. There are no other education requirements to be qualified to serve as a juror. Should there be an education requirement to be qualified to serve as a panel member? If so, what should the education requirement be and what is the military justification supporting the requirement?

Army Trial Defense Service: Proficiency in English should be the only educational requirement. A requirement for proficiency in English is a valid requirement, because there are some servicemembers from other countries who have successfully completed initial training but still struggle with English. Understanding all the evidence is essential to perform the duties of a court member. However, no other educational requirements are necessary, as they will have had sufficient education to enlist or receive an appointment and successfully complete initial training, which is a threshold higher than that for jurors in United States district courts.

Navy Trial Defense: There should be no additional education requirement for military panel members.

Marine Corps Defense Services Organization: No education should be required beyond that necessary to enlist or commission.

Air Force Trial Defense Division: No. Beyond proficiency in English, Article 25 should not contain additional education requirements as a prerequisite to service as a panel member. In order to join the military, an enlistee must have earned a high school diploma or equivalent (e.g., a General Education Development certification), and must be proficient in English. If any language or education-related issues would prevent a panel member from understanding his or her duties on a court-martial, this issue would be identified and resolved during the voir dire process.

d. Experience: (best qualified by reason of experience)

Federal and state criminal jury systems do not have an experience requirement. Should there be an experience requirement to be qualified to serve as a panel member? If so, what experience should be required? What is the military justification for this requirement?

Army Trial Defense Service: With the requirement of one year of active duty experience, no further experience requirement is appropriate. To the extent that knowledge of certain aspects of the military is necessary to make informed decisions for findings, the trial counsel and defense counsel are free to present the evidence to assist the court members in their deliberations.

Navy Trial Defense: There should be no experience requirement for military panel members.

Marine Corps Defense Services Organization: No experience should be required beyond indoctrination training.

Air Force Trial Defense Division: No. If 18 months of military service is adopted as a minimum requirement for service on a court-martial panel, no other experience criteria should be considered. Such consideration itself by a convening authority or other body would likely frustrate Congress's direction to randomize panel member selection. Further, any concern over experience required to understand a unique military crime or other military specific matter could be identified and resolved during voir dire.

e. Training: (best qualified by reason of training)

Federal and state jury systems do not have a training requirement. Should there be a specific training requirement to be qualified to serve as a panel member? If so, what should the training requirement be? What is the military justification for this training requirement?

Army Trial Defense Service: The only training requirement that would be appropriate is initial training, but the one year of active duty experience should already ensure that. Therefore, no training requirement should be included in Article 25.

Navy Trial Defense: There should be no training requirement for military panel members, other than that panel members not be in an initial training pipeline (as discussed above).

Marine Corps Defense Services Organization: There should not be a training requirement. Voir dire is replete with examples of potential members receiving quasi-legal topic training

which is incorrect or biased and can cloud servicemembers' ability to accept the facts at trial in a fair and impartial manner and requires them to set aside "training" to follow the judge's instructions. Accordingly, the services should seek to avoid training which unnecessarily encroaches on legal definitions and issues.

Air Force Trial Defense Division: No, there should not be a training requirement to be qualified to serve as a panel member. The proposed requirement for length of total active federal military service above would resolve any potential issues about sufficient military training to serve on a panel.

f. Judicial Temperament: (best qualified by reason of judicial temperament)

Federal and state jury systems do not have a judicial temperament requirement. Should there be a judicial temperament requirement to be qualified to serve as a panel member? If so, please define what you mean by judicial temperament. What is the military justification for this requirement?

Army Trial Defense Service: Like Federal and state jury systems, there should not be a judicial temperament requirement to be qualified as a court member. Such a requirement is far too subjective to implement in a way that could coexist with true random selection. Also, there is no need for this requirement, as judicial temperament is tested during the process of voir dire and challenges.

Navy Trial Defense: There should be no judicial temperament requirement for military panel member, particularly now that sentencing is no longer a Member function.

Marine Corps Defense Services Organization: Perhaps lack of judicial temperament should be a disqualifier, but otherwise, a requirement of "judicial temperament" is unnecessary and open to very broad interpretation.

Air Force Trial Defense Division: No. Though justice would benefit from the selection of panel members with a positive judicial temperament as defined by the American Bar Association (ABA) (having "compassion, decisiveness, open-mindedness, sensitivity, courtesy, patience, freedom from bias and commitment to equal justice."), the subjective consideration of which prospective members possess such a temperament would frustrate any random selection of panel members.

2. Are there other criteria that should be required to serve as a panel member?

a. Some examples from federal and state jury systems are: No qualifying mental or physical condition, never been convicted of a felony, and must not be pending felony charges punishable by more than a year in prison. Should any of these be requirements to serve as a panel member?

Army Trial Defense Service: The only other requirements warranted are to have never been convicted of a felony, to not be indicted/referred to court-martial for an offense punishable by confinement for more than one year, and be a United States citizen. Just as service as a juror is an important civic duty, so is service as a court member. Loss of that privilege and responsibility upon conviction of a felony is appropriate, even though it will be rare for a servicemember on active duty. The indictment/referral requirement addresses different concerns about bias toward either side and the ability to concentrate on the evidence in the trial. One other criteria to be considered is United States citizenship. As the finding of a court-martial may result in a Federal conviction, it would be appropriate for only citizens of the United States, who are familiar with the American justice system, to be on the panel. No other requirements are appropriate. The military standards The military standards for mental and physical fitness will already satisfy any concerns about mental or physical conditions.

Navy Trial Defense: These should all be requirements in the military system.

Marine Corps Defense Services Organization: All of these are easily handled at voir dire with the starting point that anyone on active duty is mentally and physically qualified. The number of service members on active duty with a felony conviction must be so de minimus as to not warrant developing a tracking system within the randomization process. The question can easily be handled during regular voir dire which would allow for the exploration of the basis of the conviction and any relevance it might have toward capacity to be a fair and impartial panel member.

Air Force Trial Defense Division: Yes. It would be exceptionally rare for any potential panel member serving on active duty to be disqualified from service on the basis of a prior conviction or due to a limiting mental or physical condition. It would be slightly more likely that a servicemember pending court-martial (where charges have been preferred or referred) or criminal trial by civilian authorities might be selected for panel member duties through a random selection process. These criteria should remain under Article 25, as they are articulable and subject to implementation in an objective manner that would not frustrate the goal of randomizing member selection.

b. Should there be criteria addressing the qualification of Service members under investigation for a violation of the UCMJ, or other criminal code, or who have received or are pending disciplinary or administrative action for committing an offense under the UCMJ?

Army Trial Defense Service: There should not be a criteria addressing investigation or pending adverse action for a criminal offense. There has been no such requirement in the UCMJ, and that has not caused any significant problems, because it is addressed during the voir dire and challenges process.

Navy Trial Defense: No, this can all be vetted during voir dire, especially with additional peremptory challenges. Unfortunately, in today's complaint-driven society, our best and brightest are generally the individuals that find themselves to be the subject of unfounded complaints. Most of these complaints will not ultimately be substantiated, but must be

investigated and that process often takes time. To judge a potential member based on an unsubstantiated complaint would eliminate some of our most capable and dedicated members.

Marine Corps Defense Services Organization: It would be nearly impossible to create such a system since the servicemember may not know they are under investigation, nor their command or the administrator of the randomized processor. Robust voir dire should ferret out disqualifying biases.

Air Force Trial Defense Division: No. Discipline can take a wide variety of forms under the UCMJ. Minor offenses can result in administrative action. Allegations of misconduct can result in inquiries or investigations that can last for a significant period of time, even if the underlying evidence is facially weak. This requirement would potentially result in the disqualification of a broad swath of otherwise qualified servicemembers who have committed or been investigated for minor disciplinary issues. Given the logistical difficulties in screening based on these criteria, these issues are better left to counsel and the courts through the voir dire and challenge process.

c. Please identify any other criteria that you believe should be required for a Service member to be qualified to serve as a panel member?

Army Trial Defense Service: No other criteria should be required for a servicemember to be qualified to serve as a panel member.

Navy Trial Defense: None.

Marine Corps Defense Services Organization: None.

Air Force Trial Defense Division: There are no criteria that should be required for a service member to be qualified to serve as a panel member, other than those identified above. Additional factors should be addressed by counsel through voir dire and challenges.

3. Should there be a requirement for panels to be diverse by race and/or gender?

Please explain your answer and whether there is a military justification for making this a requirement.

Army Trial Defense Service: No, court members should not be selected based on race. A truly random selection, as long as there are not improper requirements beyond what was listed above, will statistically result in diversity that is demographically proportionate to the population within the jurisdiction. By requiring a specific number of members of a certain race or gender on a panel that has a set number of eight or four, you will logically be excluding someone else, and that other prospective member could be a member of a different minority. If the selection process is truly random, that will instill trust and faith in the system. Because there may be some level of distrust, the option for the accused to elect inclusion of at least one member of the accused's minority group(s) would be a protection that is easy to implement and promotes trust and faith in the system.

Navy Trial Defense: Military demographics make the ideal of racial and gender diversity nearly impossible. Panels should be diversified by grade.

Marine Corps Defense Services Organization: Recommend that, like enlisted representation, minority accused (race or gender) be permitted to request a panel that includes representation. Also, studies have shown implicit biases exist, and a proactive step should be taken to prevent/minimize said biases. The racial/gender make-up of the military does not match that of the U.S. population. Experts argue that varied life experiences within groups leads to more equitable decision making. An accused should not be disadvantaged because a Service disproportionately fails to recruit certain minority members. While randomization of panel selection should do a better job than we often see in the jury box, an ability to affirmatively request it will ensure some level of representation.

However, such a requirement will put a strain on individual members within underrepresented minority groups. At certain ranks and locations, the same minority servicemember will be tapped over and over and over again; no single person can or should be expected to represent the entirety of their race or gender. That, in and of itself, is prejudicial to our system of justice.

Air Force Trial Defense Division: There is no uniquely military requirement, as compared to civilian juries, for court-martial panels to be diverse based on race and gender of members. The demographics of the military in some contexts (e.g., courts-martial with an officer accused) would make this difficult if required due to a lack of racial diversity at or above certain ranks. Anecdotally, the lack of diversity among panel members is a significant concern for accused members facing trial by court-martial. A system that specifically allows for an accused facing trial by court-martial, following random selection of panel members, to request a panel with additional racial or gender diversity would address those concerns to some extent. The RCMs could be changed to provide a procedure by which this could be accomplished by the convening authority when practicable. Concerns about interference with the random selection of members would be reduced since the accused would be the impetus to revisit the make-up of the panel.

4. Should there be an option for an all enlisted panel? Why or why not?

Army Trial Defense Service: The current options to elect an all officer panel or a panel with at least one-third enlisted members should be maintained. United States Army Trial Defense Service does not oppose an additional option of an all enlisted panel. For the same reason why a panel with all officers may be preferrable in some cases, a panel with all enlisted members may be preferrable in other cases. Because of the ever-present dangers of the mortal enemy of the military justice system – unlawful command influence, providing an enlisted accused with this additional option will only increase the possibility for true justice and promote trust and faith in the system.

Navy Trial Defense: There should be an option for an all enlisted panel. When officers are tried by court-martial, all members are also officers, which helps bring the members panel in line with the civilian right to a jury of one's peers. An all enlisted panel would provide the same benefit to enlisted members.

Marine Corps Defense Services Organization: Yes, there should be an "all enlisted" panel option for enlisted accused. An "all enlisted" panel option would produce fair results by raising the level of shared experiences between the panel and accused, and more closely mirroring the "peer" jury of civilians, while still being (by our recommendation) senior to the accused. Our enlisted Marines enforce good order and discipline as part of their ethos. The SNCO creed includes: "I am the mainstay of discipline… I shall be just in the enforcement of discipline…"

Air Force Trial Defense Division: No. Although increasing the quorum for enlisted members above the current minimum requirement for an enlisted accused who selects to be tried by a mixed panel would likely ameliorate some concerns about lack of racial diversity, there should not be an option to exclude the perspective of officers from a panel due to the unique nature of the military mission. While all ranks in the military are expected to lead, officers by training and duty bring more of an operational and strategic perspective to a panel. This is not to imply that officers apply a different burden than enlisted members, but in cases involving panels called upon to make more subjective decisions (e.g., whether an accused was derelict in his duties, failed to obey orders, or acted in a manner to the prejudice of good order and discipline), this different perspective as part of the finder of fact's deliberations is important to preserve. Raising the quorum for enlisted members presents a compromise solution that will help to increase diversity of panels and the opportunity for an enlisted accused to be judged by his or her enlisted peers as opposed to a panel dominated by officers. Given the role of officers within the military, no enlisted member should sit on an officer accused's court-martial panel, even by that accused's request. To allow for enlisted members to sit in judgment of officers would undermine the legal and actual authority upon which our military hierarchy is built.

5. Should the military move to a randomized panel member selection process, similar to how federal and state jurisdictions select potential jury members?

Federal and state jurisdictions typically use computer systems to randomly select members from state voter registration rolls to serve on juries. After the venire is chosen in this way, the voir dire process further narrows the number of members sitting on a jury.

Should the military use Alpha rosters, or other similar means, to randomly select the initial pool of panel members? Why or why not?

Army Trial Defense Service: Yes, the military should absolutely move to a randomized panel member selection process. The command's involvement in the selection of court members has long been a major and unnecessary criticism of the military justice system. Also, the military justice system is always hesitant to progress from an old process to a new process. Instead of looking at how selection is done now and tinkering to make it somewhat more random, the military should look at fully randomized selection and then only tinker with it as required for military necessity. This is feasible by using the Alpha rosters for the jurisdiction involved. Just as with the civilian systems, the voir dire and challenges process will narrow the pool of members qualified to serve in a particular trial.

Navy Trial Defense: Yes. What follow is a brief History of Article 25 criteria in support of our answer.

Court member selection criterion were born after experiences with overly harsh sentences imposed during WW I by inexperienced and insecure Commanders afraid of appearing weak. After WWI, a special clemency board created by the Army recommended reduction of sentences in over 77% of the cases that came before it, remitting over 18,000 years of confinement.[2]

From the period post WWI, calls for reform were met with piece meal changes, until the adoption of the UCMJ in 1950. For the first time, the so-called "law member," formerly a deliberating member of the panel, was replaced by a non-member, non-deliberating "law officer," and later in 1968, that officer became what we know today as the military judge. The MJ's authority extended to all questions of law and the progress of the trial, except for determinations on the Accused's mental responsibility.[3] The UCMJ also added "education" and "length of service" as criteria for selecting court members.

Throughout these changes, one responsibility remained exclusively the province of Members where the Accused elected trial before a panel; sentencing. The nightmare of the sentences during the WWI period were the primary impetus for the inclusion of the "best qualified" criterion for selection in Article 25(d)(2).[4] As the landscape of military justice has changed and continues to change, the Article 25 criteria have become obsolete and should be eliminated.

Analysis
Preliminarily, the criteria are inherently subjective. They assume that a convening authority ("CA") will have some personal knowledge of prospective members, knowledge which they most certainly do not have, particularly in larger commands. If a CA does have personal knowledge of potential members, how do we guard against the improper use of that knowledge (UCI) in the selection of the venire?

What exactly does "best qualified" really mean, and how do we codify a uniform standard? Best qualified to render a verdict consistent with the facts and the law? Best qualified by way of specific knowledge and experience which will prove useful in a case with specific facts? Best qualified by being particularly service minded, and unlikely to tolerate any hint of misconduct, thereby making them likely to convict? It is impossible to codify and uniformly apply the meaning of "best qualified" even with the breakdown of specific criteria.

"Judicial temperament" is a perfect example of why Article 25 is now obsolete. How does a CA know about a potential member's judicial temperament if the CA doesn't personally know the potential member? How does the CA define "judicial temperament" and how is that concept standardized across commands? If members no longer sentence after a guilty finding, of what moment is judicial temperament for a potential member? This criteria was added to safeguard against rogue and inconsistent sentencing, which is now no longer a Member function. It is obsolete.

Considering training or experience; what type of training and experience would make a potential member more or less qualified to serve, and wouldn't that necessarily change depending on the

[2] Jonathan Lurie, Arming Military Justice: The Origins of the United States Court of Military Appeals, 1775-1950, 111 (1992)
[3] Gilbert D. Stevenson, The Inherent Authority of the Military Judge, 17 A.F.L. Rev. 1, 5 (1975)(footnotes omitted).
[4] See Lurie, supra at note 1, at 77-78, 103, 111, 128.

charges and anticipated evidence? By curating potential Members by assessing training and experience, a CA must necessarily know the Member, and know the facts of the case. He will then make a subjective assessment of whether that potential Member's training and experience will help or hurt the ability of the Member to render a fair verdict, or some would argue, render the verdict the CA who sent the charges for trial wants to see. The CA is selecting the deciders by in part assessing their sophistication, savvy, and smarts. It's not surprising the process is perceived as unfair.

Conclusion
Under the current system, the subjective Article 25 criteria are subjectively applied depending on the CA, the charges, and the Accused, thereby perpetuating the long standing perception of unfairness. To eliminate the perception of unfairness, the CA who sends charges for trial must be removed from having a role in the selection of the deciders of the outcome of the trial on those charges. Because Article 25 criteria are impossible to standardize or apply uniformly across all commands for all cases, and were put in place to safeguard Member sentencing which will shortly no longer exist, they are no longer necessary and should be eliminated in favor of random selection of court Members.

Issues of training, education, and experience are best left to counsel during the voir dire process, and can be successfully curated using a combination of challenges for cause, and peremptory strikes which should be increased for both sides to a suggested number of six for all cases which carry a minimum punishment of more than one year confinement.

The better solution is a randomized panel selection scheme. With very few exceptions, all members of the community from which the case comes would be eligible for selection. Service members in medical billets (doctors, dentists, vets, nurses, etc.) would be eligible to serve, and not excluded by rule. However, lawyers, chaplains, and members of the IG would remain ineligible. Only those with more than two years of military service would be eligible. When possible, all Members on a partial court will be senior in grade to the accused. While it would be impossible based on military demographics to ensure a community cross-section factoring for race and gender, the selection scheme should contemplate a cross section of the military community by grade.

Once the randomized selection process is complete, selected Members will convene with the Court. In a preliminary voir dire process which includes all counsel and is on the record and can form the basis for appellate review, the Court may excuse any detailed Member for a stated disqualifying reason, illness, emergency, unavailability, or deployment. The remaining Members will then be sat for traditional voir dire and challenges from both sides until a panel is sworn.

The idea of randomizing the military selection process is not mine, nor is it new. Much of my thought and analysis in this document was informed by and can be attributed to lessons in the following scholarly articles:

Military Juries: Constitutional Analysis and the Need for Reform (indiana.edu)
2000-Spring-Young-Revising Member Selection.pdf
Military Jury System Needs Safeguards Found in Civilian Federal Courts | U.S. GAO

Once the pool of eligible service members is established, they should be categorized by grade, then randomly selected evenly across the grades to form the venire. This results in a cross section

of randomly selected preliminarily eligible members who will proceed to preliminary voir dire with the court where personal applications to be excused from service will be heard and decided upon.

Marine Corps Defense Services Organization: Yes, however, the selection should come from a randomized roster of all individuals within a particular geographic location (not within any particular unit or command). No one should be excluded from the requirement to submit eligibility questionnaires, regardless of billet or grade. This will protect the convening authority as much as it protects the accused. This will, however, put pressure on the command to ensure the alpha roster is up-to-date and accurate. Additionally, such a system would limit inadvertent disclosure from the command to potential members of information about the facts of a case, which might have permeated throughout the unit. It reduces the potential for (inadvertent or otherwise) unlawful command influence, jury shopping, and fear of reprisal for decision making by jurors. It also invests everyone in the process, which both enhances routine good order and discipline but also encourages resolving legal issues at the lowest level (as it should be in accordance with R.C.M. 306(b)).

Air Force Trial Defense Division: Yes, as we move to implement Congress's NDAA FY23 directive to randomly select panel members, the military should use Alpha rosters or other similar means to achieve that goal subject to whatever objective requirements that remain in place under Art 25. Alpha rosters could serve as the initial list of potential members and could be modified to exclude potential members who will not be available due to extended temporary duty (TDY), deployments, or leave.

6. Please share with us any other suggestions you have to improve the panel selection process or considerations that we should be cognizant of in making recommendations to change the selection criteria or randomize the selection process.

Army Trial Defense Service: In the Army, it is standard practice to have a "standing panel" that serves as needed for approximately six months. This is similar to civilian jurors being selected for a pool of jurors for a period of a month. It is best to leave this choice to the local authorities selecting court members. Because the selection of court members does have many moving parts and does distract from the warfighting mission, the practice does promote efficiency and decreases the chaos with which servicemembers are so familiar. Also, a suggestion that will improve the system in many ways is to change the procedure for getting to the required quorum of eight for a non-capital general court-martial and four for a special court-martial. Instead of using the procedures for random assignment of numbers and impaneling, under Rule for Court-Martial (R.C.M.) 912(f(5) and R.C.M. 912A, the UCMJ should be amended to allow the use of peremptory challenges to get to the required number of members. Each party can still be entitled to the use of one peremptory challenge in the same way that is now authorized, and then additional peremptory challenges alternating between the parties (beginning with the defense) can be used until there are eight or four members. For example, if, after challenges for cause in a general court-martial, there are 13 members remaining, just like the current system, the trial counsel can use a peremptory challenge to get to 12, and the defense counsel can use a peremptory challenge to get to 11. There are now three too many members, so the defense counsel can use the first extra peremptory challenge, the trial counsel the second, and the defense

counsel the third, which will bring the panel to eight members. Because the government is involved in the selection process, allowing the defense to go first with the extra peremptory challenges promotes trust and faith in the system. There are three advantages to this system. First, the use of the peremptory challenges by both sides will likely remove the members whose judicial temperament makes them outliers on the spectrum, resulting in a more reasonable panel. Second, this system is easily deployable. Courts-martial are tried in locations where Internet service may be nonexistent, and there is no need for a randomized number generator. Third, it is both more efficient and error-free. Under the current system, a recess is called and the military judge or designee runs a computer program to assign random numbers. This is more time-consuming and error-prone than simply allowing alternating additional peremptory challenges.

Navy Trial Defense: No response.

Marine Corps Defense Services Organization: As our military criminal justice system seeks to mirror the civilian criminal justice system, we should not lose sight of the things that are unique to our system. What will always be true of the military system is that rank and power play an enormous role in everything we do, inside and outside of the courtroom. We wear our rank on our collars every day. We address every person by their rank before saying their name. Rank and power are inherent within the military, and we must be cognizant of how that engrained structure can impact courts-martial regardless of any changes to Article 25.

Under the current rules, when an accused challenges members for cause, the military judge is required to liberally grant such challenges.[5] "Challenges based on implied bias and the liberal grant mandate address historic concerns about the real and perceived potential for command influence on members' deliberations."[6] "If after weighing the arguments for the implied bias challenge [by the Defense] the military judge finds it a close question, the challenge should be granted."[7] The liberal grant mandate "also serves as a preventative measure because 'it is at the preliminary stage of the proceedings that questions involving member selection are relatively easy to rapidly address and remedy.'"[8] When a case is close, "military judges are enjoined to liberally grant challenges for cause."[9] It should be noted that the liberal grant mandate only applies to Defense challenges for cause. Because this is a measure that was created in reaction to the inherent imbalance of power in favor of the Government during members selection (i.e. the convening authority selects each member in the venire), only the Defense receives the benefit of the liberal grant mandate.

The Marine Corps Defense Services Organization recommends that any changes to Article 25 criteria also work to codify the liberal grant mandate. While efforts can be made to reduce the inherent imbalance of power in the military criminal justice system through reform, the fact remains that the entire military apparatus is based on rank and power. Not just within a unit, but in the promotion, command slating, and school selection processes. Superior ranking officials have vast power, over anyone junior regardless of chain of command. We instill "instant obedience to orders" that itself reflects the power of our rank structure. Thus, an accused is always at a disadvantage when standing in opposition to the United States. This power

[5] *United States v. James*, 61 M.J. 132, 139 (C.A.A.F. 2005).
[6] *United States v. Clay*, 64 M.J. 274, 276–77 (C.A.A.F. 2007).
[7] *Peters*, 74 M.J. at 34.
[8] *Id*. (quoting *Clay*, 64 M.J. at 277).
[9] *Clay*, 64 M.J. at 277.

imbalance, of course, permeates members selection. The best way to ensure fair panels in the face of an inherent bias in favor of the Government is a robust voir dire process and great latitude to strike members that may not be fair and/or impartial. As such, the liberal grant mandate should be continued and codified.

Additionally, the current preemptory challenge is limited to one per side. Given the randomization model and the presumption that far more members will be selected to participate in voir dire than are actually seated and sworn, we recommend no less than six preemptory challenges be available to both the prosecution and defense.

Air Force Trial Defense Division: As changes are made to the selection criteria or randomization process, consideration should be given to increasing the number of peremptory challenges beyond the single peremptory challenge typically available to each party to the court-martial. A brief review of military caselaw reveals a significant number of appellate decisions addressing whether military trial judges abused their discretion by denying a defense challenge for cause of a member on the basis of implied or actual bias. An increase in peremptory challenges would increase the ability of an accused to address perceived errors at the trial level. More peremptory challenges would also bring the court-martial process more in line with the federal criminal justice system and would reduce concerns over the administration of the remaining Article 25 criteria within the context of random selection of panel members.

7. We heard from several Service members who spoke to the Policy Subcommittee that their Service's administrative discharge policies allowed the respondent to request minority inclusion among the discharge board members. Please provide any applicable Service regulations or policies regarding administrative discharge boards that provide this option.

Army Trial Defense Service:

The Army's policy is contained in its enlisted separations regulation, AR 635-200, Active Duty Enlisted Administrative Separations, para. 2-6.b (28 June 2021). Specifically,

(3) If the respondent requests a voting member(s) of his or her same race, color, religion, gender, or national origin (or combination thereof), a voting member of the board will be made available.

(4) In the event an individual of the requested race, color, religion, gender, or national origin (or combination thereof) is determined to be unavailable, the convening authority will annotate the measures taken to have the person(s) made available. The annotation will be entered in the board proceedings.

(5) In the event of nonavailability, the reason will be stated in the record of proceedings. However, the mere appointment, failure to appoint, or failure to record a reasoning to appoint a member of such a group to the board does not provide a basis for challenging the proceedings.

Navy Trial Defense: No response.

Marine Corps Defense Services Organization: No response.

Air Force Trial Defense Division: DAF regulations currently do not explicitly permit a respondent to request minority inclusion among discharge board members, though some convening authorities have accommodated these requests prior to administrative discharge boards. Similar to what is described above in the context of a court-martial, DAF policy should be modified to specifically allow for such a request and create procedures whereby a convening authority is encouraged to accommodate that request when practicable. Administrative proceedings often involve the litigation of complex and serious issues, to include sexual assault or other allegations. Boards may recommend service characterizations that can have a long-lasting impact on respondents. Improving the perception among military members that these panels are appropriately assembled and fair in their adjudication of issues is an important consideration when reviewing the administrative side of military justice.

Request for Information Set 2.9, Narrative Questions
Service Special Victims' Counsel/Victims' Counsel/Victims' Legal Counsel Responses

Background: Article 25 provides that a convening authority is required to detail members to a court-martial that are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament. These criteria are not further defined and they have not changed since 1950, when military judges did not preside over courts-martial and panel members determined an appropriate sentence. Except in death penalty cases, in December 2023, panel members will no longer serve as the sentencing authority, and beginning in December 2024, randomized selection processes will be used, to the maximum extent possible, in the selection of panel members.

The qualifications to serve as potential juror in the federal and state systems include:
(a) U.S. citizenship, (b) be at least18 years old, (c) be a resident for 12 months, (d) have English proficiency, (e) have no disqualifying mental or physical condition, (f) have never been convicted of a felony (unless civil rights have been legally restored), and (g) must not be pending felony charges punishable by imprisonment for more than one year.

Questions. Responses to the following questions are requested from each of the Services' criminal law/military justice organization chiefs, trial defense organization chiefs, Office of Special Trial Counsel leads, and victims' counsel program managers.

1. Please evaluate each of the Article 25 criteria below.

a. Age (best qualified by reason of age):

1) Federal criminal juries require jurors to be 18 or older. Should there be a different minimum age for military panel members? If so, what is the military justification for the difference? Do you have a suggested minimum age or a suggested age range?

Army Special Victims' Counsel (SVC): The SVC office concurs with OTJAG on all responses and will not submit a separate response.

Navy Victims' Legal Counsel (VLC): USN VLC elected not to answer with regard to the specific criteria of Article 25(e)(2) and related questions, but does offer the following to the general question of how member selection can be improved. *[Navy VLC provided a response to Q 6]*

Marine Corps VLC: There should be no minimum age for military panel members. While it is possible for a potential panel member to be under the age of 18 in the case of early enlistments, that possibility is exceedingly remote. The current Article 25 requirement that members be equal to or senior in rank to the accused will almost certainly prevent servicemembers under 18 from serving as panel members. In the very small number of cases where a servicemember under 18 is equal to or senior in rank to the accused, the rank qualification is most likely due to that member's above-average performance. Disqualifying that individual based solely on age would both discount that performance and signal a distrust of servicemembers who are otherwise called upon to make extraordinary decisions under the trying circumstances of combat.

Air Force Victims' Counsel (VC): There should not be a different minimum age for military panel members.

Coast Guard SVC The Special Victims' Counsel Office defers to the Office of Military Justice on all responses.

2) Under the current rules, panel members must be senior in rank and grade to the accused. Do you believe there is a military reason to support this requirement? If so, what is the military justification?

Marine Corps VLC: Rank and grade seniority requirements serve two valid military purposes. First, military effectiveness is dependent on a structured rank system in which higher ranking members can compel obedience from lower ranking members, even when the servicemembers do not know one another. This military rank structure is essential to good order, discipline, and success in combat. This system requires constant maintenance and reinforcement and is the justification behind the many rank-based customs and courtesies practiced throughout the military. Requiring lower ranking servicemembers to judge higher ranking servicemembers for misconduct undermines this system of obedience and deference. A system in which subordinate servicemembers debate, challenge, or question the decisions of superior enlisted personnel and officers may be suitable for non-combat organizations, but would even in garrison degrade the rigidity of a disciplinary structure in war it is not conducive to mission accomplishment. Given that a court-martial may involve allegations requiring careful questioning of the official conduct of the accused, permitting junior servicemembers to sit in judgment of those decisions during trial invites similar habits in other settings.

The second valid military purpose served by rank and grade seniority requirements is related to but distinct from the first. Servicemembers junior to the accused are not fully qualified to evaluate the performance of higher ranking servicemembers when the charges at issue relate to the performance of a military duty, as is the case with charges such as conduct unbecoming or dereliction of duty. A more mature and nuanced understanding of the exercise of military judgment and experience is essential to a fair trial in such cases.

Air Force VC: The requirement that court-martial panel members be senior in rank and grade serves to further the good order and discipline of the service; this requirement ensures those who make decisions in a case are at least as experienced (in a broad military sense) as the accused.

b. Length of Service (best qualified by reason of length of service):

Federal criminal jurors must reside primarily in the judicial district for one year before they are qualified to serve as a juror. States generally have a residency requirement and they range from simply being a resident to being a resident for more than 12 months. Should there be a minimum length of service requirement to be qualified to serve as a panel member? If so, what should that minimum length of service be? What is the military justification for a minimum length of service?

Marine Corps VLC: There should be no minimum length-of-service requirement for service on a court-martial panel for much the same reason as there should be no minimum age requirement. Servicemembers are presumed to be competent in many complex and demanding tasks very early in their service. This requirement would add administrative burden without significant benefit.

Air Force VC: There should not be a minimum length of service required to serve as a panel member.

c. Education (best qualified by reason of education):

Federal and state criminal jurors must be proficient in English. There are no other education requirements to be qualified to serve as a juror. Should there be an education requirement to be qualified to serve as a panel member? If so, what should the education requirement be and what is the military justification supporting the requirement?

Marine Corps VLC: There should be no independent education requirement for service on a court-martial panel beyond the existing Article 25 provision allowing a convening authority to consider education as a factor in determining who is best and most fully qualified to serve on a panel. There is an implicit minimum education requirement by virtue of the fact that all servicemembers have a high school diploma or equivalent certificate. Adding additional educational requirements would unnecessarily narrow the pool of members, adding burden without substantial benefit.

Air Force VC: There should not be an educational requirement to be qualified as a panel member.

d. Experience: (best qualified by reason of experience)

Federal and state criminal jury systems do not have an experience requirement. Should there be an experience requirement to be qualified to serve as a panel member? If so, what experience should be required? What is the military justification for this requirement?

Marine Corps VLC: There should be no independent experience requirement for service on a court-martial panel beyond the existing Article 25 provision allowing a convening authority to consider experience as a factor in determining who is best and most fully qualified to serve on a panel. As with education, military experience is implicit in the existing statute, given the rank and grade requirements in relation to the accused. All of these—rank, grade, and experience—are relevant in the context of many charges, especially military-specific offenses related to the performance of a specific duty, dereliction, and other charges. The current Article 25 criteria adequately address these concerns.

Air Force VC: From a Victims' Counsel perspective, experience should not be a requirement to be qualified to serve as a panel member.

e. Training: (best qualified by reason of training)

Federal and state jury systems do not have a training requirement. Should there be a specific training requirement to be qualified to serve as a panel member? If so, what should the training requirement be? What is the military justification for this training requirement?

Marine Corps VLC: There should be no independent training requirement for service on a court-martial panel beyond the existing Article 25 provision allowing a convening authority to consider training as a factor in determining who is best and most fully qualified to serve on a panel. In some cases involving highly technical skills or unique knowledge, both training and experience of the panel members might be relevant, for example where a pilot is charged with an offense related to the operation of an aircraft. In that case, the training and experience of pilots who have completed pilot training might make them better qualified to serve as members under the current Article 25 criteria. In addition, there should be no specific training requirement related to service on a court-martial panel. The responsibility of instructing members on the law and how to apply it rightfully rests with the military judge.

Air Force VC: There should not be a specific training requirement to be qualified to serve as a panel member.

f. Judicial Temperament: (best qualified by reason of judicial temperament)

Federal and state jury systems do not have a judicial temperament requirement. Should there be a judicial temperament requirement to be qualified to serve as a panel member? If so, please define what you mean by judicial temperament. What is the military justification for this requirement?

Marine Corps VLC: There should be no judicial temperament requirement for service on a court-martial panel beyond the existing Article 25 provision allowing a convening authority to consider temperament as a factor in determining who is best and most fully qualified to serve on a panel. Judicial temperament means two things: the intellectual focus, discernment, and experience effectively and fairly to weigh facts, assess credibility of witnesses, and apply the law as instructed; and the exercise of neutral, independent, and mature judgment required to assess and measure unpleasant facts, and to impose unpleasant outcomes where the law and facts of an individual case require. Judicial temperament should be viewed as a positive requirement that is properly addressed by the existing language in Article 25.

Air Force VC: "Judicial temperament" should include the qualities of open-mindedness, non-judgmental, decisive, and respectful.

2. Are there other criteria that should be required to serve as a panel member?

a. Some examples from federal and state jury systems are: No qualifying mental or physical condition, never been convicted of a felony, and must not be pending felony charges punishable by more than a year in prison. Should any of these be requirements to serve as a panel member?

Marine Corps VLC: Concerns related to mental and physical conditions and disciplinary status should be addressed through the voir dire process on a case-by-case basis, viewed in the context of the facts and circumstances of an individual case. In addition, establishing per se exclusions for personnel who may have already disclosed past misconduct and have gone on to honorable service is inconsistent with the rehabilitative objectives of military and civilian justice systems.

Air Force VC: No other specific criteria should be required to serve as a panel member.

b. Should there be criteria addressing the qualification of Service members under investigation for a violation of the UCMJ, or other criminal code, or who have received or are pending disciplinary or administrative action for committing an offense under the UCMJ?

Marine Corps VLC: Only those already enabled by the existing language in Article 25 and during routine voir dire conducted prior to every case involving members. These matters are far better suited to detailed, nuanced examination by the judge in a particular case than to rigid and binary exclusions by statute.

Air Force VC: Additional, specific criteria addressing the qualifications of Service members under investigation or who have received at least administrative action for committing a UCMJ offense is not necessary.

c. Please identify any other criteria that you believe should be required for a Service member to be qualified to serve as a panel member?

Marine Corps VLC: No other criteria should be required.

Air Force VC: There is no other criteria that should be required for a Service member to be qualified to serve as a panel member.

3. Should there be a requirement for panels to be diverse by race and/or gender?

Please explain your answer and whether there is a military justification for making this a requirement.

Marine Corps SVC: There should not be specific race or gender requirements for panel members, but military judges should have broad authority carefully to examine and reject any attempt to exclude a potential panel member from service due to race, gender, or any other protected category. Imposing a requirement based on race, gender, or other protected category presumes an unquantifiable bias in potentially harmful ways. The DAC-IPAD should also consider the possibility of specific sanctions for the willful attempt to exclude a potential member from service on a court-martial panel based on a protected category.

Air Force VC: From a Victims' Counsel perspective, ideally a panel should be diverse by race and/or gender, but there should not be a requirement for panels to reflect as such.

4. Should there be an option for an all enlisted panel? Why or why not?

Marine Corps SVC: Enlisted servicemembers should have a statutory right to demand an all-enlisted panel of members equal or senior in rank and grade to the accused. Enlisted members are eminently capable of making fair determinations and reaching just results. Creating the right to all-enlisted panels for enlisted accused would increase the perception the court martial system is fair among enlisted Marines in the court martial system.

Air Force VC: From a Victims' Counsel perspective, we would not be opposed to an all enlisted panel for an enlisted accused.

5. Should the military move to a randomized panel member selection process, similar to how federal and state jurisdictions select potential jury members?

Federal and state jurisdictions typically use computer systems to randomly select members from state voter registration rolls to serve on juries. After the venire is chosen in this way, the voir dire process further narrows the number of members sitting on a jury.

Should the military use Alpha rosters, or other similar means, to randomly select the initial pool of panel members? Why or why not?

Marine Corps SVC: Randomization should not be used to select members of the court. However, randomization may be effectively used to scope the list of potential members for more detailed review in light of the Article 25 criteria. While state and federal civilian courts use randomization, those courts also carefully examine potential jurors for bias and other disqualifiers through a robust voir dire process. The military justice system can and should employ random selection of potential members prior to the application of Article 25 criteria and voir dire.

Air Force VC: From a Victims' Counsel perspective, we are not opposed to using Alpha rosters or other similar means to randomly select the initial pool of panel members.

6. Please share with us any other suggestions you have to improve the panel selection process or considerations that we should be cognizant of in making recommendations to change the selection criteria or randomize the selection process.

Navy VLC: Navy VLCP notes during voir dire, the current common practice is to automatically disqualify panel members who are sex crime victims, or have close family members or friends who are sex crime victims. Panel members who have served in a victim support role, such as a unit Sexual Assault Prevention and Response Victim Advocate, are also summarily disqualified from serving as members.

A member's prior connection to a crime similar to the charged crime should not be a per se disqualifier to serve as a panel member. This automatic disqualifying practice denies an entire class of individuals the opportunity to serve as members. The result of this systematic disqualification of sex crime victims, persons who are close to sex crime victims, and persons

with experience in victim support roles is a remainder panel with no connection to a victim experience.

VLCP recommends the following to counter this unfair practice:

1. Require trial counsel, defense counsel, and military judges to attend regular training on implied bias in the voir dire process.
2. Revise the Court-Martial Member Questionnaire. After the standard question, Have you or a close family member ever been a victim of any sex related crime, such as sexual assault, rape, sexual assault of a child, etc.? Please only indicate yes or no. include check-boxes for members to select whether they would prefer to answer follow-up questions in open court or in a closed court setting.
3. Close the courtroom for individual voir dire when a member responds in the affirmative to the above question and has indicated in the questionnaire a preference to respond to follow-up questions in a closed setting. Court closure would be limited to the individual voir dire follow-up questions.
4. Seal the portion of the Record of Trial containing the individual voir dire follow-up questions in the closed session.

The above recommendations align with civilian courts' practice of protecting juror privacy. Civilian trial judges inform prospective jurors of the option to discuss their privacy concerns in camera and some jurisdictions permit sealing of a juror's voir dire transcript and/or questionnaire.

Sex crime victims have legitimate privacy concerns that are not currently protected in open court during voir dire. VLCP's recommendations seek to protect victims' rights by ensuring privacy through closing the court and sealing the individual voir dire portion related to their victim experience. These recommendations do not take away from the accused's rights, but rather carve out a process for victims to rightfully serve as members.

Notes:
1. Maj. Chase C. Cleveland, Voir Dire in a Time of "Me Too", ARMY LAWYER, Issue 4 at 78 (2019).
2. National Crime Victim Law Institute, Protecting the Rights of Survivors When They Are Called to Participate in Jury Service, Victim Law Position Paper, (2014).
3. See United States v. Smith, 25 M.J. 785, 787 (A.C.M.R. 1988) (holding a recent crime victim is not automatically disqualified). But see United States v. Terry, 64 M.J. 295 (C.A.A.F. 2007) (ruling the trial judge erred in not granting the challenge for cause when panel member's experience with rape was pronounced and distinct)..

Marine Corps SVC: The establishment of the Office of Special Trial Counsel (OSTC) and the many other related changes to the military justice system will not remedy the historical concern that commanders send not who is qualified, but who is available. Front-end randomization could help correct this historical trend by requiring a convening authority to apply the Article 25 criteria to select only from among those members whose names were drawn at random. Another potential course of action could include the randomization of initial selection across supporting and operational commands at an installation, with the installation commander responsible for maintaining a pool of members selected after applying Article 25 criteria. Randomizing initial eligibility across commands would parallel the concept of service as a member of a court-martial

with the civic duty to serve as a juror. Linking the concept of duty to justice to courts-martial independent of a specific unit would promote justice, enhance the military justice knowledge of service members, and enhance awareness of both accountability measures and the fundamental fairness of judicial systems.

Air Force VC: Placing women or victim advocates on panels deciding sexual assault cases should not raise the specter that the panel is not fair or impartial toward the accused.

7. We heard from several Service members who spoke to the Policy Subcommittee that their Service's administrative discharge policies allowed the respondent to request minority inclusion among the discharge board members. Please provide any applicable Service regulations or policies regarding administrative discharge boards that provide this option.

Marine Corps SVC: The Marine Corps Separations Manual does not afford a respondent the right to request minority representation among board members.

Air Force VC: DAF does not have regulations or policies providing this option.

Service Women's Action Network (SWAN) Responses to DAC-IPAD Questions

1. Please evaluate Article 25 Criteria Below

a. **Age:** Recommend leave as 18.
b. **Length of Service:** Recommend this be one year. Military Justification: Panelists should be through initial enlisted or officer entry training to ensure they understand the basics of the military justice system before serving as a panelist.
c. **Education:** Proficiency in English should be required. Beyond that the educational requirements for entry into service should be sufficient.
d. **Experience:** No additional experience should be required.
e. **Training:** Panelists should have satisfactorily passed their initial enlisted or basic officer training course.
f. **Judicial temperament:** No requirement for this should be necessary. Military Justification: When Article 25 was first instituted, non-lawyer panel members often performed judicial duties at courts-martial that now must be performed by JAG lawyers and judges.
g. **Senior in Rank or Grade to the Accused:** SWAN believes this should continue as a requirement. Military Justification: Panelists should not be named to serve on panels for their accused military seniors—especially those in their current chain of command. It leaves junior panelists open both to pressure from the accused during the court-martial or to retribution at a later date. Unlike jury members in civilian courts, military panelists and those accused often know each other, and may work together now or in the future.

2. Are there other criteria that should be required to serve as a panel member?

Panel members should meet requirements similar to those in civilian courts: Not convicted of a felony, not under investigation for a felony. Should not be the accuser or a potential witness.

3. Should there be a requirement for panels to be diverse by race, ethnicity, and/or gender?

SWAN believes the pools from which panelists are drawn should be diverse including by race, ethnicity and gender. Under current law, the Convening Authority is either the accused's commander or a more senior officer in the area who serves as Convening Authority for special and/or general courts-martial. Depending on the location of the Convening Authority, the size of the panelist pool may be large enough to ensure diversity or it may be small and not particularly diverse at all. If the revision of Art 25 allows, we recommend an effort be made to increase the size and, thereby, the likely diversity of panelist pools.

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4. Should an accused pending court-martial have the option to request minority inclusion in court-martial members?

This would be ideal, but the term "minority" needs to be clarified—exactly who would be able to exercise this option? Must the minority member on the panel be from the exact same community as the accused or a survivor of MST? If an accused is a member of several minority communities, must all be represented on the panel? Will this provision apply to accused members from the LGBTQ community—which could require panel pool members to disclose information they would prefer to keep private. What will happen when a straight, cis-gender, white male asks that member of the majority be named to the panel?

5. **Should there be an option for an all-enlisted panel?**

Yes, the rules governing the duties of court-martial panels have changed greatly since 1950 when the original version of Art 25 became law. In those days most court-martials were held without military judges presiding. That is an extraordinarily rare occurrence these days.

6. Should the military panel member selection move to a randomize process that is similar to how federal and state jurisdictions select potential jury members?

No. Military Justification: There is too little geographic stability for military members to make that system convenient. Individuals and deployable units move about constantly; people enter and leave the service daily.

a. **Should the military use Alpha list rosters or other similar means to randomly select the initial pool members?** Not sure that all units have Alpha list rosters and even if they do, they could change daily or weekly.
b. **Should the random selection method include an algorithm that results in member venire that is diverse in some way, such as by age, grade, race, or sex? Please explain your response.** Yes, to all the categories mentioned. Achieving this sort of diversity should not be difficult in most geographic areas. Recommend the algorithm also allow for diversity in the service branches of the pool members where possible.

7. Please share with us any suggestions you have for improving the panel selection process or considerations that the Committee should be cognizant of in making recommendations to change the selection criteria or randomize the selection process.

SWAN recommends that before setting up a method for random selection, the DAC-IPAD consider ways to expand panel pools by selecting the pool members based on geographic area rather than individual units. This will enlarge the pools and so provide a better chance of achieving diversity of all varieties.

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May 30, 2023

VIA E-MAIL

Brigadier General James R. Schwenk, USMC,
(Ret)
Chair, Policy Subcommittee
DAC-IPAD

Gen. Schwenk,

I am writing on behalf of Survivors United in response to your May 4, 2023, letter requesting the Organization's perspective on potential changes to Article 25 of the Uniform Code of Military Justice (UCMJ), pertaining to member selection.

Survivors United is a victim created, victim led non-profit 501(c)(3) organization seeking to ensure that military-connected victims' perspectives are received and considered at all levels of the military criminal justice system. Survivors United's members and stakeholders come from varying experiences and backgrounds but share a common hope and goal: continued improvement in the military justice system's investigation and prosecution of sexual assault and harassment. The Organization includes current and former military personnel as well as civilian victims united in the belief that only through validation of the victim perspective will meaningful change occur in the ongoing effort to prevent and punish sexual assault and harassment within the military.

Survivors United fully supports racial, ethnic, and gender diversity on military court martial panels and believes proactive and deliberate actions should be taken to ensure panels are comprised of a cross section of the broader community. In addition, Survivors United requests that the Committee review and assess the application and ongoing need for the "liberal grant mandate" which is frequently employed in ways that undermine gender diversity. Finally, Survivors United supports the current process by which panel members must be of higher rank than the accused.

Diversity on Panels

The lack of gender diversity on panels is a common feature of court martials. It is particularly common in the Marine Corps but exists across all branches. Lack of gender diversity on panels erodes victims' confidence in the process and materially undermines the justice system's goal of creating trust and a belief in the fairness of the system. The result is an erosion in victims' desire to come forward and hold their assailants accountable and a widely shared belief that minority accused, in particular, do not receive fair trials.

Female representation on panels is not just an issue of gender diversity and equality. Without women on a panel to provide input during deliberation, panels lose valuable feedback and life experiences that bring clarity and essential perspectives. This is especially true in sexual assault cases where the victim is female. A clear understanding of female anatomy and how certain acts of sexual violence may feel to a victim is critical to understanding and evaluating female victim testimony. For example, a victim might report that the assault "burned like fire." Where there are no females on a jury panel, this evidence is received in a vacuum without the life experience to put this evidence in context.

For the same reasons, racial and ethnic diversity are essential to the fair administration of the court martial process. Survivors United is committed to a process that is fair for all, including the accused. Recent analysis reporting racially disproportionate charging and court martial proceedings is deeply concerning, and further erodes faith in the process. *See* Protect Our Defenders, Racial Disparities in Military Justice (2017) (finding that black service members were more likely than white service members to face military justice or disciplinary action); *see also* DAC-IPAD, Report on Racial and Ethnic Data Relating to Disparities in the Investigation, Prosecution, and Conviction of Sexual Offenses in the Military (2020) (reporting on data limitations in the court martial process preventing concrete conclusions regarding racial disparities in the military justice system).

All military branches can and must take affirmative steps to ensure greater participation of females and ethnic/racial minorities on court martial panels. This can be achieved in a myriad of ways, including most obviously the recordation and consideration of diversity characteristics as part of the initial panel appointment process. These steps may require pulling members from other branches or taking additional prospective panel members from other commands. The increased trust in the system resulting from these actions more than makes up for the minimal disruption to the system they create.

Liberal Grant Mandate

RCM 912 governs challenges and removal of potential members for cause and details the reasons members shall be excused from serving on the panel, to include whenever it appears that a member "should not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality." A causal challenge implicates both actual and implied bias – i.e., the public's *perception* of fairness in having a particular member as part of the court-martial panel. When ruling on an implied bias challenge in a close-call case, the "liberal grant mandate" directs the military judge to err on the side of granting the challenge.

The concept of the "liberal grant mandate" first appeared in the 1890 Instructions for Courts-Martial and Judge Advocates (the precursor to the Manual for Courts Martial (MCM)), which advised that "Courts should be *liberal* in passing upon challenges." At the time, the process for challenging for cause was very different from the process we have today. For example, there were no enumerated bases for cause, so the challenging party had to allege a specific reason for the challenge, which often required litigating the merits of the challenge in a "mini-trial" that provided evidence of the member's bias. Additionally, the panel members served as both jury and judge in that they were both the ones being challenged and the ones to eventually decide whether to sustain the challenge or not. And, if the challenge was denied, then the member (whose potential bias and impartiality was just called into question by one of the parties) would remain on the panel. Under these circumstances, the liberal grant mandate was seen as necessary to prevent bias and ensure a fair and impartial panel and was, accordingly, included in subsequent MCMs.

However, the reasons for this policy dissipated over time due to the development of specific, enumerated grounds for cause and the creation of a military judge who had the power to determine the relevancy and validity of challenges for cause, rather than the panel. Therefore, when the MCM was revised in 1984, the language requesting panels to liberally grant challenges for cause was removed by the drafters, who stated that the language was "precatory" and "unnecessary." This was the first time since 1890 that this language was not included in the MCM.

Even though the liberal grant mandate language was removed from the MCM, the policy was still followed and reinforced through military court rulings and appellate decisions, effectively turning the advisory policy into judge-made law. Moreover, the mandate was limited to challenges by the *accused*, citing the role of the convening authority in selecting members and the limit of one peremptory challenge per side as the reasons that military judges were required to be liberal in granting *defense* challenges for cause, but not government challenges. *See, e.g., United States v. Leathorn*, No. ARMY 20190037, 2020

WL 7343018, at *8 (A. Ct. Crim. App. Dec. 11, 2020) (quoting *United States v. Clay*, 64 M.J. 274, 276 (C.A.A.F. 2007)) ("[M]ilitary judges are enjoined to be liberal in granting defense challenges for cause."); *United States v. James*, 61 M.J. 132 (C.A.A.F. 2005) (stating that there is "no basis for application of the 'liberal grant' policy when a military judge is ruling on the Government's challenges for cause").

While the liberal grant mandate was initially designed to prevent bias and ensure a fair and impartial panel, in practice, it does just the opposite. It is abused by defense counsel who use the policy to restrict individuals from serving as members who should otherwise be able to serve, to the detriment of sexual assault victims and the fair administration of justice. For example, in our experience, the following types of people are typically challenged by defense counsel for implied bias and, due to the liberal grant mandate, are often excused even though they state that they will follow the judge's instructions, consider only the evidence in the present case, and not bring any personal experiences into the courtroom when deciding guilt or innocence:

- Those who have been sexually assaulted or know someone who has;
- Those who have previously served as a victim's advocate or victim's counsel;
- Those who have been involved with certain sexual assault trainings or programs (for example, Sexual Assault Prevention and Response (SAPR) training).

The exclusion of these types of individuals disproportionately affects women and often results in an all-male panel. Additionally, having a panel member who is empathetic, familiar with trauma and how it can affect the brain and/or a victim's behavior, generally aware of concepts of consent, or who can provide a female perspective to deliberations, for example, does not mean that the member is biased or that the accused would not have a fair and impartial trial. However, excluding all of these types of individuals – and only leaving those who have *no* connection to sexual assault or sexual assault/victim training – ensures that the panel is unrepresentative of the actual military population and unfair for the victim.

Like the drafters in the 1984 MCM, we recommend eliminating the liberal grant mandate policy as unnecessary and unfair. The decision to sustain or deny a challenge for cause is no longer made by the very individuals who are being challenged and, instead, is being made by a judge who is presumed to know the law and be able to apply it fairly. Therefore, there is no longer a reason to apply the liberal grant mandate. Moreover, not only is this policy unnecessary, but it is also being used unfairly by defense counsel to the detriment of sexual assault victims and creating skewed, biased member panels, which is the opposite of what the policy aims to accomplish.

Panel Member Rank

Respect for rank is drilled into the heart and mind of every recruit. For this reason, rank is a critical and necessary component in military jury selection. A junior enlisted deciding the guilt of a senior officer or NCO will result in an unnecessary and unacceptable conflict. The risk of feared retaliation is simply too great. For this reason, Survivors United supports the continued seniority requirements in place.

* * *

Survivors United appreciates the opportunity to work with the Committee on these important issues and remains available to consult as you move forward with your evaluation of Article 25 reform.

Very respectfully,

Ryan Guilds

Combined Responses from Academic Experts to DAC-IPAD Policy Subcommittee
Article 25, UCMJ, Narrative Questions

Background: Article 25 provides that a convening authority is required to detail members to a court-martial that are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament. These criteria are not further defined.

These criteria have not changed since 1950, a time when courts-martial members presided over courts-martial and were required to determine an appropriate sentence. Military judges now preside over courts-martial and provide instructions for the panel members to follow, and starting in December 2023, panel members will no longer serve as the sentencing authority, except in death penalty cases. Additionally, starting in December 2024, an as yet undefined, randomized selection process will be used, to the maximum extent possible, in the selection of panel members.

The core qualifications to serve on a jury in the federal and state systems are fairly minimal. Potential jurors must: (a) be U.S. citizens, (b) be at least 18 years old, (c) be a resident for 12 months, (d) be proficient in English, (e) have no disqualifying mental or physical condition, (f) have no felony convictions (unless civil rights have been legally restored), and (g) must not be pending felony charges punishable by imprisonment for more than one year.

R.C.M. 502(a) governs court-martial panel member duties. The applicable duties are to determine whether guilt has been proven "based on the evidence and in accordance with the instructions of the military judge." Additionally, all "members have an equal voice and vote in deliberating on and deciding all matters submitted to them. No member may use rank or position to influence another member." R.C.M. 502(b) identifies the senior ranking member as the president of the court-martial and instructs the president to preside over closed sessions during deliberations and to speak for the members when announcing decisions or requesting instructions from the military judge.

Questions.

1. Please evaluate each of the Article 25 criteria below.

a. Age (best qualified by reason of age). Federal, and most state, criminal jurors must be 18 years old or older. Should there be a different minimum age for military panel members? If so, what is the military justification for the difference? Do you have a suggested minimum age or a suggested age range?

Professor Eugene Fidell, *Adjunct Professor of Law*, NYU School of Law; *Senior Research Scholar in Law*, Yale Law School; *of counsel*, Feldesman Tucker Leifer Fidell LLP, Washington, DC; May 4, 2023 response:

By analogy to Article 36(a), UCMJ, the default position should be that the age criterion for panel members should be the same as that for federal district court jurors. In theory, one could argue that a deviation could be justified if conformity with the federal standard was impracticable, but I know of no basis for Congress to reach that conclusion.

Professor Lisa Schenk, *Associate Dean for National Security, Cybersecurity, and Foreign Relations Law, and Distinguished Professorial Lecturer in Law*, the George Washington University Law School; and **Professor David A. Schlueter,** *Professor of Law Emeritus*, St. Mary's University School of Law; May 24, 2023 response:

We do not believe that there is any necessity to include a minimum age requirement in Article 25. In a particular case, the convening authority (assuming that the convening authority will continue to be involved in the selection process), could request computer-generated, randomly selected names based on a minimum age, such as in the case of a senior officer or enlisted accused. This seems unnecessary because the requirement in Article 25 regarding the preference that members be senior in rank to the accused generally would resolve this issue.

b. Length of Service (best qualified by reason of length of service). Federal criminal jurors must reside primarily in the judicial district for one year before they are qualified to serve as a juror. States generally have a residency requirement and they range from simply being a resident to being a resident for more than 12 months. Should there be a minimum length of service requirement to be qualified to serve as a panel member? If so, what should that minimum length of service be? What is the military justification for a minimum length of service?

Professor Eugene Fidell: There is no compelling basis for treating length of service as a surrogate for the federal juror residency requirement. Applying a one-year active-duty requirement would exclude a great many junior enlisted personnel as well as many junior officers, thus skewing the jury pool. Since military personnel become full members of the specialized military society immediately on entering active duty, they should be deemed "residents" at the same instant. I suppose an argument could be made for relaxing this principle to the extent of requiring that, to be eligible, court-martial members – both enlisted and officers – have received the punitive-articles explanation mandated by Article 137, UCMJ. On the other hand, the military judge will provide much better and more comprehensive information on any pertinent punitive articles when instructing the members on findings.

Professor Lisa Schenk and Professor David Schlueter: As with the age requirement, *supra*, there is no need to require a minimum length of service. Notably, the 1948 Elston Act included a requirement that court members have a minimum of two years of experience. That language was omitted in the UCMJ.[1]

[1] *See United States v. Crawford*, 35 C.M.R. 3 (C.M.A. 1964) (noting change and providing extensive discussion on selecting enlisted members for court-martial panels).

c. Education (best qualified by reason of education). Federal and state criminal jurors must be proficient in English. There are no other education requirements to be qualified to serve as a juror. Should there be an education requirement to be qualified to serve as a panel member? If so, what should the education requirement be? What is the military justification supporting this requirement?

Professor Eugene Fidell: Follow the civilian federal model. There is no justification for requiring anything beyond proficiency in spoken and written English, which in any event is required for officer and enlisted accessions.

Professor Lisa Schenk and Professor David Schlueter: There should not be a minimal education requirement for panel members. Military panels are sometimes referred to as "blue ribbon panels" because military panel members tend to have more education than the average civilian juror. That reflects the presumption that a panel member with a college degree might be more capable of discerning the facts in a complicated case. But that presumption might not hold up where every day common sense evaluation of the facts and the credibility of the witnesses does not require sophisticated reasoning or understanding. After all, an oft-repeated point in trial advocacy training is that a litigator should be able to take a complicated case and make it simple to understand.

d. Experience: (best qualified by reason of experience). Federal and state criminal jury systems do not have an experience requirement. Should there be an experience requirement to be qualified to serve as a panel member? If so, what experience should be required? What is the military justification for this requirement?

Professor Eugene Fidell: Follow the civilian federal model. Court-martial members are not witnesses, and certainly not expert witnesses. If they need to understand some issue, they will learn what they need to know through the efforts to counsel to build a record through the adversary system and with the benefit of evidentiary rulings and the taking of judicial notice by the military judge. In other words: "no experience needed."

Professor Lisa Schenk and Professor David Schlueter: As with our answer, supra, regarding educational level, there is no need to include a requirement that only members of a certain level of experience may be selected. While a member's level of experience might be helpful in analyzing the facts presented at trial (e.g., combat experience), the key inquiry should be whether the member, upon hearing the evidence and arguments, can fairly and impartially weigh the evidence and determine whether the accused is guilty of the alleged offense.

In United States v. Crawford, 35 C.M.R. 3 (C.M.A. 1964), the Court of Military Appeals noted that when the UCMJ was adopted, the 1948 Elston Act requirement that court members have not less than two years of service was eliminated. The Court also observed:

We may take judicial notice that many enlisted persons below the senior noncommissioned ranks are literate, mature in years, and sufficiently judicious in temperament to be eligible to serve on courts-martial. It is equally apparent, however, that the lower enlisted ranks will not yield potential court members of sufficient age and experience to meet the statutory qualifications for selection, without substantial preliminary screening. 35 C.M.R. at 12.

e. Training: (best qualified by reason of training). Federal and state jury systems do not have a training requirement. Should there be a specific training requirement to be qualified to serve as a panel member? If so, what should the training requirement be? What is the military justification for this training requirement?

Professor Eugene Fidell: See response 1d above. A court-martial panel is not an investigative body. The current training requirement, like a number of the other Article 25 criteria, is an artifact of the era before every case had a military judge and both sides were represented by lawyer counsel. Please refer to Eugene R. Fidell & James A. Young, Military Justice and Modernity, 68 VILLANOVA L. REV. __ (2023) (forthcoming), a copy of which is enclosed.

Professor Lisa Schenk and Professor David Schlueter: There should not be a specific training requirement. The current criteria "best qualified" in training probably stems from the view that only members who have received training similar to that of the accused can effectively reach a verdict in the case. The danger of including a training requirement algorithm is that it may raise actual or apparent unlawful command influence issues and assertions that the convening authority is "stacking" the panel.

f. Judicial Temperament: (best qualified by reason of judicial temperament). Federal and state jury systems do not have a judicial temperament requirement. Should there be a judicial temperament requirement to be qualified to serve as a panel member? If so, please define what you mean by judicial temperament. What is the military justification for this requirement?

Professor Eugene Fidell: See responses 1d and 1e above. This criterion should be jettisoned. In addition to the other reasons, it is too vague and therefore is unenforceable as a practical matter.

Professor Lisa Schenk and Professor David Schlueter: There should not be a judicial temperament requirement. In a system of random selection, it would be difficult to include a requirement focused on judicial temperament. In the current system where the convening authority personally selects the members it is more understandable that a convening authority would be familiar with potential members and could use that factor to consider in selecting the members.

g. Senior in Rank and Grade to the Accused. This requirement is unique to the military. Do you believe there is a military reason to support this requirement? If so, what is the military justification?

Professor Eugene Fidell: At one time it made practical sense to require seniority to the accused, since subordinates might have had an incentive to convict and/or adjudge a dismissal in order to improve their own chances for promotion. It was also thought to be deeply wrong, given the hierarchical nature of the armed forces, for a subordinate to sit in judgment on a superior, except in extraordinary circumstances. Neither of these rationales fully accords with contemporary conditions. The promotion incentive does not apply given the sheer size of the armed forces and modern competitive promotion systems. In addition, "command climate" surveys and DEOMI inquiries commonly entail securing the views of subordinates concerning the leadership and

performance of duty of superiors. Nonetheless, I would not jettison the seniority requirement. The armed forces properly remain strongly hierarchical. Abandoning the seniority requirement would erode that important cornerstone.

Professor Lisa Schenk and Professor David Schlueter: This language in Article 25(e)(1) should be retained. As Colonel Winthrop noted, the preference that members of the court be senior in rank and grade to the accused rests on the belief that "officers who as junior to the accused may have an interest in procuring him to be dismissed, suspended, &c…."[2]

This also reflects the view that one of the purposes of the miliary justice system is to enforce good order and discipline. Given the fact that a subordinate should not be in the position of imposing "discipline" on a superior officer or enlisted servicemember, the preference should remain in place.

2. Are there other criteria that should be required to serve as a panel member?

a. Some examples from federal and state jury systems are: No qualifying mental or physical condition, never been convicted of a felony, and must not be pending felony charges punishable by more than a year in prison. Should any of these be requirements to serve as a panel member?

Professor Eugene Fidell: I see no reason not to apply the general federal juror qualifications that Congress prescribed in 28 U.S.C. § 1865(b), given the broad policy reflected in Article 36(a). The Jury Act's general standards are not impracticable for courts-martial, even though, ironically, active duty military personnel are exempt under § 1863(b)(6). Personnel performing fire protection and police functions (including force protection) could be exempted consonant with federal law. A nice question is whether military judges or CCA judges should be exempt by analogy to the Jury Act's exemption of "public officers." State jury qualifications, on the other hand, are irrelevant.

I have lingered over the fact that thousands of non-citizen permanent residents serve with distinction in the Armed Forces. Such individuals have shown their dedication to the country. Nonetheless, I believe the Jury Act's citizenship requirement should be followed. The same is true of military personnel who are under age 18.

Professor Lisa Schenk and Professor David Schlueter: There is no real need for these factors to be considered in a military court-martial setting. Generally, servicemembers with any criminal or disciplinary record or actions pending are removed from panel selection.

[2] Winthrop, MILITARY LAW AND PRECEDENTS, p. 72 (1920 Reprint) (discussing requirement set forth in Article 79, Articles of War (1874)).

b. Should there be criteria addressing the qualification of Service members under investigation for a violation of the UCMJ, or other criminal code, or who have received or are pending disciplinary or administrative action for committing an offense under the UCMJ?

Professor Eugene Fidell: If there is a pending military, federal or state criminal charge against a potential court-martial panel member and the offense is punishable by more than a year's confinement, that person should be ineligible in light of 28 U.S.C. § 1865(b)(5). Since non-judicial punishment and summary courts-martial are not courts (much less "courts of record") and are by definition reserved for minor offenses, pending or past Article 15, UCMJ, proceedings and summary courts should not be disqualifying. Personnel who are awaiting administration separation for minor misconduct can be winnowed out, if warranted, through voir dire.

Professor Lisa Schenk and Professor David Schlueter: These criteria are probably valid, but could be determined through panel member questionnaires and/or during panel voir dire. In any case, it would be difficult to implement a systematic method to determine whether a potential panel member was being investigated. Many investigations are initiated at the command level rather than law enforcement agencies.

c. Please identify any other criteria that you believe should be required for a Service member to be qualified to serve as a panel member?

Professor Eugene Fidell: I would exempt personnel in training programs that cannot reasonably be interrupted, such as basic or recruit training, The Basic School, officer candidate school, flight training, BUD/S, and the like.

Professor Lisa Schenk and Professor David Schlueter: We do not think of any additional criteria should be required. One of the dangers of including too many criteria is that even a random system of selecting members would be subject to a challenge that the panel was "stacked." And depending on the creativity of those managing the random selection process, that could be a very valid concern.

3. Should there be a requirement for panels to be diverse by race, ethnicity, and/or gender? Please explain your answer and whether there is a military justification for making this a requirement.

Professor Eugene Fidell: One might add age, religious affiliation, extremist views, sexual orientation, and disability.

There are biased individuals in the armed forces just as there are in civil society. Experience teaches, however, that efforts to achieve balance or even a modicum of diversity on panels vests too much unfettered discretion in the official who selects the members, even when that official's motives are entirely pure. American society has struggled with this problem even where jurors are selected by disinterested officials such as jury commissioners. My recommendation is that the military justice system, through the Manual for Courts-Martial and judicial decisions, track

as closely as possible the constitutional jurisprudence set forth in Batson v. Kentucky, 476 U.S. 79 (1986), and its progeny, especially as applied in the trial of criminal cases in the federal district courts.

Professor Lisa Schenk and Professor David Schlueter: No. The alleged purpose of random selection is to take away the discretion of the convening authority, and the opportunity to stack a panel or the appearance of "stacking" a panel. And this is a slippery slope. What other diversity requirements should then be considered—religion, sexual preference, or culture?

If the system were devised to include a gender requirement, for example, and in a sexual assault case the computer selected only female servicemembers for the panel, would that be fair for the accused? On the other hand, could the accused in that case request that no female servicemembers be selected?

However, your committee may want to consider reviewing the need for adding race, ethnicity, and/or gender as an additional Article 25 criteria for the convening authority to consider.

4. Should an accused pending court-martial have the option to request minority inclusion in court-martial members? We heard from several Service members who spoke to the Policy Subcommittee that their Service's administrative discharge policies allowed the respondent to request minority inclusion among the discharge board members. Please explain your response**.**

Professor Eugene Fidell: I recommend against extending these policies to the military justice system. Unlike military administrative boards, courts-martial are presided over by military judges with the protection of fixed terms of office and whose legal rulings are binding. There are multiple other due process guarantees, such as voir dire and causal and peremptory challenges. Here again, I would look to federal district court practice, where criminal defendants have no affirmative right to minority representation on their particular jury, but have more peremptory challenges. Fed. R. Crim. P. 24(b) permits both sides three peremptory challenges if the permissible sentence does not exceed a year's confinement, six for the government and 10 for the defense if it does, and 20 for each side in capital cases. The Policy Subcommittee may wish to recommend that Congress amend Article 41(b)(1), UCMJ, to align with civilian federal practice.

Professor Lisa Schenk and Professor David Schlueter: Perhaps. But if the system permits such requests, where would one draw the line? Would similar requests regarding gender, religion, sexual preference, culture, and language be honored as well? There are cases where it was not error for the convening authority to make a good faith effort to include minority members and women on panels.[3]

This is truly a slippery slope.

We defer to the Services on the question regarding administrative discharge policies.

[3] United States v. Riesbeck, 77 M.J. 154 (C.A.A.F. 2018) (CA may seek in good faith to make panel more representative of accuseds race or gender and may depart from factors in UCMJ; but under facts CA had attempted to stack the court); United States v. Smith, 27 M.J. 242 (C.M.A. 1988) (not error for CA to make good faith effort to include females in sexual assault case but under facts it appeared that they were selected because they would favor prosecution). See generally 1 Schlueter & Schenck, MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE § 8-3(E)(5) (discussing selection of court members and citing cases).

5. Should there be an option for an all enlisted panel? Why or why not?

Professor Eugene Fidell: I would not recommend such an option but have no objection in principle to a random selection system that might at times produce an all-enlisted panel for enlisted accuseds, just as a mixed panel currently may morph into an all-enlisted one as the result of challenges. This happened occasionally under the traditional (non-random) system, as in the case of Sergeant Major of the Army Gene C. McKinney.

Professor Lisa Schenk and Professor David Schlueter: It would depend on several factors—whether the accused is an officer or enlisted and whether there would be a sufficient pool of qualified enlisted (assuming the preference that the members out rank the accused). Nevertheless, an option for an all-enlisted panel should only be available in cases where the accused is enlisted or an NCO.

6. Should the military move to a randomized panel member selection process that is similar to how federal and state jurisdictions select potential jury members? Federal and state jurisdictions typically use computer systems to randomly select members from state voter registration rolls to serve on juries. After the venire is chosen in this way, the voir dire process further narrows the number of members sitting on a jury.

a. Should the military use Alpha rosters, or other similar means, to randomly select the initial pool of panel members? Why or why not?

Professor Lisa Schenk and Professor David Schlueter: We defer to the Services on this question as we are not familiar with the current process for obtaining Alpha rosters and similar methods of obtaining unit/command membership data information.

b. Should the random selection method include an algorithm that results in a member venire that is diverse in some way, such as by age, grade, race, or sex? Please explain your response.

Professor Eugene Fidell: I do not have the expertise needed to respond intelligently to the first of these questions. On the second, a truly random system should produce diverse venires since the military workforce is highly diverse. But if that is not the case, I would favor considering focused, transparent, and defensible ways to foster diverse venires, even if the resulting panels turn out not to be diverse. I defer to others who have studied alternative random selection systems in this regard. One thing is clear: the solution cannot be ad hoc non-transparent decision making by individual convening authorities, be they ever so well-intentioned, or left to the vagaries of post hoc case-by-case appellate review.

Professor Lisa Schenk and Professor David Schlueter: As we note, *supra,* we have concerns about attempting to create a "diverse" panel, lest, as we note *supra*, the panel appear to be stacked.

7. Please share with us any other suggestions you have for improving the panel selection process or considerations that the Committee should be cognizant of in making recommendations to change the selection criteria or randomize the selection process.

Professor Eugene Fidell: I have two other observations.

First, the Policy Subcommittee should not be under any illusions about whether the Article 25 criteria are enforceable. They are not. Consider United States v. Sullivan, 74 M.J. 448 (C.A.A.F. 2015), a general court-martial case in which I was lead counsel for an O-6 from trial through certiorari petition. A key issue concerned the convening authority's flagrantly illegal exclusion of all flag officers from consideration as panel members, without making any effort to determine whether they were unavailable in fact. Of course, as admirals, these officers were by definition "best qualified," the very term used in both Article 25 and the promotion statute. The Court of Appeals for the Armed Forces in the end determined (correctly) that this violated Article 25, but unanimously held that the error was harmless because the numerous O-6s who constituted the panel asked many questions, deliberated at length, acquitted on one of the two charges, and declined to dismiss the accused or send him to Leavenworth. Those acts in no way showed that the Article 25 violation was harmless because there was nothing to indicate that a panel that included one or more admirals would not have asked even more questions, deliberated even longer, adjudged a complete acquittal, or awarded an even more lenient sentence, including a sentence to No Punishment. As long as CAAF is willing to excuse clear Article 25 violations on grounds that do not in fact show harmlessness, the military justice system is kidding itself about the value of the statutory criteria. They are window-dressing and illusory.

Second, Congress has made worthwhile changes in the Code in recent years, but its effort to square the panel circle by directing randomization in some form while retaining statutory criteria is not one of them. It would be nice if these two fundamentally incompatible systems for member selection could be reconciled, but it cannot be done. The Committee will do Congress a favor if you say as much in your report. You should also urge Congress to get commanders entirely out of the business of member-selection. Everyone knows – and has known for decades – that that is one of the very weakest links in the system, and detracts from public confidence in the administration of military justice. It makes no sense now, and in the fast-approaching OSTC era will make even less sense, for commanders to retain that power.

Professor Lisa Schenk and Professor David Schlueter: As stated *supra*, we believe that the current system which has no minimal requirements for "age, training, experience, and judicial temperament" in Article 25, and involves convening authorities selecting panel members based on these criteria—with the military judge subsequently tasked with conducting a random selection of those chosen (a pending change)—is the best suited to meet the military's unique needs. No minimal requirements for the Article 25 criteria are necessary. A wholly random military panel selection process is impractical, would be extraordinarily difficult to implement, would adversely impact the processing times for military actions, and may adversely impact military readiness and national security. Furthermore, a statutory change may not be called for to resolve perceived unlawful command influence in the selection process. The Committee should consider the alternate resolution of the Services providing recommended solutions to provide increased randomization of military panel member selection.

Additional Comments:

Professor Lisa Schenk and Professor David Schlueter:

Congress first codified selection criteria for courts-martial panel selection in the 1920 Articles of War and required convening authorities to select officers based on "age, training, experience, and judicial temperament" and the 1950 Uniform Code of Military Justice (UCMJ) incorporated these criteria into Article 25.[1] Convening authorities are now tasked with selecting panel members who are best qualified based on the same criteria established in the 1920 Articles of War.[2] We believe that the current system which has no minimal requirements for "age, training, experience, and judicial temperament" in Article 25, and involves convening authorities selecting panel members based on these criteria—with the military judge subsequently tasked with conducting a random selection of those chosen (a pending change)—is the best suited to meet the military's unique needs.

In selecting a military panel, convening authorities are better situated to understand the needs of the command, mission readiness and operational requirements, and needs of those in the "jury pool" within the command. The convening authority has the responsibility to maintain good order and discipline while ensuring efficiency and effectiveness of the military justice system. We do not see that any minimal standards for these criteria are necessary and recommend that no such minimal requirements be imposed.

In addition, we believe that a wholly random military panel selection process is impractical, would be extraordinarily difficult to implement, would adversely impact the processing times for military actions, and may adversely impact military readiness and national security. "The military justice system must be able to operate in deployed and operational environments in which large numbers of potential court-members are engaged in vital national security activities."[3] Moreover, the military justice system must be operational, efficient, and effective across five Services and the U.S Coast Guard, in times of war and peace and on the land, air, and sea. We urge your committee to consider the educated, thoughtful studies and findings of other committees that previously reviewed the issue of military panel member selection.[4] We also urge you to consider the processes and results of the previous random selection experiments conducted at Fort Riley in 1974 and at V Corps in 2005, both of which were unsuccessful[5] and found to result in reducing the competency of the panel.[6]

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[1] MILITARY JUSTICE REVIEW GROUP, REPORT OF THE MILITARY JUSTICE REVIEW GROUP, PART I: UCMJ RECOMMENDATIONS, 252 (2015) [hereinafter MJRG REPORT].
[2] See Art. 25, UCMJ.
[3] MJRG REPORT, supra note 1 at 253-54.
[4] See e.g., MJRG REPORT, supra note 1; JOINT SERVICE COMMITTEE ON MILITARY JUSTICE, REPORT ON THE METHODS OF SELECTION OF MEMBERS OF THE ARMED FORCES TO SERVE ON COURTS-MARTIAL (1999) (responding to Congressional mandate in the National Defense Authorization Act Fiscal Year 1999 to review selection of panel members and examine alternatives including random selection); HONORABLE WALTER T. COX III ET. AL., REPORT OF THE COMMISSION ON THE 50TH ANNIVERSARY OF THE UNIFORM CODE OF MILITARY JUSTICE (May 2001).
[5] See James T. Hill, Achieving Transparency in the Military Panel Selection Process with the Preselection Method, 205 MIL. L. REV. 117, 128-130 (2010) (proposing internal reforms to achieve transparency without the drawbacks of random selection and stating "[i]f implemented in a wholesale manner, the federal jury selection process would be incompatible with military demographics—making panels disproportionally junior and requiring judgment by members junior in rank to an accused under a 'purist' random scheme." Id. at 119 (footnotes omitted)).
[6] Id. at 129.

Lastly, a statutory revision may not be the best solution to address the perception of unlawful command influence in the selection process. Rather, the Armed Forces may be best suited to provide recommended solutions to address increased randomization of military panel member selection.,

Professor Richard D. Rosen, *Glenn D. West Endowed Research Professor of Law*, Texas Tech University School of Law, and Colonel (retired), U.S. Army; May 24, 2023 response:

I neither like nor fully understand the increasing effort to civilianize the military justice system. The civilian federal courts and courts-martial serve different communities, and their purposes are not altogether the same. Courts-martial not only seek justice for criminal offenses, but they are tools for preserving discipline in the armed forces.

For example, I am not convinced transferring referral authority to a Special Trial Counsel ("STC") in Washington will have a significant impact on the number of sexual assaults or courts-martial of the alleged perpetrators. I get the sense that general court-martial convening authorities currently refer most (*i.e.,* nearly all) sexual assault cases to court-martial. If I were a Staff Judge Advocate—provided cases met a "straight-face" test—I would recommend referral to protect my commanders and myself from Congress, the Defense Department, and higher headquarters who might descend upon us if cases are not referred. Thus, once a sexual assault case gets into judge advocate channels, it seems likely to be tried. Moreover, based on what I have read, problems exist at the platoon and company levels where these kinds of offenses never see the light of day. For example, NCOs may "dissuade" victims from brining complaints of sexual assault to protect the unit or its officers and NCOs. If my perception is accurate, an STC sitting in the Pentagon will be unable to discern or influence what happens at the unit level. Perhaps a salutary feature of the new STC is that he or she will be immune from the pressure on commanders to refer weak cases to court-martial, although placing the STC directly under a partisan political appointee may make this difficult.

More directly on point, is there some empirical reason for disturbing Article 25? Some rational unhappiness with current military panels?

First, if Article 25 is amended, from where will prospective court-martial members be selected? Service-wide? Installation level? In this regard, state and federal courts select prospective jurors from relatively stable communities of thousands (or even millions) of citizens. The courts randomly choose citizens from registered voter rolls and driver's license databases. But how would such a process work in the military? Military communities are much smaller and rarely stable: people are constantly on the move whether from change of duty station, TDY, training exercises, and deployments. Moreover, about a decade ago I served on a DoD Legal Policy Board subcommittee that examined courts-martial in deployed environments. Courts-martial must be mobile when we are at war or involved in long-term conflicts. Consequently, there must be a workable system for member-selection in austere environments.

Second, the current method of member selection (at least the one that existed when I was on active duty) generally ensures the availability and diversity of members. Units nominate members based—in part—upon their availability and convening authorities more or less randomly detail members taking into consideration the Article 25 criteria and such factors as race and gender. I assume that the STC will detail members under RCM 503 in cases that fall under the STC's aegis. In any event, I have no idea how a randomized algorithm can get the same results.

Third, I remember a story (perhaps apocryphal) about F. Lee Bailey, before he was disbarred. Bailey represented Captain Ernest Medina in his court-martial in connection with the My Lai

massacre. Bailey purportedly said that if he had a guilty client, he would want a civilian jury, but if he had an innocent client, he would want a trial by court-martial. Simply put, because of the Article 25 criteria, court-martial panels are more likely to reach fair and just verdicts than a jury drawn randomly from a civilian community.

I understand that some of my concerns are alleviated by the fact court-martial members will no longer assess sentences (a good idea). Furthermore, you know much more about the issues than I do. General/Dean Walt Huffman and I wrote a military law treatise for Thomson-Reuters (WESTLAW), which I continue to update. *** I do try to keep somewhat current, but I view military justice from 30,000 feet, whereas you understand what is actually going on.

MILITARY JUSTICE AND MODERNITY

Eugene R. Fidell* and James A. Young†

Abstract

Over the decades, Congress has made significant improvements in the military justice system. In doing so, however, it has neglected to remove outdated features of the system, leading to needless effort, expense, delay, and bloat. A thorough review is warranted to remove these artifacts, while taking care to ensure that the substantial rights of the accused are not prejudiced in the process.

"Change is the basis of all history, the proof of vigor."

Jenny Holzer, Inflammatory Essays (1979-81)

Introduction

A current casebook is called "Modern Military Justice."[1] It's a catchier title than, say, "Military Justice: Cases and Materials,"[2] but one does wonder whether it is not more aspirational than strictly accurate to apply the term "modern" to contemporary American military criminal justice. In important respects, as noted below, our system remains rooted in the 18th century, despite noteworthy recent changes. The argument is not so much that the present military justice system should be altered (it should), but that it already has been altered, repeatedly and usefully, in ways that render parts of it otiose or worse.

In the afterglow of the Supreme Court's decision in *Ortiz v. United States*,[3] those responsible for the administration of justice in the armed forces of the United States have had much to be pleased about. The Court, by a divided vote, pronounced a broad benediction over the military justice system, or at least over that system's highest tribunal, the U.S. Court of Appeals for the Armed Forces. Not to spoil the fun, but a case can be made that the kind words in *Ortiz*–the precise constitutional issue aside–are as misplaced as were the harsh words for which *O'Callahan v.*

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[1] LISA M. SCHENCK, MODERN MILITARY JUSTICE (3d ed. 2019).

[2] EUGENE R. FIDELL, BRENNER M. FISSELL, FRANKLIN D. ROSENBLATT & DWIGHT H. SULLIVAN, MILITARY JUSTICE: CASES AND MATERIALS (4th ed. 2023) (forthcoming).

[3] 138 S. Ct. 2165 (2018).

Parker[4] had been faulted. While there remain major issues for the Court, the new Military Justice Review Panel,[5] and Congress to resolve, scholarly attention has shifted to high theory and history, rather than closer to where the rubber meets the road, where important work remains to be done.

In the past 70 years, Congress has made substantial substantive and procedural changes to align military justice more closely with civilian federal criminal law. And although the last major review of the entire system resulted in the 2015 Military Justice Review Group's two-volume report, the changes keep coming, although in a less systematic manner. Only seven years have passed since that report, but we believe it is time to re-examine the entire system with a view to conforming military justice, to the extent possible, with contemporary standards of judicial administration and thereby decreasing costs, moving cases more quickly, fostering greater public confidence, and, importantly, doing so without prejudicing the substantial rights of the accused.

The armed forces are likely to resist some or all of the changes suggested here, some of which will shrink the several Judge Advocate General's Corps and the equivalent legal programs of the U.S. Marine Corps and U.S. Coast Guard, neither of which has a separate legal corps. Concern over agency rice bowls is hardly a novelty in public administration, and these elements of the defense establishment have enjoyed a kind of triumphalism as a result of mission creep and *Ortiz*'s pat on the head. Resistance to change is a familiar syndrome in the armed forces' administration of military justice.[6] Recent examples include the effort to improve judicial independence through fixed terms of office,[7] the transfer of charging power for a broad and increasing range of offenses from commanders to lawyers,[8] and the proposed but not yet achieved expansion of servicemember access to the Supreme Court on an equal footing with other persons

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[4] 395 U.S. 258 (1969), *overruled, Solorio v. United States*, 483 U.S. 435 (1987).

[5] *See* art. 146, UCMJ, 10 U.S.C. § 946.

[6] *See generally* Eugene R. Fidell, *The Culture of Change in Military Law*, 126 MIL. L. REV. 125 (1989).

[7] The government successfully resisted claims that Fifth Amendment due process requires military judges to have the protection of fixed terms of office. *See, e.g., Weiss v. United States*, 510 U.S. 163 (1994). Eventually the Army and then the Coast Guard established terms by regulation and in time Congress required the other services to get in step, although it did not prescribe a specific minimum term of office. *See* arts. 26(c)(4) & 66(a)(1), UCMJ, 10 U.S.C. §§ 826(c)(4) & 866(a)(1). That was done by the President in the *Manual for Courts-Martial*. *See* R.C.M. 502, 1203.

[8] The Judge Advocates General and service chiefs resisted the transfer of disposition power from commanders to lawyers. They lost that battle in 2021 when Congress passed legislation that will by the end of 2023 create "special trial counsel" in each armed force with disposition power over a broad swath of offenses. *See* arts. 1(17) & 24a, UCMJ, 10 U.S.C. §§ 801(17) & 824a; *see generally* National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, §§ 531-539c, 135 Stat. 1541, 1692-99 (2021); Philip D. Cave, Don Christensen, Eugene R. Fidell, Brenner M. Fissell & Dan Maurer, *The Division of Authority Between the Special Trial Counsel and Commanders: Planning Now for the Next Phase of Reform*, Lawfare, Feb. 28, 2022; Rachel VanLandingham, *NDAA 2022: A Missed Opportunity to Improve Military Justice*, Just Security, Dec. 28, 2021. A few additional offenses were transferred to the special trial counsel by the James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, § 541, 136 Stat. ____, ____ (2022), and it seems fair to predict that other offenses will meet the same fate in due course.

convicted of federal or state crimes.[9] Since experience teaches that it is unlikely that, left to their own devices, the armed forces will readily jettison structural artifacts that are no longer needed or look aggressively for ways to reduce bloat in the military justice system, Congress should either do so itself or see to it that the Review Panel, which is already charged with conducting periodic comprehensive reviews and assessments of the system,[10] does so.

I

Pentimenti

The *Oxford English Dictionary* defines "pentimento" as, "in a painting (particularly in oils) a trace of an earlier composition or of alterations that has become visible with the passage of time."[11] Oftentimes, the original work of art can still be discerned. So it is with military justice: all you need to do is get beneath the later accretions. And once you do, it becomes apparent that, far from having effaced the earlier state of affairs, the initial version may continue to play a role. Indeed, its effect may be profound even if it is not apparent to the naked eye.

So it is, we suggest, with the many changes that American military justice has experienced over the decades. Some of those have been highly significant; others have been late, reluctant, and in the end unduly tentative. This is not the place to retrace the path of military justice reform; many others have done that. Rather, the question is whether, despite many changes, there remain aspects of the system that silently and unwisely still reflect an earlier state of affairs. This may happen for two reasons: first, the political process (including legislative deference to change-resistance within the armed forces) may be such that only incremental reform is feasible, and second, out of an abundance of caution, Congress may be loath to jettison parts of the system on the premise that there is no harm in retaining them, belt-and-suspenders, even though changes have long since made them redundant. Congress may be slow to grasp the nettle. An example is its unwillingness to create standing military trial courts, even though it has taken steps to empower military judges to rule on certain matters prior to referral. There is no shortage, sadly, of missed legislative opportunities.

Perhaps Holmes overstated the matter when he wrote a century and a quarter ago:

> It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.[12]

In the context we are addressing, there is no occasion for revulsion, but simply a recognition that, in 1916, 1920, 1950, 1968, 1983, 2016, and 2021, each of which witnessed

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[9] *See generally* Eugene R. Fidell, Brenner M. Fissell & Philip D. Cave, *Equal Supreme Court Access for Military Personnel: An Overdue Reform*, 131 YALE L.J. FORUM (May 31, 2021).

[10] *See* art. 146(a)(3), UCMJ, 10 U.S.C. § 946(a)(3).

[11] III OED 363 (1987).

[12] Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

dramatic changes, Congress failed to give due consideration to whether, when enacting them, corresponding changes in the interest of removing what is archaic and unnecessary should also have been made, and in any event should be made–or at least carefully considered–now. No known interest-group or PAC is going to make this point, but those who labor in this vineyard might, if the conditions were right, have a chance at attracting the attention of some Senators or Members of Congress who can be persuaded to take the long view rather than waiting for the next discrete reform-ready issue to come without warning across the legislative radar.

The starting point is to identify the core characteristics of the *ur*-system: the command-centric model we and other countries inherited from Great Britain. Common law legal systems around the globe have wrestled with whether, to what extent, and how that system should be modified with evolving expectations and to keep pace with other developments in national law. In this sense, the United States has plenty of company.

What, then, were the core characteristics and assumptions of the original model? Here are a few of the most salient ones. It did not rely on standing courts. It relied on commanders to make charging decisions, select officers to sit on the panel, and act on the record following the trial. It did not contemplate a role for lawyers representing the parties at trial. Nor did it involve trial judges or direct appellate review by a law court. Army and navy courts-martial were governed by separate sets of rules that were far from identical. Most of those who were accused of offenses lacked education. And because the classic model had taken shape long before either the American criminal justice revolution of the 20th century or the development of an international corpus of human rights law, the rights afforded the accused were minimal.

Much of the original military justice system has been altered by periodic spasms of reform. Yet it retains features and asserted protections that no longer serve a purpose. Let us begin with a feature that is so obvious that it attracts virtually no attention: the significant autonomy of the individual armed services. In 1950, Congress broke new ground by enacting a single disciplinary statute for all of the armed forces—a step that other democratic countries such as the United Kingdom and Canada took years ago, but that others still have not embraced.[13] Yet the result was not a *unified* American system, but what was labeled merely a *uniform* one, and one that on examination proves to have a host of interservice variations, typically buried in service-specific regulations.[14] To be sure, the services' systems are interoperable in the sense that trial judges (but not appellate military judges)[15] may preside in cases arising in a different armed force (although

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[13] India remains a major holdout. *See* U C JHA & KISHORE KUMAR KHERA, COLONIAL FOOTPRINT IN THE INDIAN MILITARY LEGAL SYSTEM: MILITARY LAW: THEN, NOW AND BEYOND 193-209 (2022) (noting, for example, maximum sentence disparities among armed forces); Eugene R. Fidell & Navdeep Singh, *Why India must get rid of separate disciplinary codes for Army, Navy & Air Force*, The Print, July 16, 2021.

[14] *See* Army Reg. 27-10, Legal Services: Military Justice (Nov. 20, 2020); U.S. Air Force Inst. 51-201, Administration of Military Justice (Apr. 14, 2022); U.S. Navy JAG Inst. 5800.7G, Manual of the Judge Advocate General of the Navy (Jan. 15, 2021); U.S. Coast Guard Commandant Inst. M5810.1H, Military Justice Manual (July 9, 2021).

[15] *See* art. 66(a)(1), UCMJ, 10 U.S.C. § 866(a)(1).

they rarely do so),[16] and courts-martial can try members of other U.S. armed forces.[17] But in critical respects, "the military justice system" to which observers and participants so often refer is not a single system of criminal justice at all, but rather a constellation of similar systems. These systems may be headed by admirals and generals who typically march in lockstep (at least in public), but, with possible exceptions for high-profile or politically-charged cases, they remain subject to only light supervision, if that, at the Department of Defense level.[18]

What of the protections enacted in and after 1950? With the introduction of appellate counsel, it makes no sense to require the service Courts of Criminal Appeals to engage in a non-adversarial review of records of trial in hopes of spotting some error.[19] Nor should the Court of Appeals for the Armed Forces *sua sponte* engage in such review by its Central Legal Staff, especially if the accused has specifically waived an issue at trial.[20] Searching for viable issues is counsel's work, not the judges' and not a Central Legal Staff's. We applaud Congress's amendment of Article 66, UCMJ, to get factual sufficiency review in sync with comparable review

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[16] *See* R.C.M. 201(e)(4). Judge advocates commissioned in one armed force may serve as counsel in courts-martial convened in another. *Id*. Jurors (called "members") may also serve in courts convened by service branches other than their own. *Id.*

[17] *See* R.C.M. 201(e).

[18] The only aspects of military justice in which the Office of the Secretary of Defense plays a case-specific role are (1) as a general court-martial convening authority (a power that seems never to have been exercised since it was conferred in 1986), *see* art. 22(a)(2), UCMJ, 10 U.S.C. § 822(a)(2); (2) decisions on whether to oppose a defense petition for certiorari or to seek certiorari in a case the government has lost at the Court of Appeals for the Armed Forces, *see* Dep't of Defense Inst. 5030.7 (Aug. 22, 1988) (encl. 2); and (3) advising the President on whether to approve a capital sentence. *See* art. 57(a)(3), UCMJ, 10 U.S.C. § 857(a)(3); R.C.M. 1204(c)(2)(B). The practice of forwarding capital cases via the Secretary of Defense was not memorialized in the *Manual for Courts-Martial* until 2007, *see* Exec. Order No. 13,447, 3 C.F.R. 243, 247-48 (2008) (amending R.C.M. 1204), but began under President Eisenhower. *See* Dwight H. Sullivan, *Killing Time: Two Decades of Military Capital Litigation*, 189 MIL. L. REV. 1, 29 n.112 (2006), *citing* Dwight H. Sullivan, *Executive Branch Consideration of Military Death Sentences*, in EVOLVING MILITARY JUSTICE 138 (Eugene R. Fidell & Dwight H. Sullivan eds. 2002). A number of UCMJ and *Manual* provisions confer powers on the Secretary of Defense, but these relate to the wholesale administration of military justice, rather than retail or case-specific matters. *See, e.g*., arts. 22(a)(2), 33, 113(b)(1)(B), 137(c)-(d)(2), 140a(a), (d), 146, 146a(c), UCMJ, 10 U.S.C. §§ 822(a)(2), 833, 913(b)(1)(B), 937(c)-(d)(2), 940a(a), 946, 946a(c); R.C.M. 109(c)(8), 201; M.R.E. 315, 317(c), 505(a). The Joint Service Committee on Military Justice, which proposes statutory and *Manual for Courts-Martial* changes, operates under the direction of the General Counsel of the Department of Defense. *See* 32 C.F.R. § 152.3. The DoD General Counsel's JSC advisor and that of the Chairman of the Joint Chiefs of Staff, however, do not have a vote. *See* 32 C.F.R. § 152.4(a)(6). The Court of Appeals for the Armed Forces is located in the Department of Defense, but "for administrative purposes only." *See* art. 141, UCMJ, 10 U.S.C. § 941.

[19] *See* art. 66(d), UCMJ, 10 U.S.C. § 866(d) (in any case brought by the accused, the Courts of Criminal Appeals "may affirm only such findings of guilty as the Court finds correct in law, and in fact in accordance with subparagraph (B). The Court may affirm only 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.").

[20] *United States v. Chin*, 75 M.J. 220 (C.A.A.F. 2016).

by the Article III courts of appeals,[21] but it left undisturbed the practice of *sua sponte* review of the entire record that is no longer warranted given the role of legally-trained appellate counsel.

Congress long ago conferred on the accused a right to be represented for free by any military attorney of his own selection, if that attorney is reasonably available—"individual military counsel"—in addition to free detailed (lawyer) defense counsel.[22] Neither of these was part of the George III legacy, but we wonder whether the right to individual military counsel is another artifact that can be dispensed with. After all, Congress materially cut back on that right after the Court of Military Appeals held in *United States v. Johnson*[23] that it extended to lawyers in a different armed force.[24] As a result, individual military counsel play a much smaller role than they once did. Furthermore, unlike in earlier days, defense counsel now have robust support from, and better communication with, more experienced members of the defense bar, both military and civilian. Since there is no comparable right to select one's own free defense counsel in the civilian courts,[25] and all uniformed defense counsel must be certified after extensive training on the Code,[26] perhaps this feature of the system is no longer required.

The classic model of military justice, lacking a legally-trained trial judge, necessarily involved sentencing by the equivalent of a jury. With the advent of true military judges in 1968, other aspects of the system should also have been changed.[27] One of these is that, other than in capital cases, court-martial members should not determine the sentence, yet Congress kept that option open for the military accused.[28] Civilian federal defendants do not enjoy such an option[29] and jury sentencing is uncommon in state non-capital criminal justice systems.[30] Sentencing by members should have been dispensed with long ago in non-capital courts-martial, and Congress

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[21] *See* art. 66(d)(1)(B), UCMJ, 10 U.S.C. § 866(d)(1)(B).

[22] *See* art. 38(b)(3)(A), (B), UCMJ, 10 U.S.C. § 838(b)(3)(A), (B).

[23] 23 U.S.C.M.A. 148, 48 C.M.R. 764 (1974).

[24] *See* arts. 38(b)(3)(B) & (b)(7), UCMJ, 10 U.S.C. § 838(b)(3)(B) & (b)(7); R.C.M. 506(b)(1).

[25] *See generally* Tom Lynch & Adam Bates, *Poor Defendants Should Get to Choose Their Lawyers Too*, CATO at Liberty, Apr. 6, 2017; Melanie Navamanikkam, *The Sixth Amendment and the Right to Choose Appointed Counsel*, U. CIN. L. REV. blog, Mar. 1, 2017.

[26] *See* art. 27(b)-(c), UCMJ, 10 U.S.C. § 827(b)-(c).

[27] Factual sufficiency review by the Courts of Criminal Appeals is a prime example. *See generally* Matt C. Pinsker, *Ending the Military's Courts of Criminal Appeals De Novo Review of Findings of Fact*, 47 SUFFOLK U.L. REV. 481, 489-99 (2014) (implications for factual sufficiency review). Congress has retained factual sufficiency review but the accused must now first make "a specific showing of a deficiency in proof." *See* art. 66(d)(1)(B), UCMJ, 10 U.S.C. § 866(d)(1)(B).

[28] *See* arts. 25(d), 53(b), UCMJ, 10 U.S.C. §§ 825(d), 853(b).

[29] *See* FED. R. CRIM. P. 32.

[30] *See generally* Morris B. Hoffman, *The Case for Jury Sentencing*, 52 DUKE L.J. 951, 953 n.1 (2003 (collecting statutes).

finally did so in 2021, but only for cases in which all of the offenses that resulted in findings of guilty were committed after December 27, 2023.[31]

Given the level of education the armed forces now require of recruits, it could be argued that the statutory requirement to afford all personnel a careful explanation (*i.e.*, actual knowledge) of the punitive articles of the Code[32] is also no longer warranted, and that constructive knowledge should be relied on, just as it is with respect to federal and state civilian criminal prohibitions.[33] On the other hand, to the extent that some, at least, of the punitive articles may well be unfamiliar to personnel entering from civilian life, this inexpensive artifact may be justified simply in the interest of discouraging criminal conduct and there is no reason to abandon it.

In contrast, there is reason to reconsider whether there is a need for a separate, specialized, civilian appellate court sitting atop the military justice system.**[34]** This dates only to enactment of the Code in 1950, rather than the British or American Articles of War, so it is not some truly ancient artifact. Nonetheless, other structural reforms, as well as the inevitable flow of appellate decisions, have rendered the Court of Appeals for the Armed Forces obsolete by undermining the premises that led Congress to create the Court of Military Appeals (as it was originally named) in the first place. These include decades of case law that has filled in the blanks associated with what was in important respects a new statute as well as the dramatic assimilation of military law to civilian federal law, especially in the area of evidence.[35] Additionally, the development of a proper trial judiciary, referred to above, undercuts the case for intermediate military appellate courts and a top court that swoops in and acts as a policeman for the system as a whole. The dramatic fall-off

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[31] *See* National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, § 539E, 135 Stat. 1541, 1700 (2021).

[32] *See* art. 137, UCMJ, 10 U.S.C. § 937.

[33] *E.g., Cheek v. United States,* 498 U.S. 192, 199 (1991) (noting that "[t]he general rule that ignorance of the law or a mistake of law is no defense to criminal prosecution is deeply rooted in the American legal system"); *Shevlin-Carpenter Co. v. Minnesota*, 218 U.S. 57, 68 (1910) (noting that "innocence cannot be asserted of an action which violates existing law, and ignorance of the law will not excuse").

[34] *See generally* Eugene R. Fidell, *The Case for Termination of the United States Court of Appeals for the Armed Forces*, 23 J. APP. PRACTICE & PROCESS Issue 2, ___, __-__ (2023) (forthcoming). How important is it that judges in military cases have specialized military knowledge or experience? In *Grieves v. United Kingdom*, [2003] Eur. H.R. Rep. 688 (2003) (Grand Chamber), the European Court of Human Rights, in words that apply at least as well to appellate judges, saw little benefit in "the knowledge a naval officer would have of the unique language, customs and environment of the Royal Navy."

> [S]ince the essential function of the Judge Advocate is to ensure the lawfulness and fairness of the court-martial and to direct the court on points of law, it is difficult to understand why a detailed knowledge of the way of life and language of the navy should be called for, particularly where, as in the present case, the offence with which the applicant was changed was the ordinary criminal offence of malicious wounding. In any event, the Court is not persuaded that a civilian Judge Advocate would have more difficulty in following naval language or customs than a trial judge would have with complex expert evidence in a civilian case. [¶ 88]

[35] The Military Rules of Evidence, substantially based on the Federal Rules of Evidence, were promulgated by Exec. Order No. 12,198 (Mar. 12, 1980), *reprinted in* 45 Fed. Reg. 16,932 (Mar. 14, 1980).

in the caseload of the Court of Appeals for the Armed Forces is a further factor to take into account: the facts on the ground have simply changed.

Historically, if an accused was not entitled to review by the Court of Criminal Appeals, she was entitled to have her case reviewed in the Office of the Judge Advocate General. If any part of the findings or sentence was unsupported by law or if the JAG so directed, the case would be reviewed by the service appellate court and, if the JAG further desired, by the Court of Appeals for the Armed Forces.[36] That provision has undergone numerous changes that needlessly complicated military appellate procedure. "[T]he biggest failure of both the [Military Justice Review Group] and Congress was the refusal to afford the appellate review to which every accused convicted at a special or general court-martial should be entitled: an appeal of right to the [Court of Criminal Appeals]."[37] Congress has, at long last, now subjected all general and special court-martial convictions to review by an appellate court.**[38]** Nevertheless, it makes little sense for some accused to have to apply for relief from the Judge Advocate General before being entitled to review by an appellate court. Article 69 should be repealed.

A final holdover that can properly be dispensed with, even if the Court of Appeals for the Armed Forces is retained, is the power of the Judge Advocates General to certify issues of law for appellate review.[39] Unlike an accused's appeal, which is subject to review at the discretion of the court, certification by the JAG, which is almost always done at the behest of the prosecution,[40] requires the Court of Appeals for the Armed Forces to review the issue raised. Again, this is not something out of George III's playbook, but rather an artifact of the original UCMJ. The purpose was to afford the services a way to obtain, as of right, an authoritative judicial determination of novel points of law under the then-new statute. With the passage of time, the Court of Military Appeals and Court of Appeals for the Armed Forces have painted in virtually every inch of the statutory canvas, some many times over. Additionally, that court has given the certification power even less scope, imposing a time limit,[41] for example, and applying doctrines of mootness and ripeness as further curbs on the Judge Advocates General's power.[42] Nothing of value will have been lost if that power is repealed. What is more, doing so will render it at least slightly more

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[36] Art. 69, UCMJ (1950 version).

[37] James A. Young, *Post-Trial Procedure and Review of Courts-Martial Under the Military Justice Act of 2016*, ARMY LAW., Jan. 2018, 31, 36. Summary courts-martial can be dispensed with given the availability of non-judicial punishment. In any event, appellate review by a court of law is unnecessary since they are not criminal proceedings. *See Middendorf v. Henry*, 425 U.S. 25 (1976).

[38] *See* James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, *supra* note 8, § 544, 136 Stat. ____ (2022).

[39] *See* art. 67(a)(2), UCMJ, 10 U.S.C. § 867(a)(2).

[40] EUGENE R. FIDELL, BRENNER M. FISSELL, MARCUS N. FULTON & DWIGHT H. SULLIVAN, GUIDE TO THE RULES OF PRACTICE AND PROCEDURE FOR THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES § 22.03[5], at ___ (22d ed. 2023) (*Rules Guide*) (forthcoming).

[41] *See* C.A.A.F. R. 19(b)(3), 22(b)(3); *Rules Guide, supra* note 40, § 19.03[5], at ___-__.

[42] *Rules Guide, supra* note 40, § 8.03[14], at __-__.

plausible that the Judge Advocates General are merely concerned with prosecuting, rather than being impartial administrators. And ending their certification power will have the desirable side-effect of alleviating the current imbalance in prosecution and defense access to the Supreme Court, which in most cases is based on the Court of Appeals having granted discretionary review.[43]

From the time the Code was enacted, there was, in military justice, a *leitmotif* of paternalism. The Court of Appeals for the Armed Forces has long since gone out of that business.[44] Nonetheless, there is a sense that, like the forms of action at common law,[45] the paternalism legacy (like other, more explicit features of the system inherited from Britain) may yet rule us from the grave. Defenders of the status quo will argue that Congress's failure to tidy up after itself is defense in depth. At a certain point, however, the system becomes so encrusted with artifacts that it loses coherence. We believe that point has been reached.

II

Bloat

Because Congress has failed to get rid of artifacts that have outlived their usefulness and other institutional players have been more than willing to expand (and refuse to contract) whenever possible, the military justice system suffers from both make-work and bloat. Some of the bloat is a result of the make-work, some of it is free-standing. Here are some examples:

Are there too many trial judges for the shrinking overall court-martial caseload?[46] Might fewer judges be needed overall (and might cases move more quickly) if more cases were tried by judges from service branches other than that of the accused? These questions of resources and judicial administration merit examination by the Military Justice Review Panel. It is sometimes claimed that the smaller caseload does not mean fewer trial judges are needed because the cases now being tried are more complicated than hitherto. We reject that claim. Very few court-martial cases are truly complicated or can plausibly be described as "complex litigation," a phrase that can be found on far too many military and former-military resumés. The fact that new issues have to be researched by relatively inexperienced trial and defense counsel does not make those cases "complex." Of course, some cases are indeed complicated – murder cases, for example, but these are rare. Computer cases used to involve learning curve challenges, but there is no reason for them

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[43] Fidell, Fissell & Cave, *supra* note 9, at 14 & n.80; *Rules Guide, supra* note 40, § 22.03[5], at ___-__.

[44] *See, e.g., United States v. Johnson*, 21 M.J. 211, 214 (C.M.A. 1986); *see generally* David A. Schlueter, *The Military Justice Conundrum: Justice or Discipline?*, 215 MIL. L. REV. 1, 39-40 & n.141 (2013).

[45] *See* FREDERIC W. MAITLAND, THE FORMS OF ACTION AT COMMON LAW 1 (A.H. Chaytor & W.J. Whittaker eds. 1936) ("The forms of action we have buried, but they still rule us from their graves."). Faulkner similarly observed, "The past is never dead. It's not even past." WILLIAM FAULKNER, REQUIEM FOR A NUN 85 (1919). And as Dickens wrote, "It's in vain, Trot, to recall the past, unless it works some influence upon the present." CHARLES DICKENS, THE PERSONAL HISTORY OF DAVID COPPERFIELD 324 (1850).

[46] *See* Jake Dianno, *Numbers Crunching*, CAAFlog, Oct. 8, 2022, https://www.nimj.org/caaflog/numbers-crunching.

to be treated as *per se* complex today. The same is true for many of the domestic violence cases, which are hardly novel (and many of which belong in the civilian courts in any event, *Solorio* notwithstanding, but that is another article). In addition, military judges are no longer required to perform the onerous task of "authenticating" each record of trial over which the judge presided, in effect, double-checking the court reporter's work for error.[47]

The work of the service Courts of Criminal Appeals and the Court of Appeals for the Armed Forces is needlessly expansive. They review records of trial not only in connection with issues identified by the free appellate defense counsel provided by the taxpayers and the civilian appellate defense counsel who may represent appellants on a fee or *pro bono* basis. Rather, these courts' review includes a search for any errors not identified by either counsel or the petitioner.[48] This kind of review—unheard of in the Article III courts of appeals—may have made sense before lawyers played their current pervasive role in courts-martial, before there was a military trial judiciary worthy of the name, or when the Uniform Code of Military Justice was new and large parts of the jurisprudence had yet to be painted in. But none of these conditions apply now; indeed, they haven't for decades.[49]

The continued willingness of the Court of Appeals for the Armed Forces to entertain petitions for grant of review that cite no issues[50] is a prime example of the persistence of outdated systemic features. Whether or not that practice made sense in the years before Congress transformed the Boards of Review into Courts of Military Review in 1968,[51] it made none thereafter, and yet the Court of Appeals continues to employ a Central Legal Staff that conducts *de novo* review of records of trial. There's no harm in having such a staff to deal with procedural motions, motions for summary disposition, and the like, but what the CAAF staff does far exceeds those tasks. It should be abolished or made smaller.

But the problem runs deeper. There are simply too may appellate courts in the military justice system.[52] At least one, the Coast Guard Court of Criminal Appeals, has almost nothing to

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[47] *See* National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, div. E, title LVII, § 5238, 130 Stat. 2918 (2016).

[48] During the October 2021 Term of Court, only half of the petitions for review received by the Court of Appeals for the Armed Forces cited issues that had been identified and briefed by appellate defense counsel.

[49] International standards have also evolved. Thus, the "Yale Draft," a 2018 revision of the 2006 Draft Principles Governing the Administration of Justice Through Military Tribunals, observes in Principle No. 17 (Recourse procedures in the ordinary courts) that "[i]n all cases where military tribunals exist, their authority should be limited to ruling in first instance. Consequently, recourse procedures, particularly appeals, should be brought before the civil courts." *See* MILITARY JUSTICE: CASES AND MATERIALS, *supra* note 2, at ___. The present composition of the Courts of Criminal Appeals does not comport with this principle.

[50] *See* C.A.A.F. R. 21(e).

[51] *See* Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335.

[52] The four service intermediate appellate courts—Air Force, Army, Coast Guard, and Navy-Marine Corps—released a combined total of 21 published opinions between January 1 and October 22, 2022.

do—certainly not enough to justify its existence.[53] For all practical purposes it is a collateral duty for everyone, except the chief and one other judge,[54] a kind of judicial "vanity plate" for the Nation's second smallest armed force.[55] Even the larger ones see so few cases in which counsel can actually identify a substantial appellate issue (and conduct so few oral arguments) that they could easily be consolidated into a single "purple" inter-service court, with considerably fewer total appellate military judges.

As for the Court of Appeals, its throughput of cases has become so anemic that a compelling case can be made for its termination.[56] In the most recent three Terms, it handed down decisions on full opinion in only 86 cases: 25 in 2019, 36 in 2020, and 25 in 2021.[57] This is not necessarily to fault that court: trial court caseloads are down, and we are willing to assume that the Court of Appeals grants any petition that qualifies even marginally as a showing of the requisite "good cause."[58] If that is so, it simply does not have enough work to justify its existence. Nor is it a question of not warranting five judgeships; even the three it had from 1951 to 1989 are not warranted given the paucity of cases that have come to it with colorable issues over the last 10 or more years.

The time has come for the military justice appellate structure to replicate that of the civilian federal courts. If, as we believe, the uniformed trial judiciary has reached maturity, there is simply no need, if there ever was one, to subject courts-martial to three tiers of appellate review. We therefore recommend abolition of the Courts of Criminal Appeals and the Court of Appeals for the Armed Forces. In their place, there should be appellate review as of right in the U.S. Court of Appeals for the District of Columbia Circuit, subject to the usual discretionary review by the Supreme Court by writ of certiorari.[59]

Apart from questions of appellate structure and featherbedding, the amount and variety of bloat in the military justice system is impressive. There is no shortage of examples. The Army, Navy-Marine Corps, and Air Force run separate law schools, located in, respectively, Virginia, Rhode Island, and Alabama. Surely this is unnecessary.[60] Similarly, the services have continued

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[53] Including cases submitted without allegation of error, the Coast Guard Court issued a total of 15 opinions between January 1, 2020 and September 12, 2022 (an average of less than one every two months). *See* https://www.uscg.mil/Resources/Legal/Court-of-Criminal-Appeals/CGCCA-Opinions/.

[54] *See* https://www.uscg.mil/Resources/legal/Court-of-Criminal-Appeals/.

[55] The U.S. Space Force is much smaller and has no intermediate appellate court of its own. Space Force court-martial appeals are heard by the Air Force Court of Criminal Appeals.

[56] *See generally The Case for Termination, supra* note 34, at __.

[57] *See* https://www.armfor.uscourts.gov/opinions.htm.

[58] *See* art. 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

[59] *See generally The Case for Termination, supra* note 34, at __-__.

[60] The taxpayers also continue to fund multiple law-review-ish publications where a single purple one would suffice. The Army trains all of the armed forces' military judges at its Legal Center and School in Charlottesville.

to promulgate separate rules relating to trial and appellate procedure, professional responsibility, judicial conduct and legal citation. Whether this is inevitable or merely the result of personnel turbulence so every new incumbent feels impelled to revamp their predecessors' rulemaking, the result is a book that is far thicker than it needs to be.[61]

Additional bloat can be attributed to recent legislation creating special trial counsel in each service to assume responsibility for charging decisions in an as-yet unknown fraction of the overall general and special court-martial caseload.[62] At least one service, the Army, has seized on it as an opportunity to add scores of additional lawyers, paraprofessionals, and others to its JAG Corps workforce.[63] It is hard not to see this as excessive. Indeed, introduction of the special trial counsel will (or should) reduce the work of existing legal personnel. Congress should consider whether the armed forces' legal programs are adding bodies unnecessarily.

Conclusion

The Military Justice Act of 2016 and the National Defense Authorization Acts for Fiscal Years 2022 and 2023 made important changes in the military justice system. They remained, however, essentially conservative projects. It would be tremendously unfair to those who worked to enact them to say that all these measures achieved was mere tinkering. But the 2016 legislation remained tethered to the essential architecture of the preexisting system and the FY22-23 NDAAs unwisely left the armed forces with—at least for the time being—two parallel charging systems for court proceedings, one "owned and operated" by commanders and another in which lawyers outside the chain of command will make the charging decision. What Congress should have done—and can still do—is undertake a more sweeping redesign rooted not in the 18th century but in the 21st. What it would opt for today if it were to work on a clean slate is anyone's guess, and this Essay does not pretend to offer anything approaching a complete blueprint for such a system. Rather, it identifies some systemic issues in the hope that a proper holistic debate can occur and inform congressional thinking, particularly as the dust settles from the last several cycles of defense authorization legislation.

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[61] *See* EUGENE R. FIDELL, BENJAMIN K. GRIMES, JONATHAN F. POTTER, FRANKLIN D. ROSENBLATT & JOCELYN C. STEWART, MILITARY COURT RULES OF THE UNITED STATES: PROCEDURE, CITATION, PROFESSIONAL RESPONSIBILITY, CIVILITY AND JUDICIAL CONDUCT viii (9th ed. 2023) (forthcoming) ("The sheer size of this compendium is clear and convincing evidence that the proliferation of rules has become excessive and indefensible.").

[62] *See generally* Cave *et al., supra* note 8.

[63] *See* Todd South, *Army Creates New Legal Office for Murder, Rape and Other Serious Crime*, Army Times, Dec. 5, 2022, https://www.armytimes.com/news/your-army/2022/12/05/army-creates-new-legal-office-for-murder-rape-and-other-serious-crime/.

Prosecutors (Military and Civilian Experience)
Presenter Biographies

Brigadier General Bobby Christine, United States Army, Retired

Bobby graduated with his Juris Doctor from Samford University's Cumberland School of Law in Birmingham after earning his undergraduate degree from the University of Georgia. He earned his commission as an Army Combat Engineer officer from Georgia Military College in Milledgeville where he was co- valedictorian and Distinguished Military Graduate and Student. Following law school Bobby worked for a decade in the District Attorney's Office in Augusta, where he prosecuted all manner of crime including violent felonies and complex thefts. He is one of only a few prosecutors in modern Georgia to win a conviction for murder in a case where the body of the victim has never been located, as well as being the first Chief of the circuit's Columbia County Division.

Appointed Judge of Magistrate Court for Columbia County in 2005, Bobby held that post continuously until November 2017, serving as Chief Magistrate from 2009-2012. From 2005 to 2017, Bobby also maintained a private practice concentrating in domestic, probate, personal injury, and criminal litigation.

In 2017 Bobby was sworn in as United States Attorney for the Southern District of Georgia upon nomination by the President of the United States and confirmation by the U.S. Senate. In 2021 Bobby was named Acting U.S. Attorney for the Northern District of Georgia, becoming the only U.S. Attorney in history to lead two districts at once.

U.S. attorneys serve as the chief federal law enforcement officer charged with investigating and prosecuting crimes on behalf of the United States of America. Bobby was responsible for leading hundreds of employees covering 89 Georgia counties. Significant cases included serious drug offenses, racketeering, public corruption, mail and wire fraud, mortgage and bank fraud, identity theft, child pornography, immigration, firearms violations, counterfeiting and crimes on military reservations such as Fort Stewart, Fort Gordon and Fort Benning. He was responsible for the Department of Justice's anti-terrorism efforts regionally and served also as chief civil counsel in both affirmative and defensive litigation. Bobby's efforts in fighting violent crime resulted in the U.S. Attorney's Office for the Southern District of Georgia becoming amongst the most productive in America with regard to the number of violent criminals prosecuted per lawyer.

An Army reservist since age 17, both as a Combat Engineer and a Judge Advocate, Bobby is a Brigadier General in the U.S. Army National Guard, with service at the Pentagon as Advisor to The Judge Advocate General and Assistant to the Director of the Army National Guard. The senior uniformed lawyer in the Army National Guard, Bobby coordinates the efforts of nearly two thousand legal professionals across America and its territories. For decades in his military legal career Bobby both prosecuted and defended, managed legal offices, advised commanders on the law of war and been at the forefront of cutting edge cyber related issues. He is a veteran of the war in Iraq, where he prosecuted among the war's first courts-martial, and participated in the investigation of the Abu Ghraib matter. He holds a master's degree from the U.S. Army War College in Carlisle, Pennsylvania and is a Syracuse University National Security Fellow.

Among Bobby's military awards and citations are the Legion of Merit, Meritorious Service Medal, Bronze Star medal, and the parachutist badge. Bobby has previously been named Army Career Judge Advocate of the Year.

Bobby's father was a double amputee Vietnam veteran, and the service of his mother's family in an American uniform stretches back unbroken to the Revolutionary War. He and his wife, Sheri, an elementary school teacher for Columbia County, have two daughters and one son. The Christine family resides in Evans, Georgia where Bobby serves as the elected District Attorney of the Columbia Judicial Circuit.

Lieutenant Colonel (Promotable) Joshua Bearden, Prosecutor, Military Commissions, United States Army

Lieutenant Colonel (Promotable) Joshua S. Bearden is currently mobilized as a Trial Counsel for the Office of the Chief Prosecutor for Military Commissions in the 9/11 case, United States v. Khalid Shaik Mohammad, et al. He also currently serves on the United States Military Sentencing Parameters and Criteria Board as a non-voting member. Lieutenant Colonel Bearden's previous assignments include: Command Staff Judge Advocate, 167th Theater Sustainment Command (TSC), Army National Guard; Command Staff Judge Advocate, 31st Chemical, Biological, Radiological, and Nuclear (CBRN) Brigade, Army National Guard; Special Investigative Counsel to AFRICOM Combatant Commander; Deputy Staff Judge Advocate, Special Operations Command Africa (SOCAFRICA); Group Staff Judge Advocate, Special Operations Command – Central Africa (SOCFWD-CA); Staff Judge Advocate, Terrorism Criminal Investigation Unit (TCIU); Operational Law Chief, U.S. Forces Afghanistan (USFOR-A), Kabul, Afghanistan and Al Udeid Air Base, Qatar; Evidence Officer-in-Charge and Prosecutorial Advisor to the Rule of Law Field Force Afghanistan (ROLFF-A) and Combined Joint Interagency Task Force 435 (CJIATF – 435), Bagram, Afghanistan; Deputy Command Staff Judge Advocate, 62nd Troop Command, Army National Guard; Platoon Leader, Troop E, 31st Cavalry, Army National Guard.

Lieutenant Colonel Bearden is currently enrolled at Georgetown University Law Center, pursuing a National Security Law LL.M. He received his law degree from Samford University in 2003 where he was elected Chief Justice of the Honor Court and served as a member of the Top Five National Trial Advocacy Team. His military education includes a Master of Strategic Studies from the U.S. Army War College and professional education courses at the U.S. Army Intermediate Level Education (ILE) and the Judge Advocate Officer Basic and Advanced Courses. Lieutenant Colonel Bearden received his commission from the Officer Candidate School (OCS) at Fort McClellan, Alabama, in 2003, after serving nine years as an enlisted member.

His military awards and decorations include the Defense Meritorious Service Medal, the Meritorious Service Medal, the Joint Service Commendation Medal, the Army Commendation Medal, the Joint Service Achievement Medal, the Army Achievement Medal, the Afghanistan Campaign Medal, and the National Defense Service Medal.

In his civilian capacity, Lieutenant Colonel Bearden is on leave from the U.S. Department of Justice, where he serves as an Assistant United States Attorney for the Southern District of Georgia in Savannah. He currently serves as his District's National Security/Anti-Terrorism Advisory Council Coordinator responsible for national security investigations and prosecutions, as well as the Critical Incident Response Coordinator and the Bureau of Prisons Liaison. He previously served as Assistant Attorney General for the State of Alabama as a violent crimes prosecutor and capital murder litigator.

Ms. Magdalena Acevedo, Assistant United States Attorney

Magdalena Acevedo, Esq., has been a practicing attorney for twenty-two years, with the last fifteen years as an Assistant United States Attorney (AUSA) in the United States Attorney's Office for the District of Columbia. From 2001 through 2007, Ms. Acevedo served as an active-duty Army Judge Advocate.

In 2003, Ms. Acevedo deployed to Iraq in support of Operation Iraqi Freedom, where she provided legal advice on the law of war, including the rules of engagement. She also managed criminal justice matters for the unit's 37,000 soldiers and traveled throughout the country to meet with judges and help reestablish the rule of law and reopen the local courts. In 2004, the Army transferred Ms. Acevedo to the Washington, DC area to work on criminal appeals before the Army Court of Criminal Appeals and the Court of Appeals for the Armed Forces. Her military awards and commendations include the Bronze Star Medal, the Meritorious Service Medal, and the Army Commendation Medal.

Since leaving active duty honorably in 2008, Ms. Acevedo has served as an AUSA, representing the United States in criminal matters in the Superior Court of the District of Columbia, the District of Columbia Court of Appeals, and the United States District Court for the District of Columbia. Ms. Acevedo presently serves as a Community Prosecutor, educating the community on matters pertaining to crime and connecting the community to the Office.

Ms. Acevedo was born in Warsaw, Poland. She emigrated to the United States in 1986 and grew up in Detroit, Michigan. Ms. Acevedo received a Bachelor of Arts degree from Michigan State University and a Juris Doctor degree from Indiana University School of Law-Bloomington.

Ms. Kathleen Muldoon, Litigation Attorney Advisor, United States Marine Corps

Kathleen Muldoon is the Litigation Attorney Advisor (LAA) for the United States Marine Corps for the Eastern Regional Trial Counsel Office, based out of Camp Lejeune, North Carolina. She began her career with the United States Marine Corps in February 2013 as a Highly Qualified Expert (HQE) for a five-year term and transitioned to the LAA position. As LAA Ms. Muldoon trains, mentors and advises Trial Counsel throughout the Eastern region on all Complex Litigation Cases and Special Victim Cases to include sexual assault, child abuse, child pornography, domestic violence, aggravated battery and homicides. Ms. Muldoon also provides training to law enforcement (PMO, CID and NCIS) and victim advocates. Ms. Muldoon's expertise comes from over nineteen years as an Assistant State's Attorney in Chicago, Cook County, Illinois where she prosecuted misdemeanors, felonies, narcotic, sexual assaults, murders and other violent crimes. From 2002 – 2012, Ms. Muldoon was assigned to the Sex Crimes Unit, where she carried her own caseload, supervised and mentored young prosecutors and was integral in securing, planning and running the Internet Crimes Against Children (ICAC) Task Force in Cook County, IL. Ms. Muldoon was an active member of the Cook County Children's Advocacy Centers, the Salvation Army P.R.O.M.I.S.E – Partnership to Rescue Our Minors from Sexual Exploitation Task Force to combat emerging issue of Human Trafficking, and the Regional Computer Forensic Laboratory (RCFL) in Chicago. Ms. Muldoon provided training on a local, state and federal level to prosecutors, law enforcement, social workers and the community to include parents and students focusing on Internet safety. Ms. Muldoon graduated from Loyola University in Chicago with a Bachelor of Science and received her J.D. from DePaul University School of Law, Chicago, IL.

Article 25 Criteria and Randomized Selection of Panel Members.

Background: Article 25(e)(2), UCMJ, requires a convening authority to detail members to a court-martial that are, in her opinion, best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament.

These criteria are not further defined and have not changed since 1950, a time when members presided over courts-martial and determined an appropriate sentence. Starting in December 2023, panel members will no longer serve as the sentencing authority, except in death penalty cases. Additionally, starting in December 2024, a randomized selection process (to be determined) will be used, to the maximum extent possible, in the selection of panel members.

The core qualifications to serve on a jury in the federal and state systems are minimal.
A potential jurors must:

(a) be a U.S. citizen;
(b) be at least 18 years old;
(c) be a resident for 12 months;
(d) be proficient in English;
(e) have no disqualifying mental or physical condition;
(f) have no felony convictions (unless civil rights have been legally restored); and
(g) must not be pending felony charges punishable by imprisonment for more than one year.

Court-martial panel members have the following duties (effective December 2023):

(1) Determine whether guilt has been proven "based on the evidence and in accordance with the instructions of the military judge."
(2) All members have an equal voice and vote in deliberating on and deciding all matters submitted to them.
(3) No member may use rank or position to influence another member.
(4) The senior ranking member is the president of the court-martial and has two additional duties:
    (a) preside over closed sessions during deliberations, and
    (b) speak for the members when announcing decisions or requesting instructions from the military judge

Questions: Based on your experience with the venire processes for both military courts-martial members and civilian criminal juries, please provide your perspective on the following topics:

Q1: Please provide your assessment of the necessity and appropriateness of each of the Article 25e(2) criteria (age, education, training, experience, length of service, and judicial temperament) for detailing court-martial members?

Q2: Please describe the unique military purpose or demographic composition that necessitates having different selection criteria than those required in federal and state court systems.

Q3: Should Service members pending investigation, disciplinary or adverse administrative action, or with a completed disciplinary or adverse administrative action, be disqualified from serving as a court-martial member? Why or why not?

Q4: Should the requirement that panel members be senior in grade and rank to the accused be eliminated?

If an enlisted accused elects to be tried by an enlisted panel, Article 25(c)(2)(B) requires at least 1/3 of the panel be enlisted.

Q5a: Is this an appropriate percentage?
Q5b: Should the accused have the option to elect a panel composed of only enlisted members?

Q6: Please describe civilian venire processes and procedure that should be incorporated into the military court-martial member selection process.

Q7: Should the military move to a randomized panel member selection process similar to the federal and state jury selection process?

Q8: Should the random selection method include an algorithm that results in a member venire that is diverse in some category or categories, such as age, grade, race, or sex.

Q9a: Should convening authorities retain courts-martial member detailing authority or should such detailing authority be transferred to a court administrator.
Q9b: Would creation of a court administrator be feasible?

Q10a: Please share any other suggestions you have for improving the panel selection process.
Q10b: Please share any considerations for the Committee to consider when making recommendations to change the selection criteria or to randomize the selection process.

Senior Enlisted Leaders
Presenter Biographies

Regimental Command Sergeant Major Michael J. Bostic, JAG Corps, United States Army

Command Sergeant Major Mike Bostic is a native of Bennettsville, South Carolina. He completed Basic Training at Fort Sill, Oklahoma, later graduated Legal Specialist AIT at Fort Jackson, SC and Airborne School at Fort Benning, GA in 1994. CSM Bostic and his wife Kristen, have two children- Madison & Gavin.

CSM Bostic has 27 years active duty service CONUS and OCONUS as an Army Paralegal in various Army Paralegal & NCO Leader positions with assignments and combat deployments to include: Legal Specialist, OSJA, Fort Carson, CO; Legal NCO, Special Operations Support Command (Airborne), Fort Bragg, North Carolina; Army Field Recruiter, Wilmington, North Carolina; Paralegal NCO, 2nd Infantry Division, Camp Casey, Korea; Senior Paralegal NCO, 16th Military Police Brigade (Airborne), Fort Bragg, North Carolina; Brigade Operational Law Team NCOIC, 16th Military Police Brigade, Baghdad, Iraq; Senior Instructor, 27D AIT, Fort Jackson, South Carolina; Course Director, 27D AIT, Fort Jackson, South Carolina; First Sergeant, E Co, 369 AG Battalion, Fort Jackson, South Carolina; Chief Paralegal NCO, U.S. Army Armor Center & Fort Knox, Fort Knox, Kentucky; Chief Paralegal NCO, 7th Army Joint Multinational Training Command, Grafenwoehr, Germany; Command Paralegal NCO, 10th Mountain Division (Light Infantry) & Fort Drum, Fort Drum, New York; Command Paralegal NCO / Sergeant Major, SJA, Combined Joint Task Force 10, Bagram, Afghanistan; Command Paralegal / Sergeant Major, United States Army Special Operations Command (Airborne), Fort Bragg, North Carolina; Command Sergeant Major, Headquarters & Special Troops Battalion, 10th Mountain Division (LI) Sustainment Brigade, Fort Drum, New York, & CSM, TJAGLCS & Commandant, TJAG NCO Academy, Charlottesville, Virgina.

Some of CSM Bostic's military and civilian education includes PLDC, BNCOC, ANCOC (Distinguished Honor Graduate), and the U.S. Army Sergeant's Major Academy Class 63. CSM Bostic has completed Battalion Pre-Command Course, Commandant’s Course, and & the Nominative SGM/Key Leader Course. He is also a certified Army Recruiter, Instructor/Writer, Master Resiliency Assist Trainer and Battle Staff NCO. CSM Bostic has a Bachelor's of Science Degree in Management from Franklin University, and a Master's Degree in Leadership Studies from the University of Texas at El Paso.

A few of CSM Bostic's awards and decorations include the Legion of Merit; the Bronze Star Medal (2nd award) Meritorious Service Medal (8th award); Army Commendation Medal (3rd award), Army Achievement Medal (3rd award) and Army Good Conduct Medal (8th award). He is authorized to wear the Gold U.S. Army Recruiter Badge with 3 sapphire stars, the U.S. Army Parachutist Badge; German Parachutist Badge and Columbian Parachutist Badge.

Chief Master Sergeant Laura Puza, JAG Corps, United States Air Force

Chief Master Sergeant Laura M. Puza is the Senior Enlisted Advisor of the Judge Advocate General Corps. In this position, she serves as the senior advisor to The Judge Advocate General (TJAG) and to senior staff on enlisted matters for paralegals within The Judge Advocate Corps worldwide. She exercises management responsibility over and serves more than 1300 Air Force active duty and Air Reserve Component paralegals. CMSgt Puza advises The Judge Advocate General on all issues regarding quality of life, morale, health and welfare as a member of the Corp's Strategic Planning Committee and the Judge Advocate General's School Advisory Board. She is the twentieth Senior Enlisted Advisor to The Judge Advocate General.

CMSgt Puza attended Basic Military Training in October 1998. She graduated from the Services Apprentice Course in February 1999 and retrained into the paralegal career field in 2005.

Master Chief Tiffany N. George, JAG Corps, United States Navy

Master Chief Legalman Tiffany N. George is assigned to Naval Legal Service Command as the first dedicated Command Senior Enlisted Leader to Commander, Naval Legal Service Command. She is a native of St. Thomas, U.S. Virgin Islands and a graduate of Charlotte Amalie High School. She earned an Associate's in Paralegal Studies and Business Administration, a Bachelor's in Business Administration with a concentration in Criminal Justice, and a Master's in Health Administration.

Master Chief George's first assignment was on board USS ESSEX (LHD 2), forward deployed in Sasebo Japan where she served an undesignated Fireman in the Auxiliaries Division. She then attended the Legalman Accession course in Newport, Rhode Island. Her first assignment as a Legalman was at Trial Service Office Southeast, Mayport, Florida as a trial paralegal and court reporter. While assigned, she was selected to serve as the senior legalman forward deployed in support of Operation Enduring Freedom at the Office for the Administrative Review of the Detention of Enemy Combatants, Guantanamo Bay, Cuba and was court reporter for the first tribunal held.

Her other shore duty assignments include tours at Naval Nuclear Power Training Command, Region Legal Service Office Japan, and Region Legal Service Office Southeast (RLSO SE) Detachment Pensacola. While serving at Region Legal Service Office Japan, she volunteered for an 8-month Individual Augmentee assignment in Afghanistan in support of Operation Enduring Freedom. Her sea duty assignments include tours onboard USS THEODORE ROOSEVELT (CVN 71) as the Legal Department Leading Chief Petty Officer where she did an around the world tour to include a deployment to the Persian Gulf in support of Operation Inherent Resolve and took part in the Navy's first ever three carrier crew/hull swap. After the swap she finished her sea duty tour onboard USS GEORGE WASHINGTON (CVN 73) and reported to her first Command Senior Enlisted Leader (CSEL) tour at Region Legal Service Office Midwest followed by a subsequent CSEL tour at RLSO SE.

Master Chief George's personal awards include the Meritorious Service Medal (two awards), Joint Service Commendation Medal, Navy and Marine Corps Commendation Medal (three awards), Joint Service Achievement Medal, Navy and Marine Corps Achievement Medal (seven awards) and various other unit awards. Master Chief George is entitled to wear the Enlisted Surface Warfare Specialist and Enlisted Aviation Warfare Specialist breast insignias.

Master Gunnery Sergeant Christopher Pere, Office of the Staff Judge Advocate to the Commandant of the Marine Corps, United States Marine Corps

Master Gunnery Sergeant Peré was born in New Orleans, Louisiana in January 1979 and enlisted into the Marine Corps Reserves in June 1997. He attended recruit training at MCRD San Diego, California and the Legal Services Specialist Course at Camp Johnson, North Carolina in January 1998.

From April 1998 – May 1999, Lance Corporal Peré was assigned to the OSJA, 4th Marine Division, Marine Forces Reserve, in New Orleans, Louisiana as a Selected Marine Corps Reservist. During this time, he was assigned to Active-Duty Special Works orders to assist the local Marine Corps Recruiting Command within RS New Orleans. He also attended Southeastern Louisiana University, in Hammond, Louisiana.

In May 1999, Lance Corporal Peré was selected to augment to the active component of the Marine Corps, and was assigned to Legal Services Support Section, 2d Force Service Support Group, Camp Lejeune, North Carolina. He obtained the ranks of Corporal and Sergeant, during this tour. In October 2003, Sergeant Peré was assigned to the 8th Marine Corps District, HQ, in New Orleans, Louisiana as the Legal Services Chief. On 29 August 2005, Hurricane Katrina made landfall in the city of New Orleans, and devastated the local area and Naval Support Activity, New Orleans. The Marines, Sailors and Civilians of the 8th Marine Corps District were then permanently relocated to Fort Worth, Texas, where the new 8th Marine Corps District was stood up. During this tour, Master Gunnery Sergeant Peré obtained the rank of Staff Sergeant. In January 2007, Staff Sergeant Peré attended Basic Recruiter Course, in San Diego, California and obtained the additional MOS of 8411. In March 2007, he was assigned to Recruiting Station Fort Worth, Recruiting Sub-Station Denton, Texas as a canvassing recruiter. Due to his exceptional success as an 8411, in August 2008, he was selected to serve as a Recruiting Sub-Station SNCOIC in Lewisville, Texas. During this tour he obtained the rank of Gunnery Sergeant. In March 2010, Gunnery Sergeant Peré was assigned to the Joint Law Center, MCAS Miramar, California, where he served as Administrative Law and Military Justice SNCOIC, and eventually Legal Services Chief. In January 2012, Gunnery Sergeant Peré was assigned to the OSJA, 3d Marine Aircraft Wing (FWD) and deployed to Operation Enduring Freedom 12.1, in Helmand Province, Afghanistan.

In October 2012, Gunnery Sergeant Peré was assigned to the OSJA, Marine Forces Reserve, in New Orleans Louisiana as the Legal Services Chief. During this tour he obtained the rank of Master Sergeant. In August 2015, Master Sergeant Peré was assigned to Headquarters, U.S. Marine Corps, Judge Advocate Division as the 4421/4422 Occupational Field Manager. In June 2018, Master Sergeant Peré was assigned to the Legal Services Support Team, Hawaii, at Marine Corps Base Hawaii, as the Legal Services Chief. During this tour he obtained the rank of Master Gunnery Sergeant. In June 2020, Master Gunnery Sergeant Peré was assigned to the Legal Services Support Section-West, Camp Pendleton, California, as the Legal Services Chief. In May 2022, Master Gunnery Sergeant Peré was selected as the 18th Legal Services Chief of the Marine Corps and reported to Headquarters Marine Corps, Judge Advocate Division, during October 2022.

Master Gunnery Sergeant Peré's personal, and notable awards include the Meritorious Service Medal (x4), Navy Commendation Medal (x2), Navy and Marine Corps Achievement Medal (x4), Afghanistan Campaign Medal and Marine Corps Recruiting Ribbon. Master Gunnery Sergeant Peré is married to the former Rebecca Cunningham, of Savannah, Georgia. They share four children together: Beau, Maelle, Angelle and Jacques.

Senior Enlisted Service Member Discussion Topics

Article 25 Criteria and Randomized Selection of Panel Members.

Background: Article 25(e)(2), UCMJ, requires a convening authority to detail members to a court-martial that are, in her opinion, best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament.

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The core qualifications to serve on a jury in the federal and state systems are minimal.
A potential juror must:

(a) be a U.S. citizen;

(b) be at least 18 years old;

(c) be a resident for 12 months;

(d) be proficient in English;

(e) have no disqualifying mental or physical condition;

(f) have no felony convictions (unless civil rights have been legally restored); and

(g) must not be pending felony charges punishable by imprisonment for more than one year.

Court-martial panel members have the following duties (effective December 2023):

(1) Determine whether guilt has been proven "based on the evidence and in accordance with the instructions of the military judge."

(2) All members have an equal voice and vote in deliberating on and deciding all matters submitted to them.

(3) No member may use rank or position to influence another member.

(4) The senior ranking member is the president of the court-martial and has two additional duties:

  (a) preside over closed sessions during deliberations, and

  (b) speak for the members when announcing decisions or requesting instructions from the military judge

Questions: From your perspective as a senior enlisted member, please consider the following:

Q1: How important are the following qualifications to be able to perform the above duties? If the qualification is important, please explain what the specific requirement should be and why.

1. An age requirement.
2. An education requirement.
3. An experience requirement.
4. A length of service requirement.
5. A judicial temperament requirement.

Q2: Should there be any other required qualifications for court-martial member?

Q3: Is there a military reason to support the requirement that a court-martial member must be senior in rank and grade to the accused?

Q4: On the subject of an enlisted member requesting enlisted panel with 1/3 enlisted members. Please review the following options and provide pros and cons for each, and please explain any differences between enlisted and officer members that might warrant a distinction:

1. Increase the minimum percentage of enlisted members (for example, 50% enlisted).
2. Provide an enlisted accused the option to request an all enlisted member panel.
3. Allow random selection of panel members without a minimum percentage of enlisted member representation.
4. Retain the current option of at least 1/3 of the panel members be enlisted.

Q5: Should diversity by race and/or gender be a requirement for court-martial panels?

Please provide suggestions to improve the selection process by ensuring race and/or gender diversity.

Q6: If court-martial panel members were selected randomly from Alpha rosters, what concerns would you have about the ability of a randomly selected member to perform court-martial duty?

Q7: If you assisted in the process for nominating potential panel members, what factors did you consider the most important for a potential member?

Q8: Please explain the impact that the panel member selection processes (filling out questionnaires), and fulfillment of panel member duties (absence from other duties, scheduling delays), have on operations?

Q9a: Please share any other suggestions you have for improving the panel selection process.

Q9b: Please share any considerations for the Committee to consider when making recommendations to change the selection criteria or to randomize the selection process.

garlan/angela burris

From: BURRIS ERIK (00127062BE)

Sent Date: Friday, April 7, 2023 12:09 AM

To: tjf47515@yahoo.com

Subject: Packing boxes

(Please share this . . . widely!)

Earlier I was packing up legal paperwork to mail out in preparation of my now expected imminent move. The task was not as simple as I thought it would be.

During the move back to my previous dorm on Tuesday my legal paperwork was thoroughly rifled through. By guards, the paralegal specifically if I were to believe her. (Law permits inspections for contraband, not reading, though . . . what guarantees? Exactly.). Apparently a couple of pages were separated out of my record of trial because they may have appeared to be personal letters. They were/are, and are not.

Letters. Statements. Delivered to the court during my sentencing. One from a demon. One from a trusting, but betrayed, angel. Then 11, now 19.

While I heard . . . ish . . . the comments during the proceedings only the final comment from that child registered with me then. Read into the record by an adult woman, that comment was that she never wanted to see or hear from me again. I did not recall the other comments that were read from that one page statement. (I was so numb from the shock of the verdict I am surprised I heard anything.)

Today, for the first time, I read them.

The demon's letter was what one would expect from a demon, or at least a person that serves the Lord of Lies.

Heartbreakingly, I read the angel's. The child's.

A letter from my eldest daughter.

In but a few moments every bit of the pain, the frustration, the anger - that obviously will forever endure, over what was done to me, what was taken from me, returned. It was as though I had exposed small, burning embers, so small as to seem nonexistent to the casual glance, to a windstorm of pure oxygen.

What was done to me! . . . Those wrongs against me pale in comparison with what was done to her; what has likely been done to my other two as well.

Two women led her to fear. Unfounded, baseless, tragic fear. She was obviously told to be afraid. Afraid of her father. A man who has only ever, and will ever, love her unconditionally. (Both women sought their own advantage and their own gain. One by telling lies and the other by using those lies.)

My heart aches knowing this. (Time does NOT heal all wounds.).

Fear. Fear based upon lies. Jesus! (. . . and I do mean Jesus.)

Fear is NOT of the Lord (nor is the hatred I hold, nor the dark desires I have for the most unspeakable revenge).

Alas, the battle continues: the Spirit compelling me to acknowledge the blood shed so that I, you, all of us, might know salvation, versus the flesh demanding that justice be done for the wrongs done to me, my family, MY DAUGHTERS.

Justice human, not divine.

His Grace versus our, trending towards disaster, works.

I acknowledge the first. Grace is truly mind-blowing. It is awe-inspiring and overwhelmingly powerful. It is beauty on an epic scale! However every fiber of my earthly being hungers for the second, i.e. works of justice by my own hands. My desires to punish evil. By myself. As I see fit.

What is the solution to this perpetual conflict? I am forever in pain. Forever frustratingly close to hopelessness. Forever angry. Constantly struggling against even the suggestion of offering to others, INCLUDING those who so wronged me, what grace gave me: forgiveness.

Forgiveness. Because of Grace. The guarantee of the victory of the Spirit over the flesh.

Not coincidentally, it is Passover. In short order: the Last Supper, the Crucifixion, the Resurrection. His sacrifice, our salvation. His Grace. Entirely undeserved by us. Entirely, freely, given by Him.

Why freely given? Because, of course, there is nothing we could ever do to merit or earn the gift. His gift of grace given, truly because of that perfect "agape" love.

Grace. Perfect love.

So, once again I find myself torn as I have been for years - heck, I think it would be fair to say that I am wounded anew. I am torn one direction because, in short, I know what God has given me, and all those who call upon Him. I know, despite all of my -in all fairness - self-righteous indignation, that I am a sinner, and at times have fallen short of the Kingdom. At times I have fallen short of my own, personally set, expectations. I am not a saint. However, I want to be an example of His gift. I want my life to be a vessel of the Spirit.

I am torn the opposite direction because I know what this world has taken from me. I want to punish injustice. I want to personally call upon the wicked and bring them to judgment. I, quite simply, want to hurt them and cause them to suffer as I have suffered . . . and then some. I would like to believe that I have a greater comprehension of right and wrong than the indifferent and/or uninformed masses. I want to use my flesh to destroy all flesh.

Spirit pulls one direction. The flesh pulls in the other. I cannot serve both. They cannot both be victorious.

I would like to feign ignorance, perhaps later ask for absolution, but that too would be a lie. A lie as wrong as those told about me. The lies that took my life, and had consequent unfortunate impacts on others. The lies that would lead to a daughter fearing her father. It would be, as one minister friend of mine once suggested, to commit the greatest of blasphemies: to call the good of God. . . evil; to twist good to evil ends.

I, therefore, cannot feign ignorance. I know the answer. I know His answer. As I would like my life to honor my earthly father and ultimately to be a beacon for my heavenly father, I MUST find a way to internalize that answer. I must find a way to forgive others as He has forgiven me. Not merely others who have vexed or harassed me, but those who truly harmed me.

Yes. The "demon." Those who enabled her. Those who aided her. All who chose, deliberately or ignorantly, lies over the truth. To pick up the cross and live as Christ requires nothing less. He loved those who killed him. So did Stephen. So did Paul.

I don't. Not now. Not yet. But perhaps one day I will get there. (I pray he forgives the hatred bubbling in my soul even now.)

I was given Grace. Accepting it, I must live it. Easier said than done.

Though the struggle continues I know the battle is won.

For He is risen.

Master Sergeant Lisa Silva, United States Air Force, Retired
Presenting

William & Donna Santucci
Free Our Warriors
5547 Mahoning Ave Ste. 173
Austintown, Ohio 44515
330-951-1438

Judicial Proceedings Panel
Defense Advisory Committee on
Investigation, Prosecution and Defense
of Sexual Assault in the Armed Forces
One Liberty Center
875 N. Randolph Street
Attn: DAC-IPAD
Suite 150
Arlington, Virginia 22203
Electronic Mail to whs.pentagon.em.mbx.dacipad@mail.mil

Re: Public Commentary Letter of Submission

Dear Members of the Panel:

We are Bill & Donna Santucci - Our son, Anthony Santucci is in his ninth year incarcerated at the United States Disciplinary Barracks ("USDB") on Fort Leavenworth, KS due to a false allegation of sexual assault followed by an unconstitutional trial and military appeal. We have exhausted his direct military appeals and have a Habeas petition pending decision before the United States Court of Appeals for the Tenth Circuit in Denver, Colorado which was heard at oral argument in September, 2021.

By way of background, Anthony enlisted in the US Army Infantry 2012 at the time that changes were made in how the Uniformed Code of Military Justice ("UCMJ") handles sexual assaults in the Armed Forces. We believe the impetus for the sexual assault revisions was noble in concept to correct for accusations having been swept under the rug in the past.

However, in trying to right these wrongs, the pendulum has swung too far the other way so that now the accused's constitutional rights and protections have been unlawfully infringed upon, with the practical effect of reversing the sacrosanct presumption of innocence until proven guilty. Our direct experience, and the experiences of other similarly situated families reveal that in many instances, to include ours, a military accused is guilty until proven innocent. This cannot stand in our system of American justice.

Our son was just 21 when a married women approached him at a bar. They bought each other drinks and danced. They were seen kissing, "dirty dancing" and at one point, she was seen grabbing his crotch. As the night wound down, she asked Anthony if they could "go back to his place and play." They drove back to his barracks in her car as Anthony had arrived at the bar with friends and had no vehicle.

No fewer than 15 points of undisputed evidence prove a consenting adult sexual encounter. Among them:

1) asking to go to his room to “play”

2) leaving her shirt on because of a C-section scar

3) At one point, they stopped having intercourse. He asked her if she wanted to continue having sex, and she said yes.

4) She kissed him goodbye (which makes no sense after a rape).

She drove herself home and once there realized that she could not have another child. (She already had four). She called 911 asking for the morning after pill. The operator kept asking if she was assault and if the perpetrator was still there. She just kept asking for the morning after pill. Finally, likely realizing that they would not send an ambulance just for the morning after pill, she said “yes and I need the morning after pill” when asked again if she was assaulted.

No Investigation was done on Anthony’s behalf, that is, no exonerating or mitigating leads were pursued. After his conviction, we found proof of multiple lies testified to by his accuser through photos at the bar two weeks after their encounter and on her Facebook page. These findings prove that the accuser lied under oath. However, these could not be entered into evidence upon his appeal as they were not part of his original court martial.

At trial, the victim and her husband testified that she was so distraught by this sexual assault that she could barely leave her house. However, we obtained pictures from the same bar where 2 weeks earlier she had met Anthony, drinking with two men who are not her husband.

Her husband testified that she could not stand to be on Ft. Polk, Louisiana and had to move back to Alabama with their four children, thus breaking up his family.

Our son, Anthony met her at the bar in July of 2013. Her Facebook page relationship status showed that she was in a relationship with a man in Alabama in September 2013 and moved in with him when she moved to Alabama in October 2013.

Had this information been presented at the court martial, maybe there would have been a different outcome. Although these things do not prove she wasn’t sexually assaulted, they do show that she and her husband lied under oath. Was she lying about her encounter with Anthony? We believe so and fully believe in Anthony’s innocence.

We are not the type of parents who believe in our children no matter what. After reading the record of trial many times, we know Anthony is innocent. If we thought he was guilty, we would know he is right where he should be. We would continue to love and support him but would not continue with the legal fight for his freedom.

Indeed, Anthony passed a post-trial polygraph with no deception noted. He had asked to take one when he was first accused, but his military attorney told him not to do so.

The courts-martial and appellate process should never have been handled by the military. The convening authority who recommended the courts martial is the same one who selects the

jury and decides posttrial clemency before appeal. The jury was not a jury of his peers. The convening authority is their direct commander. Four of the jurors had people close to them that were victims of sexual assault, three were in the same chain of command and one had the prosecutor representing him in another matter.

We believe in a civilian court, this would never be allowed.

Anthony's case is not the only one with these issues. There are many more. We know that sexual assault does happen in the military and those cases need to be prosecuted to the fullest extent of the law.

However, the changes made to the UCMJ regarding sexual assault have stripped our service members of their basic rights and has incentivized women to make false allegations.

Anthony is from a small town in Ohio. His family loves him and wants him to be home where he belongs. He grew up listening to stories by his grandfather, father, and uncles about their time in the service in Vietnam and World War II. He has wanted to be in the military since he was a small child. He was living his dream of being in the Army Airborne Infantry. He was anxious to be deployed to serve his country to the best of his ability, but unfortunately that did not happen. Despite all of this, Anthony has remained positive and focused. He is studying business and real estate and reads many self-help books. He has written two books on real estate, yet to be published, and one book on his experiences since this false accusation. He has asked us to start a non-profit organization to help bring this issue to light and help others who have been wrongfully convicted. Freeourwarriors.org

We have spent all of our savings, Anthony's savings, and sold his car to help fund his legal fight, totalling close to $200,000 and it is ongoing. We are beyond devastated. Anthony is now 31 years old. He has missed time with his family, seeing his nieces and nephew grow up and moving forward with his life. We are 68 and 64 respectively. Our time on this earth is growing short. We have already missed so much time with Anthony and it is heartbreaking to think that something will happen to one or both of us before Anthony comes home. How would you feel if this was your son?

We are asking that changes to the handling of sexual assaults in the military be fair to both the victim and accused so that justice can be appropriately served, and the constitutional rights of our service members can be preserved.

Sexual assault trials should be in a neutral court and out of the military venue. How can anyone have a fair trial where the jurors are under the command of the very officer who ordered the court martial?

We appreciate your consideration and allowing our input at the hearing to include our Opening and Reply legal briefs currently before the Tenth Circuit.

Sincerely,

Bill & Donna Santucci

Bill & Donna Santucci

Special Victims' Counsel/Victims' Legal Counsel Organizations
Presenter Biographies

Colonel Carol A. Brewer, Chief, Special Victims' Counsel Program, U.S. Army

Colonel (COL) Carol A. Brewer assumed her current duties as Chief of the U.S. Army's Special Victims' Counsel Program in July 2021. She has served for 21 years in the Army in its Judge Advocate General's Corps. She was the Staff Judge Advocate (SJA) for the 19th Expeditionary Sustainment Command, Daegu, Korea from 2019 – 2021. She served as Special Victim Prosecutor in the Military District of Washington from 2016 – 2019. COL Brewer also served as a Deputy SJA, Chief, Administrative and Civil Law, Senior Trial Defense Counsel, Brigade Judge Advocate, Chief, Operations and Training, and Trial Counsel. COL Brewer has an LL.M., Military Law from The Judge Advocate General's Legal Center & School. She earned her Juris Doctorate from Rutgers School of Law and her B.A. in Politics and Education. She completed the Army's Basic Officer Leadership Course, extensive training regarding victim behavior and litigation and the Army and Air Force Special Victims' Counsel Certification Courses, She's a member of the Pennsylvania and New Jersey Bars, admitted to practice before the U.S. Supreme Court, the Army Court of Criminal Appeals, and the New Jersey Supreme Court. He military awards include the Bronze Star, the Army's Meritorious Service Medal, the Parachutist Badge, the Air Assault Badge, and campaign medals for service in Iraq.

Captain Daniel Cimmino, Chief, Victims' Legal Counsel Program, U.S. Navy

Captain Cimmino has been the Chief, Navy Victims' Legal Counsel Program since October 2021. Prior to this position, he served in several positions within the Navy's JAG Corps including Chief of Staff, Defense Service Offices; Commanding Officer, Defense Service Office West; and Executive Assistant and Special Counsel to the General Counsel of the Department of the Navy. Captain Cimmino received his law degree from Rutgers University School of Law-Newark, and his LLM with a certificate in national security, from Georgetown University. He also received his MSM from Troy University and his MA from the Naval War College. He is admitted to practice law in New Jersey and before the Court of Appeals for the Armed Forces.

Colonel Tracy Park, Chief, Victims' Legal Counsel Program, U.S. Air Force

Colonel Tracy A. Park is the Chief, Victims' Counsel Division, Military Justice and Discipline Domain, Joint Base Andrews, Maryland. In this capacity, she is responsible for developing policies and procedures for the Victims' Counsel program, and providing professional oversight for 60 judge advocates, 52 paralegals, and one civilian appellate counsel at 49 locations worldwide. Victims' Counsel and Victims' Paralegals are detailed to represent victims of sexual assault and domestic violence crimes before military courts-martial and in administrative legal matters, and provide confidential legal advice to victims of interpersonal violence.
Colonel Park entered the Air Force in February 2004 through the Direct Appointment Program. She has served as a Staff Judge Advocate, Deputy Staff Judge Advocate, Chief Legal Advisor, and Instructor, as well as deployed to Iraq, Kuwait, and Bosnia & Herzegovina. Prior to her current position, Colonel Park was the Section Commander for the Air Force Judge Advocate General's Corps Headquarters and Field Operating Agency, supporting more than 1,200 personnel worldwide. Colonel Park is admitted to practice law in California. She received a Bachelor of Arts in English Literature from Washington University and her Juris Doctor from George Washington University Law School.

Colonel Iain D. Pedden, Chief, Victims' Legal Counsel Program, U.S. Marine Corps

Colonel Pedden currently serves as the Chief Victims' Legal Counsel (CVLC) of the Marine Corps and Officer in Charge of the Victims' Legal Counsel Organization (VLCO). Prior to serving in the Marine Corps, Col Pedden clerked in the chambers of a state court trial judge. From 2001–2003 he clerked in the Criminal Appeals Division of the Illinois Attorney General's Office drafting briefs for the Illinois and federal courts, and representing the state in collateral and clemency proceedings death penalty cases.

Colonel Pedden has served in several military justice billets related to victims and the statements they provide during courts-martial, including service as Senior Defense Counsel, Chief Trial Counsel, and Military Justice Officer. From 2014–2017 he served on the faculty of the U.S. Army Judge Advocate General's Legal Center and School as Associate Professor of Criminal Law, teaching evidence and constitutional law. He also managed the Intermediate Trial Advocacy Course, and provided both lectures and advocacy training during the Special Victims Counsel (SVC) and Child SVC certification courses. During this tour, he was certified as an SVC, Child SVC, and Victim's Legal Counsel (VLC), and was certified and sworn as a military judge.

From 2017 to 2019, Col Pedden served as Branch Head of Military Justice at Headquarters Marine Corps in the Pentagon. In that capacity, he advised the Staff Judge Advocate to the Commandant on all military justice matters, assisted in policy development, and developed and implemented a uniform training curriculum and plan for Marine judge advocates following the Military Justice Act of 2016. He went on to additional advanced education in 2019, a command tour from 2020–2022, and reported for his current duties in August 2022.

Ms. Elizabeth Marotta, Chief, Special Victims' Counsel Program, U.S. Coast Guard

Elizabeth Marotta is the Chief, Office of Member Advocacy. In this capacity, she is responsible for the Coast Guard's Special Victims' Counsel Program and the Disability Attorney function. Prior to the Coast Guard, Ms. Marotta served 25 years in the Army and retired in the rank of Colonel. While in the Army, Ms. Marotta most recently served as the Chief, Defense Appellate Division and the Program Manager, Special Victims' Counsel. She also served in numerous other position including Staff Judge Advocate, Deputy of Government Appellate Division, Chief of Justice, and Trial Counsel.

SVC/VLC Discussion Topics

I. Victim Access to Information (Section 549B of FY23 NDAA)

II. Article 25 Criteria and Randomized Selection of Panel Members

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I. Victim Access to Information (Section 549B of FY23 NDAA)

Study on the advisability of a uniform policy for sharing information with SVC/VLC

Background: In Section 549B of the National Defense Authorization Act for Fiscal Year 2023, Congress directed the DAC-IPAD to submit a report on the feasibility and advisability of establishing a uniform policy for sharing the following information with a Special Victims' Counsel, Victims' Legal Counsel, or other counsel representing a victim:

(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 and any photographs taken by the examiner during the medical-forensic exam.

(3) Any medical record of the victim that is in the possession of investigators or the Government.

Q1: What is the current practice by which you obtain the information listed in (1) – (3) above?

Q2: What stage of the process is this information important for your client representation?

Q3: What problems do you encounter with the current process for obtaining this information?

Q4: If DoD established a uniform policy for sharing this information, what would be the benefits to your clients?

Q5: If DoD established a uniform policy for sharing this information, please describe the ideal policy you would recommend.

Q6: Please provide any additional suggestions to address this issue?

II. Article 25 Criteria and Randomized Selection of Panel Members

A. Background: Article 25(e)(2), UCMJ, requires a convening authority to detail members to a court-martial that are, in her opinion, best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament.

These criteria are not further defined and have not changed since 1950, a time when members presided over courts-martial and determined an appropriate sentence. Starting in December 2023, panel members will no longer serve as the sentencing authority, except in death penalty cases. Additionally, starting in December 2024, a randomized selection process (to be determined) will be used, to the maximum extent possible, in the selection of panel members.

The core qualifications to serve on a jury in the federal and state systems are minimal.
A potential juror must:

(a) be a U.S. citizen;

(b) be at least 18 years old;

(c) be a resident for 12 months;

(d) be proficient in English;

(e) have no disqualifying mental or physical condition;

(f) have no felony convictions (unless civil rights have been legally restored); and

(g) must not be pending felony charges punishable by imprisonment for more than one year.

Court-martial panel members have the following duties (effective December 2023):

1. Determine whether guilt has been proven "based on the evidence and in accordance with the instructions of the military judge."
2. All members have an equal voice and vote in deliberating on and deciding all matters submitted to them.
3. No member may use rank or position to influence another member.
4. The senior ranking member is the president of the court-martial and has two additional duties:
    a. preside over closed sessions during deliberations, and
    b. speak for the members when announcing decisions or requesting instructions from the military judge

B. Questions

Q1: How important are the following qualifications to be able to perform the above duties? If the qualification is important, please explain what the specific requirement should be and why.

1. An age requirement.
2. An education requirement.
3. An experience requirement.
4. A length of service requirement.
5. A judicial temperament requirement.

Q2: Should there be any other required qualifications for court-martial member?

Q3: Is there a military reason to support the requirement that a court-martial member must be senior in rank and grade to the accused?

Q4: Should there be a requirement for panels to be diverse by race and/or gender?

Q5: For enlisted accused, please provide your opinion on the following options:

1. Increase the minimum percentage of enlisted members (for example, 50% enlisted).
2. Provide an enlisted accused the option to request an all enlisted member panel.
3. Allow random selection of panel members without a minimum percentage of enlisted member representation.
4. Retain the current option of at least 1/3 of the panel members be enlisted.

Q6: Should the military move to a randomized panel member selection process, similar to how federal and state jurisdictions select potential jury members?

(Federal and state jurisdictions typically use computers to randomly select potential jury members from state voter registration rolls. After the venire is chosen, the voir dire process further narrows the number of members sitting on a jury).

Q7a: Please share any other suggestions you have for improving the panel selection process.

Q7b: Please share any considerations for the Committee to consider when making recommendations to change the selection criteria or to randomize the selection process.

Civilian Advocacy Organizations (Victim Services)
Presenter Biographies

Ms. Jennifer Elmore, President & CEO, Protect Our Defenders

Mr. Ryan Guilds, Survivors United

Ryan Guilds' is Counsel at Arnold & Porter LLP, a nationally recognized Law Firm, with offices throughout the United States. His commercial practice focuses on complex products liability litigation, white collar criminal defense, and internal corporate compliance. Mr. Guilds is a recognized national victims' rights expert who represents survivors of crime in connection with the investigation and prosecution of their assailants. Under his leadership, Arnold & Porter has represented sexual assault survivors in both civilian and military proceedings pro bono for over a decade. He is on the board of the National Crime Victim Law Institute, the honorary board of Protect Our Defenders and is the former board chair of the Network for Victim Recovery of DC.

Civilian Victim's Counsel Discussion Topics

Victim Access to Information (Section 549B of FY23 NDAA)

Study on the advisability of a uniform policy for sharing information with SVC/VLC

Background: In Section 549B of the National Defense Authorization Act for Fiscal Year 2023, Congress directed the DAC-IPAD to submit a report on the feasibility and advisability of establishing a uniform policy for sharing the following information with a Special Victims' Counsel, Victims' Legal Counsel, or other counsel representing a victim:

(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 and any photographs taken by the examiner during the medical-forensic exam.

(3) Any medical record of the victim that is in the possession of investigators or the Government.

Q1: Can you please explain your main concerns around access to materials by counsel representing a victim?

Q2a: On what basis is this information not disclosed to a victim or counsel representing a victim?
Q2b: Please address any Privacy Act concerns raised in litigation on this issue.

Q3: If DoD established a uniform policy for sharing this information, what would be the benefits to your clients?

Q4: Would a change in law or in the rules for courts-martial be a more appropriate way to address the disclosure of information to victim's counsel when a case is pending trial by court-martial?

Q5: Have you had difficulty obtaining the lab results of any items collected and tested in the course of a medical-forensic exam (or SAFE)?

Q6: Please provide any additional suggestions to address this issue.

Civilian Advocacy Organizations (Diversity)
Presenter Biographies

Ms. Elisa Cardnell, Service Women's Action Network

In her position as Director of Operations for SWAN and acting as Deputy to the CEO, Elisa Cardnell advocates for military and veteran women. She started as the Director of Operations for SWAN in 2021. In this role she manages the daily operations of a national nonprofit staff, oversees the volunteer program, and is the grant writer for the organization.

Elisa Cardnell served in the Navy on active duty for five years, and in the Navy Reserves for six years. During her time in the military, she specialized in anti-submarine warfare and operational level of war planning. She served onboard USS Ramage (DDG 61) and worked on the staffs for Commander, Naval Surface Force Atlantic and Yorktown Naval Weapons station. She also provided support as a Reservist for anti-submarine theater operations for both training and real-life events. Elisa is a service-connected disabled veteran.

Ms. Cardnell taught high school math and physics while she was in the Reserves. When medical issues ended her Navy Reserves career, Elisa ran for office and started an educational non-profit, and has worked to support moms and working-class persons. Her awards include Rookie Teacher of the Year, the Reserve Officer Association Department of Texas Sea Service-Navy Outstanding Junior Officer of the Year 2015-16 and leading her team on USS Ramage to win the Bloodhound Award for excellence in anti-submarine warfare.

Elisa Cardnell is an experienced educator, military veteran, and non-profit leader and fundraiser.

Ms. Lorry Fenner, Service Women's Action Network

In 2006, Lorry Fenner retired from the Air Force after 26 years as an intelligence officer and space operations officer. She also served in academic positions and held a variety of command and staff jobs worldwide. She served on Major Command staffs, the Air Staff, the Joint Staff (J-5, Strategy Division), and the Secretary of Defense's staff. During her career, Colonel Fenner also served on the staffs of the Scowcroft Commission (NSPD-5, Comprehensive Review of Intelligence, 2001) and the 9-11 Commission (2003-2004) and as a Fellow at the Supreme Court of the United States where she won the Tom C. Clark Award (2002-2003). Twice she taught history at the U.S. Air Force Academy, where she served as the Director of Cadet Development, the Director of World History and Area Studies, and the Director of Military History. She also taught at the National War College in strategic studies, space and information operations, and Southeastern Europe/The Balkans.

After retirement, Dr. Fenner served as a Professional Staff Member for the House Armed Services Committee as the staff lead for the Oversight and Investigations Subcommittee. She continued her federal service as the Director of the Conflict Records Research Center at the National Defense University making the captured records of Saddam Hussein and al Qaeda available to researchers. Later, Dr. Fenner served as a Multi-Disciplinary Systems Engineer with the Federally Funded Research and Development Center, MITRE. In her capacity as an Intelligence Strategic Advisor for the National Security Analysis Group she provided support to the Office of the Secretary of Defense's Senior Cyber Advisor, the FBI's Cyber Policy unit, a Joint Chiefs of Staff Operations Special Program, the Office of the Under Secretary of Defense Intelligence Strategy, Policy, and Resources Division, the Deputy Director of Intelligence for Warfighter Support, and the DDI for Technical Collection and Special Programs (SIGINT and Cyber). During that time, she also served as an unpaid Visiting Senior Research Fellow with the Institute for National Strategic Studies at NDU.

Along with military and civilian awards, Lorry Fenner earned a Ph.D. in History from the University of Michigan, an M.S. in National Security Strategy from the National War College, an M.A. in Central European History from the UM, and a B.A. in Secondary Education from Arizona State University. Her publications include those on Women in the Military with Georgetown University Press and Gender Issues. Her dissertation was “Ideology and Amnesia: The Public Debate on Women in the American Military, 1940-1973.”

Ms. Rafaela Schwan, League of United Latin American Citizens

Rafaela Schwan is a member of the LULAC National Veterans Committee. Prior to her position at LULAC, she served in several management and leadership positions in nonprofit organizations such as SER Jobs for Progress National and the Society of Hispanic Professional Engineers (SHPE). Rafaela’s growth and leadership expertise is attributed to her continuous pursuits of new and unique opportunities. She was selected to be one of the prestigious; Fellows assigned to National Aeronautics and Space Administration (NASA) Headquarters, Office of Equal Opportunity Programs. She assisted with coordination of the agency’s educational outreach programs. The foundation for her passion to drive her community to higher levels was developed during her service to her country. Rafaela served 12 years in the United States Air Force and held several positions. During her time in the military, she was a member of the United States Air Force Demonstration Squadron “Thunderbirds”.

She has served as a board member for the American Indian Science and Engineering Society and as the advisor to other reputable organizations. She has served as a reviewer for NASA’s Minority University Mathematics, Science and Technology Awards for Teacher and Curriculum Enhancement Programs. She has been published in national magazines including the SHPE national magazine. She wrote the forward for the “Ay Mija, why do you want to be an engineer? book. She also has served as a speaker for many local and national functions.

Rafaela and Kevin now reside in Fort Worth, Texas. They have two child Edward and Ericka.

Civilian Advocacy Organizations Diversity & Inclusion Discussion Topics

The DAC-IPAD is concerned about diversity and inclusion in all aspects of the military justice system, both actual and perceived. The Committee is interested in your organization's advocacy, and support of service members in your constituency and your interaction with the military with a focus on investigations and courts-martial related matters.

Organizational representatives may provide brief opening remarks (5 minutes or less) and be prepared to discuss the following topics.

Q1: What is your organization's mission and goals?

Q2: What is your organization's membership and constituency specific to military (current/former)?

Q3: How does your organization define diversity; inclusion?

Q4: What has your organization's research revealed about disparities for your constituency?

Q5: How have these disparities impacted the individuals you represent?

(for any examples, unless you reference a well-known public case, please do not use names)

Q6: How have members of your constituency benefited from the work or services of your diversity and inclusion advocates?

Q7: What successful initiatives or best practices has your organization identified concerning diversity and inclusion issues?

Q8: What recommendations do you have for how can the DAC-IPAD can best identify and address diversity and inclusion issues in military justice related matters?

DoD Office of Diversity, Equity, and Inclusion
Presenter Biography

Dr. Lisa Arfaa, Director

Dr. Lisa Arfaa assumed the duties of Director of the Department of Defense (DOD) Office for Diversity, Equity, and Inclusion (ODEI) in January 2023. In this role, she is responsible for overseeing the development and promulgation of policy and procedural guidance for the Department's Military Equal Opportunity (MEO), Equal Employment Opportunity (EEO), Diversity and Inclusion (D&I), Civil Rights, and Disability EEO programs.

As Director, ODEI, Dr. Arfaa also leads development of the annual DoD DEIA Strategic Plan and works with her counterparts in the DoD 2040 Task Force (D2T) to produce and implement near-, mid-, and long-term DEIA strategies for the Department. In this capacity, she provides strategic guidance to DoD leadership; leads key initiatives; and directs transformational efforts to align DoD policies and programs pursuant to the ODEI mission. Dr. Arfaa served as the Senior Advisor to the Vice Chairman of the Joint Chiefs of Staff from January 2020 to January 2023, where she spearheaded innovative holistic approaches to human performance and worked to build a culture of excellence resulting in improved workforce readiness throughout the DoD enterprise.

Prior to joining the Department of Defense, Lisa built an extensive career in the private and non-profit sectors and Legislative Branch by improving organizational outcomes through leadership development; equality; and diversity, equity, and inclusion in the workplace. Lisa is also a seasoned strategic communicator with deep experience creating successful publicity, promotional and communications campaigns for various non-profit organizations.

Previously, she held executive leadership positions ranging from Executive Director of the Jack Welch Management Institute at Strayer University, where she implemented former General Electric CEO Jack Welch's vision to help companies transform the culture and business performance of their management teams; to President and CEO of Physicians for Peace, a 501(c)(3) global health organization committed to building sustainable health care infrastructures and systems in underserved communities around the world. Lisa served as Vice President of Advancement at the Daniel Morgan Graduate School of National Security, while also acting as the Principal of Lysi, a management and operational effectiveness firm offering solutions-based consulting and advisory services to clients. She was a founder and managing partner of fundraising firm The Potter Webster Group and formerly served as a U.S. House of Representatives and U.S. Senate congressional staff member, and as an advocate for health care issues.

Lisa received a bachelor's degree in Government from Smith College, a master's degree in Political Management from the George Washington University, and a Doctor of Education in Interdisciplinary Leadership from Creighton University. She lives in Northern Virginia with her family.

DoD Diversity, Equity, Inclusion, and Accessibility

Briefing to Defense Advisory Committee on Investigations, Prosecution, and Defense of Sexual Assault in the Armed Forces

Office for Diversity, Equity, and Inclusion (ODEI) and DoD 2040 Task Force (D2T)

June 2023

PERSONNEL AND READINESS

Agenda

Office for Diversity, Equity, and Inclusion (ODEI)

- Mapping the DEIA Environment in DoD
- ODEI Overview
- ODEI's Strategic Priorities
- DEIA Actions

DoD 2040 Task Force (D2T)

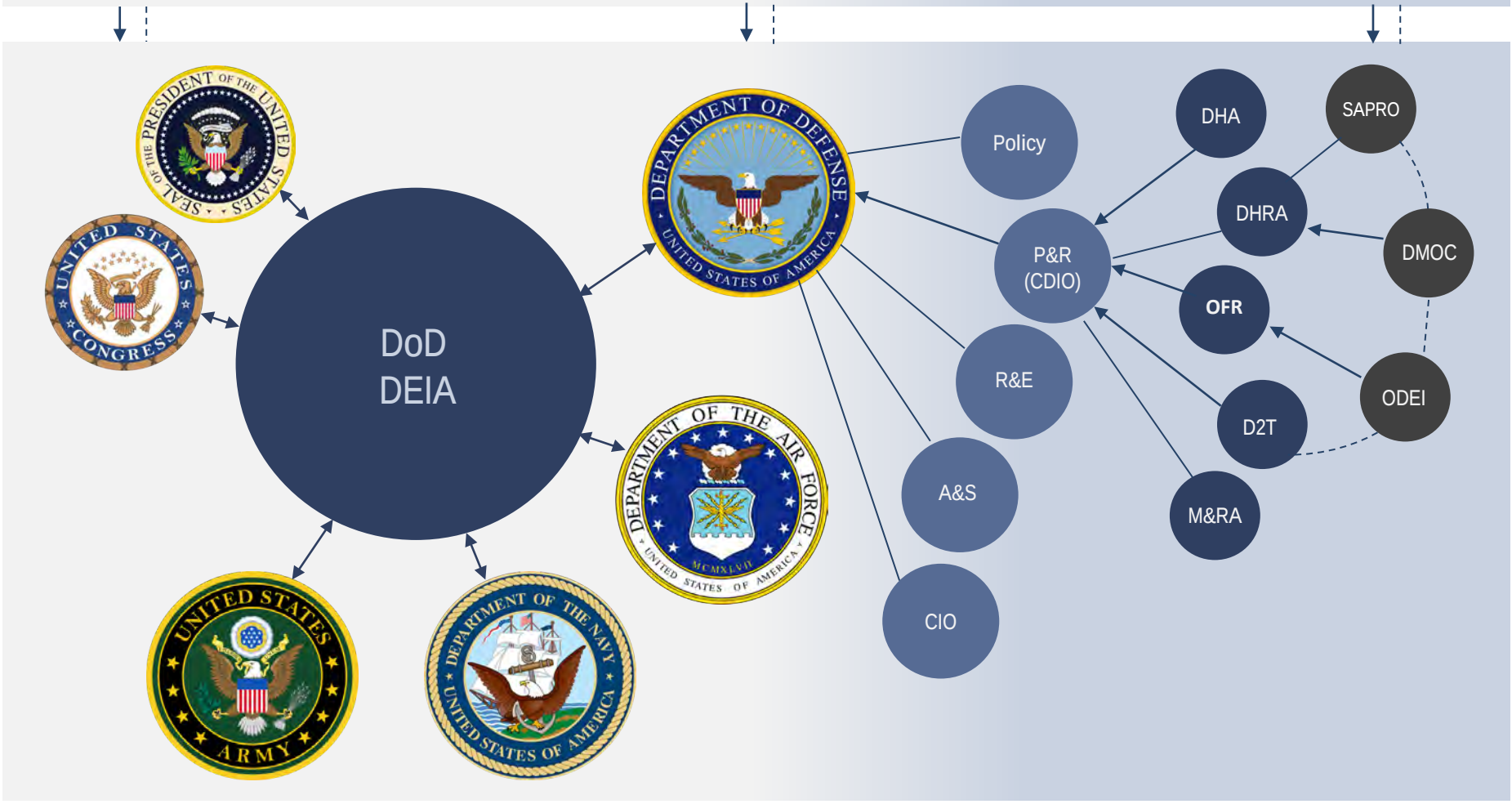
- D2T Overview
- Organizational Structure and Lines of Effort

Backup Slides

Office for Diversity, Equity, and Inclusion

Mapping the DEIA Environment in DoD

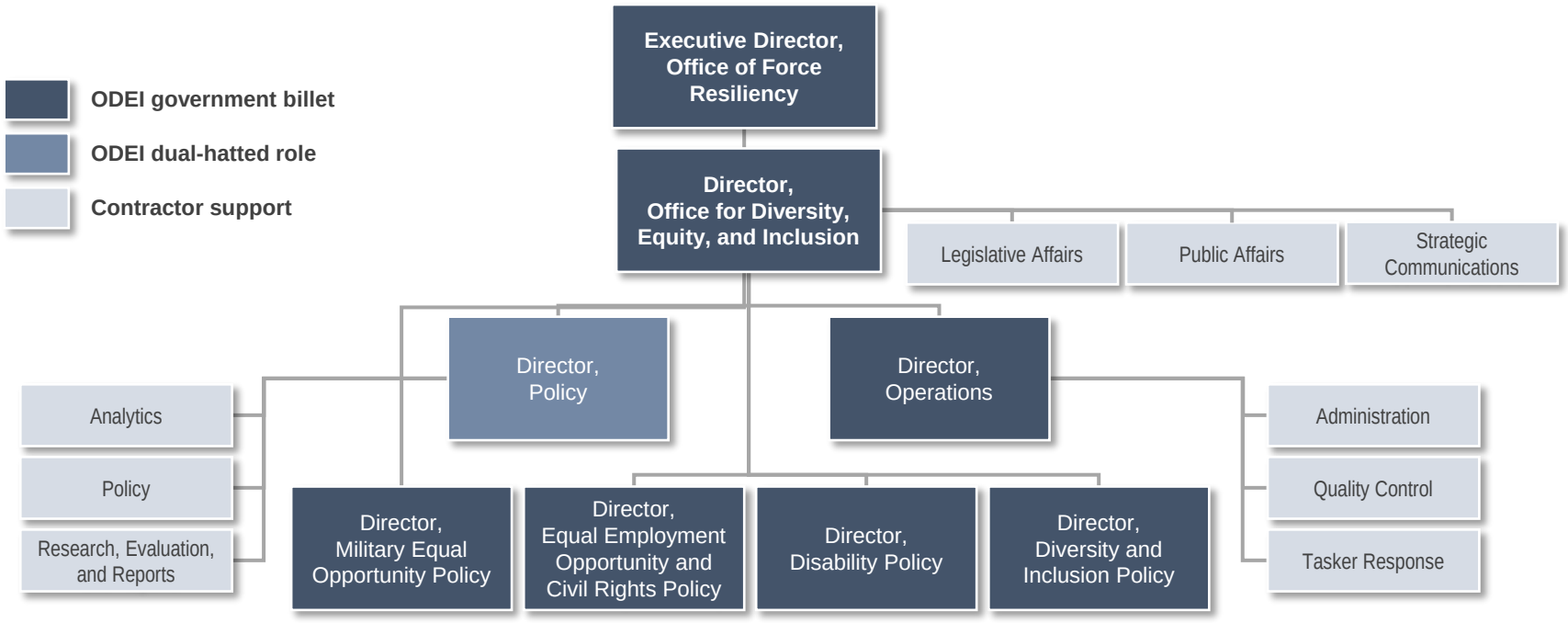
External Collaborators and Influencers (e.g., Congress, EEOC, OPM, Advisory Committees)



= Influence = Relationship = Special Collaboration

ODEI Overview

ODEI Organizational Chart



STAKEHOLDERS

OUSD P&R	OSD PA	OSD LA	OGC	SAPRO	DMOC
Military Departments	Components	WHS	Congress	OPA	M&RA

ODEI Overview

Who We Are

EEO and Civil Rights | MEO | D&I | Disability

ODEI oversees the implementation of DoD programs across the Services and Components to ensure a diverse, equitable, and inclusive Total Force.

MISSION

Formulate policies and oversee compliance to cultivate an accessible work environment and enable, foster, and sustain a Total Force culture of dignity, respect, diversity, and inclusion.

VISION

An agile and responsive organization that supports an equitable and inclusive environment that reflects the diverse nation we serve.

ODEI Overview

How We Are Funded

FY24 Presidential Budget Request topline requested $842 billion in spending, $114.7 million of which funds DoD diversity and inclusion activities.

Although .01% of the overall Defense budget, this resourcing is just a portion of our commitment to promoting and advancing DEIA, consistent with the NDAA and Executive Orders. Further, this small investment pays big dividends: growing our talent, improving innovation and mission effectiveness, and ensuring accountable leadership.

Distributed across the three Military Departments and OSD (via the Office for Diversity Equity, and Inclusion and the Defense Management Operations Center), DoD's investments in our people include:

Equal Opportunity Employment Programs

Complies with existing laws to ensure all Service members and civilian employees, regardless of background, are treated with dignity and respect by promoting an environment that prohibits discriminatory behaviors—including sexual harassment.

Diversity and Inclusion (D&I) Programs

Promote a diverse DoD workforce with an inclusive culture built on dignity and respect to further our strategic vision for D&I as a unifying core value and factor of readiness.

Disability/Reasonable Accommodation Programs

Ensures consistent implementation of disability civil rights laws to eliminate technological, architectural, and programmatic barriers and affirmatively advance equal opportunity for individuals with disabilities.

ODEI Overview

What We Do

ODEI consists of four portfolios that develop policy, provide guidance, and oversee compliance to ensure effective and consistent implementation of diversity, equity, and inclusion programs and services across DoD:

- **Military Equal Opportunity**
- **Equal Employment Opportunity and Civil Rights**
- **Disability**
- **Diversity and Inclusion**

Portfolio activities are guided by six cross-cutting focus areas supporting the Office of the Under Secretary of Defense for Personnel and Readiness vision of a DoD that is enabled by data dominance, strategically ready, globally relevant, and flexibly sustainable:

Policy, Guidance, and Compliance: Develop policies and oversee compliance within DoD to promote a diverse, equitable, and inclusive mission-ready Total Force.

Integrated Analytical Capability: Create a data dominant ODEI organization and provide analytical support through the integration of Advanced Analytics (Advana).

Research: Ensure policies are data-driven in development and oversight, leveraging best practices in the field and comprehensive data analytics to target efforts, determine effectiveness of initiatives, and ensure compliance.

Reporting: Provide enterprise-wide reports on progress of policies and initiatives and assessment of effectiveness towards overarching mission. Ensure transparency and accountability of policy compliance.

Operational Efficiency: Mature ODEI's strategic operational framework and enhance/leverage relationships with key partner organizations for efficient mission execution.

Strategic Communications and Collaboration: Implement a robust strategic communications framework to ensure accurate, pertinent information is shared across the organization and with key partners and stakeholders.

ODEI Overview

Equal Employment Opportunity (EEO) & Civil Rights

Purpose

Ensure DoD abides by EEO laws and Title VII of the Civil Rights Act of 1964, thereby allowing DoD civilian employees to work in an environment free from discrimination based on race, color, religion, sex, age, national origin, and disability.

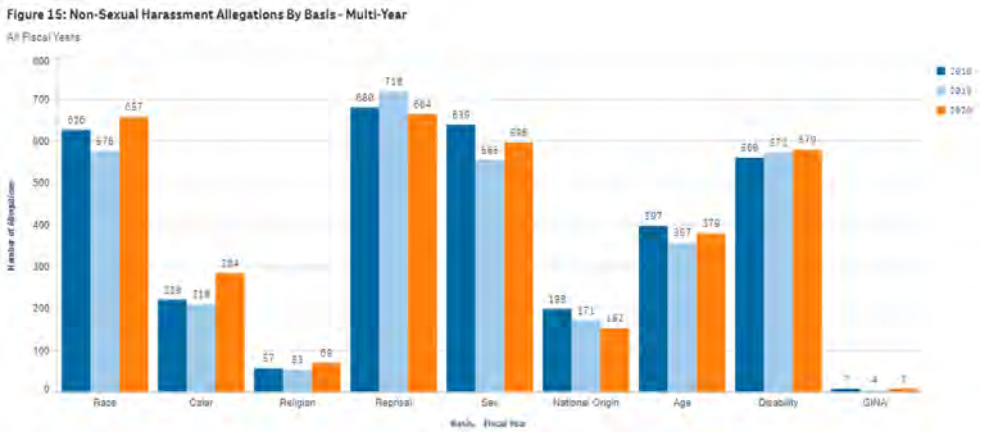
Key Issues

- Discrimination
- Harassment
- Civil rights

Key Activities

- Develops and maintains EEO and Civil Rights policies.
- Provides oversight, guidance, and compliance reviews for DoD Component EEO and Civil Rights programs and policies.
- Collects, assesses, and analyzes information/data on EEO complaints and surveyed workplace behaviors.

Advana Dashboard that Tracks Form 462 EEO Complaints



How We Measure Progress

- **Discrimination complaints.** Using agency-level Form 462 data, ODEI monitors the number of discrimination complaints across the Department and tracks trends from year to year.
- **Prevalence of EEO issues.** Workplace Gender Relations and Defense Organizational Climate Surveys measure the prevalence of EEO issues, such as racial/ethnic and gender discrimination, sexual harassment, and related contextual issues that increase or decrease the risk of these behaviors.

ODEI Overview

Military Equal Opportunity (MEO)

Purpose

Ensure Service members are treated with dignity and respect by promoting an environment that prohibits discrimination based on race, color, national origin, religion, sex (including pregnancy), gender identity, or sexual orientation.[1]

Key Issues

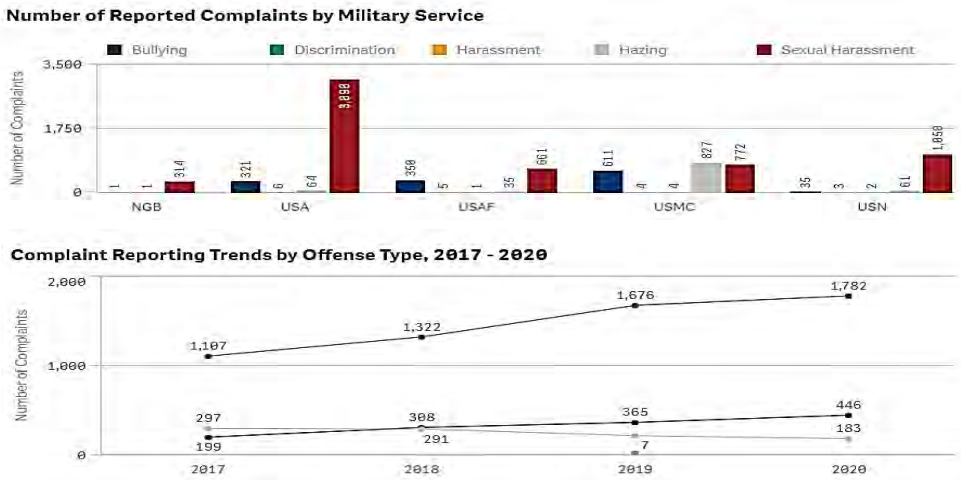
- Racial, ethnic, and gender discrimination
- Demeaning behaviors, such as harassment, hazing, and bullying

Key Activities

- Develops and maintains MEO policy.
- Provides oversight, guidance, and compliance reviews for DoD Component MEO programs and policies.
- Collects, assesses, and analyzes information/data on MEO complaints and surveyed workplace behaviors.

1. DoDI 1350.02, September 4, 2020

Advana Dashboards that Track MEO Complaints



How We Measure Progress

- **Official reports.** Dashboard containing complaints of prohibited behavior, to include hazing, bullying, sexual harassment, discrimination, and harassment.
- **Prevalence of MEO issues.** Workplace Equal Opportunity, Workplace Gender Relations, and Defense Equal Opportunity Climate Surveys measure prevalence of MEO issues, such as racial/ethnic discrimination, gender discrimination, and sexual harassment and related contextual issues that increase or decrease the risk of these behaviors.

ODEI Overview

Diversity and Inclusion

Purpose

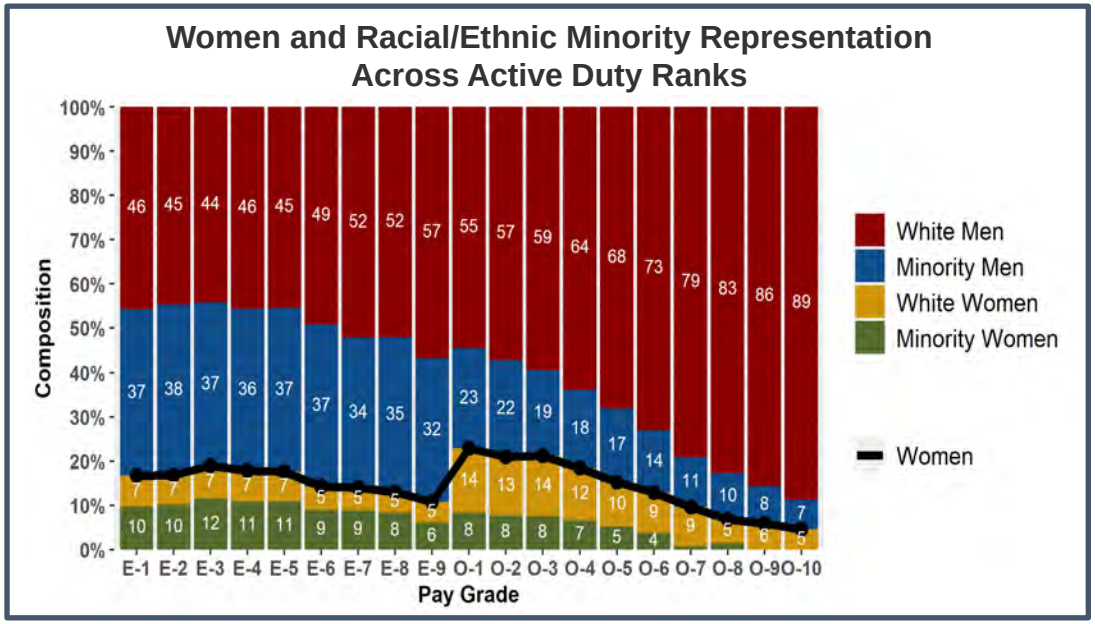
Enhance diversity and inclusion programs, policies, and environmental operating structures across DoD to optimize each person's ability to achieve the mission.

Key Issues

- Environmental barriers
- Transparency of promotion criteria and board selection processes
- Representation of minorities in senior ranks
- Inclusive culture
- Diversity and inclusion infrastructure (e.g., people, technology, structures)

Key Activities

- Develops and maintains diversity and inclusion policy and plans.
- Provides oversight, guidance, and compliance reviews for DoD diversity and inclusion programs and policies.



How We Measure Progress

- **Racial, ethnic, and gender representation.** Data from Defense Manpower Data Center and other sources track racial, ethnic, and gender representation across the DoD workforce to ensure the Department is developing a Total Force reflective of the nation it serves.
- **Workplace climate.** Federal Employee Viewpoint Survey (civilian) and Defense Equal Opportunity Climate Survey (military and civilian) provide data on workplace climate for the Total Force (i.e., employee perceptions of inclusivity, engagement, and job satisfaction).

ODEI Overview

Disability

Purpose

Ensure consistent implementation of disability rights laws to eliminate barriers and affirmatively advance equal opportunity for individuals with disabilities.

Key Issues

- Equal access to DoD, programs, activities, facilities, and information technology
- Disability discrimination
- DoD reputation as a model employer for individuals with disabilities

Advana Dashboards that Track Disability Employment

Key Activities

- Advances Military Departments' and Components' compliance with disability rights laws through collaboration and partnership with DoD and external working groups and enforcement agencies.
- Provides oversight, guidance, and compliance reviews for DoD Components on disability rights and non-discrimination laws to ensure compliance with the Rehabilitation Act and Architectural Barriers Act.
- Promotes policy development and compliance through affirmatively advancing promising and exemplary practices.

How We Measure Progress

- **Disability employment.** A dashboard utilizes civilian personnel data from the Defense Manpower Data Center to monitor employment of Individuals with Disabilities (IWD) and Individuals with Targeted Disabilities (IWTD) as a Department and in meeting three goals:
  1. 12% of the permanent civilian workforce represent IWD and 2% IWTD
  2. 12% of the GS-11 to SES (or equivalent) grade level cluster represent IWD and 2% IWTD
  3. 12% of the GS-01 to GS-10 (or equivalent) grade level cluster represent IWD and 2% IWTD

ODEI's Strategic Priorities

Strategic – Align DEIA with the National Defense Strategy (Deterring, Enduring, and Innovative Advantages); develop strategic guidance to proactively support DEIA engagements and recommendations across the Department

Communications – Evolve DEIA narrative and expand DEIA network across the Department, the interagency, and external experts

Research – Invest in research for a data-driven approach to DEIA

Unrestricted – Ensure accessibility and opportunity for all members of the Total Force

Meaningful – Drive meaningful employee engagement and belonging

ODEI's Strategic Priorities

DoD DEIA Strategic Plan

Section 4(b) of E.O. 14035, *Diversity, Equity, Inclusion, and Accessibility in the Federal Workforce*, requires DoD to:

- Prepare a DEIA Strategic Plan which identifies **actions to advance** DEIA in the workforce and workplace culture.
- Remove any **potential barriers** to DEIA in the workforce.
- Submit an **Annual DEIA Strategic Plan Status Report** outlining progress on first year priorities to the DEIA Initiative in March 2023.
- Update its strategic plan on an **annual basis** (next update due March 2023).

STATUS

- ✓ DoD DEIA Strategic Plan FY2022-2023 published to public-facing DoD website in October 2022
- Ongoing: Working with responsible offices to gather inputs for the Annual Report aligned to the plan's priority actions and measures

ODEI's Strategic Priorities

DEIA Strategic Plan (Cont'd)

DoD DEIA Strategic Plan FY2022 – 2023 Goals

1. Enhanced Global Joint Warfighter Capability to Address Emerging Security Challenges
2. Culture of Organizational Resiliency
3. Expansion of Equity and Equality
4. Workforce Inclusivity
5. Commitment to Accessibility

CONSIDERATIONS

- The DEIA Strategic Plan is a foundational, living document that will be updated annually or as needed to reflect the Department's DEIA priorities.
- The current plan serves as a high-level overview that will become more comprehensive as DEIA efforts mature.
- The current plan is designed to align with templates and requirements provided by the White House.
- DoD is considering the design for future strategic plan goals and priorities

ODEI's Strategic Priorities

Strategic Mission Connections

An organizational culture that embraces DEIA is an important capability that provides **strategic advantage**.

Diverse backgrounds, skillsets, and experiences contribute to the **innovative thought, creative adaptation, and cultural understanding necessary to successfully operate in today's complex, asymmetric environments**.

With recruiting and retention challenges shaped by a competitive labor market and decreasing propensity to serve, **it is more important than ever to attract and retain a wide range of skilled candidates**.

We persist in drawing upon the widest possible set of backgrounds, talents, and skills to **maximize our warfighting capability, deter threats and challenges, and take advantage of new opportunities**–strengthening the readiness of the Total Force.

Decades of lessons learned from doctrine, research, and global operations identify the **mission-centric capabilities** inherent in diverse and inclusive organizations.

2022 National Defense Strategy		DEIA Strategy for Enduring Advantages
Build enduring advantages	→	**Strategic** – DEIA management has a compounding effect on the Department; ensuring DEIA principals are infused to support all DoD individuals, and thus the teams and units they compose, will ultimately support the mission
Develop, combine, and coordinate our strengths to maximum effect	→	**Communications** – Evolve DEIA narrative to directly correspond to DoD mission across DoD and other agencies
Prioritize our people and promote cohesion	→	**Meaningful** – Develop leaders and supervisors who understand the mission imperative of DEIA; inspire meaningful employee engagement and belonging
Attract, promote, and retain a workforce with the skills and abilities needed to drive innovative solutions and creatively solve national security challenges in a complex global environment	→	**Research** – Invest in an expanded data-driven, evidence-based approach to further explore DEIA as a mission-imperative capability
Broaden our recruitment pool to reflect the U.S., including historically marginalized communities	→	**Unrestricted** – Ensure accessibility and opportunity for all members and potential recruits of the Total Force

DEIA Maturity Model

Foundational Capacity

Focused on **complying** with non-discrimination legislation and regulatory requirements.

Advancing Outcomes

DEIA initiatives yielding **improved results and outcomes** driven by dedicated resources, strategic planning, goal setting and evaluation. Agency practices **promote the values of DEIA**, but DEIA may not yet be integrated across Agency mission and strategic planning.

Leading & Sustaining

DEIA is an **integral part** of overall Agency mission, vision, values, strategy, policies, and practices. **Systematic implementation** of DEIA driven through goal setting, data driven analysis, and continuous improvement. Agency undertakes **structural reforms** of policies and practices to mitigate barriers, if any.

ODEI's Recent Accomplishments

Policy Achievements

Successfully **implemented anti-harassment programs** within all DoD Components and contributed to Harassment Prevention Strategy 2.0.

Achieved 100-percent compliant anti-harassment policies across DoD as of December 2022.

Updated DoDIs 1020.03 and 1350.02 to align command climate assessments under DoDI 6400.11.

Drafted new Combatant Command Policy: "Responsibility for Equal Employment Opportunity Complaints Arising in Combatant Command Areas of Responsibility" and DoD EO Policy Statement (pending final approval and release).

Developing a **formalized reasonable accommodations policy (DoDI 1020.ep) to meet important DoD/Administration priorities**, ensure compliance with Federal law, and enhance DoD's ability to take care of our people and promote the health of the Total Force.

Drafted DoDI 1020.dd to replace DoDD 1020.01, which incorporates changes in law, refers to people with disabilities (vs handicaps), and **reflects updates in equal opportunity regulations implemented since the Directive was last updated 30+ years ago.**

ODEI's Recent Accomplishments

Advancements in DEIA Research and Analytics

Research

Completed

- OPA: Service Academy Gender Relations Survey (Apr 2023)
- IDA: Evaluation of Barriers to Minority Participation in Certain Units of the Armed Forces (Mar 2023)
- Internal: Officer Retention and Promotion Barrier Analysis Study (Oct 2022)
- OPA: Workplace and Gender Relations Survey of Military Members (Sep 2022)
- CNA: Exploring Racial, Ethnic, and Gender Disparities in the Military Justice System and How to Use Administrative Data to Measure and Interpret Racial, Ethnic, and Gender Disparities in Military Justice Outcomes (Jul 2022)

In Progress

- CNA: Recruiting, Retaining, and Promoting Servicemembers who Identify as Hispanic or Latino/Latina (Aug 2023)
- Internal: Enlisted Retention and Promotion Barrier Analysis Study (Dec 2023)
- OPA: Armed Forces Workplace and Equal Opportunity Survey (Dec 2023)
- OPA: Department of Defense Civilian Employee Workplace and Gender Relations Survey (Aug 2023)
- CNA: Developing an Evidence-Based Framework to Understand and Address Racial/Ethnic Violent Extremism
- RAND: Optimization of Harassment Response for Service Members (IRC Tier 1 Recommendation C1)

Future

- Root Causes and Solutions to Military Justice Disparities
- Designing war game mapped to NDS to study how diverse and inclusive teams operate differently than homogenous ones

Independent Review Commission on Sexual Assault in the Military

Underway

- Tier 1 Recommendation 1.2 and FY 2022 NDAA, Section 543
- Tier 1 Recommendation 3.3.c: 'Cyber Harassment Report' - Hold members accountable for Cyber Harassment

Internal Review Team on Racial Disparities in the Investigative and Military Justice Systems

Underway

- Revised memorandum is with DSD

Analytic Enhancements

Hazing Prevalence in the Military

Collaborating with OPA on how to better measure hazing prevalence to address the GAO recommendation to evaluate the prevalence of hazing and expand on the FY 2022 NDAA requirement to provide a status of DoD's efforts to evaluate the prevalence of hazing and bullying.

EEO / MEO Data

Developing a strategy to establish a Department-wide MEO/EEO data collection and reporting to accurately measure and statistically assess the progress and effectiveness of DoD policies and programs and fulfill DoD's reporting requirements pertaining to discrimination, harassment, sexual harassment, and related problematic behaviors.

DEIA Actions

Current and Ongoing Efforts

FOCUS AREA	OUTCOMES	CURRENT AND ONGOING EFFORTS
Strategic Plan	Guiding of DoD's DEIA strategy and compliance with Executive Order 14035	▪ Published 2022 Annual DEIA Strategic Plan ▪ Crafting goals and objectives for 2022-2023 DEIA Strategic Plan ▪ Services are developing their own DEIA Strategic Plans
Connecting DEIA to Mission	Enterprise-wide, innovative approach to advancing DEIA as an integral part of DoD's security mission	▪ Implemented E.O. 14035 to establish the position of Chief Diversity and Inclusion Officer (CDIO) ▪ Established the DoD 2040 Task Force (D2T) ▪ Analyzing implications of DEIA for the DoD mission and the workforce; compiling findings and recommendations in D2T's Risk Report
Data Capability	Advanced analytics to synthesize DEIA data across the Department for data-informed decision making and program/initiative evaluation	▪ Leveraged Advana as the centralized DEIA analytics platform ▪ Finalized the Disability Compliance Dashboard ▪ Built out force composition (including diversity) metrics ▪ Created a predictive capability to trend current and future force-wide demographics ▪ Standardizing DoD discrimination and harassment reporting requirements
Partnerships & Collaboration	Enduring and strategic partnerships with internal and external organizations with DEIA equities and broadened DoD reach to underserved/underrepresented communities	▪ Hosted three *Taking the Pentagon to the People* events and 6 HBCU/MSI Presidential Roundtables (100+ schools) ▪ Hosted P&R Employee Resource Group (ERG) Round Table; developing ERG operational guidance ▪ Announced and currently guiding the creation of the first university affiliated research center (UARC) associated with and led by an HBCU ▪ Developing leadership learning objectives focused on unit cohesion and team effectiveness

DEIA Actions

Current and Ongoing Efforts (cont'd)

FOCUS AREA	OUTCOMES	CURRENT AND ONGOING EFFORTS
Equity Action Plan	Execution of the DoD Equity Action Plan (EAP) to provide equitable access to DoD programs and services	▪ Published the 2022 DoD EAP ▪ Preparing a DoD EAP Progress Report for the Deputy Secretary of Defense ▪ Developing a response to E.O. 14091
Prioritizing Our People	Identification of priorities, promising practices, challenges, barriers, and opportunities to be addressed/leveraged through additional policy or other interventions	▪ Completed two studies on potential racial disparities in the military justice system ▪ Finishing two studies examining barriers and opportunities for racial/ethnic minorities and women throughout the military personnel lifecycle ▪ Monitoring the Department's emerging workplace climate challenges through enhanced Command Climate Assessment ▪ Increasing support services/assistance available to Service members who submit harassment complaints ▪ Per previous administrations, implementing outstanding MLDC recommendations, D&I Board recommendations, D&I Immediate Actions, GAO, DoD and related IG recommendations
	Dedicated resources, services, policies and programs to support service members and their families	▪ Conducting a series of four-month-long talent management "sprints" focusing on key military and civilian lifecycles to create opportunities across DoD ▪ Signed the Taking Care of Our Service Members and Families memo, announcing immediate and long-term actions to help strengthen the economic security and stability of Service members and their families

DEIA Actions

Future Efforts

- Reexamine talent management strategies and practices to improve mapping of diverse skills and experiences to mission requirements
- Recruit from the broadest possible pool of the U.S. population to ensure that our warfighters have the depth of experience, expertise, and education necessary to succeed in a transnational environment.
- Develop, maintain, and champion a dignified, respectful, and safe workplace that strives to empower its workforce, removes barriers, and creates an inclusive and fair environment that connects people with technologies, innovations, and the support necessary to flourish
- Foster a more diverse and accessible force, ensuring equitable policies and processes, and building inclusive teams and leaders – matching the dynamic diversity of its people to its mission
- Develop innovative approaches to continue attracting, developing, and retaining skilled and committed Service members and civilian personnel, and enabling them to work together to overcome challenges
- Expand and revise plans, including the DEIA Strategic Plan, Equity Action Plan, progress reports, and implementation plans to ensure sustainability and mutual support across external and internal stakeholders
- Expand partnerships via Military Serving Institutions—including Historically Black Colleges and Universities—and ERGs to increase exposure to DoD employment, research, fellowship, internship, and grant opportunities

DoD 2040 Task Force

DEIA and the DoD Mission

Organizational Effectiveness

A recent RAND study noted highly integrated and diverse teams produce positive operational impacts, including exchange of a wider range of information and generation of original ideas through different communication styles.

Innovation

A 2020 analysis of team performance in the Marine Corps' 2016 Ground Combat Element Integrated Task Force found that women's contributions enhanced the performance of coed teams on more complex infantry tasks compared to all-male teams.

Unit Cohesion

Research by RAND suggests that the degree to which excluded groups are perceived as competent and accepted within newly integrated teams is an important mediator for the relationship between diversity and unit cohesion. Another study found several diversity characteristics to be statistically significant primary contributors to team task cohesion.

Conflict Decision-Making

Mixed-methods analysis of conventional warfare found that pre-war inequality among ethnic groups impacts how armies perform on the battlefield; higher inequality leads to poorer battlefield performance.

Conflict Resolution & Stability

An analysis of peacekeeping data from UN missions in Lebanon, Mali, and the Central African Republic found an increased number of different nationalities, at the ground and leadership levels amongst both military and civilian personnel, leads to peacekeeping effectiveness.

DoD 2040 Task Force

Cross-departmental task force established to advance DEIA across the Department by:

Bridging the gap between the advancement of DEIA and the DoD mission to provide the forces needed to deter war and ensure the nation's security.

Engaging executive, cross-department leadership to champion DEIA beyond the manpower and personnel space.

Embedding DEIA within and across core DoD strategy/operational documents.

Strengthening lines of communication across Office of the Secretary of Defense and Services on DEIA and talent management.

Producing immediate actions while enabling longer-term enduring changes.

Organizational Structure and Lines of Effort

Executive Lead
Chair, USD(P&R)/CDIO

Executive Steering Committee
USD(P), USD(A&S), USD(I&S), ASD (SO/LIC), Military Department Under Secretaries, Service and NGB Vice Chiefs, Director of the Joint Staff

DEIA Advisors
ODEI, DMOC, MilDep, Service, JS, and Component DEIA SMEs

LOE 1 Security, Strategy, & Plans OUSD(P&R)	LOE 2 Talent Management OUSD(P&R)	LOE 3 Education and Training OUSD(P&R)	LOE 4 External Equity OUSD(A&S)
Integrate	Advance	Integrate	Advance
DEIA within and across core functional areas and key organizational pillars central to the DoD mission	DEIA across careers from entry level to senior leadership to map talent to security challenges	DEIA into education and training to ensure leaders have tools needed to master the operational environment	equity across the Total Force and in DoD programs and services that reach the American people

DoD Office of Diversity, Equity, and Inclusion Discussion Topics

The DAC-IPAD is concerned about diversity, equity, and inclusion in all aspects of the military justice system, both actual and perceived. As the DAC-IPAD studies military justice matters related to the investigation, prosecution, and defense of sexual assault in the armed forces, the Committee is interested in the Department's efforts to develop and execute policies that support diversity, equity, and inclusion of active duty service members.

Please provide brief opening remarks and be prepared to discuss the following topics.

Q1: What is your office's mission and goals?

Q2: How does your office define diversity; equity; inclusion?

Q3: What has your office's research revealed about DEI for active duty members?

(please cover specific groups; promotion rates; leadership positions; specialty branches)

Q4: How would you respond to the comment: "we promote the best qualified people, regardless of race or gender"?

Q5: What policies, programs, initiatives, or best practices has your office implemented to enhance DEI for active duty service members?

Q6: Have any DEI studies looked at the military justice system?
If so, please discuss. If not, are there any plans to?

Q7: What recommendations do you have for how can the DAC-IPAD can best identify and address diversity and inclusion issues in military justice related matters?

2022 Portrait of Women in the Services

WWII

During World War II, all military branches enlisted women in their ranks for the first time in history; nearly 350,000 American women served in uniform.

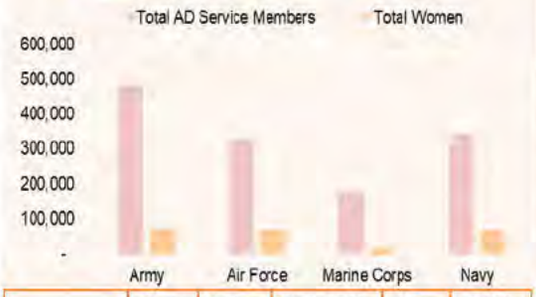
2008

Ann E. Dunwoody became the first female battalion commander for the 82nd Airborne Division in 1992 and the first female general at Fort Bragg in 2000. In 2008, she became the first woman in the U.S. Armed Forces to be promoted to four-star general.

2021

Midshipman First Class Sydney Barber is the first Black woman to serve as brigade commander at the U.S. Naval Academy. She holds the highest student leadership position at the academy.

About 1 in every 6 Active Duty (AD) Service Members (SM) is a Woman



	Army	Air Force	Marine Corps	Navy	Total
Total AD SM	482,007	328,888	179,678	343,223	1,333,796
Total Women	74,820	69,991	16,301	70,252	231,364

About 1 in every 4 Reserve Members (RM) is a Woman

	Army	Air Force	Marine Corps	Navy	Total
Total RM	184,358	70,570	35,240	57,632	347,800
Total Women	46,440	19,719	1,518	14,360	82,037

About 1 in every 5 National Guard (NG) Members is a Woman

	Army	Air Force	Total
Total NG Members	337,525	108,483	446,008
Total Women	64,179	23,694	87,873

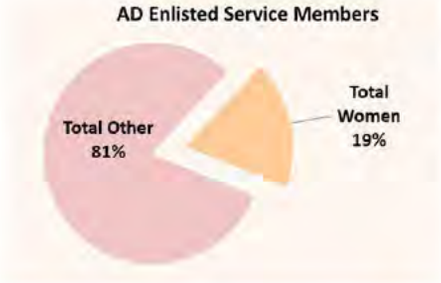
Top Five Career Fields of Women in the Services

Women Enlisted Members

- Functional Support and Administration
- Electrical/Mechanical Equipment Repairers
- Service and Supply Handlers
- Communication and Intelligence Specialists
- Health Care Officers

Women Commissioned Officers

- Health Care Officers
- Supply, Procurement, and Allied Officers
- Tactical Officers
- Engineering and Maintenance Officers
- Administrators



Department of Defense Office for Diversity, Equity, and Inclusion
Fiscal Year 2021 Military Data Source: ADVANA and Defense Manpower Data Center

2022 Portrait of Black / African American Service Members

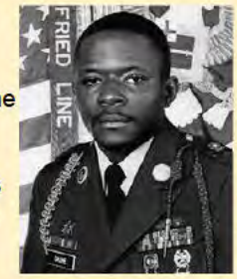
WWI

During World War I, the 369th Infantry Regiment, known as the "Harlem Hellfighters," served on the front lines for 191 days, which was longer than any other American unit.

1970

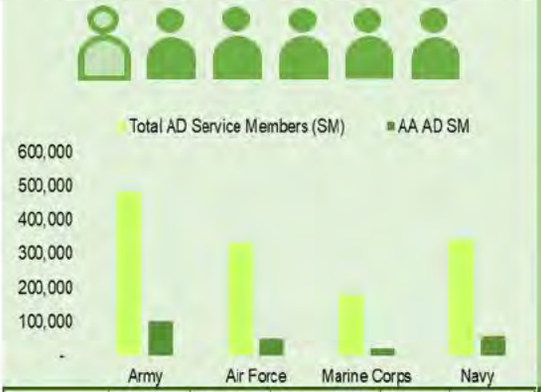
General Benjamin O. Davis Jr., founder and commander of the Tuskegee Airmen, was the first Black / African American general in the Air Force. General Davis Jr. retired as a lieutenant general.

2021



Sergeant First Class Alwyn C. Cashe was posthumously awarded the Medal of Honor, becoming the first Black recipient of the award since 9/11.

About 1 in every 6 Active Duty (AD) Service Members is Black / African American (AA)



	Army	Air Force	Marine Corps	Navy	Total
Total AD SM	482,007	328,888	179,678	343,223	1,333,796
AA AD SM	102,130	48,753	18,746	60,224	229,853

About 1 in every 5 Reservists is Black / African American

	Army	Air Force	Marine Corps	Navy	Total
Total RM	185,125	70,447	35,845	57,689	349,106
AA RM	40,629	12,203	3,479	9,102	65,413

About 1 in every 7 National Guard (NG) Members is Black / African American

	Army	Air Force	Total
Total NG Members	337,171	108,147	445,318
AA NG Members	53,747	9,916	63,663

Top Five Career Fields Representative of AD Black / African American Service Members

Enlisted Members

- Functional Support and Administration
- Infantry, Gun Crews, and Seamanship
- Electrical/ Mechanical Equipment Repairers
- Communication and Intelligence Specialists
- Service and Supply Handlers

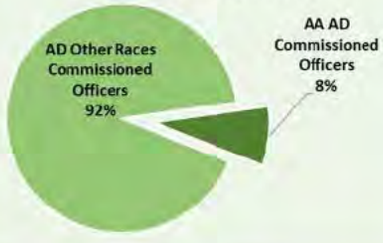
Commissioned Officers

- Tactical Officers
- Engineering and Maintenance Officers
- Health Care Officers
- Administrators
- Supply, Procurement, and Allied Officers

AD Enlisted Service Members

AD Warrant Officers

AD Commissioned Officers



Department of Defense Office for Diversity, Equity, and Inclusion
2021 Military Data Source: ADVANA and Defense Manpower Data Center

2022 | Portrait of Hispanic Service Members

Captain Kathlene Contres

Contres was the highest-ranking female Hispanic American officer in the U.S. Navy until her retirement and the first Hispanic American female officer to command the Defense Equal Opportunity Management Institute.

Rear Admiral Yvette Davids

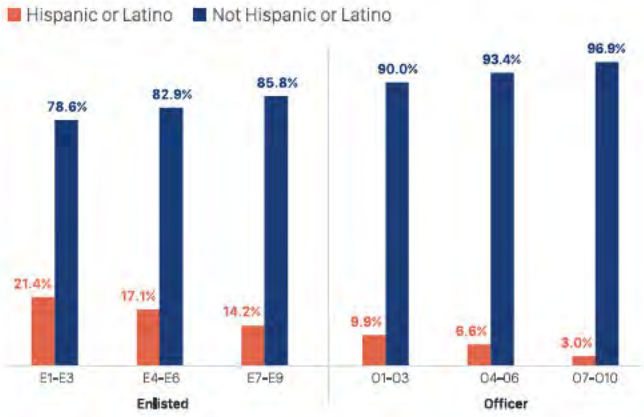
Davids is a U.S. Navy Rear Admiral and the first Hispanic American woman to command a Navy warship, the frigate USS Curts (FFG-38). Davids assumed duties as Chief of Staff, U.S. Southern Command in June 2020.

Major Oscar Francis Perdomo

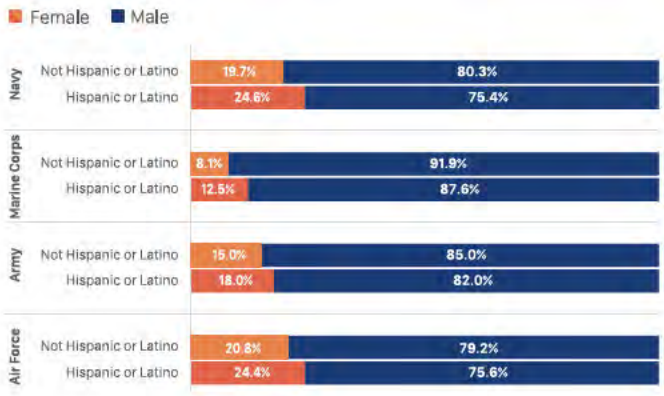
Perdomo was a U.S. Air Force officer and fighter pilot who was the last "ace in a day" for the United States in World War II. He was awarded the Distinguished Service Cross and the Air Medal with one oak leaf cluster.

10-Year change in Hispanic Active Duty (AD), National Guard (NG), and Reserve representation

Hispanic representation by pay grade



Hispanic representation by gender and Service



Department of Defense Office for Diversity, Equity, and Inclusion - Military Data Source: Defense Manpower Data Center (2022)

2022 Portrait of Asian American and Pacific Islander Service Members

1942

In 1942, Susan Anh Cuddy became the first Asian American woman to enlist in the U.S. Navy. She served as a member of Women Accepted for Volunteer Emergency Service, or WAVES. Later, she became the Navy's first female gunnery officer.

1984

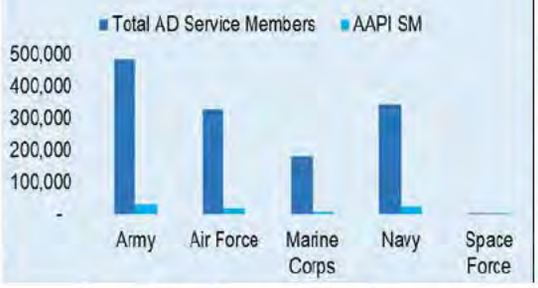
Major General John Liu Fugh became the first Chinese American general officer in the U.S. Army and served for 32 years as a military lawyer. He created the Army's first environmental law division and the procurement fraud division. He retired as The Judge Advocate General, the top lawyer for the Army.

2013

Admiral Harry B. Harris Jr. is the first Asian American to achieve 4-star rank in the U.S. Navy. After retiring from the Navy, Harris served as U.S. Ambassador to South Korea.

About 6 in every 100 Active Duty (AD) Service Members (SM) are Asian American and Pacific Islander (AAPI)

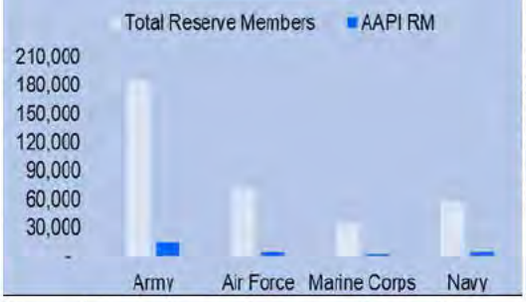
6%



	Army	Air Force	Marine Corps	Navy	Space Force	Total
Total AD SM	482,007	328,888	179,678	343,223	1,643	1,335,439
AAPI SM	30,569	18,499	7,780	24,480	131	81,459

About 7 in every 100 Reserve Members (RM) are AAPI

7%



	Army	Air Force	Marine Corps	Navy	Total
Total RM	185,125	70,447	35,845	57,689	349,106
AAPI RM	15,155	4,153	1,931	4,181	25,420

About 4 in every 100 National Guard (NG) Members are AAPI

4%

	Army	Air Force	Total
Total NG Members	337,171	108,147	445,318
AAPI NG Members	14,667	4,818	19,485

Top Five Career Fields of AAPI in the Services

AAPI Enlisted Members

- Electrical/ Mechanical Equipment Repairers
- Infantry, Gun Crews, and Seamanship
- Functional Support and Administration
- Service and Supply Handlers
- Health Care Specialists

AAPI Commissioned Officers

- Engineering and Maintenance Officers
- Supply, Procurement, and Allied Officers
- Health Care Officers
- Tactical Officers
- Non-Occupational (e.g. student, trainee)

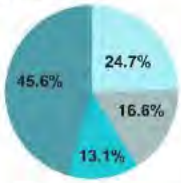
Department of Defense Office for Diversity, Equity, and Inclusion
Fiscal Year 2021 Military Data Source: ADVANA and Defense Manpower Data Center

2021 Portrait of American Indian / Alaska Native Service Members

1872 — World War II — 2021

Representation of American Indian/Alaska Native (AI/AN) Active Duty Population by Service

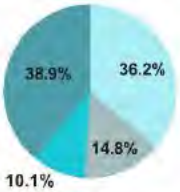
Total AI/AN: 14,365
Army: 3,549
Air Force: 2,381
Marine Corps: 1,886
Navy: 6,549



**Out of 100-percent total AI/AN Active Duty population, percentage of AI/AN by Service

Representation of AI/AN Reserve Population by Service

Total AI/AN: 3,101
Army: 1,123
Air Force: 460
Marine Corps: 312
Navy: 1,206



**Out of 100 - percent total AI/AN Reserve population, percentage of AI/AN by Service

Representation of AI/AN National Guard Population by Service

Total AI/AN: 2,891
Army: 2,199
Air Force: 692

**Out of 100 - percent total AI/AN National Guard population, percentage of AI/AN by Service

William Alchesay received the Medal of Honor, the military's highest award, for his brave actions during the Indian Wars. He persuaded Geronimo to surrender calmly to the United States government. He joined Indian Scouts at Camp Verde and held the rank of Sergeant, while working under General George Crook.

Master Sergeant Woodrow Keeble, veteran of World War II and the Korean War, became one of the most esteemed soldiers in the history of North Dakota. He was born on the Sisseton-Wahpeton Sioux Reservation, joined the National Guard in 1942, and fought on Guadalcanal during WWII. In 2008, he became the first full-blooded Sioux Indian to receive the Medal of Honor, presented posthumously.

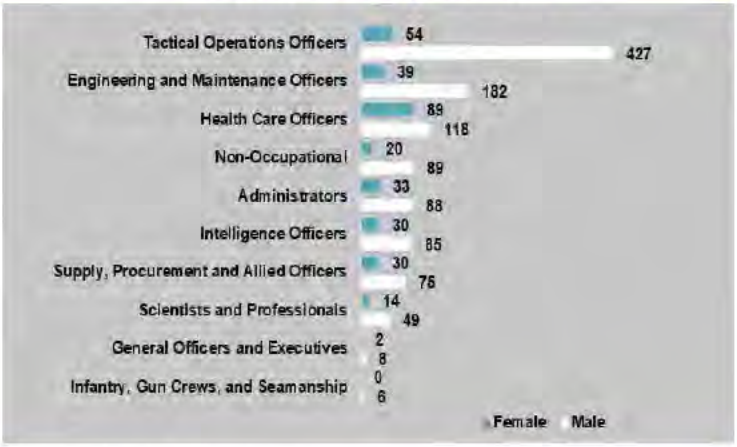
Major Vivien Redeye, Army Reserve physician, was a member of Urban Augmentation Medical Task Force 7458. She is one of the expert Army Reserve Medical Soldiers that completed the mission to provide Department of Defense support to the hospitals in response to the COVID-19 pandemic.

3.4% The percent increase of American Indian/Alaska Native senior enlisted members (E7 - E9) from Fiscal Year (FY) 2019 to FY 2020.

29% The percent of American Indian/Alaska Native commissioned Officers who earned a master s degree in FY2020.

Enlisted Occupations

Officer Occupations



Department of Defense Office for Diversity, Equity, and Inclusion
Fiscal Year 2020 Military Data Source: Defense Manpower Data Center

Mr. Jerry Clifft
Presenting

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Judicial Proceedings Panel
Defense Advisory Committee on
Investigation, Prosecution & Defense
Of Sexual Assault in the Armed Forces
One Liberty Center
875 N. Randolph Street, Suite 150
Arlington, VA. 22203
Attn: DAC-IPAD
Electronic Mail to: whs.pentagon.em.mbx.dacipad@mail.mil

RE: Public Commentary Letter of Submission

Dear Members of the Panel:

I am Holly Yeager, the mother of TSgt Robert Andrew Condon, who has been incarcerated at the USDB, Fort Leavenworth, KS since December 2014. He was arrest on October 10, 2013 and has not been free since that date, 9 ½ years. We currently have a brief in with the Supreme Court, addressing the issue that the prosecution provided the defense appellate counsel with a fraudulent record of trial, thereby denying my son of a fair appellate review. I am happy to send a copy of this brief, upon your request.

My son joined the Air Force shortly after 911. He had served for over 10 years without a hint of disciplinary problems nor criminal behavior. This is verified by the fact that he was vetted extensively for his position as an OSI Special Agent and passed without issue. He deployed 6 times, receiving commendations for his service in Iraq (where his action helped save the lives of his fellow soldiers) and Afghanistan (where his efforts helped capture 78 Taliban Fighters). I can send copies of these awards and many more, upon your request.

While in the Air Force he received his Associate Degree and Bachelor's Degree with Honors in Criminal Justice. He also attended the

Federal Law Enforcement Training Center in Georgia and became a federal agent, then working as an OSI Special Agent with the Air Force.
Since he arrival at the USDB, he has also saved the life of another inmate who was attempting suicide by hanging – saving the Army a great deal of trouble if the inmate had been successful.
While inmates saving a life receive time off their sentences, my son has received no such consideration. I have documentation of this event.

I, am not a mother who believes her child no matter what. Rather I am a retired police officer and I question everything. What I believe is the evidence; and what I have found during this ordeal is that if you are willing to cheat, you can make anyone guilty of anything. All of the following occurred during my son's case:

a. Destruction of evidence, while in the possession of the prosecution. Blackberry phone was destroyed containing 55 days of communication with alleged victim. Valuable evidence to support Robert Condon's innocence.
b. Exculpatory evidence was hidden from defense, [redacted] (original alleged victim) felony record, although expressly requested by defense.
c. Conflict of interest when prosecution hired defense (already hired) electronic expert, however, hiring defense expert's boss. Example: (Supporting evidence of Robert Condon's IM's communication could not be found by either expert but was found by his Aunt with a cell phone in 5 minutes, however, too late for cross examination of witness).
d. OSI Agents bullied, manipulated and threatened witnesses and victims into complying with prosecutorial mission. ([redacted] 3-page letter and testimony).
e. Investigator [redacted] had alleged victim change her typewritten statement to
make it into a criminal offense, crossed out and written in (Condon found innocent
of these charges) but she was used to call him a "serial rapist" and to place him in
pre-trial confinement. (Can provide a copy of this statement).
f. 28 pieces of exculpatory evidence were ignored by SA [redacted] and SA [redacted] and
had to be collected by my family for the defense.

g. Condon was denied basic legal representation – intentionally and repeatedly geographically separated from his legal counsel.
h. Violation of "Speedy Trial" rights, held 344 days before trial. Harshly treated – 71 days of solitary confinement in a civilian facility later charged with starving prisoners, TSgt. Condon lost 40 lbs.
i. Denied basic legal tenet of "innocent until proven guilty", when convening authority threw out 9 drug cases that TSgt. Condon had discovered and charged – over 120 days before he, himself, was charged with any crime. Unlawful command influence was prevalent in this case.

j. After all the appeals were completed, I asked the defense to send all documents in my son's case to me – it was at this time we discovered that the record that [redacted] was using and the one my son had (the correct one) were different. This denied my son a fair appellate review – all of that money, time and effort were wasted. Our hope in the American system of justice, was destroyed.

Robert A. Condon has written a book, The Invisible Casualty, available as an e-book for $2.99 or I can send a copy to the Panel upon request.

All of this was done in TSgt. Condon's case. I believe that sexual assault crimes should
be prosecuted, however, I also believe when a woman states that she is not a victim that should be respected. When a woman states that she was 100% willing every time, that the investigator shouldn't continue to harangue the woman until she becomes a victim to support a lie. When a woman is used by the military to make a case, against her will, she should not then be forced out of the military – all of this has happened in this case.

The women involved in this case were women he dated over time, had a previously consensual sexual relationship with. These are not strangers, he did not crawl through someone's bedroom window and attack someone in their sleep, snatch a woman off the street, use date rape drugs. My son was given 30 years as his sentence, people get less time when someone is murdered, no one in this case even broke a fingernail. He joined the Air Force at 19 years of age, served with honor for 10 years. He was arrested at age 29 when one woman told a lie. He is now 39 years old, missing his entire 30's incarcerated, valuable years in which one marries, has children, cements their careers.

His entire education has been lost, because he will never again be able to work in Criminal Justice. He has begun writing as a future career, but this would benefit greatly if he were home and able to move through process to publication on his own – rather than depending on family and friends. All you have to do is to look at his military career to see that he will be successful in his future.

I agree with [redacted], we have paid over $200,000 in legal costs, support of my son in other ways, travel to see him. While the government seems to have an unlimited amount of money, this type of costs can bankrupt the working American family.

In addition, his father a Viet Nam veteran, is gravely ill and in and out of hospitals monthly. His only living grandparent is about to turn 90 years old. Both of these men have continued to support him emotionally and financially over the last 10 years; but time is growing short for either of them to see him home and free; maybe to ever see him again.

Please try to understand what this type of injustice does to the American family.

Respectfully,

Holly Pflager-Yeager

Robert Condon

Everything related to this case started from the initial accusation of one woman, [redacted]. They had met on line and dated for just a couple of months, engaging in consensual sexual relations several times. On 9/3/13 she came to his home for a date and confronted him about seeing other women, he had never committed to exclusivity. They argued and the relationship ended. She was upset and he told her to stay if she wanted, not wanting her to drive upset and he went to bed. No sexual relations occurred on this evening, none; however, she did crawl into his bed maybe attempting to gather physical evidence for her false claim of sexual assault.

NOTE: Originally, it was thought that [redacted] made this claim because she was angry at the relationship ending. Later it was found that she had been hiding a felony conviction from the Air Force and that was soon to be revealed when they did special clearance for her career field; this would remove her from the Air Force. In fact, her enlistment was fraudulent because of this hidden criminal record. By claiming sexual assault, she would be paid as a victim, should she be dismissed from the Air Force. Maybe she feared that as an OSI Special Agent, he would find her out?

She then went to a civilian hospital, not liking whatever they told her; she left there and went to a military hospital. She made a restricted report; which she made unrestricted the following day, when she didn't show up for work, was in trouble with her command and needed an excuse.

She made a claim of a sexual assault attack that was extremely violent: lifted off her feet by her neck, choked feeling her eyes bulge out, struck in the face until she tasted blood, vaginal rape, oral rape, paddled and bitten on her shoulder until she screamed in pain. She claimed to have bruises from this encounter. Yet the SANE nurse's paperwork as well as her testimony in court shows not one injury to her body. (Testimony can be copied and sent upon request). The original interviewing Special Agent [redacted], also testified that [redacted] could see no bruising. There is no sperm found. This bite on her shoulder was not found and a subdermal camera was brought in from Washington DC to look beneath the surface of the skin, no injuries found – but the camera was working as it picked up imprints of [redacted] tattoos beneath the skin.

In addition, there were only two people present that night to testify to what happened, it's a he said/she said situation. However, Robert Condon,

lived in a townhouse and the walls between them were thin. The next-door neighbor stated that they were so thin that when he used the bathroom downstairs she could clearly hear what was happening. She testified that previous tenants in that townhouse had domestics/fights/parties and she could always hear those.

On the night in question, she was at home, but heard nothing. No screams, no fight. In addition, one dog gave a little bark when Monica left near 2 am – but none of her 5 dogs made a sound during this alleged attack happening nearby. This further confirms in her mind that no fight occurred; because this is something they would have alerted on if heard.

[redacted] HAD LIED ABOUT EVERYTHING. Yet due to the political pressure of Congress on military commanders, the investigators pressed on. Just 3 months before this investigation, Air Force General Welsh told the Senate Armed Forces Committee in an interview that Air Force Investigators were "not permitted to unfound an allegation of sexual assault after an investigation".

At this point the investigator's collected Robert Condon's phone and began contacting every woman he knew, asking if they had been sexual assaulted by him in the past. ALL stated that if they were involved with Robert Condon in that way, it was consensual and signed statements to that fact.

But Special Agent [redacted] didn't care what these women stated, he needed to make Monica's lie creditable and to that end he was in pursuit of another victim:

1. A. [redacted], was used by the government as their second victim. She repeatedly stated that she was not a victim, she had called him to her home in the middle of the night, she was upset that he left due to allergies to her cat (who is angry when the rapist leaves). And, she asked him to be her designated driver the following night, obviously trusting him.

B. They had dated on and off for 9 months. They had taken trips to New Orleans, LA and St. Augustine, FL together. After one of these trips she presented him with a picture of the two of them in a frame, with I Love You on the frame. She also placed 4 post-it notes on his desk with various declarations of love (we have those). They continued to have a "bucket list" of

other things they wanted to do together, including visiting Six Flags in the near future.

C. They worked together on the drug cases and Agent [redacted] took two cases to trial while Robert Condon was deployed to Africa, getting guilty convictions. However, the convening authority dismissed those cases as well – after making [redacted] into a victim. (Did all of this happen because they arrested VIP's son for dealing drugs?)

D. She stated in a 3-page letter to the convening authority that she didn't want to testify in this case. She stated in the letter as well as on the stand that she was bullied and manipulated and her own wrong doing was held over her head forcing her to testify against her will. She stated on the stand, under oath, she was "ordered to testify".

E. [redacted] was an [redacted] who had completed the [redacted], shouldn't she know if she were a victim?
Robert Condon was found guilty of her charges, all the while both [redacted] and Robert stated no crime occurred.

F. [redacted] did everything she could to tell the truth during this trial, however, it was not allowed. Today, she is out of the military, this case destroying her career as well as Robert Condon's. She fears retaliation from the Air Force and the government if she continues to say anything to help Robert Condon.

2. A. [redacted] stated to SA [redacted] that she was 100% willing every time and if she asked him to stop he would do so a split second later. She was "in love" with Robert and stated so on the stand during Article 32. SA [redacted] talked until he convinced her that she was a victim.

B. [redacted] agreed to write a statement for him. They met later at Starbucks and he read her statement and told her that it didn't describe a crime, so she crossed out what he instructed and hand wrote in something that would be used to charge Robert Condon with a rape.

C. If SA [redacted] did any investigation on [redacted], he could have easily found that she was not a victim – as did the defense for trial. Robert Condon was found **NOT GUILTY** of these charges but [redacted] was used to place him in pre-trial confinement making it impossible for him to assist in his own

defense; and as the third victim to repeatedly call him a "serial rapist" in court.

D. Robert Condon's defense attorney found text message from [redacted] to a friend the following day: [redacted] "I made bad [redacted] bear decisions last night". Friend: "Rob decisions?" Jenna: "yes, LOL it was a fun night". This to describe the night used by OSI as a rape.

IT SHOULD BE NOTED THAT BOTH [redacted] AND [redacted] NEVER CAME FORTH ON THEIR OWN, BOTH WERE SOUGHT OUT BY OSI AGENTS AND MADE INTO VICTIMS. BOTH HAD NEVER GONE TO LAW ENFORCEMENT AFTER ANY ENCOUNTER WITH ROBERT CONDON AND BOTH WERE STILL COMMUNICATING WITH HIM AND DATING HIM.

The prosecutor, Captain [redacted] also continued to attempt to find another victim and repeatedly pursued women in that attempt. Eventually she subpoenaed these two women as propensity witnesses:

1. [redacted] (The Judge did not allow [redacted] as a victim or propensity witness, she didn't even have the correct name – calling him [redacted]. Robert Condon's last name is tattooed on his chest, it would be impossible for her not to know his name if they had an intimate relationship.)

2. [redacted] (She is Robert Condon's ex-wife, she signed an affidavit during his vetting process to become an OSI Special Agent, stating nothing violent or sexually violent had ever occurred between them. Yet she was interviewed 5 times, maintaining this, until interview telephonically by Captain [redacted]. She was not a charged victim but used as a propensity witness. [redacted] was former Air Force, we know that [redacted] was bullied and threatened, maybe [redacted] was also?

Both of these women were used by the Air Force as propensity witnesses after being interviewed telephonically by Captain [redacted], without recordings of the interviews and without witnesses to the interview. Both had previously claimed only a consensual relationship with Robert Condon.

ALL FOUR WOMEN ABOVE CLAIMED EVERYTHING BETWEEN ROBERT CONDON AND THEM HAD BEEN CONSENSUAL AND WERE PURSUED RELENTLESSLY TO EVENTUALLY BECOME VICTIMS OR PROPENSITY WITNESSES.

M.R.E. 412 (The rape shield act) was meant to protect victims from being shamed during court martials. Here's how it was used to handicap Condon's defense and unfairly tilt the scales in
the favor of the government.

OSI interviewed [redacted]: In this interview [redacted] told OSI agents that on the night in question, at the Red Door Saloon, [redacted] told him that she planned on taking Rob home and having sex with him that night. [redacted] also stated that [redacted] was not intoxicated.
This statement is made even more exculpatory in light of the fact that [redacted] didn't even think she was a victim. The Judge used M.R.E. 412 to prevent the jury from hearing this testimony.

In [redacted] unsworn statement she stated that she was so terrified after the alleged assault that she could not even leave her dorm room. The prosecution stated that this behavior was evidence that an assault occurred even though they knew it most likely wasn't true. The prosecution knew that [redacted] was actually looking for sexual partners on Craig's list within 24 hours of the alleged assault, taking sexually suggestive pictures of herself and sending them to several other men. Yet the Judge again used M.R.E. 412 to prevent this exculpatory evidence from being disclosed in court.

Robert Condon

Everything related to this case started from the initial accusation of one woman who was eventually shown to be a liar by the physical evidence. Her name is [redacted] and she and Robert Condon had been seeing each other for a couple of months. Condon and his family seem to think that what happened next happened because she found out that he was also seeing other women and got angry. But regardless of why it happened, here is what we know for sure. She stayed over at Condon's house one night and left at 2 am. Now after she left, she went to the hospital to report that she was sexually assaulted. While she was there the nurses did a physical exam and documented it. Now a day later when she was being interviewed by Air Force OSI investigators about her accusation, she said a couple of things. First she said that Condon held her off the ground by the throat with one hand and smacked her in the face repeatedly with the other hand until her lip busted and that she could taste the blood in her mouth. The other thing she said is that he beat her on the butt and thighs with a paddle until bruises developed and that she was actually able to watch the bruises develop while he was beating her. After the interview, these OSI investigators went to the hospital to verify what she said. They pulled the records of the physical exam done by the nurses and what they found is that mere hours after the alleged assault, nurses documented that [redacted] did not have a single injury on her body. Her lip wasn't busted, she did not have bruises on her thighs like she told investigators. In other words, she was lying. Now at this point, you would think the Air Force would drop this investigation and allow Rob to go back to his life. Unfortunately, that is not what happened. 3 months before this investigation started, Air Force General Welsh told the Senate Armed Forces Committee in an interview that Air Force investigators were "not permitted to unfound an

allegation of sexual assault after an investigation." So consistent with that statement from their superior, the Air Force investigators pressed on with the mission. In a stubborn attempt to continue trying to validate [redacted] claims, these investigators flew in a subdermal camera from Washington that is capable of seeing below the surface of the skin. They knew this camera was working because it could see the subdermal imprints of [redacted] tattoos beneath the skin. Yet when they used it on her, not a single instance of trauma was found. The injuries she claimed she had simply did not exist. Instead of dropping the charges, however, the Air Force placed Condon under investigation. They confiscated his phone and contacted virtually every woman he had ever had a relationship with. They eventually called in and interviewed 4 different women. During these interviews, every single one of these women signed statements that everything that ever occurred between them and Condon had been 100% consensual. Sounds like a pretty open and shut case, right? Well, here is what happened next.

2 of these 4 women, [redacted] and [redacted] gave statements that hurt the Air Force's investigation and exonerated Rob. [redacted] was specifically asked in her interview if Condon had ever engaged in sexually deviant behavior and she said "no." [redacted] said in her statement "everything was consensual. When I asked him to stop, he would." The OSI agent who interviewed [redacted] even wrote in his investigatory notes "subject never sexually assaulted witness." Now apparently the Air Force didn't like this because both of these women later received phone calls from an OSI captain. Phone calls where nobody knows what was said because by this captain's own admission in the record of trial, the phone calls were intentionally not recorded and the only other witness was kicked out of the room ostensibly to prevent them

from hearing the conversation. Yet for some strange reason, after the call both women now signed new statements alleging sexual assault.

Another one of these 4 women, [redacted], also gave a statement that damaged the Air Force's investigation. When asked about her sexual relationship with Condon, she said, "she was 100% willing every time" "when she said no to sex acts he respected" "he never took advantage of her drunken state" and "he never forced himself on her." This same agent met [redacted] at Starbucks and interviewed her again. Just like before, nobody knows what it was that the agent said to [redacted] during this second interview. Yet once again, after the interview, [redacted] signed a new sworn statement that was used to accuse Condon of sexual assault. Having this 3rd statement allowed the Air Force to classify Condon as a serial rapist and place him in pre-trial confinement for 371 days, 71 of which were in solitary confinement where he lost over 40 lbs. due to stress and poor living conditions. Nobody during the course of this entire investigation ever thought to ask why these women changed their statements.

The fourth woman OSI agents called in for an interview was an [redacted]. The Air Force alleged that while they were dating, a few of the times that they had sex she was under the influence of Alcohol and therefore could not consent. However, during the interview she told the investigators that she was responsible for her sexual encounters with Condon and that she did not think she was a victim. She later wrote that she was bullied by one of the agents who told her she was a victim of sexual assault and snatched her phone out of her hand

and started taking photographs of text messages between her and Condon. When she expressed her discomfort with this, the agent started criticizing her. After the interview was over, the agents allowed her to keep her phone. But about a month later, when [redacted] decided to stop cooperating with this investigation, these agents threatened her with criminal charges for not turning over the phone that they allowed her to keep in the first place. They then told her that they could issue her a grant of immunity for not turning over evidence if she agreed to a second interview. [redacted] job in the Air Force was also as an [redacted]. Specifically, one who specialized in sex crimes. She had just graduated '[redacted] course." Yet despite the fact that she had been extensively trained to identify victims of sexual assault, she continued to insist she was not one. During Condon's Article 32 pre-trial hearing, an OSI agent was asked "would it be accurate to say at first that [redacted] did not feel she had been assaulted." The agent then responded by saying "I still don't think she feels like she was assaulted." So if [redacted], who was specifically trained to identify sexual assault victims isn't the one who decided if she was a victim, then who did? Then on April 28, 2014, [redacted] wrote a formal letter to the convening authority. In this letter, she talked about how she had been bullied and manipulated by these OSI agents and she asked that for the sake of her mental health that she be left out of the investigation and subsequent trial. Despite all that, the convening authority ordered [redacted] to testify as a victim against her will. Being active duty Air Force, she had to comply with that order or face disciplinary action.

At the court martial, 2 of these women were used as propensity witnesses, 3 of them were charged victims and Rob was found guilty of 2 of the women, the initial complaintant, [redacted]

and [redacted]. He was found not guilty of the charges related to the other women. He received 30 years in prison. After the court martial was over, the judge said "in the Air Force, everybody is concerned about sexual assault as they should be. We can't figure out how to get consent these days. **And it's not enough to get consent to have sex.**" That statement tells you everything you need to know about this trial. What type of legal standard is created when your judge thinks it's not enough to get consent to have sex?

And if everything I've told you isn't bad enough, things get even more astonishing when you begin to look at what took place during the actual court martial.

So, [redacted] it turns out, thought Condon was a completely different person. She was interviewed in a court closed session and the judge ended up having to throw out all of the charges relating to her because he was convinced, she had him confused with someone else. She got his name wrong; she got his physical description wrong, she got his branch of service wrong, she thought he was a marine, she described him as having no tattoos. Condon has full chest and half sleeve tattoos. [redacted] testified she thought his name was Robert [redacted] A subsequent investigation done by a private investigator hired by Condon's family, revealed that a man named Robert [redacted] who fit [redacted] description lived very close to [redacted]. Air Force investigators never made any attempt to verify if this was the guy [redacted] was talking about. Instead, they showed up to court with an accuser who had Condon confused with someone else entirely and the judge had to throw the charges out.

[redacted] who is the one who changed her initial statement of consent after an agent met her at Starbucks for second interview it turns out that when she actually testified at the court martial under oath her testimony was 100% consistent with her initial statement of consent and it completely contradicted the second statement that claimed sexual assault. At the court martial, [redacted] testified that “any time I asked him to stop, he would stop a split second later.” During the investigation, Condon’s defense attorney got ahold of text messages between [redacted] and one of her friends where she talked about how much fun she had with Rob on the night in question. Here are the texts:

[redacted]: “I made bad Jenna bear decisions last night.”

Friend: “Rob decisions?”

[redacted]: “Yes LOL it was a fun night.”

24 hours after the alleged assault she sent Condon a text message saying she was “super horny.” Once again, the investigating agents had access to this information but instead of unfounding the allegations, they let it go forward to trial. Even though he was found not guilty of the charges related to Jenna, just the optics of having another woman as a charged victim was unfairly prejudicial.

But I would say probably the most absurd part of the entire court martial came out during [redacted] testimony. One of the government’s accusations involves a trip that Condon and [redacted]

took to New Orleans together. On the last night of the trip, they became intimate. The government claims that because [redacted] was under the influence of alcohol, she was sexually assaulted. None the less, on the last night of the trip, they went out for dinner. While they were there, they got a waitress to take a picture of them together. After the trip, [redacted] had the picture put in a custom-made frame that said "I love you" on it and gave it to Condon as a gift. Now if we are to believe the government's claim that [redacted] was actually sexually assaulted, then this would be equivalent to her commemorating her first sexual assault by framing the picture from that night in an "I love you" frame and presenting it as a gift to her assailant. During the court martial when [redacted] was asked if the statement on the picture frame was correct, she replied "oh yes".

M.R.E 412 (The rape shield act) was meant to protect victims from being shamed during court martials. As you know, M.R.E 412 has been abused by overzealous prosecutors in recent years. Here are just a few of the ways M.R.E 412 was used to handicap Condon's defense and unfairly tilt the scales in favor of the government.

During the investigation, one of the agents interviewed a friend of [redacted]. In this interview, [redacted] actually told OSI agents that on the night in question at the Red Door Saloon [redacted] told him that she planned on taking Rob home and having sex with him that night. [redacted] also testified that [redacted] was not intoxicated. This is exonerating evidence. You have an alleged victim saying she planned on having sex with the accused on the night in question. This

statement is made even more exculpatory in light of the fact that [redacted] didn't even think she was a victim. Yet despite its exonerating nature, the judge used M.R.E. 412 to prevent the jury from hearing this testimony.

[redacted] stated in her unsworn victim statement that she was so terrified after the alleged assault that she could not even leave her home. The prosecution stated that this behavior was evidence that an assault occurred even though they knew it most likely wasn't true. The prosecution knew that [redacted] was actually looking for sexual partners on Craig's list within 24 hours of the assault allegation and within days of the alleged assault she was taking sexually suggestive pictures of herself and sending them to several other men. These two points seem to suggest [redacted] was being disingenuous when she said she was so terrified she could no longer leave her home. Yet the judge again used M.R.E 412 to prevent this exculpatory evidence from being disclosed at the court martial.

I could go on and on, but you probably get the point. Like so many others, Condon was determined to be guilty from the very beginning of this investigation.

Please let me know if you would like to see copies of any of the paperwork or documents mentioned such as the statements by these women, etc.

Thanks for your help, Anthony

03/17/2023

To Whom it May Concern,

I met Rob shortly after moving to Destin, FL through a mutual friend. We soon became fast friends and hung out almost daily with our group of mutual friends. It felt like a charmed life. We were all happy to be together, laughing, watching football, and having drinks at the bar; a very normal life for any twenty something. We all spent a lot of time together, usually at our regular bar or beach, with occasional dinners at each others' homes which we called "family dinner". When you spend that much time with someone you really get to know them. Also, life as a "local" at a local's bar makes it very difficult to keep any secrets. We all wanted to be there for each other and knew each other's lives. Rob shared many details with me about his life and his thoughts, and we enjoyed talking about many things. He would tell me about the girls he was seeing and introduce them to us. I always felt safe with him and so did our friend group. He is what I would describe as calm, even a peacemaker. I only saw someone try to pick a fight with him once at the bar (which is rare, living in a tourist town, drunk idiots start fights more often than not) and he calmly diffused the situation, the incident ended in a hand shake.

I never once saw him be inappropriate with anyone. He was always honest and forthcoming when we spoke. As a close friend group we looked out for one another. If any of our friends drove to the bar in a car or motorcycle many of our friends who lived nearby would let us stay

with them. Our mutual friend [redacted], and my best friend, would have Rob stay at her house if he rode his bike to the bar. He slept in the same bed as she did, as friends. Nothing inappropriate ever happened between them and I would never let my best friend be in that position with someone I didn't trust. Sometimes a few of us would stay at [redacted] house, some on the sofas and some in any bed we could find. We would wake and have breakfast and laugh about our previous night's fun. We were all just normal twenty somethings, enjoying life and laughing at our local watering hole. What was to come seemed unfathomable.

Sometime later his family let me know he would be out of pocket for a while but I didn't know why and I assumed it was work related. I didn't know anything about the cases he worked but knew that occasionally his work was more laborious and demanding than other times. It seemed a normal message to receive.

So I was very confused when a woman from the Air Force called me to schedule a time to talk about "my friend Robert". I asked her why and which Robert she was referring to. She had very poor phone skills and did not elaborate. She seemed put off that I asked her to confirm the person she was referencing. She did not tell me what the meeting would be about and was very vague. Since I have no affiliation with the Air Force and she was incredibly unclear as to why they wanted to speak with me, I declined the meeting. She seemed

shocked and mentioned that people do not say "no" to this request. I again told her “no thank you”, and ended the call. They reached out again and I asked my husband to contact the lead investigator to clarify why they wanted to speak to me as I could not get a clear answer. This woman told him that Rob had my phone number on his call list and it was simply concerning this matter and it was wise to speak to them now as to avoid being subpoenaed and risk facing ill treatment in court. This seemed odd but as we trusted the lead investigator, I agreed to speak to them.

Two female investigators came to my home while I was home alone, as my husband was deployed to Afghanistan at the time. They asked me very strange and frivolous questions about Rob’s girlfriend [redacted] and other relationships he had. I found this odd because at the time I did not know the nature of any charges against him or details of the case. I asked why they asked me these things, and they said they just wanted to clarify things about Rob as a person.

Later in the interview things took a drastic turn. One investigator said, "what if I told you we have evidence that you are having an affair with Rob?" I remember being so blindsided and shocked by this question. I felt my body lean across the table and I looked her in the eye and said "I would tell you that you don’t have this evidence because I’m not having an affair with Rob." She told me they had a Skype conversation between us

to confirm the affair. I told her that she did not. She said, “I have these Skype conversations between him and a girl named [redacted], and you go by [redacted], don’t you?" I said, "yes, I go by the name [redacted], but I’ve never Skyped with Rob ever". I stood up to get my computer in order to pull up my Skype app to show her. Before I could open it, she said "well, what’s your Skype name?” I said "[redacted], it’s my name". I showed her all of my calls on my Skype app, which were to my father and my book club. She then admitted it might be a conversation between a different girl named [redacted]. I asked them why they would pretend to have evidence of this and tell me that they did. The other investigator said, "we just want to make sure you are not a victim". I asked her, "a victim of what??" She did not answer my question. I found it so odd they would threaten me with false evidence and insult me in my own home with an accusation of an affair, while my husband was deployed…. while also refusing to explain why I would be a victim and what the charges against Rob actually were. They then had me write a statement in which I made sure to document some of the things I have written in this letter, as well as to state we did not have an affair or any other relationship other than friends.

I felt very disrespected by the investigators and also found their weak attempt to fish for some type of wrongdoing on my part and on Rob’s part to be despicable let alone incredibly un-savvy. I in no way felt

they ever cared if I were a victim of anything. I more so only felt their thinly veiled attempts at fishing for ridiculous evidence to be immature and unprofessional. I was sad to see Air Force investigators treat a military spouse (or any woman, rather) as just a pawn in their investigation. I assumed their investigation had to be incredibly weak to accuse a wife of a deployed Soldier of an affair in her own home with such insufficient evidence. From the initial phone call to the interview with investigators, I found the treatment of the Air Force towards me to be unprofessional, dishonest, and manipulative. I have no doubt that they treated other women as poorly and as ineptly.

To later find out that this investigation was somehow successful was astonishing. I know Rob to be a good man, and an excellent Airman. Someone who served their country and risked their life should never be treated this way. Civilian women should never be treated this way in the pursuit of truth. It flies in the face of true victims and puts a dark stain on the purpose of such agencies.

The behavior of the Airmen and military professionals during and after this investigation and trial is a tragic mishandling of justice. I hope that you will look at the actual facts of this case and my statements. I also hope you will consider any information attained from such an incompetent group of investigators to be manipulatively malevolent. These people did not care about actual

victims and this is evident in their treatment of women during the investigative process.

I find it incredibly difficult that myself, and other women in our close friend group and group of acquaintances have no negative things to say about Rob in general, let alone his treatment of women, to somehow mean nothing to the investigation. Our testimony meant nothing. How can what we all know to be true not be taken into consideration?

I want to believe the military still has its roots in honest servitude to its country, military servicemen and women, and the civilians who rely on their sacrifice. This concept is hard to hold onto in light of what I have experienced and the outcome of this trial. It is with a heavy heart that I implore you to do the job of an honest pursuer of truth and justice, because I have lost so much faith in the process and the character of those who serve the Air Force. I hope that you or anyone can prove me so very wrong in this matter.

Respectfully,

Jo Sarah Krebsbach

Vol 22

TO: AFSOC/CC

28 April 2014

FROM: Special Agent [redacted]

SUBJECT: Testimony in *United States v. TSgt Robert Condon*

1. Sir, I am submitting this letter to respectfully request that I not be ordered to testify in the upcoming General Court Martial, *United States v. TSgt Robert Condon*. On 3 October 2013, you signed a letter granting me testimonial immunity in exchange for my cooperation with the investigation and testimony at trial. Since that time, I have been very unhappy with the way that the investigation has been conducted and I no longer wish to testify. Please consider the following new information in support of my request.

2. From the very beginning, this was never an investigation that I wanted to be part of. First, I had a personal relationship with TSgt Condon and I felt my participation would be a betrayal to him. Second, I am a very private person and participating in this case so far has already resulted in various invasions into my personal life that are very embarrassing for me. My first two interviews, for example, took place at my duty office. It was an emotional interview for me and it was obvious to my co-workers that I was seriously involved. These interviews should have taken place at a separate location.

3. I was also told during my first interview with OSI that no one in my chain of command would be informed of the information I provided, whether I disclosed a sexual assault or not. I was told that due to the sensitivity of the case and the persons involved, any information I provided pertaining to my relationship with TSgt Condon would only be reviewed by a few higher HQ personnel. While writing my statement, I was informed that my Commander, my outgoing Superintendent, my inbound Superintendent, and the AFOSI HQ Psychologist among others, were notified. Second, three of my co-workers were chosen to escort TSgt Condon from confinement to the Art 32. I am concerned in trying to plead his case to the agents who escorted him, TSgt Condon revealed intimate personal details about myself, our relationship, and/or confirmed my role in this case to them. Further, while at the Article 32 these same agents were in the courtroom listening to much of the testimony and evidence presented. One of the biggest reasons I decided to PCS is because too many people who I interacted with on a daily basis learned too much about this investigation. This made it difficult to focus at and remain confident at work. I only hope that their knowledge will not follow me throughout the rest of my career.

4. The confiscation of my phone eliminated any remaining desire to participate in this case. Prior to the confiscation and during my second interview, SA [redacted] and SA [redacted] asked to review my phone. I told them that they could look at relevant messages while the phone remained in my control. SA [redacted] took my phone from my hand, placed it on the desktop and began to snap photos of it. I told him multiple times that this made me uncomfortable. His response was to criticize my reluctance by implying as an agent I should know better; that forfeiting my phone's content should be expected. I decided to let them take the photos they needed because it would help, despite SA [redacted] continued offenses.

5. I was later asked to participate in a third interview with two agents who work at another office and whom I frequently interact with. When the interview began I was asked a few questions

pg 1 of 3

DEFENSE EXH [redacted] FOR IDENT
OFFERED PAGE R. [redacted]
ACC/REJ PAGE R. [redacted]
Appellate Exhibit CVII
Page Marked 265
Page 1 of 3

relating to my immunity request. The agents asked if my phone was in my possession and presented a search and seizure warrant. First, they never explained to me the basis for the warrant. Second, the agents had already taken dozens of photos of relevant messages from my phone and already had TSgt Condon's phone in evidence. It did not make sense that mine was also needed. I have never been comfortable with my phone being seized nor with the way it was seized. It is also well known throughout the OSI community that it is rare to seize a witness's or victim's phone. However, it was made adamantly clear to me on several occasions that I was obligated to turn in my phone as part of part of my immunity agreement; that the immunity requires my "full participation." It was implied that if I did not consent to release my phone, my immunity agreement would be void. I later learned that the Search and Seizure Authorization provided for my phone while at Eglin AFB was not legal, as the warrant was issued for Hurlburt Field. Yet the agents refused to return my phone and demanded I provide my password.

6. This was very upsetting. What bothers me the most is that no one else understood why it was such a big deal that my phone was seized. The seizure of my phone seemed inconsequential to all parties involved, except for myself. As I've previously stated, I am a VERY private person and to have multiple persons accessing all of my most intimate data without my permission was a profound violation of my privacy. No one concerned themselves with how they would feel if they were in my position. There was very little relevant data; most of the information on my phone has nothing to do with this case or investigation.

7. My participation in this case has not only deeply affected my personal life, but my professional life too. I was removed from the Criminal Investigations office and moved into the Counterintelligence Investigations office. I was told that this would prevent any "conflict of interest." I was angered by this decision because it happened so suddenly and it felt like I was being punished.

8. Throughout the investigation, I do not feel that the OSI agents who interviewed me and some of the legal personnel were respectful or straightforward with me. I felt the immunity agreement was used as a tool to manipulate me into testifying and has been held over my head at every step. I do not believe these tactics are ethical, nor do they uphold the values of integrity within our legal system. For example, I was provided with a false sense of control when asked to sign Consent for Search and Seizure for my phone only to find out that the consent was irrelevant, as a search warrant was issued anyway. Discovering that I had no real control has only caused more damage and I feel compelled to object to how wrong this is.

9. I have tried to tolerate feeling mistreated because I felt I was doing the right thing. I am not so sure anymore. The government's actions have left a much more significant impact on my life than anything between TSgt Condon and I. I had compartmentalized my relationship with TSgt Condon and only spoke of our relationship because I felt responsible for the injury caused to these other women. I also felt professionally responsible. After all, it is my duty to protect others and help them find justice through seeking the truth.

10. I must emphasize that everything I have explained above has caused an overwhelming amount of distress in my life. I am overcome with a great deal of stress, anxiety, and guilt when I think about having to testify. This is something that I want to put behind me. Not just because

I feel so mistreated by the government, but beesuse TSgt Condon is somsone I care about. No one seems to understand the emotional complexity of this situation.

11. I strongly believe that testifying will be detrimental to my mental health. I want nothing more than to heal properly and move forward. I feel if I am forced to testify it will result in me taking several steps backward in any progress I have made. Sir, I respectfully ask that you please re-consider the order given to me to testify. I have discussed this matter with my Special Victim's Counsel and I understand that this may result in the action of my immunity being withdrawn. I also understand without my testimony the Government may not be able to successfully prosecute TSgt Condon for the charges related to me.

Submitted Very Respectfully,

[redacted]

United States Air Force

Air Force Office of Special Investigations

[redacted]

AFOSI 9 FIS
602 West B Avenue
Eglin AFB, FL 32544
Email: [redacted]

[redacted]

INMATE OBSERVATION REPORT

REPORT DATE (YYYY/MM/DD): 2016/07/05

1. INMATE NAME (Last, First, Middle)	2. SS[illegible]	3. ID NUMBER
CONDON, ROBERT ANDREW		[redacted]

4. CUSTODY LEVEL	5. DETAIL	6. CELLBLOCK/DORMITORY	7. CELL #/BUNK #
MDI	O-POD CUSTODIAL	[redacted]	[redacted]

8. OBSERVATION

a. TYPE OF OBSERVATION: [X] FAVORABLE [ ] UNFAVORABLE [ ] INJURY [ ] BEHAVIORAL

b. DATE (YYYY/MM/DD)	c. TIME	d. LOCATION	e. WAS INMATE NOTIFIED ABOUT THIS REPORT
2016/07/05	0105	[redacted]	[X] YES [ ] NO

9. OBSERVATION REPORTED BY

a. NAME (Last, First, Middle)	b. GRADE	c. TITLE	d. DATE (YYYY/MM/DD)
[redacted]	[redacted]	CORRECTIONAL SPECIAL	

10. WITNESS

a. NAME (Last, First, Middle)	b. GRADE	c. TITLE	d. DATE (YYYY/MM/DD)

11. OBSERVATION SUMMARY (Give an in-depth description of the observation; include all necessary information, provide attachment if necessary);

ON 5 JUL 2016 I [redacted], 256TH MP CO (DETENTION), WHILE POSTED AS THE PAPA HOUSING UNIT CORRECTIONAL SPECIALIST, WITNESSED INMATE CONDON (94312) HELP IN THE SAVING OF (b) (6); (b) (7)(C); (b) (7)(F) LIFE. UPON FINDING [redacted] TRYING TO HANG [redacted] I ASKED HIM TO HELP. HE QUICKLY RAN IN THE CELL AND PREVENTED FURTHER HARM TO (b) (6); (b) (7)(C); (b) (7)(F). ASSISTANT WATCH COMMANDER AND WATCH COMMANDER NOTIFIED.

12. SIGNATURE OF REPORTING PERSON	b. DATE (YYYY/MM/DD) 2016/07/05	

13. WAS MEDICAL ATTENTION NEEDED?	[ ] YES	[X] NO	b. DATE (YYYY/MM/DD)	c. TIME

d. DESCRIBE ANY IMMEDIATE MEDICAL ATTENTION GIVEN:

14. OBSERVATION REPORTED TO

a. SUPERVISOR NAME (Last, First, Middle Initial)	b. DATE (YYYY/MM/DD)	c. TIME
(b) (6); (b) (7)(C); (b) (7)(F)	2016/07/05	0419

15. ACTIONS OF CORRECTIONS SUPERVISOR:
THE REPORT WAS REVIEWED AND FORWARDED TO MPI FOR INFORMATIONAL PURPOSES. NOTIFICATIONS WERE SENT OUT IAW THE USDB NOTIFICATION MATRIX.

16. ACTIONS OF REVIEWING AUTHORITY:
REPORT REVIEWED, NO FURTHER ACTIONS NEEDED. FORWARD TO CTF.

17. COMMANDING OFFICER REVIEW

a. NAME, GRADE, TITLE	c. SIGNATURE	e. DATE (YYYY/MM/DD)
[redacted]		2016/07/06

NO. _____

In The
Supreme Court for the United States

_____

ROBERT A. CONDON, Technical Sergeant (E-6)
U.S. Air Force

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES ARMED FORCES COURT OF CRIMINAL APPEALS

PETITION FOR A WRIT OF CERTIORARI

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United States Air Force
1500 W. Perimeter Rd., Suite 1190
Joint Base Andrews, MD 20762

Counsel for United States of America

QUESTIONS PRESENTED FOR REVIEW

1. Is the decision of the Court of Criminal Appeals of the Armed Forces, which is without findings of fact or law, susceptible to review by this Court which should require a remand to obtain that information to permit meaningful review.

2. Whether the failure of the prosecution to ensure that the same transcript of proceedings was provided to counsel for Petitioner as was provided to the prosecution and, if not, whether that warrants relief.

3. Whether Petitioner's counsel was ineffective in failing to detect that there was a difference in the transcript provided to the prosecution and to him and whether that difference warrants relief.

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

- United States Air Force Court of Criminal Appeals
  In Re: Robert A. Condon
  Miscellaneous Docket No. 2022-07
  Date: 08/04/2022

- United States Court of Appels for the Armed Forces
  Robert A. Condon v. United States
  USCA Docket No. 22-0287/AF
  Date: 11/18/2022

TABLE OF CONTENTS

INDEX TO APPENDICIES

TABLE OF AUTHORITIES CITED

Cases

Statutes

JURISDICTION

[X] For cases from federal courts:

The date on which the United States Court of Appeals decided my case was 11/18/2022.

[X] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date:_____, and a copy of the order denying rehearing appears at Appendix_____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including____ (date) on____(date) in Application No._A___.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from state courts:

The date on which the highest state court decided my case was_____

A copy of that decision appears at Appendix_____.

[ ] A timely petition for rehearing was thereafter denied on the following date:__ , and a copy of the order denying rehearing appears at Appendix_____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including_____date) on_____(date) in Application No._A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment of United States Constitution
Sixth Amendment of United States Constitution

28 U. S. C. §1254(1)
28 U. S. C. §1257(a)

STATEMENT OF THE CASE

While the circumstance here is unique, it is verging on the obscene to suggest that this Court will enter a decision holding that the failure of prosecution to provide accurate transcripts does not deprive Petitioner of his rights to due process of law as guaranteed by the Fifth and Sixth Amendments of the United States Constitution.

REASONS FOR GRANTING THE WRIT

QUESTION NO. 1:

> Does the decision of the Court of Criminal Appeals of the Armed Forces, which is without findings of fact or law susceptible to review by this Court, require a remand to obtain that information to permit meaningful review

The entire decision from the Court of Criminal Appeals of the Armed Forces is but one sentence. To be sure, it is clear as to what the relief was: it was denied. But it contains not a hint of analysis of the facts or the law. It is immune from review because of that shortcoming.

If this form of opinion if this form of opinion is permitted, why should not all courts draft their decisions in this manner? It is no doubt easier for the various writers but it avoids any potential analysis by this or other courts. That would debase the entire history of Supreme Court jurisprudence.

It is not that the United States Court of Criminal Appeals for the Armed Forces is unique and able to write whatever it wishes. In Ortiz v. United States, 138 S. Ct. 2165 (2018), this Court held that it had appellate jurisdiction over

decisions of the United States Court of Appeals for the Armed Forces. No special provisos were mentioned. In Ortiz it would appear that the decision being reviewed was one that indeed contained assessment of the facts under the law and therefore could be reviewed pursuant to a grant of the Petition for Certiorari.

As this Court is aware there are several different standards for review to be applied in the cases which come before it depending on the issues. If they are factual, the standards include whether they are arbitrary, capricious, not supported by substantial evidence or clearly erroneous. Questions of law are reviewed *de novo*. Questions of judicial oversight are reviewed under the standard of abuse of discretion while questions of constitutionality apply the test of rational basis, intermediate scrutiny and strict scrutiny, depending on the circumstances.

Review in this Court of decisions of other courts, indeed of the legislature and the executive branch, was established in 1803 and remains the law today. Marbury v.

Madison, 5 U.S. 137 (1803). Nothing has happened that suggests that standard of review is different for military courts.

This decision presented for review here makes the Court whose work is to be reviewed here the final arbiter of the correctness of its own decision. As the Supreme Court of Ohio said recently in a different proceeding but with a similar issue, "To the extent that a trial court's policy allows the trial court to review the correctness of its own decisions, that policy is unreasonable." State v. Hill, 2022-Ohio-4544 (2022). Dealing with a similar issue, this Court condemned the practice of courts announcing their decision and leaving it to the parties to write the findings in fact and conclusions of law. Anderson v. City of Bessemer, 470 U.S. 564 (1995). But while those decisions might not be favored, at least the Court would have had something to look at and evaluate.

This may be the practice in the Court of Criminal Appeals for the Armed Forces which was developed at a time when it felt its word was final but since Ortiz, that is not the case. Some sort of reasoned decision should be provided to facilitate this

Court's review. It is essential if Petitioner is to be treated in a manner consistent with the requirements of the Fifth and Sixth Amendments of the Constitution of the United States.

QUESTION NO. 2:

> Whether the failure of the prosecution to ensure that the same transcript of proceedings was provided to counsel for Petitioner as was provided to the prosecution and, if not, whether that warrants relief.

The circumstances of Petitioner's appeal were that he was confined in the Leavenworth Disciplinary Barracks in Kansas. His appellant counsels were located in Florida and Virginia. There were thousands of miles between them all. They were also aware that their conversations were being recorded by the Government. That made execution of this appeal difficult. But throw in the fact that there were two different transcripts and it was a practical impossibility. That this is correct was established by Colonel Todd Fanniff, the Air Force Officer asked to look into these circumstances. He confirmed that there were indeed two different transcripts but never provided an explanation as to why.

The confusion on the part of counsel for Petitioner was driven in no small measure by the fact that there were no page breaks. Consecutive pagination in both transcripts created the

appearance that all portions of the transcripts were before them. There were three lawyers representing Petitioner on his appeal and they all missed this circumstance.

Yet the prosecution was aware of it, noted it, and corrected its copies and those of the court but said not a word to counsel for Petitioner.

These circumstances do not arise regularly, and one supposes that the careful conduct of other lawyers may have prevented that but it did happen here. As a result, Petitioner is now one-third of the way through a 30 year sentence, having been discharged dishonorably from the Air Force despite having had a decorated career as an Air Force non-commissioned officer serving in several foreign combat zones.

This Court should not let stand this decision which permits such conduct by the prosecution. The protections guaranteed by the Fifth and Sixth Amendments must be assured. In the Air Force the burden is on the prosecution to prepare the transcripts according to the military code and it failed to do that. It would be troubling enough if this were a case where the airman

had been simply discharged but add in the substantial prison sentence and it just ought not be allowed to occur.

QUESTION NO. 3:

> Whether Petitioner's counsel was ineffective in failing to detect that there was a difference in the transcript provided to the prosecution and to him and whether that difference warrants relief.

This Court is no doubt familiar with the standards of review of the claims of ineffective assistance of counsel so time will not be taken setting them forth since they are well-established. Often such claims are dismissed as being attributable to trial tactics. There is no such possibility here. Nothing can be gained by having briefs submitted containing pagination citations to a transcript record the judges do not have. It is impossible to assess the deleterious impact that had on the judges attempting to review his appeals. But there had to be a disparaging eye cast on the Petitioner's briefs whose cites did not match the record. His counsel should have detected the issue and did not. That is by definition ineffective assistance of counsel which deprived Petitioner of his rights under the Sixth Amendment and warrants a new appeal.

STANDARD OF REVIEW

The scope of review if *de novo*. In military courts, whether it is ineffective assistance of counsel or an error in post-trial proceedings does not matter. The scope of review to be exercised is *de novo*. United States v. Miller, 82 M.J. 204 (2022); United States v. Beauge, 82 M.J. 157 (2022); and United States v. Schmidt, 82 M.J. 68 (2022).

CONCLUSION

For the reasons set forth in the questions presented for review, a favorable decision should be made regarding Petitioner's contentions and certiorari should be granted to allow full development of the issues here and a review of the merits of this appeal.

Respectfully submitted,

Richard M. Kerger (0015864)
Counsel for Petitioner Robert A. Condon
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USCAAF Bar No. 37766
Date of Admission: 09/12/2022

NO. _____

IN THE SUPREME COURT FOR THE UNITED STATES

ROBERT A. CONDON, Technical Sergeant (E-6), U.S. Air Force,
PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PROOF OF SERVICE

I, RICHARD M. KERGER, do swear or declare that on this date as required by Supreme Court Rule 29 I have served the enclosed PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The names and addresses of those served are as follows:

Solicitor General of the United States of America
5614 Department of Justice
950 Pennsylvania Ave., N.W.
Washington, DC 20530-0001

Olivia B. Hoff, Capt., USAF Appellate Government Counsel
Mary Ellen Payne, Associate Chief
Government Trial and Appellate-Operations Division
United States Air Force
1500 W. Perimeter Rd., Suite 1190
Joint Base Andrews, MD 20762

I declare under penalty of perjury that the foregoing is true and correct.

Executed on_____, 2023.

_____
Richard M. Kerger (0015864)

times to different people. And to the extent there is corroborating evidence, the evidence supports both versions.

But there is one example where the victim has made a demonstrably false or misleading statement, and she has made it multiple times. [redacted] has consistently made it part of her narrative that when she arranged to stay at TSgt Yates' house, she was under the impression that he would be gone because he was going on leave to visit his kids, but that his plans later changed. She was clearly intending to give the false impression that he changed his plans so he could spend time with her and that she only asked to stay there because she thought the house would be vacant. She even expressed the view that he changed his plans as part of a well-thought out plan that he developed to have sex with her. But the evidence proves this to be false. The Facebook messages unequivocally prove that he made it very clear from the outset that he would be home when she came to stay, at least until January 30. She knew very well that he was going to be home, as he said "We'll be under the same roof for a few days i guess." She responded: "Okay that's fine". And he reminded her later that he would be home and off of work during her visit. In fact, they had extensive, playful discussions about where she would sleep and whether he was willing to alternate between the couch and the bed. The Facebook messages also indicate a plan on the part of both parties to keep her presence at his house secret from her husband because he disapproved of their friendship and to keep it secret from others to avoid having "people talk." So, it appears to me that [redacted] realized that people would having trouble believing her rape account if they knew that she had essentially invited herself to stay with TSgt Yates for several days when she knew he would be home; thus, she decided to intentionally lie to make her rape account more plausible. Unfortunately, these misrepresentations had the opposite effect, seriously damaging her overall credibility. While the fact that she misrepresented this fact does not meant that she was not sexually assaulted, there is no doubt that a skilled defense counsel will be able to exploit these misleading statements to effectively impeach her credibility.

I note that TSgt Yates' did plans change at one point, and he decided not to go out of town and to shorten his leave, but the evidence proves that he changed his leave plans before [redacted] arrived and informed her of this. In fact, it was [redacted] who, just hours before her scheduled arrival on January 27, asked if she could stay with TSgt Yates two days longer because she was unable to get a flight out on February 1 as she originally planned.

Nor does the evidence support that TSgt Yates had any plan to get in [redacted] pants. To the contrary, he specifically told her not to wear revealing clothing around his house, so he would not be tempted by her, as reflected in this exchange:

> *TSgt Yates: BTW, spandex and booty shorts are not authorized"*
>
> [redacted] *Why not?*
>
> *TSgt Yates: Im going to be on leave those few days you're here SOOOOOOOO i'd rather you not make me think like a man around you.*

(PHO Ex 7)

Appellate Ex VI
Marked Page ____

(4) I recommend the charge and its specification be disposed of as follows: I do not recommend referral of this charge, or any other sexual assault charge, to a General Court-Martial, or any other Court-Martial. I recommend the charge and specification be dismissed.

p. Conclusion:

The reason for my recommendation is that I consider it to be a virtual certainty that any sexual assault charge will result in an acquittal. Although the victim's account is credible, the accused's account is equally credible, if not more so. In my opinion, based on 22 years of experience as an Air Force JAG, and extensive experience as a prosecutor and defense counsel, there is no way that the government will be able to prove a sexual assault occurred beyond a reasonable doubt. Furthermore, I believe that a court-martial is likely to further traumatize the victim, as she will be subjected to a difficult and embarrassing cross-examination and impeachment of her character and credibility through other evidence, only to result in an acquittal which could be personally devastating. While there is some appeal in the idea of giving a person who claims to be a victim "her day in court," when the outcome is so likely to be unsatisfying to the victim, and the trial process so hard on both the victim and the accused, we must consider whether we would be advancing the goals of the military justice system by pursuing this prosecution. While some level of administrative discipline may be appropriate to punish TSgt Yates for his poor judgment, I do not believe a General Court-Martial is the right disposition for this case.

q. Chronology:

4 November 2016. – Appointed Preliminary Hearing Officer
10 November 2016. Set date and time for hearing
19 November 2016. Hearing began at 0905. Hearing ended at 1330.
19-20 December 2016 – Wrote report.
20 December 2016 - Completed report. Delivered to SJA at 1700.

Respectfully submitted,

[redacted]

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MEMORANDUM FOR AFTC/CC

FROM: 96 TW/CC

SUBJECT: Recommendation for Disposition – *United States v. TSgt Damion Yates*

1. In accordance with Rule for Court-Martial 404, and Air Force Instruction 51-201, I am forwarding the case of TSgt Damion Yates to you for your action. The accused is charged with one charge and a specification of sexual assault when the other person is incapable of consenting, in violation of Article 120, Uniform Code of Military Justice (UCMJ). Pursuant to Article 32, UCMJ, the Preliminary Hearing Officer (PHO) found there was no probable cause to believe the accused committed the offense charged, but found there was probable cause to believe that the accused committed a different offense under Article 120, UCMJ. Specifically, he found probable cause for charging either sexual assault by causing bodily harm or sexual assault upon a sleeping or unconscious person. However, the PHO recommended that no charges related to sexual misconduct be referred to trial by court-martial due to his concerns regarding the alleged victim's credibility and the highly likely result of an acquittal.

2. I have consulted with my SJA and reviewed the attached PHO Report. I agree with the PHO's recommendation. I conclude there is insufficient evidence to refer this case to trial by court-martial. Accordingly, I recommend that the charge and specification be dismissed without prejudice and that the case be returned to 96 LRS/CC for whatever action he deems appropriate.

3. I have attached a list of proposed court members, should you decide to refer the case to trial. The nominated members satisfy the criteria set forth in Article 25, UCMJ.

[redacted]

9 Attachments:
1. Proposed Court Members
2. Proposed Court Member Data Sheets
3. Charge Sheet & 1st Indorsement w/Atchs, 3 Nov 16
4. 96 TW/JA Advice w/o Atchs, 12 Jan 17
5. PHO Appointment Memo w/o Atchs, 4 Nov 16
6. PHO Report w/Atchs, 20 Dec 16
7. Accused & Defense Counsel Receipts for PHO Report
8. Notice of Opportunity to Submit Views on Disposition Memo, 21 Dec 16
9. Victim's Written Submission, 29 Dec 16

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DEPARTMENT OF THE AIR FORCE
HEADQUARTERS, AIR FORCE TEST CENTER (AFMC)
EDWARDS AIR FORCE BASE, CALIFORNIA

MEMORANDUM FOR AFTC/CC

JAN 30 2017

FROM: AFTC/JA

SUBJECT: Pretrial Advice, *United States v. TSgt Damion Yates*, ***-**-4601, 96th Logistics Readiness Squadron, Eglin AFB, Florida

1. The accused, TSgt Damion Yates, is charged with one specification of sexual assault when the other person is incapable of consenting, in violation of Article 120, Uniform Code of Military Justice (UCMJ). The charge and specification was preferred on 3 November 2016. A preliminary hearing under Article 32, UCMJ was conducted on 19 November 2016. On 20 December 2016, the preliminary hearing officer (PHO) did not find probable cause to support the charge of sexual assault. On 25 January 2017, the 96 TW/CC, the Special Court-Martial Convening Authority, forwarded the charge with a recommendation that the charge and specification be dismissed without prejudice and that the case be returned to the 96 LRS/CC for whatever action he deems appropriate.

2. Pursuant to Rule for Courts-Martial 406 and Article 34, UCMJ, I provide you the following advice:

a. The charge and specification is generally in proper form.

b. The charge and specification alleges an offense under the UCMJ.

c. The charge and specification is warranted by the evidence contained in the documents listed below as attachments.

d. The accused is on active duty in the United States Air Force. I am satisfied a court-martial would have jurisdiction over the accused and the offense charged.

3. The PHO concluded that, upon review of the evidence, to include, inter alia, the videotaped interviews, written statements of the accused and the victim, and the numerous communications between the two parties and other parties, and after a credibility assessment of the parties involved, the charge and specification was not supported by probable cause. The PHO also determined that probable cause could be met for sexual assault by bodily harm or sexual assault upon a sleeping or unconscious person. However, the PHO ultimately recommended that no charge of sexual assault be referred to court-martial and that the charge be dismissed. The 96 TW/JA recommended that the charge be forwarded with a recommendation for referral to trial by general court-martial.

4. On 21 December 2016, the 96 TW/JA notified the victim, [redacted], and her Special Victim's Counsel, of her opportunity to submit views on the disposition of the sexual assault

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allegation in her case. [redacted] provided a statement saying she believes trial by court-martial is appropriate and she is willing to participate at trial.

5. The 96 TW/CC forwarded the charge to you with a recommendation that the charge and specification be dismissed without prejudice and that the case be returned to the 96 LRS/CC for whatever action he deems appropriate. I concur. I agree with the PHO's recommendation and I do not recommend that the charge and specification be referred to a general court-martial. I recommend dismissal of the charge and specification without prejudice, and that the case be returned to the 96 LRS/CC.

[redacted]

8 Attachments:
1. Memorandum for AFMC/CC
2. Charge Sheet
3. 1st Indorsement to Charge Sheet with Attachments
4. Preliminary Hearing Officer Appointment Letter and Report with Attachments
5. Receipts for Preliminary Hearing Officer's Report
6. SPCMCA's Forwarding of Charges without Attachments
7. 96 TW/JA's Recommendation without Attachments
8. Notice to Victim to Submit Views and Victim's Statement

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DEPARTMENT OF THE AIR FORCE
HEADQUARTERS 96TH TEST WING (AFMC)
EGLIN AIR FORCE BASE FLORIDA

31 January 2017

MEMORANDUM FOR SrA JOHANNA L. QUINTELLO

FROM: 96 TW/JA (Colonel Michael W. Taylor)

SUBJECT: Notification of [redacted] Decision to Forward the Case of TSgt Damion Yates to General Ellen M. Pawlikowski for Review

1. [redacted] has recommended that all charges and specifications against TSgt Damion Yates should not be referred for trial by court-martial. [redacted] has decided not to refer any charges to a court-martial. [redacted] is forwarding the case to [redacted] for the review required by the 2014 National Defense Authorization Act, Section 1744(d).

2. If you have any questions about this process, you may contact Ms. Nancy Blakely at 850-882-8038 or Capt Simon M. Caine at 850-882-8310. You may also consult with a legal assistance attorney or your Special Victims' Counsel.

[redacted]

cc:
Special Victim's Counsel

1st Ind, [redacted] Feb 17 2017

MEMORANDUM FOR 96 TW/JA, [redacted]

I understand that [redacted] has decided not to refer any charges against TSgt Damion Yates to trial by court-martial. I understand that the allegations against TSgt Yates are being forwarded to [redacted] for review.

[redacted]

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DEPARTMENT OF THE AIR FORCE
HEADQUARTERS, AIR FORCE TEST CENTER (AFMC)
EDWARDS AIR FORCE BASE, CALIFORNIA

MEMORANDUM FOR AFMC/CC

JAN 30 2017

FROM: AFTC/CC

SUBJECT: Reasons for Decision Not to Refer Charge to Trial by General Court-Martial. TSgt Damion Yates, 96th Logistics Readiness Squadron, Eglin AFB, Florida

1. After reviewing the Article 32 Preliminary Hearing Report, the Pretrial Advice of my Staff Judge Advocate pursuant to Article 34, UCMJ, the statements the victim made during the course of the criminal investigation against TSgt Damion Yates, and considering the views submitted by the victim, I have decided not to refer the charge against TSgt Yates to trial by general court-martial.

2. I have decided not to refer the charge against TSgt Yates to trial by general court-martial because the Article 32 Preliminary Hearing Officer recommended not referring the charge to trial, the 96 TW/CC recommended not referring the charge to trial, the Pretrial Advice of my Staff Judge Advocate did not recommend referring the charge to trial, and I have concluded that a general court-martial is not appropriate in this case. I intend to dismiss the charge without prejudice and return the case to the 96 LRS/CC for whatever action he deems appropriate.

[redacted]

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23 February 2017

MEMORANDUM FOR AFTC/CC

FROM: AFMC/CC

SUBJECT: Review of Convening Authority Decision Not to Refer Charges –
TSgt Damion Yates, 96th Logistics Readiness Squadron, Eglin AFB, Florida

1. A sexual assault allegation against Technical Sergeant Damion Yates has been forwarded to me for review pursuant to Section 1744(d) of the Fiscal Year 2014 National Defense Authorization Act. I have reviewed the case file, which includes the following:

a. DD Form 458, Charge Sheet, dated 3 Nov 16, with 1st Indorsement
b. AFOSI ROI, dated 5 Oct 16; Article 32 Preliminary Hearing Officer (PHO) report w/ attachments, dated 20 Dec16, and the associated PHO appointment letter, dated 4 Nov 16
c. A certification the victim was notified of the opportunity to express views on disposition for consideration by the convening authority, dated 21 Dec 16
d. Victim's statements to AFOSI and Chain of Command
e. Victim's Statement on Disposition, dated 29 Dec 16, and Victim's request for a new Article 32 hearing, dated 17 Feb 17
f. AFTC/JA Article 34 Pretrial Advice, dated 30 Jan 17
g. GCMCA's statement regarding decision not to refer any charges for trial by court-marital, dated 30 Jan 17
h. A certification the Victim of the alleged sexual assault offense was informed of the convening authority's forwarding of the case for review, dated 31 Jan 17
i. Other documents to include: Recordings of Victim's and Subject's AFOSI Interviews and the Article 32 hearing, SPCMCA's Disposition Recommendation, dated 25 Jan 17, 96 TW/JA's Legal Review, dated 12 Jan 17

2. I find that, in making the decision not to refer charges to trial by court-martial, you considered the statements provided by the victim during the course of the criminal investigation against TSgt Yates and you considered the views expressed by the victim, as to the disposition of the alleged sexual assault offense. I further find the victim was properly notified that I would be conducting this review.

[redacted]

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS AIR FORCE MATERIEL COMMAND
WRIGHT-PATTERSON AIR FORCE BASE OHIO

MEMORANDUM FOR AFTC/CC

FEB 23 2017

FROM: AFMC/CC

SUBJECT: U.S. v. TSgt Yates

I hereby forward to you for action as you deem appropriate the attached SVC request addressed to all reviewing authorities.

[redacted]

Attachment:
Victim Request for New Preliminary Hearing, dtd 17 Feb 17, w/ 2 attachments

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DEPARTMENT OF THE AIR FORCE
HEADQUARTERS AIR FORCE TEST CENTER (AFMC)
EDWARDS AIR FORCE BASE, CALIFORNIA

MEMORANDUM FOR [redacted]

FEB 27 2017

FROM: AFTC/CC

SUBJECT: Denial of Request for a New Preliminary Hearing, *United States v. TSgt Damion Yates*, 96th Logistics Readiness Squadron, Eglin AFB, Florida

On 23 February 2017, the AFMC/CC forwarded me your request for a new preliminary hearing, dated 17 February 2017. In your request, you highlighted evidence the parties agreed not to consider that was referenced on page 12 of the report. You also highlighted comments the PHO made that you believe called into question his impartiality. I did not consider or rely on this evidence and these comments in making my decision on referral in this case. Your request for a new preliminary hearing is denied. My decision not to refer the charge and specification against TSgt Yates to trial by general court-martial stands.

[redacted]

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DEPARTMENT OF THE AIR FORCE
HEADQUARTERS AIR FORCE TEST CENTER (AFMC)
EDWARDS AIR FORCE BASE, CALIFORNIA

MEMORANDUM FOR AFTC/JA

FEB 27 2017

FROM: AFTC/CC

SUBJECT: Dismissal of Charge, *United States v. TSgt Damion Yates*, 96th Logistics Readiness Squadron, Eglin AFB, Florida

In accordance with Rule for Courts-Martial 407, as the General Court-Martial Convening Authority, I hereby dismiss the charge and specification from the charge sheet (DD Form 458), dated 3 November 2016, in the case of *United States v. TSgt Damion Yates*.

[redacted]

MILITARY INJUSTICE

The Army increasingly allows soldiers charged with violent crimes to leave the military rather than face trial

A federal watchdog called for ending the practice nearly 50 years ago, but the military pushed back. Now, soldiers leave the Army with a negative discharge, avoiding possible federal conviction and with little record of the allegations against them.

BY **VIANNA DAVILA**, **LEXI CHURCHILL** AND **REN LARSON**, THE TEXAS TRIBUNE AND PROPUBLICA, AND DAVIS WINKIE, MILITARY TIMES APRIL 10, 2023

This article is co-published with ProPublica, a nonprofit newsroom that investigates abuses of power, and with Military Times, an independent news organization reporting on issues important to the U.S. military.

On-line at: https://www.texastribune.org/2023/04/10/military-army-administrative-separation/

Stationed at Army posts thousands of miles apart, two soldiers faced a flurry of criminal charges after they allegedly assaulted women within days of each other in early 2017.

One soldier was accused of physically assaulting his wife and firing a gun as she tried to flee their home near Fort Hood in Texas. Police later found a bullet hole in a window screen.

The other told investigators in Alaska that he'd had sex with a fellow soldier who he knew was drunk and incapable of providing consent. They later found DNA evidence of his semen on her shorts.

Military prosecutors deemed the cases strong enough to pursue them in court. But the Army instead kicked the soldiers out, allowing them to return to civilian life with scant public record of the accusations against them.

The two cases are among hundreds that lay bare a long-standing but little-known practice that permits service members facing criminal charges to circumvent trial by being discharged from the military. The service members often receive negative marks on their personnel records but avoid the possibility of a federal conviction.

A federal watchdog agency in 1978 called for abolishing the practice, known as administrative separations in lieu of court-martial, arguing that it should be used only to remove service members who were unfit for the military, not to dispose of cases involving alleged criminal offenses.

DOCUMENT RESUME

05737 - [B1226163]

Eliminate Administrative Discharges in Lieu of Court-Martial: Guidance for Plea Agreements in Military Courts Is Needed. FPCD-77-47; B-186183. April 28, 1978. 34 pp. + 5 appendices (19 pp.).

Report to the Congress; by Elmer B. Staats, Comptroller General.

A 1978 report to Congress called for the elimination of administrative discharges in lieu of court-martial. Credit: Highlighted by ProPublica and The Texas Tribune

Nearly 50 years later, however, the practice remains. And, in the Army, it is increasingly being used for cases in which soldiers are charged with serious crimes such as sexual assault, domestic violence or child abuse, an investigation by ProPublica, The Texas Tribune and Military Times found.

More than half of the 900 soldiers who were allowed to leave the country's largest military branch in the past decade rather than go to trial were accused of violent crimes, according to an analysis of roughly 8,000 Army courts-martial cases that reached arraignment. The figure is a significant increase from about 30% in the previous decade.

Choosing to handle such cases administratively instead of through the courts can have serious ramifications, experts told the news organizations.

Some soldiers escape potential legal consequences: Those who may have been convicted of sexual assault won't have to register as sex offenders, and those who could have been found guilty of domestic abuse will not be subject to federal restrictions prohibiting them from owning firearms.

"If you're letting serious crimes go through the administrative separation route, you increase the possibility of a serial rapist, a child molester, going back into the community and doing it again because there's no public record and no dissuasion," said Joshua Kastenberg, a professor at the University of New Mexico School of Law and former Air Force judge advocate.

But such administrative separations also carry a stigma, particularly for service members charged with minor offenses, according to experts. Those who are granted permission to leave the military typically receive an "other than honorable" discharge. Such a designation strips service members of many veterans benefits and can look bad to employers, experts said.

Military commanders are not required to explain their reasoning when granting these discharges. But the news organizations found instances in which they have approved separations even in cases with witnesses, DNA evidence or confessions.

In the Fort Hood case, the ex-soldier was arrested for choking his girlfriend a year after the Army chose not to pursue charges against him for allegedly assaulting his wife. He later pleaded no contest to the charges involving his wife and guilty to charges related to the assault of his girlfriend. He declined an interview through a relative.

“I just wish that they would have done more,” Morgan Short, the second woman who accused him of assault, told ProPublica, the Tribune and Military Times.

Army officials declined to comment about individual soldiers’ cases.

Army Col. Christopher Kennebeck, chief of the criminal law division at the Office of Judge Advocate General, did not dispute the news organizations’ finding that these types of administrative separations are increasingly being used for violent crimes. He said they are intended for minor offenses or cases in which the Army is not able to meet the necessary burden of proof to win at trial. A separation from the Army is a good alternative if commanders believe wrongdoing occurred but do not have enough evidence for a conviction, he said.

“You have someone who still exists in society, still has the presumption of innocence to go on with their lives,” Kennebeck said. “It’s just that in the military, you might not be able to continue to serve.”

But former Air Force chief prosecutor Col. Don Christensen said once officials read charges in court against a soldier, as happened in each case analyzed by the news organizations, the government should be ready to go to trial. Backing away from those charges signals to Christensen, now in private practice, that the Army is concerned that it can’t win cases, which he said is its own problem.

“You have someone take an oath saying the charges were true, so it’s true that this person is violent, it’s true this person is a sex offender. But now I’m going to say that we’re just going to fire him and turn him back into civilian society without really addressing the issue,” Christensen said.

Unheeded calls

Soldiers charged with crimes ranging from going AWOL and smoking marijuana to rape and aggravated assault with a deadly weapon can request to leave the Army rather than go to trial.

In doing so, enlisted soldiers must acknowledge that they committed an offense that could be punishable under military law. They do not have to admit guilt to a specific crime.

After an enlisted soldier's immediate commanders weigh in with a recommendation, a senior commander overseeing the court-martial, typically a two-star general or higher, decides whether to grant the discharge in consultation with legal advisers. Officers don't have to admit guilt, and ultimately a Pentagon official decides whether to accept the request.

The practice has no exact equivalent in the civilian justice system.

One comparison, according to legal experts, is deferred adjudication, a process that lets people accused of certain crimes avoid a conviction if they successfully complete probation without any other violations.

A key difference is that with deferred adjudication, judges, not commanders, decide and can ultimately revoke the probation and continue with the original charges if the person fails to meet the agreed-upon conditions.

In the military, however, soldiers are free to return to civilian life once a discharge is granted and there are no stipulations for revoking the agreement if the soldier gets in trouble again. And unlike in the civilian justice system, where the public can typically access court records related to a case, limited information is available in the military because the soldier was never convicted.

[*Read about the history of administrative separations.*]

Federal lawmakers and some military appeals judges took issue with the lack of due process and growing use of administrative separations throughout the 1960s.

Perhaps the most significant critique of such separations came in 1978 when the federal government's General Accounting Office, now known as the Government Accountability Office, released a report that called for ending the practice.

The report said that while military branches had used such separations "as an expedient way to get rid of problem people," Congress never intended for the process to apply to criminal cases.

Releasing some soldiers while trying others for the same offense resulted in unequal treatment and limited the effectiveness of military courts, which "must enforce the law and also protect the rights of individual service members. They cannot accomplish these objectives if a major portion of criminal offenses are dealt with outside the judicial process," the report stated.

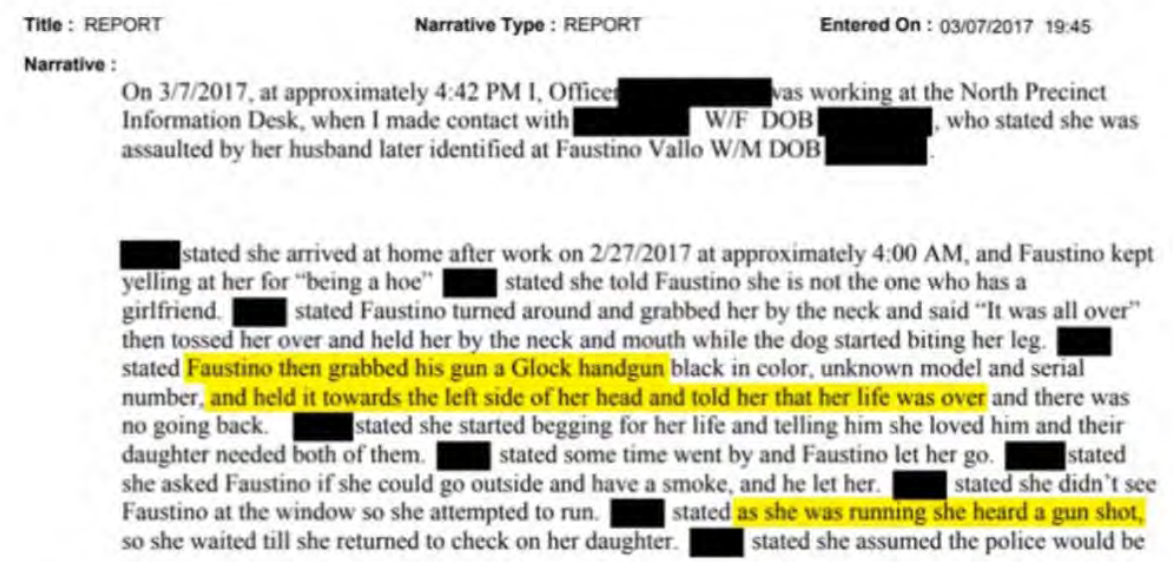
But the military argued that eliminating administrative separations would increase the workload of its courts.

So the practice continued.

One accusation, then another

Late one March afternoon in 2017, Faustino Vallo's wife walked into a police station near Fort Hood, the massive Central Texas Army post where her husband of more than two years worked as a bomb technician.

Vallo had grabbed her by the neck and held his Glock handgun to her head during an argument nine days earlier, she told Killeen police. According to records detailing her account, Vallo told her that her life was over and fired a gun as she ran from the house. When she returned, he told her he didn't mean for the gun to go off, according to her account in partially redacted military investigative files. Officers later found a bullet hole in a window screen.



Title : REPORT **Narrative Type :** REPORT **Entered On :** 03/07/2017 19:45

Narrative :

On 3/7/2017, at approximately 4:42 PM I, Office[redacted]was working at the North Precinct Information Desk, when I made contact with [redacted] W/F DOB [redacted], who stated she was assaulted by her husband later identified at Faustino Vallo W/M DOB [redacted].

[redacted]stated she arrived at home after work on 2/27/2017 at approximately 4:00 AM, and Faustino kept yelling at her for "being a hoe" [redacted] stated she told Faustino she is not the one who has a girlfriend. [redacted] stated Faustino turned around and grabbed her by the neck and said "It was all over" then tossed her over and held her by the neck and mouth while the dog started biting her leg. [redacted] stated Faustino then grabbed his gun a Glock handgun black in color, unknown model and serial number, and held it towards the left side of her head and told her that her life was over and there was no going back. [redacted]stated she started begging for her life and telling him she loved him and their daughter needed both of them. [redacted] stated some time went by and Faustino let her go. [redacted]stated she asked Faustino if she could go outside and have a smoke, and he let her. [redacted] stated she didn't see Faustino at the window so she attempted to run. [redacted] stated as she was running she heard a gun shot, so she waited till she returned to check on her daughter. [redacted] stated she assumed the police would be

A military agent's investigation report details allegations Faustino Vallo's wife made that the soldier pointed a loaded gun at her. 📷 Highlighted by ProPublica and The Texas Tribune

About six months later, as the Bell County Attorney's Office was pursuing misdemeanor charges against Vallo, it received an email from an Army attorney. She asked that the case be transferred to Fort Hood, which had decided that it wanted to proceed with aggravated assault charges against the soldier, a private first class.

Another email arrived in March 2018, a year after the woman reported the alleged assault. Vallo's case was scheduled to go to trial at Fort Hood at the end of the month but the commanding general had instead accepted his administrative separation request, an Army captain wrote to the county attorney's office. He would be permitted to leave the Army within a week and receive an "other than honorable" discharge.

"He will not have been tried for the charges we brought against him," the captain wrote.

A Fort Hood spokesperson declined a request to interview an Army attorney involved in Vallo's case.

After the Army discharged Vallo, the Bell County Attorney's Office decided to prosecute him as it had initially intended. That process took another year.

During that time, Vallo was arrested again for domestic assault, this time for attacking his girlfriend, Morgan Short, in Coryell County.

In early April 2019, Short had just poured herself a glass of wine when she and Vallo got into a disagreement. She said Vallo, who was also drinking, suddenly knocked the glass out of her hand and then pushed her down against the white-tiled living room floor. He put the full weight of his body on her back and began to choke her and then bite her, Short said in an interview with the news organizations.

Eventually, she said, Vallo let her go. She ran to her bedroom closet and prayed to God not to let her die. When Short tried to leave the house, she said Vallo put a gun in his mouth in front of the couple's infant son and the young daughter he shared with his estranged wife.

"I don't know why he didn't kill me because I really feel like he was going to," Short recalled.

Police in Copperas Cove, where the attack occurred, refused to release an incident report, but a story in the Killeen Daily Herald said officers observed several fresh injuries on Short.

On June 10, 2019, Vallo pleaded guilty in Coryell County to choking Short. He was fined and given five years deferred adjudication.

Days later, he pleaded no contest in Bell County to discharging a firearm for the incident involving his wife and received nine months deferred adjudication. He would not serve jail time if he followed certain conditions including that he have no access to firearms during that period.

Vallo, his estranged wife and the civilian defense attorney who represented him in the Bell County case declined interview requests for this story.

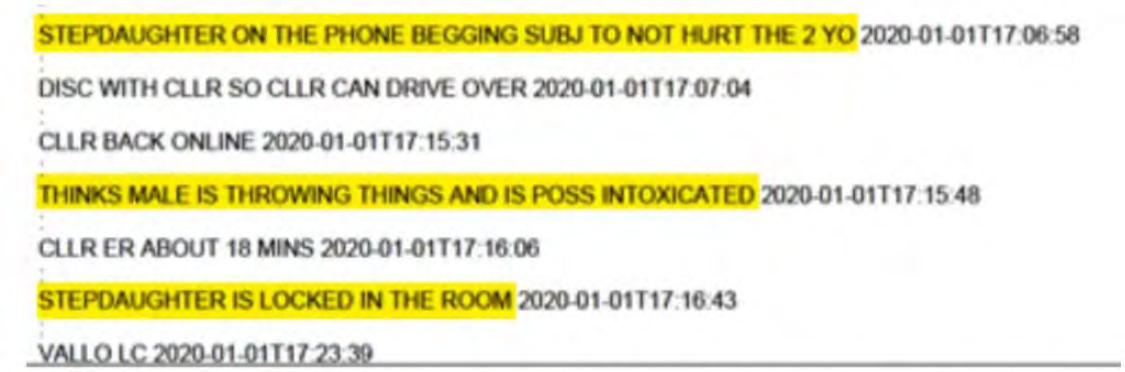
Bell County Attorney James E. Nichols said he wasn't sure why the case took so long after his office took it back from the Army. He said he did not know if his attorneys were aware of Vallo's Coryell County plea because prosecutors generally don't get alerted that someone with a pending case has been arrested in another county.

Such information is critical and could have resulted in a harsher sentence in the Bell County case, said Miltonette Craig, an assistant professor in Sam Houston State University's Department of Criminal Justice and Criminology. Nichols agreed more information about the case could have affected the judge's decision.

Short also did not know about Vallo's conviction in Bell County when he persuaded her to let him back into her life. It didn't take long before he became aggressive again, records show.

On New Year's Day 2020, Vallo had chugged a bottle of vodka and threatened to "beat my ass and leave me on the floor crawling," Short recalled in an interview with the news organizations. At one point, she said, he locked her in the bedroom and spit in her face.

After struggling to get an answer from 911 operators, Short said she called her family, who eventually got through to police. Officers were dispatched to the home for a "violent domestic," according to a partial incident report released by law enforcement.


STEPDAUGHTER ON THE PHONE BEGGING SUBJ TO NOT HURT THE 2 YO 2020-01-01T17:06:58

DISC WITH CLLR SO CLLR CAN DRIVE OVER 2020-01-01T17:07:04

CLLR BACK ONLINE 2020-01-01T17:15:31

THINKS MALE IS THROWING THINGS AND IS POSS INTOXICATED 2020-01-01T17:15:48

CLLR ER ABOUT 18 MINS 2020-01-01T17:16:06

STEPDAUGHTER IS LOCKED IN THE ROOM 2020-01-01T17:16:43

VALLO LC 2020-01-01T17:23:39

A partial incident report from January 2020, released by the Killeen Police Department, shows Morgan Short's family called 911 to report her allegation that Vallo was threatening her. Highlighted by ProPublica and The Texas Tribune

At the time of the report, Vallo was still under probation for both assaults. He wasn't arrested. Short believes it was because he'd threatened her with physical violence but had not actually assaulted her.

In June, a Coryell County judge extended Vallo's probation in connection with Short's 2019 assault after he was twice arrested for drunk driving. The judge, who did not return a call for comment, required him to attend Alcoholics Anonymous meetings twice a week.

The drunk driving arrests were a violation of Vallo's probation conditions. Craig said the judge could have revoked Vallo's deferred adjudication and convicted him of the assault charge.

“I don’t remember feeling hope”

The true number of service members across the armed forces who were allowed to separate from the military instead of facing trial for serious charges is difficult to know.

Compared with other branches, the Army released the most complete court data to the news organizations under the federal Freedom of Information Act. Even the Army’s records are limited because they provide data only for cases that reach arraignment, meaning that the number of soldiers who were discharged as part of the practice is higher than what the news organizations’ analysis shows.

One area that provides some insight into the practice across all branches is the military’s handling of sexual assault. Congress has mandated more detailed reports on such cases as part of a larger crackdown.

According to those reports, more than 1,000 service members who were charged with sexually assaulting an adult from 2012 to 2021 were permitted to leave the military rather than face trial. Of those, 726 were in the Army.

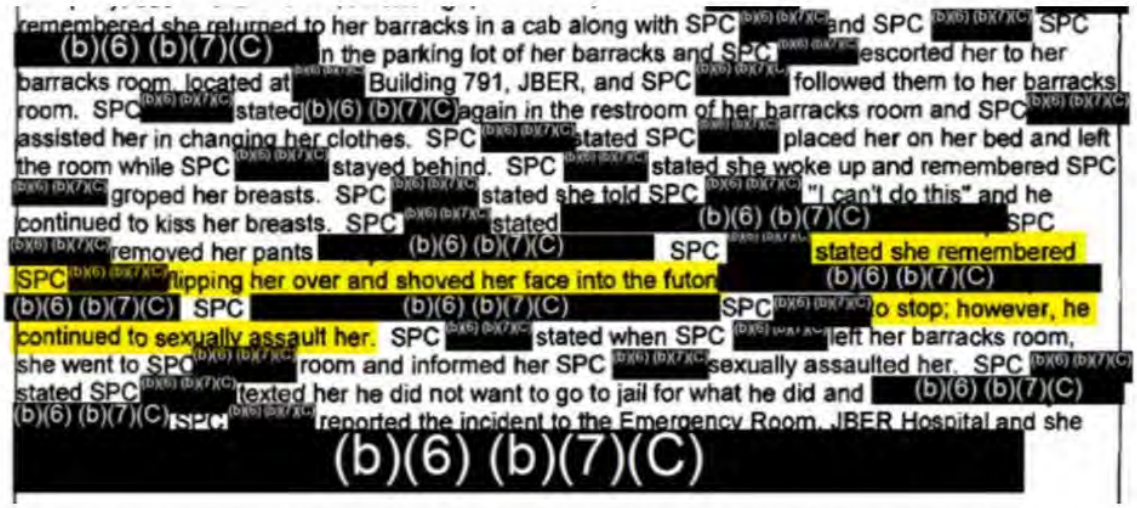
Overall, the Army had the highest rate of service members — about 1 in 4 — who left despite being charged with sexual assault, according to an analysis of the reports. (The next highest branch was the Air Force, which had a rate of nearly 1 in 5.)

Tony Thomas, an Army specialist, was one of the soldiers.

A female soldier accused Thomas of sexually assaulting her on March 5, 2017, after they’d spent the night celebrating her 24th birthday in Anchorage, Alaska, where both were stationed. The woman, who spoke to the news organizations, agreed to be identified by her middle name, Hope.

By the end of the night, Hope was “obviously intoxicated,” a friend later told investigators. Thomas and a friend helped her to her barracks room because she couldn’t walk on her own. The friend then left, according to partially redacted investigative files that reference security footage from outside of the room. Thomas stayed behind.

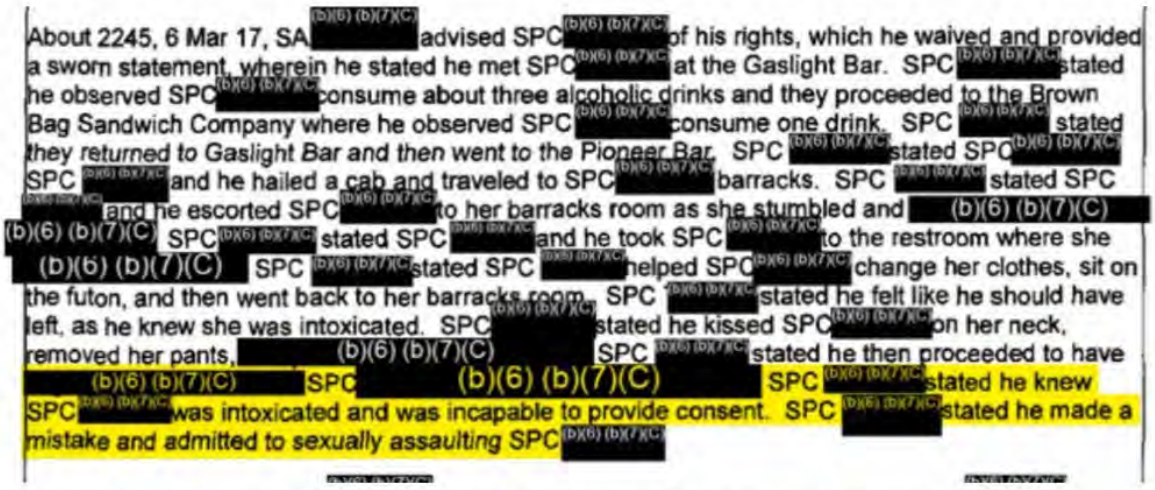
Hope told investigators that she woke up to Thomas groping and kissing her breasts. She recalled him taking off her pants, turning her over and shoving her face into the futon. She said that she told him to stop but that he continued to sexually assault her, according to the files.



This military agent's investigation report details allegations made by a soldier that a fellow service member, Tony Thomas, sexually assaulted her in her barracks room in March 2017. Highlighted by ProPublica and The Texas Tribune

Once Thomas left, Hope went to the friend's room and said she'd slept with him and he would not stop when she told him to. "I feel horrible. I kept saying 'no, no stop' but he didn't," Hope said, according to her friend's account in the investigative reports. Maybe it was her fault, Hope told her friend, because she was drunk and wearing "little" shorts. She then reported the assault to military authorities.

Later that day, Thomas acknowledged that he knew Hope was intoxicated and was incapable of providing consent, according to an investigator's account of the interview. He said he'd made a mistake and admitted to the investigator that he sexually assaulted her, records show.



Thomas said he knew the woman was intoxicated and was unable to give consent, according to an investigator's account of the interview. Highlighted by ProPublica and The Texas Tribune

Thomas declined to comment through a relative, who maintained the soldier's innocence and said the punishment he received was "unjust." His family indicated they plan to challenge his discharge status.

A DNA test of the woman's shorts later detected Thomas' semen. An Army prosecutor determined in July 2017 that there was probable cause Thomas committed sexual assault, records show.

Despite having an attorney and meeting with an investigator on the case, Hope said she was not aware of all of the evidence collected by prosecutors.

She began to feel like no one around her offered encouragement.

"I don't remember feeling hope," she said. "I don't remember feeling confident that 'OK, this is going to go before a judge and they're going to actually believe what happened or they're going to take me seriously.'"

More than a year after she accused Thomas of assault, Hope met again with an investigator on the case. By then, she had transferred to Fort Hood to avoid seeing her alleged attacker. She and her new husband had just learned she was pregnant. "I finally just kind of mulled it over and I was like: 'I don't want to take this to trial. I don't want to sit on trial pregnant, reliving something that I want to just go away.'"

Hope said the investigator laid out various options, including that Thomas could be discharged instead of going to trial. She said that path seemed best to her at the time.

"I was trying to move on in my life," she said.

Kennebeck, the Army's criminal law director, said that commanders consider victim input and preference when deciding whether to take a case to court-martial or grant an administrative separation.

It is possible, however, to pursue a sexual assault case when a victim doesn't want to testify, said Liz Boyce, general counsel and director of policy and legal at the Texas Association Against Sexual Assault. In the civilian system, she said, prosecutors commonly offer plea deals in such cases. The key is ensuring the victim is consulted about that decision, she said.

But discharges in lieu of trial are not plea bargains, so there is no conviction on a person's record. The local district attorney in Anchorage could have considered pursuing charges against Thomas, under an agreement with the military, but it's not clear if the Army shared information about his case.

Boyce said deciding not to pursue any possible legal punishment is "dangerous, frankly."

“They’re not going to have any kind of repercussions the way a guilty verdict would have, the way a felony is going to follow you,” Boyce said.

Moving forward

After six years and a lot of therapy, Hope says she wishes she’d chosen a different course.

She believes administrative separation “was a Band-Aid” for her case. “If I could go back now and know what I know now, no, hell no, I would have taken it to court,” she said.

For her part, Short wishes the Army had done more. She continues to wonder why military officials didn’t take Vallo to trial when his wife accused him of assault.

Vallo always gave her different explanations for why he was discharged from the Army, Short said. There was no easy way for her to access any documentation about that decision. It’s not anywhere online.

“It kind of blows my mind that they just kicked him out. And then didn’t proceed to press any charges,” Short said. “That’s insane to me. They’re enabling people to keep acting this way.”

History of these separations

It’s not clear when administrative separations in lieu of court-martial began, but experts and records show that at least since the 1950s their primary purpose was to remove service members from the military who commanders believed were not fit to serve. That meant those who got in trouble for minor misconduct or military-specific offenses like being chronically late to formation, said Joshua Kastenberg, a professor at the University of New Mexico School of Law and former Air Force judge advocate.

The practice grew in popularity as about 2 million people were drafted into the military during the Vietnam War, bringing a slew of discipline problems. Near the beginning of the war, the various branches granted 424 such discharges. The number ballooned to nearly 27,000 soon after the war ended in 1976, according to a federal watchdog agency’s report.

Many soldiers who were discharged faced charges for being AWOL and other minor misconduct, according to experts and other archival records, which also indicated administrative separations were rarely used for serious criminal offenses at the time.

“Let’s be honest, you can’t court-martial everyone who is a discipline problem and who doesn’t want to be in the Army,” Fred Borch, a retired Army colonel and military history expert, said in an interview. “So I would say that the compromise was, ‘Hey, we have an administrative way to get rid of people who don’t want to be here without really being overwhelmed with courts-martial.’”

Borch, who served as an Army lawyer for 25 years before retiring in 2005, could not recall when the practice evolved to include soldiers accused of criminal acts but said, “You wouldn’t take a discharge like this for a rape or a murder or a robbery because, my general opinion would be, the person has got to go to jail.”

About the data: How we analyzed administrative separations in lieu of court-martial

To examine the Army’s use of separations and resignations in lieu of trial, ProPublica, The Texas Tribune and Military Times used data from the Army Court-Martial Information System, which covers cases that were referred to the Army’s two highest trial courts dating back to 1989. The database does not include cases that were dismissed or resolved before they reached arraignment, which is a formal hearing when charges are read to the defendant.

The newsrooms analyzed cases in which soldiers had their charges withdrawn or dismissed administratively and were allowed to leave the service instead of facing trial, processes most commonly known as Chapter 10s for enlisted soldiers or resignations for the good of the service for officers.

We categorized crimes as violent using the National Institute of Justice’s definition, which counts cases in which a victim is harmed by violence. Such crimes include rape, sexual assault, physical assault, murder and robbery.

For our analysis, we included charges that fell under the following articles of the Uniform Code of Military Justice, standardized to the most recent edition of the Manual for Courts-Martial: 118 (murder and homicide), 119 (manslaughter), 120 (sexual assault and rape of an adult), 120B (sexual assault and rape of a child), 122 (robbery), 128 (physical assault), 128A (maiming) and 128B (domestic violence). Additionally, charges of striking or assaulting officers (commissioned and noncommissioned) are included in the analysis. (These were charged under articles 89, 90 and 91.) We classified cases with at least one of the above charges as violent, regardless of any other accompanying charges.

Our reporting on administrative separations focused on the Army, which is the nation’s largest military branch, has a significant presence in Texas and maintains the most complete court databases compared with the other military branches. Neither the Department of Defense nor any of the other branches provided separations data broken down by the type of charge.

DAC-IPAD Docketed Courts-Martial

	Date	Location	Service	Charges	Name	Rank

June 2023

1.	6/26-29	Fort Stewart, GA	Army	120	Alvarez	E-3
2.	6/26-30	JB MDL, NJ	Air Force	120, 128b, 131b	Quinones	E-6
3.	6/26-30	Fort Bragg, NC	Army	120bx2, 120x2, 133	Thomas	O-3
4.	6/26-30	Fort Campbell, KY	Army	107, 120, 128	Tate	E-4
5.	6/26-30	Camp Lejeune, NC	USMC	120	Mayes	E-4
6.	6/26-30	Camp Lejeune, NC	USMC	117, 120, 120c	Estradameza	E-3
7.	6/26-30	Miramar, CA	USMC	92, 120	Montoya	E-3
8.	6/26-7/1	Luke AFB, AZ	Air Force	112ax2, 120, 128b	Fewell	E-6
9.	6/27-30	Fort Polk, LA	Army	120x2	Miles	E-2

July 2023

1.	7/6-14	Norfolk, VA	USN	120	Nash	E-5
2.	7/7-14	Washington Navy Yard	USN	92, 120, 125, 128	Williamson	MIDN
3.	7/10-14	San Diego, CA	USN	120, 120c	Pengelly	E-6
4.	7/10-15	Hill AFB, UT	Air Force	115, 120, 128, 128b	Ramsey	E-5
5.	7/10-13	Fort Stewart, GA	Army	120x4	Caravano	O-2
6.	7/11-14	Fort Polk, LA	Army	128bx5, 120x2, 120b	Jones	E-2
7.	7/11-16	JB Charleston, SC	Air Force	120x2, 128	Croy	E-4
8.	7/12-14	Fort Drum, NY	Army	120x2	Lanham	E-5
9.	7/21-28	Jacksonville, FL	USN	120b	Flores	E-6
10.	7/24-28	Pensacola, FL	USMC	120, 128	Weber	E-2
11.	7/24-28	Camp Pendleton, CA	USMC	120	Ramirez	E-4
12.	7/24-29	Luke AFB, AZ	Air Force	120	Johnson	O-2
13.	7/28-8/3	Bremerton, WA	USN	120b, 128	Marmolejo	E-5
14.	7/31-8/3	Fort Stewart, GA	Army	120bx13	Andrada	E-7
15.	7/31/8-4	Fort Riley, KS	Army	128bx2, 120	Watt	E-3
16.	7/31-8/4	Fort Bragg, NC	Army	120, 128	Hafen	E-4

August 2023

1.	8/1-3	Fort Drum, NY	Army	120, 121	Halliday	E-2
2.	8/1-4	Fort Polk, LA	Army	120x2	Mitchell	E-4
3.	8/7-9	Fort Lee, VA	Army	120b	South	E-7
4.	8/7-11	Fort Knox, KY	Army	120x2, 121	Gustave	E-8
5.	8/7-11	JBLM, WA	Army	120	Dawkins	E-4
6.	8/7-12	Ellsworth AFB, SD	Air Force	120, 128, 128b	Gray	E-5
7.	8/7-12	Cannon AFB, NM	Air Force	120, 120cx2	Leach	E-4
8.	8/14-17	Fort Knox, KY	Army	120x2, 120c, 128x2	Rodriguez	E-9
9.	8/14-18	Fort Carson, CO	Army	120, 120c, 128, 80	Perez	E-4
10.	8/21-23	Fort Stewart, GA	Army	120bx7, 134	Grubbs	E-3
11.	8/21-25	Fort Campbell, KY	Army	120b, 120, 120c	Herron	E-4
13.	8/22-25	Fort Polk, LA	Army	120bx22, 134x15	Lopez	E-6
14.	8/22-25	Fort Sam Houston, TX	Army	120bx2	Mitchell	E-6
15.	8/28-31	Fort Carson, CO	Army	120x2	Burling	O-3
16.	8/28-31	Fort Campbell, KY	Army	120x6	Vargas	E-3